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IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

MIAMI DIVISION

CASE NO.: 16-cv-21199-CMA

ANDREA ROSSI, et al.,)
)
Plaintiffs,)
v.)
THOMAS DARDEN, et al.,)
)
Defendants.)

February 7, 2017

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DISCOVERY HEARING PROCEEDINGS
BEFORE THE HONORABLE JOHN J. O'SULLIVAN
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

On behalf of the Plaintiff:

PERLMAN BAJANDAS YEVOLI & ALBRIGHT, PL
283 Catalonia Ave.
2nd Floor,
Coral Gables, FL 33134
BY: BRIAN W. CHAIKEN, ESQ.
BY: JONATHAN ANNESSER, ESQ.
BY: CHRISTOPHER PERRE, ESQ.

1 MR. LOMAX: Your Honor, I have to look at it.

2 THE COURT: Why didn't you look at it before you came
3 in here? What am I doing here? I'm leaving. This is not how
4 you do a discovery dispute in front of me.

5 First, you go through every one of these with him and
6 you tell him this is why the guy isn't privileged. Why you
7 think is privileged. And then, you get down from this hundred
8 down to two, or one, or none, and then you talk to me.

9 MR. CHAIKEN: I was going to get there, Your Honor.
10 There are two that we've discussed in great detail that are --

11 THE COURT: No. You need to talk about this stuff
12 with each other before you come in.

13 Now, I will go in there. You guys talk about it and
14 when I come back out, you can tell me which ones you cannot
15 agree on. This is not the way we do this here.

16 I am not here to just like be in every one of your
17 disputes. I am here to hear one percent of your disputes. The
18 ones that have real meaning.

19 Now, you, when he tells you that he has here that
20 don't make sense, you ought to look at that and respond to it.

21 MR. LOMAX: Yes, sir.

22 MR. CHAIKEN: I apologize, Your Honor.

23 (Recess.)

24 THE COURT: All right. Where are we.

25 MR. CHAIKEN: Your Honor, I apologize. I was trying

1 communications with lawyers specifically for the purpose of
2 talking about entering into this license sentence agreement,
3 the terms of the license agreement, and what's going to happen
4 under the license agreement. If the license agreement is with
5 Industrial Heat --

6 MR. LOMAX: If I could approach, Your Honor? I've got
7 testimony transcripts excerpts.

8 THE COURT: Well, I mean, is it your contention --
9 let's say he's lying in his deposition does that somehow waive
10 the privilege?

11 MR. CHAIKEN: If he's lying in his deposition we want
12 him to get to the heart of it.

13 THE COURT: I know you want to get to the heart of it.

14 Let's say in his deposition he says when I was a
15 principal with Cherokee I had nothing to do at all or with
16 anything to do with your client, with Mr. Rossi, or Dr. Rossi.

17 MR. CHAIKEN: Right.

18 THE COURT: And there are e-mails that you have that,
19 you know, fall during the time period. When he said I had
20 nothing to do with that deal during at that time period.

21 If they're privileged do you get it look at them
22 because they are different than his testimony in his
23 deposition?

24 I am not aware of any law that says you do. I don't
25 know if he's lying or not lying, but I'm saying just because he

1 says something different in his deposition that might appear in
2 something that's privileged that does not waive the privilege
3 as far as I know.

4 MR. CHAIKEN: Assuming that's true, but how could we
5 know that's not true unless we see what the communications are?

6 THE COURT: You can't see privileged communications.
7 You could ask me to review them, I guess, if that's what you
8 want.

9 MR. CHAIKEN: That may where we end up you know.

10 MR. LOMAX: They're saying he lied in his deposition
11 and that is the basis for --

12 THE COURT: I mean, I don't hear them saying that he
13 lied in his deposition. They're saying he was clear in his
14 deposition.

15 In other words, the reason to find it is not
16 privileged is not -- I do not really care what he said in his
17 deposition. That really does not make a difference because
18 lying in a deposition, which is the best thing to happen for
19 you, that does not make his communication with his attorney non
20 privileged, or waived, or anything of that sort.

21 MR. CHAIKEN: Right.

22 THE COURT: Unless you can show some kind of fraud
23 that he was using the attorneys at the time to commit some kind
24 of fraud.

25 MR. LOMAX: Your Honor, if I might add this.

1 THE COURT: They've indicated that he was involved in
2 the process of negotiating the terms of the agreement with Mr.
3 Rossi or Dr. Rossi.

4 MR. CHAIKEN: Right.

5 THE COURT: Generally I take lawyers at their word
6 until you come in here and you are able to show me something
7 different.

8 MR. CHAIKEN: Sure, Your Honor.

9 And if he has privileged communications that are
10 specifically regarding that time frame prior to the entrance of
11 the agreement, that's great. After the entry of the agreement
12 they formed a company called Industrial Heat.

13 Industrial Heat, he claims, I have no role. I don't
14 get paid by Industrial Heat. I'm an investor in Industrial
15 Heat. I have nothing else to do with it.

16 Would I get e-mails from the management of Industrial
17 Heat whom I trusted completely to do the job? Yes, I would.
18 Would they ask me for advice? Occasionally, they would. Would
19 I give my opinions? Yes, I would.

20 So, you know, if you look at the case law regarding
21 attorney/client privilege, he's got to be someone who is
22 reasonably necessary to receive those communications. And by
23 his testimony he said, you know, we believe he's not reasonably
24 necessary.

25 So they're running things up the chain to a guy who

1 claims to be nothing more than an investor. He's not an
2 officer. He doesn't claim to have any responsibility. So to
3 the extent that they're passing on privileged communications to
4 him, or he's included in those communications, we think they've
5 waived that privilege or there was no privilege to begin with.

6 THE COURT: Okay.

7 MR. LOMAX: Again, his testimony was that he was
8 brought in as needed for Industrial Heat to answer questions
9 about decisions that needed to be made.

10 THE COURT: I don't understand how that's privileged.

11 MR. LOMAX: It was privileged because he's functioning
12 on behalf of Industrial Heat.

13 THE COURT: As what? I mean, there has to be some
14 legal issue.

15 In other words, if he's asked something about, what do
16 you think about this nuclear process that's not --

17 MR. LOMAX: Totally agree, Your Honor.

18 We're not saying those documents are privileged.
19 We're talking about legal decisions.

20 THE COURT: Okay.

21 MR. LOMAX: So when the lawyer sends an e-mail saying
22 let me include John Mazzarino because he was there during the
23 conversations with Dr. Rossi. He was there when we talked
24 about doing this agreement.

25 Let me include John Mazzarino because his knowledge of

1 the facts, his knowledge of the information are going to inform
2 the advice that we give to this client to Industrial Heat. And
3 what they're saying is that John Mazzarino, who is there from
4 the beginning including him later, somehow destroys the
5 privilege.

6 Now, what they didn't talk about is the case law that
7 talks about the reasonable expectation of the holder of the
8 privilege, Tom Darden, Industrial Heat. His business partner,
9 John Mazzarino, being included on communications. What is his
10 reasonable expectation as to the privileged nature of those
11 communications?

12 He expects him to be privileged. He's sending them to
13 the e-mail addresses at Industrial Heat. He's talking about
14 Industrial Heat. He's not talking to a person who he met a
15 long time ago, or someone off in the distance who may have some
16 knowledge or expertise. He's talking to somebody who is
17 specifically involved in this deal who worked with him. Who is
18 part of this whole network. Cherokee Investment Partners is a
19 party to this case.

20 I mean, these are guys who know each other and work
21 together. These are communications that are privileged, Your
22 Honor, and they ought not to be anything but that.

23 THE COURT: All right.

24 MR. CHAIKEN: Your Honor, it goes back to the heart of
25 the case, which is they're claiming Cherokee is separate and

1 distinct and had nothing to do with the Industrial Heat deal.

2 They set up this corporation Industrial Heat.

3 That's the entity that was part of the deal. Don't
4 touch Cherokee or any of the Cherokee entities because they're
5 completely separate. In fact, there is no Cherokee money in
6 this deal. There are no Cherokee funds. Cherokee is not
7 playing a role.

8 THE COURT: All right.

9 MR. CHAIKEN: So they have drawn that line in the
10 sand.

11 So now they're saying despite the fact that Cherokee
12 has nothing to do, we're giving our privileged communications.
13 And our attorneys are talking to the founding manager of
14 Cherokee.

15 Again, I'm talking about after the creation of
16 Industrial Heat to the extent that they've had privileged
17 communications before because it dealt with what they are doing
18 before the agreement was signed, fine, but as soon as that
19 company is formed, they have that corporate organization.

20 The case law says if you are going to share privileged
21 communications in that corporate structure, the people who get
22 that information have to have a reasonable need to know.
23 Mazzarino testified I'm just an investor. I don't play a role
24 in the management of the company.

25 Would I be asked for advice from time to time? Yes, I