

02/16/2017 Thomas Darden

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

ANDREA ROSSI and LEONARDO
CORPORATION,

Plaintiffs,

VS.

THOMAS DARDEN; JOHN T. VAUGHN;
INDUSTRIAL HEAT, LLC; IPH
INTERNATIONAL B.V.; and
CHEROKEE INVESTMENT PARTNERS,
LLC,

Defendants.

INDUSTRIAL HEAT, LLC and IPH
INTERNATIONAL B.V.,

Counter-Plaintiffs,

Vs.

ANDREA ROSSI and LEONARDO
CORPORATION,

Counter-Defendants,

And

J.M. PRODUCTS, INC.; HENRY
JOHNSON; FABIO PENON; UNITED
STATES QUANTUM LEAP, LLC;
FULVIO FABIANI; and JAMES
BASS,

Third-Party Defendants.

No. 1:16-cv-2119-CMA

Videotaped Deposition of
THOMAS DARDEN

(Taken by Plaintiff)

3509 North Haworth Drive, Suite 403, Raleigh, North Carolina

February 16, 2017

Reported in Stenotype By
Leslie Christian

Transcript produced by computer-aided transcription

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A P P E A R A N C E S :

ON BEHALF OF PLAINTIFFS:

PERLMAN, BAJANDAS, YEVOLI & ALBRIGHT, P.L.
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ALSO PRESENT:

MICHAEL KIRBY, CLVS
DR. ANDREA ROSSI

1 S T I P U L A T I O N S

2 I, Leslie Christian, being a court
3 reporter and a Notary Public in and for the state of
4 North Carolina, was appointed commissioner by consent
5 to record the deposition of THOMAS DARDEN, on
6 February 16, 2017 beginning at 9:08 a.m., at
7 CaseWorks, located at 3509 Haworth Drive, Suite 403,
8 Raleigh, North Carolina.

9 THE VIDEOGRAPHER: We are on the
10 record at 9:08 a.m. This is the videotaped deposition
11 of Thomas Darden in the matter of Andrea Rossi, et al.,
12 vs. Thomas Darden, et al. This deposition is being
13 held in the offices of CaseWorks at 3509 Haworth Drive,
14 Suite 403 in Raleigh, North Carolina 27609, on February
15 16, 2017.

16 The court reporter is Leslie
17 Christian, the videographer is Michael Kirby, both with
18 CaseWorks.

19 Would counsel please introduce
20 themselves.

21 MR. CHAIKEN: Yes, good morning.
22 Brian Chaiken on behalf of plaintiffs. I may be joined
23 by Jonathan Annesser on the phone.

24 MR. BELL: Bernard Bell for the
25 defendants including Mr. Darden.

1 MR. ARAN: Fernando Aran on behalf of
2 third-party defendant J.M. Products, Henry Johnson and
3 James Bass.

4 MR. NUNEZ: Also on the phone this is
5 Rudy Nunez on behalf of Fulvio Fabiani and United
6 States Quantum Leap, LLC. I'm going to be going back
7 on the phone in a couple of minutes.

8 THE VIDEOGRAPHER: Court Reporter,
9 please swear in the witness.

10

11 P R O C E E D I N G S

12 Whereupon,

13 THOMAS DARDEN,
14 having been duly sworn by the Notary Public, was
15 examined and testified as follows:

16 DIRECT EXAMINATION BY

17 MR. CHAIKEN:

18 Q. Good morning, Mr. Darden. Could you please
19 state your name and spell your last name for the
20 record.

21 A. **Thomas F. Darden, D-a-r-d-e-n.**

22 Q. And where do you currently live?

23 A. **In Raleigh.**

24 Q. Can you please provide your address.

25 A. **My -- well, 111 East Hargett Street,**

1 you recall speaking to?

2 **A. I don't remember the specifics. I remember**
3 **they didn't want to do it.**

4 Q. And did they ever explain to you why
5 they didn't want to sign this?

6 **A. No, we were -- we were confused about that.**

7 Q. Is there any reason that you're aware of
8 today as to why they would not want to sign?

9 **A. I don't remember the conversations around**
10 **that. I think J.T. might have been the one talking to**
11 **them.**

12 Q. Did you have discussions with Dr. Rossi
13 about Ampenergo's refusal to sign it?

14 **A. Yes, we did.**

15 Q. And what were those conversations?

16 **A. Well, they said, "Well, they didn't sign.**
17 **So, you know, I guess that deal is off or can't do**
18 **that."**

19 Q. So after that conversation took place did
20 you say, "Hey, listen, Ampenergo didn't sign. The
21 license agreement says you guys start the test as soon
22 as you get -- as soon as the equipment arrives;
23 therefore, you're in breach"?

24 **A. Yes. We said, "We don't owe you -- you**
25 **know, sorry. You missed the date. They don't agree to**

1 this so what are we going to do." We said to him, "We
2 would love to pay you some more money if we had
3 technology that worked. So why don't you think of some
4 other kind of test that we could do. We're willing to
5 pay you money if you -- if we can build devices and we
6 can operate those devises. We don't care how long it
7 is really." I mean, we care a little bit but, you
8 know, we're willing to be very malleable about that.
9 "Let's build some devices. Let's get something
10 operating." You know, but, I mean, the agreement
11 speaks for itself.

12 Q. Did you put that -- that subsequent offer
13 in writing?

14 A. I don't know. I mean, it was -- did we say
15 to him in writing somewhere, "We can't build these
16 units. We want to build these units. Help us build
17 these units. Let's get something going." I don't know
18 but we -- I'm sure that we said to him, "Andrea, the
19 problem is not money. We're happy to pay money if we
20 have technology that works. We don't have technology
21 that works. Help us get some technology working
22 somewhere and we're happy to pay you some money."

23 Q. Right. But did you ever say in writing,
24 "Hey, listen, the time for the test has now come and
25 gone. We need to reach some other arrangement. We're

1 happy to pay you money, but it's got to be under
2 different terms"?

3 MR. BELL: Objection to form.

4 THE WITNESS: I don't remember
5 specific writing about that. You know, we were in the
6 same office so we talked about a lot of this.

7 (BY MR. CHAIKEN)

8 Q. Did you -- after you had the conversation
9 with Dr. Rossi about Ampenergo not signing off did you
10 say, "Hey, you know what, Ampenergo didn't sign off.
11 Let's start the guaranteed performance test right away
12 because the clock is ticking and we made this
13 investment, and time is money"?

14 MR. BELL: Objection to form.

15 THE WITNESS: Well, we said all the
16 time, "We want to get something running." I'm sure
17 that we didn't say, "Let's start the guaranteed
18 performance test." You know, the time period for that
19 had passed.

20 Q. Got it. So it's your testimony today that
21 Dr. Rossi knew all along right after October 2013 that
22 his ability to enforce the 89 million dollar payment
23 pursuant to the license agreement had come and gone?

24 A. Yes. He knew that his ability to enforce
25 that had come and gone. We also told him that if we

1 had successful evidence after the technology worked,
2 that we approved devices that we built, we would be
3 happy to discuss paying you more money.

4 (Whereupon Exhibit 17 was marked for
5 identification as of this date.)

6 Q. I'm going to show you what's been marked as
7 Exhibit 17. Now, your counsel is going to object to
8 this document.

9 MR. BELL: Yeah, I am. So why are you
10 going to do it?

11 MR. CHAIKEN: Because I'm going
12 to make you object to it.

13 MR. BELL: Here's the problem that I
14 have with it -- and we can do it however you choose to
15 see fit. But our view is that this is clearly in
16 violation of the protective order. You're violating
17 court order by using -- attempting to use this at a
18 deposition when it's been clawed back under the
19 protective order and you're potentially subject to
20 sanctions for that.

21 MR. CHAIKEN: Okay.

22 MR. BELL: With that, do you still
23 want to mark it?

24 MR. CHAIKEN: Yes. And what I would
25 like to do is if you want to move for a protective

1 record at 11:54 a.m.

2 (Whereupon a break was taken.)

3 THE VIDEOGRAPHER: We are back on the
4 record at 12:03 p.m.

5 (BY MR. CHAIKEN)

6 Q. Mr. Darden, I was about to ask you some
7 questions about what had been marked as Exhibit
8 Number 17. Counsel -- your counsel and I have been
9 discussion it off the record.

10 MR. CHAIKEN: I believe, Mr. Bell,
11 you're going to instruct your witness not to answer any
12 questions regarding this document.

13 MR. BELL: That's correct. My
14 position, as I stated before we went off the record, is
15 under paragraphs -- whatever that was we just looked
16 at. 21 or 22 or 20 and 21 of the protective order.

17 MR. CHAIKEN: Right. Our position is
18 that that document -- any privileges that have been
19 waived as to that document I guess we'll have that
20 issue before the court. So I'm not going to ask any
21 further questions on that document.

22 (BY MR. CHAIKEN)

23 Q. So my question now is as of January -- and
24 I guess your position isn't going to change. But as of
25 January 2014 it was your opinion that the guaranteed

1 performance test pursuant to the contract could not be
2 performed, correct?

3 **A. Yes, that test.**

4 Q. Right. And your -- and you believe that
5 you communicated that position to Dr. Rossi orally, but
6 you don't know if you communicated it to him in
7 writing; is that correct?

8 **A. I don't remember whether we did it in**
9 **writing, but I distinctly remember it orally more than**
10 **once and, particularly, the issue of he had not**
11 **transferred the technology. Therefore, he had breached**
12 **the agreement. We were not able to replicate. The**
13 **measurements were not accurate. And we had some very**
14 **contentious meetings around that including one in Miami**
15 **that -- where I went down there to meet to talk about**
16 **that specific subject.**

17 Q. So let me step back a second. So my
18 understanding was that the guaranteed performance test
19 could not have happened due to timing issues as of
20 October 2013. The issues relating to being able to
21 replicate and the other issues, were those all -- were
22 those all issues at that time October 2013 as well?

23 **A. I'm sorry. Can you say that part again.**

24 Q. Yeah. And I'm a little confused by your
25 prior response because we had been talking about the

1 guaranteed performance tests in terms of timing.

2 A. Um-hm.

3 Q. And you just mentioned a whole bunch of
4 other issues that I wasn't sure was the issue as of
5 that time October 2013.

6 A. Okay. So those conversations were around,
7 "We're out of contract or, you know, the deal is over
8 or the -- you know, the time has passed. We're no
9 longer talking about that particular contract.
10 However, we want technology that works. If we have
11 technology that works that we can replicate then we're
12 willing to discuss with you paying you a lot of money
13 even though we shouldn't have to do that."

14 Q. Right. So were there other issues besides
15 timing issues in or around October 2013 with respect to
16 guaranteed performance tests?

17 A. I don't remember October '13 but -- so, I
18 mean, we had said that if a device -- we had previously
19 said that if we ran the six cylinder unit, which also
20 carried with it the implication that we built it
21 because it's a small unit and we had to have built
22 those reactors and it was easy to measure because it's
23 small.

24 So something that we could really get our
25 heads around. So that's -- and I say if we ran the six