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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA  
MIAMI DIVISION  
CASE NO. 16-CIV-21199-CMA/JJO

ANDREA ROSSI, *et al.*,  
Plaintiffs,

vs.

THOMAS DARDEN, *et al.*,  
Defendants.

Miami, Florida  
February 23, 2017  
Pages 1-29

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

APPEARANCES:

FOR THE PLAINTIFFS:

*Perlman, Bajandas, Yevoli & Albright, PL*  
BY: PORPOISE EVANS, ESQ.  
BY: CHRISTOPHER PERRE, ESQ.  
283 Catalonia Avenue  
2nd Floor  
Coral Gables, Florida 33134

FOR THE DEFENDANTS:

*Jones Day*  
BY: CHRISTOPHER M. LOMAX, ESQ.  
BY: ERIKA S. HANDELSON, ESQ.  
600 Brickell Avenue  
Suite 3300  
Miami, Florida 33131

TRANSCRIBED BY:

DAWN M. SAVINO, RPR  
Official Court Stenographer  
400 N. Miami Avenue, 10S03  
Miami, Florida 33128  
Telephone: 305-523-5598

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

COURTROOM DEPUTY: All rise.

THE COURT: Good afternoon. We're here today on the case of Andrea Rossi versus Thomas Darden and others, case number 16-civil-21199.

Can I have appearances for the Plaintiff first.

MR. EVANS: Good afternoon, Your Honor. Porpoise Evans and Chris Perre on behalf of Plaintiffs.

THE COURT: Thanks.

For the Defendant?

MR. LOMAX: Good afternoon, Your Honor. Christopher Lomax and Erika Handelson on behalf of the Defendants.

THE COURT: All right. We're here on -- who filed the first notice?

MR. LOMAX: Plaintiffs, did Your Honor.

THE COURT: Okay. All right.

What's the problem? I tell you, I'm seeing way too much of you guys, I can tell you that right now. I have cases that are just as big as this, I see maybe once or twice, I've seen you guys like twice a week. It's way too much.

You know what that indicates to me? That indicates that you lawyers either don't know what you're doing, or you're being completely uncooperative with each other because most of these discovery disputes should be resolved amongst the parties, not with getting the court involved.

1           So with that caveat, go ahead. Because it's way too  
2 many times that I'm seeing you fellahs, and women. Go ahead.

3           MR. EVANS: Understood, Your Honor. Today the issue we  
4 brought before the court could easily have been brought by the  
5 Defendants because it involves a privilege issue.

6           There were -- there was at least one document produced,  
7 several are at issue, but at least one which, on its face,  
8 privileged. It was produced by Defendants in October, maybe  
9 early November. When Plaintiffs were reviewing the documents,  
10 they came across it and sent a letter to Defendants saying it  
11 appears this could be privileged, we're sequestering it, and let  
12 us know how you would like to handle it. This was on November  
13 16th, Your Honor.

14           Over 30 days went by, December 20th. As the case was  
15 progressing, the Defendants ultimately sent a letter saying  
16 you're right, that document is privileged. We would like you to  
17 destroy it and return any copies, standard letter. Plaintiffs'  
18 position at that point was that the privilege had been waived,  
19 objections to using the document after over a month had passed  
20 had been waived, they clearly weren't that interested in the  
21 document, and we sent a letter back to them in that regard.  
22 That was on December 28th.

23           Over another month passed when we received another  
24 letter from the Plaintiffs -- I mean, from the Defendants  
25 dealing with a couple of more documents that had been produced.

1 Not referring to the prior document. We never got a response to  
2 our letter saying that we believed the privilege has been  
3 waived. But on February 1st, we did get a letter referring to a  
4 couple of additional documents to which Defendants were claiming  
5 privilege. One of those documents we agreed with, and it was  
6 destroyed and hasn't been thought of since. Two of those  
7 documents we believe there is no privilege, and they're at issue  
8 before the court. The day after we received that letter,  
9 February 2nd, we responded to Defendants and told them these are  
10 not privileged documents, the second two. The first, we agreed  
11 with them.

12 Fast forward two additional weeks, and my colleagues  
13 were in deposition and they sought to use the documents that had  
14 been disputed. And after not having any additional response  
15 from the Defendants to our letter saying we intend to use these,  
16 we believe the privilege has been waived or that the documents  
17 are not privileged, this was last week, February 16th, at which  
18 point the Defendants instructed their witness not to answer  
19 questions about those documents because they were claiming  
20 privilege. We immediately sought to come before the court for a  
21 ruling on that issue.

22 That's what brings us here today.

23 THE COURT: So what does the law say? Once you tell  
24 them about the document, how much time do they have to say okay,  
25 destroy it?

1 MR. EVANS: Well, the law is unclear on it, Your Honor.  
2 There is no bright line on when they must destroy it. It's  
3 reasonable. They must make -- to quote the law --

4 THE COURT: Where are you quoting from?

5 MR. EVANS: I'm quoting from the Federal Rule of  
6 evidence 502.

7 THE COURT: You're talking about the first document  
8 now, right?

9 MR. EVANS: I am talking about the first document  
10 which, on its face, again, does appear to be privileged and that  
11 we believe that was waived.

12 THE COURT: Okay.

13 MR. EVANS: I'm quoting the case from the Southern  
14 District, April 8, 2015, the case is Thermoset Corp versus  
15 Building Materials. It's a Judge Cohn, 2015, US District Court  
16 Lexis 45924. And the court said the final element of Rule  
17 502(b) requires that the producing party take prompt remedial  
18 efforts to rectify the inadvertent disclosure.

19 Our position is that these were not prompt remedial  
20 efforts when, after our initially notifying them on November  
21 16th we did not even hear a word from them until December 20th.  
22 And there's a pattern of our being very forthright about what we  
23 have, what we intend to do and then hearing nothing for months  
24 or weeks from defense counsel.

25 I use this case of Thermoset, particularly because it

1 -- you know what, I'm sorry. I'd also direct the court to a  
2 second case which is partially on point. That case is United  
3 States versus Sigmund, a little bit earlier, it's from 2013 and  
4 -- it's 2013 US District Lexis 157653. And I would like to  
5 point the court towards Sigmund because Sigmund actually was a  
6 case where the party who had produced the claimed privilege  
7 documents waited about nine months, I believe, before attempting  
8 to claw it back, which is much longer --

9 THE COURT: Do you have any case where the party who  
10 received the privileged document said I have a privileged  
11 document of yours, what do you want me to do with it? Are there  
12 any cases like that?

13 MR. EVANS: Yeah, I believe that's what happened in the  
14 Sigmund case.

15 THE COURT: That wasn't the other party saying, you  
16 know, I now realize that I gave you this stuff and I want it  
17 back.

18 MR. EVANS: I don't have a direct answer for you, Your  
19 Honor, because I'd have to look much more closely.

20 THE COURT: Well, you'll have to look at what the facts  
21 are, because it's kind of unusual, I think, that the party who  
22 received it, who says this is privileged, if you think it's  
23 privileged, then you should throw it out or destroy it or return  
24 it.

25 In other words, you receive a document that's

1 privileged, then you should stop looking at it. I think that's  
2 what the rules indicate.

3 MR. EVANS: Exactly. And we didn't look at it to study  
4 it and to determine whether it was privileged, that was the  
5 point. We saw that it appeared to be a legal memorandum, it was  
6 not from any law firm that we had ever heard of, but we didn't  
7 go any further in terms of inspecting the document at that point  
8 because it was from a law firm, appeared to be -- it was marked  
9 confidential and privileged, if I'm not mistaken. And I  
10 actually said to my colleague you don't have any choice but to  
11 notify them immediately and you can't look at that document.  
12 That was what happened the same day.

13 THE COURT: Okay. Rule 26 says that you may promptly  
14 present the information to the court under seal for a  
15 determination of the claim.

16 MR. EVANS: well Your Honor, I do believe if there was  
17 any misstep, it was not coming to the court sooner. But  
18 assuming that by Defendants' silence they concurred with the  
19 waiver of the privilege and that there wasn't any mistake on our  
20 point, it was that we didn't come to have Your Honor decide it  
21 back in December.

22 THE COURT: well, I mean, when you sent the letter, did  
23 you say we think this is privileged, if we don't hear from you  
24 we're going to assume that you're waiving the privilege and  
25 we'll use the document? Did you put them on any kind of notice

1 like that?

2 MR. EVANS: Not in the initial e-mail on November 16th.  
3 However, on December 28th, I believe that was the substance of  
4 the letter responding to their December 20th letter.

5 THE COURT: That what, after they told you that it was  
6 privileged?

7 MR. EVANS: Correct.

8 THE COURT: Okay. But then you're arguing that it was  
9 waived only because of the amount of time they spent in between  
10 November 6th and December 20th.

11 MR. EVANS: well, our letter had several grounds. One  
12 was that it was not put on the privilege log, they did not give  
13 us an amended privilege log to include the document; that more  
14 than 30 days had passed and that the document itself was marked  
15 confidential, so clearly had been reviewed.

16 THE COURT: Okay. what do you say about all this,  
17 about this first one?

18 MR. LOMAX: Thank you, Your Honor.

19 THE COURT: Is that microphone on, Cheri?

20 COURTROOM DEPUTY: Might have turned it off.

21 MR. LOMAX: How about now?

22 THE COURT: Yeah, there you go.

23 MR. LOMAX: Your Honor, as an initial matter, I would  
24 point out that there is no rule that I'm aware of that says  
25 without a request for a response in a certain amount of time,



1 one party can unilaterally decide that enough time has gone by  
2 that constitutes your delay as a waiver. We responded to the  
3 information that we received about this document and we  
4 specifically stated these are privileged materials. We ask that  
5 you destroy them and to not use them any further in this  
6 litigation.

7 Then we were met with the response -- and I would point  
8 Your Honor to the protective order in this case that  
9 specifically talked about what is supposed to happen. Paragraph  
10 21 of the protective order that you entered and that Plaintiffs  
11 agreed to states that if a party inadvertently or  
12 unintentionally produces materials subject to a claim of  
13 privilege or work product protection, the materials for which a  
14 claim of inadvertent or unintentional production is thereafter  
15 made, shall be returned to the producing party within seven  
16 calendar days of the producing party's written request, or  
17 otherwise destroyed. And the production will not operate as a  
18 waiver of the applicable privilege or work product protection.  
19 Moreover, any notes or summaries referring or relating to any  
20 such inadvertently or unintentionally produced materials shall  
21 be destroyed. We sent a letter directly along those lines and  
22 the response that we got was you've waived it.

23 Thereafter, there was no effort to come to court to  
24 adjudicate whether or not we waived the privilege. Instead,  
25 Plaintiffs unilaterally decided we don't care what you guys say

1 about this privilege, we're going to go forward. We're going to  
2 use it in depositions, we're going to use it to advance the  
3 merits of our case.

4 The protective order speaks directly to this issue. It  
5 should have been destroyed and if they wanted to challenge the  
6 claim --

7 THE COURT: Well, does it say that you have to do  
8 something within seven days?

9 MR. LOMAX: Yes, Your Honor. Within seven days of  
10 being notified of opposing party's claim of privilege, you are  
11 to destroy.

12 THE COURT: Okay. All right. But you didn't -- in  
13 other words, they notified you that they found a privileged  
14 document. You didn't respond until December 20th, about seven  
15 weeks later.

16 MR. LOMAX: Correct.

17 THE COURT: Or maybe six weeks later. I'm sorry.  
18 Maybe five weeks, it was November 16th to December 20th. So  
19 five weeks later you responded and said --

20 MR. LOMAX: Privileged.

21 THE COURT: -- destroy it.

22 MR. LOMAX: Please destroy it.

23 THE COURT: Why didn't you respond quicker than that?

24 MR. LOMAX: Your Honor, there's no real excuse for why  
25 we didn't respond quicker. There were a lot of things going on.

1 Your Honor may not recall, we were ordered to produce a number  
2 of documents, ended up producing over 100,000 pages of  
3 documents. Other things were happening in the litigation. This  
4 didn't have a hard concrete deadline, it just didn't happen as  
5 swiftly as it could have.

6 THE COURT: All right. Anything further, Mr. Evans? I  
7 mean, the whole idea of a protective order is to allow clawback  
8 so that the parties aren't, you know, wrapped up in making sure  
9 that every document is not privileged. That's the idea of it.  
10 That's why they came up with this whole clawback thing is give  
11 them your documents, if you find something that's privileged,  
12 give it back or destroy it.

13 MR. LOMAX: One other point to correct, Your Honor. It  
14 is on the privilege log that we produced, this document. That  
15 was stated by Plaintiffs, and I just want to correct the record  
16 that it is there.

17 THE COURT: All right. As to the first document, I  
18 find that it remains privileged, can't be used in the litigation  
19 and should be destroyed by the Plaintiff or -- I don't know if  
20 you want it destroyed or returned. If you have any copies,  
21 destroy it.

22 MR. LOMAX: Your Honor, and I would also ask you to  
23 consider the use of the document that occurred afterwards in  
24 depositions.

25 THE COURT: Yeah, I'm not considering that now so --

1 MR. LOMAX: Okay.

2 THE COURT: -- let's get moving on this case. All  
3 right? I mean, you know, does this, like, make or break your  
4 case or are we just doing this as a law school question?

5 MR. EVANS: It is a proverbial -- from what I  
6 understand, it's a proverbial smoking gun. It's not an  
7 intellectual exercise.

8 THE COURT: well, it seems to me it is. Under the  
9 protective order that you entered, you're supposed to destroy it  
10 if you receive something that is protected. And it was clearly  
11 protected, you should have put it in an envelope or destroyed it  
12 and not used it anymore.

13 MR. EVANS: I understand.

14 THE COURT: All right. What's the next? Now, we're  
15 talking about these other two, there's two documents that you  
16 can't agree on whether or not they're privileged? Is that what  
17 is left?

18 MR. EVANS: Yes, Your Honor.

19 THE COURT: Okay. What are they? What documents are  
20 they?

21 MR. EVANS: Those are documents that -- it's two  
22 e-mails, Your Honor. It's two e-mails to an individual whose  
23 name is Zalli, so we have referred to them as the Zalli  
24 documents.

25 THE COURT: Do you have them here?

1 MR. EVANS: I do, Your Honor.

2 THE COURT: All right. And remind me now, these were  
3 given to you in a group of stuff, and then you identified it or  
4 they told you hey, you have some privileged documents of ours?

5 MR. EVANS: These were identified by Defendants. We  
6 did not -- there's no indication on them that they -- no indicia  
7 of privilege on them.

8 THE COURT: So there's two. One of them you agreed was  
9 privileged after consultation, and two of them you can't decide?  
10 Is that what it is?

11 MR. EVANS: Yes, Your Honor.

12 THE COURT: Okay.

13 MR. LOMAX: Do you have a copy?

14 MR. EVANS: I do have copies. Can you locate the  
15 copies? Thank you.

16 THE COURT: This is from Tom Darden, I'm looking at one  
17 that's dated November 4, 2015. Tom Darden, Zalli, Z-A-L-L-I, at  
18 JFG. Who is Zalli?

19 MR. LOMAX: Your Honor, Mr. Zalli is one of  
20 Mr. Darden's attorneys.

21 THE COURT: Okay. And Mr. Darden is writing to him?

22 MR. LOMAX: He's writing to him in which e-mail? The  
23 November 4th?

24 THE COURT: November 4, 2015 at 7:32 a.m.

25 MR. LOMAX: Your Honor, as you know, this case is about

1 a contract, the payment of which would have come due at the end  
2 of the performance of a test. Mr. Darden is outlining to his  
3 lawyer his understanding of the potential issues with that  
4 contract.

5 THE COURT: Okay. Let me take a quick look at this  
6 then. Okay.

7 why does the Plaintiff think this is not privileged?

8 MR. EVANS: To begin with, Your Honor, we really  
9 actually have no reason to believe, except for taking  
10 Defendants' word, that Mr. Zalli or Ms. Zalli is an attorney.  
11 But I think the most important thing is shadowed or foreshadowed  
12 by the subject line which says info regarding business problem.  
13 This is not -- there are no legal -- there's no legal advice  
14 either being given or being sought in this e-mail, but rather if  
15 you look to the very last -- the second to last paragraph, the  
16 one that begins "we want to know" --

17 THE COURT: Yeah.

18 MR. EVANS: -- that is what this e-mail is about.  
19 Essentially or -- not even essentially, but what Defendants are  
20 doing here is seeking investigative services from Mr. Zalli.  
21 They're asking for Mr. Zalli to look into Mr. Rossi, our client,  
22 to look into his relationship with Fabio Penon, they're not  
23 seeking legal advice. They're not asking for legal advice,  
24 there's no indication that there's a legal relationship or  
25 there's an advisory relationship. What it appears to be from

1 this communication is help with a business problem as described  
2 in the subject line and specifically, investigative services.  
3 If they went out and hired a private investigator to do exactly  
4 what they're doing here, what they're asking for here, they  
5 would have given the same description of their side of the  
6 litigation or the pending litigation, and then concluded as they  
7 did here with the request for investigative services. This  
8 isn't about legal advice.

9 THE COURT: Okay. what do you say?

10 MR. LOMAX: Your Honor, Mr. Zalli is an attorney, he's  
11 Mr. Darden's attorney.

12 THE COURT: where is he located?

13 MR. LOMAX: He's in Israel.

14 THE COURT: Okay.

15 MR. LOMAX: I have a copy of his bio if you need to see  
16 it.

17 THE COURT: You can show it to opposing counsel, I  
18 guess, because he has some doubt as to whether he's an attorney.

19 MR. LOMAX: Your Honor, this -- if you would read this,  
20 you read the document?

21 THE COURT: I did read it. Yeah. I mean, what he  
22 makes is the point at the end, he doesn't say "I need some legal  
23 advice, what should I do about this potential fraud problem I'm  
24 looking at", instead, they said "I need you to find out for me  
25 what the relationship is between this fellow and a couple other

1 guys".

2 MR. LOMAX: Your Honor, as you saw, Mr. Darden laid out  
3 the entire understanding of the situation that he had with the  
4 people he's now in litigation with. And he was contacting this  
5 individual to find out what, if any, information exists that  
6 would support a potential claim against these folks for engaging  
7 in fraudulent conduct, which actually now is being litigated.  
8 And this was just the initial set of information that he  
9 provided to this attorney to assist in that process. The  
10 relationship didn't end here. He provided background  
11 information. He said "this is where we need to start; I need to  
12 find out this information, I want to seek information and have  
13 advice from you based upon this information".

14 THE COURT: Where does he say that he wants advice from  
15 him based on the information?

16 MR. LOMAX: Well, he doesn't directly state that in  
17 this e-mail, but this is the nature of the relationship that he  
18 was seeking with this attorney, and he had to give this  
19 background information in order to do that.

20 And, you know, just to respond to Plaintiff counsel's  
21 point that this is information regarding a business problem;  
22 well, Mr. Darden had a business and he entered into a  
23 relationship, a business relationship, with Mr. Rossi that went  
24 the wrong way. So it's a business problem. That doesn't mean  
25 that he can't seek legal advice about his business problem and



1 that's what he's doing. As Your Honor saw, he laid it all out.  
2 He talked about the contract. He talked about the individuals  
3 involved. And in order to understand whether he's going to have  
4 claims that are potentially going to be against him or that if  
5 he has claims that may be filed against someone else, he needs  
6 to know that information. So he retained this individual for  
7 that purpose, which was to seek legal advice about the potential  
8 claims at issue in this dispute.

9 And so this is not something -- first of all,  
10 Plaintiffs were not supposed to review this document and make  
11 their own assessment about whether it was privileged. We  
12 identified this document, we sent a clawback letter then they  
13 made their own determination and said "you know what, we don't  
14 agree, we're going to go forward and use these documents in  
15 depositions". That's not how the protective order works, Your  
16 Honor. I read it to you. Paragraph 21, they're supposed to  
17 destroy the document, not have any trace of it, no notes about  
18 it, then come to you and say "well, we disagree, this is a  
19 privileged document". That's not what happened here. Here we  
20 are now after the fact.

21 THE COURT: Had you reviewed this document prior to  
22 being notified?

23 MR. EVANS: We had reviewed -- we were aware of this  
24 document and we were excited at what we saw on the paper. And  
25 what I heard from my colleagues was they were in disbelief about

1 what they saw, and clearly there's nothing on there to suggest  
2 that it's a privileged communication.

3 THE COURT: But what happened when he contacted you and  
4 told you that it was a privileged communication? why didn't you  
5 then seal it and provide it to the court?

6 MR. EVANS: Again Your Honor, I'll go back to my  
7 previous statement which was that was a misstep and that would  
8 have been appropriate. But not hearing anything back from our  
9 immediate -- our immediate response to Defendants that we don't  
10 consider this a privileged document, we've reviewed it before  
11 you ever mentioned it and the passage of weeks after that letter  
12 from us, which came the day after they asked for the clawback,  
13 led us to believe that there was nothing left to discuss, that  
14 it was not going to be a contested matter. We thought maybe  
15 they -- they were making their best effort at clawing something  
16 back that is potentially explosive, and then they made the  
17 decision that, you know, it was not worth the fight because  
18 obviously it was not privileged.

19 MR. LOMAX: Your Honor, again, we don't have an  
20 obligation after we make a claim of privilege to then go back  
21 and forth about all of these issues. We've made the claim of  
22 privilege. They're supposed to then say "well, let's go to the  
23 court. We disagree, well we have to have a dispute, take it and  
24 let the court decide". They're supposed to destroy the  
25 document, they're using it.

1 THE COURT: Well, either destroy it or seal it.

2 MR. LOMAX: Or seal it.

3 In addition to this, Your Honor, on the point that this  
4 document is not privileged, this is a classic initial  
5 consultation where someone goes in and lays it all out and says  
6 "here is my issue, what can you do to help me. This is what I  
7 think I want you to do, but you talk to me about it". And if  
8 Plaintiffs are saying that that's not privileged, that a person  
9 cannot sit down with a lawyer and explain a problem that they're  
10 having and seek some advice and seek some consultation, then I  
11 dare say we have a real big problem with communications between  
12 lawyers and their clients or people who are seeking legal  
13 advice.

14 THE COURT: Okay. I find this is seeking legal advice  
15 and, you know, if you read it, he talks about the reason why --  
16 let me see. The reason we have not engaged in conflict with  
17 Rossi, which would lead one to believe a conflict would be, you  
18 know, demanding money back or in anticipation of litigating  
19 something because we're not satisfied, the technology doesn't  
20 work. Also there's the chance that the one MW plant will fail,  
21 this could make this all moot.

22 So I find that this is a -- that he's laying out the  
23 facts for legal advice, and he's suggesting that the lawyer find  
24 out the relationship between some of the parties who are  
25 involved in the underlying dispute. So I find that it is

1 privileged and it can't be used in this litigation. Any copies  
2 are to be either returned or destroyed.

3 what's the next one? This is another one to Zalli and  
4 Usi (ph)? who is Usi?

5 MR. LOMAX: I think that's another person at the firm,  
6 Your Honor.

7 THE COURT: And this is what? "I'm sending this to my  
8 other e-mail".

9 MR. LOMAX: This is part of the same type of  
10 communication.

11 THE COURT: well, he's sending him what? I don't see  
12 what he's sending him.

13 MR. LOMAX: These are the parties that he says he's  
14 concerned about, and you see their names. It's the same  
15 individuals in the other communication that he listed.

16 THE COURT: I don't know. First of all, why are you  
17 trying to protect this? What does this say? It says "I'm  
18 sending this from another e-mail. Here's some added  
19 information. I'll respond also in other e-mail". Then he says  
20 -- he gives Fulvio Fabiani's phone number and e-mail, Andrea  
21 Rossi's phone number, it looks like, and I guess some e-mails  
22 for him and Fabio Penon's e-mail.

23 MR. LOMAX: You know, Your Honor, it's just part and  
24 parcel of the other communication. It's not a huge deal if they  
25 want to use it, if they think this is something useful. We

1 disagree. We think it's communications with his attorneys, and  
2 shouldn't be used for purposes of this litigation.

3 THE COURT: I guess I don't understand, this is from  
4 Tom Darden, but at the bottom there it says Collette Sauer,  
5 legal assistant to Henry Johnson?

6 MR. LOMAX: Yeah, that's actually just contact  
7 information for the various people who ended up being parties to  
8 this case. Henry Johnson is a third party defendant in the  
9 case. So if you look at this, Your Honor, all these people  
10 ended up being parties to this case and these are the folks that  
11 Mr. Darden was inquiring about. Same folks that you referenced.

12 THE COURT: Well, I mean, is there some document that  
13 puts this in -- these things are four months apart. This isn't  
14 like the next day.

15 MR. LOMAX: Right.

16 THE COURT: I don't understand. This thing has to have  
17 some context. Is there an e-mail? It sounds like I don't know  
18 what -- I mean, there's definitely a communication with his  
19 attorneys. But I don't have any kind of context of what was the  
20 e-mail the day before? Did the attorney say can you send us,  
21 you know, the addresses of some people so we can try to contact  
22 them or we can sue them or do we know?

23 MR. LOMAX: We don't have that, Your Honor.

24 MR. EVANS: And Your Honor, in addition on this e-mail,  
25 there's no indication who Mr. Uzi is, but the e-mail address is

1 different. So I would say that as far as -- even if we were to  
2 concede, which I'm not sure that Mr. Jaffe is involved in  
3 privileged communications, the privilege seems to be destroyed  
4 by the inclusion of this third party Usi.

5 THE COURT: Who is Usi?

6 MR. EVANS: I have no -- I'm sorry.

7 THE COURT: I'm asking them, I guess.

8 MR. LOMAX: Your Honor, I would have to make sure -- I  
9 don't want to make a misrepresentation on the record about  
10 Mister or Mrs. Usi, but I believe he was another lawyer working  
11 on this case with Mr. Zalli.

12 THE COURT: He is at a different e-mail. I mean, it's  
13 not at the same company. It's at Wall Company instead of JFG  
14 Company. I suppose IL, is that his real, you know, connotation  
15 or whatever?

16 MR. LOMAX: Yes.

17 THE COURT: All right.

18 MR. LOMAX: I mean, I can --

19 THE COURT: Well, I find you haven't shown that this is  
20 privileged because I don't know what it's in response to. The  
21 information within it doesn't look like it's privileged to me.

22 MR. LOMAX: Right.

23 THE COURT: It looks like it's just information. You  
24 know, that is not -- there's certainly no privilege to people's  
25 addresses and phone numbers. So on this second document, I find

1 that the Defendant has not shown that it's privileged.

2 MR. LOMAX: I understand.

3 THE COURT: I just don't even know why we're talking  
4 about this document because unless this is some kind of secret  
5 or something, everybody in the place probably knows what his  
6 phone numbers are. All right.

7 MR. LOMAX: Understood.

8 THE COURT: Any other issues?

9 MR. EVANS: That's all from Plaintiffs, Your Honor.

10 THE COURT: Let me give these back to you. Well, the  
11 one you can give to the Defendant. The other one you can do  
12 what you want.

13 Are there any other issues to address today?

14 MR. LOMAX: Yes, Your Honor. Two issues from the  
15 Defendants. If I may provide some documents to the court and to  
16 Plaintiffs' counsel.

17 And just by way of background, Your Honor, we were  
18 before you several months ago on Plaintiffs' motion to quash  
19 subpoenas to banks for bank accounts for the Plaintiffs. And  
20 Your Honor quashed the subpoenas and ruled that if we were  
21 unable to obtain relevant information from Plaintiffs, we could  
22 come back before Your Honor again to make our appeal for why  
23 these bank records should be produced.

24 So I want to re-raise that issue and I want to provide  
25 some documents to support my position.

1 THE COURT: Okay. Did you give them these documents  
2 before?

3 MR. LOMAX: These are all documents that are part of  
4 the case; yes, sir.

5 THE COURT: No, I mean did you give it to them in this  
6 discussion? I mean, I don't understand. You're supposed to try  
7 to resolve this stuff before you came here. How can you be  
8 giving him documents that you know you should have sent them to  
9 him a week ago, and said "hey, here's what I'm going to give to  
10 Judge O'Sullivan and we need to try to resolve this issue".

11 MR. LOMAX: We talked about the documents generally. I  
12 don't know that I said I'm going to put together these three  
13 sets.

14 THE COURT: Okay. Well, good. You guys can talk about  
15 it amongst yourselves and then you can let me know when you're  
16 finished and try to resolve the issue. Before you come here,  
17 don't come here and show me a document, a case or anything that  
18 you haven't shown to the other side ahead of time, because  
19 that's what you're supposed to do when you confer.

20 COURTROOM DEPUTY: All rise. Court's in recess.

21 THE COURT: Back on the record in Rossi versus Darden.  
22 What do we got left?

23 MR. EVANS: We've been able -- Your Honor, we've been  
24 able to resolve the issue that you sent us out to resolve.

25 THE COURT: Okay. Good.



1 MR. EVANS: And I think it makes sense to at least tell  
2 you on the record what our resolution is.

3 THE COURT: All right.

4 MR. EVANS: If you need a written order, I think that  
5 will help guide the written order.

6 THE COURT: So go ahead.

7 MR. EVANS: The issue, Your Honor, was the bank account  
8 statements that were subpoenaed and that have not been reviewed.

9 THE COURT: Are those in your possession now?

10 MR. EVANS: They are in our possession.

11 THE COURT: Okay.

12 MR. EVANS: And Mr. Darden was going to ask Your Honor  
13 to just open up the bank account statements and turn them over,  
14 because he had certain questions about interrogatory responses  
15 that Plaintiffs had given. And after going through it again,  
16 because I know that my colleagues and Mr. Darden had discussed,  
17 it we actually came to a solution.

18 THE COURT: Mr. Lomax, right?

19 MR. EVANS: Yes. I'm sorry.

20 MR. LOMAX: I would love to be Mr. Darden.

21 THE COURT: You would probably have more money.

22 MR. LOMAX: Correct.

23 MR. EVANS: So Mr. Lomax and I were actually able to  
24 come to an agreement. And what we're going to do is the  
25 attorneys for the parties are going to meet between now and the

1 end of next week to sit down, review the bank account statements  
2 together in order to look specifically for any checks or other  
3 payment entries that would indicate payments to vendors who did  
4 work on the E-Cat.

5 THE COURT: Okay.

6 MR. EVANS: And then we will allow them to take -- make  
7 photocopies of those cancelled checks that are in the bank  
8 statements or whatever. You know, if there's no cancelled check  
9 and it was an electronic payment, they could take a photocopy of  
10 that redacted page.

11 THE COURT: Okay. Sounds good. I don't see that you  
12 need an order, do you? I mean, you put it on the record so --

13 MR. EVANS: I think we're probably good then.

14 THE COURT: Okay. All right. Anything else?

15 MR. LOMAX: Do we need an order on the issues?

16 THE COURT: Yeah, I'll issue that order though because  
17 that was pretty similar. All right?

18 Anything else?

19 MR. LOMAX: No, thanks for your time.

20 THE COURT: All right. Thanks for getting the matter  
21 resolved, I appreciate it.

22 MR. LOMAX: Thank you, Your Honor.

23 Oh, I did have one sort of ministerial matter, Your  
24 Honor. You ordered us to have the deposition of Fulvio Fabiani  
25 in Russia, he was going to appear by phone or video conference.

1 THE COURT: Yeah.

2 MR. LOMAX: And there are some logistical issues.  
3 Apparently, the state department says it is illegal to take a  
4 deposition in Russia.

5 THE COURT: I'm not aware of that.

6 MR. LOMAX: And so other, I guess, service providers  
7 like the court reporters are saying they've done it before. So  
8 we're just trying to find out exactly what it is we can do, and  
9 you ordered it to occur on March 28th. I'm sorry. February  
10 28th.

11 THE COURT: Yeah.

12 MR. LOMAX: And so it's just unclear if we'll be able  
13 to resolve all of those issues by that date. We're doing  
14 everything we can in order to make it happen, but it may have to  
15 happen sometime thereafter.

16 THE COURT: Well, I mean, I guess you'll have to let me  
17 know. When you know a little more, you'll have to let me know,  
18 you know, if you need a few more days. But the discovery period  
19 is over and summary judgment motions, I'm sure, are due shortly  
20 thereafter, and I don't know if his deposition goes to summary  
21 judgment motions or not.

22 It's illegal to take -- the state department says it's  
23 illegal to do what?

24 MR. LOMAX: The Russian state department says.

25 THE COURT: Oh, the Russian state department.

1 MR. LOMAX: Sorry. Yes.

2 THE COURT: Oh, okay. I thought you meant our state  
3 department was saying no. I got no idea what the Russians -- I  
4 don't even know what our state department would say, but I don't  
5 know what the -- you know, the answer is. I guess you'll have  
6 to try to work it through.

7 why did you consult the Russian state department?

8 MR. LOMAX: Mr. Pace reviewed the website. He's very  
9 thorough in that way, and he just wanted to make sure we were  
10 going to be in compliance with all the various rules and he  
11 determined that there would be an issue with the legality of  
12 actually taking his deposition in Russia.

13 THE COURT: But I thought you guys were going to be  
14 here and he was going to be in Russia?

15 MR. LOMAX: Right. Even under those circumstances.

16 THE COURT: Oh, really?

17 MR. LOMAX: Yes, Your Honor.

18 THE COURT: So what, Mr. Pace wants to travel to Russia  
19 some day? Or is he worried that Putin is going to ask for his  
20 extradition or what?

21 MR. LOMAX: I don't think he does. I don't think he  
22 does, it's just --

23 THE COURT: Some countries -- you know, I've had a case  
24 where, I think it's France or Switzerland, it's against the law  
25 for them to turn over documents --

1 MR. LOMAX: Right. Yeah.

2 THE COURT: -- in a lot of instances in discovery. And  
3 I just order them -- you know, usually there's a US subsidiary  
4 that's involved, I just tell them look, you got to do it. You  
5 know, if you don't want to do it, get out of the lawsuit or take  
6 a default or something. I'm not saying that's going to apply to  
7 you, but there are some crazy laws in some of these other  
8 countries.

9 MR. LOMAX: Right. So we'll keep Your Honor updated if  
10 there is other --

11 THE COURT: Maybe they can agree to move them to, you  
12 know, somewhere in the next country that's closer or somewhere  
13 and go there.

14 All right. Good luck.

15 MR. EVANS: Someplace that hasn't been annexed.

16 THE COURT: Right. Don't send him to the Ukraine.

17 (PROCEEDINGS CONCLUDED)  
18 \* \* \* \* \*

**C E R T I F I C A T E**

19 I certify that the foregoing is a correct transcript from the  
20 digital audio recording of proceedings in the above-entitled  
21 matter.

22 3-25-2017  
Date

/s/ Dawn M. Savino  
DAWN M. SAVINO, RPR

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