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

ANDREA ROSSI, *et al.*,  
Plaintiffs,

vs.

THOMAS DARDEN, *et al.*,  
Defendants.

Miami, Florida  
April 20, 2017  
Pages 1-104

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

APPEARANCES:

FOR THE PLAINTIFFS:

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1 for that reason as well.

2 And the same thing when it comes from the piping. The  
3 piping crossed over from both sides, right? So technically both  
4 can be faulted for that.

5 I appreciate the time, and I know we have other issues  
6 to address, Your Honor.

7 THE COURT: All right. Motions for sanctions denied.

8 As to the pipe, the Defendant became aware of the  
9 removal of the pipe in approximately March 2016 and didn't bring  
10 this matter to the court's attention until approximately a year  
11 later. The pipe was destroyed some time between February and  
12 March of 2016, and so I find that the request is out of time.

13 Also find that the Plaintiffs were not aware of the  
14 allegations of manipulation of the tests until August of 2016,  
15 and that's the earliest that they would have been on notice of a  
16 duty to preserve, so the duty to preserve has not been shown  
17 prior to August of 2016.

18 I also find that I think it's -- regarding whether or  
19 not it's crucial to the case, somewhat cumulative in that you  
20 have testimony of what was there and what occurred. And you  
21 have the ability to cross-examine Dr. Rossi about his  
22 statements, about what was there and how the tests were done.  
23 You pointed out to the court the different weaknesses in his  
24 testimony and why one should not believe that -- well, not this  
25 so much, but the heat exchanger or heat dissipater was not

1 working or didn't exist.

2 As far as bad faith, I find that bad faith hasn't been  
3 shown because the pipe was repurposed and you haven't shown that  
4 it was intentional for no other reason. In addition, that they  
5 were on notice that they needed to preserve it.

6 As to the -- what is the name of the thing? The heat  
7 exchanger, right?

8 MR. PACE: Yes, Your Honor.

9 THE COURT: The same thing, I find that there was no  
10 duty to preserve that until after the counterclaim was filed at  
11 the earliest, in August of 2016. If not, even there it wasn't  
12 mentioned in the pleadings, it didn't come to light as one of  
13 the Defendants' arguments until January 2017 when an expert  
14 report was provided. So I find that they didn't know that it  
15 was going to be an issue in this case prior to that. And for  
16 the other reasons I've stated regarding the pipe.

17 As to the e-mails, I find that there was a -- there is  
18 missing e-mails, I think everybody is in agreement with that, at  
19 least as to not being produced by Dr. Rossi, although they may  
20 exist in other areas either with Mister -- is he a Mister or  
21 Doctor Fabio?

22 MR. ANNESSER: Doctor.

23 THE COURT: Dr. Fabio, they could be in the possession  
24 of the Italian e-mail provider. But at least as to Dr. Rossi's  
25 possession, he did not -- it's missing from his possession. I

1 find that he did have a duty to preserve that and that steps  
2 were taken to preserve them shortly after the filing of the  
3 lawsuit. However, I find that their existence is not crucial to  
4 proving or disproving -- proving either the Plaintiffs' case or  
5 the Defendants' case or disproving either of those cases or  
6 disproving the Plaintiffs' case in that they would be cumulative  
7 to the records that we know now exist.

8 I also find that the Defendant did not take sufficient  
9 steps to attempt to obtain other copies of these e-mails; for  
10 instance, by questioning Dr. Penon or trying to obtain them from  
11 the Italian mail server or taking up the Plaintiff on their  
12 offer to have the Defendants' expert examine the e-mail servers  
13 to see if they would be able to determine when they were  
14 destroyed or why they were no longer available.

15 So for those reasons, I deny your request for  
16 sanctions.

17 what's the next one?

18 MR. PACE: I think it would be Plaintiffs' motion for  
19 sanctions.

20 THE COURT: All right. You're excused, if you would  
21 like to leave.

22 MR. LEON de le BARRA: Thank you, Your Honor.

23 THE COURT: You got 50 minutes left.

24 MR. ANNESSER: Your Honor, I think we can probably  
25 expedite this by combining two of the issues before the court.