

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

CASE NO. 1:16-CV-21199-CMA/O'Sullivan

ANDREA ROSSI, *et al.*,

Plaintiffs,

v.

THOMAS DARDEN, *et al.*,

Defendants,

_____ /

**PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANTS' APPEAL OF
MAGISTRATE JUDGE O'SULLIVAN'S DENIAL OF DEFENDANTS' MOTION FOR
SANCTIONS BASED ON PLAINTIFFS' AND THIRD PARTY DEFENDANT J.M.
PRODUCTS INC.'S SPOILIATION OF EVIDENCE**

Plaintiffs, Andrea Rossi and Leonardo Corporation, by and through their undersigned counsel, hereby file their response in opposition to Defendants', Thomas Darden, John T. Vaughn, Industrial Heat, LLC ("IH"), IPH International B.V. ("IPH"), and Cherokee Investment Partners, LLC, Appeal of Magistrate Judge O'Sullivan's Denial of Defendants' Motion for Sanctions Based on Plaintiffs' and Third Party Defendant, J.M. Products, Inc.'s, Spoliation of Evidence [ECF No. 285], and state:

Brief Introduction

Defendants' motion for spoliation pertains to the purported destruction of (1) an output pipe, (2) a heat exchanger, and (3) communications with Fabio Penon. Judge O'Sullivan properly denied Defendants' motion following a hearing on April 20, 2017. Defendants' Appeal [ECF No. 285] merely re-hashes the same factual arguments that have already been presented, and fails to

indicate any abuse of discretion and/or clearly erroneous findings. Judge O'Sullivan's ruling should accordingly be affirmed.¹

Background

On December 14, 2015, Plaintiffs' counsel sent a demand letter to Defendants' counsel outlining a dispute between the parties. Of relevance, Plaintiffs' counsel identified and acknowledged IPH's contention that the testing of the E-Cat Unit "cannot be the Guaranteed Performance process" predicated upon the beginning date of the test. At such time, Plaintiffs were on notice only that Defendants disputed the timing of the Guaranteed Performance Test. Plaintiffs were not put on notice of any dispute with respect to the measurements taken during the Guaranteed Performance Test, whether Defendants knew (or even cared) about the existence of a heat exchanger within the 1MW E-Cat Plant, or that Defendants believed there may have been fraudulent or deceptive acts taking place within the 1MW E-Cat Plant.

Subsequently, in February 2016, the Defendants and their counsel visited the 1MW E-Cat Plant with Plaintiffs and Plaintiffs' counsel. During such visit, Defendants still did not indicate that there was any question as to the validity of measurements taken, that the heat exchanger was at all material, or that Defendants believed Plaintiffs perpetrated any type of fraud or scheme. Rather, Defendants and Plaintiffs jointly padlocked a container, which Plaintiffs believed to contain all equipment that may be the subject of litigation. Accordingly, without knowledge of Defendants' yet-to-be identified issues of manipulation and/or heat dissipation, Plaintiffs repurposed the output pipe and heat exchanger to begin new ventures and continue their business.

Approximately one (1) month later, in March 2016, the Defendants and their counsel returned to the 1MW E-Cat Plant. During the second visit, Defendants took measurements and,

¹ As a preliminary note, Defendants' Appeal [ECF No. 285] attaches sixteen (16) Exhibits. Plaintiffs object to any such Exhibit that was not part of the record before Judge O'Sullivan, including Defendants' Exhibits 1-14.

significantly, observed that the piping was no longer present at the facility. Defendants made no indication at that time that the removal of the piping was an issue. Had Defendants raised the issue in March 2016, Plaintiffs may have had the opportunity to locate and/or preserve the piping.

On April 5, 2016, Plaintiffs filed their Complaint against Defendants [ECF No. 1], and Defendants filed their Motion to Dismiss on June 2, 2016 [ECF No. 17]. The Motion to Dismiss did not make any mention of any purportedly spoliated evidence. On July 28, 2016, Defendants filed their Unopposed Motion for Extension of Time [ECF No. 27] to file and serve an answer and “any counterclaims” to the Complaint. According to the Motion, Defendants were still considering what, if any, defenses, counterclaims, and/or third party claims were available to them, requiring additional time to consult with the clients. ECF No. 27 at 2.

Finally, on August 6, 2016, approximately six (6) months after the output pipe and heat exchanger were repurposed, Defendants filed their first Answer, Additional Defenses, Counterclaims and Third Party Claims [ECF No. 29]. For the very first time, Defendants raised concerns regarding potential manipulation of data. Defendants still had not yet raised any issues with respect to the absence of the heat exchanger and/or concerns over dissipation of heat, nor had Defendants brought any spoliation claims before the Court or even advised Plaintiffs of their concerns of missing/destroyed/re-purposed evidence.

On January 31, 2017, through the Expert Disclosure of Joseph A. Murray and Expert Report of Rick A. Smith, Defendants finally indicated that the heat exchanger may be relevant. By that time, the heat exchanger had already been repurposed for approximately one (1) year. Defendants had still not brought any spoliation claims before the Court and, on February 27, 2017, all discovery, including expert discovery, was completed. *See* ECF No. 23 at 1.

On March 22, 2017, approximately one (1) month after the discovery deadline (and the date of the original dispositive motion deadline), and more than one (1) year after Defendants learned that certain pipes/equipment from the 1MW E-Cat Plant were repurposed, Defendants, for the first time, filed a motion for spoliation. Defendants' motion was heard by Magistrate Judge O'Sullivan who, after considering the evidence, denied the motion. [ECF No. 266].

Specifically, Judge O'Sullivan made the following findings of fact: (1) the request was untimely because Defendants failed to bring the matter to the Court for approximately a year after learning of the alleged spoliation; (2) the pipe and heat exchanger were removed in or around March 2016, but no duty to preserve arose until at least August of 2016; (3) the allegedly spoliated evidence is not crucial; rather, it is cumulative; and (4) Defendants have not shown any bad faith. **Ex. 1** at 45-46.

On May 4, 2017, Defendants filed their appeal of the foregoing Order [ECF No. 285]. As a basis for their appeal, Defendants claim that no legal authority exists to support Judge O'Sullivan's timeliness finding. To the contrary, as more fully set forth below, ample authority exists. Defendants fail to identify any concise statement as to how or where Judge O'Sullivan erred. Judge O'Sullivan's Order [ECF No. 266] and factual findings must be affirmed.

Memorandum of Law

A. Standard

The decision regarding a spoliation motion is reviewed for an abuse of discretion. *Oil Equip. Co. v. Modern Welding Co.*, 661 Fed. Appx. 646, 652 (11th Cir. 2016). Typically, there are a range of conclusions that the judge may reach and, as such, the decision must be affirmed unless the judge "made a clear error in judgment or has misapplied the law." *Id.*; *see also Eli Lilly & Co. v. Air Express Int'l USA, Inc.*, 615 F.3d 1305 (11th Cir. 2010). The abuse of discretion standard is

similar to that set forth in Federal Rule of Civil Procedure 72(a), which states that objections to a magistrate's order may be modified or set aside only if such order is "clearly erroneous" or "contrary to law."

The party moving for spoliation carries the burden of proof. *In re Boston Boat III, L.L.C.*, 310 F.R.D. 510 (S.D. Fla. 2015). Specifically, the moving party must show that: (1) the missing evidence existed at one time; (2) the alleged spoliator had a duty to preserve the evidence; and (3) the evidence was crucial to the movant being able to prove its prima facie case or defense. *Id.* "Additionally, in this circuit sanctions for spoliation of evidence are appropriate 'only when the absence of that evidence is predicated on bad faith.... Mere negligence in losing or destroying the records is not enough for an adverse inference, as it does not sustain an inference of consciousness of a weak case.'" *Peeler v. KVH Indus.*, No. 8:12-cv-1584-T-33TGW, 2013 U.S. Dist. LEXIS 104240, 2013 WL 3871420 (M.D. Fla. July 25, 2013) (quoting *Bashir v. Amtrak*, 119 F.3d 929, 931 (11th Cir. 1997)). Even grossly negligent conduct does not justify spoliation sanctions. *Id.* (citing *Point Blank Solutions, Inc. v. Toyobo Am., Inc.*, No. 09-61166-CIV, 2011 U.S. Dist. LEXIS 42239, 2011 WL 1456029, at *10 (S.D. Fla. Apr. 5, 2011)). "In fact, district courts in our Circuit regularly deny adverse inference requests even when there is an indisputable destruction of evidence." *Id.*

B. Judge O'Sullivan properly found that the Defendants' Motion was untimely as to the output pipe and heat exchanger.

Judge O'Sullivan correctly ruled that Defendants' Motion regarding the output pipe and heat exchanger "is out of time" because Defendants became aware of their removal in approximately March 2016 and did not bring this matter to the Court's attention until approximately a year later." **Ex. 1** at 46. In response, the Defendants misrepresent to this Court

that “[t]here is no authority for the Magistrate Judge’s timeliness argument in the context of spoliation, and his decision should be reversed.” ECF No. 285 at 10.

There is ample authority to deny a spoliation motion for untimeliness. “Courts view spoliation motions filed near a dispositive motion deadline or in response to a motion for summary judgment with extreme skepticism.” *Sherwood Invs. Overseas Ltd., Inc. v. Royal Bank of Scotland N.V.*, No. 6:10-bk-00584-KSJ, 2015 Bankr. LEXIS 2513 (Bankr. M.D. Fla. July 22, 2015) (denying motion for spoliation as untimely where movant “waited over a year from when it discovered the facts upon which spoliation motion is based before filing it”); *see also Olson v. Shawnee Cnty. Bd. Of Comm’rs*, 7 F. Supp. 3d 1162, 1199 (D. Kan. 2014) (holding spoliation motion filed eight months after the close of discovery untimely); *Am. Nat. Prop. & Cas. Co. v. Campbell Ins., Inc.*, No. 3:08-CV-00604, 2011 U.S. Dist. LEXIS 80534, 2011 WL 3021399, at *3 (M.D. Tenn. July 22, 2011) (holding motion made four months after close of discovery untimely); *Johnson v. Next Day Blinds Corp.*, No. WMN-09-2069, 2012 U.S. Dist. LEXIS 95800, 2012 WL 2871418, at *2 (D. Md. July 11, 2012) (holding spoliation motion filed after the close of discovery, just eight weeks prior to the dispositive motion deadline, untimely).

Defendants cannot claim to be unaware of the foregoing authorities, as Plaintiffs cited thereto in their Response in Opposition to Defendants’ Consolidated Motion in Limine. ECF No. 276 at 3. Notwithstanding, Defendants make no attempt to address or distinguish the same.

In addition to the case law cited above, the Southern District of Florida’s Local Rule 26.1(g) also clearly states, in relevant part, that “[a]ll disputes related to discovery *shall* be presented to the Court... within (30) days from the... date on which a party first learned of or should have learned of a purported deficiency concerning the production of discovery materials.” Defendants failed to raise the issue of purported spoliation as to the output pipe and heat exchanger

for approximately a year after learning that Plaintiffs repurposed the same and, instead, first raised the issue of spoliation at the time of the dispositive motion deadline. Accordingly, Judge O'Sullivan properly denied Defendants' Motion as untimely with respect to such evidence.

C. **Judge O'Sullivan properly found that the Plaintiffs did not have a duty to preserve the output pipe and/or heat exchanger at the time they were repurposed, and that Plaintiffs attempted to preserve the communications with Penon.**

- (i) Plaintiffs had no duty to preserve the output pipe until at least August 2016.

With respect to the output pipe, Judge O'Sullivan properly found that the Plaintiffs were not aware of the allegations of manipulation of the tests until August 2016, and that is "the earliest that they would have been on notice of a duty to preserve, so the duty to preserve has not been shown prior to August of 2016." **Ex. 1** at 46. This ruling is substantiated by the fact that, in December 2015, Defendants merely argued that the Guaranteed Performance Test could not have been completed due to an issue of timing. Defendants did not once raise an issue of potential manipulation of data when: (1) Plaintiffs' counsel sent the demand letter in December 2015; (2) Defendants visited the 1MW E-Cat Plant in February 2016; (3) Defendants visited the 1MW E-Cat Plant in March 2016; (4) Plaintiffs filed their Complaint in April 2016; (5) Defendants filed their Motion to Dismiss in June 2016; or (7) Defendants filed their Motion for Enlargement of Time in July 2016. Rather, Defendants did not raise a concern regarding the measurements until the filing of their Answer, Additional Defenses, Counterclaims and Third Party Claims in August 2016. In fact, Defendants were even unaware of their defenses and counterclaims in July 2016 when they filed their Motion for Enlargement of Time.

Defendants do not dispute the foregoing. Instead, Defendants argue that Plaintiffs "destroyed evidence critical to proving the allegations in their Complaint...." ECF No. 285 at 2. Accepting Defendants' assertion as true (it is not), no sanction is necessary, as Plaintiffs (according

to Defendants' logic) have already harmed themselves by repurposing the pipe. Notwithstanding, the fact remains clear that, at the time the pipe was repurposed, Plaintiffs anticipated only a dispute regarding the timing of the Guaranteed Performance Test. This is especially so in light of the fact that the License Agreement contemplated only that the agreed-upon ERV, Fabio Penon, provide written certification that guaranteed performance was achieved. The License Agreement did not contemplate any evaluation of measurement devices, data, or equipment by any person other than the agreed-upon ERV. A dispute only as to timing would not have required preserving the output pipe. Judge O'Sullivan's factual finding must accordingly be affirmed.

(ii) Plaintiffs had no duty to preserve the heat exchanger until January 31, 2017.

Regarding the heat exchanger, Judge O'Sullivan correctly ruled that "there was no duty to preserve that until after the counterclaim was filed at the earliest, in August of 2016. Indisputably, the issue regarding the heat exchanger did not come to light as one of the Defendants' arguments until January 30, 2017, when Defendants' expert report was provided." **Ex. 1** at 47. Defendants cannot dispute the fact that the heat exchanger and/or the issue of heat dissipation is not mentioned in any pleading, motion, discovery request, and/or other document prior to Defendants' expert disclosures. Judge O'Sullivan's factual finding must accordingly be affirmed.

(iii) Plaintiffs took steps to preserve the communications with Penon.

Judge O'Sullivan found that "steps were taken to preserve [the communications with Penon] shortly after the filing of the lawsuit." **Ex. 1** at 48. Defendants make no effort to dispute this. Instead, Defendants reargue that they are unable to examine the e-mail communications. ECF No. 285 at 15. Such argument is addressed by Judge O'Sullivan's factual finding that the e-mail communications are cumulative, as set forth in more detail below. Defendants do not identify any

clearly erroneous findings by Judge O’Sullivan, and the Order below must accordingly be affirmed.

D. Judge O’Sullivan properly found that the communications with Penon were not crucial to the Defendants’ claims or defenses.

Judge O’Sullivan found that the existence of the communications with Penon “is not crucial to proving or disproving – proving either the Plaintiffs’ case or the Defendants’ case or disproving either of those cases or disproving the Plaintiffs’ case in that they would be cumulative to the records that we know now exist.” **Ex. 1** at 48. Judge O’Sullivan found that Defendants had the opportunity to take the deposition of Fabio Penon; question Penon regarding communications with Plaintiffs; review Plaintiffs’ logs which underlaid the communications; and review Penon’s final reports which summarized and/or compiled the information that would have been contained in the communications. Again, Defendants make no effort to identify how or where the Court erred in making such factual findings. The Order must therefore be affirmed.

E. Judge O’Sullivan properly found that Plaintiffs did not act in bad faith.

Finally, Judge’ O’Sullivan found that Plaintiffs did not act in bad faith. Specifically, with respect to the output pipe, Judge O’Sullivan ruled that “bad faith hasn’t been shown because the pipe was repurposed” and Defendants have not shown that the repurposing was intentional for any other reason. **Ex. 1** at 47. The Magistrate Judge made the same findings with respect to the heat exchanger. *Id.* As for the communications with Penon, Judge O’Sullivan found that Defendants “did not take sufficient steps to attempt to obtain other copies of these e-mails; for instance, by questioning Dr. Penon or trying to obtain them from the Italian mail server or taking up the Plaintiff on their offer to have the Defendants’ expert examine the e-mail servers to see if they would be able to determine when they were destroyed or why they were no longer available.” *Id.* at 48. As seen throughout the entirety of Defendants’ appeal, Defendants fail to address how or where Judge

O'Sullivan made any error in the foregoing factual findings. Absent any clear error, the Order must be affirmed.

WHEREFORE, Plaintiffs, Andrea Rossi and Leonardo Corporation, respectfully request the Court enter an Order affirming Judge O'Sullivan's Order [ECF No. 266], and granting any further relief the Court deems just and proper.

Dated: May 18, 2017

Respectfully submitted,

s/ Robert A. Bernstein

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 18, 2017, the foregoing document was served on all counsel of records identified on the attached Service List via the manner specified.

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

5 **ANDREA ROSSI, et al.,**

6 Plaintiffs,

7 vs.

8 **THOMAS DARDEN, et al.,**

9 Defendants.

Miami, Florida
April 20, 2017
Pages 1-104

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

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4
5 P-R-O-C-E-E-D-I-N-G-S

6 THE COURT: I got to get the file. I'll be in in a
7 minute.

8 All right. We're here today in the case of Andrea
9 Rossi and others versus Thomas Darden and others, case number
10 16-civil-21199, on an amended notice of hearing filed by the
11 Defendants as well as a notice filed by the Plaintiffs.

12 Could I have appearances for the Plaintiffs first?

13 MR. ANNESSER: Your Honor, John Annesser and Robert
14 Bernstein on behalf of Dr. Rossi and Leonardo Corporation, Dr.
15 Rossi also with us today.

16 THE COURT: Okay. And who is here for the Defendants?

17 MR. PACE: Good afternoon, Your Honor. Chris Pace,
18 Chris Lomax and Erika Handleson from Jones Day here for the
19 Defendants.

20 THE COURT: Okay.

21 MR. LEON de la BARRA: Good afternoon, Your Honor.
22 Francisco Leon de la Barra here on behalf of J.M. Products, Inc,
23 Henry Johnson and James Bass.

24 THE COURT: Okay. All right. I'm sorry. Tell me your
25 co-counsel's name Mr. Annesser?

1 MR. ANNESSER: Robert Bernstein. He is here just
2 observing today.

3 THE COURT: Okay. All right.

4 what do you want to address first? Do you want to take
5 care of the stuff relating to -- do you only have one issue, or
6 what's your issue? why are you here?

7 MR. LEON de la BARRA: I think we only have one issue
8 which the Defendants brought up.

9 THE COURT: All right. Let's address that first so you
10 can leave.

11 MR. PACE: So that would be our spoliation motion. If
12 I may, Your Honor -- one second here. We previously provided
13 these exhibits to opposing counsel. I have them in a binder for
14 Your Honor.

15 THE COURT: Okay.

16 MR. PACE: And guys, I only have one copy. These are
17 the same ones I sent you by e-mail.

18 THE COURT: Is both of them spoliated or just one?

19 MR. PACE: Pardon me?

20 THE COURT: Is this against both of them or just one of
21 them?

22 MR. PACE: It is against both Plaintiffs and J.M.
23 Products.

24 May I approach, Your Honor?

25 THE COURT: Yes. Thank you.

1 MR. PACE: And I'd like to start with some context if I
2 can.

3 THE COURT: You know, this always concerns me when I
4 look at like both sides and you both are filing these motions
5 for sanctions, motions for spoliation. You guys ever get
6 together and like try to talk to things and say maybe -- I've
7 said this to you a hundred times, maybe we should get focused on
8 this litigation. Has anyone here brought an action yet, a
9 sanctions motion here, that you've been successful in? Maybe
10 you're both going to be successful today, but maybe you should
11 really be thinking about how to move this case along rather than
12 how to fight -- let's get some other issue that we can go to
13 Judge O'Sullivan for for two hours and discuss.

14 MR. PACE: Your Honor, I understand. I think when you
15 hear the substance of this motion, you're going to understand
16 that this goes right to the heart of the case.

17 If I may, the contextual background is Plaintiffs have
18 claimed that they operated a plant, I'm going to call it 1MW
19 plant, that's the device that's producing energy. It was used
20 to produce a massive amount -- their position is it was used to
21 produce a massive amount of steam that was sent from one side of
22 a warehouse to another side of a warehouse. One side where
23 Plaintiffs were operating, the other side where J.M. Products
24 was operating. It was carried over there by a pipe.

25 The contention is that, you know, they operated that

1 plant at a level that produced a massive amount of energy. Just
2 for context, one megawatt of energy is enough power to power
3 several hundred homes. And then once the steam was over on the
4 other side, on the J.M. Products side, it was turned back into
5 water, which is essentially done by kind of releasing the heat
6 out of the steam and letting it, you know, cool and condense
7 back down to water and then come back and be recycled back over
8 to Leonardo. So it's allegedly steam going from the Leonardo
9 container to the J.M. Products container, water coming back from
10 J.M. Products container to the Leonardo container.

11 When the test ended in February of 2016, the parties,
12 at least, you know, Industrial Heat and Leonardo, Dr. Rossi,
13 IPH, agreed to lock up the container that housed this plant,
14 this 1MW plant that was at the warehouse, so that had been
15 locked up. But what Plaintiffs did afterwards is they took the
16 pipe that carried the steam, or allegedly carried the steam,
17 from Leonardo over to J.M. Products and they removed it and they
18 took it down and not only did they take it down, they destroyed
19 it in the sense that they repurposed various parts of it. And
20 this comes in the deposition testimony, so this is undisputable.

21 They also have claimed -- and this is significant for
22 several reasons, one of which is there was supposed to be heat
23 measurements in order for them to have a claim under the
24 contract. What had to be going from Leonardo to J.M. Products
25 had to be steam, had to be at least 100 degrees Celsius

1 regularly. So the way you measured that was in this pipe. You
2 would have heat sensors in the pipe.

3 There's also a claim that there was -- one of the
4 things you put, if you're sending steam from one place to
5 another, is you have what's called like a condensate line. It's
6 meant to pick up if there's any water because you're supposed to
7 get steam and not water, right? Water weighs more, it drips
8 down and you can collect it from there. There was supposed to
9 be a condensate line on this pipe. They removed all of that and
10 like I said, not only removed it, but they destroyed it
11 afterwards.

12 The second element here is, as I told you with the
13 amount of steam this was producing, everybody agrees, even their
14 expert agrees, it would produce a massive amount of heat if you
15 were going to turn that steam back into water. I mean, you got
16 to dissipate the heat, right? So what they've claimed that
17 happened is there was a series of pipes over on the J.M.
18 Products side that took the steam up to a second story room, let
19 it, you know, push the heat out using fans, and then let it turn
20 back into water and flow back into the J.M. Products container.
21 There's not a single picture of this -- it's called a heat
22 exchanger. There is not a single picture of this heat
23 exchanger, there is not a single receipt of this heat exchanger.
24 Dr. Rossi testified that temporary workers helped him put it
25 out, he doesn't have a receipt for paying them and he doesn't

1 have the names of any of them. But what he has testified is
2 they took that down as well. They removed that. This is on the
3 side of the warehouse that -- J.M. Products' side, where our
4 guys weren't allowed to go and had been and they got rid of it.
5 And so now there's no, you know, there's no evidence.

6 They have testimony they say that it existed. They've
7 offered up an expert who has said if it existed, then it would
8 have been sufficient to dissipate this heat. Otherwise yeah,
9 the whole place would have been really hot. He even used the
10 phrase somebody would die if they were in the container. And so
11 -- and again, this is something that was destroyed allegedly
12 after the end of the test and clearly should have been retained.

13 And like I said, this is also not a case where you say
14 yeah, but I've got a thousand pictures of it because there's
15 literally not a single picture of it, of this heat exchanger.

16 Now, our position is it doesn't exist, but if it in
17 fact exists, there's clearly a spoliation issue because they've
18 destroyed it.

19 THE COURT: When did they destroy it.

20 MR. PACE: Pardon?

21 THE COURT: When did they destroy it?

22 MR. PACE: Sometime after February 16th.

23 THE COURT: When was the lawsuit filed in this case?

24 MR. PACE: April 4th.

25 THE COURT: Was it destroyed before the lawsuit?

1 MR. PACE: It's not clear whether it was destroyed or
2 after the lawsuit.

3 THE COURT: well, they have to have some duty to
4 maintain it, don't they?

5 MR. PACE: There was.

6 THE COURT: ...whatever they want when they want to.

7 MR. PACE: And there's an anticipation of litigation.
8 There was e-mail exchange or there was letter exchanges in
9 December that indicated that there was going to be -- there
10 could be litigation. In December, there's a letter sent by us
11 to them saying you know what, you guys are doing -- can't be
12 this guaranteed performance test under the license, you're not
13 going to be entitled to your 89 million. They sent back a
14 letter accusing Industrial Heat and IPH of anticipatory breach.
15 Dr. Rossi even testified that at least by January, he was aware
16 that the parties were, you know, kind of irreconcilably a part
17 so they were aware that litigation was forthcoming. And in fact
18 --

19 THE COURT: You send him a letter and tell him don't
20 destroy any pipes?

21 MR. PACE: No, we didn't. I don't think we had to send
22 him a letter saying don't destroy any pipes. I mean, we
23 literally went in there, Your Honor, and padlocked the
24 container. We didn't think oh, they'll turn around and destroy
25 the piping. We padlocked the container. And then, you know, so

1 that had been preserved, but then they go ahead and they destroy
2 the piping. And the piping is all wrapped in insulation so the
3 pictures of the piping, you can't tell where the sensors are,
4 you can't tell if there's a condensate line, you can't tell all
5 these things. If you had the piping, you can also test it to
6 examine it for whether there was any water flowing in there. If
7 you had water flowing through part but not all, it kind of has
8 telltale stains within the piping itself.

9 So clear -- and Mr. Annesser was there with me as well.
10 I mean, we did it together. We both put on our -- we had our
11 lock, they had their lock, we locked up the container.

12 THE COURT: When was this?

13 MR. PACE: This was February 16th or 17th. So I don't
14 think there was any dispute at that point that litigation was
15 coming. And then, you know, like I said, they get rid of the
16 pipe and they get rid of this heat exchanger for which, like I
17 said, there's absolutely no evidence of it except for testimony
18 that it allegedly existed.

19 On top of those two elements -- oh, and I'm sorry, I
20 should say the testimony was with the heat exchanger just like
21 with the pipe, not only was it taken down, but all of this stuff
22 that was used for it was repurposed. So it can't be even
23 recreated. There was -- the fans were taken a part and
24 repurposed according to their testimony, the piping which was, I
25 think hundreds, but tens at least of meters of piping was all

1 repurposed and there was a wood decking it was allegedly on on
2 the second floor, and all that wood was taken down and reused
3 for other purposes.

4 So again, it's not even hey, yeah, we took it down and
5 it's in this back room, oh but I would have liked to have seen
6 it while it was up, it's not even in the back room. I mean,
7 it's been completely destroyed.

8 THE COURT: When did you find out about all this?

9 MR. PACE: During Dr. Rossi's testimony.

10 THE COURT: When was that?

11 MR. PACE: If you've give me just a second, I think the
12 -- I think it was first in February, I think it's February 13th.

13 THE COURT: February 13th of 2017?

14 MR. PACE: Yes.

15 THE COURT: All right.

16 MR. PACE: And there had been one witness a couple
17 weeks prior who had made a reference to the heat exchanger which
18 was James Bass, though he said -- all he testified is that he
19 saw it once. And then it was Dr. Rossi who testified to it in
20 more detail, as well as testified that it was taken down and
21 destroyed. He was deposed several times. He was deposed
22 individually as a corporate rep for Leonardo and as the
23 corporate rep for J.M. Products. And so across those three
24 depositions, different parts of these facts came out. Those
25 depositions were between February 13th and March 1st.

1 And then the third element is Dr. Rossi testified that
2 he had daily e-mails where this test was being reviewed or
3 assessed or whatever the right phrase is, by someone named Fabio
4 Penon. And he wrote a report afterwards that says yeah, this
5 thing, you know, works great. Dr. Rossi had daily e-mails where
6 he's providing data to Fabio Penon. All those e-mails have been
7 destroyed. And, you know, and counsel has looked for them and I
8 have no question at all that they've done a full examination for
9 them. They simply no longer exist. Those e-mails occurred
10 between the end of February all the way up through -- I'm sorry,
11 the late February 2015 all the way up through February 2016.

12 we have an example of one of the e-mails that was
13 actually produced that was provided by Fabio Penon, but that
14 doesn't -- you know, when you run a test for 358 days, you know,
15 there's 358 e-mails.

16 THE COURT: when were those destroyed?

17 MR. PACE: We don't know when -- we don't know when
18 those were destroyed. I mean, certainly the latter ones must
19 have been destroyed at the very latest in late February of --

20 THE COURT: when did you ask for them?

21 MR. PACE: Pardon me?

22 THE COURT: when did you ask for them?

23 MR. PACE: In our first document -- I think our first
24 document request we would have asked for them. We didn't know
25 they existed. We didn't know there was daily communications

1 with Penon, that Dr. Rossi was sending daily e-mails to Penon.
2 We asked for any communications between them. We had a fight
3 over it here in court. I apologize, I know we've had a lot of
4 them, but you ordered that anything that was E-CAT related they
5 produce, and they produced some e-mails between Dr. Rossi and
6 Fabio Penon, but not these daily e-mails and these daily e-mails
7 have measurements of the performance of the E-CAT.

8 THE COURT: When did you find out about the daily
9 e-mails.

10 MR. PACE: Pardon me?

11 THE COURT: When did you become aware that you didn't
12 get the daily e-mails?

13 MR. PACE: I think it was February 23rd when we did the
14 deposition in the Dominican Republic. That's when Fabio Penon
15 said that he got these daily e-mails.

16 THE COURT: Okay.

17 MR. PACE: And so -- and again, from our standpoint, it
18 seems -- it's very clear. I mean, this is the -- this case,
19 their claims, the Plaintiffs' claims are absolutely about the
20 operation of this plant, and that it allegedly was producing all
21 this power.

22 These -- you know, the things that they destroyed go to
23 the very heart of it. Like I said, their expert, as well as our
24 expert, agree that if there's not a heat exchanger, then that
25 thing must not have been producing the heat that they're

1 claiming, the steam that they're claiming, because otherwise
2 people wouldn't be able to work in there. And certainly people
3 who visited the place would have noticed when you walked inside
4 wow, it's 150 degrees in here. So that's a very critical issue
5 and that's been destroyed.

6 THE COURT: So it's your -- you believe that it didn't
7 exist? Did you tell me that?

8 MR. PACE: We do because there's no -- all we have is
9 his testimony. But I guess my point is, you know, Dr. Rossi's
10 testimony is that it did exist and that he destroyed it. So and
11 again, from our standpoint it's well, there's no evidence
12 otherwise of it. There's no receipts of it, for the equipment
13 that supposedly is part of it, there's no receipts for the
14 people who had to put this thing up. Our experts have looked at
15 the description of like the piping and it was -- like it would
16 weigh like hundreds of pounds. So the idea that somebody could
17 have put these things up doesn't make sense. We've seen the
18 wall and there's not holes in the wall that would hold up the
19 piping.

20 But the fact of the matter is if it did exist as
21 they're claiming, they also openly acknowledge, they destroyed
22 it and they eliminated all the parts to it. I mean, they
23 repurposed all the parts to it.

24 THE COURT: Right.

25 MR. PACE: So -- and as to the output pipe, you know,

1 we're not disputing that the output pipe did exist, it clearly
2 did exist, there's photographs of it. It's wrapped in
3 insulation, it's not photographs that can be inside, it's all
4 wrapped in insulation, but you can't -- you know, they then
5 destroyed that, repurposed it as well so you can't even
6 reconstruct it. You can't go find the pipe in the corner and
7 say okay, at least we have the pipe and it's got, you know --
8 whether it had, for example, this condensate line, you can't
9 tell. Where the heat sensors were, you can't tell.

10 There's testimony that some piping had heating strips
11 on it. Now, that would -- that would be a way of heating up a
12 pipe externally to make it seem like a heat sensor would think
13 oh -- if you assume the heat sensor is picking up the heat from
14 inside the pipe, but you've got a heat strip outside the pipe,
15 obviously that fools the sensor. But we can't tell whether that
16 pipe had heat strips on it or not. And again, all that -- you
17 know, that's testimony from their witnesses. Now, their
18 witnesses say that the heating cords were on other pipes. But
19 again, we can't tell whether it was on these pipes.

20 In terms of the Penon/Dr. Rossi e-mail communications,
21 we don't know what was in them. There are days when this plant
22 was not operating, at least for some period of time. We don't
23 know what was said in those communications. And we can't know
24 because they have now been destroyed and Penon is out of our --
25 you know, we can't subpoena Penon, he's out of our reach. He

1 voluntarily produced some documents for them, he voluntarily
2 appeared for deposition for them. But he's otherwise -- I mean,
3 he's not cooperating with us and I say I understand why he's not
4 cooperating, don't get me wrong. But, you know, we don't have
5 access to that information. And that's a lot of e-mails, you
6 know.

7 Again in terms of destroying, we're not talking like
8 well, here's one e-mail or two e-mails, there's, you know, 300
9 some odd -- you know, 358 of these e-mails that have been
10 destroyed.

11 THE COURT: How do you know that?

12 MR. PACE: Because the testimony was that every day --
13 he sent an e-mail every day with the measurement. And with it
14 would have like updating information. And we have what they
15 claimed was attached, at least a couple examples of what was
16 attached to some of these e-mails, but we don't have the kind of
17 daily e-mails. And you can imagine the significance
18 particularly if the numbers varied at all. If they ever changed
19 the numbers in the course of these e-mails or on the days when
20 something wasn't operating, what came in, you know, what was
21 communicated in the e-mails as well. So -- and again, there's
22 nothing for the output pipe, there's nothing we can do about
23 that. It's been, like I said, destroyed and repurposed, the
24 same thing with the heat exchanger.

25 THE COURT: Yeah, I heard all that. You don't need to

1 tell me that again.

2 what do you want about this?

3 MR. PACE: We're asking for -- well, let me add one
4 more fact if I can, Your Honor, which is because I want to make
5 sure I wrap in J.M. Products in this. All -- Dr. Rossi
6 testified as J.M. Products' corporate representative that he had
7 complete control over the J.M. Products side of the warehouse
8 and the operations on that side as well.

9 THE COURT: Who said that?

10 MR. PACE: Dr. Rossi.

11 THE COURT: Yeah.

12 MR. PACE: So he had control of both sides of the
13 equation, both sides of the warehouse. And he described himself
14 as the scientific and technical director for J.M. Products. So
15 his conduct, I think just for that reason, gets attributed also
16 to J.M. Products.

17 But even beyond that, to the extent we had already told
18 J.M. Products in December of 2015 that they had an issue with us
19 because they weren't letting us have access to the plant that we
20 were entitled to, and then we advised them that they were in
21 breach of their term sheet in, I believe it was the very
22 beginning of January of 2016. So they were certainly aware as
23 well. I mean everyone --

24 THE COURT: They had a contract with you?

25 MR. PACE: Pardon me?

1 THE COURT: They had a contract with you?

2 MR. PACE: They did. They did. It was called the term
3 sheet but yeah, the contract. And so everyone was aware that
4 the likelihood of litigation that was arising out of this, they
5 were also copied on the communications between -- you know, that
6 Mr. Annesser and I had on some of them.

7 But so our position is that one, as to their claims, as
8 to Plaintiffs claims against us, I should -- if you give me just
9 one second. I don't want to misstate myself here. So there is
10 a breach of contract claim -- the Plaintiffs have breach of
11 contract claim against Industrial Heat and IPH and an unjust
12 enrichment claim against Industrial Heat and IPH that in our
13 view should be dismissed in light of the spoliation of the
14 evidence. They have other claims that are, you know, more
15 distant admittedly, like the fraudulent inducement claim, that
16 the fraudulent inducement isn't really a function of what
17 happened, you know, what evidence was destroyed in connection
18 with 1MW claim. So we're not claiming that it should be
19 dismissed. That judgment should be entered.

20 Their other claims are -- let me see -- breach of
21 contract, unjust enrichment, trade secrets, yeah. So the only
22 one that would survive, though I don't think there would be any
23 damages on it so I'm not sure there would be a claim that would
24 be left, would be the fraudulent inducement claim and that may
25 end up actually being naturally dismissed as a result of this

1 case.

2 THE COURT: So you want me to dismiss their case
3 because of this. Is that what you're saying?

4 MR. PACE: Essentially, yeah. But again, so -- yes.
5 So let me make it even easier. Yes, Your Honor. Our position
6 is that their claims should be dismissed, judgment should be
7 entered in our favor on the -- on our breach of contract claim
8 against the Plaintiffs.

9 THE COURT: You want me to rule for you as well besides
10 dismissing theirs and then rule and then what, rule for you?

11 MR. PACE: On our breach of contract claim as well as
12 on our FDUTPA claim against -- Fulvio Fabiani's counsel can't be
13 here today, so I'm actually not going to include him and USQL
14 for that reason. But as to the parties that are here, it would
15 be Plaintiffs and J.M. Products that judgment should be entered
16 against them on our FDUTPA claim.

17 THE COURT: Okay. And what does the law say you have
18 to do to get that? You have to show bad faith?

19 MR. PACE: It does say you have to show bad faith, but
20 the context of what bad faith means is a -- that somebody should
21 have been aware that they -- you know, the anticipation of
22 litigation and the intentional destruction of evidence. There's
23 no malice requirement. The case law is clear that, you know,
24 you don't have to do it with a malice requirement and here,
25 again, there's -- it's undisputed, the testimony is, it's their

1 direct testimony that they intentionally destroyed the output
2 pipe, they intentionally destroyed the heat exchanger. I mean,
3 you know, like I said, they not only destroyed it, but
4 repurposed so they can't even put it back together, and they did
5 it in a time period when they knew that litigation was imminent
6 amongst the parties.

7 THE COURT: All right.

8 MR. ANNESSER: Your Honor, Mr. Pace raised three
9 separate issues of alleged spoliation and I want to address each
10 one separately so we can actually go into the detail, the first
11 of which is the output pipe going from the one megawatt plant to
12 the J.M. side.

13 To begin, the spoliation of that portion or the alleged
14 spoliation of that output pipe occurred between February and
15 March 2016. In fact, the Defendants were made aware of this on
16 a site visit in March of 2016 when they noted that.

17 THE COURT: When they noted what?

18 MR. ANNESSER: In fact they came out, they took
19 measurements, they saw that that piping was gone, they took
20 measurements from the hole in the wall where that piping had
21 previously been and had they raised the issue at that point in
22 time or any time nearby, perhaps it would have been located
23 somewhere within the facility and at least parts of it kept
24 together. It was never raised. A year later is the first time
25 that they ever raised that before the court. After the

1 discovery cut off has been concluded, after summary judgment
2 motions have been filed. For the first time they raise it with
3 the court.

4 Next, to address the elements necessary to impose
5 sanctions for spoliation, the first element is the missing
6 evidence existed at one time. On this particular piece, it's
7 clear it did exist at one time.

8 The second element is that the spoliator had a duty to
9 preserve the evidence. In fact, Mr. Pace relies on a letter
10 that his office sent December 4, 2015, which is Tab Number 12 in
11 his book that he provided, and you'll see at that point in time,
12 in December 2015, it was clear that litigation was going to
13 ensue if they didn't pay, and that was the issue that we raised.
14 We said this is the guaranteed performance test, you need to
15 show us and we asked for reasonable assurances that they would
16 pay upon the conclusion. Their response never raised any issue
17 with, you know, problems with the test, or errors or
18 manipulation of the measurements or otherwise that would put us
19 on notice that they were planning on making any claim. Had they
20 in fact had those beliefs or those thoughts, they could have
21 very easily sent a preserve letter and we would have followed
22 it. We had no indication at all that this was an issue for them
23 and that applies to the heat exchanger as well.

24 THE COURT: well, did they let you know that they
25 thought that you basically were a fraud?

1 MR. ANNESSER: No. Not at all. If you look at the
2 letter, in fact the issues that were addressed were that they
3 didn't believe that this was a guaranteed performance test and
4 that they did not believe that Mr. Penon was the ERV which
5 they've subsequently now admitted in this proceeding.

6 THE COURT: That Mr. Penon was what?

7 MR. ANNESSER: The ERV, the expert responsible for
8 validation, the third party independent validator that was hired
9 by both parties. Subsequently in this case, they've now
10 admitted that so in fact, that issue is even gone. But it had
11 nothing to deal with any accusation that there was manipulation
12 of the test, that we were doing anything fraudulent or
13 otherwise. There was no indication of that until the filing of
14 their complaint in August of 2016. That was the first time that
15 those accusations were made, no spoliation was ever sent, no
16 preservation letter was sent, there was nothing to put us on
17 notice; therefore, there was no duty, legal or otherwise to
18 preserve.

19 THE COURT: When did they file their counterclaim?

20 MR. ANNESSER: August 2016. By that point in time,
21 this output pipe had been removed in February so approximately
22 six months before. February or early March.

23 THE COURT: Okay.

24 MR. ANNESSER: So -- and again, they knew that and
25 they've been sitting on this for a year with the hopes that this

1 court is just going to give them a slam dunk win.

2 The third element is that the evidence is crucial to
3 the movant being able to prove its prima facie case or defense.
4 In fact, quite frankly, I don't think it goes to the prima facie
5 case or defense of either party in this case. That output pipe
6 had measurement equipment in it placed by engineer Penon as they
7 know, because they were present, the measurement equipment was
8 removed by engineer Penon on the last day of the test. So what
9 you had was a pipe that had some holes where equipment had been,
10 nothing to indicate that we should have preserve it or
11 otherwise, no claim that those measurements were bad, they had
12 Mr. Murray their purported expert there.

13 THE COURT: This is when?

14 MR. ANNESSER: This was February of 2016.

15 THE COURT: Uh-huh.

16 MR. ANNESSER: And then Mr. Murray came back again in
17 March of 2016 at that time, this had been removed, they didn't
18 raise an issue about it then, they didn't bring it before the
19 court or otherwise, or sent a letter saying hey, wherever this
20 thing is, if you still have it, save it. And I don't know if we
21 would have had it at that point in time or not. But they never
22 even made the attempt until now.

23 The last element, as the court noted, is that there has
24 to be --

25 THE COURT: Why don't you think it's crucial to proving

1 their case?

2 MR. ANNESSER: Your Honor, okay. So their claims,
3 their affirmative claims, are for breach of contract relating to
4 the validation test which occurred years before and the delivery
5 of certain IP, intellectual property. Has nothing to do with
6 this output pipe. Second one was breach of contract relating to
7 breach of a confidentiality agreement, breach of a
8 noncompetition agreement and a variety of other breaches that
9 are unrelated. Then they have a fraudulent inducement claim in
10 the term sheet which is the agreement between all of the parties
11 -- well, actually not all of the parties, J.M., Leonardo
12 Corporation and Industrial Heat and those parties had agreed to
13 bring the plant down for testing. There is nothing in that
14 agreement that discusses the protocol for testing or otherwise.
15 It was simply an agreement that the Leonardo plant or the E-CAT
16 plant would provide steam to the other side. Nothing about
17 measurements or otherwise. There were requirements that if they
18 asked for data, they could have it, but that was it. Nothing
19 regarding the test protocols or otherwise.

20 Their next claim is under the FDUTPA which is honestly
21 a very vague claim. It's hard to determine at any given time
22 what's being alleged, but in that claim they alleged that there
23 was manipulation of the data, manipulation of the testing or
24 otherwise. And again, the first time that comes up is August
25 2016.

1 THE COURT: That would be crucial to that claim,
2 wouldn't it?

3 MR. ANNESSER: Well in fact, Your Honor, their
4 purported expert, Mr. Murray, testified that he didn't believe
5 that there was any manipulation of testing or data, that he just
6 thought that it was a bad test plan. That the test plan used by
7 engineer Penon was not robust enough. Notwithstanding the fact
8 they agreed to it, that it wasn't good enough to tell whether it
9 actually worked. That was the testimony of their own expert.
10 So I don't think it is crucial.

11 Then their last claim is with respect to Mr. Fabiani
12 only or Mr. Fabiani and USQL which does not involve us. So
13 whether it's essential to any of those claims, I don't believe
14 it is. It's not essential to our claims, the existence of that
15 pipe or that condition of it or otherwise, because we've claimed
16 the breach of contract for failure to pay, we've claimed an
17 unjust enrichment. In the event that the court finds for some
18 reason that the contract was not valid, we had misappropriation
19 of trade secrets, and I don't even have it in front of me, the
20 last element, but it goes to none of those. Nor would we have
21 ever been on notice until they filed their counterclaim that
22 that was even an issue for them. They had been there, they had
23 contact with us, Mr. Pace and I exchanged e-mails at least ten
24 times in the period leading up to the first complaint being
25 filed, and not once did they ask for anything to be preserved or

1 tell us that hey, we don't believe this is actually working.
2 Never once did it come up.

3 THE COURT: All right.

4 MR. ANNESSER: First time that came up, again, was in
5 August of 2016 long after it had been removed.

6 But again, lastly is the element of bad faith, and he's
7 offered you nothing to show that there was bad faith here. In
8 fact, there is no evidence to offer and that's why he cannot
9 satisfy that element of the claim.

10 THE COURT: Does it have to be subjective bad faith?
11 What does that mean, bad faith? He says as long as you did it
12 intentionally, that's sufficient.

13 MR. ANNESSER: No, Your Honor. In fact, what the case
14 law says is if it's done intentionally and they can show there
15 was no other reason for doing it, there's no purpose, that it
16 was done for the point of making it not available, that is bad
17 faith. But where there's no showing that it wasn't done for any
18 other reason or otherwise, you cannot presume bad faith just by
19 the fact that it's been removed.

20 THE COURT: Why was it removed?

21 MR. ANNESSER: It was removed at the time because as
22 Mr. Pace said, the pipe was repurposed. It was used in another
23 project that was ongoing at the plant.

24 THE COURT: Okay.

25 MR. ANNESSER: Now, with respect to the second alleged

1 spoliation, the heat exchanger, this one we don't even get past
2 the first prong. The first prong requires that the missing
3 evidence existed at one time. Now, we certainly claim it
4 exists, but Mr. Pace can't take both sides. He's either got to
5 stand before the court and say yes, it did exist and they
6 spoliated it, or he's got to say that it didn't exist in which
7 case he would not be entitled to spoliation. They've taken the
8 position in this case that the heat exchanger did not exist, yet
9 he stands here today and asks the court to sanction us for
10 destroying something that he believes didn't exist in the first
11 place. We can't get there. He's got a choice, he's got to make
12 that choice and pursue one or the other avenue. If he wants to
13 concede today that the heat exchanger did exist, then we can
14 proceed. And I would be happy -- I'm going to any ways, but
15 then we can get past that first prong. Until then, he doesn't
16 even satisfy that.

17 Again, going to the second prong that we had a duty to
18 preserve the evidence. Now, the first time in this case that
19 the heat exchanger or anything relating to the use of the heat,
20 the dissipation of the heat or otherwise came up in this case
21 was January 31, 2017. This year. And that was when they filed
22 their expert report of Mr. Joseph Murray and Mr. Smith. That is
23 the first time it came up in the case. You can look through the
24 pleadings, there's nothing that alleges that the steam was never
25 sent over, there's nothing that alleges that the heat was not

1 properly dissipated or that it would have been impossible or
2 otherwise. By that point in time, the heat exchanger had been
3 disassembled, again around the same time period, March, give or
4 take, of 2016. So almost a year.

5 THE COURT: How come when they were doing these
6 inspections, they didn't see the heat exchanger? It's in the
7 same building.

8 MR. ANNESSER: Your Honor, it's a very tall ceiling,
9 probably my guess would be 25 feet. There's a wall that's
10 probably between eight and ten feet that separates the two sides
11 of the facility. Okay. One side was used by Leonardo
12 Corporation with the E-CAT, the other was used by J.M. Products
13 with their process. The heat exchanger was located on the J.M.
14 Products side of the plant.

15 Now the Defendants had no right to go over there, there
16 was no -- in fact, they were never told what the process was
17 that the steam was being used for. I believe before this
18 litigation it was never an issue, they didn't care. It's not in
19 any agreement or otherwise. In fact, I believe there's
20 references to it being a confidential process. They never went
21 over there, they never asked to go over there.

22 Now, they've got photographs which were taken at the
23 time, and I think it probably does show evidence of the pipes
24 going in, but there was never photographs of the heat exchanger
25 itself. We don't have them either. In fact, the testimony has

1 been both by my client and another one of the third party
2 defendants was that it was there and described it, etcetera.
3 There was no indication at any time in this lawsuit,
4 particularly prior to us even filing our claim, that that would
5 be an issue.

6 Up until August, we didn't know that they took issue at
7 all with the test, whether it how it ran, etcetera. In fact,
8 the initial complaint filed in August does not say that the heat
9 could not have been dissipated or that that was even an issue.
10 They say that it was just a big scheme to defraud them and that
11 it wasn't actually using the steam. Well, that's not supposed
12 to put us on notice. Again, that's one of those things that if
13 they knew that it was an issue, if they knew that they were
14 planning litigation regarding it, they could have very easily
15 sent a litigation hold letter and we would have complied with
16 it. But not knowing that it was going to be an issue at all,
17 they've got a plant there where the plant's not operating in the
18 manner that it had been using the E-CAT steam because the E-CAT
19 was shut down, they repurposed it, they put it to use in another
20 manner.

21 Again, with respect to the alleged spoliation, the
22 existence of the heat exchanger is, again, not crucial to their
23 defense or their claims. They're not claiming that it didn't
24 work at all. But up until January 31st was the first time we
25 hear this argument that it would have been too hot if you didn't

1 have this heat exchanger which was there, and that's provided in
2 the testimony. The defense, when you look at the pleadings, has
3 not raised that it was impossible to run this machine there.
4 They just claim that we manipulated the data and we lied about
5 how much steam was being used. That's the pleadings.

6 Now, they've tried to use this, again, amorphous FDUTPA
7 claim to be fluid. They're trying to kind of meld the facts as
8 they can within that claim. But within the strict confines of
9 the pleadings, it doesn't exist. It doesn't go to any of those
10 zones.

11 And then again lastly, the bad faith element. At the
12 time that this was taken a part and repurposed, there was no
13 knowledge on behalf of my client, or J.M. for that matter, to
14 the extent that they tie the two together, that it would even be
15 an issue in this case. Just because he got rid of something
16 during the pendency of the litigation that he didn't believe
17 even pertained to that, he also changed out his car at some
18 point during that period, but we're not here on a spoliation of
19 that. And there's a reason, because it has nothing to do with
20 the litigation at hand. And at the time that it was taken down,
21 those pipes had nothing to do with the litigation at hand, had
22 nothing to do with the dispute and we had no way of knowing it.

23 And then lastly, with respect to the e-mail
24 communications with Dr. Penon. As soon as we were propounded
25 the requests for production asking for e-mail communications, I

1 believe before our client probably even saw it, we contacted
2 him, we said we're going to call the service and we're going to
3 have them imaged.

4 THE COURT: Contacted who?

5 MR. ANNESSER: It was -- do you have the name?

6 THE COURT: I mean, you're talking about you contacted
7 the Defendants or --

8 MR. ANNESSER: No, no, no. I'm sorry, we contacted a
9 service that does all the technical stuff. I'm sorry. I'm not
10 a computer savvy person. And asked them to image his e-mail
11 accounts. And they went to great lengths to go in and they
12 imaged the entire e-mail account preserving everything. And
13 then they were held, that went through and then we sorted them
14 eventually to give them responsive documents, but it imaged the
15 entire thing.

16 THE COURT: When was that?

17 MR. ANNESSER: That was upon being propounded, I
18 believe it was the first set of requests for production from
19 Industrial Heat if I'm not mistaken. So this would have been
20 back in October perhaps, maybe November.

21 THE COURT: October 2016?

22 MR. ANNESSER: Yes, Your Honor. I believe that's
23 correct, and I may be off by a month. But at that time, we did
24 exactly what we needed to do. We went, we had a third party
25 vendor come in, image it, take everything off. I mean, I've got

1 e-mails that have nothing to do with this case imaged and we
2 produced everything that was responsive.

3 Now, we did not find those e-mails. In fact, when my
4 client was asked about it during his deposition, we said no, it
5 should be there. We went back to the vendor and said look, we
6 need you to find it, what's going on, why aren't we seeing
7 these. They said look, we've looked, they're not there. In
8 fact, I talked to Mr. Pace and I said if you want, let's have
9 your vendor, your electronic discovery vendor speak with ours
10 and if they want tests run or something like that, we're happy
11 to do so. I'm going to put them in contact if you want and
12 Mr. Pace said no, that's not necessary. But yet, we're sitting
13 here today and he's claiming that spoliation occurred.

14 Now, the e-mail communications between Dr. Rossi and --
15 I'm sorry, Dr. Penon is, I have to say, would be material to the
16 case. I don't know that it necessarily would be crucial. Dr.
17 Penon had his own test results, he has his own measurements,
18 etcetera. Dr. Rossi sent him an e-mail once a day with updates
19 and with one measurement that he recorded daily. Now, Mr. Pace
20 made the argument that well, Dr. Penon was kind enough to
21 cooperate with us but not him. To my understanding, Mr. Pace
22 has never reached out to Dr. Penon and asked for his
23 cooperation. He certainly didn't ask when he had him and had
24 time to ask him questions during his deposition. We've reached
25 out to him and when we have, he's been fairly responsive. I

1 don't know that they've ever asked whether these e-mail
2 communications are in Dr. Penon's possession. Most e-mails have
3 a sender and recipient. That would certainly be the next step
4 before we go to spoliation.

5 And again, coming down to the last element here,
6 there's no showing of bad faith. My client doesn't know why
7 they're not there, doesn't know why they were not pulled up when
8 we imaged the hard drive. He specifically said that I don't
9 know that they were deleted, I don't know if there was some
10 error with them, we don't know. And in fact, we probably would
11 have known more had their e-discovery vendor taken the time to
12 call ours as we offered and discuss it. Perhaps it could have
13 been something they could do to see if there's a way to retrieve
14 them, find out if they were deleted or otherwise. But they
15 refused that offer. Rather, they ask the court to come in and
16 strike our pleadings, which is a very drastic remedy.

17 THE COURT: You admit that there's missing evidence
18 that existed that they -- under the e-mails.

19 MR. ANNESSER: Your Honor, yes. My client has
20 testified that he sent e-mails on a daily basis. We don't know
21 what happened to them.

22 THE COURT: Okay. You think you had a duty to preserve
23 those?

24 MR. ANNESSER: Your Honor, to the extent that we had a
25 duty to preserve them as soon as we were made aware that they

1 were relevant, and again, as soon as we were, we imaged the hard
2 drive. So we preserved what existed in the hard drive at the
3 time.

4 THE COURT: well, when they -- we don't even know when
5 they went missing?

6 MR. ANNESSER: We don't know when they went missing.
7 We don't know if they're somehow on some other account or
8 otherwise. We don't know. Again --

9 THE COURT: Is this like a Hotmail or what type of
10 e-mail?

11 MR. ANNESSER: No. Unfortunately I believe Dr. Rossi
12 has four e-mails and two of them are Italian servers which were
13 difficult to work with to image. And I'm not sure, I would have
14 to speak with my client to find out which one of the servers
15 those would have been on.

16 THE COURT: Is this his own private e-mail or --

17 MR. ANNESSER: Yes. Private e-mail, that's correct.

18 THE COURT: well, I mean, what was at the end of it?
19 At what? At Dr. Rossi.com?

20 MR. ANNESSER: No, it was at Libro.it (ph).

21 THE COURT: what is that?

22 MR. ANNESSER: It's an Italian e-mail service.

23 THE COURT: Like a Hotmail?

24 MR. ANNESSER: Kind of like a Hotmail, yeah.

25 THE COURT: Did anybody go to them and say do you have

1 copies of this?

2 MR. ANNESSER: I don't believe anyone did. I don't
3 believe anyone did.

4 THE COURT: Okay. What's your answer on the duty to
5 preserve? Did you have a duty to preserve then?

6 MR. ANNESSER: As soon as the duty arose when they said
7 this is at issue and here, we want these we.

8 THE COURT: Well, wouldn't you have known that was an
9 issue going back to December of the prior year?

10 MR. ANNESSER: Again, the only -- in fact, the only
11 allegations in December from them that this was not the
12 guaranteed performance test because it's too late and two,
13 engineer Penon is not the ERV, so now they're claiming it's
14 essential to show that that the ERV somehow manipulated it or
15 they manipulated data, but at that point in time they're saying
16 he's not even the ERV. He's not doing our test. This is not
17 contractual.

18 THE COURT: Okay. What about August of 2016? Did you
19 have a duty to preserve on that?

20 MR. ANNESSER: As of August of 2016, I would have to
21 look at the pleadings but I believe a duty would have arose
22 because he became a defendant in the matter. And at that time,
23 I believe it was shortly after that, August, September, October.
24 When they propounded their request, we sent it out immediately,
25 had no knowledge that it wouldn't be in the account. We sent it

1 out our third party vendor.

2 THE COURT: And what is the testimony in regards to
3 that? I mean, what is -- Penon, is that his name? Or your
4 client say about that.

5 MR. ANNESSER: Penon, in terms of what, the
6 communications?

7 THE COURT: Yeah.

8 MR. ANNESSER: He says he received communications from
9 Dr. Rossi on a daily basis which is consistent with what Dr.
10 Rossi has testified.

11 THE COURT: And did he record them somewhere in a log?

12 MR. ANNESSER: He had some -- and in fact, the
13 testimony was, and I'll be very specific here, on a daily basis
14 certain measurements were sent from Dr. Rossi to engineer Penon.
15 And what it was is they began with a log and logged -- the first
16 e-mail would be log day one, here are the measurements that I'm
17 sending you. And all but one measurement was duplicative of
18 other measurements he had. They were just kind of confirmation
19 that they were both getting the same measurements. The e-mail
20 on the second day just had a second entry in that log, so it was
21 day one and day two and so on and so forth. So on the 5th day,
22 there were five entries all for each day.

23 THE COURT: There were transcriptions of these e-mails?
24 I mean, essentially of the essential information on the e-mails?
25 Is that what you're saying?

1 MR. ANNESSER: Yes. So the measurements each day were
2 added to this log, and the log was e-mailed day after day after
3 day, with no text or transcripts other than today's -- you know,
4 today's log, or something to that effect.

5 THE COURT: So does that log exist now?

6 MR. ANNESSER: In fact, the majority, if not the entire
7 end list, so it would be one of the latter e-mails Dr. Penon
8 produced it, I don't remember if it was before or after his
9 deposition, but it was produced, so they have the cumulative end
10 log, which is the cumulative every single day for the year.
11 They've never asked for the individual days from engineer Penon
12 as far as I'm aware. They certainly have not asked me to
13 somehow help coordinate with engineer Penon. And Dr. Rossi has
14 testified as to the same as engineer Penon did, that it was a
15 daily update to that log and they have the log fully updated. I
16 mean, I believe it goes all the way through the end of the test,
17 the version that was produced by engineer Penon.

18 THE COURT: All right. Anybody else want to be heard
19 on this?

20 MR. LEON de la BARRA: Yes, Your Honor, I'll be brief
21 just because I believe Mr. Annesser covered most of the points.

22 AS Mr. Pace pointed out, my client, J.M. Products, kind
23 of only gets looped in here because Dr. Rossi testified as the
24 corporate rep of J.M. Products wherein he testified that he kind
25 of ran the day-to-day operations. But for that testimony, there

1 is no evidence to suggest that Dr. Rossi was actually acting on
2 behalf of J.M. Products as well as on behalf of himself
3 individually and/or Leonardo Corporation. In fact, I believe
4 the deposition testimony, in his deposition testimony Dr. Rossi
5 testifies that when it came to the purchase of the materials
6 that were used to create the heat exchanger, that it was
7 actually Leonardo Corporation, he believed that it was Leonardo
8 Corporation that purchased the materials, that would lead one to
9 believe that it was Leonardo Corporation's, they're the ones
10 that paid for it, they're the ones that built it, therefore
11 they're the ones that would be in control at the end of the test
12 to be able to dismantle it or do what they deem fit with the
13 heat exchanger or those materials. That's one point.

14 On the second point of duty to preserve, the Defendants
15 rely on a letter that was sent on February 22nd, I believe,
16 February 22, 2016 to Mr. Johnson, which is the president of J.M.
17 Products, wherein they say please be advised.

18 THE COURT: Is that in their exhibit too?

19 MR. LEON de le BARRA: It should be. It's one of the
20 exhibits I was provided. I don't know what tab because I don't
21 have the binder.

22 THE COURT: Which exhibit is that?

23 MR. LEON de le BARRA: Exhibit 13.

24 MR. ANNESSER: The composite.

25 THE COURT: All right. I got Exhibit 13.

1 MR. LEON de le BARRA: It's the fourth page in Exhibit
2 13 if you include the Exhibit 13 page.

3 THE COURT: I see it, yeah.

4 MR. LEON de le BARRA: So in there it says please be
5 advised that J.M. Products has defaulted under the term sheet by
6 denying J.T. Vaughn, an Industrial Heat, LLC employee, access to
7 the one megawatt plant during the morning of February 16, 2016.
8 Emphasis one megawatt plant. Nothing to do with J.M. Products'
9 side of the facility.

10 You go to the next paragraph, we would also like to
11 address with J.M.P. or its counsel the subject of Industrial
12 Heat providing additional security for 1MW plant. Again,
13 limited scope, breaches of contract because they didn't allow us
14 access to the one megawatt plant, breaches of contract because
15 he didn't do anything outside of padlock the one megawatt plant
16 to secure it. Right. So there's -- in that letter there's no
17 --

18 THE COURT: One megawatt plant, that's the other side.

19 MR. LEON de le BARRA: That's the E-CAT, correct.
20 That's the plant that was producing energy. So in that letter
21 which they're relying on, there's nothing in there that would
22 indicate that any litigation is going to have to do with the
23 output pipe or the heat exchanger as it relates to J.M.
24 Products. In fact, interestingly enough, the only thing it
25 would indicate is a breach of contract claim which they didn't

1 bring. They brought instead the fraud in the inducement into
2 the term sheet and the FDUTPA claim.

3 THE COURT: Okay.

4 MR. LEON de le BARRA: And last but not least, as it
5 relates to bad faith, I believe Mr. Annesser mentioned that part
6 of the analysis that has to be done is, you know, is there any
7 evidence, circumstantial or otherwise, that would indicate that
8 the reason, the sole reason for the destruction of the evidence
9 or the repurposing of the materials, that the only reason would
10 have been to keep it from coming out, from being available. To
11 that end, the testimony has been that all the materials have
12 been repurposed, both the output pipe and the fans and, you
13 know, the other pipes of the heat exchanger, they've all been
14 repurposed either by Dr. Rossi or Leonardo Corporation in other
15 ventures.

16 To that end, I refer the court to Asmat V Penney Corp
17 (ph), which is a case out of the Middle District of Florida from
18 2005. In that case, there's a scenario where there's an
19 accident in a shopping center and, you know, kind of the
20 evidence there that was destroyed is called an auto pole, it's a
21 pole that goes from the floor to the ceiling. In that case, the
22 -- I guess the owner of the parking lot where the accident
23 occurred removed that auto pole, they decided hey, this is fit
24 to use somewhere else, and they repurposed it by re-installing
25 the auto pole at a different store. They didn't mark it for

1 identification, so there was no way of knowing after the fact
2 hey, which one of these poles that's in this park is actually
3 the pole that was the subject of the incident. And in that
4 case, the court held that the actions did not warrant sanctions.
5 At no point during the time that Plaintiffs in that case ever
6 request to inspect the auto pole or ask JC Penney to preserve
7 the auto pole which is similar to the facts here.

8 They claim that as of December 2015, they knew there
9 was going to be litigation and they would have to deal with
10 these things, but they never sent a letter to J.M. Products, any
11 of the third party defendants or for that matter Plaintiffs
12 saying hey, preserve the evidence, preserve everything at the
13 Doral location because it's going to be at issue in one way or
14 another. So I don't think that duty ever really arose and
15 there's not that level of -- in essence, there's no bad faith in
16 the spoliation of the evidence.

17 THE COURT: Anything else, Mr. Pace?

18 MR. PACE: If I may Your Honor. Just touching on these
19 different points. First of all, I think first and foremost,
20 Plaintiffs' claim for \$89 million is based on the position that
21 they operated this plant at a certain level for roughly a one
22 year time period. Part of that measurement that it was
23 operating at this level is the output pipe and what was going
24 through that output pipe. Was it in fact steam, the contract
25 required steam. No dispute that if they didn't produce steam,

1 then their breach of contract claim is gone. It's right there
2 in the contract. Same thing with, you know, if this heat
3 exchanger doesn't exist, then they weren't producing the amount
4 of steam that they're claiming because everybody agrees, the
5 experts agree that it would be impossible, this room would be
6 way too overheated. They're about to bring an \$89 million claim
7 when we're there in February, we lock up the container and they
8 lock up the container. They understand they have to lock up --
9 locking up the container, everybody is on notice at that point
10 but yet, you go ahead and destroy, for example, the pipe.

11 And by the way, this pipe is not -- it's not like some
12 magical diamond or something you say well, gee, there's no other
13 diamond just like that. It's piping. That's what it is. The
14 heat exchanger is piping. It's fans and it's wood.

15 Now, we don't even know -- there's no claim that we
16 didn't even know that they allegedly existed, but there's no
17 obligation on our part to have to send them a letter that says
18 don't destroy that pipe. They have -- they're about to bring
19 litigation, they're aware there's a big dispute between the
20 parties, they have a duty to preserve evidence. Once that duty
21 arises, they have to preserve the evidence. And here, they
22 consciously didn't. Again, they not only took it down, but they
23 took it down and they destroyed it and again, we're talking
24 about things like piping. You can go out -- according to Dr.
25 Rossi, the piping used for the heat exchanger was like bought --

1 you could buy it at like Home Depot. Buy other piping then if
2 you needed piping for something. If you needed some pieces of
3 wood for something, buy pieces of wood from something else. We
4 have no obligation to actually have to tell them don't destroy
5 these pieces of evidence. They're about to file an \$89 million
6 lawsuit and they're taking away critical pieces.

7 Again, the heat exchanger is a great example where
8 everyone now agrees, at least the experts agree, that if that
9 thing didn't exist, then there's no way that the results that
10 they're claiming could be accurate. Because like I said, this
11 place would be an oven.

12 Same thing in terms of the output pipe. If that output
13 pipe showed that water was flowing through there or there had
14 been any other manipulation of the output pipe, you know, that's
15 something that you would have been able to test. You know,
16 should we have disassembled -- on February 16th when we put
17 padlocks on the container, should we also have like physically
18 removed the output pipe and taken it with us? I mean, that
19 seems to be their approach or we at least had to very
20 specifically say hey, don't consciously destroy this evidence,
21 which is what they were going out there and doing.

22 And then if I can on the -- I want to say one thing
23 about the e-mail and one thing about J.M. Products. The one
24 thing about the e-mail is to say we don't know what is in all of
25 these e-mails. We know that there were e-mail exchanges. The

1 e-mails themselves have been destroyed. We have actually
2 contacted Fabio Penon and he's never returned our contact.
3 Again, in fairness, he was a defendant in this case and we
4 weren't able to serve him in Italy, so I'm not going to be
5 shocked that he's not willing to cooperate with us. We even
6 asked, we actually did ask Mr. Annesser for some assistance at
7 one point, in which he refused, I understand why as well in
8 terms of when we had the whole issue about wanting to have time
9 to depose Penon. And then we worked out a resolution. But he's
10 never been on our side and again, I understand that. But these
11 e-mail communications were daily communications.

12 THE COURT: Did you ask Mr. Penon for them?

13 MR. PACE: We asked him to talk to us. He's never even
14 returned our request for him to talk to us.

15 THE COURT: You deposed him, right?

16 MR. PACE: When he voluntarily showed up there is when
17 we had a chance. I had, I think, two hours at the end to depose
18 him.

19 THE COURT: Did you ask him?

20 MR. PACE: Ask him for the e-mails?

21 THE COURT: Yeah.

22 MR. PACE: No. I didn't know the e-mails existed until
23 he testified about them. I don't think my obligation when he
24 says at the deposition, the first time I ever heard about it was
25 at the deposition when he says I got daily e-mails from Dr.

1 Rossi. And Mr. Annesser knows because I talked to him
2 afterwards about where those were, you know.

3 And in terms of the vendor issue, what he told me was
4 our vendors have looked at this thing very carefully, they can't
5 find them. And that's when I told him, and he'll recall this, I
6 said look, I'm not questioning you or -- his co-counsel Brian,
7 I'm not questioning you guys. So I have no doubt that when you
8 tell me your vendor can't find them, your vendor can't find
9 them. So the whole idea of why didn't you get the vendors
10 together, because they're not there. He came in here and told
11 you that they're not here.

12 This idea on the heat exchanger that we have to pick a
13 side makes no sense. They're taking the position, they're sworn
14 testimony is it existed. If that's true, they destroyed it.
15 Consciously destroyed it. We shouldn't have to go into trial
16 and fight over this issue over whether this thing existed or
17 not, when the fact of the matter is, you know, like I said, it's
18 -- our guys will put on testimony that it never existed and
19 their guys will say it existed and yet we -- you know, we
20 destroyed it consciously.

21 In terms of bad faith, as I said, the case law is clear
22 that it doesn't require malice. It requires that, you know, you
23 took intentional actions to the -- you did something
24 accidentally, that's not going to be enough for spoliation. And
25 then you did so at a time when you knew or should have known --

1 and actually the language of the case is knew or should have
2 known that you had a duty to preserve the evidence. So here, I
3 think it's not even should have known, they knew. These parties
4 were already fighting starting by December of 2015. They should
5 have been preserving all this evidence or, by the way Your
6 Honor, they also could have, if they were going to destroy
7 something, contacted us in advance and said hey, we're about to
8 destroy something, if you want to come on over here and take
9 pictures.

10 Again, also we have a situation where magically, you
11 know, there's no pictures of this heat exchanger. I'll talk to
12 the heat exchanger right now, right. There's no pictures,
13 there's no receipts, there's no nothing.

14 Last thing I just want to say on J.M. Products, I don't
15 know how you put up Dr. Rossi as your corporate representative.
16 He testifies that he's your scientific and technical director,
17 this is all for J.M. Products, and that he has control over all
18 J.M. Products operations at that time warehouse. That was his
19 testimony. And then they stand up and say yeah, but for that,
20 they really don't have anything so you should disregard that.
21 He's your person. He's your agent. He's your officer. A
22 director is the title he gave. So they are responsible for his
23 conduct, and it was, on as Mr. Annesser admitted, it was on the
24 J.M. Products side of the warehouse, the side that we weren't
25 allowed over to. So it's also under, you know, J.M.'s control

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.

1 One is the Plaintiffs' motion for sanctions in which we plan on
2 asking the court to sanction the Defendants by determining
3 certain documents which have previously been determined to be
4 privileged as not being privileged, even if attorney-client
5 privilege would otherwise apply.

6 Similarly before the court today is, on remand from
7 Judge Altonaga, a reconsideration of specifically one of those
8 documents which we've called the Zalli document in the past, a
9 document that had been produced, had been reviewed by us and
10 then ultimately clawed back by the Defendants. So I believe
11 that we can, in essence, combine the two since the remedies
12 would be the same and the arguments are in many parts very
13 similar.

14 THE COURT: Why is that remanded to me by Judge
15 Altonaga?

16 MR. ANNESSER: It was remanded because the court
17 informed us that we needed to ask you for factual findings
18 pursuant to the *In Re: Denture Cream* opinion that sets forth the
19 prongs that need to be determined to establish privilege.

20 THE COURT: I don't remember the circumstances of this
21 document. You're going to need to remind me. Is this a
22 document that was provided to you mistakenly? Is that what it
23 was?

24 MR. ANNESSER: Yes, Your Honor. It was provided to us
25 and then some months later, it was ultimately clawed back and

1 claimed to be privileged.

2 THE COURT: And what was your claim?

3 MR. ANNESSER: Well, there were a couple claims at the
4 time primarily that it wasn't privileged at all. In fact, if I
5 recall the heading of the document said like business issue or
6 something to that effect, it was not legal services. I don't
7 know if counsel has a copy of that document with them today, we
8 have destroyed our copies so we do not have one.

9 THE COURT: Okay.

10 MR. ANNESSER: Your Honor, just as a little bit of
11 background. And this goes both into the sanctions and with
12 respect to this particular motion.

13 At some point in time, one of the Defendants in this
14 case, Mr. Darden, the head of IPH and IH, two of the other
15 Defendants, contacted a gentleman who his full name escapes me,
16 we've called him Mr. Zalli based on his e-mail. And this
17 gentleman purportedly is an Israeli attorney that they
18 consulted. The e-mail that was produced references many of the
19 things in this case, referencing the E-CAT, referencing my
20 client. In fact, making many admissions which they've now
21 offered testimony that Mr. Darden has perjured himself on is
22 made clear by this e-mail. That communication was very clearly
23 a business communication. Does not ask for legal advice or
24 otherwise. To our understanding, Mr. Zalli is licensed only in
25 Israel which is not within the license territory of our

1 contract, he was not offering legal advice in the United States
2 and we do not believe him to be Barred anywhere but Israel.

3 Now ultimately, it came to be known that Mr. Zalli was
4 in contact with another Israeli gentleman Mr. Sha or Sha. I
5 apologize. Mr. Sha in fact went, and this is where we start
6 going into the motion for sanctions, Mr. Sha was engaged by
7 Industrial Heat or by the Defendants along with Mr. Zalli to
8 contact a gentleman by the name of Mr. Levi. Now, Dr. Levi is a
9 scientist that had performed what we refer to as a Lugano test,
10 which was a test of the E-CAT device done during the test period
11 and during the licensing person that validated the technology.
12 It was a third party independent test done by a group of
13 scientists, some of which are on the committee to select the
14 Nobel Prize. This issue has come before the court before. In
15 fact, when we were here previously some months ago, they had
16 wanted to direct certain questions and bring these scientists
17 and these Nobel Prize committee scientists in particular into
18 the case. We objected and said Dr. Rossi is currently being
19 considered or has a chance of being awarded the Nobel Prize and
20 any contact with them could jeopardize that.

21 Notwithstanding the actions of Mr. Zalli and Mr. Sha,
22 the Israeli gentlemen, they went and contacted Mr. Levi. Mr.
23 Levi was one of the scientists, again at Lugano, that did the
24 test and when they contacted him, they came saying we represent
25 a client, without mentioning any names, and specifically said

1 they were a secret client and that they represented him and that
2 they would make much money by doing stuff together.

3 And throughout the course of the conversation --
4 there's an affidavit that's been performed by Mr. Levi -- it
5 became very clear that they wanted to distance Mr. Levi from Dr.
6 Rossi. They said well, we don't want to deal with Dr. Rossi
7 anymore, which is somewhat interesting because they didn't
8 identify who they were or what their prior dealings with Dr.
9 Rossi were.

10 They also asked him and expressed their concerns of his
11 adherence to the findings in the Lugano report, the report that
12 validated the technology. They were not happy that he was so
13 close with that and that they really didn't like that part about
14 him. But if they can get past that, they're going to make lots
15 of money.

16 They went even further to tell him that they want him
17 to do testing on an E-CAT-like product for him, specifically
18 referring to the E-CAT. These are all things that are being
19 done under the guise of representing some other customers
20 somewhere else, when in fact we've now learned that they are
21 representatives of Industrial Heat, Mr. Darden and IPH
22 International, paid by them presumptively.

23 On the other side, there is another gentleman that took
24 part in the Lugano testing, his name is Bo Hoistad. Bo Hoistad
25 is one of the gentleman who sits on the committee that selects

1 the Nobel Prize Laureates. Mr. Hoistad was contacted by another
2 gentleman who you've heard in this case, Mr. Weaver, who is a
3 representative and somehow a third party independent contractor
4 or otherwise for Industrial Heat. Mr. Weaver, in addition to
5 his time purportedly helping with patenting certain IP and
6 otherwise, is an avid blogger who likes to diminish my client's
7 credibility or attempt to on the internet, but he goes to Bill
8 Hoisted, and this is after this court has ordered that there
9 would be no contact with them, that they would not issue a
10 subpoena to them before alerting us first so we could bring it
11 before the court, he goes and he sends an e-mail to Mr. Hoistad
12 specifically stating that we're coming across all this new
13 information and basically making a vague underlying threat that,
14 you know, you should see what's coming. In fact, we have it set
15 forth in the motion we filed, it goes on to pushing farther and
16 say you have to look at the effect that this is going to have on
17 the institutions and the professors that took part in Rossi's --
18 in the testing of Dr. Rossi's E-CAT. These were vague threats.
19 These were attempts to manipulate the testimony of these people.

20 THE COURT: Didn't we -- this sounds vaguely familiar.
21 Didn't we address this one before?

22 MR. ANNESSER: Your Honor, it was briefly addressed
23 before.

24 THE COURT: And it was denied, wasn't it?

25 MR. ANNESSER: Your Honor, in fact I don't believe it

1 was ever addressed directly on point with respect to the Zalli
2 document, the court has determined that it was privileged. With
3 respect to documents with Mr. Sha, the court had determined --

4 THE COURT: No, I'm talking about there was this
5 allegation of them intimidating witnesses.

6 MR. ANNESSER: Your Honor, it was peripherally done and
7 in fact we filed --

8 THE COURT: I mean, I ruled on it when you say it was
9 peripherally done.

10 MR. ANNESSER: Your Honor, I don't believe there was a
11 ruling with respect directly other than outside of the privilege
12 context of that document. We brought a motion that we had
13 originally filed with Judge Altonaga believing it to be in her
14 venue, and I apologize for that. It should have been before
15 this court and the court instructed us so, said you have to
16 raise that with Judge O'Sullivan, and that's what we're doing
17 now.

18 THE COURT: I'm just concerned, because I know there
19 was an issue that came before me in regards to them intimidating
20 witnesses.

21 MR. ANNESSER: Yes, Your Honor. And I think that was
22 done in the context of determining what role these gentlemen
23 played, so as to determine whether the Zalli document was
24 privileged. That was, I believe, the context. Then we brought
25 a motion.

1 THE COURT: Do the Defendants agree with that?

2 MR. PACE: Your Honor, it was -- you looked at the Levi
3 declaration in connection with the Zalli privilege ruling,
4 because one of the things they were trying to claim was that
5 that was a basis for destroying the privilege on the Zalli
6 document. And so --

7 THE COURT: The intimidation.

8 MR. PACE: Yes and --

9 THE COURT: I found that they didn't prove
10 intimidation.

11 MR. PACE: Right, because it has the -- he says --
12 well, I don't want to make my argument. I'll hold off. But
13 yes, it's that context. If you want to know more about what you
14 ruled, I'm happy to address it.

15 MR. ANNESSER: My understanding, Your Honor, was that
16 the court had not made a finding as to whether we proved
17 intimidation or otherwise, it was strictly in the context not of
18 witness tampering, in essence what this is, but in the context
19 of privilege.

20 THE COURT: Well, but you were trying to have the
21 privilege waived because of some crime fraud exception or
22 something.

23 MR. ANNESSER: No, Your Honor. We were defining the
24 roles of the people who these e-mails were with. And I
25 understand there's a very fine distinction. One is saying under

1 our motion for sanctions. We're saying they should be
2 sanctioned for bad faith litigation conduct. Specifically
3 addressing, this court said no, you can't even subpoena the
4 Nobel Laureate guys, the Swedish professors, without letting the
5 other side know. And then they send their agent in the back
6 sending e-mails that are vague threats. They're very clear
7 vague threats. So it's brought in a different context.

8 Notwithstanding the sanction that we're seeking is if
9 in fact under the *In Re: Denture Cream* standard, which I'll go
10 to in a minute, if in fact the court still finds that the
11 document is privileged, then that privilege should be waived as
12 a result and as a sanction for their bad faith litigation
13 conduct.

14 THE COURT: I thought I ruled on that once before.
15 You know, you guys are going to have to show me the transcript
16 from that, but go ahead.

17 MR. ANNESSER: Okay. Well, let me move at this point
18 into the *In Re: Denture Cream* standards for this particular
19 document. *In Re: Denture Cream* --

20 THE COURT: Let me just tell you, I'm not familiar with
21 those, so you're going to need to -- I'm familiar with that
22 litigation, it's actually litigation that is in front of Judge
23 Altonaga I think.

24 MR. ANNESSER: Yes, Your Honor. And in fact, there's a
25 holding in that case.

1 THE COURT: By who?

2 MR. ANNESSER: And that was by, I believe Judge
3 Simonton if I'm not mistaken.

4 THE COURT: Uh-huh.

5 MR. ANNESSER: And one of the citations from that case
6 -- and I have a copy if the court would like it.

7 THE COURT: All right.

8 MR. ANNESSER: May I approach, Your Honor?

9 THE COURT: Yeah.

10 MR. ANNESSER: Sorry. Your Honor, if you look at the
11 top, it's going this way, Page 10 of 23 in the second column.

12 THE COURT: Yeah.

13 MR. ANNESSER: And about halfway down the first block
14 on the second column, it starts that the Florida Supreme Court
15 has held that unlike a claim of attorney-client privilege made
16 by an individual, the claim of privilege raised by a corporation
17 is subject to a heightened level of scrutiny. To establish the
18 communications are protected by the attorney-client privilege,
19 P.G., the party in that case, as corporate defendants therefore
20 must demonstrate that the documents satisfy the following
21 requirements. One, the communication would not have been made
22 but for the contemplation of legal service. And this Zalli
23 document doesn't reference legal service at all. In fact, it
24 asks for a background check in essence. Two, the employee
25 making the communication at the direction of his or her

1 corporate superior. In this case, it was Mr. Darden. He was
2 the top. Three, the superior made the request of the employee
3 apart of the corporation's effort to secure legal advice or
4 services. We don't believe that this particular document
5 satisfies those grounds. They're not asking for legal advice,
6 they're not saying what can we do legally or otherwise. They're
7 in fact just asking for a background check on my client as well
8 as other people. Four, the content of the communication relates
9 to legal services being rendered and the subject matter of the
10 communication is within the scope of the employee's duties. I
11 don't think there's an issue as to the scope of the duties of
12 the employee, but we don't believe that this document relates to
13 legal services being rendered whatsoever.

14 THE COURT: Does it relate to work product or is that
15 an issue here?

16 MR. ANNESSER: No, work product is not an issue here,
17 and I don't have the date of the document in front of me, but I
18 believe that it was pre-suit. Number five, the communication is
19 not disseminated beyond those persons who, because of the
20 corporate structure, need to know its contents. That I don't
21 think is relevant here.

22 In addition, the burden of proof rests squarely on the
23 party claiming the attorney-client privilege to show that the
24 primary purpose of the communication in question was for the
25 purpose of obtaining legal advice, not business advice. If I

1 recall this document properly, in fact, I believe it says
2 business issue at the top of the document, not legal issue.
3 Furthermore, it says when advice given by an attorney relates to
4 both businesses and legal matters, the legal advice must
5 predominate in order for the attorney-client privilege to apply.
6 Clearly a review of this document, the Zalli document, does not
7 lend itself to this document having anything to do with legal
8 advice or seeking legal advice.

9 THE COURT: I don't see this six and seven here. What
10 page is that on?

11 MR. ANNESSER: I'm sorry, this is a continuation on to
12 the next page after five.

13 THE COURT: Oh, I see. Okay.

14 MR. ANNESSER: There's a lot of footnotes on that one.

15 And then lastly, and this is at the top right-hand side
16 or halfway through the first block on the right-hand side of
17 page 11 on 23, the business aspects of a corporate decision are
18 not protected simply because legal considerations are involved.
19 In those cases where the document does not contain sufficient
20 information to indicate whether the material was considered
21 confidential, that matter should not be privileged. There is a
22 general agreement that the protection of privilege applies only
23 if the primary or predominate purpose of the attorney-client
24 consultation is to seek legal advice or assistance. And the
25 Zalli document does not satisfy those prongs. There is nothing

1 within that document, to my recollection, that we believe even
2 hints at the request for legal advice. The fact that Mr. Zalli
3 was simply an attorney is insufficient to make it
4 attorney-client privileged communication.

5 Moreover, in light of the other facts as we discussed
6 them on the other side with respect to his role and involvement,
7 and it's clear what his role was now in engaging Mr. Sha to have
8 these improper communications with one of the scientists that
9 did the Lugano report, not disclosing that they were Industrial
10 Heat, that they were inquiring either for the purpose of
11 litigation or otherwise. So didn't tell them anything. They
12 said he was a -- it was a secret investor that was interested.
13 Those in and of themselves warrant this document to be
14 determined not to be privileged.

15 But furthermore, the crime fraud exception applies.
16 It's our position -- and this again ties into the sanctions
17 aspect -- it's our position that the crime fraud exception
18 applies. It doesn't necessarily have to be a crime. Even if it
19 didn't rise to the level of witness tampering, if it was
20 fraudulent communications and it was done even with an attorney,
21 again, this is only if the court finds that all of the prongs
22 are met, if it was done with an attorney in order to deceive
23 someone fraudulently, and that's exactly what they did, they
24 spoke to this gentleman, Dr. Levi and they said oh, we represent
25 an investor, we can bring you great wealth and great riches, all

1 you have to do is talk to us about these things, tell us how you
2 test the E-CAT, we don't like that you're involved with Dr.
3 Rossi and your support is a reason for concern. That's
4 fraudulent. They never came out, identified who they were, who
5 they represented and done so in an open way that would warrant
6 protection of those documents. Crime fraud exception says you
7 can't do that. When you involve your attorney, if that was the
8 case here, in those actions, in furtherance of this fraud, the
9 attorney-client privilege does not apply.

10 Furthermore, and this is the point that I find most
11 concerning, that document specifically has an admission from
12 Mr. Darden, if I recall, that says that they never told Dr.
13 Rossi that the test that he was performing was not the
14 guaranteed performance test. He admits that. Now, in their
15 motion for summary judgment --

16 THE COURT: Say that again? They what?

17 MR. ANNESSER: Okay. One of the issues is they've
18 claimed that the test that was carried out for a year was not
19 the guaranteed performance test according to the contract. In
20 this e-mail, if my recollection is correct and I believe it is,
21 it specifically discusses and says we haven't told him that this
22 is not the guaranteed performance test. Yet Mr. Darden
23 testified at his deposition that prior to the date of that
24 e-mail, we had told him many times well before the test even
25 began that this was not the guaranteed performance test, that

1 the time had run. Now, at that point in time, it was simply
2 perjury by Mr. Darden. But then that perjured testimony was
3 offered by counsel in their summary judgment motion,
4 notwithstanding the knowledge that counsel has of that e-mail,
5 the clear admission that they had not told him, that was offered
6 in support of their summary judgment motion, which arguably
7 warrants sanctions.

8 The sanctions we're seeking are not severe here. The
9 sanctions we're seeking are to have all communications with
10 Mr. Zalli disclosed to us, whether it goes beyond this or not,
11 and we believe that there are other communications. All
12 communications with Mr. Sha. There has been one produced. That
13 one references other communications that we've never received,
14 or in the alternative, for them to produce Mr. Zalli here so
15 that he can be deposed and asked regarding his role in that
16 matter.

17 THE COURT: All right.

18 MR. ANNESSER: Thank you, Your Honor.

19 THE COURT: Do you guys want to respond?

20 MR. PACE: Yes, Your Honor. Just one second if I can.
21 Your Honor, may I approach again with the binder? These are all
22 documents that were provided to the other side.

23 I can start Your Honor, I think to answer a question
24 that you had. If you can look on -- if you take a second and
25 look at Tab 5, I think we actually have the transcript, it's

1 Page 17. This is the declaration that you looked at, the Levi
2 declaration.

3 THE COURT: And it's in reference to what? What was
4 the issue that was before me?

5 MR. PACE: They were seeking reconsideration on your
6 privilege ruling as to the privilege protection for the Zalli
7 e-mail.

8 THE COURT: Is it the same thing that is before me
9 today?

10 MR. PACE: Yes.

11 THE COURT: If I already ruled on this, why am I ruling
12 on it again?

13 MR. PACE: I would ask the question of Mr. Annesser, to
14 be honest with you.

15 MR. ANNESSER: Well Your Honor, with respect to the
16 attorney-client privilege on the Zalli e-mail, we took an appeal
17 of the court's order with respect to that. Judge Altonaga
18 granted us leave to come back, ask for reconsideration and ask
19 for factual findings as to the prongs as set forth *In Re:*
20 *Denture Cream*.

21 THE COURT: Right.

22 MR. ANNESSER: With respect to the allegations
23 pertaining to Mister -- well, the bad faith litigation conduct
24 which again, kind of all plays into one, those issues with
25 respect to Mr. Zalli's document were raised tangentially as to

1 the roles of the parties. I believe, and I have not read this
2 yet, but I don't believe that there was an order or ruling by
3 the court that there was no bad faith litigation conduct. I
4 think what there was is a -- the court finding that privilege
5 applied in this case, that there could have been, I guess, some
6 sort of privilege as a result of Mr. Zalli being an attorney and
7 that we had not made a showing to override that privilege at
8 that point in time. But in fact, at that point in time, we had
9 not raised, I believe, before this court, the issue with respect
10 to the communication with Bo Hoistad, the Nobel Prize Committee
11 gentleman.

12 MR. PACE: So just to continue --

13 MR. ANNESSER: Your Honor, I believe Page 17 under Tab
14 5, the court found that that is not sufficient evidence of crime
15 or fraud to override the attorney-client privilege which I
16 previously found applies to the document at hand, and which I
17 believe is a November 4th e-mail from Mr. Darden to Mr. Zalli.
18 So again, in the context it was with respect to the
19 attorney-client privilege, not as a sanction with that respect.
20 That is the ruling that we took up to Judge Altonaga and among
21 other things, she said come back, you need to get factual
22 findings before I can rule on it in line with the --

23 THE COURT: This is the ruling that you took to Judge
24 Altonaga or you took the ruling where I said you had to give the
25 document back?

1 MR. ANNESSER: I believe -- I'm sorry. It was the
2 document back. I believe this was from the reconsideration, the
3 motion for reconsideration of that ruling. We had asked this
4 court to reconsider.

5 THE COURT: You're basically asking me the same thing
6 today that you asked me back then.

7 MR. ANNESSER: No, Your Honor. Okay. So again, maybe
8 I shouldn't have combined the two motions. One is a motion for
9 sanctions. We did not ask for sanctions before, it's a
10 different standard than considering attorney-client privilege.
11 Okay. The attorney-client privilege -- and I understand this is
12 confused because I put the two together, I apologize. The
13 attorney-client privilege, we went to Altonaga, she said come
14 back, get factual findings in line with *In Re: Denture Cream* and
15 so we're doing that, that's separate and apart.

16 Moreover, in addition to the *In Re: Denture Cream*,
17 there's the crime fraud exception, and there's two elements to
18 it. One is the element with respect to Mr. Zalli and what is
19 known and his improper behavior, okay. The fraudulent aspect.

20 THE COURT: Isn't that what we discussed at this other
21 time?

22 MR. ANNESSER: That was, again, as I believe it was
23 tangentially addressed.

24 THE COURT: Tangentially? It goes on for pages here.

25 MR. ANNESSER: Your Honor.

1 THE COURT: What is tangentially? You're bringing the
2 same issue to me over and over again and saying well, if you
3 didn't find it before, let's find it now.

4 MR. ANNESSER: Your Honor, again, the primary -- here
5 is the findings on the *In Re: Denture Cream*, that's one issue.
6 And then now, the additional issue of they have proffered this
7 testimony, perjured testimony, not only has Mr. Darden offered
8 it and given it at his deposition, but now it's been proffered
9 to the court in the motion for summary judgment. Those had not
10 occurred at the time of the court's earlier ruling and in fact,
11 the court's earlier ruling is what we are now back on to go
12 through *In Re: Denture Cream*. So that is --

13 THE COURT: No, no. I mean you're conflating these.
14 They're not conflated. There's two different issues here. One,
15 I understand Judge Altonaga says tell me exactly why you think
16 that that document that you ordered clawed back should go back.
17 That's what she wants to know. Okay. We're going to do that.
18 Then there's another issue where you're saying all this conduct
19 that we discussed back when Mr. Chaiken was here, not you,
20 unless you were sitting in the chair, I don't know, back on
21 March 9, 2017, when you all came to me and said hey, that zalli
22 thing should not be privileged because it's part of a crime
23 fraud and I addressed that. Didn't I?

24 MR. ANNESSER: Your Honor, yes, in the privilege
25 context, the court absolutely did. We're asking --

1 THE COURT: Well, you're talking to me about crime
2 fraud exception.

3 MR. ANNESSER: We're asking for a sanction, Your Honor.
4 Now we're -- the crime fraud exception in particular, and while
5 I did mention this again, the particulars were now they've taken
6 it to the next level. They have perjured themselves.

7 THE COURT: No, no. Before that. I'm not talking
8 about that argument, I'm talking about the argument that you
9 made before that. You said if you find that this document is
10 still privileged, then you should except it from the privilege
11 because of crime fraud exception because it involved an attorney
12 in furtherance of the fraud.

13 MR. ANNESSER: Yes, Your Honor. That is the sanctions
14 part of our motion today. And I'm sorry I put the two together.

15 THE COURT: You're cutting it very thin. This is stuff
16 I've already addressed or at least that portion I've already
17 addressed. I've asked you guys about this before. You can't
18 just keep bringing stuff to me over and over and over again and
19 hoping that something's going to happen. I ruled that this was
20 not -- did not constitute a crime fraud exception previously,
21 didn't I?

22 MR. ANNESSER: Your Honor, the court ruled that there
23 was not enough evidence to apply the crime fraud exception on
24 that factor to the privilege of the document.

25 THE COURT: Right. So why do you think you should be

1 able to come back here? You made that argument to me. If you
2 want, we can record it.

3 MR. ANNESSER: Yes, Your Honor. And again, and perhaps
4 I've interjected it in the wrong place. We are asking for
5 sanctions based on that conduct. Whether it meets the crime
6 fraud exception elements or not. We think it does. And so the
7 sanction motion.

8 THE COURT: I know you think it does, but I already
9 ruled it doesn't.

10 MR. ANNESSER: Again, there's different standards for
11 the bad faith litigation conduct and the crime fraud exception
12 and so what we've asked the court --

13 THE COURT: Listen, you're the one who stood up here
14 and just told me crime fraud exception. I didn't bring that up,
15 you did.

16 MR. ANNESSER: Yes, Your Honor. At the time -- okay.
17 So in the timing of everything, we filed our motion for
18 sanctions with Judge Altonaga believing that was the proper
19 venue. We were incorrect, the court said you need to send that
20 back to Judge O'Sullivan. At the same time -- and that was
21 around the same time that the court had originally ruled on the
22 Zalli document. And so that issue came up as part of a motion
23 for reconsideration as to privilege only. Not as to sanctions,
24 as to privilege only. Okay. And in that context, the court did
25 rule and so those are two separate things.

1 THE COURT: All right. So you're the one that brought
2 up the crime fraud exception. Are you asking me to rule on the
3 crime fraud exception today or not?

4 MR. ANNESSER: No, Your Honor. I'm asking you to rule
5 on the motion for sanctions, I'm asking you to rule -- except
6 for -- to the extent that crime fraud exception applies because
7 of the perjured testimony not brought up here and the ultimate
8 --

9 THE COURT: Okay. That's not the context you just
10 argued it to me in.

11 MR. ANNESSER: I apologize, Your Honor, if that was
12 what I did. It was not intended. There are two things we're
13 asking the court to rule on. One is the motion for sanctions
14 and one is with respect to the Zalli document.

15 Now, with respect to the motion for sanctions, the
16 sanction we're seeking is disclosure of all documents and
17 communications with the individuals involved. Not just limited
18 to this document.

19 THE COURT: Go ahead.

20 MR. PACE: Your Honor, if I may, unfortunately neither
21 of us ordered the transcript and neither of us has the
22 transcript of the hearing before Judge Altonaga, so it puts both
23 of us at a slight disadvantage. But that's not my understanding
24 of what Judge Altonaga did. They had raised the question of *In*
25 *Re: Denture Cream*, they being Plaintiffs, and Judge Altonaga

1 said is that something that you raised with Judge O'Sullivan,
2 they said no. And they said well then, why didn't you raise it
3 first. I thought we kind of prevailed on the issue and the
4 judge said it -- you can always re-raise something with Judge
5 O'Sullivan. So in fact, I very clearly remember standing up at
6 the end saying the judge said no, Mr. Annesser Mr. (Inaudible).
7 (Inaudible). They wanted to be able to go back to Judge
8 O'Sullivan.

9 So to be clear, the judge never said *In Re: Denture*
10 *Cream* standards necessarily have to apply. Says they raised
11 something that had been in front of you and so she said you go
12 back to Judge O'Sullivan on that. And I thought we otherwise
13 had kind of resolved the matter. But it is true that she did
14 say they could bring it back here. She did not give a direction
15 in terms of what -- she didn't say I expect Judge O'Sullivan to
16 do X, Y and Z. But nevertheless, just --

17 THE COURT: I mean, these are not like some fantastic
18 statement of the law here that's *In Re: Denture Cream*. You
19 didn't cite this to me, but we certainly discussed it the main
20 purpose of the document was a business -- that's just hornbook
21 law, whether it's a business or, you know, litigation purpose or
22 legal advice purpose.

23 MR. ANNESSER: I agree with, Your Honor. I believe we
24 did address the issues. And when we referenced that to the
25 court, she said did you bring up this case and did you ask for a

1 specific finding as to each of those elements; we said no, we
2 did not. We had discussed them, we thought, more thoroughly and
3 she said I can't even consider it until you do, and she granted
4 us leave to come back and bring it up before the court again for
5 clarification as to that matter.

6 THE COURT: All right.

7 MR. PACE: If I can, Your Honor, just because I'd like
8 to have kind of a record in the event we go back to Judge
9 Altonaga, we provided in Tab 2 the testimony from Tom Darden
10 relating to the engagement of Zalli (inaudible). Where he
11 testifies that, you know, he did engage them to provide legal
12 services which was an investigation into potential international
13 fraud and whether they were a victim of international fraud.
14 That's in the e-mail. And again, it's a privileged document,
15 and Mr. Annesser is at least attempting to reference it here, so
16 we may have to ask for this hearing to be sealed.

17 But that being said, the e-mail is from Mr. Darden to
18 Mr. Zalli and so it's providing him the context, the background,
19 the information he needs to be able to provide the services. So
20 it's not written by the lawyer. So the requested of does it
21 reflect legal advice, no. You're asking -- you're the nonlawyer
22 asking the lawyer for, you know, assistance, you know. You're
23 not -- you don't have to then say, you know, the case of Smith v
24 Jones, here's how something works. It refers to a business
25 problem, it doesn't refer to, you know, business dealing,

1 business operations. It is a problem. It's a problem with a
2 business he was operating.

3 Your Honor has reviewed the document in the context of
4 these exact same arguments. First of all, they're very clear
5 that the only thing I think that -- you know, when he goes
6 through the five *In Re: Denture Cream* elements which, by the
7 way, is Florida law, not North Carolina law, so it's not even
8 the right law -- but the only thing at the end of the day that
9 he says is I don't think it was for legal services. You've twice
10 ruled that it was after hearing arguments on it. They had
11 deposition testimony from Tom Darden that it was, they keep
12 trying to conflate this thing with Uzi Sha which we'll get to in
13 a second. But just so we're clear, this document doesn't
14 mention anything about Professor Levi, this document doesn't
15 mention anything about Uzi Sha, and the time periods are
16 separate so they're kind of conflating things there, possibly
17 so.

18 But I think Your Honor's rulings have been clear.
19 Again, I do understand that Judge Altonaga has sent it back
20 here. I think the record now is clear in terms of the basis for
21 the court's ruling.

22 THE COURT: How is it clear? I ruled.

23 MR. PACE: I know.

24 THE COURT: I thought I made it clear last time what my
25 ruling was, but so I'm trying to figure out -- we don't have the

1 transcript of exactly what Judge Altonaga said.

2 MR. PACE: I apologize. She did not -- one thing I can
3 tell you, and I think Mr. Annesser will agree, she did not say
4 this needs to go back to Judge O'Sullivan for a particular --
5 you know, for something very specific. It was -- they raised
6 the issue and she said did you raise that and did you make that
7 argument, did you raise that case and make those arguments to
8 Judge O'Sullivan. They said no. And then I should be doing
9 this in the first instance. Like she didn't say I am expecting
10 Judge O'Sullivan to do X or Y, she gave them the opportunity to
11 come back here. So to that extent, I very much agree that
12 that's what she did.

13 THE COURT: Well, how do you satisfy each of these, the
14 communication would not have been made but for the contemplation
15 of legal services? There you say what, that it was a request
16 for legal services by the client?

17 MR. PACE: It is, and that's what the testimony in Tab
18 2 reflects.

19 THE COURT: And the employee making the communication
20 did so at the direction of his or her corporate supervisor?

21 MR. PACE: Let me be clear. First of all, they don't
22 dispute that because Tom Darden (inaudible).

23 THE COURT: He was the superior.

24 MR. PACE: But just so I'm clear to keep my objection,
25 you are talking about the Florida privilege standard and you're

1 talking about someone in North Carolina communicating with
2 somebody outside the country. So I don't think Florida law is
3 the right law. But let's pretend for the moment that it were.

4 THE COURT: Do you have some North Carolina law that
5 says something different?

6 MR. PACE: Yes. Well, the Florida law is based on
7 Florida used to follow the control (inaudible) test, and I don't
8 have all the details, I apologize. I know it's late, but
9 Florida used to apply the control booth test. The situation
10 with control booth was only the top executives, right, get the
11 privilege. So if there's somebody further down the chain, the
12 only way they would get the privilege is if you could show that
13 the guy up top --

14 THE COURT: Well, that's not an issue here because
15 Darden is the top guy, right?

16 MR. PACE: Right. That's why -- I'm sorry. I'm
17 getting overly academic.

18 THE COURT: Okay.

19 MR. PACE: But it's the same reason why that the second
20 one, you know, or the third one isn't really an issue. The
21 superior made the request as part of the corporation's efforts
22 to secure legal services.

23 THE COURT: What about four, the content of the
24 communication relates to the legal services being rendered.

25 MR. PACE: And that's -- again, this is the testimony

1 he's providing information to the lawyer to be able to provide
2 the advice on, you know, the investigation on whether they were
3 the subject -- the language is the victim of international
4 fraud.

5 THE COURT: And the communication is not disseminated
6 beyond those persons?

7 MR. PACE: And they --

8 MR. ANNESSER: We don't dispute that prong.

9 THE COURT: Okay. And the last thing, I think, is that
10 the primary purpose was not a business -- let me just read it.
11 Primary purpose of the communication was for the purpose of
12 obtaining legal advice, not business advice.

13 MR. PACE: And that's how Darden testified, that it was
14 to obtain their advice. You want to get advice from somebody,
15 from the lawyer, to look into whether you have been the victim
16 of international fraud, you've got to give them the context for
17 it.

18 THE COURT: Okay.

19 MR. PACE: Then Mr. Annesser keeps kind of loosely
20 throwing around this accusation of perjury, which is completely
21 unfounded. And let me give you some context here which is --
22 and he knows this because we talked about this before, the
23 testimony of Thomas Darden was that they had told Dr. Rossi in
24 2013 and 2014 that the time period had lapsed for the guaranteed
25 performance test. The e-mail that he's referring to is a more

1 contemporaneous one where the question is after Dr. Rossi had
2 started doing what he was doing in Doral, had he told Dr. Rossi
3 during that time period, we had been telling him on this thing
4 he's now doing hey, by the way, this is not the guaranteed
5 performance test. And in fact, he has never testified to that.
6 He didn't testify in his deposition oh, in May of 2015 or in
7 October of 2015, I told, you know, Dr. Rossi hey, stop doing
8 what you're doing here because it can't be the guaranteed
9 performance test. So there's no perjury in any event. I mean,
10 to be honest with you, even if there was an inconsistency, at
11 best all they would have is an inconsistency. But there's not
12 even an inconsistency here. But they keep trying to find a way
13 to back door in this document that still doesn't get them
14 anywhere.

15 They are making, you know, accusations in terms of the
16 crime fraud when they talk about their motion for sanctions, and
17 I think what the court ruled before goes directly to this point
18 which is when you look at the Levi declaration, say look, he
19 never really says it, he doesn't say that they told him they'd
20 give him a bunch of money, he says I kind of felt like they were
21 going to pay me money if I retract this report. He doesn't say
22 that somebody said I'm going to beat you up, he says I kind of
23 felt threatened. And in fact, we've now provided, because Your
24 Honor raised this and so we went out and contacted this Uzi Sha,
25 got a declaration from him which is Tab 21, and he says I didn't

1 threaten the guy. And he says I didn't threaten the guy. So
2 there's really not a kind of an inconsistency. And in fact, we
3 provide some of the communications, text messages, where Levi is
4 reaching back out to him. The whole idea of, you know, I came
5 into a meeting and I threatened some guy and he text messages me
6 afterwards hey, when are we meeting next time, obviously is
7 completely inconsistent.

8 THE COURT: Let me see the document. The document.

9 MR. PACE: Tab 21, Your Honor.

10 THE COURT: No, not that. I'm talking about the
11 document --

12 MR. PACE: Oh, yes.

13 THE COURT: The e-mail.

14 MR. PACE: Your Honor, if I can hand you a copy -- let
15 me get back to the microphone. This, Your Honor, is the
16 privileged document. So for these purposes, we're obviously not
17 asking that it be admitted in to the record.

18 THE COURT: This is from Tom Darden dated November 4,
19 2015 to zalli@jfgco.IL.

20 MR. PACE: Yes, Your Honor.

21 THE COURT: Zalli is a lawyer where?

22 MR. PACE: In Israel.

23 THE COURT: I think I thought maybe in the beginning of
24 their argument they said that the privilege shouldn't apply
25 because he's a lawyer in Israel, not in the United States? Did

1 you make that argument?

2 MR. ANNESSER: I'm sorry, Your Honor?

3 THE COURT: That the privilege shouldn't apply because
4 he's a lawyer in Israel?

5 MR. ANNESSER: Your Honor, the argument was made that
6 not that it shouldn't apply because he's a lawyer in Israel, but
7 specifically that in context of this document when looking at
8 it, a lawyer in Israel has nothing to do with the license
9 agreement. It's not seeking legal advice on its face. The only
10 thing that we've got to determine that it's legal advice is
11 Mr. Darden's claim, but had it been an attorney in the United
12 States, it would have been harder or -- I'm sorry, easier to
13 understand. This is an attorney in Israel. In fact, that was
14 outside of the licensed territory, we don't believe he was
15 licensed anywhere within the territory, so --

16 THE COURT: within what territory?

17 MR. ANNESSER: The licensed territory under the license
18 agreement included North America, South America, I believe
19 Russia, China and the United Arab Emirates. And he was, to our
20 understanding, not licensed to practice in any of those areas.
21 So his relevancy or his usefulness, if in fact he is an attorney
22 practicing, is much less likely being that he's an attorney in
23 Israel outside of the jurisdiction, outside of the territory and
24 therefore, would not be part of any license deals or otherwise
25 pertaining to Dr. Rossi and the E-CAT.

1 THE COURT: All right.

2 MR. PACE: Let me -- if I can just kind of continue on
3 those lines (inaudible). The licensed territory, the
4 territories of the license agreement is a red herring. They're
5 asking about whether he is a victim of international fraud.
6 Mr. Darden testified that he had worked with Mr. Zalli, with
7 Mr. Jaffe in connection with a matter in Europe previously which
8 was the reason that he had reached out to contact him for his
9 services, for his assistance. So the idea -- I mean, there is a
10 reason that he does that, license in the United States. The
11 claim is that he was contacting him to come in and investigate
12 the matter in the United States.

13 By the way, even if that were the case, that wouldn't
14 destroy the privilege. I was referencing the Uzi Sha
15 declaration, so you've noted the date of the document you have
16 in front of you. The contact of Professor Levi that's
17 referenced in Professor Levi's declaration is from -- I believe
18 it's the middle of June, the middle of 2016.

19 THE COURT: I don't understand. What does the date
20 have to do with the date of this stuff?

21 MR. PACE: It doesn't. That's part of the point which
22 is what they try to say is well, you know, subsequently there's
23 contact with Levi, with Professor Levi. And I'm saying that's
24 contact that then -- I'm sorry. I think what he was arguing in
25 part was the fact that Levi was later contacted by Uzi Sha in

1 mid-2016 evidences that the Zalli, that Tom Darden's
2 communication with Zalli in November 2015 is somehow part of a
3 crime fraud. And what I'm saying is it can't be. There's no
4 fraud here anyway.

5 But more to the point, you know, the communication
6 would have to be in furtherance of -- the communication doesn't
7 talk about Levi. It doesn't talk about some contact that's
8 going to occur a month down the road. So that's the only reason
9 I was making that point. I do think they are independently
10 (inaudible) if I understand them correctly, and Mr. Annesser is
11 conflating the two. But I do think they're making an
12 independent argument which is the contacting of Levi itself is a
13 basis for some kind of sanctions.

14 On that, I want to say a few things. One is, you know,
15 Your Honor's already ruled looking at the Levi declaration that
16 it doesn't really show that there's been any threats or bribery.
17 The Uzi Sha declaration confirms that, because it addresses it
18 directly as opposed to Levi saying oh, I kind of felt like they
19 were trying to do something with me. Professor Levi is never a
20 witness in this case. We've provided the initial disclosures
21 that are in here as an exhibit, and I apologize, I don't know
22 the tab where, but we have the initial disclosures -- Tabs 10
23 and 11. No one identified Professor Levi as a potential
24 witness.

25 THE COURT: What about their concern about the Nobel

1 Prize?

2 MR. PACE: That as well, which is two things. One,
3 we've given you the Nobel Prize committee. It is at Tab 9. And
4 none of these people is on the Nobel Prize committee. Two, the
5 only evidence of Dr. Rossi being considered for this is his
6 statement. He said it. There is an e-mail from Industrial Heat
7 from a long time ago where it says Rossi told us he may be under
8 consideration for a Nobel Prize.

9 THE COURT: Now, when this was brought up to me before,
10 didn't I say you couldn't -- I don't remember what was my exact
11 ruling then?

12 MR. ANNESSER: Your Honor, I was just looking at it so
13 I can inform the court. The ruling was that if they are going
14 to issue a subpoena out to these individuals, that they had to
15 contact us first. It does not specifically state that they
16 can't contact them under any manner, but it's clear from the
17 spirit that that was the intent.

18 THE COURT: Okay. What do you say about that?

19 MR. PACE: First of all, that's clearly not the ruling.
20 The ruling was if it was going to be a subpoena for documents,
21 that we had to let the other side know. There wouldn't be a
22 ruling that you couldn't have contact, nor I don't think could
23 there be such a ruling. Because there wouldn't be a basis for
24 it.

25 But second of all, you know, again, I think we're

1 talking about the contact that occurred here which is in, you
2 know, kind of --

3 THE COURT: You couldn't subpoena who? What was the
4 limit of who you couldn't subpoena?

5 MR. PACE: Your ruling was we couldn't -- we had hidden
6 communications from the Plaintiffs, and you limited it to
7 certain communications we could get from the Plaintiffs,
8 communications with any of these professors. And then you said
9 we can't essentially circumvent that by going out and
10 subpoenaing, at least -- let me rephrase. If we were going to
11 subpoena these professors separately, then -- you know, for
12 documents, then we needed to, you know, notify the other side
13 first. I don't think you were aware at the time that they were
14 all in Europe.

15 THE COURT: You couldn't subpoena Levi if you wanted
16 to, could you?

17 MR. PACE: You can always speak to witnesses.

18 THE COURT: No, subpoena. You have no authority to
19 issue a subpoena to him overseas, would you?

20 MR. PACE: I didn't stand up and say, Your Honor, that
21 doesn't apply because it didn't seem relevant. But yes, all of
22 these professors are in Europe, they are well beyond the reach
23 of the subpoena power.

24 THE COURT: Okay.

25 MR. PACE: So for that reason, it wasn't really

1 something I felt the need to stand up and address or correct.
2 But like I said, so this issue with the Nobel Prize is a red
3 herring.

4 The contact with Bo Hoistad, same thing. He's one of
5 the professors that worked on the Lugano report. I want to get
6 to that in a second, but there's no threats. I mean, you know,
7 Mr. Annesser used the phrase that I had written down because it
8 was so unique which was "clear vague threats". Seems to be a
9 contradiction. All that Dewey weaver said, and I think Your
10 Honor even addressed this at one point when you said look, if
11 they believe that there's -- that if they're right, that Dr.
12 Rossi is faking any parts of this test, then for them to tell
13 somebody else hey, if you're lining up this guy, your reputation
14 could be at issue is a truthful statement. I mean, it's not
15 meant to be any form of intimidation. But I want to make sure
16 that I'm clear that there's no claim of bribery with Dewey
17 weaver, there's no claim -- the only claim of coercion is when
18 he says something along the lines of, you know, the reputation
19 of the university could be at issue, which again, he's perfectly
20 entitled to say. And there's no, you know, declaration here
21 from Professor Hoistad -- I might be butchering his name. That
22 they (inaudible) in question. He references Tom Darden, I
23 think.

24 THE COURT: where is this e-mail?

25 MR. PACE: I think it was -- well, they -- I don't

1 think they provided it here today. But it was an exhibit to
2 their motion that they brought up with the District Court and
3 the District Court denied and said we've got to bring up the
4 issue with you.

5 so I don't know if I put that in my binder.

6 THE COURT: You have a copy of the motion here. I
7 don't see any e-mail attached to it.

8 MR. ANNESSER: Your Honor, it's I believe Exhibit 6.

9 THE COURT: In this binder?

10 MR. ANNESSER: No, not in this binder.

11 THE COURT: I don't have the motion. The motion has
12 been stricken, hasn't it? We're not here on this motion, are
13 we?

14 MR. ANNESSER: No, Your Honor.

15 MR. PACE: The motion was denied. The motion filed in
16 the District Court was denied.

17 THE COURT: It was stricken, right? Or denied or
18 whatever. I haven't read this motion because it's not what's in
19 front of me. I mean, maybe the issues you've raised in here are
20 in front of me, but Judge Altonaga has a process that you're not
21 to file any motion that relates to discovery. So when she
22 strikes them, I don't --

23 MR. ANNESSER: Yes, Your Honor, I've got a copy of the
24 e-mail. There's actually an e-mail chain here.

25 THE COURT: Yeah, sure. Which the first page of it?

1 MR. ANNESSER: The first e-mail begins here and then as
2 e-mails are, they go backwards.

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

4 MR. PACE: Yes, Your Honor, if I can. He made a
5 reference to a report, I want to put this in into context.
6 These professors worked on something called -- a report that
7 people called the Lugano report. The findings of the Lugano
8 report, if accepted, would -- those results of the test that
9 Plaintiffs had performed, Plaintiffs would get zero under the
10 license agreement, and I don't think there's any dispute of it.
11 Plaintiffs had to hit a certain threshold to get anything under
12 the license agreement. We addressed the Lugano report in our
13 counterclaims. I'm not saying that -- you know, we've also said
14 there's questions about that report and there's evidence in the
15 record that shows there's questions about the report. But the
16 fact of the matter is even if you accept the report at face
17 value, its findings would lead us to win on breach of contract
18 claim, and would be wildly inconsistent with the claims that Dr.
19 Rossi or Fabio Penon had been making as to the performance of
20 this E-CAT plant. They concluded that there was, it's called
21 the coefficient of performance below four, somewhere in the
22 three range. Here they're claiming that they were well over 100
23 on a number of days and constantly well over 70 or 80. So
24 (inaudible) is higher and the agreement says if you don't at
25 least reach four, you get zero. So the fact of the matter is,

1 it's not critical.

2 And by the way, their argument has always been that
3 it's not the guaranteed perform test and of course it's not,
4 we're not saying that it is, but that's one of the reasons why
5 no one has been -- I mean, look. They were able to get Fabio
6 Penon from Italy and have him deposed, I don't think there was
7 any effort to try to depose any of these individuals because
8 they're outside of the subpoena reach, but also they're outside
9 of the range of people wanting to contact them.

10 So -- and again, I'm going to draw a contrast here, I
11 realize my motion was denied and I'm not trying to reargue that,
12 but I'm just making the contrast which is, you know, we're
13 talking about things that are directly involved in this case, in
14 this test that was done in Doral, Florida and they're talking
15 about people who weren't witnesses, who weren't listed by either
16 party as being witnesses, they were at least identified at one
17 point in one of our document responses as people who might have
18 knowledge, no one tried to depose any of them. There are no
19 threats to any of these individuals, there's no bribery to any
20 of these individuals. There's communications with these
21 individuals and there's no evidence, with the exception of Levi,
22 saying I felt coerced. No one else has come forward to say I
23 felt anything, you know, I felt anything was done wrong. But
24 also there -- you know, people can contact them and say hey,
25 what do you think about this, I think there's questions about

1 this.

2 THE COURT: All right. I'm ready to rule. All right.

3 Under the *In Re: Denture Cream* standards which counsel
4 has provided a copy of to me, I'm going to persist in my prior
5 ruling that this November 4, 2015 e-mail is attorney-client
6 privileged. The communication was made in contemplation of
7 legal services. There's a narrative about issues that were
8 raised and then there's a request for legal assistance. The
9 person who this was sent to is an attorney. And so the next
10 one, if the employee made the communication, did so at the
11 direction of his or her corporate superior; here Mr. Darden made
12 it, who was the corporate superior, I don't think that's an
13 issue in this case.

14 The next one, I believe, the superior made the request
15 of the employee as part of the corporation's efforts to secure
16 legal advice or services. Again, doesn't apply in this
17 instance.

18 The fourth one, the content of the communication
19 relates to the legal services being rendered and the subject
20 matter of the communications are within the scope of the
21 employee's duties. Again, we have Mr. Darden who is the head of
22 this company, and so it's clearly within his duties. And the
23 content of the communication, although it relates to business,
24 it relates to a legal issue within the business. And so I find
25 that the subject that the communication relates to the legal

1 services which are requesting to be rendered.

2 And the last one, which is whether it was disseminated
3 to anybody else, is not at issue in this case.

4 And the last one, which is that the party claiming the
5 attorney-client privilege must show the primary purpose of the
6 communication in question was for the purpose of obtaining legal
7 advice, not business advice. Counsel had made that argument,
8 I've reviewed the document and it's clear, although it relates
9 to a business issue, the request is for legal advice in regards
10 to that business issue. And so therefore, I find that that
11 should be privileged.

12 I find that the Plaintiffs have not shown bad faith
13 conduct by the Defendants in this case. I'm going to
14 incorporate in my ruling the prior -- the transcript of my prior
15 ruling in regards to the Levi affidavit which is only stronger
16 now because now there's also an opposing affidavit from Uzi Sha
17 which basically denies that he did any of the things which
18 Mr. Levi never really says he did it, he says that he gave me
19 the feeling that he might pay me money or there was some kind of
20 threat of violence if I remember correctly. So I incorporate my
21 prior ruling into that.

22 I also find that the e-mail from Mister -- let's see
23 who that was from. That was from Weaver to Bo Hoistad, if
24 that's how you say it, is not -- I don't find it threatening, I
25 find it's communicating facts. I believe Mr. Weaver believes

1 it, and I don't think it was in violation of this court's ruling
2 previously that none of these professors could be subpoenaed
3 without permission -- I'm sorry, without first consulting with
4 the opposing side. I never had a ruling that they couldn't talk
5 to any of these professors or have someone who was connected
6 with them talk to these professors.

7 I also find that the e-mail here, the e-mail that I
8 found is privileged is in a different time frame than the time
9 period of these other actions, and there's no evidence that
10 they're connected.

11 I also find that -- let me just look at my notes here.
12 I think that's it.

13 MR. ANNESSER: Your Honor, if I may ask the court for
14 clarification as to one issue.

15 THE COURT: Yeah.

16 MR. ANNESSER: And then ask to point a couple of things
17 to the court just for the record, because if we decide to ask
18 for a review of the ruling --

19 THE COURT: Yeah.

20 MR. ANNESSER: -- I don't want to be told we didn't
21 bring it up.

22 First of all, what was the legal advice being sought,
23 what does the court find that legal advice was?

24 THE COURT: I think that's privileged. Within the --
25 it's within the memorandum which is privileged. But there is --

1 my in camera review of that, the -- what did I do with it now?
2 The final paragraph asks for -- asks for him to act as an
3 attorney in developing -- in addressing issues that are raised
4 throughout the memo.

5 MR. ANNESSER: And Your Honor, the only other thing I
6 want to raise for the court, because the court said there was
7 nothing that seemed to connect the Uzi Sha with the supposed
8 legal advice that was being rendered. In fact, in the
9 declaration of Uzi Sha, Tab Number 21, he says that he was
10 retained by attorney Zalli Jaffe, assisted Jaffe in his legal
11 advice to Thomas Darden, and in connection with that work, he
12 met Dr. Levy.

13 THE COURT: Okay. What do you say about that?

14 MR. PACE: Sure, Your Honor. But there's no connection
15 to the document. Again, when they're talking about a client,
16 they're talking about a client (inaudible), they can -- did
17 Zalli Jaffe have communications with Uzi Sha, yes. We're not
18 denying that. That e-mail is not the conduit for having any
19 kind of contact with Professor Levi. There may have been
20 subsequent discussions, but, you know, he was retained
21 subsequently, and I'm going to draw a line in terms of how the
22 privilege is going to be disclosed here and we are going to ask
23 for sealing, but they're to investigate, he's entitled to then
24 later on do something like hire an investigator. That doesn't
25 show -- that doesn't connect up the e-mail.

1 THE COURT: Yeah, I agree this e-mail doesn't connect
2 contact with Mr. Levi by Mr. Sihav (ph).

3 All right. What else?

4 MR. PACE: Your Honor, may I ask for -- one for return
5 of that document?

6 THE COURT: Yeah, I'm going to give it back to you.

7 MR. PACE: May I approach?

8 THE COURT: Well, hold on. Are we finished?

9 MR. ANNESSER: Your Honor, the other thing is although
10 it's not appeared on their privilege log yet, even though the
11 Zalli document, with respect to the determination as to whether
12 it is seeking legal advice, although Mr. Darden does testify in
13 the Tab 2 that he was seeking legal advice, when we asked what
14 was the nature of the legal advice, what type of legal advice
15 did you ask him to perform, it was objected to. And in fact, on
16 the privilege log, ordinarily we would be provided certain
17 information, who was copied on it, etcetera. We've got that
18 because we've seen the e-mail in the past and we don't believe
19 -- don't believe there were any other names other than the two,
20 but the nature of the privilege. And that's something that I
21 think we're still --

22 THE COURT: The nature of the privilege?

23 MR. ANNESSER: I'm sorry. Not just the nature of the
24 privilege, but a descriptor of the document, what it applies to.
25 And for the rest of the privilege log, actually it's the

1 privilege description, not just attorney-client privilege, but
2 what the, I guess the nature of his involvement was or the
3 nature of his communication. Seeking legal advice on X matter
4 or this matter. And that's never been provided in addition to
5 the fact that they refused to indicate in their --

6 THE COURT: I mean, seeking legal advice in regards to
7 Mr. Rossi?

8 MR. PACE: Well, specifically whether he's the victim
9 of international fraud as he testified. But what they're really
10 saying is no, we don't have it on a privilege log because we've
11 been in front of you, I think this is now four times in all
12 honesty, fighting over this issue.

13 THE COURT: All right. Anything else?

14 MR. ANNESSER: No, Your Honor.

15 THE COURT: Okay. Here, you can have the document
16 back.

17 If you're requesting that this be sealed, I'm denying
18 that request because I don't find that there's any reason to
19 seal anything that was here, and I was careful not to -- other
20 than give a general description of the document, I didn't reveal
21 what was in that document. So your request to seal the hearing
22 today is denied.

23 MR. PACE: Your Honor, may I just have one second on
24 that? I'm not saying that you said anything, but Mr. Annesser
25 was here repeatedly saying what he thought was in the document.

1 I mean, that's what he was arguing. And so I think -- you know,
2 that's -- you've just confirmed it's attorney-client privilege
3 communication, because he saw it.

4 THE COURT: well, I think his description of it was
5 generic enough. I mean, first of all, I don't see any reason to
6 seal it other than I think the reason you might want to request
7 to seal it is to make sure that you're continuing to protect the
8 attorney-client privilege, which you've done. So you've done
9 that. And I'm denying your request to seal it because I find
10 that any disclosures that were made were generic enough and
11 didn't -- you didn't waive -- you're not waiving your, you know,
12 the privilege by its discussion here today.

13 MR. PACE: Your Honor, that's more than -- and then I
14 would just have a reference to Federal Rule of Evidence 502,
15 that that's what gives you the authority to do that.

16 THE COURT: All right. We're running out of time here
17 or we're out of time actually.

18 MR. PACE: Yeah, Your Honor. There are other issues
19 that -- I mean, it's obviously well past their time.

20 THE COURT: What other issues are there still left?

21 MR. ANNESSER: Your Honor, one issue is the remand of
22 the issue regarding the DRV and Dewey Weaver documents. This
23 court had ruled they were not privileged. The Defendants took
24 appeal to Judge Altonaga, she remanded it back and instructed
25 that the court had to do a document by document review in order

1 to make that determination.

2 THE COURT: Do you have the transcript of that?

3 MR. PACE: No, Your Honor, we don't.

4 THE COURT: You need to provide me with that
5 transcript.

6 MR. PACE: We will.

7 MR. ANNESSER: As soon as we get it, Your Honor.

8 MR. PACE: Both sides asked for it immediately
9 afterwards. The court reporter, I think, was in the middle of a
10 trial.

11 THE COURT: well, how did she know what my ruling was
12 if she didn't have the transcript?

13 MR. PACE: She had -- I'm sorry.

14 THE COURT: She had my transcript?

15 MR. PACE: Yes, she had your transcript. what I think
16 Mr. Annesser is referring to is we don't have for you her
17 transcript as to what she specifically said at that hearing. We
18 should have it.

19 THE COURT: All right. well, when you get it you can
20 -- well, I think it will automatically be filed or be filed
21 within a few days of you getting it, and you can put this back
22 on the calendar if you want.

23 MR. PACE: And then we had three additional issues. I
24 can -- I mean, I honestly think I can cover each of them in
25 about five minutes or so but --

1 THE COURT: Just so I understand, you have four issues
2 here. Plaintiffs' motion for sanctions. Have you -- you
3 haven't discussed that bad faith litigation conduct?

4 MR. ANNESSER: Your Honor, that was, again, the one
5 that was wrapped into the Zalli document argument.

6 THE COURT: Okay. So that's done. I'm looking at
7 Mr. Pace's notice. So that's done.

8 Judge Altonaga's remand of the Deep River Venture
9 privilege documents, we're going to need to get her transcript
10 and have another hearing.

11 Defendants' motion for sanctions, spoliation. That's
12 been ruled on, correct?

13 MR. ANNESSER: Correct.

14 THE COURT: So now that leads us to a protective order
15 for a 30(b)(6) deposition of a corporate rep? Is that the issue
16 that you want to address?

17 MR. PACE: That was one of them. I mean, we had
18 several issues. Does Your Honor have the -- are you looking at
19 --

20 THE COURT: I'm looking at it.

21 MR. ANNESSER: Your Honor, last night at 6:00 they
22 noticed additional things that we are not prepared to discuss.
23 We are prepared, though, on the protective order issue.

24 MR. PACE: The example will be back here in Deep River
25 Ventures.

1 THE COURT: Well, I mean, I'm sorry, but you filed
2 something last night? I'm sure I would have seen it.

3 MR. PACE: It's 265. It's Docket Entry 265, Your
4 Honor.

5 THE COURT: How the heck did I miss that? This is a
6 second amended notice or something?

7 MR. PACE: It's amended notice of hearing and --

8 THE COURT: Well, I have an amended notice of hearing
9 that was filed on April 10th at Docket Entry Number 249.

10 MR. PACE: Oh, then we should have titled this amended,
11 second amended notice of hearing.

12 THE COURT: Oh, I see this, 265. I don't know how come
13 because usually they should come in my e-mail. Maybe I just
14 thought that this was the other one.

15 All right. Well, if you haven't those -- I see it's
16 three additional ones on the bottom there. If you haven't
17 discussed those, I don't want to hear about them because you're
18 supposed to try to resolve this stuff yourself first.

19 MR. PACE: Well, we have had various meet and confers
20 on these issues.

21 THE COURT: All right. Look it. You want to tell me
22 something in the next three minutes if you want to. If you
23 don't, we can do it another time. What do you want to do? Do
24 you want to talk about these 30(b)(6)? I don't understand how
25 you still got 30(b)(6) stuff. I thought you had to do that by

1 March 31st.

2 MR. PACE: Let's talk about the 30(b)(6) if we can.

3 THE COURT: In two minutes or less.

4 MR. PACE: I will try to be fast. Your Honor ruled --
5 I'm looking at the transcript -- that to the extent that there
6 was a question that was not answered in the 30(b)(6) deposition,
7 they could ask it again. And in fact, I think Mr. Annesser
8 stood up and said I want to make sure I can also ask the
9 follow-up questions and you said yes.

10 THE COURT: Yes.

11 MR. PACE: So we told them, we said okay, that's the
12 way the deposition, you know, you got -- you're limited to the
13 questions you asked before that to which the response was that,
14 you know, I don't know, I don't know anything more than
15 Industrial Heat, plus the reasonable follow-up. And they said
16 no, we're entitled to take the deposition all over again and ask
17 any issue we want or any subject we want within the scope of
18 those (inaudible). So that's why we had the disagreement.

19 THE COURT: When was the deposition supposed to be
20 taken by?

21 MR. PACE: Pardon?

22 THE COURT: Was there a date when the deposition was
23 supposed to be taken by?

24 MR. PACE: There was.

25 THE COURT: I thought it was the end of March.

1 MR. ANNESSER: Your Honor, yes. And it was scheduled
2 and we were advised by counsel that their clients would not be
3 appearing and that they would be filing or moving this court for
4 protective order.

5 MR. PACE: First of all, there was a date by which it
6 was supposed to occur, they did not want to have it done by
7 then. But then the issue that arose was we had the
8 disagreement. Last time I was in front of Your Honor when we
9 had this issue, you were clear if there is something you don't
10 want to have happen, you got to file a protective order in
11 advance as opposed to coming back afterwards and trying to
12 complain about something. So I thought the transcript is very
13 clear that this is what they're supposed to be limited to, we
14 raised it with them, they said they will not limit the
15 deposition in that manner and they -- and we said well, we're
16 going to have to bring it in front of Judge O'Sullivan.

17 THE COURT: All right. What does the Plaintiff say
18 about this?

19 MR. ANNESSER: Your Honor, to begin, the last time we
20 were before the court with respect to bringing a protective
21 order in advance, that was for the designated topics for a
22 30(b)(6) deposition, not with respect to what questions we may
23 or may not ask. Quite frankly, I have to look at my outline
24 that I haven't look at since the first deposition, but
25 realistically we have to be able to examine these witnesses.

1 This court found that the testimony that was provided was
2 insufficient. And with depositions, it does not always follow a
3 very clear line of questions. You have to respond to the
4 answers that are given and they may lead in directions that were
5 not specifically the next question in the original deposition
6 that they filed to provide answers for.

7 THE COURT: Yeah, that's why I said you could ask
8 follow-up questions. I don't understand, what are we doing
9 here?

10 MR. ANNESSER: Yes, Your Honor. They've asked to limit
11 the depositions to only those questions or those exact issues
12 that were raised in the first deposition, and we said we
13 couldn't do that. So they've moved for a protective order.

14 MR. PACE: No, and we said follow-up. We were very
15 clear with that and that's what Your Honor ruled. Said you get
16 the re-depose him on those issues for which he either did not
17 know the answer or you were referring to Mr. Vaughn as having a
18 response and Mr. Annesser said just to make sure, we go
19 (inaudible), those issues are the follow-ups and we said that
20 that was fine. We raised it and said that's okay, they said no,
21 we're entitled to go into any topic that is within the scope of
22 the deposition topics. We said that's not what the judge
23 ordered when --

24 THE COURT: Okay. I understand what you said. I don't
25 understand, what do you want me to do? Do you want me to say

1 you can depose him about anything? You depose him about the
2 stuff that he either didn't know before or that he said go talk
3 to somebody else about that.

4 MR. ANNESSER: Your Honor --

5 THE COURT: That's what my ruling was.

6 MR. ANNESSER: When I go forward, I don't want to ask
7 questions that are going to offend this court and the standard
8 procedure is to go forth with the deposition. If there's a
9 question that they feel that falls outside, they can do one of
10 two things; either stop the deposition, seek a protective order
11 or in the alternative, allow him to answer or just instruct him
12 not to answer.

13 THE COURT: I think they can only seek protective order
14 if it's harassing and other stuff.

15 MR. ANNESSER: Your Honor, so --

16 THE COURT: It's in direct violation of my order, so
17 you don't ask questions that are outside of the subject matter
18 of what the questions were before. It's simple. I can't
19 predict to you what's going to happen. Go take the deposition
20 and then you guys figure it out. And if, you know, I don't like
21 the way it happens, then I just sanction you, or do something
22 else. I don't know. Maybe you guys will be taking depositions
23 after the trial is over.

24 when is trial set?

25 MR. ANNESSER: I believe end of June, Your Honor.

1 THE COURT: When?

2 MR. ANNESSER: End of June.

3 THE COURT: Okay. Well, you need to get this
4 deposition taken. You know, you have my ruling, it's clear, you
5 know. I've given that same ruling to probably a hundred
6 lawyers, never had anybody come back and say judge, I want you
7 to clarify the ruling. Read it. It's there. Ask questions
8 that are within the scope of the prior inquiries that you made
9 and follow-up questions. I don't know how much more clear I can
10 make it. I can't do it any better than that. You know, and you
11 need to be reasonable. Maybe if you guys would, you know, be
12 reasonable with each other, we wouldn't be spending four hours
13 here discussing stuff that there's no need to discuss like, you
14 know, how many angels can dance on the head of a pin. What
15 question can I ask at the deposition. How do I know what
16 question you can ask at a deposition other than you follow my
17 order which says you can inquire into the areas that he either
18 didn't know or, you know, refer to some third party.

19 MR. ANNESSER: That was our intent, Your Honor.

20 THE COURT: Well, that's good. Then go do it.

21 When are you going to do the deposition? When is the
22 deposition going to happen?

23 MR. PACE: We can confer, it was actually two
24 depositions and we can --

25 THE COURT: I mean, there has to be some end to this

1 party, isn't there?

2 MR. PACE: Yes, Your Honor.

3 THE COURT: I think last time I thought I said to do it
4 by the end of March.

5 MR. ANNESSER: April 7th, Your Honor, they were set,
6 they were noticed, and they did not appear as a result of their
7 moving for a protective order.

8 THE COURT: All right. When do you want to take the
9 depositions by?

10 MR. PACE: We could do one next week and then we'll get
11 both of them done by the end of, you know, within two weeks.

12 THE COURT: All right. The depositions are to occur
13 before May 5th. You can't agree on the date, you're to -- how
14 long are these depositions going to take, a couple hours each?

15 MR. ANNESSER: Your Honor, probably more than a couple
16 hours each. There was virtually no information given in the
17 first round and there were a lot of questions.

18 THE COURT: Okay. What's the name of the two clients,
19 two witnesses?

20 MR. ANNESSER: It is IPH International, B.V.

21 THE COURT: All right. IPH International is to take
22 place on May 4th at 10:00.

23 What's the second one?

24 MR. ANNESSER: Second one is Cherokee.

25 THE COURT: Cherokee is to take place on May 5th at

1 10:00, if you guys can't come to an agreement. Otherwise, you
2 can do it whenever, you know, you want to. I mean, by May 5th.
3 All right. Anything else?

4 MR. PACE: No, Your Honor. I literally just want to
5 make sure that the 4th and the 5th were Thursday and Friday, not
6 a weekend.

7 THE COURT: Yeah, yeah.

8 MR. PACE: Thank you, Your Honor.

9 THE COURT: Maybe that's what I'll start doing is I'll
10 order you guys to do stuff on weekend.

11 MR. PACE: We appreciate it, Your Honor.

12 THE COURT: Here you go. You can have these, I think
13 they're actually both Defendants.

14 MR. PACE: They are.

15 THE COURT: I don't want to have any empty binders in
16 my office, give them to Goodwill or something.

17 All right. Have a good night.

18 MR. ANNESSER: Thank you, Your Honor.

19 (PROCEEDINGS CONCLUDED)

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C E R T I F I C A T E

I certify that the foregoing is a correct transcript from the

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digital audio recording of proceedings in the above-entitled matter.

Date

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