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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

16-21199-CV-ALTONAGA/O'SULLIVAN

ANDREA ROSSI, ET AL,)
)
 PLAINTIFFS,)
)
 VS.)
)
 THOMAS DARDEN, ET AL,)
)
 DEFENDANT.)
 -----)

(TRANSCRIPT BY DIGITAL RECORDING)

TRANSCRIPT OF DISCOVERY HEARING HAD BEFORE THE
HONORABLE JOHN J. O'SULLIVAN, IN MIAMI, MIAMI-DADE COUNTY,
FLORIDA, ON AUGUST 30, 2016, IN THE ABOVE-STYLED MATTER.

APPEARANCES:

FOR THE PLAINTIFFS: JOHN W. ANNESSER, II, ESQ.
BRIAN W. CHAIKEN, ESQ.
D. PORPOISE EVANS, ESQ.
PERLMAN, BAJANDAS, YEVOLI & ALBRIGHT, P.L.
283 CATALONIA AVENUE, SUITE 200
MIAMI, FL 33131 - 305 377-0086

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CERTIFIED COURT REPORTER
9960 SW 4TH STREET
PLANTATION, FLORIDA 33324
954 424-6723

1 APPEARANCES CONTINUED:

2 FOR THE DEFENDANTS: CHRISTOPHER R. J. PACE, ESQ.
CHRISTOPHER M. LOMAX, ESQ.

3 JONES DAY
4 600 BRICKELL AVENUE, SUITE 3300
MIAMI, FL 33131 - 305 714-9730

5 FOR THIRD PARTY DEFENDANTS: FRANCISCO LEON DE LA BARRA, ESQ.

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1 (MIAMI, MIAMI-DADE COUNTY, FLORIDA; AUGUST 30, 2016, IN OPEN
2 COURT.)

3 THE COURT: WE'RE HERE TODAY IN THE CASE OF ANDREA
4 ROSSI AND LEONARDO CORPORATION VERSUS THOMAS DARDEN, INDUSTRIAL
5 HEAT, LLC, IPH INTERNATIONAL B.V., AND CHEROKEE INVESTMENT
6 PARTNERS, LLC.

7 COULD I HAVE APPEARANCES FOR THE PLAINTIFF FIRST?

8 MR. ANNESSER: YOUR HONOR, JOHN ANNESSER, MR. RYAN
9 CHAIKEN AND MR. PORPOISE EVANS ON BEHALF OF LEONARDO
10 CORPORATION AND DR. ROSSI.

11 THE COURT: OKAY. GOOD. THANKS. YOU CAN BE SEATED.

12 MR. ANNESSER: WE ALSO HAVE OUR CLIENT PRESENT AS
13 WELL --

14 THE COURT: OKAY.

15 MR. ANNESSER: -- DR. ROSSI.

16 THE COURT: ALL RIGHT. THANK YOU.

17 AND WHO IS HERE FOR THE DEFENDANTS?

18 MR. PACE: GOOD MORNING, YOUR HONOR. CHRIS PACE AND
19 CHRIS LOMAX FROM JONES DAY ON BEHALF OF ALL OF THE DEFENDANTS.

20 THE COURT: OKAY. GOOD.

21 MR. PACE, I HAVEN'T SEEN YOU IN A LONG TIME. YOU WERE
22 AT THE U.S. ATTORNEY'S OFFICE YEARS AGO, RIGHT?

23 MR. PACE: I WAS. I HAD FAR MORE BLOND HAIR BACK
24 THEN.

25 THE COURT: WELL, I HAD SOME HAIR BACK THEN. I THINK

1 YOU WERE KNOWN BY REBEL PACE BACK THEN. THAT'S PROBABLY NOT A
2 GOOD NAME ANYMORE.

3 MR. LEON DE LA BARRA: GOOD MORNING, YOUR HONOR.
4 FRANCISCO LEON ON BEHALF OF HENRY JOHNSON AND J.M. PRODUCTS.

5 THE COURT: OKAY. HENRY JOHNSON, ARE THEY ON A
6 COUNTER-CLAIM?

7 MR. LEON DE LA BARRA: YEAH.

8 THE COURT: OKAY. I'M SORRY. TELL ME YOUR NAME
9 AGAIN?

10 MR. LEON DE LA BARRA: FRANCISCO LEON.

11 THE COURT: OKAY. AND TELL ME YOUR CLIENTS AGAIN?

12 MR. LEON DE LA BARRA: HENRY JOHNSON AND J.M.
13 PRODUCTS.

14 THE COURT: OKAY. GOOD.

15 ANYBODY ELSE HERE?

16 (NO RESPONSE)

17 THE COURT: NO? OKAY. GOOD.

18 ALL RIGHT. I THINK THE PLAINTIFFS SET THIS DOWN IN
19 REGARDS TO OBJECTIONS TO THIRD PARTY SUBPOENAS?

20 MR. ANNESSER: YES, YOUR HONOR.

21 THE COURT: ALL RIGHT. MAYBE GIVE ME A LITTLE
22 SUMMARY. I MEAN, I DID GO THROUGH THE CASE A LITTLE BIT BUT
23 MAYBE YOU CAN GIVE ME A LITTLE SUMMARY ON WHAT'S GOING ON.

24 MR. ANNESSER: YES, YOUR HONOR.

25 MY CLIENTS FILED A COMPLAINT IN THIS ACTION FOR BREACH

1 OF CONTRACT ARISING OUT OF A LICENSE AGREEMENTS THAT WAS
2 ENTERED INTO BETWEEN THE PLAINTIFFS AND TWO OF THE
3 DEFENDANTS -- ACTUALLY ONE OF THE DEFENDANTS WHICH LATER
4 ASSIGNED TO A SECOND DEFENDANT.

5 THE COURT: WHAT IS THE LOW ENERGY NUCLEAR REACTOR?

6 MR. ANNESSER: A LOW ENERGY NUCLEAR REACTOR IS A
7 DEVICE THAT IS CAPABLE OF PRODUCING ENERGY IN EXCESS OF THE
8 AMOUNT OF ENERGY THAT COMES INTO THE DEVICE.

9 THE ISSUE IN THIS CASE PERTAINS TO A DEVICE GENERATED
10 OR, I'M SORRY, CREATED BY MY CLIENT CALLED THE E-CAT, WHICH IS
11 PERCEIVED TO BE A LOW ENERGY NUCLEAR REACTOR. AGAIN, IT'S
12 IN -- IT'S THE SUBJECT OF A LICENSE AGREEMENT WITH INDUSTRIAL
13 HEAT WHICH IS ONE OF THE DEFENDANTS WHICH LATER ASSIGNED TO IPH
14 INTERNATIONAL, A SECOND DEFENDANT.

15 THE COURT: OKAY.

16 MR. ANNESSER: SO THE CAUSE OF ACTION THAT HAS
17 SURVIVED A MOTION TO DISMISS IN THIS CASE FROM THE PLAINTIFFS
18 WAS A BREACH OF CONTRACT CLAIM AND UNJUST ENRICHMENT CLAIM,
19 FRAUD IN THE INDUCEMENT CLAIM, AS WELL AS A MISAPPROPRIATION OF
20 TRADE SECRETES.

21 THE DEFENDANTS IN THIS CASE HAVE FILED A
22 COUNTER-CLAIM, SPECIFICALLY DEFENDANTS INTERNATIONAL -- OH. I'M
23 SORRY. IPH INTERNATIONAL B.V. AND INDUSTRIAL HEAT, LLC. THEIR
24 BREACH OF -- I'M SORRY. THEY FILED CLAIMS FOR BREACH OF
25 CONTRACT, A SECOND CLAIM FOR BREACH OF CONTRACTS WHICH

1 ENCOMPASSES NUMEROUS VARIOUS BREACHES THAT ARE ALLEGED
2 INCLUDING ONE IN PARTICULAR CLAIMING THAT WE HAVE SOMEHOW
3 BREACHED THE CONTRACT UPON INFORMATION AND BELIEF THAT MY
4 CLIENTS FAILED TO PAY THE APPROPRIATE TAXES ON THE INCOME THAT
5 THEY HAVE RECEIVED. THAT PARTICULAR CLAIM IS LIKELY GOING TO
6 BE THE SUBJECT OF A MOTION FOR SANCTIONS. WE FEEL THAT IT IS
7 FRIVOLOUS.

8 NOTWITHSTANDING, THE THIRD CLAIM IS FRAUD IN THE
9 INDUCEMENT. THE FOURTH CLAIM WAS A CLAIM UNDER THE FLORIDA
10 DECEPTIVE AND UNFAIR TRADE PRACTICES ACT. AND LASTLY A CLAIM
11 THAT DOES NOT PERTAIN TO MY CLIENTS, BUT A -- AN ADDITIONAL
12 CLAIM OF BREACH OF CONTRACT AGAINST A THIRD-PARTY DEFENDANT.

13 THE COURT: AND WHAT IS THE THIRD PARTY'S -- WHAT WAS
14 THEIR PARTICIPATION IN THIS? HOW DID THEY GET INTO THIS CASE?

15 MR. ANNESSER: THE -- OKAY. THERE ARE MULTIPLE
16 THIRD-PARTY DEFENDANTS. MR. LEON DE LA BARRA REPRESENTS SOME
17 OF THEM. J.M. PRODUCTS WAS A COMPANY THAT IN ESSENCE HAD THE
18 LENER REACTOR OR THE E-CAT PLANT OPERATING AT ITS FACILITY. IT
19 WAS A CUSTOMER OF INDUSTRIAL HEAT.

20 MR. HENRY JOHNSON IS THE PRINCIPAL OF THAT COMPANY.
21 HE IS, I BELIEVE, IF I'M NOT MISTAKEN THE PRESIDENT AND CEO.
22 THERE IS ANOTHER THIRD-PARTY DEFENDANT FABIO -- I'M SORRY.
23 FULVIO FABIANI WHO IS A INDEPENDENT CONTRACTOR OR A CONSULTANT
24 HIRED BY INDUSTRIAL HEAT THAT THEY HAVE ELECTED TO SUE. HIS
25 COMPANY, USQ&L, WHICH IS UNITED STATES QUANTUM LEAP, IS ALSO

1 NAMED. THAT AGAIN IS WHAT THE LAST COUNT IN THE COMPLAINTS
2 PERTAINS TO SOLELY TO THAT AGREEMENTS BETWEEN USQ&L,
3 MR. FABIANI AND THE DEFENDANTS IN THIS CASE.

4 AND LASTLY, THERE ARE TWO OTHER THIRD-PARTY
5 DEFENDANTS. ONE IS AN EXPERT THAT WAS HIRED TO DO AN
6 INDEPENDENT EVALUATION. HE WAS SELECTED BY BOTH PARTIES. HE
7 WAS ENGAGED TO TEST THIS E-CAT DEVICE AND TO MAKE SURE THAT IT
8 COULD MEET CONCERN PERFORMANCE CRITERIA. HE DID THAT.

9 HE HAS NOW BEEN NAMED AS A DEFENDANT ON THE CLAIMS
10 ALLEGING A VIOLATION OF FLORIDA DECEPTIVE AND UNFAIR TRADE
11 PRACTICES ACT, AND I DO NOT BELIEVE HE WAS NAMED AS PART OF THE
12 FRAUD IN THE INDUCEMENT BUT HE MAY HAVE BEEN.

13 THE COURT: ALL RIGHT.

14 MR. ANNESSER: AND THEN LASTLY A GENTLEMAN BY THE NAME
15 OF JAMES BASS WHO WAS A -- AN EMPLOYEE OR AGENT OF J.M.
16 PRODUCTS. AND MR. BASS, I DON'T BELIEVE HE HAS BEEN SERVED
17 YET. AND THE DEFENDANTS HAVE ALLEGED THAT HE IS FICTITIOUS AND
18 THAT HE DOES NOT EXIST, ALTHOUGH THEY HAVE NAMED HIM IN THE
19 CASE AND THEY HAVE SUED HIM UNDER THE FLORIDA DECEPTIVE AND
20 UNFAIR TRADE PRACTICES ACT AS WELL.

21 THE COURT: ALL RIGHT. AND SO WHAT'S THE PROBLEM?

22 MR. ANNESSER: YOUR HONOR, THERE WERE FIVE SUBPOENAS
23 ISSUED AND WE REALLY TAKE ISSUE WITH THREE OF THEM FROM MY
24 PERSPECTIVE.

25 THE COURT: OKAY.

1 MR. ANNESSER: THE FIRST TWO SUBPOENAS, ONE OF WHICH
2 WAS TO TD BANK, THE OTHER WHICH WAS DIRECTLY TO BANK UNITED ARE
3 EXTREMELY BROAD.

4 THEY REQUEST ANY AND ALL DOCUMENTS OR ESI RELATING TO
5 A SPECIFIC ACCOUNT NUMBER OR HELD IN THE NAME OF LEONARDO
6 CORPORATION OR ANDREA ROSSI. IT DOES NOT LIMIT IT WHATSOEVER
7 AS TO SPECIFIC DOCUMENTS THAT THEY NEED.

8 THE FINANCIAL INFORMATION FROM OUR COMPANY IS NOT AT
9 ISSUE IN THIS CASE. IN FACT, THE FINANCIAL INFORMATION LIKELY
10 CONTAINS NAMES OF CUSTOMERS THAT WE HAVE RECEIVED MONEY FROM,
11 NAMES OF VENDORS THAT WE HAVE PAID. AND INDUSTRIAL HEAT AND
12 IPH INTERNATIONAL, THE DEFENDANTS, HAVE PUT THEMSELVES IN A
13 POSITION OF BEING, IN ESSENCE, A COMPETITOR OF MY CLIENT,
14 DR. ROSSI AND LEONARDO CORPORATION.

15 SO DISCLOSURE OF THAT INFORMATION WOULD SERVE NO
16 RELEVANT PURPOSE IN THIS CASE, COULD LEAD TO NO DISCOVERABLE OR
17 ADMISSIBLE EVIDENCE IN THIS CASE. AND IT'S OVERLY BROAD TO THE
18 EXTENT THAT IT REQUESTS THE ENTIRE UNIVERSE OF DOCUMENTS THAT
19 THESE BANKS MAY HAVE ON MY CLIENTS AND THEIR BANK ACCOUNTS.

20 THE COURT: WELL, THE ACCOUNT THEY NAMED, IS THAT --
21 WHOSE ACCOUNT IS THAT?

22 MR. ANNESSER: I BELIEVE THAT'S OWNED BY LEONARDO
23 CORPORATION.

24 THE COURT: OKAY.

25 MR. ANNESSER: AND IN FLORIDA THERE IS A

1 CONFIDENTIALITY THAT ATTACHES TO BANK ACCOUNTS. SPECIFICALLY
2 THE FLORIDA CONSTITUTION GIVES ITS RESIDENTS THE RIGHT TO
3 PRIVACY, AND I QUOTE, PROTECTS THE INDIVIDUAL'S EXPECTATION OF
4 PRIVACY IN FINANCIAL

5 RECORDS. AND TO THAT I CITE TO --

6 THE COURT: DOES THAT APPLY IN A FEDERAL LITIGATION
7 DISCOVERY?

8 MR. ANNESSER: YES, YOUR HONOR. THERE IS A RIGHT TO
9 PROTECTION OF DOCUMENTS. THERE IS AN EXCEPTION TO THAT RIGHT
10 OF PROTECTION, AND THAT IS WHERE THE DOCUMENTS THAT ARE BEING
11 SOUGHT SPECIFICALLY ARE AT ISSUE, EITHER THE STATUS OF THE
12 DOCUMENTS OR THE STATE US OF THE FINANCIAL STANDING OF THE
13 CLIENTS. BUT THAT'S NOT THE CASE HERE.

14 THE COURT: BUT THAT'S THE CASE FOR ANY -- IN OTHER
15 WORDS, I DON'T THINK I HAVE TO LOOK AT THE FLORIDA
16 CONSTITUTION. I HAVE TO LOOK AT RULE 26 AND DETERMINE WHETHER
17 OR NOT THEY ARE RELEVANT. IF THEY'RE RELEVANT THEN IT DOESN'T
18 MATTER THAT THE STATE SAYS THAT THEY HAVE SOME KIND OF SUPERIOR
19 PROTECTION, DOES IT?

20 MR. ANNESSER: THAT'S CORRECT, YOUR HONOR.

21 THE COURT: OKAY.

22 MR. ANNESSER: IF THEY'RE NOT RELEVANT. BUT EVEN IF
23 THEY ARE RELEVANT TO THE EXTENT THAT IT COULD RELEASE
24 INFORMATION THAT WOULD BE HARMFUL TO HAVE RELEASED TO A
25 COMPETITOR --

1 THE COURT: YEAH.

2 MR. ANNESSER: -- WE HAVE TO GO A STEP FURTHER. IT'S
3 NOT JUST THAT THE DOCUMENTS THEMSELVES --

4 THE COURT: WELL, HAVE YOU ENTERED A PROTECTIVE ORDER?
5 I MEAN, HAVE YOU ENTERED INTO AN AGREEMENT IN REGARDS TO
6 DISCOVERY IN THIS MATTER TO PROTECT, YOU KNOW, TRADE SECRETES
7 OR CONFIDENTIAL INFORMATION?

8 MR. ANNESSER: WE HAVE NOT EXECUTED ONE YET. WE HAVE
9 BEEN -- ONE HAS GONE BACK AND FORTH AND WE ANTICIPATE HAVING IT
10 EXECUTED SOON.

11 THE COURT: AND WOULD THAT PROTECT WHATEVER PROBLEMS
12 YOU HAVE REGARDING THE --

13 MR. ANNESSER: NO, YOUR HONOR. SPECIFICALLY BECAUSE
14 THE STATUS OF THE TWO PARTIES AT THIS POINT IN TIME IS THEY ARE
15 COMPETITORS IN BUSINESS. JUST SIMPLY KNOWING WHO THE SUPPLIERS
16 AND CUSTOMERS ARE COULD CAUSE SUBSTANTIAL FINANCIAL HARM TO MY
17 CLIENTS.

18 THEY'RE IN ESSENCE ASKING FOR INFORMATION THAT
19 COULDN'T POSSIBLY BE RELEVANT FOR THE SOLE PURPOSE OF KNOWING
20 WHO WE'RE BUYING FROM, WHO WE'RE SELLING FROM, WHERE MONEY WAS
21 TRANSFERRED AND THAT'S NOT AT ISSUE IN THIS CASE. THERE IS --
22 THERE IS NO ALLEGATIONS THAT GO TO THE FINANCIAL STANDING OF MY
23 CLIENT AT ANY GIVEN TIME.

24 THE COURT: AND THE DAMAGES AREN'T RELATED TO THAT?

25 MR. ANNESSER: THE ONLY THING THAT SEEKS DAMAGES

1 RELATING TO ANYTHING FINANCIAL IS THEIR CLAIM THAT WE FAILED TO
2 PAY THE APPROPRIATE TAXES, WHICH AGAIN WE BELIEVE IS FRIVOLOUS.
3 WE HAVE NOT RESPONDED TO THE COMPLAINT YET, ALTHOUGH THAT WILL
4 BE DONE ON THURSDAY AND WE EXPECT TO REQUEST THE COURT TO
5 DISMISS THAT AS EXPECT OF THE BREACH OF CONTRACT CLAIM.

6 SO IF NOTHING ELSE WE WOULD REQUEST THAT THE COURT AT
7 LEAST STAY ITS DECISION AND STAY THE SUBPOENA SUBJECT TO THE
8 COURT'S RULING ON THE MOTION TO DISMISS BECAUSE WE BELIEVE THAT
9 THAT WAS A RED HEARING THROWN IN JUST SIMPLY TO DISCOVER
10 INFORMATION THAT OTHERWISE THEY WOULD NOT BE ENTITLED TO.

11 THE COURT: OKAY. WHAT DOES THE DEFENDANT SAY ABOUT
12 THESE TWO BANK SUBPOENAS?

13 MR. PACE: YOUR HONOR, I THINK THIS IS SIMPLE.

14 AS TO BOTH BANK ACCOUNTS MONEY WAS PAID BY MY CLIENT
15 INTO THESE BANK ACCOUNTS. LEONARDO CORPORATION -- I'M GOING --
16 I APOLOGIZE, YOUR HONOR. LET ME JUST -- I DON'T KNOW WHY I
17 FEEL MORE COMFORTABLE -- THE MICROPHONE IS A LITTLE BETTER.

18 LEONARDO CORPORATION IS ESSENTIALLY A SINGLE PURPOSE
19 ENTITY. THEY OPERATE TO TRY TO DEVELOP -- IN EFFORTS TO
20 DEVELOP AND PRODUCE IN SOME FASHION A PRODUCT, AN INTELLECTUAL
21 PROPERTY ASSOCIATED WITH A PRODUCT. SO -- AND WE HAVE -- MY
22 CLIENTS HAD A LICENSE FOR THAT PRODUCT IN A NUMBER OF
23 TERRITORIES INCLUDING THE UNITED STATES.

24 THE COURT: RIGHT.

25 MR. PACE: SO EVERYTHING THAT COMPANY DID WAS RELATED

1 TO THIS -- TO THIS AGREEMENT. WE MADE OUR PAYMENTS INTO
2 THAT -- INTO THESE ACCOUNTS. THERE IS A NUMBER OF INVOICES
3 THEY SENT US. WE MADE PAYMENTS INCLUDING TEN MILLION DOLLARS
4 WAS SENT TO THE TD MERITRADE ACCOUNT. THERE WAS THE INITIAL
5 BIG PAYMENT WHICH WE ARE CHALLENGING NOW.

6 WE HAVE A -- I THINK IT'S QUITE LOGICAL --

7 THE COURT: LET ME ASK YOU.

8 WHAT DIFFERENCE DOES IT MAKE WHAT THEY DID WITH THE
9 MONEY? IF THEY SENT IT TO A CHARITY, OR THEY SENT IT TO THEIR
10 WIFE, OR THEY USED IT TO HAVE A PARTY, OR THEY BOUGHT MORE
11 EQUIPMENT WITH IT. WHAT DIFFERENCE DOES IT MAKE?

12 MR. PACE: WELL, THERE ARE SEVERAL RELEVANCES TO IT.
13 SO LET ME -- IF I CAN KIND OF WALK THROUGH IT.

14 ONE RELEVANCE OF THE USE OF THE MONEY ENDS UP BEING IF
15 IT WENT TO ANY OF THE OTHER DEFENDANTS WHO WE HAVE PLED THAT
16 THERE HAS BEEN A SCHEME TO DEFRAUD OUR CLIENTS OUT OF -- OUT
17 OF -- YOU KNOW, IN ATTEMPT TO KIND OF MAKE IT APPEAR THAT
18 THEY'RE COMPLYING WITH AN AGREEMENT WHEN THEY'RE NOT COMPLYING
19 WITH THE AGREEMENT. THAT'S ONE.

20 TWO, WE HAVE BEEN TRYING TO IDENTIFY --

21 THE COURT: YOUR TALKING ABOUT THE THIRD-PARTY
22 DEFENDANTS I ASSUME, RIGHT?

23 MR. PACE: NO. LEONARDO ROSS -- OH. YES. PAYMENTS?
24 YES. I APOLOGIZE.

25 THE COURT: OKAY.

1 MR. PACE: PAYMENTS FROM LEONARDO AND ROSSI TO THE
2 THIRD-PARTY DEFENDANTS.

3 AND PART OF THE PROBLEM IS, I'LL TAKE HENRY JOHNSON
4 JUST AS AN EXAMPLE -- NOT TRYING TO SINGLE HIM OUT BUT IT'S HE
5 EASIEST EXAMPLE.

6 HE HAS A NUMBER OF OTHER COMPANIES. MOST OF THESE
7 DEFENDANTS HAVE A NUMBER OF OTHER COMPANIES. SO THE WHOLE IDEA
8 OF SAYING, GIVE US A LAUNDRY LIST OF TO WHOM THESE PAYMENTS MAY
9 HAVE BEEN MADE IS NOT QUITE SO SIMPLE. IT'S NOT SIMPLY, YOU
10 LOOK AT THE CAPTION AND SAY, IS THERE ANY PAYMENT MADE TO
11 THESE -- YOU KNOW, THESE IDENTIFIED THIRD PARTIES. YOU ALSO
12 HAVE TO FIGURE OUT ALL OF THEIR COMPANIES AND CORPORATIONS.

13 SECOND. TO THE EXTENT ONE OF THE ISSUES IN THIS CASE
14 THERE IS A TESTING PERIOD THAT THE PLAINTIFFS ARE CLAIMING THAT
15 THEY PERFORMED DURING A PERIOD THAT HAS TO -- THIS PRODUCT HAD
16 TO RUN FOR 350 OUT OF 40 DAYS. THEY RAN A TEST FOR 357 OR
17 EIGHT DAYS AND SAID, HEY, THIS THING FUNCTIONED PERFECTLY FOR
18 350 OF THOSE DAYS.

19 THE COURT: ALL RIGHT.

20 MR. PACE: WE'RE LOOKING FOR THE SERVICE PROVIDERS.
21 AGAIN, THIS BANK ACCOUNT WILL SHOW US WHO MONEY WAS PAID TO
22 BECAUSE WE HAVE INFORMATION, AND WE'VE PLED IT IN THE
23 COMPLAINT, THAT THERE WAS -- PLED IN THE COUNTER-CLAIMS AND
24 THIRD-PARTY CLAIMS THAT THEIR DAYS -- THAT THE SYSTEM WASN'T
25 OPERATING WHEN THEY CLAIM IT WAS OPERATING. THAT'S DIRECTLY

1 RELEVANT TO WHAT'S GOING ON IN THIS CASE.

2 SO, FOR EXAMPLE, IF WE WERE INVOICED BY THE
3 PLAINTIFFS, FOR EXAMPLE, FOR ELECTRICAL WORK THAT WAS DONE OVER
4 A FIVE DAY TIME PERIOD, WE DIDN'T GET THE UNDERLYING BACKUP, WE
5 JUST GOT THE INVOICE. OBVIOUSLY WE WANT TO SEE WHERE THE
6 PAYMENT WENT FROM THE BANK ACCOUNT AND BE ABLE TO SAY, HERE IS
7 THE SERVICE PROVIDERS.

8 WE KNOW OF ONE SERVICE PROVIDER. WE'VE ALREADY
9 SUBPOENAED THEM. THEY'RE NOT EVEN CHALLENGING. THAT WAS A
10 WELDING COMPANY THAT WE HAPPENED TO, YOU KNOW, BE ABLE TO -- WE
11 GOT THEIR NAME FROM SOMEBODY ELSE.

12 THE COURT: OKAY.

13 MR. PACE: WE DON'T KNOW THE OTHER SERVICE PROVIDERS.
14 THOSE PAYMENTS WOULD COME OUT OF THAT -- OUT OF THESE TWO BANK
15 ACCOUNTS. AND IT DOES -- THERE ARE ALSO ALLEGATIONS OF -- YOU
16 KNOW, WHEN THEY TALK ABOUT -- LET ME BREAK THE CUSTOMER ISSUE
17 INTO TWO.

18 ONE IS, IF THERE WERE OTHER CUSTOMERS HE WAS SELLING
19 TO, AS WE'VE PLED IN THE COUNTER-CLAIMS AND THIRD-PARTY CLAIMS,
20 THAT IN AND OF ITSELF IS ACTUALLY A -- WOULD BE A BREACH OF THE
21 LICENSE AGREEMENT.

22 BUT PUTTING THAT EVENING ASIDE. THE FACT OF THE
23 MATTER IS A CONFIDENTIALITY ORDER CAN COVER ANY OF THAT
24 INFORMATION AND THAT SHOULDN'T BE OF A GREAT CONCERN.

25 BUT THERE ACTUALLY IS LITERALLY A PROVISION IN THERE

1 BECAUSE THE LICENSE AGREEMENT ALSO HAS ESSENTIALLY A RIGHT OF
2 FIRST OFFER THAT IF YOU ARE GOING TO ALSO -- EVEN IF YOU'RE
3 GOING TO SELL TO OTHER TERRITORIES THERE ARE EXCEPTIONS TO IT.
4 I DON'T WANTED TO GET, YOU KNOW, DEEP INTO IT --

5 THE COURT: RIGHT.

6 MR. PACE: -- BUT EVEN EVIDENCE IN THAT AREA WOULD BE
7 RELEVANT. SO WE THINK OVER ALL IT MAKES A LOT OF SENSE FOR US
8 TO GET THESE RECORDS.

9 AND AGAIN, ALL OF -- IT'S THE RECORDS. IT DOES NOT,
10 JUST TO CLARIFY SOMETHING HERE BECAUSE OF A STATEMENT THAT WAS
11 MADE. IT IS FOCUSED ON THESE TWO BANK ACCOUNTS. IT DOESN'T
12 KIND OF SAY GO DIG AROUND AND FIND ANY OTHER ACCOUNT THAT YOU
13 HAVE. THE REQUEST IS THE DOCUMENTS OF ESI RELATING TO THIS
14 BANK ACCOUNT OWNED OR HELD IN THE NAME OF EITHER LEONARDO
15 CORPORATION OR --

16 THE COURT: YOU ONLY WANT THE PARTICULAR BANK ACCOUNTS
17 THAT YOU NAMED.

18 MR. PACE: YES. THE ONLY THING IS WE ASKED TO BE --
19 WHAT WE ASKED TO CLARIFY HERE IS THAT IF THERE ARE
20 COMMUNICATIONS ABOUT THE ACCOUNT THEN WE SHOULD GET THOSE
21 COMMUNICATIONS.

22 IN OTHER WORDS, IF THEY'RE COMMUNICATING -- THERE IS
23 NOT JUST A BANK ACCOUNT STATEMENT, RIGHT? IF THEY HAVE
24 COMMUNICATIONS WITH THESE DIFFERENT PARTIES --

25 THE COURT: RIGHT.

1 MR. PACE: -- ABOUT THE BANK ACCOUNTS THAT WE THINK WE
2 ARE ENTITLED TO THAT AS WELL.

3 AND SOMETIMES OBVIOUSLY THE COMMUNICATION CAN BE --
4 YOU KNOW, IF IT WERE UNCLEAR. IN OTHER WORDS, IF SOMEBODY
5 WROTE A LETTER SAYING, I WANT TO WITHDRAW ALL OF MY MONEY FROM
6 YOUR FINANCIAL INSTITUTION, THAT MAY NOT REFERENCE A PARTICULAR
7 BANK ACCOUNT BUT IT COVERS THAT BANK ACCOUNT.

8 THE COURT: OKAY. WHAT DO YOU SAY ABOUT ALL OF THAT?

9 MR. ANNESSER: A BRIEF RESPONSE, YOUR HONOR.

10 SPECIFICALLY THE CONCERNS THAT I HEARD IN WHAT THEY'RE
11 LOOKING FOR IS WHERE WHETHER MONEY WENT TO THE OTHER
12 DEFENDANTS, AND THAT CERTAINLY COULD BE SUBJECT TO AN
13 INTERROGATORY OR OTHER FORM OF DISCOVERY THAT DOES NOT INCLUDE
14 DISCLOSING OUR CONFIDENTIAL BUSINESS INFORMATION IN ITS
15 ENTIRETY.

16 NOW, MR. PACE STATED THAT THEY'VE ONLY REQUESTED FROM
17 ONE ACCOUNT. THE LANGUAGE OF THE SUBPOENA THAT WAS SERVED UPON
18 THESE DIFFERENT ENTITIES SPECIFICALLY SAYS --

19 THE COURT: WELL, HE'S SAYING THAT HE'S LIMITING IT TO
20 THE ACCOUNTS. I DON'T CARE WHAT IT SAYS. HE'S SAYING HE'S
21 LIMITING IT TO THE TWO ACCOUNTS OTHER THAN CORRESPONDENCE
22 BETWEEN THE BANK AND THOSE FOLKS.

23 MR. ANNESSER: YES, YOUR HONOR.

24 NOW, THE SECOND ISSUE THAT HE RAISED WAS SERVICE
25 PROVIDERS.

1 THE COURT: RIGHT.

2 MR. ANNESSER: THEY HAVEN'T REQUESTED INFORMATION.
3 AND UNFORTUNATELY WE ARE HERE BEFORE THE COURT -- I CONTACTED
4 MR. PACE BEFORE WE SET THIS UP AND I SAID, IS THERE A WAY WE
5 CAN LIMIT THIS, AND WE COULDN'T. AT THAT POINT IN TIME HE
6 REFUSED TO LIMIT TO ANY DEGREE.

7 I THINK A LIMITATION THAT WOULD LIMIT IT TO, AGAIN IF
8 THERE ARE ANY PAYMENTS THEN THEY CAN REQUEST THAT OF US AND WE
9 WOULD CERTAINLY RESPOND TO OTHER DEFENDANTS IN THIS MATTER. I
10 DON'T DISPUTE THAT THEY WOULD BE ENTITLED TO THAT INFORMATION.

11 THE COURT: YES.

12 MR. ANNESSER: BUT I DON'T THINK WE HAVE TO GIVE THEM
13 THE ENTIRE UNIVERSE OF INFORMATION REGARDING MY CLIENT'S
14 BUSINESS, THEIR FINANCIAL DEALINGS, ET CETERA.

15 THE COURT: WHAT ABOUT OTHER CUSTOMERS HE WAS SELLING
16 TO?

17 MR. ANNESSER: YOUR HONOR, THEY HAVE A LIMITED LICENSE
18 AS TO CERTAIN TERRITORIES. WE HAVE OTHER LICENSEES, THOSE ARE
19 RECOGNIZED IN THE CONTRACT, THE CONTRACT THAT'S ATTACHED TO THE
20 COMPLAINT, THE LICENSE AGREEMENT AND IT'S REFERENCED IN THE
21 COUNTERCLAIM.

22 THERE IS NO QUESTION THAT THERE WERE OTHER CUSTOMERS,
23 IF YOU WILL, OR OTHER LICENSEES THAT ARE OUT THERE. THIS IS A
24 LIMITED LICENSE SPECIFICALLY TO A VERY WELL DEFINED GROUP OF
25 TERRITORIES.

1 THE COURT: WHICH IS -- WHAT ARE THE TERRITORIES?

2 MR. ANNESSER: THE TERRITORIES ARE NORTH AMERICA,
3 SOUTH AMERICA, RUSSIA, THE UNITED ARAB EMIRATES --

4 (INAUDIBLE)

5 MR. ANNESSER: -- AND CHINA.

6 THANK YOU.

7 THE COURT: SO WHAT DOES THAT LEAVE, EUROPE AND
8 AUSTRALIA, OR SOMETHING?

9 MR. ANNESSER: WE HAVE ALL OF EUROPE. WE HAVE
10 AFRICA --

11 THE COURT: ALL RIGHT.

12 MR. ANNESSER: -- WE HAVE AUSTRALIA -- AND THE REST OF
13 ASIA.

14 THE COURT: ALL RIGHT.

15 MR. PACE, I THINK YOU'RE USED TO BEING -- YOU KNOW,
16 IT'S BEEN SOME TIME I THINK BUT YOU'RE USED TO BEING A
17 PROSECUTOR WHERE YOU JUST GO AND GET ALL THE RECORDS AND THEN
18 HOPE TO FIND STUFF. BUT THAT'S NOT THE WAY IT WORKS IN CIVIL
19 DISCOVERY.

20 SO I BELIEVE -- I AGREE WITH THE PLAINTIFFS ASSERTION
21 THAT IF YOU WANT TO KNOW THIS STUFF -- I MEAN, I'LL TELL YOU
22 HOW IT WORKS.

23 HE SENT YOU A REQUEST, ASKED FOR THIRD-PARTY -- YOU
24 KNOW, PAYMENTS TO THIRD-PARTY DEFENDANTS. HE ASKED FOR THE
25 SERVICE PROVIDERS, YOU KNOW, YOU MADE PAYMENTS TO OR WHATEVER

1 REGARDING THE CONTRACT. SO I THINK THAT'S HOW YOU GET STUFF IN
2 DISCOVERY.

3 BUT GENERALLY HERE IS WHAT HAPPENS. IF HE -- IF HE IS
4 ABLE TO COME BACK TO ME AND SAY, LOOK. WE ASKED HIM FOR THE
5 THIRD-PARTY PROVIDERS AND THEY LEFT OUT, YOU KNOW, 16 PAYMENTS,
6 OR A PAYMENT, OR TWO PAYMENTS, OR FIVE PAYMENTS THEN MAYBE HE
7 HAS THE ABILITY TO GO LOOK AT THE BANK ACCOUNTS BECAUSE THAT
8 MEANS THAT YOU'RE NOT DOING YOUR JOB IN PROVIDING THE PROPER
9 DISCOVERY.

10 SO IT'S JUST KIND OF A WARNING THAT YOU SHOULD BE
11 AWARE OF THAT IF YOU -- IF THAT'S WHAT YOU WANT TO DO IS
12 ALERTING HIM TO ASKING ABOUT PAYMENTS TO PARTICULAR INDIVIDUALS
13 YOU'VE GOT TO MAKE SURE THAT YOU COMPLY FULLY.

14 MR. ANNESSER: I AGREE, YOUR HONOR, A HUNDRED PERCENT.

15 THE COURT: OKAY.

16 WHAT DO YOU SAY, MR. PACE? DO YOU HAVE SOMETHING YOU
17 WANT TO ADD TO THAT?

18 MR. PACE: I WOULD, YOUR HONOR, ONLY IN THE POINT OF
19 HOW EXACTLY AM I SUPPOSE TO KNOW THAT THERE THEY ARE EXCLUDED
20 PARTIES?

21 IN OTHER WORDS, IF I HAVE THE BANK RECORDS I CAN SAY,
22 HOW DID YOU NOT GIVE ME THE PAYMENTS TO X?

23 THE COURT: I AGREE WITH YOU. BUT YOU DON'T GET BANK
24 RECORDS IN CIVIL LITIGATION GENERALLY, YOU KNOW, EXCEPT FOR
25 THOSE RECORDS THAT ARE RELEVANT TO THE ISSUE AT HAND.

1 AND, YOU KNOW, YOU'VE GOT TO -- HOW DOES THAT HAPPEN?
2 IT HAPPENS BY -- THROUGH THE DISCOVERY PROCESS. IF THEY'RE NOT
3 BEING STRAIGHT WITH YOU THEN YOU'RE GOING TO GET THE BANK
4 RECORDS. BUT YOU'VE GOT TO COME IN HERE AND SHOW ME SOME PROOF
5 THAT THEY'RE NOT BEING STRAIGHT WITH YOU AND WHY YOU NEED SOME
6 OR ALL OF THOSE BANK RECORDS.

7 BUT YOU JUST DON'T GET TO LOOK AT PEOPLES' BANK
8 RECORDS BECAUSE THERE MIGHT BE STUFF IN THERE THAT THEY'RE NOT
9 TELLING YOU ABOUT, AT LEAST IN HERE THAT'S THE WAY I LOOK AT
10 IT.

11 IF YOU'RE ABLE TO COME IN AND SHOW ME SOME EVIDENCE
12 THAT THEY'RE NOT BEING -- NOT PROVIDING PROPER DISCOVERY THEN
13 THE DISCOVERY WIDENS BECAUSE YOU CAN'T TRUST THE OTHER SIDE. I
14 MEAN, DISCOVERY JUST -- THAT'S THE WAY IT IS. YOU GOT TO --
15 THE LAWYERS HAVE TO LOOK, AND THEY LOOK AT THE STUFF.

16 JUST LIKE YOU CAN'T GET EVERY CORPORATE RECORD THEY
17 EVER HAD SO YOU CAN MAKE SURE THAT THEY PROVIDED ALL THE
18 CORPORATE RECORDS. YOU GET THE CORPORATE RECORDS THAT RELATE
19 TO THE CLAIMS IN THE CASE.

20 SO THE -- THE REQUEST TO QUASH I GUESS THE SUBPOENA --
21 MR. ANNESSER: YES, YOUR HONOR.

22 THE COURT: -- IS GRANTED. AND MAYBE -- I DON'T KNOW
23 WHAT KIND OF RECORD YOU HAVE. IF YOU DON'T HAVE THE RECORDS,
24 YOU THEN ARE GOING TO HAVE THE RESPONSIBILITY OF GOING TO THE
25 BANK AND GETTING THEM.

1 MR. ANNESSER: YES, YOUR HONOR.

2 THE COURT: IN OTHER WORDS, IF THEY -- CHECKS OR
3 WHATEVER ARE NECESSARY. OKAY?

4 MR. ANNESSER: YES, YOUR HONOR.

5 THE COURT: OKAY.

6 WAS THIS A THIRD SUBPOENA?

7 MR. ANNESSER: THERE IS A THIRD SUBPOENA, YOUR HONOR,
8 THAT IS SENT TO A MR. JAMES TRAVIS WHO WAS THE ACCOUNTANT FOR
9 LEONARDO CORPORATION AND DR. ROSSI FOR A NUMBER OF YEARS. HE
10 IS LOCATED IN NEW HAMPSHIRE.

11 SPECIFICALLY FLORIDA STATUTE 90.50551C DECLARES THAT
12 THE RECORDS PROVIDED TO AN ACCOUNT ARE CONFIDENTIAL. THOSE ARE
13 NOT RECORDS THAT ARE INTENDED TO BE DISCLOSED --

14 THE COURT: RECORDS PROVIDED? I DON'T KNOW IF I AGREE
15 WITH THAT.

16 IN OTHER WORDS, IF YOU GIVE YOUR ACCOUNTANT BANK
17 RECORDS THAT DOESN'T -- THERE IS A PRIVILEGE WITHIN FLORIDA
18 LAW. BUT THAT DOESN'T -- THAT DOES NOT -- I BELIEVE THERE IS A
19 LONG STRING OF CASES THAT RELATE TO, FOR INSTANCE, ATTORNEYS.
20 I DON'T THINK ACCOUNTANTS WOULD BE TREATED DIFFERENTLY. THAT
21 IF YOU GET A RECORD -- IN OTHER WORDS, IF YOUR CLIENT GIVES THE
22 BANK RECORDS TO THE ACCOUNTANT, THE BANK RECORD DOESN'T BECOME
23 DISCOVERABLE? THAT PROTECTS IT FROM BEING DISCOVERED?

24 MR. ANNESSER: NO, YOUR HONOR.

25 I'M NOT ARGUING THAT SOMEHOW THE ACCOUNTANT PRIVILEGE

1 SOMEHOW DRIFTS DOWN TO ANYTHING THAT YOU PROVIDE TO HIM. THAT
2 IS NOT WHAT WE'RE ARGUING.

3 BUT IT'S A COMMUNICATION TO THE ACCOUNTANT. WHETHER
4 THAT COMMUNICATION ATTACHES A DOCUMENT SUCH AS A BANK RECORD OR
5 OTHERWISE. THEY MAY BE ABLE TO GET IT FROM SOME OTHER SOURCE.
6 THEY CANNOT GET IT FROM THE ACCOUNTANT.

7 SPECIFICALLY THE STATUTE READS, A COMMUNICATION
8 BETWEEN AN ACCOUNTANT AND THE ACCOUNTANT'S CLIENT IS
9 CONFIDENTIAL --

10 THE COURT: YEAH. I KNOW --

11 MR. ANNESSER: -- IF IT IS NOT INTENDED TO BE
12 DISCLOSED TO A THIRD PERSON.

13 THE COURT: OKAY.

14 MR. ANNESSER: IT FURTHER -- THE STATUTE GOES FURTHER
15 AND DOESN'T LEAVE IT AT JUST CONFIDENTIAL. IT SAYS THAT THERE
16 IS A PRIVILEGE BETWEEN THE COMMUNICATIONS OF AN ACCOUNTANT AND
17 THE CLIENT.

18 THE COURT: RIGHT.

19 MR. ANNESSER: SPECIFICALLY A CLIENT HAS A PRIVILEGE
20 TO REFUSE TO DISCLOSE AND TO PREVENT ANY OTHER PERSON FROM
21 DISCLOSING THE CONTENTS OF CONFIDENTIAL COMMUNICATIONS WITH AN
22 ACCOUNTANT UNLESS SUCH OTHER PERSONS LEARNED OF THE
23 COMMUNICATIONS BECAUSE THEY WERE MADE IN RENDITION OF
24 ACCOUNTING SERVICE TO THE CLIENT. THIS PRIVILEGE INCLUDES
25 OTHER CONFIDENTIAL INFORMATION OBTAINED BY THE ACCOUNTANT FROM

1 THE CLIENT FOR THE PURPOSE OF RENDERING ACCOUNTING SERVICES.

2 THE COURT: OKAY.

3 MR. ANNESSER: IT IS ALL-ENCOMPASSING. THERE ARE
4 EXCEPTION --

5 THE COURT: -- NOT ALL-ENCOMPASSING ALL I --

6 MR. ANNESSER: WELL --

7 (BOTH TALKING AT THE SAME TIME)

8 THE COURT: AGREE WITH THAT.

9 IN OTHER WORDS, IF YOUR COMPANY GIVES YOUR BOOKS TO
10 THE ACCOUNTANT THEY COULD SUBPOENA THE ACCOUNTANT AND SAY, GIVE
11 ME THE BOOKS.

12 THEY CAN'T SAY, GIVE ME THE COMMUNICATION -- I MEAN,
13 THEY CAN SUBPOENA WHATEVER THEY WANT BUT I DON'T THINK I WOULD
14 BE LIKELY TO GIVE THEM THE COMMUNICATIONS THAT RELATED TO THAT.
15 BUT ANY RECORD THAT STANDS -- ANY RECORD THAT HAS A LIFE OF ITS
16 OWN OUTSIDE OF YOUR ACCOUNTANT, I BELIEVE THAT THEY'RE ENTITLED
17 TO UNLESS YOU CAN CONVINC ME OTHERWISE.

18 SO IF YOU SENT THEM BANK RECORDS, YOU SENT THEM THE
19 BOOKS, ALL OF THAT STUFF IS NOT -- IS NOT -- I MEAN, JUST LIKE
20 IF YOU GIVE IT TO YOUR ACCOUNTANT, IT'S NOT PROTECTED. THAT
21 DOESN'T PROTECT IT.

22 WHAT'S PROTECTED IS WHAT THE ACCOUNTANT DID WITH THAT.
23 YOU KNOW, IN IF THE ACCOUNTANT MADE WORKSHEETS THAT WOULD BE
24 PROTECTED. IF THE ACCOUNTANT, YOU KNOW, SENT HIM A LETTER AND
25 SAY, HEY, GET ME SOME MORE BANK RECORDS BECAUSE I THINK YOU

1 HAVE A PROBLEM WITH THE WAY YOU REPORTED YOUR INCOME, THAT'S
2 PROTECTED, OR THE WAY YOU -- YOU KNOW, YOU'RE BOOKS ARE PUT
3 TOGETHER, THAT'S PROTECTED. BUT THE THIRD-PARTY RECORDS IN THE
4 POSSESSION OF THE ACCOUNTANT I DON'T BELIEVE ARE PROTECTED.

5 MR. ANNESSER: WELL, YOUR HONOR, I THINK THAT'S
6 COVERED UNDER THE -- THIS PRIVILEGE INCLUDES OTHER CONFIDENTIAL
7 INFORMATION OBTAINED BY THE ACCOUNTANT FROM THE CLIENT FOR THE
8 PURPOSE OF RENDERING ACCOUNTING --

9 THE COURT: I AGREE WITH THAT. BUT BANK RECORDS ARE
10 NOT CONFIDENTIAL INFORMATION NOR ARE CORPORATE ACCOUNTING
11 RECORDS.

12 MR. ANNESSER: NO. BUT COMMUNICATIONS SUCH AS
13 INFORMATION FROM THE COMPANY PERTAINING TO ANY NUMBER OF
14 THINGS.

15 NOW, THE BOOKS OF THE CORPORATION MAY BE DISCOVERABLE
16 IN A CASE OBVIOUSLY IT HAS TO BE RELEVANT AS WE JUST
17 DISCUSSED --

18 THE COURT: RIGHT.

19 MR. ANNESSER: -- WITH RESPECT TO THE BANK ACCOUNTS,
20 MAY BE DISCOVERY FROM OTHER SOURCES. I DON'T BELIEVE THAT IT
21 IS DISCOVERABLE FROM THE ACCOUNTANT THEMSELVES.

22 THE PURPOSE OF THE STATUS IS TO ALLOW PEOPLE TO BE
23 HONEST WITH THEIR ACCOUNTANTS JUST LIKE THEIR ATTORNEYS --

24 THE COURT: YEAH.

25 MR. ANNESSER: -- AND DISCLOSE ALL THE INFORMATION SO

1 THE ACCOUNTANT CAN PROVIDE ADVICE. AND FLORIDA HAS CODIFIED
2 THAT IN THE STATUTE TO PROTECT THOSE RECORDS.

3 THE COURT: YEAH. THERE IS -- I MEAN, I THINK THERE
4 WAS THE SUPREME COURT CASE. THERE IS AN OLD SUPREME COURT CASE
5 WHERE IT MAKES CLEAR THAT THIRD-PARTY RECORDS IN THE
6 POSSESSION -- I THINK IT WAS NOT AN ACCOUNTING CASE, BUT
7 GENERALLY ACCOUNTANTS -- THE ONLY REASON YOU HAVE ACCOUNTING
8 PRIVILEGE IN THIS CASE IS BECAUSE IT'S A DIVERSITY CASE.
9 FEDERAL LAW GENERALLY DOESN'T PROTECT ACCOUNTANT PRIVILEGE, BUT
10 HERE WE DO RESPECT IT BECAUSE YOU HAVE A DIVERSITY CASE UNLESS
11 I HEAR OTHERWISE. AND THIRD-PARTY RECORDS IN THE POSSESSION OF
12 SOMEONE WHO HAS A PRIVILEGE IS NOT PROTECTED AS FAR AS I KNOW.

13 MR. ANNESSER: WELL --

14 THE COURT: LET ME HEAR FROM THE DEFENDANTS AND SEE
15 WHAT -- THE OTHER DEFENDANTS AND LET ME SEE WHAT THEY SAY.

16 MR. PACE: YOUR HONOR, THE SITUATION I THINK IS EVEN
17 MORE CLEAR HERE.

18 ONE -- FOR A NUMBER OF REASONS. ONE, MR. TRAVIS WAS A
19 OFFICER OF -- THERE ARE TWO LEONARDO CORPORATIONS. THERE IS A
20 LEONARDO CORPORATION FORMED IN NEW HAMPSHIRE AND THERE IS A
21 SAME NAME LEONARDO CORPORATION FORMED IN FLORIDA.

22 THE COURT: WHICH IS OURS?

23 MR. PACE: THE DEFENDANT -- THE PLAINTIFF HERE IS THE
24 LEONARDO CORPORATION FORMED IN FLORIDA.

25 THE COURT: OKAY.

1 MR. PACE: THEY ARE SAYING THAT THE LEONARDO
2 CORPORATION FORMED IN NEW HAMPSHIRE, THEY EXIST AT THE SAME
3 TIME WAS LATER MERGED INTO THEM. THAT'S AN ISSUE IN DISPUTE.

4 BUT HE WAS -- HE WAS A DIRECTOR OF -- LET ME SEE. HE
5 WAS AN OFFICER OF BOTH. HE WAS A DIRECTOR OF AT LEAST ONE OF
6 THEM. HE IS BASED IN NEW HAMPSHIRE. AND SO, THE ISSUE OF --
7 I'M NOT EVEN SURE WHAT THE CORRECT ANSWER OF THE PRIVILEGE --
8 YOU KNOW, THE ACCOUNTANT PRIVILEGE FOR A NEW HAMPSHIRE BASED
9 ACCOUNTANT CONNECTED WITH A NEW HAMPSHIRE BASED CORPORATION.
10 I'M NOT SURE IF THAT (UNINTELLIGIBLE) FLORIDA LAW IN ANY EVENT.

11 BUT THOSE ISSUES IN ALL FAIRNESS, YOUR HONOR, ARE
12 REALLY NOT BEFORE YOU AT THIS TIME. I MEAN, SOMEBODY CAN PUT
13 SOMETHING ON A PRIVILEGE LOG AND WE CAN DEAL WITH IT IN THE
14 CONTEXT OF THAT PRIVILEGE LOG.

15 BUT PARTICULARLY WHEN SOMEBODY IS WEARING MULTIPLE
16 HATS IT DOES BECOME COMPLICATED TO SAY, ANY COMMUNICATION
17 YOU'VE HAD WITH THAT INDIVIDUAL WHO IS -- AS I SAID, HE IS --
18 MAYBE HE IS YOUR ACCOUNTANT BUT HE IS ALSO YOUR OFFICER. HE IS
19 ALSO YOUR DIRECTOR. HE IS AGAIN OFFICER OF ANOTHER COMPANY.

20 THE COURT: RIGHT.

21 MR. PACE: I JUST THINK AGAIN THIS IS TERRIBLY
22 PREMATURE TO TRY TO ADDRESS THE ISSUE OF ARE THERE SOME
23 DOCUMENTS THAT MAY BE COVERED BY A FLORIDA ACCOUNTANT/CLIENT
24 PRIVILEGE.

25 THE COURT: OKAY. WHAT DOES THE PLAINTIFF SAY ABOUT

1 ALL OF THAT?

2 MR. ANNESSER: YOUR HONOR, IN ADDITION TO THE
3 PRIVILEGE, HE STILL HASN'T ESTABLISHED THE RELEVANCE OF THE
4 DOCUMENTS BEING REQUESTED. LIKE THE BANK REQUEST, THIS IS A
5 ALL-ENCOMPASSING --

6 THE COURT: RIGHT. I HAVEN'T HEARD YOU --

7 MR. ANNESSER: SO --

8 (BOTH TALKING AT THE SAME TIME)

9 THE COURT: -- NOT RELEVANT. YOU HAVEN'T MADE THAT
10 ARGUMENT. SO TELL ME THAT.

11 MR. ANNESSER: WELL, YOUR HONOR, THIS AS WITH THE BANK
12 REQUEST WAS ALL-EMCOMPASSING. GIVE US ALL INFORMATION, ALL
13 ESI, ALL DOCUMENTS PERTAINING TO, AND THEN A LIST OF PEOPLE.
14 AND AMONG THAT LIST OF PEOPLE ARE LEONARDO CORPORATION AND
15 DR. ROSSI.

16 AND AGAIN THERE ARE NO CONNECTIONS WHATSOEVER THAT CAN
17 BE MADE THAT WOULD BRING THOSE WITHIN THE SCOPE OF RELEVANCE IN
18 THIS CASE. IT'S A FISHING EXPEDITION TO TRY TO FIND SOMETHING.
19 SPECIFICALLY THEIR REQUEST GOES BACK TO 2010. THAT'S TWO YEARS
20 BEFORE THE LICENSE AGREEMENT IN DISPUTE IN THIS CASE WAS EVEN
21 ENTERED INTO, WHICH WAS SEPTEMBER OF 2012.

22 THEY'RE LOOKING TO FIND SOMETHING BUT THEY DON'T HAVE
23 ANYTHING TO LOOK FOR. IF THEY WERE TO DEFINE SPECIFIC ITEMS
24 THAT THEY WERE SEEKING, PERHAPS THERE COULD BE AN ARGUMENT
25 MADE. BUT WE BELIEVE AS IT'S PHRASED NOW THEY'RE ASKING FOR

1 THE UNIVERSE. THERE IS NO LIMITATION WHATSOEVER.

2 THE COURT: WHAT DO YOU SAY ABOUT THAT, MR. PACE?

3 MR. PACE: YOUR HONOR, I THINK QUITE SIMPLY HE'S THE
4 WRONG PARTY OR PERSON TO RAISE THE ISSUE. THAT'S SOMETHING
5 THAT MR. TRAVIS CAN RAISE. I DO WANT TO ADDRESS THE TIME
6 PERIOD.

7 AS WE -- WE EVEN IDENTIFIED IN OUR SUBPOENA. WE SAY,
8 HERE IS SAY HERE IS WHY WE PICKED THIS TIME PERIOD, BECAUSE THE
9 SECOND LEONARDO CORPORATION, WHILE THE FIRST ONE CONTINUES TO
10 EXIST IN NEW HAMPSHIRE THE SECOND ONE ENDS UP GETTING FORMED IN
11 FLORIDA.

12 THAT IS IN FACT A RELEVANT ISSUE TO THE CASE BECAUSE
13 THEY PLAYED GAMES WITH WHO THE CONTRACTING PARTIES WERE IN
14 TERMS OF, YOU KNOW, WHY EXACTLY DID YOU NEED, WHY NOT MOVE
15 LEONARDO OF NEW HAMPSHIRE TO LEONARDO OF -- YOU KNOW, MOVE IT
16 DOWN TO FLORIDA AS OPPOSED TO CREATING A SEPARATE COMPANY AND
17 CREATING ISSUES CONNECTED WITH THAT.

18 BUT AGAIN ISSUES -- WE DON'T KNOW WHAT DOCUMENTS
19 MR. TRAVIS HAS. WE DON'T KNOW IF HE'S GOT THOUSANDS OF
20 DOCUMENTS, WE DON'T KNOW IF HE HAS JUST A HANDFUL OF PAGES OF
21 DOCUMENTS.

22 AGAIN, MR. TRAVIS CAN BE IN A POSITION IF IN FACT WHAT
23 WE'RE ASKING FOR IS INCREDIBLY BURDENSOME TO RAISE THE ISSUE OF
24 BURDEN. BUT OTHERWISE, YOU KNOW, LEONARDO IS AT THE HEART OF
25 THIS -- HEART OF THIS CASE AND INCLUDING THE TWO DIFFERENT

1 LEONARDO COMPANIES AND WHAT HAS BEEN CONDUCTED.

2 AND AGAIN, COULD THERE BE AN OPPORTUNITY DOWN THE ROAD
3 FOR THIS ISSUE TO BE RAISED JUST LIKE WITH THE ACCOUNTANT
4 PRIVILEGE? YES. IF IT TURNS OUT THAT MR. TRAVIS SAYS, I HAVE
5 A TON OF MATERIAL AND IT WAS GOING TO BE VERY HARD FOR ME TO GO
6 GATHER UP ALL OF THIS STUFF, HE CAN RAISE THAT OBJECTION AND
7 WE'LL HAVE TO DEAL WITH IT.

8 BUT IT SHOULDN'T BE SOMETHING HERE THAT -- YOU KNOW,
9 THAT RESULTS HERE ON A MOTION TO QUASH BY A PARTY THAT'S NOT
10 THE RECIPIENT OF THE SUBPOENA.

11 THE COURT: OKAY. WHAT DO YOU SAY ABOUT ALL OF THAT?

12 MR. ANNESSER: YOUR HONOR, AS TO STANDING. THE
13 PLAINTIFFS HAVE A PERSONAL RIGHT AND PRIVILEGE WITH RESPECT TO
14 THEIR FINANCIAL RECORDS. AND THE COURT'S, SPECIFICALLY THE
15 SOUTHERN DISTRICT COURT HAS FOUND IN KIND V. ADF MID-ATLANTIC,
16 LLC, THAT THE PERSON WHOSE FINANCIAL RECORDS ARE BEING SOUGHT
17 HAS STANDING TO CHALLENGE A DEFENDANT'S SUBPOENA TO A
18 THIRD-PARTY. SO THE CASE LAW IS CLEAR THAT WE HAVE STANDING TO
19 RAISE THESE ISSUES.

20 THEY HAVE REQUESTED DOCUMENTS TO BE SENT DIRECTLY TO
21 THEM WITHOUT ANY REVIEW OR OTHERWISE. THERE IS A PRIVILEGE
22 THAT WE WOULD HOPE THAT MR. TRAVIS WOULD NOT BREACH BY
23 DISCLOSING DOCUMENTS THAT ARE COVERED BY THE PRIVILEGE, BUT
24 THERE IS NO FILTER.

25 SO IF MR. PACE WANTS TO TAKE THE RISK OF HAVING

1 POTENTIALLY PRIVILEGED DOCUMENTS DELIVERED TO HIS OFFICE, THAT
2 IS CERTAINLY A RISK. BUT I DON'T BELIEVE THAT IT WOULD BE
3 APPROPRIATE. I DO BELIEVE THAT WE HAVE STANDING TO PROTECT
4 THOSE FINANCIAL RECORDS IRRESPECTIVE OF WHERE THEY'RE KEPT.
5 AND THE LAW IN FLORIDA IS CLEAR THAT WE HAVE THE RIGHT EVEN IF
6 THE SUBPOENA IS TO A THIRD-PARTY TO CONTEST THE --

7 THE COURT: DO YOU KNOW THE -- WHAT ABOUT HIM BEING A
8 NEW HAMPSHIRE ACCOUNTANT?

9 MR. ANNESSER: I'M SORRY, YOUR HONOR?

10 THE COURT: WHAT ABOUT HIM PRACTICING IN NEW HAMPSHIRE
11 AND BEING A NEW HAMPSHIRE ACCOUNTANT DOES THE PRIVILEGE IN
12 FLORIDA APPLY TO HIM?

13 MR. ANNESSER: YOUR HONOR, THE STATUTE DOESN'T
14 DIFFERENTIATE. AND I WAS UNABLE TO FIND ANY CASE LAW THAT
15 DOES.

16 THE STATUTE SPECIFICALLY SAYS, ANY INFORMATION
17 PROVIDED TO THEIR ACCOUNTANT. THEY DON'T SAY ACCOUNTANT IN
18 FLORIDA, OR FLORIDA ACCOUNTANT, OR ANYTHING TO THAT EFFECT. I
19 HAVE BEEN UNABLE TO FIND CASE LAW THAT GOES ONE WAY OR ANOTHER.

20 THE COURT: OKAY.

21 MR. ANNESSER: SO THE PLAIN READING I BELIEVE IS THAT
22 IT APPLIES TO ANY ACCOUNTANT THAT THEY CHOOSE TO USE.

23 THE COURT: ALL RIGHT. I'M GOING TO QUASH THAT
24 SUBPOENA AS WELL WITH LEAVE FOR THE -- WELL, WHAT I WOULD
25 SUGGEST IS THAT YOU ALL TALK ABOUT IT AND TRY -- BECAUSE I

1 THINK THAT THERE MAY BE SOME DOCUMENTS THAT THE ACCOUNTANT HAS
2 THAT RELATES TO, YOU KNOW, FOR INSTANCE, HOW LEONARDO FLORIDA
3 OR NEW HAMPSHIRE MERGED INTO LEONARDO FLORIDA WHICH MAY BE
4 PRIVILEGE OR MAY NOT BE PRIVILEGE. I DON'T KNOW.

5 BUT I THINK HE HAS -- I THINK MR. PACE MAKES A GOOD
6 POINT THAT HE SHOULD BE PERMITTED -- MY PROBLEM IS I THINK -- I
7 THINK IT'S TOO BROAD RIGHT NOW. SO IT'S GOT TO BE NARROWED TO
8 RELEVANT DOCUMENTS.

9 ONCE THAT RELEVANT DOCUMENT REQUEST IS MADE THEN YOU
10 NEED TO RESPOND TO THAT. AND IF YOU HAVE DOCUMENTS THAT ARE
11 PRIVILEGED YOU PUT IT ON THE PRIVILEGE LOG AND THEN YOU ALL CAN
12 COME BACK HERE AND MAKE THE ARGUMENT TO ME OF WHETHER OR NOT --
13 YOU KNOW, I DON'T KNOW THE ANSWER.

14 IF IT'S, AS YOU SAY IT'S THE COMPANY THAT'S IN FLORIDA
15 THAT ASSERTS THE PRIVILEGE, NO MATTER WHERE THEIR ACCOUNTANT IS
16 THEN YOU WOULD BE CORRECT. IF IT'S LIKE -- MR. PACE I THINK
17 SAYS HE'S NOT SURE. BUT IF IT'S THAT WHERE THE ACCOUNTANT IS
18 LOCATED THEN IT MAY NOT APPLY. BUT THAT'S SOMETHING THAT WE
19 HAVE TO DISCUSS LATER, PLUS -- BUT YOU HAVE TO PROVIDE A
20 PRIVILEGE LOG IF YOU'RE GOING TO ASSERT A PRIVILEGE AT THAT
21 TIME.

22 MR. PACE: YOUR HONOR, AS TO ONE POINT OF
23 CLARIFICATION.

24 THE COURT: YES.

25 MR. PACE: WHAT YOU'RE SAYING IS QUASHING. AND THEN

1 -- BUT YOU THEN TALKING ABOUT NARROWING. AND SO, ARE YOU
2 QUASHING -- USUALLY I THINK IF A NARROWING IS SOMETHING WOULD
3 NOT BE DONE AT THE QUASHING STAGE, RIGHT? THAT WOULD BE DONE
4 WHEN THEY OBJECT AND WE RESPOND AND WE FIGHT IT OUT.

5 THE COURT: WELL, I THINK --

6 MR. PACE: IT'S NOT BECAUSE --

7 (BOTH TALKING AT THE SAME TIME)

8 THE COURT: -- THIRD-PARTY TO OBJECT TO THE SOMEBODY.

9 MR. PACE: NOT TO THE -- I MEAN, HE CAN MAYBE ON
10 PROTECTING HIS CONFIDENTIAL INFORMATION. BUT HE CERTAINLY
11 CAN'T OBJECT, AND THESE CASES DON'T SAY HE HAS A STANDING TO
12 OBJECT TO SAY, YOU'RE ASKING FOR TOO MANY DOCUMENTS VERSUS NOT
13 ENOUGH.

14 THE COURT: NO. NO. NO. HE'S OBJECTING TO THE --
15 HE'S OBJECTING TO THE RELEVANCE. I THINK HE HAS THE ABILITY TO
16 OBJECT TO RELEVANCE.

17 MAYBE HE CAN'T OBJECT TO BURDEN BECAUSE HE'S -- THE
18 OTHER GUY HAS GOT TO COME IN AND SAY, HEY, YOU KNOW, THIS IS
19 GOING TO BE A BURDEN, OR AT LEAST SUBMIT AN AFFIDAVIT OR
20 SOMETHING. BUT HE CAN OBJECT TO RELEVANCE AND HE CAN OBJECT TO
21 PRIVILEGE.

22 MR. PACE: OH. AND -- YOUR HONOR, I'M SORRY. I'M NOT
23 TRYING TO ASK YOU TO REVERSE YOUR RULING, I'M JUST TRYING TO
24 UNDERSTAND JUST ONE ISSUE OF IT, WHICH IS -- IN QUASHING THE
25 SUBPOENA --

1 THE COURT: YEAH. I UNDERSTAND. IT IS KIND OF
2 CONFUSING.

3 MR. PACE: WHAT YOU'RE SAYING IS WE SHOULD BE --
4 YOU'RE TELLING US WE HAVE TO SEEK THE INFORMATION FIRST FROM
5 THE PARTIES, AND THEN IF THERE IS --

6 THE COURT: NO. NO. I'M NOT TELLING YOU THAT
7 ACTUALLY.

8 MR. PACE: OKAY.

9 THE COURT: I'M TELLING YOU, YOU CAN SEEK THE
10 INFORMATION FROM THE ACCOUNTANT IF YOU WOULD LIKE TO. IT MIGHT
11 BE EASIER JUST TO TRY TO SEEK IT FROM THE PARTIES. BUT IF YOU
12 WANTED TO SEEK -- I'M NOT GOING TO PREVENT YOU FROM SEEKING IT
13 FROM A THIRD-PARTY.

14 MR. PACE: THAT'S WHAT I'M SAYING.

15 SO IF WE PROVIDE A DIFFERENT SUBPOENA THAT IS MORE
16 FOCUSED --

17 THE COURT: EXACTLY.

18 MR. PACE: -- THEN YOUR RULING IS ONLY LIMITED TO THE
19 FACT THAT THIS SUBPOENA GIVEN --

20 THE COURT: RIGHT. I'M NOT RULING THAT HE'S AN
21 UNSUBPOENABLE PARTY. I'M -- OR HE'S NOT A PARTY BUT A PERSON.
22 BUT RATHER THAT THE SUBPOENA IN THIS CASE IS TOO BROAD. AND I
23 THINK THE BETTER WAY TO GO ABOUT IT IS TO NARROW THE SUBPOENA
24 BY TALKING AMONGST YOURSELVES AND HOPEFULLY COMING AT LEAST TO
25 SOME AREAS THAT YOU CAN BE IN AGREEMENT AND OTHERS IF YOU CAN'T

1 THEN, YOU KNOW, COME BACK TO ME.

2 MR. PACE: THAT'S THE CLARIFICATION I WANTED --

3 THE COURT: OKAY.

4 MR. PACE: -- TO MAKE SURE THAT WE COULD STILL GO BACK
5 AND ISSUE ANOTHER SUBPOENA IF WE FOCUSED IT DOWN.

6 THE COURT: YEAH. YEAH. DO YOU UNDERSTAND?

7 MR. ANNESSER: YES, YOUR HONOR.

8 THE COURT: OKAY. ANYTHING ELSE I CAN HELP ANYBODY
9 WITH?

10 MR. PACE: NO, YOUR HONOR.

11 MR. ANNESSER: NOT TODAY. THANK YOU VERY MUCH.

12 MR. LEON DE LA BARRA: YES, YOUR HONOR.

13 THE COURT: YES.

14 MR. LEON DE LA BARRA: THERE IS THE SUBPOENA FOR
15 RECORDS FROM T MOBILE HAS THE RIGHTS TO A CELLPHONE NUMBER THAT
16 IS OWNED BY MY CLIENTS.

17 THE COURT: OKAY.

18 MR. LEON DE LA BARRA: WE WOULD LIKE TO REQUEST THE
19 COURT TO QUASH THAT SUBPOENA AS WELL AS WITH A LOT OF THE
20 ARGUMENTS THAT MR. ANNESSER HAS MADE.

21 THE SUBPOENA IS OVERLY BROAD. IT'S NOT RELATED TO
22 ANYTHING REALLY IN THE CASE. IT'S -- YOU KNOW, IT'S NOT GOING
23 TO LEAD TO THE DISCOVERY OF ANY ADMISSIBLE EVIDENCE AND IT'S
24 CELLPHONE RECORDS. AND IT'S PRETTY ALL ENCOMPASSING. THE
25 REQUEST, LOGS OF ALL TELEPHONE CALLS, WHEN INITIATED, WHO

1 CALLED, THE LOCATION OF THE CELLPHONE WHEN THE CALL WAS MADE --
2 EXCUSE ME, YOUR HONOR -- THE DURATION OF THE CALL AS WELL AS
3 ANY AND ALL TEXT MESSAGES WITH THE SAME KIND OF INFORMATION
4 REQUESTED.

5 THEY ALSO REQUEST DOCUMENTS SUFFICIENT TO SHOW THE
6 SUBSCRIBER INFORMATION RELATED TO THE PHONE NUMBER AND ANY AND
7 ALL COMMUNICATIONS BETWEEN T MOBILE AND THE SUBSCRIBER AND/OR
8 HENRY JOHNSON OR JAMES BASS.

9 WE BELIEVE THAT THERE IS A REASONABLE EXPECTATION OF
10 PRIVACY AS IT RELATES --

11 THE COURT: WHO DO YOU REPRESENT?

12 MR. LEON DE LA BARRA: J.M. PRODUCTS AND HENRY
13 JOHNSON.

14 THE COURT: OKAY. AND YOU NAMED SOMEONE ELSE'S NAME,
15 BASS? WHO IS THAT?

16 MR. LEON DE LA BARRA: JAMES BASS IS, AS MR. ANNESSER
17 SAID, IT'S A THIRD-PARTY THAT THEY CLAIM WAS -- DOESN'T EXIST
18 YET THEY'VE NAMED THEM IN THE COMPLAINT, IN THEIR THIRD-PARTY
19 COMPLAINT.

20 SO WE'RE REALLY HERE AS IT RELATES TO HENRY JOHNSON
21 AND J.M. PRODUCTS. BUT IN ANY EVENT, YOU KNOW, THE
22 CELLPHONE -- THE T MOBILE NUMBER IS OWNED BY J.M. PRODUCTS, WE
23 BELIEVE. SO WE WOULD REQUEST THAT THEIR SUBPOENA BE QUASHED
24 BECAUSE IT'S, YOU KNOW, A LITTLE PREMATURE.

25 THE COURT: OKAY. WHAT DO YOU SAY ABOUT THAT

1 MR. PACE?

2 MR. PACE: THIS WASN'T ACTUALLY PROPERLY RAISED, BUT I
3 RATHER HANDLE IT NOW THAN COME BACK TO ANOTHER DATE.

4 SO, AS WE'VE PLED IN THE COMPLAINT, WE'VE PROVIDED AN
5 EXHIBIT, EXHIBIT 20, THAT PROVIDES THE CARD OF JAMES BASS.
6 THIS IS THE PHONE NUMBER THAT JAMES BASS USED, DIRECTOR -- HE'S
7 SUPPOSED TO BE THE DIRECTOR OF ENGINEERING OF J.M. PRODUCTS.
8 I'LL TAKE A STEP INTO THE FACTS SO TO GIVE THE COURT SOME
9 CONTEXT.

10 THE PARTIES ON THE OTHER SIDE -- YOU KNOW, PLAINTIFFS
11 AND THIRD-PARTY DEFENDANTS, MY SHORT VERSION OF PARTIES ON THE
12 OTHER SIDE, PRESENTED TO MY CLIENT THE PICTURE THAT THIS J.M.
13 PRODUCTS WAS A COMPANY THAT WAS WORKING FOR -- WAS A SUBSIDIARY
14 OF A MAJOR PUBLICLY TRADED U.K. CORPORATION AND THAT THEY WERE
15 GOING TO PROVIDE SERVICES TO THIS COMPANY, AND AS A RESULT THAT
16 WAS GOING TO BE SIGNIFICANT TO SHOW THAT THEY COULD PROVIDE A
17 CERTAIN LEVEL OF POWER TO THIS SUBSIDIARY OF A MAJOR U.K.
18 PUBLICLY TRADED COMPANY.

19 IT TURNS OUT THAT THAT'S NOT THE CASE, THAT J.M.
20 PRODUCTS IS JUST A SHELL COMPANY. IT'S RUN BY AND OWNED BY
21 HENRY JOHNSON AND/OR OTHERS.

22 THERE WAS AN INDIVIDUAL WHO PRESENTED HIMSELF AS JAMES
23 BASS, DIRECTOR OF ENGINEERING. AGAIN YOU WOULD THINK IF THERE
24 WAS A REAL COMPANY WITH REAL OPERATIONS THEN MAYBE THEY WOULD
25 REQUIRE A DIRECTOR OF ENGINEERING.

1 AS WE SUBSEQUENTLY DISCOVERED THERE ARE NO SUCH REAL
2 OPERATIONS AND AS A RESULT NO NEED FOR A DIRECTOR OF
3 ENGINEERING. IN FACT, THERE IS NO SUCH JAMES BASS, YOU KNOW,
4 THAT'S -- GOT AN ENGINEERING BACKGROUND ANYWHERE IN THE STATE
5 OF FLORIDA. WE'RE TRYING TO FIND THIS PERSON.

6 HIS BUSINESS CARD HAS HIS PHONE NUMBER. HE APPEARED
7 AT MEETINGS WITH DR. ROSSI, OR AT LEAST IN DR. ROSSI'S
8 PRESENCE, IN HENRY JOHNSON'S PRESENCE. SO THEY'RE AWARE OF HIM
9 BUT NO ONE HAS TOLD US.

10 AS YOU NOTICED HERE TODAY, EVEN WE'VE HAD THIS KIND
11 EVER DANCE, NO ONE HAS COME UP AND SAID THAT JAMES BASS DOES
12 WORK OR DOESN'T WORK FOR J.M. PRODUCTS. NO ONE REFUSES TO.

13 THE PLAINTIFFS DID THEIR INITIAL DISCLOSURE, THEY
14 LISTED A NUMBER OF WITNESSES. INTERESTINGLY ENOUGH, THE MAIN
15 CUSTOMER TO WHICH THEY WERE SELLING POWER HAD A DIRECTOR OF
16 ENGINEERING NAMED JAMES BASS YOU WOULD THINK HE MIGHT GET
17 INCLUDED AS A WITNESS. HE DIDN'T.

18 SO WE'RE GETTING THESE TELEPHONE RECORDS IN AN EFFORT
19 TO TRY TO IDENTIFY THE INDIVIDUAL AND SAY, HERE IS THE PHONE
20 NUMBER HE'S PROVIDED US. THAT'S THE WAY FOR GETTING IN CONTACT
21 WITH HIM --

22 THE COURT: WHAT TIME PERIOD ARE YOU LOOKING AT?

23 I DON'T THINK THE PHONE COMPANIES INCLUDE ANY GPS
24 RECORDS (INAUDIBLE)

25 MR. PACE: IT'S -- I DON'T KNOW EXACTLY WHAT THEY DO

1 HAVE. I MEAN, OBVIOUSLY IF THEY DON'T HAVE IT, THEY DON'T HAVE
2 IT.

3 THE COURT: RIGHT.

4 MR. PACE: YOUR HONOR, CERTAINLY IF THERE IS A TIME --
5 OH. HERE IT IS. JUST 1, 2004 -- 2014. I APOLOGIZE. JUNE 1,
6 2014. AND IF THAT'S -- IF THAT -- I HAVE TO BE HONEST, IF THAT
7 WERE THE ISSUE I'M SURE WE COULD NARROW IT SOME.

8 THE REASON WE PICKED THAT, THAT WAS WHEN WE FIRST
9 STARTED TO HAVE INTERACTIONS WITH THIS SUPPOSED -- WHEN J.M.
10 PRODUCTS COMPANY WAS IDENTIFIED TO US, BACK THEN CALLED J.M.
11 CHEMICAL PRODUCTS COMPANY.

12 THE COURT: ALL RIGHT.

13 WHAT DO YOU SAY ABOUT THAT?

14 MR. LEON DE LA BARRA: YES, YOUR HONOR.

15 IN ADDITION TO THE OBJECTIONS I PREVIOUSLY RAISED, ONE
16 OF THE BIG ISSUES IS THAT THEY ARE NOT LIMITING ANY
17 CELLPHONE -- ANY PHONE CALLS TO PARTICULAR NUMBERS OR
18 PARTICULAR INDIVIDUALS. THEY'RE JUST -- THEY WANT EVERYTHING,
19 AND THAT --

20 THE COURT: THEY WANT EVERYTHING RELATING TO AT LEAST
21 AS TO JAMES BASS -- YOU'VE IDENTIFIED A NUMBER THAT WAS ON A
22 BUSINESS CARD OF THEIR COMPANY THAT HAD JAMES BASS'S PHONE
23 NUMBER ON IT, RIGHT?

24 MR. PACE: YES, YOUR HONOR. IT'S EXHIBIT 20 IN THE
25 PUBLIC RECORD. IT'S EXHIBIT 20 TO OUR --

1 MR. LEON DE LA BARRA: YES, YOUR HONOR. BUT IF THAT
2 TELEPHONE NUMBER PERTAINS TO THE COMPANY THERE IS GOING TO BE
3 SEVERAL COMMUNICATIONS THAT WEREN'T JUST MADE BY JAMES BASS.
4 AND FURTHERMORE, IT RISKS DISCLOSING TRADE SECRET --

5 THE COURT: HOLD ON. HOLD ON.

6 CELLPHONE NUMBERS USUALLY ARE ASSIGNED TO A PARTICULAR
7 INSTRUMENT. SO IT'S NOT LIKE THE -- IT'S A T MOBILE PHONE,
8 IT'S A CELLPHONE THAT MAYBE THE COMPANY PAID FOR BUT IT'S ON
9 JAMES -- THAT'S -- JAMES BASS WOULD ANSWER IF HE'S -- IF THAT'S
10 THE PHONE ON HIS CARD.

11 I MEAN, THIS IS COMPLETELY DIFFERENT THAN THE OTHER
12 ARGUMENTS. THIS IS -- YOU KNOW, HE'S TRYING TO DETERMINE
13 WHETHER JAMES BASS IS A REAL PERSON. NOBODY --

14 MR. LEON DE LA BARRA: TO THE EXTENT --

15 THE COURT: WAS JAMES BASS A REAL PERSON?

16 MR. LEON DE LA BARRA: TO THE EXTENT THAT HE WANTS THE
17 SUBSCRIBER INFORMATION I THINK WE CAN -- YOU KNOW, WE CAN
18 APPEASE HIM WITH THAT AND --

19 THE COURT: HE ALSO WANTS TO FIND HIM SO HE CAN
20 SUBPOENA HIM --

21 MR. LEON DE LA BARRA: PROVIDE THE ACCOUNT INFORMATION
22 WHICH WOULD PROVIDE AN ADDRESS AND STUFF. BUT, I MEAN,
23 AGAIN --

24 THE COURT: IS JAMES BASS A PERSON? I MEAN, SOMEBODY
25 GOING TO ASK YOU THAT QUESTION. THIS IS LITIGATION. DOES HE

1 EXIST OR DOESN'T HE?

2 MR. ANNESSER: YOUR HONOR, I CAN STATE THAT HE DOES
3 EXIST. AND IF COUNSEL REQUESTED HIS CONTACT INFORMATION OF ANY
4 OF THE THIRD-PARTY DEFENDANTS, OR EVEN THE PLAINTIFFS IN THIS
5 CASE WE LIKELY WOULD BE ABLE TO ASSIST HIM IN DOING SO IN
6 FINDING THAT PERSON.

7 THE COURT: WHAT DO YOU SAY ABOUT THAT?

8 MR. PACE: YOUR HONOR, I STILL THINK WE'RE ENTITLED TO
9 GET THESE RECORDS AND THIS INFORMATION ABOUT SOMEBODY WHO HAS
10 KIND OF DISAPPEARED AND GONE TO THE FOUR WINDS.

11 BUT IF YOUR HONOR -- AND IT STILL TROUBLES ME THAT
12 WE'RE NOT GETTING REALLY A DIRECT ANSWER TO THESE THINGS. BUT
13 IF WHAT YOUR HONOR WANTS TO DO IS TO HAVE US -- WHAT IS THE
14 DATE HERE, SEPTEMBER 2ND? I'M HAPPY TO CONTACT T MOBILE AND
15 ASK THEM TO HOLD OFF FOR A WEEK AND THEN HAVE A CONVERSATION IF
16 YOUR HONOR FEELS THAT WOULD BE A BETTER WAY OF DOING IT.

17 THE COURT: OKAY. WELL, HERE IS THE THING.

18 HE'S GOING TO GET THE RECORD RELATING TO THAT PHONE
19 NUMBER UNLESS YOU PROVIDE HIM WITH A -- WITH A GOOD ADDRESS AND
20 PHONE NUMBER FOR MR. BASS THAT HE CAN, YOU KNOW, USE TO CONTACT
21 HIM WITHIN -- I'M GOING TO GIVE YOU TWO WEEKS.

22 SO YOU CAN EITHER DO THAT OR ELSE HE'S GOING TO -- YOU
23 KNOW, HE'S GOING TO GO OUT AND GET THE PHONE RECORDS AND TRY TO
24 FINDS HIM HIMSELF. SO IF YOU DON'T THINK HE SHOULD GET THE
25 PHONE RECORDS THEN TELL HIM WHERE MR. BASS IS.

1 DO YOU HAVE CONTACT WITH HIM?

2 MR. LEON DE LA BARRA: YOUR HONOR, I PERSONALLY DO
3 NOT.

4 THE COURT: DOES YOUR CLIENT?

5 MR. LEON DE LA BARRA: I WOULD ASSUME SO.

6 THE COURT: OKAY. WELL, I'M GOING TO REQUIRE YOU TO
7 GET THAT INFORMATION TO OPPOSING COUNSEL WITHIN ONE WEEK. AND
8 THEN YOU WILL HAVE A WEEK TO, YOU KNOW -- HOPEFULLY YOU'RE
9 GOING TO GO BACK, TALK TO YOUR CLIENT, AND YOUR CLIENT IS GOING
10 TO SAY, YEAH. HERE IS HIS ADDRESS, HERE IS HIS PHONE NUMBER.
11 LET ME GET HIM ON THE PHONE AND, YOU KNOW, AND THEN GET
12 MR. PACE ON THE PHONE AND GO, HERE HE IS.

13 YOU KNOW, HERE IS WHERE YOU SERVE HIM WITH A SUBPOENA
14 OR YOU'LL TAKE A SUBPOENA FOR HIM. BUT IF THAT DOESN'T HAPPEN
15 THEN HE GETS THE RECORDS.

16 SO IN TWO WEEKS -- SO I'M GOING TO GIVE YOU A WEEK,
17 EVEN THOUGH IT SHOULDN'T TAKE THAT LONG TO GIVE IT TO MR. PACE.
18 THEN MR. PACE A WEEK TO TRY TO FIND HIM OR HOPEFULLY TALK TO
19 HIM AND THEN YOU'LL KNOW IT'S NOT AN ISSUE. IF IT STILL IS AN
20 ISSUE THEN HE'S ENTITLED TO THE PHONE RECORDS.

21 MR. LEON DE LA BARRA: UNDERSTOOD, YOUR HONOR.

22 MR. PACE: UNDERSTOOD.

23 THE COURT: ALL RIGHT. ANYTHING ELSE I CAN HELP YOU
24 ALL WITH?

25 (NO RESPONSE)

1 THE COURT: NO?

2 ALL RIGHT. I'M GOING HAVE THE PLAINTIFF WRITE THE
3 ORDER ON THIS. OKAY? I DON'T KNOW IF YOU WANT TO DO TWO
4 ORDERS, ONE SEPARATELY FOR MR. BASS OR -- HOW YOU WANT TO DO
5 IT? YOU GUYS DECIDE --

6 MR. ANNESSER: I'LL CONFER WITH COUNSEL AND WE'LL --

7 THE COURT: OKAY. EITHER DO -- PASS IT BY OPPOSING
8 COUNSEL --

9 MR. ANNESSER: YES, YOUR HONOR.

10 THE COURT: -- AND THEN LET ME KNOW OR SEND IT HERE.
11 WHEN DO YOU WANT TO GET IT TO ME BY? I'M NOT IN ANY
12 BIG RUSH BUT I JUST WANT TO HAVE A DATE.

13 MR. ANNESSER: I CAN HAVE A DRAFT OUT TO EVERYBODY
14 TODAY. SO IT DEPENDS ON --

15 MR. PACE: IF WE COULD JUST HAVE A COUPLE OF DAYS ONLY
16 BECAUSE I HAVE KIND OF A CRAZY SCHEDULED --

17 THE COURT: OKAY.

18 MR. PACE: -- ON SOME OTHER MATTERS, YOUR HONOR. BUT
19 I'M SURE BY THE END OF THE WEEK YOU'LL DEFINITELY HAVE IT.

20 THE COURT: ALL RIGHT. WHAT'S TODAY, TUESDAY? SO BY
21 FRIDAY AT FOUR P.M. SEND IT IN. OKAY?

22 WHEN ARE YOU WORKING --

23 (INAUDIBLE)

24 THE COURT: MAKE IT BY THREE P.M. ON FRIDAY. OKAY?

25 MR. ANNESSER: YOUR HONOR.

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MR. PACE: YES, YOUR HONOR.

THE COURT: OKAY. GOOD SEEING EVERYBODY.

MR. PACE: THANK YOU, YOUR HONOR.

MR. ANNESSER: THANK YOU, YOUR HONOR.

THE COURT: GOOD LUCK.

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C E R T I F I C A T E

UNITED STATES OF AMERICA
SOUTHERN DISTRICT OF FLORIDA

I, CARL SCHANZLEH, OFFICIAL COURT REPORTER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, DO HEREBY CERTIFY THAT THE FOREGOING 43 PAGES CONSTITUTE A TRUE TRANSCRIPT OF THE PROCEEDINGS HAD BEFORE THE SAID COURT HELD IN THE CITY OF MIAMI, FLORIDA, IN THE MATTER THEREIN STATED.

IN TESTIMONY WHEREOF, I HEREUNTO SET MY HAND ON THIS 6TH DAY OF SEPTEMBER 2016.

/S/CARL SCHANZLEH
CARL SCHANZLEH, RPR-CM
CERTIFIED COURT REPORTER
9960 SW 4TH STREET
PLANTATION, FL 33324
TELEPHONE 954 424-6723

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

4 ANDREA ROSSI, et al., Miami, Florida
5 Plaintiffs, October 14, 2016
6 vs. 8:34 a.m. to 9:38 a.m.
7 THOMAS DARDEN, et al., Courtroom 12-2
8 Defendants. (Pages 1 to 60)

9 MOTION HEARING AND STATUS CONFERENCE
10 BEFORE THE HONORABLE CECILIA M. ALTONAGA,
11 UNITED STATES DISTRICT JUDGE

12 APPEARANCES:

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I N D E X

WITNESSES

WITNESSES FOR THE PLAINTIFFS:

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WITNESSES FOR THE DEFENDANTS:

Page

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EXHIBITS IN EVIDENCE

PRE

MARKED

ADMITTED

Plaintiffs' Exhibit No.

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Defendants' Exhibit No.

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MISCELLANEOUS

Proceedings.....

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Court Reporter's Certificate.....

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1 (The following proceedings were held at 8:34 a.m.)

2 THE COURT: Good morning, please be seated.

3 ALL PARTIES: Good morning, Your Honor.

4 THE COURT: Please state your appearances.

5 MR. ANNESSER: Your Honor, John Annesser and Chris
6 Perre on behalf of the plaintiffs Andrea Rossi and Leonardo
7 Corporation. I also have my client with me, Mr. Rossi -- I'm
8 sorry -- Dr. Rossi.

9 THE COURT: Mr. Annesser and what was the second name?

10 MR. ANNESSER: Christopher Perre is my associate.

11 THE COURT: Spell the last name, please.

12 MR. PERRE: P-E-R-R-E.

13 THE COURT: Okay. Thank you. Good morning.

14 MR. ANNESSER: Thank you.

15 MR. PACE: Good morning, Your Honor, we have got a lot
16 of Chris's in the house today. This is Chris Pace with Chris
17 Lomax and Christy Mastrucci, all for the defendants Industrial
18 Heat, IPH International, Cherokee Investment Partners, Tom
19 Darden, and JT Vaughn.

20 THE COURT: Good morning.

21 MR. NUÑEZ: Good morning, Your Honor.

22 THE COURT: I -- you need a microphone, please.

23 MR. NUÑEZ: Good morning, Your Honor, Rodolfo Nuñez on
24 behalf of United States Quantum Leap LLC and Fulvio Fabiani,
25 third-party defendants.

1 MR. ARAN: Good morning, Your Honor, Fernando Aran on
2 behalf of third-party defendants for J.M. Products, Henry
3 Johnson, and James Bass.

4 THE COURT: Thank you. Good morning.

5 MR. ARAN: Good morning.

6 THE COURT: Okay. Before we address the motion to
7 strike the second amended affirmative defenses, I wanted to
8 hear from perhaps the plaintiff whether all of the parties in
9 this action have been served.

10 MR. ANNESSER: Your Honor, actually I am going to turn
11 this to Mr. Pace.

12 THE COURT: Mr. Pace, all right.

13 MR. ANNESSER: The original parties in the action have
14 all been served. The third-party defendants have not.

15 THE COURT: All right. Mr. Pace.

16 MR. PACE: That's correct, Your Honor. There is one
17 defendant who is -- one third-party defendant yet to be served.
18 He is in Italy. His name is Penon. So all the third-party
19 defendants -- I'm sorry.

20 THE COURT: His name is Fabio Penon.

21 MR. PACE: Fabio Penon. The defendants have been
22 served or have waived service. All of the third parties have
23 been served or waived service, with the exception of Fabio
24 Penon. We are doing The Hague Convention process for him right
25 now. And in all honesty, partially our mistake. The Hague

1 website said we didn't have to translate something that we then
2 found out in Italy we have to translate. So we are getting the
3 complaints and the counterclaims and third-party claims,
4 everything translated into Italian in order to serve it. So
5 we're expecting to be able to serve it, we think -- or I'm
6 sorry -- file it with the court in Italy next week.

7 THE COURT: And that means we are going to have
8 Mr. Penon served when, Mr. Pace?

9 MR. PACE: It is up to the Italian courts at that
10 point, unfortunately. They won't give us a particular time. I
11 am certainly hoping he will get served within the month, but I
12 have to be honest, Your Honor, my experience is not consistent
13 with that.

14 THE COURT: Right. And neither is mine. And that
15 makes a problem for the case and for your ability to bring
16 Mr. Penon into the case.

17 MR. PACE: We understand that, Your Honor, and I guess
18 our request at this point would be to see how it progresses or
19 to see how it proceeds. I mean I -- we would like the case
20 otherwise to proceed. If Mr. Penon is served relatively
21 quickly, that's great. If Mr. Penon is not, then we are going
22 to have to address the issue of what to do with the claims
23 against Mr. Penon.

24 THE COURT: You can bring those separately?

25 MR. PACE: We could. I mean, he is part of -- there

1 is a common claim that he is part of. And, you know, the
2 parties -- the plaintiffs have already sent or attempted to
3 send a subpoena to him. I don't know how they're going to do
4 that, since he's in Italy. But I think people recognize that
5 he's relevant to the case. So I wish I had a better solution
6 for right now, but I guess I would ask for the Court to give us
7 at least a little bit of time to see how it plays out. If, for
8 example, it is sitting in the court system over in Italy for a
9 month and nothing at all has happened, I am going to have to
10 deal the issue of trying to figure out do I -- can I carve him
11 out of the suit, sue him separately, dismiss him -- I just
12 don't have an answer for you right now, Your Honor.

13 THE COURT: Well, Mr. Annesser, this affects your
14 clients' claims that you are desirous of bringing to a
15 resolution.

16 MR. ANNESSER: Yes, Your Honor, we do not wish to
17 delay this any further than it has to be. As Mr. Pace pointed
18 out, our subpoena may or may not effectively reach him. We are
19 going to have to go through the same process, I'm sure, that he
20 has to go through unless we can get Mr. Penon to agree to
21 accept service, which he has not yet. We personally believe
22 they should serve him or carve it out into a separate case. If
23 they do carve it out into a separate case and then later can
24 consolidate it back in --

25 THE COURT: We have the scheduling order in place,

1 don't we?

2 MR. ANNESSER: Yes, we do, Your Honor. But that
3 was --

4 THE COURT: What's our trial -- what's our trial date?

5 MR. ANNESSER: Your Honor, we were set, I believe,
6 for -- I do not have it in front of me -- I believe it was July
7 of 2017.

8 THE COURT: All right.

9 MR. ANNESSER: But that was prior to the addition of
10 the third-party defendants. And actually the other parties as
11 well as the plaintiffs have been working together to propose to
12 the Court a joint proposed scheduling order that takes into
13 account the late service of the third-party defendants and
14 allows us adequate time to conclude discovery on all of the
15 issues.

16 THE COURT: And what is that?

17 MR. ANNESSER: It has not been finalized yet, although
18 I believe we are substantially finished with it, and we
19 hopefully can propose that to the Court within a couple days.

20 THE COURT: What trial date are you envisioning?

21 MR. ANNESSER: We were -- Chris, do you recall? I
22 don't have it in front of me.

23 MR. PACE: Your Honor, if I recall correctly, it is
24 essentially about a -- somewhere in a three- to four-month
25 extension. I think it was still by the end of 2017, if I

1 remember correctly, but I don't actually have our notes from
2 our negotiation, but we did actually have an in-person meeting
3 with everybody to come up with a new schedule to propose to the
4 Court.

5 THE COURT: What discovery has taken place to date?

6 MR. ANNESSER: Your Honor, there has been written
7 discovery between the plaintiffs and the defendants at this
8 point in time. There has been some third-party discovery
9 propounded -- I'm sorry -- nonparty discovery propounded by the
10 defendants. But we are at a very early stage, and we are in
11 the process of discussing deposition dates for at least one
12 deponent at this point in time, but we'll likely be discussing
13 numerous other deponents shortly.

14 THE COURT: Well, until I'm able to pull up our
15 docketing, let's move on to the motion to strike.

16 What's your discovery cutoff date, Mr. Annesser?

17 MR. ANNESSER: Currently, Your Honor, I believe the
18 discovery cutoff was in February or March of 2017. And I
19 apologize, Your Honor, I did not bring the scheduling order
20 with me.

21 THE COURT: All right. Well, let's address, if we
22 would, then, the motion to strike.

23 MR. ANNESSER: Yes, Your Honor, would you prefer that
24 I address the court from the podium or from the bench?

25 THE COURT: Wherever you are more comfortable. And

1 let's just go defense by defense as opposed to all of them. So
2 you might want to stay there, if you'd like, and I will be
3 hearing from defense counsel as to each one.

4 MR. ANNESSER: Thank you, Your Honor. As to the first
5 affirmative defense that was asserted, it was a general defense
6 of standing. There's actually two parts to the defense that I
7 would like to individually address.

8 The first one is there is a claim that when Leonardo
9 Corporation New Hampshire merged into the Leonardo Corporation
10 Florida, that that merger was in violation of a
11 nonassignability transfer provision within the license
12 agreement that is at the heart of this case.

13 The defendants rely on a case *Cincom Systems v.*
14 *Novelis Corp.* out of 6th Circuit court, which was interpreting
15 Ohio law, similar to Florida law although not exact, on the
16 issue. And in that court, they found that a merger was a
17 transfer that would in fact violate that provision within a
18 contract, or actually in that case, it was a nonassignability
19 provision relating to -- to the transfer of a license for
20 intellectual property, which is not dissimilar to our case.

21 But in Florida law -- and I have cited a couple of
22 cases in our brief -- a merger in Florida is seen -- and I'd
23 like to quote -- "is like the uniting of two or more rivers;
24 neither stream is annihilated but all continue in existence."
25 There is law that says if you want to specifically exclude

1 mergers, you can state that. You can say even a merger is a
2 violation of this provision.

3 They did not do that here.

4 But going just beyond that -- and again that's Florida
5 law. That's *Celotex Corp. v. Pickett*, 490 So.2d 35 --

6 THE COURT: I'm sorry. Did you gentleman give my
7 court reporter the case cites? I think, if you look at the
8 notice on the tables, it tells you if you are going to cite any
9 case law, to please give those --

10 MR. ANNESSER: I apologize, Your Honor, I will retract
11 that. It is within the brief, and so I will retract the case
12 citation. In essence --

13 THE COURT: I'm sorry. I don't understand that.

14 MR. ANNESSER: I did not provide it to the court
15 reporter, and the case that I am citing to is within the brief.

16 THE COURT: I know. Do you want me to spell them out
17 as you say them? Or how do you want her to get the spellings?

18 MR. ANNESSER: Your Honor, I don't believe she even
19 needs to have it. I can argue without the direct citation
20 because I believe it is set forth adequately within our brief.

21 THE COURT: All right.

22 MR. ANNESSER: And so this is directly from the
23 argument in the brief.

24 The issue in Florida is there is no extinguishment.
25 The independent existence may cease, but it still exists as

1 part of a larger corporation, a merged corporation, and
2 therefore there is no transfer. In fact, the model business
3 code, which is also cited in the brief, likewise provides that
4 a merger is not a transfer and it is not an assignment.

5 Florida's law -- Florida model business corporation
6 act is based upon the model business code, adopted almost word
7 for word with a very minor change which we don't believe
8 affects the commentary at all.

9 But looking further beyond the competing law as to
10 whether a merger is, in fact, a transfer in assignment, we'd
11 have to ask ourselves in this particular case, unlike in the
12 cases cited by defendants, we have a merger of the licensor,
13 not the licensee. So what they're advocating is is that
14 because the licensor merged, they can no longer enforce a
15 contract that they were a party to. The company that merged
16 into Leonardo Florida can no longer enforce that contract, yet
17 at the same time maintaining the position that they can sue
18 Leonardo Florida -- and they have -- under the same contract.
19 It is an inequitable result that does not have any support in
20 logic.

21 Moreover, the assignment in this particular case
22 occurred after all of the obligations under the contract by
23 Leonardo New Hampshire or Leonardo Florida had been completed.
24 And as cited in the brief, Florida law provides that you can
25 assign a claim at any time irrespective of an antiassignment or

1 antitransfer provision within a contract. So if a claim
2 arises, money is owed or otherwise, you can assign that claim.
3 In this case, our merger, even if it were seen as a transfer or
4 an assignment, occurred after the completion of all of the
5 obligations of the contract, and therefore would be
6 permissible.

7 Lastly, under this portion of the argument on
8 standing, the defendants are required to accept all of the
9 allegations in the complaint as true. We have alleged that we
10 have standing and that we have the -- that we have merged into
11 the company and that we are the party at interest. By denying
12 that, they have, in essence, created a denial as opposed to an
13 affirmative defense, which has to accept as true and then offer
14 a justification, excuse or avoidance of the claims in the
15 complaint.

16 Now, the second aspect to the standing argument that
17 they raise is that Dr. Rossi is not the beneficiary of the
18 provision that we claimed a breach of. For instance, the
19 contract was entered into by Dr. Rossi and Leonardo
20 Corporation. The payment, which we claim has not been made, of
21 \$89 million was to be directed to Leonardo Corporation. On
22 that ground alone, defendants argue and assert as a defense
23 that we therefore don't have standing on behalf of Dr. Rossi to
24 bring our claim.

25 The 11th Circuit has held that -- and this is within

1 our brief, Your Honor -- the 11th Circuit has held that a party
2 to a contract for the benefit of another party is the party in
3 interest and is not divested of standing as a result of the
4 benefit being -- I'm sorry -- being inferred upon another
5 party.

6 THE COURT: Why are you making an issue out of this
7 defense, because quite frankly if it remains as an affirmative
8 defense, the burden is on the defendants to prove it at trial.

9 MR. ANNESSER: Your Honor, I agree.

10 THE COURT: Why do you care?

11 MR. ANNESSER: I agree, and that actually could be
12 said of a number of these defenses. This is a very complicated
13 case. It's going to be complicated going along. And I think
14 it's in the Court's best interests as well as my client's best
15 interests --

16 THE COURT: Well, courts never like motions to strike
17 affirmative defenses. I don't know if you knew, but the case
18 law is pretty plain about that aspect of it. They're generally
19 disfavored. But this is one where there's no downside to you.
20 Let them say you have no standing, let them prove it, right?

21 MR. ANNESSER: Your Honor, yes, that is the
22 alternative, although it is yet another issue that must be
23 addressed as the case proceeds.

24 THE COURT: How? How? At trial, it would be the
25 defendant's burden to get before that jury and say you have no

1 standing and you have no claim against them. It would be their
2 burden of proof.

3 MR. ANNESSER: Yes, Your Honor. And, of course, if
4 they come up with any type of proof whatsoever, whether we
5 believe it's adequate or not, we do have to respond to that.
6 And that again clouds the issue. And frankly, Your Honor, we
7 believe a number of the defenses and number of the statements,
8 which we'll get to further in this motion to strike, have been
9 inserted just to cloud the issue in this case. It is a fairly
10 basic case at the heart, but with the affirmative defenses, it
11 clouds the issues that are truly at the matter of the dispute
12 as opposed to peripheral.

13 THE COURT: I mean, you have no concern that you have
14 standing. You know you do, right?

15 MR. ANNESSER: Yes, Your Honor. Yes, Your Honor,
16 we --

17 THE COURT: Much ado about nothing on this one,
18 wouldn't you say?

19 MR. ANNESSER: Your Honor, again, it's do we deal it
20 with now? Pay me now or pay me later. And we just -- it's
21 been my experience that it's easier to get these things when
22 there is no basis as a matter of law, for the defense to clear
23 them out early, and so we can limit the labors that are
24 required later.

25 THE COURT: All right.

1 Mr. Pace, do you want to have this burden of showing
2 these plaintiffs don't have standing?

3 MR. PACE: Certainly.

4 THE COURT: And what is the law that applies to this
5 case?

6 MR. PACE: Florida.

7 THE COURT: Florida.

8 MR. PACE: This is going to end up being Florida law.
9 I mean, there is some gimmicks here when it comes to it's a New
10 Hampshire corporation into a Florida corporation.

11 But our point is -- and some of these things
12 admittedly blend between affirmative defense and negating,
13 but --

14 THE COURT: Well, let's be clear, do you want to
15 simply negate or do you want to take the burden on?

16 MR. PACE: We would have the burden on standing,
17 Your Honor. I'm not trying to waiver on that. There's some
18 other ones that will come --

19 THE COURT: I know, and I saw that. And you asked me
20 to treat them as denials or what have and leave them there, but
21 it really changes your burden of proof.

22 MR. PACE: I agree, Your Honor. And again when we get
23 to the next one and talk about failure to state a claim --

24 THE COURT: Well, that's not an affirmative defense.

25 MR. PACE: Right. It's a -- averment is a denial --

1 THE COURT: I think I already addressed that, didn't
2 I, on the 12(b)(6) motion?

3 MR. PACE: You did. You did. We've raised it. We've
4 preserved it. We are not asking the Court to rule on a motion
5 to dismiss again. But let me just, if I can, just on this one
6 on standing, because I do want to explain our basis for it,
7 even though I agree, I believe in the posture we are in, it's
8 really not necessarily the occasion for the Court to, you know,
9 rule on the ultimate merits.

10 But the point is the case law is -- we feel the case
11 law is clear that when you've got a contract that bars any
12 assignment of transfer, including involuntarily and including
13 by operation of law of this contract, that you can't just
14 assign it to another -- you can't just transfer it to another
15 corporation. You can't move corporations. And they can say
16 all they want about licensor and licensee.

17 But if I can give you one concrete example of why
18 there's an issue here, my client -- one of my clients -- two of
19 my clients actually, but let's just say one of them, has the
20 control over any distribution or any disclosure of certain
21 information, certain intellectual property. One thing they
22 can't prevent is they can't prevent the Leonardo from
23 disclosing it amongst itself. Right? In other words, they can
24 say, Leonardo, you can't disclose it to any outsider, but you
25 can keep internally. Leonardo merges into IBM. Under their

1 theory, well, that's fine. IBM now can use all that
2 information internally. Well, no, wait a second. We have a
3 contract provision that says, little company Leonardo, you
4 can't tell this information to anybody else. You know, and now
5 all of a sudden you can merge into somebody else.

6 So we are in the same situation as the case that I've
7 cited. I agree, in the case I cited one is a licensor versus a
8 licensee. But they talk about the model business code.
9 Florida, there's a provision in the model code that refers to
10 contracts. Florida cut that out. When he says it's a minor
11 change, that's a huge change. Under the Model Business
12 Corporation Act, it says contracts are vested in the new
13 company without any impairment. Florida says, we don't want
14 that language. They consciously dropped it. They had to
15 consciously drop it, and they just are referring to transfer of
16 title.

17 So I think the law is actually relatively clear on
18 this, but again I also don't know if this is necessarily the
19 occasion that the Court has to tackle the issue. Their
20 reference to obligations under the contract, just to be clear,
21 the contract is continuing. They have continuing obligation of
22 the contract. We disagree about that. They think it's over.
23 We don't. But, you know, it's not so clear that the
24 obligations under the contract are not continuing. There is a
25 license in perpetuity -- well, maybe not in -- yeah, to some --

1 in some parts in perpetuity; in other parts for the duration of
2 a patent, assuming we made all the payments. We feel we made
3 all the payments. They feel we didn't make all the payments.
4 But that's a dispute the Court will handle.

5 As to Dr. -- as to Rossi versus Leonardo on
6 enforcement -- and we have cited our support for the issue --
7 the payment, they don't dispute it, the payment was to be made
8 to Leonardo Corporation. That somebody is the shareholder of
9 Leonard Corporation or the sole owner of Leonardo Corporation
10 doesn't let them sue on behalf of Leonard Corporation. That
11 there are other obligations in the contract that may flow to
12 Rossi does not mean that he gets to enforce obligations that
13 flow to Leonardo. That's the case we cited for the Court for
14 the proposition that -- and mainly this does not arise often --
15 but there are situations where there are multiparty contracts,
16 and if there is an obligation flowing to one particular party,
17 that party's the one who's supposed to enforce that. That's
18 the example that we've provided to the Court.

19 So do I feel on the standing issues we have the
20 burden? We do have the burden. I would imagine these would
21 never make it to trial because they are probably going to be
22 decided on summary judgment one way or the other.

23 THE COURT: Unless the facts are disputed.

24 MR. PACE: Unless the facts are in dispute. And then
25 there'll be -- you know, then there'll end up being issues for

1 trial.

2 THE COURT: Right.

3 MR. PACE: But we don't, you know -- that's -- we
4 don't have a concern about that. Or we recognize that. Maybe
5 that's a better way of phrasing it.

6 THE COURT: It's certainly. I mean the standard here
7 is under Rule 12(f): Is the defense impertinent, scandalous,
8 immaterial, redundant?

9 I don't see that it meets those descriptions on this
10 one affirmative defense, Mr. Annesser.

11 So let's move on to the next.

12 MR. ANNESSER: Your Honor, the second affirmative
13 defense which, I believe, the defendants have admitted is not a
14 proper affirmative defense, yet they ask the Court to treat it
15 as a denial, certainly we acknowledge that that is the proper
16 procedure where an affirmative defense fails to actually state
17 an affirmative defense, it may be treated as a denial.

18 But in this particular case with this defense, I am
19 not quite sure how it could be treated as a denial --

20 THE COURT: Failure to state a claim?

21 MR. ANNESSER: Yes, Your Honor.

22 THE COURT: Let me direct my question to Mr. Pace, if
23 I could. I have already found the plaintiffs stated a claim,
24 so I would agree that this is redundant, immaterial, and
25 impertinent.

1 MR. PACE: Well, Your Honor, the case law that
2 addresses it.

3 THE COURT: Um-hmm.

4 MR. PACE: It generally says the response, if it is
5 really a negative averment, is not to strike it but just to
6 treat it as a negative averment.

7 THE COURT: But I will be striking some other ones, so
8 let's clean up your answer and let's remove that.

9 MR. PACE: Again, as long as -- from my standpoint, as
10 long as I haven't waived any rights to this position --

11 THE COURT: I don't know how you waive it when you
12 filed a 12(b)(6) motion.

13 MR. PACE: Your Honor, I'm not necessarily
14 disagreeing, but --

15 THE COURT: Okay. So that one is stricken. Next.

16 MR. ANNESSER: Thank you, Your Honor.

17 The third affirmative defense, which is actually a
18 multiple-issue defense, they raise estoppel, waiver, laches and
19 I quote, other applicable equitable defenses without any
20 description as to what those defenses are.

21 Specifically, Florida law provides that on equitable
22 defenses such as waiver and estoppel and laches, to state the
23 defense, the party must state the elements of the defense and
24 allege facts to support those elements. They have failed to do
25 so, particularly in relation to other applicable equitable

1 defenses, which they fail to even identify. That doesn't even
2 reach the standard of bare-bones pleading requirement much less
3 adequate pleadings as required under the rules.

4 THE COURT: Okay. Thank you.

5 Mr. Pace.

6 MR. PACE: Your Honor, I think this is quite to the
7 contrary. We have pled -- if you look at these affirmative
8 defenses, certainly the context in which I know historically
9 people have thought of these are one-line affirmative defenses.
10 They start, Your Honor, if you look at our answer on Page 21,
11 this one that they are addressing right now is they are on
12 Page 22. There is an explanation as to each -- the basis for
13 each of the affirmative defenses. This is then a citation to
14 portions of the counterclaims and third-party claims that
15 provide additional context.

16 Given that the only issue here and the standard here
17 is fair notice, we believe that this is certainly more than
18 fair notice. In fact, I -- I have never seen an answer in
19 affirmative defenses -- and Your Honor may very well have and
20 will tell me to the contrary -- but that have this kind of
21 detail. And --

22 THE COURT: I would agree -- I would agree, though,
23 with the plaintiff. You can't just say, And other applicable
24 and equitable doctrines. I don't -- I can only wonder what
25 they might be, as would plaintiffs. So I would agree to

1 striking that part of your third defense.

2 MR. PACE: That's fine, Your Honor, as long as we have
3 the estoppel, waiver, and laches, and then in all honesty, that
4 is part of the "and other inequitable defenses" tends to be one
5 of those things where you find out as discovery goes on, so we
6 would have to come back to Your Honor and say we've discovered
7 a new affirmative defense that we didn't have a basis
8 originally to provide the detail on so --

9 THE COURT: And that we couldn't raise before the
10 deadline for amending pleadings because we were really diligent
11 in pursuing this in discovery and, nonetheless, did not
12 discover it.

13 MR. PACE: I agree, Your Honor.

14 THE COURT: All right. So that part is stricken,
15 though.

16 MR. PACE: So just that part is under equitable.

17 THE COURT: Correct. Yes. Next.

18 MR. ANNESSER: Okay. Your Honor, with respect to --
19 and I believe we can address two of them together -- the fourth
20 and sixth affirmative defenses, which are for unclean hands and
21 unlawful actions, they're all predicated upon allegations
22 within the counterclaim and reference to the counterclaim that
23 allege fraud, fraud in the -- I'm sorry -- yeah, fraud in the
24 inducement as to the term sheet and other fraudulent actions on
25 behalf of Dr. Rossi, the Leonardo Corporation, the USQL,

1 Mr. Fabio Penon, and the other third-party defendants. In
2 fact, with respect to those allegations, I believe they cite to
3 the entirety of their second amended answers and affirmative
4 defenses. This is a shotgun pleading that says, okay, you find
5 within these allegations which ones may apply.

6 But moreover, because they are based on fraud, this
7 Court has held that where the allegations on a FDUTPA claim are
8 based on allegations of fraudulent acts, that it has to meet
9 the Rule 9 pleading requirements, the heightened standard of
10 pleading under Rule 9, as opposed to under Rule 8.

11 Specifically, in this case, they allege that there was a
12 scheme -- and that is the word that they use -- among the
13 third-party defendants and the plaintiffs to defraud them under
14 the license agreement and the term sheet. Those allegations of
15 fraud, which are addressed in our motion to dismiss in more
16 detail, we feel are -- well, they lack the specificity required
17 under 9(b). And so by simply stating "we rely on the entire
18 second amended affirmative answer, affirmative defenses, and
19 counterclaims and third-party claims," likewise this defense
20 lacks the requisite specificity required under Rule 9.

21 THE COURT: Thank you.

22 Mr. Pace.

23 MR. PACE: Thank you, Your Honor. I think he grouped
24 the fourth and the sixth?

25 THE COURT: 4 and 6, correct.

1 MR. PACE: Because the sixth affirmative defense only
2 refers to nine paragraphs, very specific. The fourth
3 affirmative defense refers to some particular paragraphs in the
4 counterclaim and third-party claim. Your Honor, there is very
5 detailed counterclaims and third-party claims here. They're
6 very clear. They talk about very specific actions. They cite
7 e-mail documents, they cite memos, they give particular dates,
8 they give particular people who were involved. That we cite
9 multiple paragraphs to give context to it. This is not one of
10 those things that we are abstractly saying go off to the
11 library and try to find something. It is within the very same
12 document.

13 Your Honor's aware -- I mean, this is a case that's
14 only three or four months old from Your Honor recognizing that
15 9(b) does not apply to FDUTPA claims and that FDUTPA claims can
16 involve not just fraud, but deception, manipulation, unfair
17 practices. And you can use the word scheme in that context, as
18 we, I think, appropriately have. It is a very involved scheme.
19 It takes a number of paragraphs to plead.

20 I think Mr. Annesser is confusing what's a shotgun
21 pleading with a detailed pleading. A shotgun pleading is I'm
22 going to plead a few facts, and then out of that, I'm going to
23 say there's RICO, antitrust, securities, ERISA violations, etc.
24 That's a shotgun pleading.

25 When you have a pleading that has a lot of detail and

1 talks about particular meetings and quotes from e-mails and
2 references to context of those meetings and gives -- you know,
3 brings together all the multiple parties and multiple
4 locations, that is not a shotgun pleading. That's a detailed
5 pleading. That's what we have here.

6 Now, could we literally reprint those paragraphs in
7 the affirmative defenses? I guess in theory we could. I
8 just -- that seems to me to be a little bit ridiculous. And in
9 all fairness, Your Honor, in the terms of structuring this,
10 I'll just be honest, you know, we put it -- we kind of drafted
11 the counterclaims and third-party claims first and then worked
12 on the affirmative defenses and so didn't seem to make a whole
13 lot of sense. They raised originally the issue of -- because I
14 have to admit in our first version of this, they were the
15 one-sentence affirmative defenses; I'll acknowledge that. And
16 they said, you know, that's not good enough. And I went -- we
17 went back, and we changed them all. And this is an example of
18 changing them.

19 THE COURT: I agree that these are good enough, and if
20 and when on the motion to dismiss I require more particularized
21 pleading, then it would also similarly address any concerns as
22 to these affirmative defenses. But I see no problem with
23 directing the plaintiffs to those particular paragraphs that
24 flesh out the factual bases for these defenses. This is --
25 this is certainly, in my mind, satisfying *Iqbal* and *Twombly*.

1 Otherwise, as Mr. Pace said, he is going to have to basically
2 repeat and regurgitate everything that he's incorporating by
3 reference, so that the motion to strike these two is denied.

4 I think you also wanted to address the seventh
5 fraudulent representation, Mr. Annesser?

6 MR. ANNESSER: Yes, Your Honor. Certainly, there can
7 be no argument whatsoever as to whether fraudulent
8 misrepresentation falls under the heightened pleading
9 requirements. In this particular case they have failed yet
10 again to reach those heightened pleading requirements in the
11 allegations.

12 Under Florida law, to reach that -- Your Honor, I'm
13 sorry -- under the federal rules, to reach that heightened
14 pleading requirement, they have to have specific alleged
15 fraudulent statements, specifically state who made those
16 statements, they have to state the individuals -- I'm sorry --
17 what the individual or entity obtained as a consequence of the
18 fraud. That's not set forth either in the counterclaims and
19 third-party claims or within this particular affirmative
20 defense.

21 And to the extent that they relate to the entirety of
22 the counterclaim, again there is case law in Florida that makes
23 it very clear you can't leave a party -- it is not proper
24 notice to a party to leave them guessing as to which
25 allegations pertain to that defense and which ones don't.

1 There are allegations in the counterclaim of standing, of
2 venue, etc., and identifying the parties. Certainly, those
3 don't give rise to a claim for fraudulent misrepresentation.

4 So we are entitled to know more specifically what they
5 are relying on and the individual statements that they are
6 relying upon. And that's not set forth clearly. There is
7 admittedly in the counterclaim, third-party claim, there is one
8 e-mail which is attributed to Dr. Rossi, but everything else is
9 identified as statements made by Dr. Rossi, Leonardo, USQL,
10 Henry Johnson, J.M., etc., grouped together as one. And
11 certainly, they're not talking in unison or singing as a choir.
12 We are entitled generally to know individually what statements
13 were made by each defendant in that particular claim and when
14 those statements were made and the other requisite details
15 required under Rule 9.

16 THE COURT: Thank you.

17 I will hear from defense.

18 MR. PACE: It's ironic for him to raise this, only
19 because the complaint provides, quote, language that they say
20 was by defendants, and obviously defendants being corporations
21 and individuals could never have spoken at the same time. So
22 they're literally applying a different standard than when he
23 advocated to this Court on the motion to dismiss.

24 And, in fact, even if the correct standard were
25 applied, we have satisfied it, even though their complaint did

1 not, because we do identify. We have e-mail from Dr. Rossi.
2 We will have a meeting where it was -- I am saying Dr. Rossi,
3 Mr. Rossi. We'll have a meeting where he will be in attendance
4 with one other person -- we've pled it with another defendant
5 here or -- I'm sorry -- a third-party defendant -- and we talk
6 about what the substance is that occurred at that meeting. We
7 have got e-mails from him that provide the substance of what
8 those e-mails are. I mean, look, it is not that hard to go
9 through in our counterclaims and third-party claims and find
10 the statements that are said to be false or fraudulent, because
11 there's a good indicator. They use the word "false" or
12 "fraudulent." They are in here.

13 Now, contextually, I still think it's appropriate,
14 I'll give, if I can, just as an example, there is a -- there
15 are allegations in the complaint about a company that was
16 created in Florida so that -- to provide an excuse for them to
17 move down -- for Mr. Rossi and Leonardo to move down here to
18 Florida and bring a plant, a piece of equipment that we bought
19 from them down here to operate in Florida and that the company
20 was not -- they -- it was pitched to us as a company that was
21 going to have a real manufacturing process, and, in fact, that
22 didn't occur.

23 Contextually, you should have all of that to
24 understand when we cite in Paragraph 71, here is a long e-mail
25 from Mr. Rossi that makes a number of statements, and then in

1 Paragraphs 72 and 73, we say they are false. I don't think
2 there is any problem with including the prior paragraphs that
3 say here is the setup for this whole -- you know, for these --
4 this whole series of communications. So that's pretty detailed
5 and again much more detailed than the complaint ended up being,
6 which said defendants say quote/unquote and it is impossible
7 for five different parties to have said the exact same things
8 in unison, which is literally what he just argued, as opposed
9 to what we've pled, which actually does have a breakdown.

10 MR. ANNESSER: Your Honor, if I may just briefly
11 respond. One of the confusions comes -- and they are claiming
12 fraudulent misrepresentation, particularly in relation to the
13 term sheet. To the extent they are claiming that Leonardo
14 Corporation New Hampshire is the proper party as opposed to
15 Leonardo Corporation Florida, that in itself requires a
16 distinguishment as to which one they are alleging. If they are
17 going to continue on the path and say that we don't have rights
18 under the contract and that it was Leonardo Corporation New
19 Hampshire the entire time and that that should be separate and
20 distinct from us, then they need to state that because they are
21 currently suing Leonardo Corporation Florida for a term sheet
22 that they are claiming was entered into by Leonardo Corporation
23 New Hampshire. So we are entitled to clarification at the bare
24 minimum as to who the statements were made by.

25 And the plaintiffs acknowledge the one e-mail that

1 does attribute to Dr. Rossi. So as to Dr. Rossi, I do believe
2 the defense could be adequately pled. But as to Leonardo, it
3 is not because it fails to identify even a single instance
4 where the Leonardo Corporation Florida made a statement by
5 itself, this is what the statement was, this is when it was
6 made, etc. Again, the only example of an individual allegation
7 that has been made is that e-mail that we have referenced.

8 THE COURT: The motion to strike is granted in part,
9 denied in part. Please amend it so that you are clear as to
10 the actual fraudulent misrepresentation by the corporate
11 entity.

12 All right? Next.

13 MR. PACE: Your Honor, may I ask just one thing on
14 that, though, because -- just so we're clear -- and I can add
15 the allegation if it's needed in here, but Mr. Rossi owns both
16 Leonardo Corporation New Hampshire and Leonardo Corporation of
17 Florida. To the extent he's dealing on behalf of Leonardo,
18 everything he does is on behalf of every corporation. I mean,
19 I don't know how there's necessarily -- he's the one who's
20 created the confusion. He created two companies called
21 Leonardo Corporation, one in New Hampshire and one in Florida.

22 THE COURT: Right.

23 MR. PACE: So everything that's said on behalf of
24 Leonard Corporation, he was talking about a contract Leonardo
25 Corporation was entering. It's on behalf of Leonardo. They

1 have created the confusion.

2 THE COURT: Well, there are two Leonardos, though, so
3 you need to clarify.

4 MR. PACE: You want me just to provide that?

5 THE COURT: You need to clarify. You need to amend to
6 clarify that.

7 MR. PACE: Then we will provide that clarification.

8 THE COURT: Okay. Next.

9 MR. ANNESSER: Your Honor, as to the ninth affirmative
10 defense, merger, integration and ratification, in essence, the
11 defense alleges that -- and the heart of this defense is that,
12 because we entered into the license agreement and the first
13 amendment thereto, then any claim for fraudulent inducement is
14 vitiated. By entering into the agreement, we have merged every
15 prior conversation, representation, or otherwise and integrated
16 it into that agreement, and therefore, there could not be a
17 claim for fraudulent inducement.

18 They have cited to a 5th D.C.A. opinion that just came
19 out recently for the proposition that a merger clause negates a
20 cause of action for fraud or fraudulent inducement. And
21 specifically, with respect to that opinion itself, the court
22 goes on -- had they read the rest of the opinion -- it states,
23 that is an oversimplification and they don't accept it. In
24 fact, they go on to say that such a conclusion would be
25 superficial and in defiance of logic. Clearly, if there were

1 statements made to induce a party into a contract -- and this
2 Court as well as all of the Florida courts have held that where
3 those statements have been made to induce a party into the
4 contract, that is not vitiated by a merger clause that says we
5 are merging all prior agreements into this one.

6 Now, on the other hand, had there been a nonreliance
7 clause, which we do not have in this case -- and that was what
8 the Court, the 5th D.C.A. addressed in the court cited by the
9 defendants, had there been a nonreliance clause saying the
10 parties did not rely on anything outside of this agreement,
11 that would be a different story, but we don't have that here.

12 THE COURT: Thank you.

13 Defense.

14 MR. PACE: First of all, I kind of agree with
15 Mr. Annesser's implication. I have read the case, and I give
16 the Court the context for the case in my brief, which is what
17 the 5th D.C.A. said is we don't like this -- we don't think
18 this is necessarily the right rule -- I say that in my brief --
19 but this is the only way we can reconcile these two conflicting
20 Supreme Court -- Florida Supreme Court cases, one that he cites
21 and one that the court also cites. You know, the court
22 identified the cases, said here's the rule, we think it is kind
23 of a weird rule, but this seems to be the rule. So this --
24 this -- Billington is a statement in 2016 of what Florida law
25 is.

1 But let me, if I can, just kind of talk about this in
2 a slight bit more detail because I think it merits it. The
3 agreement states it contains the entire agreement of the
4 parties and it supersedes any oral representation. So it's not
5 just a merger. It is kind of a merger -- you know, a merger
6 integration/nonreliance, so it really does kind of cover the
7 gamut here. The parties -- the allegations -- for example, one
8 basis of fraudulent inducement is Cherokee said it was going to
9 guarantee the payment.

10 Well, there is no guarantee by Cherokee. This is a
11 long agreement. This is a long document. There's related
12 documents to it. In total, there are a bunch of pages. None
13 of them have Cherokee as a party. None of them have Cherokee
14 as a guarantor. That should negate any fraudulent inducement.
15 Otherwise, there is no ability in a written contract to prevent
16 these things. This is one of the reasons you have these
17 provisions.

18 So now admit -- I admit in this context on a motion to
19 strike an affirmative defense, the Court doesn't need to reach
20 this issue. It can simply say it's at least a defense. But we
21 actually think it goes more than just being a defense. We
22 think it's actually the right position on the law.

23 So -- but -- and again, that's -- we then make
24 reference to in terms of how this is pled, obviously the
25 affirmative defense clearly pleads here are the contract

1 provisions, here is how they apply. That's what I am
2 explaining to the Court now.

3 Our view is and has always been, now, whether you say
4 this is a matter of negating their claim or an affirmative
5 defense, this is an example of one where I would say there is
6 ambiguity. If your -- you can say statements in the contract
7 expressly contradict what you are basing your fraudulent
8 inducement claim on -- maybe that's negative. When you say I
9 am relying on a merger clause, integration clause, nonreliance
10 clause, maybe that becomes an affirmative defense. So there is
11 some ambiguity there, I will concede.

12 But regardless of which way you go, we think that we
13 prevail on the underlying issue.

14 THE COURT: I will not strike this defense. I think
15 there is a slim chance of prevailing on it, but that doesn't
16 mean it can't be there and that it's not supported at least by
17 some law as cited by defense counsel.

18 The next?

19 MR. ANNESSER: Your Honor, defendants' tenth
20 affirmative defense is speculative damages, and they state no
21 factual support or basis for the damages being speculative.
22 They do raise and they have raised in a motion that we have not
23 provided enough information to allow them to determine whether
24 they're speculative or not, I believe was their argument. At
25 the end of the day, until we specify -- which we have not been

1 required to do yet -- the specific elements of our damages, I
2 believe it's premature and there is no foundation to allege
3 that our damages are speculative and therefore is improper at
4 this time.

5 THE COURT: Defense.

6 MR. PACE: Your Honor, the complaint -- this is
7 directed at their noncontract claims. We are clear that that's
8 what we are talking about. The complaint identifies no
9 damages. The only damages they identify are on the contract
10 claim. The Court recognized that in the motion to dismiss
11 order when we made this as a point, they can't identify any
12 damages, and the Court concluded, you know, that they have not
13 identified any separate damages, but it's possible discovery
14 will reveal separate damages for plaintiffs' fraud claim, and
15 you're allowing them discovery as a consequence. I understand
16 that. But we should be entitled to raise a defense. We can't
17 figure out what their damages could be. They haven't figured
18 them out.

19 THE COURT: It is not a pleading defect, though. It
20 is not a defect in the pleading. And you can certainly raise
21 it at the appropriate time, a motion *in limine*, motion for
22 summary judgment, any other way. But that -- this is not
23 proper. Right now, I have given them, as you say, the ability
24 to pursue this. They are going to do it. And if they can't
25 prove up damages, you'll have that discussion at the right

1 time, but it is not to be an affirmative defense.

2 MR. PACE: Your Honor, as long as we haven't waived
3 it --

4 THE COURT: You don't.

5 MR. PACE: -- we have no problem with it. We just --

6 THE COURT: You never -- you never waive that a party
7 doesn't have sufficient evidence of damages. How would you
8 waive that?

9 MR. PACE: Well, actually, Your Honor, it's a little
10 bit trickier, right, because when it comes to speculative
11 damages, it is not that you don't have damages. Think of the
12 new business, because we are dealing a little bit with a new
13 business issue, where the law will say there is limitations on
14 damages a new business can get because it is too speculative.
15 I can tell you what would happen mostly likely with the next
16 McDonald's franchise at a location because I've got all these
17 other McDonald's franchises to test it on. When Chris Pace
18 opens up the Chris Pace Restaurant, who knows? Would you have
19 succeeded? Would you not? And you want to -- I want to claim
20 I would have made \$20 million a year, I would have been prime
21 112. Somebody else comes along and says, no, you would have
22 been a terrible restaurant. So there is limits on speculative
23 damages that is different than no damages.

24 THE COURT: Right. That's a motion for partial
25 summary judgment.

1 MR. PACE: Again, 7, as long as we are not waiving
2 that --

3 THE COURT: You are not.

4 MR. PACE: -- but that's why I'm saying there's some
5 ambiguity where the burden lies with that. But as long as we
6 are not waiving it, we are perfectly happy to take it out of
7 the document.

8 THE COURT: You are not. You are not. Next.

9 MR. ANNESSER: Your Honor, as to the last portion that
10 we are seeking to strike, it's actually a portion of the
11 counterclaim claim, third-party claims that addresses eight
12 paragraphs' worth of what I can only refer to as defamation
13 against my client, claiming he has had tax problems in the past
14 and that he has failed to pay taxes, etc. They have responded
15 by saying, well, it comes back into an antecedent breach
16 argument that they may have with respect to an affirmative
17 defense on our clients.

18 But it is improper for a number of reasons, one of
19 which is they fail to allege any facts that would be required
20 to prove up even an affirmative defense of antecedent breach,
21 much less the allegations that are contained with the
22 counterclaim, specifically with respect to damages. They are
23 claiming that my client didn't pay taxes. Well, in order for
24 that to be a defense or an independent claim, two things have
25 to happen. One is there has to be damages to them. You cannot

1 have a breach without damages. And second of all, they have to
2 show that it was a material breach.

3 Certainly a provision in the contract that says he has
4 to pay all his taxes does not go to the heart of this case or
5 of this license agreement that was entered into by the parties.

6 A material breach goes to the basis of this license
7 agreement, and it is clear that the basis was the licensing of
8 intellectual property to a company within a certain geographic
9 territory, not whether they pay taxes or don't. Even if the
10 allegations were true, they would not give rise to a defense,
11 because if Dr. Rossi did not pay his taxes, which is denied,
12 but notwithstanding, even if it was true, there is no way that
13 they could be harmed by that.

14 They had asserted this originally in their first
15 counterclaim and subsequently withdrew it because we pointed
16 out the fact that there was no basis. There is no damages that
17 could affect them, and therefore they don't have a claim. And
18 that equally applies to an affirmative defense. Without
19 damages, they can't say, oh, well, he did something that was
20 against the contract, even though it didn't hurt us and we
21 should be able to get out of it.

22 THE COURT: Defense.

23 MR. PACE: To start, Your Honor, they have not
24 challenged and I don't think they can challenge, but they have
25 not challenged the fifth affirmative defense -- he acknowledged

1 that here -- which is the antecedent breach. So that question
2 of is that a defense or not is not before the Court, doesn't
3 need to be addressed. It is a defense, but in any event, what
4 we have pled is the basis for -- we -- and they are not
5 disputing this, you know, where they -- one part say you don't
6 plead enough, now he is complaining we plead too much. It is
7 an antecedent breach to violate provisions of the contract. We
8 specified those provisions in the contract.

9 The prior tax problems that Mr. Rossi had is the
10 reason -- is part of the reason for this being material. It is
11 the reason they are being included in there. They were not
12 only included in the license agreement. They were -- they
13 actually -- the parties made them certify it a second time
14 later on before the -- or at the time the \$10 million payment
15 that was made. So it was always an issue because of the
16 concerns that the implications it could have.

17 You know, this is an agreement where they are buying
18 and licensing certain intellectual property, and there is
19 additional intellectual property that might or could be created
20 on an ongoing basis in the future. So they have a direct
21 interest in it. And again, to me, the materiality is shown by
22 the fact that there are certain provisions in this contract
23 that deal with this issue. They brought it up repeatedly. As
24 we said, there's a factual basis for it, which is the
25 historical issues, which I don't even go into in the complaint.

1 They're far more detailed than we referenced in the
2 counterclaim and third-party claim. We're entitled to be able,
3 at the very least, to assert it as an affirmative defense, and
4 we have asserted it in here is an affirmative defense.

5 THE COURT: This defense is not stricken.

6 MR. ANNESSER: Your Honor, we were not -- we were not
7 addressing the defense itself.

8 THE COURT: The actual paragraphs that you are
9 challenging and seeking to strike will not be ordered stricken.

10 MR. PACE: Your Honor, can I raise one house -- almost
11 administrative matter.

12 THE COURT: Yes.

13 MR. PACE: There is a pending motion to dismiss by the
14 plaintiffs. It does raise some of the same issues that the
15 third-party defendants raised.

16 THE COURT: Yes.

17 MR. PACE: Yesterday the Court struck the third-party
18 defendant motion to dismiss --

19 THE COURT: Yes.

20 MR. PACE: -- but not the plaintiff motion to dismiss
21 to require one motion, so I'm just a little bit -- I just
22 wanted to make sure we should still be moving forward with
23 responding to the plaintiffs' motion to dismiss and then there
24 is going to be another round of motions to dismiss with the
25 third-party defendants. Or did you want all that consolidated?

1 because they do raise overlapping arguments.

2 THE COURT: I know that they are. But in terms of my
3 work on my end, as opposed to having six sets of briefs
4 addressing the third-party claims, I wanted to have three. On
5 the plaintiffs' motion, it is going to be those three briefs
6 that we work on.

7 MR. PACE: Perfect.

8 THE COURT: And I don't like to have parties
9 incorporate arguments from your other papers, so please don't
10 do that, having me go back and forth and figure out what you
11 are incorporating or adopting from the other parties'
12 arguments.

13 MR. PACE: Your Honor, from a timing standpoint,
14 because there's one affirmative defense -- you struck the
15 second, the struck certain words in the third and I think the
16 tenth, but there is one where you said we have to provide some
17 additional allegations. May I ask, at least at this juncture,
18 to not have to amend the document quite yet because of the
19 motions to dismiss, if there is going to be -- I would rather
20 not -- I've already --

21 THE COURT: I agree. I agree.

22 MR. PACE: -- do it twice. Okay. So I will hold off
23 doing that.

24 THE COURT: Let's hold off on your amended affirmative
25 defenses until such time as I rule on the plaintiffs' motion to

1 dismiss.

2 Does that give you the clarity you are seeking?

3 MR. PACE: It will, because I actually imagine that
4 once the Court gets the third-party motions to dismiss, they're
5 very interrelated, so the rulings will probably be somewhat
6 similar or --

7 THE COURT: I am trying to keep this case simple. And
8 you are all going to do your best to complicate it for me, so
9 we're not going to do that, because complicating and papering
10 the file is just going to make it go a lot slower, and we're
11 not going to do that. I apologize to you gentlemen over there
12 for having you do your work over again, but to the extent that
13 we have parties filing -- it might come at summary judgment
14 time as well where you're going to do it together and not in
15 separate submissions, because that really multiplies my work on
16 my end.

17 MR. PACE: Understood.

18 THE COURT: Okay. Now let's go back to the schedule,
19 as soon as I am able to open up the docket. Now, the case was
20 filed in April.

21 MR. PACE: It was.

22 THE COURT: And you were served shortly thereafter.

23 MR. PACE: We accepted service, and so we had --

24 THE COURT: Right. So you had knowledge of this case
25 from May?

1 MR. PACE: Yes.

2 THE COURT: Right.

3 MR. PACE: Yes.

4 THE COURT: Okay. So.

5 MR. PACE: Since April -- I mean, Your Honor, since it
6 was filed. I am not going to deny that.

7 THE COURT: All right. So we have the missing
8 defendant needing to be served through The Hague Convention,
9 and I am going to give you one month to do it and get him
10 served, failing which, he will be dismissed without prejudice.
11 You can serve him later and sue him later, but it is not going
12 to be him dictating how this case gets resolved.

13 MR. PACE: May I ask this, only because -- remember,
14 this is a third-party defendant, it's not a defendant, so I
15 mean, if you -- from a timing standpoint of the case, it's not,
16 you know, April obviously isn't the relevant touchstone. April
17 was when the plaintiffs filed their complaint.

18 THE COURT: That's a relevant touchstone for you
19 knowing you needed to bring in a third party, and here we are
20 in October still talking about that third party.

21 MR. PACE: But in fairness, Your Honor, we filed a
22 motion to dismiss -- to dismiss the complaint. If the
23 complaint had been dismissed, we wouldn't have been suing these
24 other parties.

25 THE COURT: But you could evaluate the merits of your

1 motion to dismiss and say, well, what are the chances? And the
2 motion to dismiss and the pendency of it doesn't mean you can
3 sort of sit back and not do anything when you have a scheduling
4 order in place with deadlines and a trial date.

5 MR. PACE: Well, yes, Your Honor, but we didn't have
6 to answer, and until we answered and filed our claims, we
7 couldn't serve anything on Penon. I mean, prior to us filing
8 our counterclaims and third-party claims, we couldn't have
9 served anything on Penon. What -- I am not sure what we were
10 supposed to do in April, May, and June as to this person in
11 Italy. We knew he was in Italy. I don't think we were
12 required to bring our claims while our motion to dismiss was
13 pending.

14 THE COURT: When did you receive my order on the
15 motion?

16 MR. PACE: Your Honor, as soon as it came down. And
17 I'm -- Your Honor's ruling was in July.

18 THE COURT: July 19.

19 MR. PACE: July 19.

20 THE COURT: July 19.

21 MR. PACE: Wow, I got that right.

22 THE COURT: It's almost three months later.

23 MR. PACE: I agree, Your Honor. I am not trying to
24 claim -- all I'm asking --

25 THE COURT: So you've had the 90 days envisioned by

1 our rules for regular service. This is service on an
2 international party. And when I have international parties
3 clouding the issues and clouding our schedule, we can do one of
4 two things and you gentlemen can tell me what you want to do.
5 I administratively close the case until all of the parties are
6 before the Court and we can pursue a realistic discovery
7 schedule and look at a realistic time table for trial case.

8 And the case goes away from my end, and I don't sit
9 and have to handle these 12(b)(6) motions and other preliminary
10 matters. We can do that, and you bring this gentleman and make
11 him a part of this case and take six months, take a year to do
12 so. That's generally how long it takes under The Hague, in my
13 experience. Or, as you said, he's a third-party defendant.
14 You can sue him separately and later, once you are obtaining
15 your service under The Hague. So those are your options,
16 because I'm not going to just keep this case sort of hostage to
17 the gentleman in Italy.

18 MR. PACE: I understand. And I guess my request -- as
19 I understood what the Court was just saying initially and maybe
20 I overreacted to it, but was it -- I thought you were going to
21 enter an order today that within a month, the case was going to
22 be dismissed as to him.

23 THE COURT: I'm giving you one additional month to
24 serve him. On July 19, you knew at that point, the very
25 latest, you needed to get him served and made a party to this

1 case. And here we are, as I said, three months later: He is
2 not here, and everyone else is.

3 So you all speak to each other. If you want to
4 administratively close the case -- I think the plaintiff also
5 wants to subpoena the gentleman and have him deposed. You tell
6 me what your preference is, but it is not going to be piecemeal
7 continuances and tinkering with the scheduling order, which is
8 already in place and was in place before you impleaded him.

9 MR. PACE: I understand Your Honor's position. As I
10 said -- and we will do everything we can to serve Mr. Penon.
11 We will confer with the other parties.

12 I am not going to deny that ultimately what's very
13 likely going to happen is that we're going to end up having to
14 carve out the claims against Mr. Penon and do him separately.
15 All I'm saying is I'm asking that the Court not today order or
16 rule that 30 days from now, his claims are gone unless he's
17 appeared before the Court. That's -- and I am sorry if I
18 misunderstood where the Court was going --

19 THE COURT: Discovery closes February 27. He is not
20 even here. The scheduling order gives you a February 27
21 deadline on discovery, and this third-party defendant hasn't
22 even been served.

23 MR. PACE: I understand, Your Honor. The order was
24 set before there was any third-party claims or counterclaims.
25 It was based on the original complaint. I think this is what

1 Mr. Annesser was saying. The parties have actually all agreed
2 they're going to come to the Court and ask for some additional
3 time in light of there being counterclaims and third-party
4 claims. But -- and if -- it is not a motion before the Court
5 right now. The only other motion out there, I think, is our
6 motion for a protective order, but -- a confidentiality order.
7 But I understand what the Court is saying. And again, we will
8 deal with the Penon issue, and within a month, we will --

9 THE COURT: The third-party defendants have been a
10 part of this case since August 5th. The order, the scheduling
11 order, was entered July 1st, and it gave you an August 11th
12 deadline to join parties.

13 MR. PACE: And we did.

14 THE COURT: And you did. But it doesn't mean you join
15 the parties and serve them six months or a year later, which is
16 what we are looking at under The Hague Convention.

17 MR. PACE: I agree, Your Honor.

18 THE COURT: So, indeed, you will have one month to
19 serve this Italian gentleman and make him appear here.
20 Otherwise, he will be dismissed without prejudice, and you can
21 pursue your claims against him separately on a separate track
22 whenever you get service on him under The Hague Convention.

23 MR. PACE: I understand -- again, I'm sorry and if I'm
24 being hyper technical, Your Honor just said serve and him
25 appear here.

1 THE COURT: Serve him.

2 MR. PACE: Okay.

3 THE COURT: Give me proof of service.

4 MR. PACE: That he has been served --

5 THE COURT: Served under The Hague Convention, which
6 you knew you needed to do when you received my order denying
7 your motion to dismiss, and that was back on July 19.

8 MR. PACE: Your Honor, I understand the Court's
9 position. We will move with absolute diligence, and I am
10 certainly not going to deny my experience is similar to the
11 Court's in terms of how long it's going to take, so I know
12 where this very likely will be heading, but we would like to
13 have the month to do our best.

14 THE COURT: Right. And if you all want to agree to
15 put this case on the back burner for six months, a year, or
16 longer while you pursue the gentleman under The Hague, you let
17 me know that.

18 MR. PACE: I think we understand the alternatives,
19 Your Honor. We appreciate that.

20 THE COURT: All right.

21 MR. PACE: And that's for the defense. I don't
22 believe we had any other issues, Your Honor.

23 THE COURT: Any issues from third-party defendants?

24 MR. NUÑEZ: No, Your Honor.

25 MR. ARAN: On the scheduling aspect, I will try to do

1 everything possible, but I respectfully submit, we, as counsel,
2 didn't learn of this until September, and I have got a
3 February 27th discovery deadline. I don't do well --

4 THE COURT: It sounds like you are going to be getting
5 a continuance because, indeed, you just came into this case in
6 September, notwithstanding the fact that the main parties have
7 known about it since April, but I am looking at probably two
8 additional months beyond that.

9 MR. ARAN: That would probably be enough. That would
10 probably be enough.

11 THE COURT: And given that all that has taken place is
12 paper discovery, not like depositions have been taken that you
13 missed out on, I think the third-party defendants can come up
14 to speed fairly quickly.

15 MR. ARAN: Understood. Thank you.

16 THE COURT: Okay. And I would ask that whatever
17 proposed, revised scheduling report you want to submit, to
18 please do that quickly so that we all know the dates that are
19 governing the case.

20 MR. PACE: Well, Your Honor, we will have it to you
21 before the end of next week.

22 THE COURT: Okay. Anything else?

23 MR. PACE: That's all, Your Honor. Thank you very
24 much.

25 MR. ANNESSER: Thank you, Your Honor.

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THE COURT: Thank you. All right. You all have a good day.


MR. PACE: Thank you.

(The proceedings concluded at 9:38 a.m.)

C E R T I F I C A T E

I hereby certify that the foregoing is an accurate transcription of the proceedings in the above-entitled matter.

12/5/16
DATE


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

ANDREA ROSSI, *et al.*,
Plaintiffs,

vs.

THOMAS DARDEN, *et al.*,
Defendants.

Miami, Florida
December 20, 2016
Pages 1-43

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

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

2 COURTROOM DEPUTY: All rise.

3 THE COURT: Afternoon. We're here today in the case of
4 Rossi versus Darden, Case number 16-civil-21199.

5 Could I have appearances for the Plaintiff first?

6 MR. CHAIKEN: Yes. Good afternoon, Your Honor. Brian
7 Chaiken, C-H-A-I-K-E-N and Christopher Perre, P-E-R-R-E, on
8 behalf of Plaintiffs.

9 I also have Dr. Rossi who is here with us today. Dr.
10 Rossi asked me to tell you that he is wearing a piece on his
11 head for health reasons, and instead of wearing a hat, which
12 really didn't help the cause, he has a piece. So that explains
13 his appearance.

14 THE COURT: That's fine. I wouldn't have even known
15 that. Okay. Thank you. You can be seated unless you're
16 addressing the court.

17 Who is here for the Defendant?

18 MR. PACE: Good afternoon, Your Honor. Chris Pace and
19 Chris Lomax are here for Industrial Heat.

20 THE COURT: Okay. All right.

21 I got -- the Defendant's filed an objection to the
22 Plaintiff's notice of hearing. That's inappropriate, so I'm
23 striking that. In the future, if you have an objection to it,
24 when you come here, you can tell me all about it, but you're not
25 supposed to be filing anything before that. The notice only

1 indicated in there what the issues were that were going to be
2 addressed and not argument. The idea of having these hearings
3 is not to have argument ahead of time because it puts you in
4 some kind of advantage.

5 All right. Let me hear from the Plaintiff.

6 MR. CHAIKEN: Well Your Honor, we have two issues. One
7 substance and one form. I guess we'll deal with form first. I
8 guess that's the bigger picture issue.

9 Plaintiffs -- excuse me. Defendants have been
10 providing us with documents responsive to our request pursuant
11 to the previous order that you had issued in this case. They
12 have produced over 65,000 documents, over 138,000 pages worth of
13 materials as well as a 3.2 terabyte hard drive. And we've gone
14 back and forth with opposing counsel, and our biggest issue that
15 hasn't been unresolved as of yet is trying to get Defendants to
16 identify which documents are responsive to which requests.

17 THE COURT: Okay. What do you say about?

18 MR. CHAIKEN: And if I can just really briefly go into
19 that.

20 Their claim in the case is that the documents were
21 produced in the ordinary course of business and the way they're
22 normally held, pursuant to Federal Rule. We shared with them
23 yesterday some of the comments or feedback we received from our
24 vendor who is trying to help us decipher what we received, and I
25 had sent him an e-mail and I'll just quote one thing that I had

1 sent them, which I think sums up the entire thing. And our
2 provider told us that based on the volume, format and file types
3 produced, video, audio, database files, et cetera, it will take
4 an extreme amount of time, cost and resources to fully evaluate
5 the production. More so, given the complete lack of
6 transparency Defendant has shown with this production. There
7 are hundreds, if not thousands, of hours of audio and video, an
8 assumption based on the file size that has been produced. This
9 format, more so with no understanding of what the files are
10 responsive to, create undue burden on the Plaintiffs and may
11 result in unnecessary expense for them to attempt to decipher
12 the content of the production. Furthermore, based on
13 Plaintiff's sampling of the production, it is also believed that
14 select video and audio files are not even responsive to
15 discovery. This heightens our concern about the Defendants
16 simply performing a data dump.

17 Now I've got examples of documents, Your Honor.

18 THE COURT: what did they say about that?

19 MR. CHAIKEN: They haven't responded to that. Or they
20 claim that our requests were so broad that they were just being
21 responsive.

22 THE COURT: So did they respond to that or not?

23 MR. CHAIKEN: Their response was our requests were so
24 overly broad that their responses were within the scope of our
25 requests.

1 THE COURT: Okay.

2 MR. CHAIKEN: Now, they've also said that they're not
3 going to identify, you know, which documents are responsive to
4 which requests, which I think would resolve most of our
5 problems.

6 THE COURT: Okay. What do you say about that,
7 Mr. Pace?

8 MR. PACE: A few things. One Your Honor -- and let me
9 provide this before I provide it to you. One, Your Honor, is
10 that this e-mail came over yesterday. And as opposed to when it
11 should have come over, had time for the parties to talk about
12 it. Can I hand the court one piece of paper?

13 THE COURT: Yeah. Well, did you talk about the e-mail?

14 MR. PACE: I'll address --

15 THE COURT: Hand it to me.

16 MR. PACE: Actually I don't know if we (inaudible).
17 Sorry. Let me get back to the microphone.

18 we did talk about it and we talked about trying to, you
19 know, resolve the matter or look into the matter. But let me --
20 let's talk about the video and this production. I've given you
21 an example, because this is the 3.2 terabyte hard drive. We
22 have things -- these things are broken down into files, so this
23 is just an example. If you go into it and you look at the file,
24 one of them is filed Italy. You click on Italy, you come up
25 with these breakdowns by year. You click on the year and you

1 come up in these subfolders, analysis, data, images, video. So
2 they're all put together.

3 Plaintiffs, on the other hand, when they produced a
4 very, very small number of videos, just gave us the videos
5 without any indication. Some of them are of somebody's
6 apartment. We actually were able to open a couple of them.
7 There are a few seconds showing the inside of somebody's
8 apartment. The reality of the process is that I don't know if
9 in here they're going to find a video. I mean, our folks
10 reviewed them, they were the testing related videos. I would
11 imagine none of them are of somebody's apartment or of a
12 birthday party. But they may -- if they're a video that was
13 taken of the testing facility, they asked for everything we had
14 relating to the testing facility, we produced it.

15 So is there a lot of data there? Yeah. I mean, we
16 told the court the last time we were here there's a lot of data.
17 They asked for a lot of data. We had a meet and confer about
18 them, they were saying they wanted to have receipts for pipes
19 and wires -- I'm sorry, I keep using pipes instead of wires. So
20 we got all of the testing data. We organized it so that that
21 massive file is all organized in this fashion, which they didn't
22 do with the videos they produced which are also --

23 THE COURT: So how -- I thought you said this is how
24 it's kept in the ordinary course of business.

25 MR. PACE: Well actually, for this what we did is it

1 was in different places and we said get it together and put it
2 in an organized fashion so we could produce it this way.

3 THE COURT: So why don't you tell them that the
4 terabyte is in response to your requests that you have all
5 videos of the plant or whatever it is you just said to me?

6 MR. PACE: We've told them that. They know what's in
7 the terabyte drive. They know it's the testing data. I don't
8 think he's saying to the contrary.

9 THE COURT: Okay. Do you have a problem with the
10 terabyte drive?

11 MR. CHAIKEN: Yeah, I absolutely do, Your Honor. I've
12 got a copy of two videos right here I could show you.

13 THE COURT: I'm not watching a video.

14 MR. CHAIKEN: What's on the terabyte. They're 30
15 second videos.

16 THE COURT: I'm not watching videos, you can tell me
17 what's on it.

18 MR. CHAIKEN: The videos show a bunch of people in a
19 church. That's the first video. The second video shows people
20 riding on a train.

21 THE COURT: Okay. why is that?

22 MR. PACE: Your Honor, I'm not going to dispute that
23 there may be some videos in there that shouldn't be in there,
24 just like they gave us videos of an apartment, of somebody's
25 apartment.

1 THE COURT: I mean, it's not like well, they didn't do
2 the right job so we're going to send them videos of our church.

3 MR. PACE: We didn't, Your Honor. There's a lot of
4 videos in here. If somebody had a file that says videos of X,
5 they copied it over. Now, maybe in that video of X, you know,
6 if you go into my work computer it's almost all work stuff. I
7 will admit I have a couple pictures of my daughters in there.
8 If I kind of said here's the file folder of my work stuff and I
9 copy it when you're producing this large amount of data, then
10 you can have it. If the issue is the videos, you know, we can
11 go back and look at the videos. I mean, I'm not going to
12 dispute that there's something in there. Like I said, I think
13 this is the reality of the production process given the amount
14 of stuff we were trying to produce.

15 THE COURT: Okay. So I don't understand, what does the
16 Plaintiff want them to do?

17 MR. CHAIKEN: The Plaintiff wants them to identify
18 which documents are responsive to which requests.

19 THE COURT: All right. Well, he just told you the JPEG
20 is -- the JPEG is all videos? I mean, the terabyte thing?

21 MR. PACE: No, the terabyte drive has analysis, data,
22 images and videos. But it all relates to the E-Cat testing or
23 is supposed to all relate to the E-Cat testing. Out of 3.2
24 terabytes, I'm not going to say that there can't be mistakes in
25 there.

1 MR. CHAIKEN: If that's the answer, I'm satisfied with
2 that answer, Your Honor. These documents are --

3 THE COURT: Okay. You got the answer --

4 MR. CHAIKEN: These documents are --

5 THE COURT: So you got the answer for that. We don't
6 need to talk about that anymore.

7 Now, what else do you want?

8 MR. CHAIKEN: Okay. We've got 65,000 documents which
9 and I have no idea -- and 138,000 pages, and I have no idea what
10 requests they're responsive to.

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

12 MR. PACE: We're allowed to produce -- well, two
13 things. One is we're allowed to produce things in the ordinary
14 course. But second is --

15 THE COURT: It's the way they're maintained in the
16 ordinary course of business. Generally what that contemplates
17 is like the old days where you would go, show up at the person's
18 business and they'd say all of my invoices are in that filing
19 cabinet there. Go ahead and look at it. Or I guess if they're
20 on a computer, all my invoices are, you know, under such and
21 such. Go ahead and look at it.

22 MR. PACE: I agree, Your Honor. And in the new world,
23 fortunately they kind of changed it and updated it a little
24 (inaudible), we didn't highlight the (inaudible) -- I'm sorry.
25 I keep getting away from the microphone. I apologize for that.

1 I've got another case too, but I think this will make
2 the point. What we have agreed to provide them, and I will
3 admit, I said this yesterday because I did not realize we hadn't
4 provided the file path -- I'm sorry, Your Honor. I think it's
5 Page 8. Six. Wow, my eyesight is going. Eight. It's
6 highlighted, it should be.

7 THE COURT: I see it. Eight and nine here.

8 MR. PACE: Yeah. But there's two issues with
9 production on electronic documents. And we did not give them
10 the file path originally because I thought that we had -- we
11 gave them the file name which is what they requested, but we're
12 providing them the file path. When you provide the file path on
13 the electronic documents, it does tell you the way that they're
14 maintained.

15 THE COURT: Okay. Have you looked at the file path?

16 MR. PACE: They have not because I haven't given it to
17 them. It just came up yesterday and I told them we'll get it to
18 them by the end of the day.

19 THE COURT: All right. Will you be satisfied if he
20 gives you the file path?

21 MR. CHAIKEN: I don't know, Your Honor. I would have
22 to see it first. We've received, as per your last order,
23 documents over the last month including just recently as Friday,
24 so we're still analyzing the documents. We have provided the
25 documents to our service provider. We provided Defendant's

1 counsel with a protocol for providing the metadata that we've
2 requested. In fact, we provided it way up front. We never
3 received any feedback, they just gave us the documents in the
4 form they decided to give them to us. We've given them a new
5 protocol very recently, asked them to give us comments and
6 feedback, we've yet to receive any feedback.

7 THE COURT: Okay. When did you give them that?

8 MR. CHAIKEN: I believe it was yesterday, Your Honor.

9 THE COURT: I mean, why do you give them stuff
10 yesterday when we're here today?

11 MR. CHAIKEN: Well, Your Honor --

12 THE COURT: So that we can just make sure that nothing
13 is resolved and you can just throw it up in the air in front of
14 me and I'm supposed to figure out what to do with 650,000
15 documents?

16 MR. CHAIKEN: Absolutely not, Your Honor. In fact, we
17 gave them our ESI requests and our requests for metadata over a
18 month ago and again, they gave us documents in the form they
19 gave them to us. They never said we're not going to give you
20 these fields or --

21 THE COURT: Well, when you have your ESI conference,
22 you're supposed to discuss what form you're going to get the
23 documents in, you're supposed to agree that the documents will
24 be provided in some form and then you give them to him in that
25 form and he gives them to you in that form.

1 MR. CHAIKEN: I would agree, Your Honor.

2 MR. PACE: Your Honor, we produced them in the format
3 they requested and in the form they requested. They didn't
4 request file path, but I'm saying I --

5 THE COURT: Well, you got the file path -- hold on.
6 Give them the file path. You have an expert who is working on
7 this thing too who is collecting all this stuff?

8 MR. PACE: We have an e-discovery vendor, we do.

9 THE COURT: Okay. Good. That person is to communicate
10 with his e-discovery vendor, his e-discovery person, and he's to
11 explain to him how he's to research these records so he can get
12 to what he wants. Because this is not hide the ball.

13 MR. PACE: Your Honor, it's not -- that first came up
14 yesterday. Wait a second, Your Honor. In fairness to us and
15 the amount of volume we produced, we produced the testing data
16 in an incredibly organized fashion.

17 THE COURT: I don't want to hear a speech about what
18 you provided. There's two ways to provide things, okay?

19 MR. PACE: Fair enough.

20 THE COURT: Maybe, and I suspect that this thing isn't
21 right because you guys aren't communicating well together,
22 that's why I'm telling you to get your experts together so they
23 can communicate with each other well.

24 But there's two ways of -- one thing is to give them a
25 lot of documents, but give them so much garbage that there's no

1 way they're ever going to find what is relevant to this case.
2 The other thing is to provide a lot of documents because they
3 asked for a lot of documents and they're all relevant and, you
4 know, that's fine. But just saying well, we provided this and
5 we provided that, that means nothing to me. I've got no idea.

6 I've had cases where they only provided ten documents
7 and people were happy, and I've had other cases where you got to
8 provide a million documents and that wasn't enough. You have to
9 provide 1.5 million documents then. So, you know, telling me
10 the number of documents means zero except for the fact that you
11 provided a lot of junk to them.

12 MR. PACE: well, what I was going to say, Your Honor,
13 was we gathered up the testing material and we organized it.
14 That's the big production. We then produced, for example, the
15 communications back and forth.

16 THE COURT: I don't understand. What production is
17 that?

18 MR. PACE: The terabyte hard drive. The terabyte hard
19 drive.

20 THE COURT: I don't want to hear what you provided, I
21 want to hear what the problems are. I don't want to hear what
22 you did, I want to hear what you didn't do and why you didn't do
23 it. I've heard that, I'm now ordering you to provide the path.
24 Or if you're voluntarily providing the path, you're to do that.
25 The part you're to provide your expert or someone who is

1 familiar with how these records are kept, how they can be
2 searched, and have them talk to his expert and don't come back
3 here again either of you until you've accomplished that.

4 And don't come back here again and tell me -- you guys
5 have been, you know, calling my law clerk about five times a
6 week going we need time, we need more time, and then you come in
7 here and go oh well, I just sent him all this stuff yesterday.
8 And he's not -- you know, that doesn't make sense. Instead of
9 calling my law clerk asking for 30 minutes every 30 minutes, why
10 don't you instead call each other and talk to each other?

11 I mean look it, this is a big case. You guys are good
12 lawyers. You shouldn't need me for more than 30 minutes to
13 resolve an issue. It should be an issue that comes to me and
14 say judge, you know, we think that this stuff is protected by
15 the work product privilege and they think there's not and I
16 think we need to have an argument on this or we think that this
17 stuff is hidden in a mountain in Colorado and we shouldn't have
18 to go get it, so we need a judge really to decide whether or
19 not, you know, it's proportional to the needs of the case. Not,
20 you know, oh we gave them videos and we did this and we did
21 that. This is garbage. This is not what I'm here for.

22 So I suggest you guys start working on this stuff a
23 little better. I don't know who is, you know, doing the
24 communicating between you, but if it's not you two and it's
25 someone else, they need to communicate. And if they can't get

1 it accomplished, then you two get it accomplished before you
2 come and see me again. I'm not here to resolve kindergarten
3 matters, and I'm serious about this.

4 All right. What's the next issue?

5 MR. CHAIKEN: Your Honor, as it relates to that same
6 point, which is we believe that they are responsible for
7 providing us which documents by Bates stamp number are
8 responsive to which.

9 THE COURT: They're not if they give it to you in the
10 ordinary -- the way it's kept in the ordinary course of
11 business.

12 MR. CHAIKEN: Right.

13 THE COURT: Now you're telling me you can't figure out
14 head or tails. He tells you that he's going to give you
15 whatever this trail is so that you can hopefully do that.

16 MR. CHAIKEN: Right. I've got some case law as well I
17 would like to present.

18 THE COURT: Here's another thing. You want to present
19 case law, he just did this too. You present the case law to the
20 opposing party 48 hours before the hearing so that way he's not
21 reading it while you're arguing.

22 MR. CHAIKEN: Yes, Your Honor.

23 THE COURT: Okay. What are you giving me case law on?

24 MR. CHAIKEN: I'll get to a microphone. This case
25 stands for the proposition that if a party claims the documents

1 were kept in the ordinary course of business, it bears the
2 burden of demonstrating that fact. Even when a party produces
3 documents as they were kept in the ordinary course of business,
4 if the business recordkeeping system is so deficient as to
5 undermine usefulness of production, that party may not have met
6 its obligation under Rule 34.

7 THE COURT: All right. So why are you giving me this?
8 Didn't he just say he's going to be giving you something that
9 you're going to be able to search this?

10 MR. CHAIKEN: And we will discuss that with our
11 provider. In fact, I suggested that our two service providers
12 talk to each other and that was a suggestion that I made as of
13 yesterday. I understand, Your Honor, we will do that.

14 Getting past that, then we can walk through just a few
15 of the additional objections that they've raised to our specific
16 requests. If you don't have them in front of you, I can hand
17 you a copy Your Honor.

18 THE COURT: Okay. You can hand me a copy I guess.

19 MR. CHAIKEN: Sure.

20 THE COURT: They're probably attached to your motion,
21 aren't they? Or no?

22 MR. CHAIKEN: I hope so, but I've got the amended
23 responses (inaudible).

24 THE COURT: They wouldn't be -- well, unless they were
25 attached to your -- but this is fine.

1 MR. CHAIKEN: If you open up the interrogatory
2 responses, we can quickly go through the issues I have.

3 MR. PACE: Your Honor, the interrogatory responses were
4 not noticed for today's hearing.

5 THE COURT: Yeah, the two things you have on here are
6 requests for production on your notice of hearing. Is that
7 right? I mean, you're looking at me like --

8 MR. CHAIKEN: Yeah.

9 THE COURT: One is the first request for production and
10 one is the second request for production.

11 MR. CHAIKEN: I guess we missed putting the -- the
12 amended response is the first set of interrogatories.

13 THE COURT: What's the issue in the first set of
14 interrogatories?

15 MR. CHAIKEN: There are two interrogatories that I
16 think require that you hear the issue.

17 THE COURT: All right. Tell me what they are.

18 MR. CHAIKEN: Interrogatory Number 6 which is on page.

19 THE COURT: This also tells me that you guys aren't
20 communicating because if you were communicating before you filed
21 this notice, you would have been talking about this
22 interrogatory.

23 MR. CHAIKEN: No, we did actually, Your Honor. We did
24 talk about these interrogatories yesterday.

25 THE COURT: Again, yesterday. From now on, here's what

1 you're supposed to do. Before you file a notice, you're
2 supposed to discuss this stuff with each other and you're
3 supposed to try to resolve it. Now, I know what happens a lot
4 of times is you try to resolve them, maybe you can't get it all
5 resolved, and then some lawyers, before they come in here go,
6 you know, I don't really want to go in front of Judge O'Sullivan
7 and show him how immature we are and how we can't practice law
8 and so you resolve it the night before. I understand that
9 happens a lot, which I'm very happy when I get here and you say
10 well, we resolved two out of three of these issues.

11 But you don't start the night before trying to resolve
12 the issues that you're going to discuss with me the next day.

13 MR. CHAIKEN: Your Honor, to be fair, we had started
14 discussing these issues well over a month ago.

15 Interrogatory Number 6. We're requesting that they
16 provide us information with respect to their claim that
17 Mr. Penon, who is the expert in charge of validating the test,
18 anything that they stated as to why the protocol --

19 THE COURT: Who did Mr. Penon work for?

20 MR. CHAIKEN: Penon worked for the entity, Defendant
21 Industrial Heat, and he was selected by both parties and agreed
22 to by both parties as the evaluator for the validation test.

23 THE COURT: Okay. Okay. Go ahead.

24 MR. CHAIKEN: And so we've asked them to provide us,
25 you know, each and every reason why the agreed-upon protocol was

1 not followed. And you can read through A through G. And their
2 response was the test -- the protocol that you've identified is
3 incorrect. The correct protocol is attached as Exhibit 1 to the
4 response, but they haven't responded to any of the items A
5 through G. We've asked them to give us a response and they've
6 refused.

7 THE COURT: Okay. Well, they're saying that what you
8 attached as A was not the test protocol; am I correct?

9 MR. CHAIKEN: That's correct. And they attach what
10 they claim is the correct protocol.

11 THE COURT: Okay. Now what, you want them to do it for
12 the correct protocol?

13 MR. CHAIKEN: That's correct.

14 THE COURT: Okay. Do you have a problem with that?

15 MR. PACE: They can certainly serve an interrogatory on
16 that. I don't have the interrogatories with me, it wasn't
17 noticed for the hearing. These have not been being discussed
18 for the last few months. This came up just yesterday,
19 production issues have been, that I admit. But no, I mean, they
20 can serve an interrogatory on it and we can respond to it.

21 THE COURT: I'm just -- here's what you're to do.
22 You're to substitute in Interrogatory Number 6, the correct
23 protocol is substituted for Exhibit A and you're to provide a
24 new response. Either answer it -- either -- are you listening
25 to me?

1 MR. PACE: I am.

2 THE COURT: You either answer it or give me an
3 objection. Whatever you want to do. But we're not going to go
4 and start all over in the 30 day program and then you guys argue
5 over another 30 days and then come and see me in six months.

6 what's the next one?

7 MR. CHAIKEN: Number 2 on Page 4. We've asked them to
8 identify persons with knowledge regarding the subject matter of
9 the action and the basis and substance -- excuse me, nature and
10 substance of the knowledge they believe each person has.

11 They've identified persons, but not what knowledge they may
12 have. It's important for us to understand what knowledge these
13 people may have so we can identify the appropriate witnesses to
14 be deposed, if necessary; or not to be deposed if they don't
15 have knowledge of anything that's really relevant.

16 THE COURT: Okay. What do you say about that? You
17 gave a list of 31 people, the question was to provide what
18 knowledge they have. That doesn't mean you have to write a
19 novel on each one of these, but you have to indicate who the
20 person is and what his position is.

21 MR. PACE: Your Honor, this is not -- this is not
22 something that's been coming up recently. Had they asked us
23 about it, we could have provided -- we will provide the
24 paragraph. This still isn't the way it should be done. I mean
25 --

1 THE COURT: Well I know, but what should be done was
2 when you listed the people, you should have answered the
3 question. Don't you think so?

4 MR. PACE: Your Honor, I don't have -- I don't even
5 have it in front of me, so I'm sorry.

6 THE COURT: Okay. I mean, I don't see any objection
7 here. Let's see what you say here. Does he have an objection
8 to providing what knowledge they have?

9 MR. CHAIKEN: They just simply said they may have
10 knowledge and information pertaining to the facts alleged in the
11 pleadings or underlying the subject matter of the action.

12 THE COURT: Okay. So you're to provide a one or two
13 sentence explanation of what this person has to do with this
14 case. Okay?

15 MR. PACE: We will, Your Honor.

16 THE COURT: All right. Does that take care of the
17 interrogatories?

18 MR. CHAIKEN: That does, Your Honor. Thank you.

19 THE COURT: Okay.

20 MR. CHAIKEN: Going to the requests for production.

21 THE COURT: Which one?

22 MR. CHAIKEN: Specifically Number 8 which is on page --
23 begins on Page 8.

24 THE COURT: On Page 8?

25 MR. CHAIKEN: Yep. It's Request Number 8, we ask for

1 documents reflecting what the relationship and/or agreements
2 between Defendant IH and these individuals, and they've agreed
3 to provide us with that information for certain individuals but
4 not others.

5 THE COURT: Okay. Which ones don't they want to
6 provide?

7 MR. CHAIKEN: They don't want to provide with respect
8 to Barry West, Joe Murray, T. Barker Dameron.

9 THE COURT: Hold on. Hold on. Barry West, Joe Murray,
10 go ahead.

11 MR. CHAIKEN: T. Barker Dameron, Joe Pike.

12 THE COURT: I got it. Yeah.

13 MR. CHAIKEN: Daniel Pike, Robert Godes and Woodford.

14 THE COURT: Okay. Do they indicate why they don't want
15 to provide it for them?

16 MR. CHAIKEN: I'm not sure why they've excluded those
17 people, Your Honor.

18 THE COURT: Okay. How come you didn't want to provide
19 it regarding those people?

20 MR. PACE: Well, we actually did on a separate document
21 request provide, I think, the Joe Murray employment agreement.
22 T. Barker employment agreement. But otherwise what -- let me
23 get one objection out first because you've already struck the
24 objections so you said I should raise it here, which is our view
25 is we've already had a hearing on the objections, they're now

1 going back and re-raising -- we had an hour long hearing on it.

2 THE COURT: On what?

3 MR. PACE: On the objections. That was the hearing we
4 had before you on October 28th.

5 THE COURT: On this request for production?

6 MR. PACE: On both these sets of requests for
7 productions, as well as on the interrogatories. And their
8 position is there's things that they didn't get to in that
9 hearing, but we had an hour before you and now we're going back
10 to these things.

11 THE COURT: Okay. Why are we going back to something
12 that we argued about before?

13 MR. CHAIKEN: Well, we didn't argue about this specific
14 request for production. We ran out of time at the last hearing
15 and at the end of the last hearing, you said hey, take my
16 rulings into account, go back see if you can come to an
17 agreement. If you can't, come back here.

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

19 MR. PACE: Your Honor, all you said is if there's other
20 issues, you can come back. I don't think it meant that they can
21 come back on the objections. I understand --

22 THE COURT: I would agree if I ruled on the objection.
23 But what he said sounds familiar to me, like something I would
24 say. I don't have a particular memory of saying it, but it
25 seems like that's what I would say. Now, if I already ruled on

1 this particular objection, I'm not ruling on it a second time.
2 I don't recall ruling on it the first time.

3 MR. PACE: Well, some objections were handled in
4 groups. So let me just say on this, there are requests in here,
5 and this -- you may recall this from the last hearing. There
6 are requests in here that seek information relating to my
7 client's or -- yeah my client's investments in other
8 technologies. And what we had argued last time, and I thought
9 we prevailed on last time, was the point of if it has some
10 connection to the E-Cat Technology, we were producing it. I
11 mean, so in other words, if they sent something to somebody
12 reference the E-Cat Technology, we were going to produce it even
13 if -- doesn't matter who that person is. But otherwise, getting
14 into our other inventors was inappropriate.

15 THE COURT: Okay.

16 MR. PACE: And that -- I believe that was a limitation
17 Your Honor recognized. Same thing with getting into all these
18 different kinds of, you know, investment companies. It's just
19 not relevant to the case. The case is about Industrial Heat and
20 IPH. There was a question about Cherokee, and I think we did
21 agree to give them anything about Cherokee because Cherokee is
22 the other party and the other party covered by the allegations.
23 They made allegations that the judge said didn't mean anything,
24 that they said oh, you formed subsidiaries or you formed other
25 companies. And the judge's order on the motion to dismiss said

1 that's not a fraud. Forming other companies doesn't create a
2 fraud. So we've tried to narrow this thing down to agreements
3 with the parties in here, we included Ampenergo, because
4 Ampenergo has a relationship to the E-Cat Technology.

5 THE COURT: well, let's talk about the ones you didn't
6 provide. Barry West. who's he?

7 MR. CHAIKEN: Barry West was an independent contractor.
8 We've separately provided for Barry West and for Barry West, for
9 T. Barker and for Joe Murray. We've provided their employment
10 agreement or independent contractor agreement.

11 THE COURT: Barry West -- I'm sorry. T. Barker and who
12 is the third one?

13 MR. PACE: Dan Maroon and Joe Murray.

14 THE COURT: Joe Murray and Dan Maroon? Is that one of
15 the ones that's here?

16 MR. PACE: Yes. It's G, Your Honor.

17 THE COURT: I see T. Barker is G. You said Dan Maroon.
18 Who is Dan Maroon? I mean, I don't see his name on here.

19 MR. CHAIKEN: Dameron.

20 MR. PACE: I'm --

21 THE COURT: Okay.

22 MR. PACE: I'm sorry. I'm butchering it. I'm sorry.
23 (Cross talk between the court and counsel)

24 THE COURT: I got it. Okay. All right.

25 So the documents they provided for those, is that

1 sufficient or do you need for documents?

2 MR. CHAIKEN: If those are the agreements between IH
3 and those individuals, we'll accept that.

4 THE COURT: Okay. All right. So that leaves us with
5 Joseph pike, Daniel Pike, Robert Godes and Woodford Patient
6 Capital Trust, PLC if I'm not mistaken.

7 MR. CHAIKEN: Correct.

8 THE COURT: Okay. So who is Joe Pike?

9 MR. PACE: Joe Pike is an investor in IHHI, which is
10 the holding company of Industrial Heat.

11 THE COURT: Okay. Why is he -- why do you want his
12 documents?

13 MR. CHAIKEN: He's listed. I want any agreement
14 between him and IH. He's someone they listed in response to
15 Interrogatory Number 2. If he played some role or has some --
16 obviously someone who has knowledge of the facts of our case.
17 If he has an agreement with IH, we would like to know what that
18 agreement is.

19 THE COURT: Okay.

20 MR. PACE: If the agreement relates to Dr. Rossi or
21 Mr. Rossi, we would be producing it. We produced e-mails with
22 Joe Pike. I mean, we're not concealing the name Joe Pike, but I
23 don't think -- like his shareholder agreements, to the extent
24 that's what they're seeking, I don't think that that's
25 responsive or relevant to discovery.

1 THE COURT: Okay. what do you say about that?

2 MR. CHAIKEN: Well, if he's a shareholder in IH or
3 anything having to do with our technology, then certainly we
4 would like to know what the basis of that investment was, what
5 he was told by the company. If he was told by IH that hey, this
6 is the greatest technology ever and it works fantastically and
7 then he's turning around in this lawsuit saying this technology
8 is worthless and doesn't work, we would like to be able to point
9 out those contradictions.

10 MR. PACE: Those documents would have been produced and
11 they know that because we produced the investor presentations.
12 Again, he's referencing Mr. Rossi's technology. If it
13 referenced Mr. Rossi's technology, we've produced it.

14 MR. CHAIKEN: Okay. You know what, I'll accept that,
15 Your Honor.

16 THE COURT: Okay. Daniel Pike? Is that the same
17 thing? Is he related to Joseph Pike?

18 MR. CHAIKEN: I believe so. He's the son of Joe, so
19 same issue. I agree.

20 THE COURT: You agree to provide the same documents?

21 MR. PACE: We provided them with Daniel Pike as well.
22 If it related to Mr. Rossi, we provided it.

23 THE COURT: Okay. Robert Godes?

24 MR. CHAIKEN: Robert Godes is an inventor who works for
25 a company called Brillouin. We believe Brillouin may have

1 received information regarding the E-Cat intellectual property.
2 Mr. Godes is the inventor and/or owner of Brillouin. We would
3 like to know if there is any agreements between independent --
4 Industrial Heat and Brillouin and Mr. Godes that could impact
5 this case.

6 THE COURT: Okay.

7 MR. PACE: Your Honor, if it related to Mr. Rossi and
8 Mr. Rossi's technology, we've produced it. They have no
9 connection with Brillouin. But the fact of the matter is if
10 there is an e-mail or a document with Brillouin that references
11 anything about the Rossi technology, it has been --

12 THE COURT: Were any payments made to Godes as a result
13 -- relating to that technology?

14 MR. PACE: Relating to the Rossi technology, it's been
15 produced.

16 I do want to say one thing on the record because of
17 something that he said. We don't agree with his
18 characterizations of Penon. I don't think it's germane to the
19 hearing.

20 THE COURT: Of who?

21 MR. PACE: Penon. The person he characterized as the
22 expert that was selected by both the parties and was on our
23 side.

24 THE COURT: Oh, okay.

25 MR. PACE: I don't think Your Honor needs to resolve it

1 for this hearing.

2 THE COURT: All right. That leaves Woodford Patient
3 Capital Trust, PLC.

4 MR. CHAIKEN: Yes. And Woodford is referred to in
5 their response, there's allegedly an agreement with Woodford
6 Funds with respect to some funding. We don't know why that
7 wouldn't be produced.

8 THE COURT: Okay. Why would that not be produced?

9 MR. PACE: If it related to Mr. Rossi, if it references
10 Mr. Rossi or his technology, it has been produced. And they
11 know that. They know they've got a bunch of investor
12 presentations, they used them at depositions.

13 MR. CHAIKEN: Presentations are one thing, agreements
14 are something else.

15 THE COURT: Are there any agreements with him regarding
16 Mr. Rossi's technology?

17 MR. PACE: No. No. Well, investment agreements. And
18 we also I think actually maybe did produce one of those in any
19 event. But still it's --

20 THE COURT: Well, that would include if he's investing
21 in the company because of Mr. Rossi's technology then.

22 MR. PACE: Well, our position would be Woodford was
23 investing in the company because of its kind of portfolio, but
24 if we did not produce the subscription agreement of Woodford, I
25 will produce it. But I still think -- I'll go find out whether

1 we've produced that one.

2 THE COURT: Okay. Produce it if you have it.

3 MR. PACE: But if there's any communications with
4 Woodford about Mr. Rossi or any documents sent to him back and
5 forth about Mr. Rossi or his technology, we've produced that
6 already.

7 THE COURT: Okay.

8 MR. CHAIKEN: Just to be clear, I would like to see the
9 copy of the agreement that's referenced in response to
10 Interrogatory Number 16.

11 THE COURT: 16 says -- well I don't see that being -- I
12 mean, I can't say. I don't know what you're talking about
13 there. Is there some agreement they provided pursuant to 16?

14 MR. CHAIKEN: That's what I'm asking for. I'm asking
15 to see a copy of it. They referenced it.

16 THE COURT: Where did they reference it?

17 MR. CHAIKEN: Page 22, interrogatories.

18 THE COURT: Oh, interrogatories.

19 MR. CHAIKEN: Yes.

20 THE COURT: Page 22. Okay. What do you say about
21 that? They want to see the agreement with Westford Funds for an
22 additional \$150 million in capital if the circumstances warrant
23 it.

24 MR. PACE: I think -- wait, wait. I may be looking at
25 the wrong one that he was referencing. Yeah. No, this is the

1 one that I'm saying, Your Honor, it's -- there's an option
2 provision for 150 million. I believe we've produced it. But
3 again --

4 THE COURT: Okay. If not, produce it.

5 MR. PACE: I'll produce it.

6 MR. CHAIKEN: Thank you, Your Honor. That's it for
7 that one. We can move on to Number 19 which is on Page 16.

8 THE COURT: Okay.

9 MR. CHAIKEN: Number 19, request Number 19 provides any
10 and all documents evidencing communications between you and any
11 other person or entity in which you mention, discuss or refer to
12 any deficiency or noncompliance with any testing procedure or
13 test plan in relation to the E-Cat. And the response from
14 Defendants was they'll provide documents which discuss or refer
15 to any deficiency or noncompliance with the operation of the one
16 megawatt E-Cat plant and they've basically limited our request.

17 THE COURT: well, do you have something else other than
18 the one -- what did you say? Megawatt E --

19 MR. CHAIKEN: Megawatt E-Cat plant, right, exactly. So
20 they're talking about the deficiency or noncompliance with the
21 operation of the plant. We're asking for communications
22 regarding deficiencies or noncompliance with the testing
23 procedures or test plans, not merely the operations of one
24 plant.

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

1 MR. PACE: It's been produced. They could have raised
2 this with us, we would have told them. We produced anything
3 that was covered by other requests where it was anything about
4 the E-Cat testing.

5 THE COURT: Okay. So amend your response to Number 19
6 to indicate it's been produced.

7 MR. PACE: We will.

8 THE COURT: What's the next one?

9 MR. CHAIKEN: Let's see, Number 33 which is on Page 24.
10 We asked for any and all documents which support, pertain to or
11 evidence your statement that Leonardo has long since failed to
12 achieve guaranteed performance as described in the second
13 amendment. I'm assuming Mr. Pace is going to tell me they've
14 produced them already.

15 MR. PACE: I'm sorry, which one are we talking about?

16 MR. CHAIKEN: Number 33 on Page 24.

17 THE COURT: Evidence regarding your statement that
18 Leonardo has long since failed to achieve guaranteed performance
19 as described in the second amendment.

20 MR. PACE: And we said we produced documents which
21 reflect, discuss or address whether or not they support
22 Industrial Heat's statement that Leonardo has long since failed
23 to achieve guaranteed performance as described in the second
24 amendment, and we've done that.

25 MR. CHAIKEN: Right.

1 MR. PACE: So, I mean, I think our objection was trying
2 to figure out -- and we raised this with them to figure out what
3 was meant to be covered by pertained. It's not covered within
4 reflect, discuss or address.

5 MR. CHAIKEN: Okay.

6 THE COURT: So do I need to rule on that?

7 MR. CHAIKEN: No, I think we're fine with that one. I
8 apologize, Your Honor.

9 I think the last -- let's see. The last one we have --
10 just look through my notes, Exhibit 52. Request Number 52 which
11 is the last one. Page 34.

12 THE COURT: All right.

13 MR. CHAIKEN: Any and all agreements between IH and
14 Penagril (ph). Penagril was the broker who Plaintiffs used to
15 find purchasers of technology or licensors of technology. We've
16 asked for all agreements. They've limited it to simply the
17 agreements related to the E-Cat IP. We think if there are other
18 types of compensation agreements between IH and Penagril, we
19 should be able to see it.

20 THE COURT: Why?

21 MR. CHAIKEN: It could influence bias in this case.
22 And Penagril hasn't -- although Penagril would be owed over \$45
23 million under the contract, they haven't made any claim in this
24 case. We think there's some other side deal going on and we
25 would like to see it.

1 THE COURT: All right. What do you say to that?

2 MR. PACE: Your Honor, if there's anything related to
3 the E-Cat, we would have produced it. They are also a
4 shareholder in IHHI and so agreement -- I mean, I think
5 agreements could cover kind of shareholders. But this says
6 Industrial Heat. Well again, look, I don't think it's relevant,
7 but if we need to search for it, we can go ahead and search for
8 it. But again, my position is that would not cover anything in
9 their capacity as a shareholder of IHHI.

10 THE COURT: What do you say about that?

11 MR. CHAIKEN: Well, I think that goes to the point. If
12 they're a shareholder of IHHI, then they have an ulterior
13 interest here. They're listed as a party that has knowledge of
14 the facts of this case. We think there may be some bias. We
15 would like to get into that.

16 MR. PACE: By the way, they also have this. Because
17 they have a production from AEG. This is another reason why
18 this shouldn't be coming up.

19 THE COURT: Who is AEG.

20 MR. PACE: Ampenergo. Sorry.

21 THE COURT: Okay.

22 MR. PACE: Ampenergo gets abbreviated as AEG.

23 THE COURT: All right.

24 MR. PACE: I apologize. They have a document
25 production from AEG. I think it includes some of the

1 shareholder stuff. Even though we don't think it's really
2 relevant to the case, but again --

3 THE COURT: All right. I'm going to overrule your
4 objection and find that you have to respond in full to 52.
5 Because, I mean, I think my general rule is it has to relate to
6 the E-Cat, but I think in this instance, he's showing why it
7 would be relevant even if it doesn't relate to E-Cat itself.

8 All right. What else do we need to talk about?

9 MR. CHAIKEN: That's all I have, Your Honor.

10 THE COURT: Okay.

11 MR. PACE: Your Honor, can I just make sure so we're
12 not back here again?

13 THE COURT: Yeah.

14 MR. PACE: To be clear on the record, we're done with
15 their document requests, we're done with the interrogatories,
16 they've had their chance to --

17 (Cross talk between the court and counsel.)

18 THE COURT: I'll wait until the end until we're done
19 with that because today we didn't run out of time. I think the
20 last time we did run out of time.

21 MR. PACE: Fair enough. I just don't want to come back
22 here.

23 THE COURT: You still have an obligation, if you find
24 additional stuff that would be responsive to that, to produce
25 it.

1 MR. PACE: I agree, and we may even have production
2 issues, Your Honor. I'm not going to dispute that we're not
3 going to have something else. I don't want to come back on
4 these objections. I don't think this is the way the process is
5 supposed to work. I'm getting kind of blasted a little bit here
6 and I understand the heat just flows in this direction, but I
7 didn't set this hearing for an hour, I didn't wait until
8 yesterday to raise some of these issues when it relates to
9 objections. I know you don't want to hear about it, but I'm
10 just saying I don't want to have to come back here a third time.

11 THE COURT: I just said that, that we're done with
12 these two. But you have a duty to continue to supplement if
13 there's additional records that are provided.

14 MR. CHAIKEN: Well Your Honor, then I would ask just
15 the issue of whether or not they've produced documents in the
16 ordinary course of business including the 100 --

17 THE COURT: Yeah. Well, that issue would not resolve
18 -- hopefully it's going to be resolved when your experts meet
19 and when he provides you this path way. And if not, you can
20 come back to me on that. Yeah.

21 MR. CHAIKEN: Fair enough. That's all I need, Your
22 Honor.

23 MR. PACE: Can I move to one other issue?

24 THE COURT: Yeah, sure.

25 MR. PACE: Just because of scheduling concerns because

1 of the holidays. We have -- and we've had multiple meet and
2 confers with the third party defendants, we have at least a
3 couple of issues as to each, neither of which will take more
4 than 30 minutes. There's a schedule -- I mean we could -- we
5 tried to get in the schedule this week, they weren't available,
6 I understand it. Next week I understand the court's off, so
7 that pushes us all the way into January. And our discovery
8 cut-off, including experts, is the end of February.

9 THE COURT: So I'm sorry, what did you want to set for
10 a hearing?

11 MR. PACE: I'm trying to -- in all honesty, Your Honor,
12 I'm trying to figure out how to handle -- we've got some
13 discovery objections or some objections we want to resolve, but
14 just --

15 THE COURT: Objections by them or by a third party?

16 MR. PACE: No. Third party. I'm sorry, Your Honor.
17 We had some conversations, I don't -- maybe I should not be
18 doing this on the record, but I'm trying to figure out from a
19 scheduling standpoint when we should try to schedule this and
20 when we can try to schedule this thing.

21 THE COURT: You have to tell me what it relates to.
22 It's objections by a third party to what? A subpoena?

23 MR. PACE: I'm sorry. The party. A third party
24 defendant. They're a party in this case.

25 THE COURT: Oh, they're a party in this case.

1 MR. PACE: Yes. And I'm not asking you to rule on
2 anything, I'm just trying to figure out --

3 THE COURT: So it's JM Products or with Henry Johnson
4 or one of those folks?

5 MR. PACE: Right. It's with all of those folks.

6 THE COURT: Okay.

7 MR. PACE: And --

8 THE COURT: So you want me to give you 30 minutes in
9 the beginning of January?

10 MR. PACE: Well, I also want to be able to confer with
11 them first. But I'm trying to figure out just from what Your
12 Honor just said -- I mean, I don't want to set a notice without
13 knowing what I'm going to do.

14 THE COURT: Here's what I'm going to do. I'm going to
15 give you a time in the beginning of January and then you're
16 going to let me know whether or not you need it or not.
17 Hopefully you're going to be able to resolve the issues with
18 them and if you can't, then you can use this time to set it down
19 for a hearing. But I want you to have a real conversation with
20 them ahead of time.

21 MR. PACE: We have been, Your Honor. And that's why
22 I'm saying, I hope we can resolve it, but just in case we can't.

23 THE COURT: Right. I'll give you a time and if for
24 some reason they say look it, you know, I'm at my great
25 grandmother's wedding that day, then come to me or call up and

1 say we can't do it, that way we have to do it another day.

2 MR. PACE: If somebody is at their great grandmother's
3 wedding, I actually will personally come in here and tell you.
4 I'll probably withdraw the objection.

5 THE COURT: There you go. Hopefully they'll be at
6 their great grandmother's wedding.

7 How about Thursday, January 5th? Is that good? In the
8 afternoon?

9 MR. PACE: That would be great, Your Honor. Can we --
10 they're represented by two separate groups of lawyer.

11 THE COURT: Hold on. Hold on. I just realized that
12 the preliminary injunction hearing is probably going to last all
13 day. We can do it the afternoon of Tuesday, January the 3rd.
14 Or we can go to the next week if you want. I mean, I don't know
15 what you guys -- if you guys are working, you know, Christmas
16 week or not. Because that's the first day back after the
17 holiday, the 3rd. Can't do it on that Thursday because I have a
18 preliminary injunction hearing. I can do the 6th if you want at
19 2:00. Oh, you're right. Okay. Yes, I do have time on either
20 the 5th or the 6th in the afternoon.

21 MR. PACE: That's perfect. We'll deal with the other
22 lawyers and --

23 THE COURT: Which one you want me to hold for you? You
24 pick one.

25 MR. PACE: Just because I hate doing things on Friday

1 afternoon, can we take Thursday afternoon?

2 THE COURT: Okay. Thursday afternoon at 2:00.

3 MR. PACE: 2:00. And then if we could --

4 THE COURT: I mean, if you talk to them and they need
5 Friday, just call. But if you don't call for a week, it could
6 be gone. I'll hold that Thursday afternoon at 2:00 for you.

7 MR. PACE: That's why I wanted to raise it here. With
8 all the scheduling things going around, it's just been hard to
9 try to get something scheduled, so we wanted to try to lock
10 something in and then work backwards.

11 THE COURT: All right.

12 MR. PACE: But we have been negotiating with them and
13 trying to eliminate the issues.

14 THE COURT: Good. All right. So if you need me --
15 Tori, put this on the calendar tentative 30 minutes for
16 Thursday, January 5th for Darden. I don't know, I assume are
17 you guys going to be here or is that something --

18 MR. CHAIKEN: I don't believe that's our issue.

19 THE COURT: Okay. Good. All right.

20 Anything else? Any other issues you want to discuss
21 today? You're welcome to the -- it wasn't on this thing, if you
22 think it's going to help move the case forward and not sandbag
23 somebody.

24 MR. CHAIKEN: No, Your Honor. We appreciate your time.
25 Thank you very much.

1 THE COURT: Okay.

2 MR. CHAIKEN: Happy holidays.

3 THE COURT: Yeah, you guys have a great holiday. See
4 you next year.

5 MR. PACE: Thank you, Your Honor. Nothing else.

6 THE COURT: All right. Thanks a lot.

7 Oh yeah, when do you want to provide me with the order?

8 MR. CHAIKEN: 48 hours from when we get the transcript?

9 THE COURT: How long does it take to get the
10 transcript, Cheri?

11 COURTROOM DEPUTY: It varies depending on what you're
12 willing to pay.

13 THE COURT: Yeah, if you want to pay a lot of money,
14 you can probably get it in an hour.

15 COURTROOM DEPUTY: Find out.

16 MR. CHAIKEN: Can we get it next week?

17 THE COURT: Are you working next week?

18 MR. CHAIKEN: I'm working next week, yes sir.

19 THE COURT: Okay.

20 COURTROOM DEPUTY: You'll have to speak to the court
21 reporters. I'll give you the number. They can tell you when
22 you can get it.

23 THE COURT: All right. When are the amended responses
24 going to be provided and whatever order you've agreed to today?

25 MR. PACE: I'm trying to go back through my -- figure

1 out what we --

2 THE COURT: I don't think there was anything that was
3 super extraordinary.

4 MR. PACE: That's what I'm thinking. I mean, look,
5 we'll get them done as fast as we can. I'd say outer limit of
6 two weeks. I don't think we need two weeks, but I just don't --
7 I'm looking at a little bit of scribble scratch here right now
8 to be perfectly honest with you so --

9 THE COURT: Provide them as soon as possible, but in no
10 event later than January 3rd.

11 MR. PACE: That's perfect, Your Honor.

12 THE COURT: All right. And when do you want to -- you
13 still haven't told me, you have to give me a date when you want
14 to provide the --

15 MR. CHAIKEN: How about Thursday next week?

16 THE COURT: That's fine. If you want to put it off --
17 I'm not going to be here next Thursday, so if you want to put it
18 off to the 3rd, you're welcome to. I mean, if you get it
19 earlier, you can send it early.

20 MR. PACE: Can't we just set the date as Christmas and
21 just --

22 THE COURT: Yeah, right. That would be nice. That's
23 when we should set this case for trial.

24 MR. PACE: It will be our present to you. We'll be
25 like here, happy holidays.

1 THE COURT: Yeah, right. All right. So by, you know,
2 hopefully earlier. But if not by January 3rd provide the order,
3 proposed order. Yes.

4 MR. PACE: It's just strange to have the same date that
5 the order would come in to you.

6 THE COURT: The order is in effect right now.

7 MR. PACE: Right. That's fine.

8 THE COURT: So it really doesn't matter. The order is
9 in effect, the documents are due by then.

10 MR. PACE: I wasn't thinking. We'll have the
11 transcript well before then, so we'll be able to look at the
12 transcript that we haven't missed anything in our chicken
13 scratch.

14 THE COURT: Okay. All right.
15 Anything else I can help you all with?

16 MR. PACE: No. Happy holidays.

17 MR. CHAIKEN: Thank you very much.

18 THE COURT: All right. Have a great holiday.

19 MR. CHAIKEN: Thank you.

20 (PROCEEDINGS CONCLUDED)

C E R T I F I C A T E

21 I certify that the foregoing is a correct transcript from the
22 record of proceedings in the above-entitled matter.

23 12-22-2016
Date

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

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

ANDREA ROSSI, *et al.*,
Plaintiffs,

vs.

THOMAS DARDEN, *et al.*,
Defendants.

Miami, Florida
January 5, 2017
Pages 1-39

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

APPEARANCES:

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

12 COURTROOM DEPUTY: All rise.

13 THE COURT: We're here today in the case of Andrea
14 Rossi and others versus Thomas Darden, as well as I think this
15 relates to a third party defendant, J.M. Products and others,
16 case number 16-civil-21199.

17 Could I have appearances for the Plaintiff first.

18 MR. CHAIKEN: Good afternoon, Your Honor. Brian
19 Chaiken on behalf of Plaintiffs.

20 THE COURT: Thanks.

21 And for Thomas Darden and the Defendants?

22 MR. PACE: Good afternoon, Your Honor. Chris Pace,
23 Chris Lomax and Erika Handelson on behalf of Defendants.

24 THE COURT: Thanks. And for the Third Party
25 Defendants?

MR. LEON: Francisco Leon on behalf of J.M. Products,
Henry Johnson and James Bass.

MR. NUNEZ: And Your Honor, Rudy Nunez on behalf of

1 Fulvio Fabiani and United States Quantum Leap, LLC.

2 THE COURT: Okay. Good. All right. I think this was
3 filed by the Defendants, right?

4 MR. PACE: It was, Your Honor.

5 THE COURT: You can be seated unless you're addressing
6 the court.

7 what's the issue?

8 MR. PACE: If I can, Your Honor, let me -- if I can
9 just set an agenda because there are four issues and I just want
10 to make sure -- I think we can cover all of them very easily in
11 a half an hour.

12 THE COURT: Good.

13 MR. PACE: One is the end date of discovery. At what
14 point do they no longer have to continue to produce documents.
15 One is the start date, so two dates, you know, sandwiching.
16 There's one scope issue as to J.M. Products, Johnson and Bass,
17 and then there's a document production timing issue as to Third
18 Party Defendants Fabiani and USQL.

19 So if I can just kind of take them in that order and if
20 Your Honor wants everybody else to chime in, they certainly can.

21 THE COURT: Okay.

22 MR. PACE: There's a common objection as to end date.
23 All the Third Party Defendants want to stop producing documents
24 after February of 2016 because that is when the testing, the --
25 what they've alleged -- what the Plaintiffs have alleged is the

1 guaranteed performance testing finished was in February of 2016.

2 THE COURT: Tell me who are these Third Party
3 Defendants? How are they related to this thing?

4 MR. PACE: The alleged customer to which power was
5 being provided is J.M. Products.

6 THE COURT: Okay.

7 MR. PACE: Henry Johnson is the president of that
8 company.

9 THE COURT: Right.

10 MR. PACE: James Bass is the alleged director of
11 engineering of the company.

12 THE COURT: Okay.

13 MR. PACE: Fabio -- Fulvio Fabiani was working with
14 Mr. Rossi, was like his assistant or his person handling the
15 electrical parts and his company is US Quantum Leap.

16 THE COURT: Okay.

17 MR. PACE: Now --

18 THE COURT: So what kind of records are you getting
19 from them?

20 MR. PACE: We haven't gotten anything yet from Fabiani
21 and USQL and that's an issue for today. From Johnson, Bass and
22 J.M. Products, or at least Johnson and Bass, we've gotten some
23 documents. In fact, one of the things, you know --

24 THE COURT: I guess what I really mean is what kind of
25 records are you trying to get from them?

1 MR. PACE: Well, we're trying to get -- if I can
2 explain the problems with these date limitations.

3 THE COURT: All right.

4 MR. PACE: Our position is that the company, J.M.
5 Products was essentially -- was a scam. It was a sham company
6 that wasn't really operating. We were fooled into -- they said
7 "hey, we've got this customer in Florida, let us bring our plant
8 from North Carolina down to Florida so we can provide services
9 for this real customer". Turns out there is no real customer.
10 And again, from their actual document production, I can hand you
11 a few e-mails that show that this is in fact the case, that --
12 so that scam didn't end on February 2016. They continued it
13 afterwards. In fact, Mr. Johnson sent a letter to me or -- I'm
14 sorry, to Industrial Heat saying -- in April of 2016 saying
15 "hey, we want this plant to be re-started", and we called their
16 bluff on it and said "okay, we'll re-start the plant", and then
17 they came back and said "oh no, you know, there's -- you know,
18 Rossi and Leonardo are saying there's a dispute between the
19 parties so we can't really go forward with opening the plant."
20 so the scam, the sham, did not end in February of 2016.
21 And our view is we should be able to get the documents up to
22 present, to the extent they're otherwise responsive. I mean,
23 obviously we're asking for responsive topics.

24 THE COURT: So this relates to J.M. or to both folks?

25 MR. PACE: It relates to all the Third Party Defendants

1 because I believe they've all taken a uniform position on that.

2 THE COURT: Explain to me about J.M. and Henry Johnson,
3 but not about and Fabio Penon. Is he part of J.M.?

4 MR. PACE: No, he's not. So if I can, that would
5 certainly cover J.M. Products, Bass and Johnson.

6 As to Fabiani and US Quantum Leap, the same applies,
7 there was -- in fact, there was a meeting that Fabiani had with
8 --

9 THE COURT: Just so I understand the alignment here.

10 MR. PACE: I'm sorry.

11 THE COURT: Fabio Penon, who is he associated with,
12 anybody?

13 MR. PACE: He's not supposed to be associated with
14 anyone, but --

15 THE COURT: well, who is representing Fabio Penon?

16 MR. PACE: No one. He's not been served in the case.
17 He's in Italy.

18 THE COURT: Oh, so I don't need to worry about him.

19 MR. PACE: Yeah, you don't need to worry.

20 THE COURT: Okay. well, forget about him. We don't
21 need to talk about stuff I don't need.

22 MR. PACE: Yeah.

23 THE COURT: So then we have United States Quantum Leap
24 and Fabiani, right?

25 MR. PACE: Correct.

1 THE COURT: They're together.

2 MR. PACE: Correct.

3 THE COURT: Okay. So tell me why you need records for
4 them through today.

5 MR. PACE: So they -- for example, Fabiani met with Joe
6 Murray in March of 2016 to talk about after the February -- the
7 conclusion of the testing in February or the alleged testing in
8 February, Industrial Heat tried to have contact with Fabiani to
9 try to say what's going on here, what data do you have, what
10 information, because we've got an agreement with you and you
11 have to provide us all this information. And he stonewalled
12 them for a number of months. He apparently now lives in Russia,
13 which is a new development we just found out about, but he was
14 properly served in this case so we don't have to deal with that
15 issue right now. But our view is, again, it doesn't stop in
16 February. He continued to have e-mail communications and in our
17 view, continued to perpetuate the sham all the way until, you
18 know, the lawsuit was filed and then the communications ceased.

19 THE COURT: When was the lawsuit filed?

20 MR. PACE: Well, when our claims were filed against him
21 was July or September of 2016. I can get the exact date if
22 that's, you know, significant to the court.

23 THE COURT: That was when he brought the third party
24 lawsuits?

25 MR. PACE: Correct.

1 THE COURT: Is that when you want the records to?

2 MR. PACE: Yeah. I mean, if there are records that go
3 up through present, I think we would still be entitled to them.
4 If they're still having communications about J.M. Products for
5 example.

6 I mean, again, the examples I can give you, Your Honor,
7 are J.M. Products had some -- a tax preparer did some work for
8 J.M. Products, they get an invoice. Rossi sends something back,
9 an invoice for a \$1,050. Rossi says "send me an invoice for a
10 \$1,050 for nickel powder", and it's to pay the money that he has
11 -- that J.M. Products has to pay on these invoices is just a
12 sham. There's other e-mails where he says, Rossi says, "I've
13 always paid whatever comes due for J.M. Products".

14 So, you know, there is no -- you know, we were pitched
15 that this was an independent company. There was somehow a
16 separate company. In fact, the documents we received thus far
17 show that it is in fact simply operated by Andrea Rossi, and
18 there's also e-mails where he controls the bank account, you
19 know, including minor overdraws. He says "tell me, you know,
20 why is there a \$300 or 337 overdraw". So we think we're
21 entitled to all of those communications.

22 THE COURT: Okay. So what does J.M. Products say?

23 MR. LEON: Well Your Honor, the allegations in the
24 complaint and the allegations in the counterclaims all end as of
25 February, the date that the test ended which was the middle of

1 February of 2016. The allegations in their counterclaims even,
2 all the acts or inactions or omissions that they're claiming
3 were allegedly deceptive or allegedly -- alleged
4 misrepresentations all occurred well before March 1st of 2016.

5 For example, one of their main claims against J.M.
6 Products, Henry Johnson, is the fraud in the inducement claim.
7 They don't need any communications after even 2016 to be able to
8 prove whether or not representation was correct or incorrect and
9 whether or not they relied on that representation to enter into
10 the agreement. So if you take that count aside, what's left is
11 that was for entering into the term sheet and then also
12 allegedly moving the plant to Florida. That's one part of the
13 scheme they're alleging.

14 The second part of the scheme they're alleging is the
15 manipulation of data. And in their own allegations, they don't
16 allege that any of the Third Party Defendants, J.M. Products,
17 Henry Johnson or James Bass, manipulated any of the data.
18 Instead, all they say you guys made misrepresentations that
19 induced us to bring the plant to Florida and you guys didn't, on
20 multiple occasions, call it two or three occasions, didn't allow
21 Industrial Heat access to the E-Cat plant, which J.M. Products
22 did not have access to per the term sheet.

23 So our position is that anything that occurs after
24 February of 2016 is not only irrelevant to the allegations in
25 the pleadings, but is also not necessary. In essence, they're

1 going on a fishing expedition to try to get information or
2 communications or documents that don't pertain to the lawsuit,
3 that aren't necessary for the lawsuit. It's overburdensome.

4 THE COURT: How many records do you guys have? They
5 say sounds like it's really not a real company. You say it's
6 overburdensome. Why is it overburdensome?

7 MR. LEON: Henry Johnson is the attorney, has been, and
8 they've known this, has been and still is the attorney for Rossi
9 and Leonardo Corporation on various matters. James Bass still
10 has communications with Rossi because he now works with Rossi
11 and Leonardo Corporation on things unrelated to the lawsuit. At
12 a certain point in time, once the Third Party Defendants were
13 going to be brought in or it was felt that they were going to be
14 brought in, there was a joint defense agreement. There's that
15 issue. Rossi and Leonardo Corporation, they continued to
16 develop new technologies, there's an issue there because the
17 parties still maintain communications. It's no secret that they
18 still communicate just on things that don't relate to the
19 lawsuit. So it becomes a fishing expedition for them to get
20 potentially privileged information, potentially confidential
21 information when it's just not necessary.

22 THE COURT: Okay. What about the other folks?

23 MR. NUNEZ: Yes, Your Honor, Rudy Nunez.

24 As Your Honor is well aware, the scope of discovery and
25 relevance of discovery depends on the claims, the defenses and

1 the proportionality. In this case, as you heard from Mr. Pace,
2 my client, Fulvio Fabiani, was the assistant for Mr. Rossi who
3 is the big player, right? As we've taken one deposition,
4 basically my client's counterpart for Industrial Heat, for the
5 Defendant, basically characterized himself as a worker elf. And
6 I asked him "well, what about Mr. Fabiani? what was he doing?
7 No, he's a worker elf too. He was doing whatever Mr. Rossi told
8 him." So in the big scheme of things, proportionality, my
9 client is a small player here. My client is not in dispute on
10 the \$100 million controversy between the Plaintiff and the
11 Defendant. My client was paid \$10,000 a month by Industrial
12 Heat to help Mr. Rossi. His contract -- well, let me back up.

13 Now, let's look at the claims in the case. We got one
14 claim is a breach of contract. well, that contract started
15 September of 2013. That contract terminated when Mr. Fabiani
16 stopped working at the Doral facility at the end of February
17 2016. My client then leaves the country, he is now working in
18 Russia doing some consulting work, he's a computer engineer
19 doing some consulting. The burdensomeness is my client's, you
20 know, he's hard working, you know, 60, 70-hours-a-week-guy
21 working on several projects, and it's hard for him and it's
22 burdensome for him to be doing all the discovery in this broad
23 array of discovery that has been asked.

24 Mr. Pace's original discovery, which we objected to,
25 we're here on the objections, their time frame, they wanted to

1 start January of 2011. Just to give Your Honor an idea of why
2 we're objecting. They wanted to start this discovery time frame
3 January of 2011. Mr. Darden, the main principle of Industrial
4 Heat, he doesn't even meet Mr. Rossi until 2012. My client is
5 not involved with the Defendants until September of 2013. So
6 our position is while we objected and maintained that the
7 documents should only be produced for the time at Doral, the
8 time that the facility was in Doral, and the main issues are
9 involved in the work in Doral, I can concede, and I tried to
10 concede, we conferred and tried to work things out, I can
11 concede okay, September 1, 2013, you entered into a contract
12 with my client, okay, you get communications, documents, et
13 cetera from that time. Then February 2016, my client stops
14 working on this, he goes away, he's off this project. Okay. So
15 we think it should end there.

16 THE COURT: I mean, why are we arguing -- if he's off
17 the project and he doesn't have anything, then we don't have to
18 worry about anything after February 2016 because he went to
19 Russia and he's doing something else.

20 MR. NUNEZ: Well, he's off the project, he's off the
21 project, he's doing something else, but he hasn't stopped
22 working with Mr. Rossi. And they continued some relationship
23 with regard to E-Cat, E-Cat development, it's my understanding,
24 and to the extent that those documents and any work that he's
25 done for Rossi after February 2016 are not relevant to this

1 case.

2 Again, if we look at the claims for the breach of
3 contract, their claims on breach for my client are that my
4 client did not give them -- and you heard this from Mr. Pace,
5 did not give them data and information for the time period that
6 the plant was working in Doral. Again, ending February 2016.
7 That is their primary basis for the breach of contract.

8 with regard to the other claim that my client's
9 involved in is the FDUTPA claim. So that claim is the
10 inducement to move the plant from North Carolina to Doral. That
11 happens in 2014. Okay. A year or a year and a half after my
12 client's been working for Industrial Heat. So the allegations
13 are moving the plant to Florida, this is the scheme, right, the
14 getting them to move the plant to Florida; manipulating the
15 data, failing to provide data which is also part of the breach
16 of contract, and finally, demanding payment. And that's Rossi
17 demanding payment. I guess -- my client also he feels that he's
18 owed one more month of payment, but those are their claims for
19 FDUTPA.

20 So now they wanted this huge expanded discovery time
21 frame that's frankly not relevant to their claims and to the
22 proportionality of my client.

23 THE COURT: Are you talking about from February 2016 to
24 when -- when did you file your third party claim? Have you
25 figured that out yet?

1 MR. PACE: I think we actually originally filed it in
2 July, beginning of August, and we've amended it a couple of
3 times. I'm actually looking at the amended version. I'm sorry
4 about that.

5 THE COURT: So they're talking, at most, ten months
6 through now, you know. At the least it would be until when they
7 filed the lawsuit which would be July, which would be five
8 months. So we're not talking about -- you know, he's talking
9 about going an extra six years.

10 MR. PACE: If we can limit it, let's say --

11 THE COURT: Let me tell you something. You got a fraud
12 claim, you've got to prove some kind of, you know, fraud.
13 You've got to prove the guy's state of mind. Sometimes state of
14 mind is determined by -- later on when you're sending an e-mail
15 that says "hey, you know, we did something bad to these people"
16 or you know: Let's hide this or let's hide that". And even
17 though it's occurring after the action, it still shows a state
18 of mind at the time that the actions were occurring. I mean, I
19 would think on a contract claim, I don't know how -- a contract
20 claim is a contract claim. But on the fraud allegations, it
21 seems like it is would be fair to go --

22 MR. NUNEZ: well, and to that point -- and again, with
23 regard to my client alone, he's not involved and he's not named
24 in the fraud claim. He's only in the FDUTPA claim.

25 THE COURT: well, FDUTPA usually involves fraud,

1 doesn't it?

2 MR. NUNEZ: But not in this case. I think they've
3 argued strenuously that it's not based on fraud and they don't
4 have the heightened pleading requirements.

5 MR. PACE: Deceptive and unfair practices, Judge. Your
6 Honor, you have it right. Their issue of whether 9B applies,
7 the judge has already ruled on.

8 THE COURT: Under FDUTPA, you have to --

9 MR. PACE: whether you have to or not, you know, our
10 complaint complies and whether 9B applies or not -- but that's
11 not the issue. The issue is the scheme that's pled, which I
12 think is what you're referring to is we actually don't plead a
13 fraud claim, we have a fraudulent inducement. But that's
14 different. But the FDUTPA claim is unfair and deceptive
15 practices and it covers the entire time period.

16 THE COURT: The entire time period of what?

17 MR. PACE: well, it covers up to present. I mean,
18 until the scheme -- I mean, the scheme has never fully been
19 revealed or resolved.

20 THE COURT: But, I mean, where does it say that in your
21 pleading?

22 MR. PACE: I think we say "up to present", and I guess
23 that's when the complaint was filed. But, you know, our
24 position is that --

25 THE COURT: They say you said until February 2016.

1 MR. PACE: But that's the point, Your Honor. I mean,
2 the scheme doesn't end -- again, if I can --

3 THE COURT: well, let's just clear this up first. Did
4 you say until the complaint -- until your third party complaint
5 was filed or did you say until February 2016?

6 MR. PACE: We never said until February 2016. And if I
7 can explain.

8 THE COURT: Okay.

9 MR. PACE: For example, and I have a document here to
10 show you which is the correspondence they sent in April of 2016
11 when they say you have to re-open this plant and that was a
12 bluff by J.M. Products. We need the power, and then when we
13 called their bluff, they said oh no, I guess we don't really
14 need you to re-open the plant.

15 THE COURT: I know. You already described that, but
16 generally discovery is limited to the claims that you brought.
17 Now, that's not saying that sometimes discovery isn't
18 appropriate for past the claims to prove the claim. But if your
19 claim says until February 2016, that's different than if your
20 claim says to the date of the filing of the complaint or until
21 the date of the filing of the complaint and continuing, you
22 know, continuing on. I don't know what your complaint says.

23 MR. NUNEZ: Your Honor, if I may, if we look at their
24 complaint, and I only have one copy, I'm sorry, at Paragraph
25 142, the first part of the scheme was to manipulate the

1 Defendants in allowing the plant to be moved from North Carolina
2 to Florida. And there's more in the photograph. I'm just
3 summarizing.

4 Paragraph 143, the second part of the scheme was to
5 manipulate the operation of the plant and the measurements of
6 the plants operations. All of that concluded February of 2016.
7 And --

8 THE COURT: He says he has an e-mail that says in April
9 2016 you said let's start the plant back up.

10 MR. NUNEZ: Well, that's not my clients. Again, Your
11 Honor, my client is just the FDUTPA. My client is not involved
12 with J.M. Products. I'm just Fabiani and USQL, and I'm trying
13 -- because I think there should be a differentiation here
14 between my client, Rossi, J.M. Products, they're alleged to have
15 done different things.

16 And then in Paragraph 144 of the complaint, says the
17 final part of the scheme was to demand the money. Rossi
18 demanded the money. Okay. And that happened shortly after
19 February 2016.

20 If anything, the limit should potentially be -- that's
21 straight from their complaint, the final part of the scheme is
22 demand, I think it's 80 million, \$89 million. It's a demand,
23 yeah, \$89 million, it's the demand of the \$89 million. I think
24 that's probably early March or sometime in March. And that's --

25 THE COURT: Excuse me. What's the docket entry for the

1 --

2 MR. NUNEZ: This was docket entry -- I'm sorry, Your
3 Honor, 78. And their FDUTPA claim starts on Paragraph 140. And
4 I read to Your Honor from Paragraph 142, 43 and 44.

5 MR. LEON: If I may, Your Honor, as I stated before,
6 their allegations as to James Bass, Henry Johnson and J.M.
7 Products don't go beyond February of 2016 because the actions or
8 inactions that they allege were deceptive or unfair all occurred
9 prior to that date. They don't get an extension just because
10 communications were had after the fact.

11 THE COURT: Well see, they do because if they're able
12 to show that you're communicating about the fraud that you
13 participated in before the fact. What he gets is he gets
14 information regarding his claim. So if tomorrow your client
15 types out an e-mail and says "boy, I really ripped off Andrea
16 Rossi and Leonardo Corporation" and sends it to his best friend
17 in California, he gets that because that relates to the
18 underlying claim. Even though it was sent today, it still shows
19 the state of mind of what he was doing in 2015.

20 MR. LEON: Correct, and I can agree with that. But if
21 we limit the discovery they're entitled to, any and all
22 communications or any and all documents. If what they want is
23 an admission or something of that nature, we can stipulate that
24 if there's something in the documents after the fact that is an
25 admission like Your Honor just stated, we will produce it. But

1 they don't get to go on a fishing expedition and see any and all
2 communications and any and all documents when it's not relevant
3 to the case.

4 MR. PACE: Your Honor, two things. One is just in the
5 sense of we were ordered to produce all of our communications
6 with all the other parties. That was the court's prior order in
7 connection with discovery served upon us. We think it's
8 appropriate and up to present and what we had done. We think
9 it's appropriate as to the other parties as well.

10 But the second thing is to say part of the issue here
11 is they're not supposed -- we were told that they were going to
12 be separate, that they were independent, that they were somehow,
13 you know, distinct. So any of their communications, whenever
14 they're communicating about things like Leonardo paying or Rossi
15 making sure that the \$150 is available in a checking account for
16 J.M. Products so it can pay some expense, that proves our claim.
17 So we're entitled, I think, to that information.

18 I also want to add, Paragraph 88 of our counterclaims
19 and third party claims, we specifically talk about the fact that
20 Fabiani says at the end of February that he was going to provide
21 us certain information, but in later e-mails, you know, we've
22 attached them as Exhibit 21, later e-mails he committed to
23 providing us certain raw data to us and never provided any of
24 it. So we clearly are not limiting ourselves to February 2016.

25 And again, as Your Honor has said, it's not an extended

1 time period. We're not talking about the end date should have
2 been February of 2013, and we're trying to get it up to present.
3 We're talking about a 10 month period. If they had responded to
4 -- you know, at the time period and the document request had
5 come out, it would have been a few months ago. So it would have
6 even been less, but there's no -- again, the scheme has not been
7 stopped. In fact, what the folks are just here now telling you
8 is they're continuing to work on things relating to -- they're
9 supposedly continuing to work together.

10 MR. LEON: On things unrelated, if I might just
11 clarify.

12 THE COURT: All right. I'm going to require that the
13 documents -- first of all, I look at this e-mail, the e-mail
14 that's referred to is May 16th, the furthest e-mail that is
15 attached to Exhibit 21 is May 16th, and that's from Joseph
16 Murray to Fulvio Fabiani. So I'm going to require that the
17 documents be provided up to the filing of the first
18 counterclaim. When was that? Do you want to give me a date?

19 MR. PACE: Your Honor, we'll include that in the order.

20 THE COURT: Okay.

21 MR. PACE: I apologize. It's either the end of July or
22 beginning of August.

23 THE COURT: I can have the clerk find it if you want,
24 but you know what day I'm talking about.

25 MR. PACE: I absolutely do, Your Honor, and we will --

1 THE COURT: Okay.

2 MR. PACE: I don't think that's something we can fudge.

3 THE COURT: Okay. All right. I find that it's
4 relevant to prove -- first of all, some of these e-mails in the
5 complaint and the claim, especially as to Fabiani who says he's
6 not involved in a fraud but only the FDUTPA claim, goes up
7 through May and I think it's fair to provide communications and
8 documents relating to communications up through the time of the
9 filing of the counterclaim and that it's likely to lead to
10 admissible evidence.

11 what's the next issue?

12 MR. NUNEZ: Your Honor, I'm sorry. Just for
13 clarification, so we dealt with the end date.

14 THE COURT: Yeah.

15 MR. NUNEZ: With regard to Fabiani, what about the
16 beginning date? Our position is that it should be from the date
17 of the contract of September 1, 2013. That was his first
18 involvement with Industrial Heat.

19 THE COURT: By the way, your first answer in third
20 party claim was August 5, 2016.

21 MR. PACE: August 5th.

22 THE COURT: You then amended it the 11th and then, I
23 guess, amended it again.

24 The start date? When do you want to start?

25 MR. NUNEZ: The contract date which was September 1,

1 2013.

2 THE COURT: That's the date the actual contract was
3 entered into?

4 MR. NUNEZ: That's the date of the contract, Your
5 Honor, yes.

6 THE COURT: I mean, before you have a contract, don't
7 you have conversations and communications and stuff? So why
8 would you start that date?

9 MR. NUNEZ: That's a good point, Your Honor. I mean,
10 no doubt. My thing then would be -- and I agree with Your
11 Honor, but it can't be what they want of January 2011.

12 THE COURT: Okay.

13 MR. NUNEZ: If there's a contract, I think the license
14 agreement is October 2012? And that's a license agreement
15 between Rossi and them. But my client, if he starts working for
16 Industrial Heat September 1st, I mean, what's a reasonable time
17 that they started?

18 THE COURT: well, when did he start working for Rossi?

19 MR. NUNEZ: He's been working with Mr. Rossi, to my
20 understanding, for years. For years and years. It's a
21 long-term relationship which they knew about at the inception.
22 It wasn't something that wasn't disclosed or that they didn't
23 know about.

24 THE COURT: Got it. Got it.

25 MR. PACE: Prior to 2011, we only went back 2011.

1 You'll admit that he was working with Mr. Rossi prior to 2011.

2 MR. NUNEZ: I can't say -- I can't admit to a specific
3 date. I don't think it should be --

4 MR. PACE: I don't think he was.

5 THE COURT: I understand. Why do you think 2011 is a
6 fair date?

7 MR. PACE: Because he's got information, the testing
8 began, the development of this E-Cat product started actually
9 even prior to 2011, but we started with January of 2011 to have
10 a clear number, a clear date. It actually started somewhere in
11 2010, but it's a little vague as to when. Mr. Fabiani was
12 involved with Mr. Rossi in that testing. We were not. I mean,
13 now it was -- some of the stuff that was told to us in
14 connection with entering into the license agreement in October
15 of 2012 from a burdensomeness perspective we don't think that
16 there's a substantial burden that's going to be associated with
17 it. And again, he's kind of uniquely in a position, other than
18 Mr. Rossi, to be able to provide that information. I don't know
19 how much stuff he has from back then. If for some reason there
20 was -- and there's been discussions, and I understand, but
21 unless there's a massive amount of information, I think that the
22 2011 date is a relevant date.

23 THE COURT: Okay. What do you say, Mr. Nunez?

24 MR. NUNEZ: Well Your Honor, my argument is not so much
25 of burdensomeness, it's again as to relevance. Their complaint

1 -- and again, my client is not named as breach of the license
2 agreement all those claims, but my understanding and my reading
3 of the complaint they're not -- their dispute is not that the
4 E-Cat doesn't work. Their dispute is the fraud and the FDUTPA
5 claims with regard to, again, moving the plant from North
6 Carolina to Florida. Their claims are not "hey, this doesn't
7 work so we should be able to look at all -- you know, every
8 test, every data that they have with regard to this E-Cat to see
9 if it does indeed work", which is what I understand that they're
10 looking for. That's just not relevant to their claims. Their
11 claims are very specific about moving the plant from North
12 Carolina to Florida, manipulation of the data in Florida and the
13 demand for money.

14 So going back to "hey, does this thing work", that's
15 their due diligence that they needed to do in October of 2012
16 when they enter into the license agreement. That has to do --
17 they did testing in North Carolina, this is a long-term project.
18 And I think my issue, Judge, is with the relevance and not
19 agreeing to this fishing expedition of "give me everything".

20 THE COURT: Okay. What's the relevance?

21 MR. PACE: Two things. Well, one is they just
22 identified. But any of the testing, because we do dispute the
23 operation of the E-Cat. What he's focusing on -- one issue that
24 arises here is we're entitled to get discovery, we think, as to
25 claims that are in the complaint against us, as well as in our

1 answer and counterclaims against the Plaintiffs as well as the
2 Third Party Defendants. He keeps focusing on just "here's what
3 I think the allegations are against my client". Our discovery
4 is not limited to that. There is clearly a dispute here, does
5 this E-Cat technology work. I don't think anyone can deny
6 that's a dispute in the lawsuit. And I don't think Mr. Nunez is
7 going to deny that is a dispute in the lawsuit. So this
8 discovery goes to that.

9 It does also go to the -- you know, again, whatever
10 information he had about the E-Cat and the E-Cat technology goes
11 to that issue as well as to the relationship between he and
12 Mr. Rossi in terms of their communications or dealings with
13 Industrial Heat. But again, to me, the easiest way of resolving
14 is just to understand that we're entitled to discovery from him,
15 not just as to allegations.

16 THE COURT: Yeah, I understand not just on the
17 allegations of the counterclaim, but also the allegations of the
18 complaint and your defenses of whatever. So he says he's going
19 to -- that it is an issue of whether E-Cat works, and even
20 though your guy is not charged with that part of it, that it is
21 relevant to the other lawsuit.

22 MR. NUNEZ: Your Honor, I would tell you from my
23 reading of it, I do dispute that. I don't think that this
24 complaint is about that. My reading of the complaint, it's not
25 about the claims between Rossi and Industrial Heat, it's not

1 about whether this thing works. It's they had a license
2 agreement that certain, certain thresholds had to be met.
3 That's not the right word.

4 THE COURT: well, let me ask him: Show me where in
5 your answer the issue arises.

6 MR. PACE: It arises, I guess I would start, in our
7 introduction. Let me see if I can find you the language.

8 THE COURT: Are you looking at the second amended
9 answer?

10 MR. PACE: I'm looking at the third amended. I'm
11 sorry. There's actually a third amended. That's Number 78.

12 MR. NUNEZ: And from what I've learned of the case,
13 Industrial Heat has even filed patents claiming that this
14 technology works.

15 MR. PACE: So it's in a variety of places, but to make
16 it easier --

17 THE COURT: The first paragraph says that "the
18 defendants deny that this thing generates a low energy nuclear
19 reaction resulting in release of energy along the lines claimed
20 by Plaintiff". Isn't that what we're talking about?

21 MR. NUNEZ: I'm sorry, first paragraph of the answer?

22 THE COURT: Yeah.

23 MR. PACE: It's the answer or the counterclaim.

24 THE COURT: They say "the testing is flawed and
25 unreliable in many respects. It's never been validated".

1 MR. LEON: Exactly, Your Honor. The testing that
2 occurred in Doral was flawed.

3 THE COURT: I find that it's relevant. You go back to
4 2011.

5 All right. What's the next issue?

6 MR. PACE: We have a start date issue with Johnson.

7 THE COURT: You said we're going to cover all this
8 stuff in a half an hour, it's already been a half an hour.

9 MR. PACE: I apologize, Your Honor. I thought some of
10 these issues would be a little bit quicker.

11 THE COURT: What's the problem with the start date with
12 Johnson? What do you want?

13 MR. LEON: If I may, Your Honor, in our several meet
14 and confers, we've actually conceded that point and we've
15 actually produced documents that go before the date that we had
16 originally cut off.

17 THE COURT: Okay. So he says you got an agreement.

18 MR. PACE: If there's no date limitation, we're fine.

19 THE COURT: There's no issue there.

20 All right. What's the next issue?

21 MR. PACE: We have not yet gotten any documents
22 produced by Mr. Fabiani or USQL.

23 THE COURT: All right. Mr. Fabiani -- Mr. Nunez, when
24 is Mr. Fabiani going to produce these documents?

25 MR. NUNEZ: Yes, Your Honor. And we've conferred and

1 we tried to work this out. Mr. Fabiani has transferred already
2 to me what I believe, and I'm not technology adept let's say,
3 I'm not the tech person and by the time I got it my, you know,
4 computer guy was out of town and I went on vacation. So I've
5 had some timing issues. But I couldn't deal with that, it's not
6 something I could deal with myself.

7 THE COURT: Yeah, I understand.

8 MR. NUNEZ: What I have right now is the testing data
9 that they're looking for which is probably responsive to two or
10 three of their requests. I have it, and I basically need to get
11 with a professional to help me get it -- you know, get it to
12 them in a discoverable form.

13 THE COURT: Right.

14 MR. NUNEZ: I don't know -- we talked yesterday, I was
15 looking at it today, I don't know if it's something I can put
16 Bates stamps on. I'm not sure how to get it to them for
17 purposes of this litigation.

18 THE COURT: All right.

19 MR. NUNEZ: And I suggested about another week for me
20 to get it to them.

21 THE COURT: Okay. How is that? A week good?

22 MR. NUNEZ: And I would ask a week from -- let's say a
23 week from tomorrow because I reached out to my client and he's
24 on vacation until the 9th, and I probably need his help. So
25 let's say --

1 THE COURT: A week from tomorrow? How is that?

2 MR. PACE: If we get everything a week from tomorrow
3 including the e-mails and everything else and in a proper
4 format, we're fine. This is the issue that we've had.

5 THE COURT: You guys got to talk to each other about
6 the format ahead of time so everybody knows, because I've had
7 cases where people spend hundreds of thousands of dollars
8 putting it in a format and, you know, part of under Rule 26
9 you're supposed to determine what the format is up front so
10 everybody knows.

11 MR. PACE: And the format issue, I don't know if that's
12 really the problem. The problem has been that we haven't gotten
13 the documents out of them and they've had some technical issues,
14 I understand that. But, you know, the case is moving along and
15 discovery technically right now ends the end of February.

16 THE COURT: Yeah, well I wouldn't count on getting
17 anything more from Judge Altonaga. I mean, sometimes she'll
18 continue stuff, but generally --

19 MR. PACE: I understand. I mean --

20 THE COURT: -- she's very strict.

21 MR. PACE: That's why I'm pushing.

22 THE COURT: So by January 13th you're to provide the
23 documents.

24 MR. NUNEZ: Your Honor, now I think I'm going to need a
25 little bit more time on the communications e-mails because I

1 haven't gotten those yet from my client. He doesn't get back
2 until Monday, so the raw data, which is the largest part of my
3 production, that I'll have ready by next week. I would ask for
4 one more week to get that, I'll try to get the other stuff a lot
5 quicker which should just be e-mails, tests, reports, things
6 like that.

7 MR. PACE: But this is the problem, Your Honor. It
8 just keeps getting extended. They responded --

9 THE COURT: When did you first do the request for
10 production?

11 MR. PACE: November. Oh, when did they respond? In
12 November. We did it in October.

13 THE COURT: Okay. You got to provide it all by next
14 Friday. So tell your client, call him up in Russia and tell him
15 to start running his e-mails. I mean, it shouldn't be that hard
16 for him to discover what e-mails he's got regarding Mr. Rossi or
17 whatever.

18 MR. PACE: And Your Honor, we will be reasonable in
19 discussions with him.

20 (Cross talk between counsel)

21 MR. NUNEZ: Yeah, yeah. I -- and that's part of the
22 thing. It's not just e-mails from Mr. Rossi, it's e-mails from
23 probably 30 -- I don't know about 30, but probably like 15 to 20
24 different individuals and corporations.

25 THE COURT: Try to get it to him by the 13th. If you

1 need a couple more days, then just work it out amongst
2 yourselves.

3 MR. NUNEZ: Thank you, Your Honor.

4 THE COURT: All right. What's the next one?

5 MR. PACE: The last issue, Your Honor, for today is the
6 -- we have a scope issue as it relates to Johnson, J.M. Products
7 and Bass that we just haven't been able to resolve, which is our
8 position has been documents don't need to -- as long as they
9 relate to any of the allegations either in the complaint against
10 us or in our answer and counterclaims or third party claims,
11 we're entitled to them. So it doesn't have to relate directly
12 to the E-Cat.

13 Part of the issue -- like I said, some of the documents
14 they have produced in all honesty are documents that show that
15 there is a -- you know, that J.M. Products is actually just
16 being run by Rossi, but they haven't been willing -- they've
17 objected by saying they're actually narrowing the scope to
18 things like the term sheet or to the E-Cat or stuff like that.
19 And in our meet and confers, we just haven't been able to
20 resolve the issue.

21 But our position is, again, if it's responsive to the
22 complaint, we ought to be entitled to it and it shouldn't be
23 something that you say well, this doesn't -- for example, it
24 doesn't talk about the E-Cat. Well, you know what, the e-mail
25 where Rossi is saying I -- you know, tell me what money you need

1 for J.M. Products I'll deposit it in the account so you can make
2 these payments, that may not relate to the E-Cat, it sure as
3 heck relates to our claims.

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

5 MR. LEON: To be fair, Your Honor, in the meet and
6 confers that Chris and I have had, we did amend our objection.
7 We are not objecting to limit it to the E-Cat, but to the
8 pleadings. So that would include the complaint, that would
9 include the answer to affirmative defenses and that would
10 include the counterclaims and third party claims.

11 THE COURT: So that's what you just said you wanted,
12 isn't it?

13 MR. LEON: All we're saying is we're not going to
14 produce documents that are not relevant to the pleadings. Now,
15 to the extent that they're relevant to the pleadings, absolutely
16 it's fair game, and they have been produced.

17 MR. PACE: Well, two things. One is they had said they
18 were going to amend it and they haven't amended. So if they are
19 going to commit to amend it --

20 MR. LEON: That is correct. He is correct. We hadn't
21 filed, we decided just to wait for Your Honor's ruling on today.

22 THE COURT: Okay. They will amend it to indicate that.

23 MR. PACE: If I can add one other thing though?

24 THE COURT: Yeah.

25 MR. PACE: Also on the request, we have asked --

1 because J.M. Products were supposed to be independent of a
2 variety of parties such as Fabiani, such as Rossi, et cetera,
3 we've asked for all communications with those people because if
4 they're having communications, you know, anything, "let's go out
5 to dinner; hey, our kids ought to be playing together", that
6 contradicts the "wait they were told this is a separate company
7 that was going to be operating independently". So in terms of
8 -- I just want to make sure we're all clear too when we say
9 what's relevant, it is relevant that they're having
10 communications with these parties about other subjects.

11 Now Johnson, I would say, would be the exception
12 because there's times that items are going to go on a privilege
13 log and we don't have any problem with that because he's also a
14 lawyer. But to the extent that Bass -- and, you know, again,
15 for example, Bass is another example. He was supposed to be the
16 quote, unquote, director of engineering for J.M. Products.
17 Turns out from the discovery we've had thus far his dealings
18 have been with Rossi including asking Rossi -- I've got an
19 e-mail that shows when he asked Rossi "hey, there's a meeting
20 tomorrow, people are coming in, what should I tell them?"
21 Because I don't know -- because he doesn't know what's going on.

22 So that's my only issue is I think as long as the
23 responses is also viewed appropriately as to any furtherance of
24 the scheme.

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

1 MR. LEON: I think -- Your Honor, I think we've been
2 pretty generous with the relevance factor. I think we have
3 produced --

4 THE COURT: I mean, do you interpret the relevance the
5 way he does? I mean, you're getting the documents from him that
6 says this stuff? So they must be giving it to you.

7 MR. LEON: The only thing we object to in terms of
8 relevance is something that we disagree on which he just said is
9 whether or not they're meeting for dinner or whether or not, you
10 know -- "hey, how is Papito the fish doing" or "how is your cat
11 doing" things like that. I'm not saying that those
12 communications exist.

13 THE COURT: Yeah, yeah, yeah.

14 MR. LEON: But as an example, those communications
15 aren't relevant. To the extent that they show that these guys
16 were related, that they knew each other, Johnson was the
17 attorney for Rossi and Leonardo when they were negotiating the
18 license agreement. They knew that Rossi and Johnson were
19 related. They knew that Johnson was the president of J.M.
20 Products. There's no --

21 THE COURT: All right. What do you say about that?

22 MR. PACE: Your Honor, I'm happy -- I can produce a
23 document where they say that J.M. Products is a subsidiary of a
24 publicly traded British company and that Henry Johnson signed
25 and they know that. So Johnson was supposedly kind of

1 technically in there as the CEO until the real person came in,
2 because this was all going to be done by a company called
3 Johnson Matthey, that it was supposedly a subsidiary of Johnson
4 Matthey. In fact, I have documents. If we want to talk about
5 documents, I brought an example.

6 THE COURT: No. I mean, I think what he's saying is by
7 showing that -- in other words, it would be true if the
8 allegation was Rossi said he never knew this guy Johnson, you
9 know, and he got him out of a phone book.

10 MR. LEON: Correct.

11 THE COURT: But he's known Johnson for years. So the
12 fact that they went out to dinner together or their kids play
13 together, you know, seems like it's out there.

14 MR. PACE: Your Honor, I will agree on that. If I can,
15 there's other parties that that's more relevant to and in fact,
16 the way we've done our discovery -- and I apologize. I gave you
17 a bad example. We've done it with things like Penon. Penon was
18 supposed to be an independent validator. If there was any
19 communications with Penon, we should be getting those. There's
20 a couple of European parties that we've identified. I think
21 when it comes to Rossi and Johnson interactions, for example
22 we've largely focused on J.M. Products and issues related to
23 J.M. Products.

24 My only thing is just to say -- and again, we don't
25 have to decide this here as much as to make -- we may to the

1 extent we don't -- let me start over. We have not been able, in
2 our meet and confer process, to come to a meeting of the minds,
3 I think, on what the scope of the discovery is. I'm happy to --
4 given what has been said today, they will amend their responses
5 and we will deal with them in that context. But again, I think
6 it's --

7 THE COURT: Okay. It's hard for me to rule on this,
8 but anyway, you're going to amend your thing.

9 I'm going to tell you what my thought is right now and
10 so it's that if it -- in other words, I agree with you on
11 Johnson because they have an ongoing relationship. But the
12 allegation in the complaint is that they don't know this person,
13 this person is some third person who was brought in for -- you
14 know, to do independent testing or whatever it is, and there's
15 documents that show a relationship between the parties, then I
16 think that that's relevant to the allegations in the complaint.
17 So when you're going through the documents, keep that in mind.
18 If you have an issue with it, you know, and you can get a little
19 more focused on what we're talking about, you can come back.

20 MR. PACE: We appreciate that, Your Honor.

21 MR. LEON: Thank you, Your Honor.

22 THE COURT: Okay. All right.

23 Anything else I can help you out with?

24 MR. PACE: Your Honor, only one other thing. Just
25 because we've got counsel for Rossi and Leonardo here, we have

1 discovery disputes too. I don't want to raise them today, but
2 if we could maybe try to see if we can find a date, just because
3 of the deadlines coming up, I think we need to get it resolved.
4 They have not produced documents to us yet either. I think
5 they've committed to produce them on the 13th if I have the date
6 right. But we've got some scope issues as well, and so if we
7 could --

8 THE COURT: All right. When are you talking about?
9 Like the 19th or -- I mean the week of the 13th so you can see
10 what you have?

11 MR. PACE: I'm actually inclined to -- I mean, they've
12 been very clear as to what their limitations are that they're
13 imposing and where we have agreement. I think we can do it
14 before the 13th. I'm a little reluctant to wait too long to do
15 it.

16 THE COURT: All right. Do you want to do it next --
17 how about next Tuesday? Is that good?

18 MR. CHAIKEN: What time, Your Honor?

19 MR. PACE: I could do in the morning or in the late
20 afternoon. I have a client CEO coming in who is meeting with
21 the US Attorney's Office the next day, so the middle of the day
22 is kind of a tough one for me.

23 THE COURT: What time do you want to do it in the
24 morning?

25 MR. PACE: I'm sure Your Honor gets in earlier than I

1 do. So whatever time. I'm not a 7-a.m.-er, I can tell you
2 that.

3 THE COURT: All right. I'll put an hour aside at the
4 most, hopefully 30 minutes. We'll do it at 10:00? Is that
5 good?

6 MR. CHAIKEN: That's fine, Your Honor.

7 THE COURT: Does that give you enough time?

8 MR. PACE: That will give me enough time to run back.
9 I appreciate it. Thank you, Your Honor.

10 THE COURT: All right. Let us know if you're able to
11 resolve the issues.

12 MR. PACE: We will. We certainly will.

13 THE COURT: Okay. I mean, you've had enough hearings
14 with me you should know, be able to predict how I'm going to
15 rule and just agree so we don't have to keep meeting like this.
16 Okay?

17 Good seeing you guys. Okay. Have a good day.

18 MR. PACE: We'll prepare the order and we will have it
19 to the court by -- we don't need a transcript for this, do we?
20 Can we get it to the court --

21 THE COURT: Just give me a time. All we want to do is
22 tickle it because the order is in effect right now. If you need
23 a week, you can have a week.

24 MR. PACE: Yeah, can we have -- we'll provide it to the
25 court by the end of the day on Thursday the 12th. I just

1 struggled with the math there.

2 THE COURT: There you go. The 12th. Okay?

3 MR. PACE: Thank you, Your Honor.

4 THE COURT: All right. All right.

5 Anything else? No?

6 MR. PACE: No, Your Honor.

7 THE COURT: Okay. Thanks. Have a good day.

8 (PROCEEDINGS CONCLUDED)
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10 **C E R T I F I C A T E**
I certify that the foregoing is a correct transcript from the
record of proceedings in the above-entitled matter.

11 January 9, 2017 _/s/ Dawn M. Savino
12 Date DAWN M. SAVINO, RPR

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