IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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ARISTO VOJDANI and
IMMUNOSCIENCES LAB, INC.,

ORDER

Plaintiffs,

10-cv-37-bbc

v.

NEUROSCIENCE, INC. and
PHARMASAN LABS, INC.,

Defendants.

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Defendants Neuroscience, Inc. and Pharmasan Labs, Inc. have filed a motion for reconsideration of a portion of the May 19, 2011 opinion and order in which I denied defendants' motion for judgment as a matter of law under Fed. R. Civ. P. 50. In particular, defendants argue that I erred in upholding the jury's finding that plaintiffs suffered damages as a result of defendants' use of plaintiffs' testing methods, in violation of the confidentiality agreement. I agree and am granting defendants' motion.

At trial, plaintiffs' measure of damages for defendants' continued use of the confidential information was 50% of the sales defendants made on the tests using that information. They generated this figure using an expired contract under which defendants

had agreed to pay that amount in the past. In the May 19 order, I concluded that a reasonable royalty is an appropriate measure of damages for the breach of a confidential agreement and that the amount that defendants had been paying plaintiffs in the past for access to their confidential information is strong evidence of what it was worth to defendants.

In their motion defendants argue that my conclusion is wrong for several reasons, but I need only consider one of them: the instructions presented to the jury do not define a reasonable royalty or even identify a reasonable royalty rate as an appropriate measure of damages. This is correct. The instructions discuss consequential damages, future profits and future earnings, but they say nothing about a reasonable royalty. The reason is that plaintiffs never *asked* for such an instruction. Rather, their argument was that they were entitled to be put "in as good a position financially as [they] would have been in but for the breach" and that they were "entitled to a performance of the parties' agreement" that they were "to be paid 50% by Defendants for the use of [their] confidential testing methods." Plts.' Br., dkt. #260, at 21 (quoting Schubert v. Midwest Broad. Co., 1 Wis. 2d 497, 85 N.W.2d 449, 452 (1957)). The obvious problem with that argument is that it assumes that the relevant breach was the failure to pay 50%, but that is not the case. The breach was the use of confidential information; the contract regarding the "50/50" arrangement was no longer in effect. Because the confidentiality agreement did not include a liquidated damages

clause, the only way to justify a damages award that relies on the past agreement is by using the past agreement as evidence of a reasonable royalty.

Plaintiffs do not argue that the jury instructions may be read as including a theory of damages for a reasonable royalty or that they argued such a theory to the jury. Nor do they argue that a jury is entitled to rely on a theory of damages that was not in the jury instructions. E.g., Black v. Pan American Laboratories, L.L.C., — F.3d —, 2011 WL 2673096, *5 (5th Cir. Jul. 11, 2011) (plaintiff may not preserve verdict with theory that is inconsistent with jury instructions); Galena v. Leone, 638 F.3d 186, 201–02 (3d Cir. 2011) (party waived arguments related to theory not presented to jury at trial, where that party failed to request court to present theory in instructions and failed to object to its not having been presented). Cf. State v. Wulff, 207 Wis. 2d 143, 151-52, 557 N.W.2d 813, 817 (1997) (reversing criminal conviction because government's only theory in support of verdict was not presented to jury). If plaintiffs had raised this theory during trial, defendants could have presented evidence attempting to show that the expired contract was not a good indicator of the value of the confidential information. Defendants did not make this showing because they were not on notice that they needed to do so.

Plaintiffs' only response to defendants' argument is that defendants waived it by failing to raise it earlier. However, I agree with defendants that they could not have been expected to raise this issue in their Rule 50 motion because plaintiffs did not attempt to

justify the verdict under a reasonable royalty theory. Further, because plaintiffs do not identify another basis for any damage award related to the confidentiality agreement, I must grant defendants' motion for reconsideration of my holding that it was not error for the jury to award plaintiffs for damages suffered as a result of defendants' use of plaintiffs' testing methods.

ORDER

IT IS ORDERED that the motion for reconsideration filed by defendants Neuroscience, Inc. and Pharmasan Labs, Inc., dkt. #269, is GRANTED. I will refrain from amending the judgment until after the remaining breach of contract claim related to laboratory-developed assays is resolved.

Entered this 26th day of July, 2011.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge