IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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ARISTO VOJDANI and
IMMUNOSCIENCES LAB, INC.,

Plaintiffs,

OPINION AND ORDER

10-cv-37-bbc

v.

NEUROSCIENCE, INC. and
PHARMASAN LABS, INC.,

Defendants.

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Plaintiffs Aristo Vojdani and Immunosciences Lab, Inc. have filed a motion for reconsideration of an order entered on July 26, 2011, in which I concluded that defendants Neuroscience, Inc. and Pharmasan Labs, Inc. were entitled to judgment as a matter of law on plaintiffs' claim that they suffered damages as a result of defendants' use of plaintiffs' testing methods after June 5, 2009, in violation of a confidentiality agreement. Because plaintiffs have not shown that this order was erroneous, the motion will be denied.

For background, I note that the parties signed two agreements in the course of their business relationship. The first was a confidentiality agreement signed in April 2007. It provided that the parties would exchange confidential and proprietary information and that neither side would disclose the information for five years or use it except as provided in the agreement. The second agreement was a letter of intent signed on June 21, 2007, setting forth the purpose of the parties' proposed collaboration and its terms, including the rate of payment for testing materials that plaintiffs would transmit to defendants. Defendants were to split the revenue for these materials 50/50 with plaintiffs. (The parties agree that the letter of intent remained in effect until March 2008 and they treated it as a contract, both in their business relationship and in litigation.) In December 2008, defendants shut down NeuroImmunology Labs without plaintiffs' consent. Plaintiffs then told defendants that they no longer had permission to use plaintiffs' immunology testing methods.

A jury awarded plaintiffs more than $1,000,000 for defendants' breach of the confidentiality agreement. Dkt. #226. Defendants moved for judgment as a matter of law, arguing that the verdict could not be sustained because plaintiffs had failed to show that they had suffered any losses as a result of the breach of the confidentiality agreement. Instead, plaintiffs relied on the expired letter of intent under which defendants had agreed to pay plaintiffs 50% of the sales defendants made on the tests using plaintiffs' testing methods.

In the order denying defendants' motion for reconsideration of the damages award, I concluded that the verdict could be justified using a reasonable royalty rate theory and that the jury could have used the expired letter of intent to determine what the rate should be. In particular, I stated that "[o]ne fair way to measure damages in a case like this could be to determine the value of the information defendants took. . . . Obviously, 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." Dkt. #267, at 7.

In their motion for reconsideration of that decision, defendants pointed out that the jury instructions did not define a reasonable royalty or even identify a reasonable royalty rate as an appropriate measure of damages. Because a jury cannot rely on a theory of damages that was not in the jury instructions and plaintiffs did not identify any other damages they had suffered that the jury could consider, I granted defendants' motion for reconsideration. Dkt. #274.

In their present motion, plaintiffs concede that they did not advance a reasonable royalty theory at trial and they do not argue that the verdict may be upheld under that theory. Instead, they argue that the jury instructions support the verdict because 50% of defendants' sales represent plaintiffs' "actual losses" from the breach of the confidentiality agreement.

I considered this argument and rejected it in the order granting defendants' motion for reconsideration:

> 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.

Order, dkt. #274, at 2-3.

Plaintiffs are correct that they were "entitled to be placed in as good a position financially as [they] would have been but for the breach," Plts.' Br., dkt. #276, at 6, but they fail to explain how *the use of the confidential information*, which is the only breach at issue, harmed them financially in any way. In other words, plaintiffs do not explain how their financial position would have been improved if defendants had refrained from using plaintiffs' confidential testing methods after June 5, 2009. Although they may have "lost" the 50% of sales when defendants stopped paying them, that loss was not caused by the breach of the confidentiality agreement because that agreement did not require defendants to pay plaintiffs a particular sum of money for the confidential information. Rather, it prohibited defendants from using that information without plaintiffs' permission. Because plaintiffs have not shown how defendants' breach of that agreement caused them *any* financial loss, they cannot prevail.

Plaintiffs make a handful of new arguments in their motion, none of which are sound. First, plaintiffs say that defendants continued paying them 50% of their sales for a while even after the letter of intent expired. Why should that matter? Plaintiffs do not have a right to force defendants to pay them a particular amount indefinitely simply because defendants gratuitously extended a previous arrangement for several months. This means only that defendants paid plaintiffs more during that time than they were obligated to. Even if it were the case that defendants could have bound themselves through a course of conduct, that fact would be irrelevant to this claim. The jury was not asked to decide whether the parties had extended the terms of their letter of intent regarding the "50/50" arrangement beyond June 5, 2009, much less whether defendants had breached such an agreement. Again, plaintiffs did not ask for those issues to be included in the special verdict form. Rather, the jury was asked to determine whether defendants had breached the confidentiality agreement and the extent to which plaintiffs were harmed by that breach. Plaintiffs are stuck with the way they framed their claim.

Plaintiffs cite Vitor Corp. v. Hall Chemical Corp., 292 F.2d 678 (6th Cir. 1961), and Medical Store, Inc. v. AIG Claim Services, Inc., 2003 WL 2566917 (S.D. Fla. Oct. 17, 2003), but both of these cases undermine plaintiffs' argument rather than support it. In Vitor, 292 F.2d at 692, the court relied on a reasonable royalty theory: "when a plaintiff, having suffered a plain injury and not having been able to make satisfactory proof of damages, a clear instance is presented . . . where the award of a reasonable royalty is the only solution of the difficulty." In Medical Store, 2003 WL 25669175, at *6-8, the case included a trade secrets claim and the court relied almost exclusively on the law of trade secrets to determine an appropriate measure of damages. Id. at *8 ("The Court finds the foregoing approach to damages mandated by the circumstances and in accord with the flexible and imaginative approach courts generally use in these misappropriation of trade secret cases."). Because plaintiffs concede that the jury was not instructed to consider a reasonable royalty rate or damages for misappropriation of a trade secret with respect to this claim, these cases are not instructive.

Next, plaintiffs say that defendants have waived any objection to the damages award because they have "cited no legal authority that actual loss is an improper measure of damages." Plts.' Br., dkt. #276, at 11. This is a non sequitur. As I discussed above, the damages award cannot be justified under an "actual loss" theory because plaintiffs have not pointed to any evidence that they sustained any losses as a result of defendants' use of their confidential information. Thus, it is simply irrelevant whether defendants cited authority regarding an actual loss theory.

Finally, plaintiffs say that "[t]o allow [defendants] to use [plaintiffs'] confidential information with impunity would not be a fair result." Id. at 10. Although it is true that plaintiffs are left without a remedy for what the jury found to be a breach of the confidentiality agreement, plaintiffs have only themselves to blame. Plaintiffs chose not to pursue the only theory of damages that could have supported the verdict while failing to adduce any evidence supporting the "actual loss" theory that they did advance. There is no unfairness in holding a party to its own theory of the case.

ORDER

IT IS ORDERED that the motion for reconsideration filed by plaintiffs Aristo Vojdani and Immunosciences Lab, Inc., dkt. #275, is DENIED.

Entered this 6th day of September, 2011.

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