

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

ARISTO VOJDANI and
IMMUNOSCIENCES LAB, INC.,

Plaintiffs,

ORDER

10-cv-37-bbc

v.

GOTTFRIED KELLERMANN,
MIEKE KELLERMANN, PHARMASAN
LABS, INC. and NEUROSCIENCE, INC.

Defendants.

A final pretrial conference was held in this case on January 13, 2011, before United States District Judge Barbara B. Crabb. Plaintiffs appeared by Aaron Davis and Eric Chadwick. Defendants appeared by Henry Helgen and Amanda Cefalu.

Counsel predicted that the case would take 6-7 days to try. They understand that trial days will begin at 9:00 and will run until 5:30, with at least an hour for lunch, a short break in the morning and another in the afternoon. The jury will be selected on Monday, January 31, 2011, but the trial will not start until the trial in United States v. Crayton, 10-cr-12-bbc, is completed. Counsel should be ready to start no later than 2:00 p.m. on

Wednesday, February 2, 2011. The trial will be bifurcated.

Counsel agreed to the voir dire questions in the form distributed to them at the conference. The jury will consist of eight jurors to be selected from a qualified panel of fourteen. Each side will exercise three peremptory challenges against the panel. Before counsel give their opening statements, the court will give the jury the introductory instructions on the way in which the trial will proceed and their responsibilities during the trial.

Counsel did not request sequestration of witnesses. Counsel are either familiar with the court's visual presentation system or will make arrangements with the clerk for instruction on the system.

No later than noon on the Friday before trial, plaintiffs' counsel will advise defendants' counsel of the witnesses plaintiff will be calling on the first day of trial and the order in which they will be called. Counsel should give similar advice at the end of each trial day; defendants' counsel shall have the same responsibility in advance of defendants' case. Also, no later than noon on the Friday before trial, counsel shall meet to agree on any exhibits that either side wishes to use in opening statements. Any disputes over the use of exhibits are to be raised with the court before the start of opening statements.

Counsel should use the microphones at all times and address the bench with all objections. If counsel need to consult with one another, they should ask for permission to

do so. Only the lawyer questioning a particular witness may raise objections to questions put to the witness by the opposing party and argue the objection at any bench conference.

Counsel are to provide the court with copies of documentary evidence before the start of the first day of trial.

Counsel discussed the form of the verdict and the instructions on liability. In this case, the special verdict form is unusually tentative because the parties' submissions were so different from one another and were unaccompanied by any explanation of the reasons for the proposed instructions.

In the three weeks before trial, counsel are to do the following:

With respect to special verdict questions:

1. Rework their proposed verdict forms to make it clear to the jury what defendant or defendants they are to be considering in connection with each question. In doing this, plaintiffs' counsel need to make sure that there is a factual and legal basis on which the jury could find that each named defendant is liable under the particular claim and should be able to support this with a written memorandum.

2. Review their characterization of the breach of contract issues that are in dispute. It is not clear at this time what specific promises were allegedly broken; counsel should make this explicit.

3. As counsel will see from the first draft of the proposed special verdict, I have

grouped all of the breach of contract claims together, including defendants' counterclaim. To avoid confusion, I have identified in each question which side has the burden of proof as to that question. Note that I did the same kind of grouping with the claims related to customer lists and testing methods. Some of the dates are omitted because the parties have not agreed on them; they should make every effort to reach agreement before the start of trial.

4. Plaintiffs should consider carefully whether they wish to pursue the civil theft claims, which do not seem to have any purpose other than to multiply plaintiffs' claims.

5. Counsel should bear in mind that it is my practice to ask about specific acts that, if proven, will show that a legal wrong has been committed. For example, it is not necessary to include questions (or instructions) about trade secrets claims and their elements. Instead of asking the jury whether defendants "misappropriated" plaintiffs' trade secrets and then having to define misappropriation, I will ask the jury whether defendants continued to use plaintiffs' customer lists after defendants no longer had permission to do so.

Counsel agreed that questions about respondeat superior and vicarious liability are not necessary because the corporations are responsible for the acts of their employees. Plaintiffs' counsel will not assert any claims of conspiracy.

With respect to jury instructions:

First, counsel should meet to go through the instructions one at a time and decide together which ones are necessary. They should ask themselves how each instruction relates to a particular question on the verdict form. To help in this process, they should anticipate that the court's stand way of instructing the jury is to start with each question and then read the instructions that relate to that question. For example, I would start by reading question no. 1 on the verdict form, which asks whether an agreement was reached between the parties and then I would read the instructions that related to an agreement.

Second:

1. Plaintiffs' counsel should review the ten proposed instructions on agency. Unless plaintiffs can show the relevance of any of these, I will not use them.

2. If counsel are proposing changes to any standard Wisconsin jury instruction, they should have be prepared to explain the need for each change.

Final decisions on the instructions and form of verdict will be made at the instruction conference once all the evidence on liability is in.

The following rulings were made on the parties' motions in limine.

Plaintiffs' Motions

1. Motion to exclude evidence of plaintiffs' CLIA termination

GRANTED with one exception: Defendants may introduce the fact of termination

and the fact that plaintiffs' customers received letters advising them of the termination.

2. Motion to exclude expert testimony of counterclaim damages

GRANTED as unopposed.

Defendants' Motions

1. Motion to exclude evidence of G. Kellermann's prior conviction and immigration status

GRANTED as unopposed as to immigration proceedings and on prior conviction unless plaintiffs can show that it is relevant to any of their claims.

2. Motion to preclude Sharon Ehrmeyer from testifying

GRANTED because Ehrmeyer is not testifying as expert but testifying about inferences jury could draw from regulations applicable to testing laboratories when they discontinue a particular method or begin using a new method.

Entered this 14th day of January, 2011.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge