IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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ARISTO VOJDANI and
IMMUNOSCIENCES LAB, INC.,

Plaintiffs,

v.

NEUROSCIENCE, INC. and
PHARMASAN LABS, INC.,

Defendants.

OPINION AND ORDER

10-cv-37-bbc

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Plaintiffs Aristo Vojdani and Immunosciences Lab, Inc. have filed a motion for "clarification," which is more accurately described as a motion to limit the scope of the issues in the upcoming trial. Dkt. #298. For the reasons stated below, I am granting the motion in part and denying it in part.

This is the second trial being held in this case. In the first trial, the jury was presented with a 19-question special verdict form on liability on various claims and counterclaims. The jury resolved some claims in favor of defendants and some claims in favor of plaintiffs. Dkt. #223. (I later set aside the jury's finding that plaintiffs were entitled to more than $1,000,000 in damages for defendants' breach of the confidentiality agreement because

plaintiffs had not shown at trial that they had suffered *any* harm under any theory of damages included in the jury instructions. Dkt. ##274 and 280.)

A new trial is required on one of plaintiffs' breach of contract claims because of a problem with the special verdict form in the first trial. Three questions were devoted to that claim. Question No. 1 asked, "Has plaintiff ImmunoSciences Lab, Inc. proven by a preponderance of the evidence that defendant NeuroScience, Inc. agreed in the June 21, 2007 letter of intent (first paragraph under the heading 'Pricing') to pay plaintiff the invoiced amount for each LDA (laboratory-developed assay) plate sent to defendant NeuroScience whether the plate was sold to a client or not?" Question No. 2 asked, "Has plaintiff ImmunoSciences proven by a preponderance of the evidence that defendant NeuroScience did not pay plaintiff the full amount of the invoices for the LDA plates plaintiff supplied?" And Question No. 3 asked, "Has plaintiff ImmunoSciences proven by a preponderance of the evidence that it was harmed by defendant NeuroScience's failure to pay the invoice for each LDA that plaintiff sent to defendant NeuroScience?" The jury answered "yes" to Question No. 1 and "no" to Question No. 2. The jury did not answer Question No. 3 because it was instructed not to in the event that it answered "no" to Question No. 2.

The problem with the jury's answer to Question No. 2 was that the undisputed evidence showed that defendants had *not* paid "the full amount of the invoices for the LDA

plates plaintiff supplied. However, plaintiffs did not seek judgment as a matter of law on Question No. 2 or ask the court to remove the question from the verdict before it was submitted to the jury. Even after the jury returned the verdict on liability, plaintiffs did not point out the problem to the court before the damages phase began on other claims. Instead, plaintiffs waited until after the trial was completed before arguing in a motion for a new trial that the jury's answer to Question No. 2 had no support in the record. Dkt. #254.

In their motion for "clarification," plaintiffs advance a bold argument. First, they say that the scope of the new trial should be limited to asking the jury the same Question No. 2 that was asked in the first trial. It would violate their rights under the Seventh Amendment, plaintiffs say, to submit Question No. 1 again or to otherwise ask the jury to determine the scope of the parties' agreement. Second, because it is undisputed that defendants did not pay the full amount of the invoices, there is no point in submitting that question to the jury either. Finally, plaintiffs say that it is unnecessary to submit even a damages question to the jury because the parties have stipulated that the difference between the amount invoiced and the amount paid was $846,695.39. Dkt. #281.

Plaintiffs' arguments have multiple problems. First, plaintiffs' motion for "clarification" is a thinly disguised motion for judgment as a matter of law. However, plaintiffs waived their opportunity to obtain that relief when they failed to seek it during the trial. A court may not grant a motion for judgment as a matter of law after a verdict has

been returned unless that party is renewing a motion it filed before the close of the case. Fed. R. Civ. P. 50(b). I cannot violate the Federal Rules of Civil Procedure simply because plaintiffs do not expressly invoke Rule 50. In the absence of a settlement, a new trial is necessary.

Second, plaintiffs' motion ignores the problem with the verdict that I identified in the order granting their motion for a new trial. In particular, Question No. 1 asked the jury to determine the scope of the "letter of intent"; Question No. 2 asked the jury to determine whether defendants paid the full amount of the invoices. However, contrary to plaintiffs' assertion, *neither* question asked the jury to determine whether defendants breached an agreement with plaintiffs.

This omission would not have been a problem if the parties agreed that the terms of the "letter of intent" reflected the parties' actual agreement. However, as plaintiffs well know, defendants' position during the trial and now is that, to the extent the written agreement required them to pay plaintiffs the invoiced amount, the parties modified the terms of the "letter of intent" in later dealings. Unfortunately, that issue was not addressed in the special verdict form in the first trial.

Plaintiffs seem to assume that Question No. 1 could be read to include a modification theory, but they point to no language in the question that supports such a theory. The question does not ask generally what the parties' ultimate agreement was; rather, it focuses

specifically on the language of the "letter of intent." Thus, it should have been obvious to plaintiffs that the issues in the second trial could not be limited to an identically-worded Question No. 2. The modification issue must be addressed as well.

Plaintiffs argue that defendants "waived" the modification issue by not seeking to include it in the verdict form, but a review of the transcript of the jury instruction conference shows that defendants did raise this issue. Dkt. #241 at 40. Their argument may have not been the most artful or clear, but it was sufficient to preserve the issue.

Further, plaintiffs cite no authority for the proposition that the scope of a new trial is limited to issues challenged expressly by the parties, at least when it is clear that the original verdict form failed to include all relevant issues. Plaintiffs cite many cases for the waiver principle, but none of them prohibit a court from granting a new trial on issues that should have been tried the first time but were not. After all, Fed. R. Civ. P. 59(d) grants the court authority to order a new trial on its own motion "for any reason that would justify granting one on a party's motion." In fact, district courts have an independent obligation to avoid trial errors, at least for plain errors that affect a party's substantial rights. Jackson v. Parker, 627 F.3d 634, 640 (7th Cir. 2010).

In this case, defendants made a modification argument to the jury and the jury received an instruction on modification, but the verdict form did not include a question that encompassed this issue. As defendants have argued, that may explain why the jury was

confused and answered Question No. 2 in a way that was inconsistent with the evidence. Under these circumstances, it would be both unreasonable and unfair simply to ask the jury the same question that required a new trial in the first place.

I agree with plaintiffs in one respect: the new jury will not be permitted to decide the scope of the agreement in the "letter of intent" because that issue was resolved in the first trial. Plaintiffs are correct that it would be inappropriate under the Seventh Amendment as well as the doctrine of issue preclusion to allow a second jury to reexamine the factual findings of the first jury. Matter of Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1303 (7th Cir. 1995). Defendants have never argued that the evidence was legally insufficient to support the jury's answer to Question No. 1 or that the scope of the "letter of intent" was a matter for the court to decide.

Citing Gasoline Products Co. v. Champlin Refining Co., 283 U.S. 494, 496 (1931), defendants argue that Question No. 1 must be retried because it is "inextricably intertwined" with the other issues to be retried. I disagree. The issues are distinct and easily separable. The court can instruct the jury that the parties had a written agreement that required defendants "to pay plaintiff the invoiced amount for each LDA (laboratory-developed assay) plate sent to defendant NeuroScience whether the plate was sold to a client or not." The primary question for this trial will be whether the parties subsequently modified that agreement. Neither the Seventh Amendment nor issue preclusion is implicated by that

question because the first jury never answered it.

ORDER

IT IS ORDERED that the motion for clarification filed by plaintiffs Aristo Vojdani and Immunosciences Lab, Inc., dkt. #298, is GRANTED IN PART and DENIED IN PART. The jury in the new trial will be bound by the original jury's answer to Question No. 1, but the new jury may consider whether the parties modified their agreement.

Entered this 11th day of October, 2011.

BY THE COURT:

/s/
BARBARA B. CRABB
District Judge