

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

ARISTO VOJDANI and
IMMUNOSCIENCES LAB, INC.,

OPINION and ORDER

Plaintiffs,

10-cv-37-bbc

v.

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

Defendants.

In 2007 plaintiffs Aristo Vojdani and Immunosciences Lab, Inc. began a business relationship with defendants Gottfried Kellermann, Mieke Kellermann, Pharmasan Labs, Inc. and Neuroscience Inc. involving medical testing of patient specimens. The relationship did not turn out as plaintiffs had hoped, leading to this lawsuit in which plaintiffs are asserting various state law claims against defendants, including theft of trade secrets and breach of contract. Defendants have filed counterclaims for fraud and breach of contract. Jurisdiction is present under 28 U.S.C. § 1332, diversity of citizenship.

Three motions are now before the court. Defendants have moved for summary judgment on seven of the ten counts in plaintiffs' complaint, dkt. #48, and plaintiffs seek

summary judgment on all of defendants' counterclaims. Dkt. #37. In addition, plaintiffs have filed a motion for the court to disregard "additional" proposed findings that defendants submitted with their reply brief, along with two new affidavits. Dkt. #94.

Plaintiffs are correct that the court's summary judgment procedures do not allow one party to submit new proposed findings of fact with a reply brief. Accordingly, I will not consider defendants' additional proposed findings of fact. I will consider the affidavits only to the extent that defendants relied on them to dispute the facts proposed by plaintiffs.

With respect to the motions for summary judgment, the question for many claims came down to whether plaintiffs or defendants had the burden of proof on a particular claim or issue. Unfortunately, the predominant approach of the parties in this case was to raise claims without carefully considering their merit and to raise many arguments in their summary judgment briefs without developing most, if any, of them. Thus, despite lengthy briefs and voluminous proposed findings of fact from both sides, in many instances, there was little helpful legal analysis or factual development in the parties' filings. When both sides drop the ball, the proper allocation of the burden of proof becomes the dispositive factor.

Accordingly, I conclude that defendants are entitled to summary judgment on the following claims: (1) trade secret misappropriation relating to testing methodologies; (2) civil theft relating to defendants' alleged retention of hard copies of plaintiffs' testing

methodologies and customer lists; (3) unjust enrichment; and (4) civil conspiracy for violating any rights other than those related to the other claims in the lawsuit that have survived summary judgment. I conclude that plaintiffs are entitled to summary judgment on defendants' counterclaims for fraud; plaintiffs' motion will be granted in part and denied in part with respect to the counterclaim for breach of contract. The remaining claims will proceed to trial.

The undisputed facts, taken from the parties' proposed findings of fact and the record, are set forth below. Both sides were imprecise in their proposed findings of fact regarding which party or parties were responsible for many acts. In many cases, one side would identify a particular party as responsible ("Gottfried Kellermann") and the other side would assign responsibility collectively ("defendants"), but neither side explicitly challenged the other's designation. Accordingly, I have referred to the parties collectively as "plaintiffs" and "defendants" unless it was clear from the proposed fact that a particular party was at issue.

UNDISPUTED FACTS

Plaintiff Aristo Vojdani is the chief executive officer and technical director of plaintiff Immunosciences Lab, Inc., a clinical and research laboratory. Plaintiff Vojdani is a citizen of California, which is where plaintiff Immunosciences is incorporated and the location of its principal place of business.

Defendant Gottfried Kellermann is the chief executive officer of defendant Neuroscience, Inc. and the laboratory director of defendant Pharmasan Labs, Inc. (In some instances, the parties refer to Neuroscience, Inc. as “NeuroScience, Inc.,” sometimes using both designations in the same document. For the sake of consistency, I have used the former designation throughout this opinion.) Defendant Mieke Kellermann is the president of Pharmasan Labs and vice president of Neuroscience. Defendant Neuroscience markets and sells “neurotransmitter and immunological testing assessments and service” and develops products for “combat[ting] neurotransmitter imbalances.” Defendant Pharmasan provides laboratory testing services to Neuroscience.

The Kellermanns are citizens of Wisconsin, which is the state of incorporation of defendants Neurosciences and Pharamsan and the location of their principal place of business. (The parties have notified the court that Gottfried Kellermann “has been ordered removed from the United States due to immigration issues,” dkt. #104, but that he is still in Wisconsin. This should not affect jurisdiction for two reasons. First, even if he is removed in the near future, jurisdiction is determined at the time the complaint is filed. Doctors Nursing & Rehabilitation Center v. Sebelius, 613 F.3d 672, 677 (7th Cir. 2010). Further, even if jurisdiction would be lost under 28 U.S.C. § 1332(a)(1) (citizens of different states), jurisdiction would remain under § 1332(a)(3) (“citizens of different states and in which citizens or subjects of a foreign state are additional parties”).

A. Plaintiffs' Dispute with the Health Department

In June 2005, the California Department of Health Services informed plaintiffs that it had “determined that [plaintiffs’] facility was not in compliance with all of the conditions required for certification of the CLIA program.” (CLIA stands for Clinical Laboratory Improvement Amendments, a body of federal law regulating the standards that medical laboratories must follow.) The department cited various federal regulations that it determined plaintiffs were violating. One of the department’s stated concerns was that plaintiffs’ process for verifying the accuracy of their tests was deficient. In July 2005, the department determined that plaintiffs’ “allegation of compliance continues to be not credible” and it forwarded plaintiffs’ file to the Center for Medicare and Medicaid Services “to initiate sanction actions.”

In a letter dated November 30, 2005, the center imposed various sanctions on plaintiffs, including revocation of the laboratory’s “CLIA certificate.” The center sent a letter to plaintiffs’ clients, “to alert [them] that test results [they] received since July 2002 from Immunosciences Lab, Inc. may not be accurate or reliable.” After plaintiffs filed a federal lawsuit challenging the sanctions, the center entered into a settlement agreement with plaintiffs, which included a provision for an independent inspection by the College of American Pathologists.

In June 2007, plaintiffs informed the center that it had failed the college's inspection. As a result, the center prohibited plaintiffs from "testing patient specimens" and "owning or operating any laboratory . . . for a period of twelve months." Plaintiffs ceased testing services, which were plaintiff Immunoscience's sole source of revenue.

B. Plaintiffs' and Defendants' Negotiations

In the spring of 2007, plaintiff Vojdani and defendants Gottfried Kellermann and Mieke Kellermann met to discuss potential collaboration between their businesses with respect to "immunological testing provided by" plaintiffs. Vojdani told the Kellermanns that he could no longer conduct testing in his laboratory. (The parties dispute what the Kellermanns knew about the reasons for the shutdown. According to plaintiffs, Vojdani gave the Kellermanns a comprehensive account of the "CLIA issues." According to defendants, Vojdani said that insurance companies pressured CLIA to shut down the laboratory for "political" reasons. In particular, Vojdani told them that he had diagnosed a number of patients with sicknesses caused by mold in their homes and that insurance companies became concerned with the number of claims being filed related to mold as a result.)

In April 2007, defendant Gottfried Kellermann (as the president and CEO of defendant Neuroscience) and plaintiff Vojdani (as CEO of Immunosciences) signed a confidentiality agreement that included the following provisions:

WHEREAS, NS and IS respectively possess certain confidential and proprietary information and are willing to disclose such confidential and proprietary information to each other, subject to terms and conditions set forth herein.

* * *

1. . . . IS shall disclose to NS certain information and materials relating to its business model, laboratory services for the purpose of health care delivery and patient management. All such information exchanged by NS and IS shall constitute "Confidential Information. . . ."

2. In consideration of NS' and IS['] disclosure of Confidential Information to each other, each recipient agrees that, for a period of five . . . years from the date of this Agreement, it shall make no use of any Confidential Information received from the other except for the above purpose; shall retain in confidence all such Confidential Information; and shall prevent disclosure by it of such Confidential Information to third parties These restrictions shall not apply to Confidential Information which:

(a) at the time of disclosure is or thereafter becomes available to the public through no fault of the receiving party;

(b) as shown by dated written or electronic records, was known to, or was otherwise in the possession of the receiving party or its affiliate prior to the receipt of such Confidential Information from the other party;

(c) is obtained by the receiving party from a source other than the other party and other than one who would be breaching a commitment of confidentiality to that other party by disclosing the confidential information to the receiving party;

(d) is developed by the receiving party or its affiliates independently of any disclosure made hereunder[.]

* * *

4. NS and IS agree to return or destroy all of the other party's Confidential Information (including copies and excerpts) upon request.

On June 21, 2007, plaintiff Vojdani (as CEO of Immunosciences) and defendant Gottfried (as CEO of Neuroscience) signed a "letter of intent" that included the following provisions:

Purpose

This letter of Intent outlines the proposed collaboration and commercialization between Neuroscience, Inc. ("NS") and your laboratory, Immunosciences Labs, Inc. ("ISL"), in addition to the Neuroscience, Inc. laboratory services provided by Pharmasan Labs, Inc. ("PL").

The business and commercial goal is to offer ISL testing services to current ISL customers as well as NS and PL current or future customers. It is the intent to provide a variety of ISL developed laboratory testing service offerings through the commercial channels established by NS and PL.

The testing services and immunological parameters that ISL currently offers or have in the past will become available for sale by NS. These tests are intended to assist in identifying neurological, immunological or other health conditions that NS markets and are the focus of this letter of intent.

* * *

Terms

The terms of the relationship between the distinct and independent commercial of NS, PL and ISL will remain. However, NS and PL will hereby retain the right to market the IS proprietary test developed, patented or commercialized to date, choosing selectively as determined to be appropriate and capable those tests that are scientifically and clinically most suitable for health conditions that are NS's primary commercial focus.

Services

The companies will retain their individual commercial presence and operating

structure in all aspects, but NS and PL will initiate several aspects for providing ISL tests as described below:

1. A series of tests currently marketed by NS, but supported by ISL scientific expertise--specifics to be determined by NS & PL management.
2. Food Sensitivity Panels offered by NS/PL NS will market a food sensitivity panel with a # to be determined performed by NS (w. ISL training and validation support) sold and marketed through our NS channels. Wholesale pricing to Neuro[s]cience will be negotiated and included in the Final Agreement.
3. ISL and NS scientific collaboration – the parties agree to share scientific and intellectual property as determined to be of benefit for the furthering of testing and product development that compliment neurology and immunology. ISL will be involved in the education and training of HCP in the science and testing relevant to patient and customer needs.

Pricing

1. Laboratory-Developed Assay (LDA) Testing – ISL will provide the testing material (plates and all necessary components) to NS/PL and will include an invoice for the material at 50% of client price (50/50). It is understood that each company will receive 50% of client's price and will absorb their own costs of operation. NS/PL will pay ISL's invoices according to NS/PL's monthly sales.
2. Research Use Only (RUO) or FDA-approved kits – ISL will provide the methodology for a series of tests which will require NS/PL to purchase RUO or FDA-approved kits in order to perform. NS/PL and Immunosciences will agree to split the revenue of such tests 50/50.

The parties will negotiate any unresolved issues and agree as to a Final Agreement containing the usual and customary representations, warranties and indemnifications. The parties intend to bargain in good faith to resolve any

outstanding issues not clearly defined in this letter.

The parties understand and agree that this Letter of Intent does not bind [plaintiffs] or Neuroscience unless a definitive Final Agreement is executed between Neuroscience and [plaintiffs] within sixty (60) days of acceptance of this Letter of Intent.

A diagonal line is drawn through the number “60” in the letter and “6 months or (180)” is written next to it. The parties “re-signed” the letter in September 2007.

In August 2007, the Kellermanns incorporated a new business, NeuroImmunology Labs, Inc. “as a separate laboratory operation to conduct and perform the testing services pursuant to” the letter of intent. Defendant Gottfried Kellermann “promised [plaintiff] a 50/50 ownership in” NeuroImmunology. (The parties dispute whether Kellermann made this promise before the letter of intent was signed or after.) The parties later exchanged draft agreements, but could not resolve their differences.

C. Plaintiffs’ Customer Lists

Plaintiffs maintained two customer lists, one that included clients that had ordered testing services within the last three months and another that included all clients who had ordered tests from the company in the last 20 years. Plaintiffs gave defendants both customer lists “as part of the business arrangement.” Defendants added the customers on plaintiffs’ list to their own customer list.

Plaintiffs protected the customer lists by maintaining a password that was assigned to a “select group” of employees, including “all the people [who] worked in the front desk, front office [and] client services.” In addition, employees were required to sign an employee handbook. That handbook states:

In the course of your work at ISL, you will have access to confidential, proprietary and trade secret information regarding ISL, its test procedures, SOPs and technical steps involving those processes, ISL clients, and perhaps fellow employees. It is your responsibility to in no way reveal or divulge any such information unless it is necessary to do so in the performance of your duties.

Plaintiffs did not share their list with “any other entity for any business purpose.”

C. The Parties’ Business Relationship

After the parties signed the letter of intent, plaintiff Vojdani showed defendants how to conduct some testing methodologies, but defendant Mieke Kellermann told him that she already knew how to run the tests. Plaintiffs’ contribution to the business relationship included providing plates and “other testing material” to defendants “for in-house or laboratory developed assays” and providing equipment for use in processing assays. In addition, plaintiffs gave defendants written testing methodologies to conduct the following assays:

- Glutathione (3008)

- Lymphocyte Subpopulation Analysis (LSA) (3013)
- Natural Killer Cell Activity (3014)
- Secretory IgA (3016)
- Gliadin (IgG, IgA) (5056)
- Immune Evaluation II (5070)

Regulatory T Cells

Percentage FOXP3 and CD25+ Cells of CD4+ Cells

- Immune Evaluation IV (5071)

T&B Cell Function

PHA stimulation T-cell function (CD4)

PHA stimulation T-cell function (CD8)

PWM stimulation B-cell function (CD19)

- Stimulated cytokine production (5082-5086 and 5100-5103)
- Lyme Immune Panels (5650-5652)
- Apoptosis (8042)

Defendants used these methodologies to run tests on patient samples. Defendants conducted their own “validation” of these tests and reported accurate results. (The parties dispute various matters about the quality of the testing materials plaintiffs provided.) After defendants conducted the tests, they sent the results to the health care provider of the

patient who ordered the test. For at least some of the tests, defendants paid plaintiff 50% of each sale.

From September 2007 to December 2008, defendants made payments to plaintiff Vojdani for three kinds of tests: (1) “Laboratory-Developed Assays” developed by plaintiff Immunosciences; (2) FDA-approved kits involving tests commercially available from other vendors; and (3) “Research Use Only” tests. Plaintiffs supplied testing products to defendants from August 2007 to April 2009.

D. The Parties’ Relationship after NeuroImmunology Is Shut Down

Defendants “shut down” NeuroImmunology Labs in December 2008 without plaintiffs’ consent. Plaintiff Vojdani informed Gottfried that defendants “no longer had consent to use his immunological testing methodologies and needed to go back to their original testing menu.”

After December 2008, defendants continued to order plates from plaintiffs, conducted testing on the plates and paid plaintiffs “for at least a portion of the tests.” Through February 2009, defendants continued “to conduct some of the in-house or laboratory developed assays provided by plaintiffs and report the results to health care providers.” Defendants continued to conduct the “Food Sensitivity” testing until at least June 5, 2009. Defendants did not inform federal regulators of this continued testing.

All of the methodologies provided by plaintiffs to defendants had a “discontinuance date” of November 30, 2008, with the exception of “three Antibodies to Dietary Proteins and Peptides.” However, defendants’ records reflect sales of each of these assays between January 1, 2009 and September 29, 2010, with the exception of Secretary IgA and Lyme Immune Panels. With the exception of “some Food Sensitivity Panel assays,” defendants did not pay Vojdani for any of immunological testing conducted after December 2008 for these assays.

Plaintiffs have not asked defendants to return or destroy any information or material provided to defendants.

OPINION

One of the first questions in every case brought under state law is *which* state’s law governs the dispute. The parties have assumed that Wisconsin law applies, so I will do the same. RLI Insurance Company v. Conseco, Inc., 543 F.3d 384, 390 (7th Cir. 2008) (“When neither party raises a conflict of law issue in a diversity case, the applicable law is that of the state in which the federal court sits.”)

A. Defendants’ Motion for Partial Summary Judgment

Defendants seek summary judgment on the following claims asserted by plaintiffs: (1)

trade secret misappropriation related to testing methodologies and customer lists; (2) breach of the confidentiality agreement related to testing methodologies and customer lists; (3) civil theft; (4) conversion; (5) unjust enrichment; and (6) civil conspiracy. (Defendants seek summary judgment on plaintiffs’ “claim” of “respondeat superior—vicarious liability,” but this is a misnomer. Respondeat superior is a theory of liability, not a substantive claim.) Defendants do not seek summary judgment on Counts II-IV of the complaint, “Breach of Contract—Laboratory-Developed Assay (LDA) testing,” “Breach of Contract—Research Use Only (RUO) or FDA-approved kits” and “Breach of Contract—Continued Use of Plaintiffs’ Intellectual Property.”

Plaintiffs do “not contest dismissal of their claim for conversion,” Plts.’ Br., dkt. #62, at 22, so I need not consider that claim. I will address the remaining claims in turn.

1. Trade secrets

a. Testing methodologies

A threshold question in any claim for misappropriation is whether the information in question meets Wisconsin’s definition for a trade secret under Wis. Stat. § 134.90(1)(c):

Information, including a formula, pattern, compilation, program, device, method, technique or process to which all of the following apply:

1. The information derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by

proper means by, other persons who can obtain economic value from its disclosure or use.

2. The information is the subject of efforts to maintain its secrecy that are reasonable under the circumstances.

Defendants' first argument is that plaintiffs have failed to show that any aspect of the testing methodologies at issue are not "generally known" or "generally ascertainable." I agree with defendants that plaintiffs failed in both their brief and proposed findings of fact to make such a showing. Instead, plaintiffs attempt to shift the burden of proof to defendants or blame defendants for the lack of specifics.

First, plaintiffs fault defendants for failing to figure out on their own what aspects of the methodologies are secret. For example, in plaintiffs' brief, they say that they "supplied nearly an eight-page interrogatory answer, which identified by Bates number the dozens of documents that contained the trade secret testing methodologies provided to Defendants as part of the parties' business arrangement." Plts.' Br., dkt. #62, at 4. However, plaintiffs cannot meet their burden of proof simply by citing a string of documents and telling defendants and the court that the secrets are "in there somewhere." Estate of Moreland v. Dieter, 395 F.3d 747, 759 (7th Cir. 2005) ("We will not scour a record to locate evidence supporting a party's legal argument."). Plaintiff Vojdani admitted during his deposition that he did not come up with every aspect of the testing methodologies, e.g., Vojdani Dep., dkt.

#57, at 198, 206-07, 212, 218-19 and 233, so it was up to plaintiffs to identify the aspects of those methodologies that are entitled to protection.

As defendants point out, the Court of Appeals for the Seventh Circuit has made it clear that a plaintiff must do more than assert generally that a particular method is not known to others in the field:

According to [the plaintiff], “a 43-page description of the methods and processes underlying and the inter-relationships among various features making up [the plaintiff’s] software package” is specific enough. No, it isn’t. These 43 pages describe the software; although the document was created for this litigation, it does not separate the trade secrets from the other information that goes into any software package. Which aspects are known to the trade, and which are not? That’s vital under the statutory definition. Likewise, [plaintiff’s] tender of the complete documentation for the software leaves mysterious exactly which pieces of information are the trade secrets. As we remarked in Composite Marine Propellers, Inc. v. Van Der Woude, 962 F.2d 1263, 1266 (7th Cir.1992), a plaintiff must do more than just identify a kind of technology and then invite the court to hunt through the details in search of items meeting the statutory definition.

IDX Systems Corp. v. Epic Systems Corp., 285 F.3d 581, 583-84 (7th Cir. 2002). Plaintiffs’ claim suffers from the same defect; it “leaves mysterious exactly which pieces of information are the trade secrets.”

Alternatively, plaintiffs argue in their brief and throughout their proposed findings of fact that it is defendants’ fault for failing to allow Vojdani to explain the trade secrets in more detail during his deposition:

During his deposition, Dr. Vojdani again and again referred Defendants’

counsel to the testing methodology documents for the specifics of the trade secret. (Vojdani FOF Nos. 117-118.) Nonetheless, Defendants' counsel just asked general questions about the subject of the methodologies and whether the subject of the immunological testing had been written about in published articles.

Plts.' Br., dkt. #62, at 7. This argument is a nonstarter. It is not defendants' obligation to provide opportunities during cross examination for plaintiffs to prove their claims. Plaintiffs' counsel was free to elicit testimony from Vojdani at the deposition or in an affidavit that provided the necessary information. Plaintiffs' failure to do so is fatal to this claim.

b. Customer lists

I conclude that defendants have failed to meet their initial "obligation of setting forth the basic facts and law which, in their view, warranted summary judgment on this claim." Carmichael v. Village of Palatine, Illinois, 605 F.3d 451, 460 (7th Cir. 2010). Defendants acknowledge that a customer list may qualify as a trade secret in some instances, e.g., Minuteman, Inc. v. Alexander, 147 Wis. 2d 842, 857, 434 N.W.2d 773 (1989), so that is not a ground for dismissal. Defendants' opening brief identifies many arguments why the customer lists in this case do not qualify, but they fail to develop any of them or cite relevant authority other than boilerplate law that is not in dispute. This section of defendants' brief reads more like a collection of random musings than an argument.

The most developed argument in defendants' opening brief is that plaintiffs failed to

take adequate steps to protect the secrecy of the lists. However, plaintiffs argue in their responsive materials that they protected the lists by refusing to share them with other businesses, limiting the employees who could view them and including them in confidentiality agreements. Defendants do not respond to that argument in their reply brief or further develop any of the issues raised in their opening brief. Instead, they abandon the arguments in their opening brief in favor of several new issues. Defendants' approach to this claim constitutes waiver. Narducci v. Moore, 572 F.3d 313, 324 (7th Cir. 2009) (“[T]he district court is entitled to find that an argument raised for the first time in a reply brief is forfeited.”)

2. Breach of confidentiality agreement

Plaintiffs' claim for breach of the confidentiality agreement is similar to their trade secrets claim. They contend that defendants are violating that agreement by continuing to use the testing methodologies and customer lists. The agreement includes a provision prohibiting the parties from using any confidential information received from the other party outside the context of their business relationship for five years.

Again, defendants develop no argument in their opening brief regarding the customer lists, so they are not entitled to summary judgment on that claim. With respect to the testing methodologies, defendants do not deny that the methodologies are “relat[ed] to . .

. laboratory services for the purpose of health care delivery” under the confidentiality agreement. Rather, defendants argue that the methodologies fall under one or more of the exceptions to the agreement related to information that is publicly available or that was already in defendants’ possession. Thus, defendants’ argument is similar to the one for the trade secrets claim, that plaintiffs have failed to show that the testing methodologies were actually secret.

This claim is different from the trade secrets claim because it is *defendants* who have the burden to show that one of the exceptions to the confidentiality agreement applies. "In allocating the burdens, courts consistently attempt to distinguish between the constituent elements of a promise or of a statutory command, which must be proved by the party who relies on the contract or statute, and matters of exception, which must be proved by his adversary." State v. Big John, 146 Wis. 2d 741, 756, 432 N.W.2d 576, 583 (1988) (quoting McCormick, Handbook of the Law of Evidence, § 337 at 787-88 (2d ed. 1972). See also L. Richards Machinery Co. v. McNamara Motor Exp., Inc., 7 Wis. 2d 613, 616, 97 N.W.2d 396, 398 (1959) (“The burden of proof is on the [defendant] to exempt itself from liability in case of loss or damage by showing that the damage was occasioned by one or more exceptions exempting it from liability.”)

Defendants have not met their burden. They simply make a series of unsupported propositions that some of the testing methodologies are disclosed in published articles and

some are “general scientific concepts discussed and readily available over the internet.” Dfts.’ Br., dkt. #55, at 11. That is not enough to show as a matter of law that the testing methodologies fall within one or more of the exceptions in the confidentiality agreement. Defendants develop new arguments in their reply brief but, again, that was too late.

3. Civil theft

Under Wis. Stat §§ 895.446 and 943.20, a person is liable for civil theft if he “[i]ntentionally takes and carries away, uses, transfers, conceals, or retains possession of movable property of another without the other's consent and with intent to deprive the owner permanently of possession of such property.” Plaintiffs contend that defendants have committed theft by retaining and using hard copies of the testing methodologies and customer lists.

Defendants point out that the confidentiality agreement does not require return of materials unless a party requests them. It is undisputed that plaintiffs have not asked defendants to return hard copies of the testing methodologies or customer lists. Accordingly, defendants are entitled to summary judgment on the issue whether defendants “retain[ed] possession” of these documents without plaintiffs’ consent.

Defendants cannot rely on the same argument with respect to their alleged “use” of the lists and methodologies because the agreement grants permission to use the materials

only so long as the parties maintain a business relationship. It does not require plaintiffs to explicitly ask defendants to stop their use. Because defendants do not develop any other argument in their opening brief, I will deny summary judgment on this claim with respect to defendants' continued use of the documents.

4. Unjust enrichment

A party may have a claim for unjust enrichment when the following three elements are present: (1) a benefit conferred upon the defendant by the plaintiff; (2) knowledge or appreciation of the benefit by the defendant; and (3) acceptance and retention by the defendant of such benefit under such circumstances that it would be inequitable for him or her to retain it without paying the value thereof. W.H. Fuller Co. v. Seater, 226 Wis. 2d 381, 385-86, 595 N.W.2d 96 (1999). Defendants argue in their opening brief that plaintiffs' unjust enrichment claim is preempted by the trade secrets law and the parties' "letter of intent." Wis. Stat. § 134.90(6)(b)("[T]his section displaces conflicting tort law, restitutionary law and any other law of this state providing a civil remedy for misappropriation of a trade secret."); Continental Casualty Co. v. Wisconsin Patients Compensation Fund, 164 Wis. 2d 110, 118, 473 N.W.2d 584, 587 (Ct. App. 1991) ("The doctrine of unjust enrichment does not apply where the parties have entered into a contract.")

In their response brief, plaintiffs do not challenge defendants' understanding of these preemption doctrines. Instead, they say that defendants misunderstand the scope of this claim. In particular, they explain that their claim for unjust enrichment is limited to defendants' failure to pay them for "FDA-approved kit immunological testing." Plts.' Br., dkt. #62, at 22. They argue that such testing is not (1) a trade secret (because it relies on publicly available testing methodologies); or (2) covered by the letter of intent (for reasons that are not clear).

Even if I assume that plaintiffs' unjust enrichment claim is not preempted, I agree with defendants' alternative argument that plaintiffs have not identified what "benefit [plaintiffs] have conferred upon [defendants] such that retention of such information would be inequitable." Dfts.' Br., dkt. #55, at 17. Plaintiffs do not even attempt to address this element in their brief. Their only argument is that defendants at one time paid plaintiffs for the tests they conducted using FDA-approved kits but then stopped payment. However, this shows only that defendants had been conferring a benefit on plaintiffs; it does not show what plaintiffs were doing in return for that benefit.

Without specific evidence showing a benefit *to* defendants, plaintiffs cannot prevail on this claim. The doctrine of unjust enrichment does not give plaintiffs an equitable right to continued payment simply because they received payment in the past.

5. Civil conspiracy

Plaintiffs devote six pages of their brief to their claim for civil conspiracy, but nearly all of the discussion is simply a regurgitation of various proposed findings of fact. Plaintiffs include virtually no legal analysis for this claim. For example, Wisconsin recognizes a common law conspiracy claim as well as a narrower statutory conspiracy claim under Wis. Stat. § 134.01 for “injury to business,” WIS JI-CIVIL 2820 (noting distinction between two claims), but plaintiffs never specify in their complaint or their brief which claim they are asserting. Because plaintiffs never cite § 134.01 or discuss its elements and the two cases plaintiffs cite are common law conspiracy claims, Augustine v. Anti-Defamation League of B'Nai B'Rith, 75 Wis. 2d 207, 249 N.W.2d 547, 552 (1977); Onderdonk v. Lamb, 79 Wis. 2d 241, 255 N.W.2d 507, 509-10 (1977), I will assume that plaintiffs intend to assert a common law claim.

This assumption does not help plaintiffs because a common law claim requires a showing of “concerted action [by the defendants] to accomplish some unlawful purpose or upon concerted action to accomplish some lawful purpose by unlawful means.” Onderdonk, 79 Wis. 2d at 246-47, 255 N.W.2d at 509-10. In other words, plaintiffs must point to a right that defendants violated collectively. Zimmerman v. Logemann, 2009 WL 4407205, 10 (W.D. Wis. 2009)(“An allegation of a conspiracy is not so much a separate ‘claim’ as it is a mechanism for holding defendants liable for wrongful conduct.”); Taurus IP v.

DaimlerChrysler Corp., 519 F. Supp. 2d 905, 928 (W.D. Wis. 2007) (citing Segall v. Hurwitz, 114 Wis. 2d 471, 481, 339 N.W.2d 333, 338 (Ct. App. 1983) (“a civil conspiracy requires an underlying tort”). Despite the lengthy discussion in their brief, plaintiffs never identify what right that might be; they simply list a number of actions by defendants of which they disapprove.

In their complaint, plaintiffs say that the defendants’ acts in support of the conspiracy were to “misappropriate and steal Plaintiffs’ tangible property, intellectual property, confidential information, and Trade Secrets, and breach the parties’ agreements.” Dkt. #1, ¶ 99. Because plaintiffs have asserted separate claims for each of those legal theories, the sole question raised by plaintiffs’ civil conspiracy “claim” is whether the individual defendants may be held liable for the alleged violations of those rights. I turn to that question next.

6. Liability against individual defendants

Defendants’ sole argument for seeking dismissal of Gottfried Kellermann and Mieke Kellermann is that all of their actions at issue in this case were performed in their capacity as officers of Pharmasan and Neuroscience. They cite Sprecher v. Weston's Bar, Inc., 78 Wis. 2d 26, 37, 253 N.W.2d 493, 498 (1977), for the proposition that “contracts entered into for the corporation by its officers or agents are contracts of the corporation as a distinct legal entity and neither confer rights nor impose liabilities or restrictions on the shareholders

individually.” They acknowledge that an exception exists when an officer causes the corporation to breach the contract, id., but they do not discuss whether that exception should apply in this case. Further, plaintiffs cite Oxmans' Erwin Meat Co. v. Blacketer, 86 Wis. 2d 683, 692, 273 N.W.2d 285, 289 (1979), for the proposition that a “corporate agent cannot shield himself from personal liability for a tort he personally commits or participates in by hiding behind the corporate entity; if he is shown to have been acting for the corporation, the corporation also may be liable, but the individual is not thereby relieved of his own responsibility.” Defendants do not attempt to distinguish Oxman in their reply brief. In light of defendants’ failure to develop this issue and both sides’ failure in their proposed findings of fact to carefully distinguish among the actions of the different defendants, I conclude that dismissal of Gottfried Kellermann and Mieke Kellermann would be premature.

Defendants raise a separate question whether the corporate defendants can be held liable for the actions of the individual defendants under the doctrine of respondeat superior. Because the corporate defendants are included in each of plaintiffs’ claims, it is unnecessary to determine at this time whether the corporations may be held liable for the individuals’ conduct as well.

B. Plaintiffs’ Motion for Summary Judgment on Defendants’ Counterclaims

Defendants have asserted three claims against plaintiffs: (1) “fraudulent misrepresentation”; (2) “fraud in the inducement”; and (3) “breach of contract.” (In addition, defendants repeat plaintiffs’ mistake of asserting a “claim” for “respondeat superior.” Plaintiffs do not develop a separate argument regarding Immunosciences’ potential liability for Vojdani’s actions, so I need not consider that question.) Plaintiffs seek summary judgment on each of these claims. They argue that the two fraud claims are barred by the economic loss doctrine and that the breach of contract claim is barred by federal law.

1. Fraud

Defendants’ fraud claims are a little hard to pin down. It is not clear whether they represent different claims or simply slightly different legal theories for the same alleged misrepresentations because defendants do not differentiate the two claims in their brief. In fact, defendants do not include any discussion of the alleged fraud, but simply cite back to their counterclaim and answer. In that pleading, defendants identified two alleged misrepresentations: (1) “Vojdani failed to disclose any sanctions or administrative compliance issues relating to [Immunosciences’] performance, goods or services”; and (2) “Vojdani further held out and represented to Kellermann that [Immunosciences] could produce certain testing plates and necessary components for testing purposes that were or could be properly verified.” Dkt. #5, ¶¶ 2-3. For the purpose of this opinion, I will assume

that plaintiff Vojdani made these statements both before the parties entered into a business relationship as well as during the relationship.

Plaintiffs do not challenge the merits of defendants' fraud counterclaims, so I do not need to decide whether defendants have adduced enough facts on these claims. Instead, plaintiffs rely on Wisconsin's "economic loss doctrine," which is "a judicially-created remedies principle that operates generally to preclude contracting parties from pursuing tort recovery for purely economic or commercial losses associated with the contract relationship." Tietsworth v. Harley-Davidson, Inc., 2004 WI 32, ¶ 23, 270 Wis. 2d 146, 677 N.W.2d 233. The general idea behind the doctrine is straightforward and uncontroversial: to prevent dissatisfied buyers from using tort law to recover losses that were or should have been protected against through contract law. Digicorp, Inc. v. Ameritech Corp., 2003 WI 54, ¶ 35, 262 Wis. 2d 32, 662 N.W.2d 652. Difficulties often arise in applying the doctrine because there is no test with a list of factors to be applied by rote; rather, each case requires a policy determination whether contract law adequately protects against the risks at issue in the case and whether it is more appropriate for the buyer or the seller to bear a particular loss. Daanen & Janssen, Inc. v. Cedarapids, Inc., 216 Wis. 2d 395, 412, 573 N.W.2d 842, 849-50 (1998).

Defendants do not argue that the economic loss doctrine is inapplicable because the parties' business relationship was not governed by a contract. (The letter states that it "does

not bind” the parties “unless a definitive Final Agreement is executed.” Although the parties did not enter into a “Final Agreement,” neither side is challenging the letter of intent for the purpose of summary judgment.) Thus, I need not determine the extent to which the letter of intent created an enforceable agreement. Rather, defendants say that an exception to the doctrine applies because the parties’ relationship involved the provision of services.

“[T]he economic loss doctrine does not apply to contracts for services.” Insurance Co. of North America v. Cease Electrical Inc., 2004 WI 139, ¶ 2, 276 Wis. 2d 361, 365, 688 N.W.2d 462, 464. If a contract involves both products and services, the question becomes which aspect is “predominant.” Linden v. Cascade Stone Co., Inc., 2005 WI 113, ¶ 8, 283 Wis. 2d 606, 614, 699 N.W.2d 189, 193.

The business relationship between the parties in this case cannot be described reasonably as one in which plaintiffs’ “predominant” contribution was the provision of services. Although the relationship was not clearly defined in all respects, both the letter of intent and the parties’ conduct made it clear that it was plaintiffs’ responsibility to provide defendants with the raw materials necessary for testing medical specimens. It was *defendants* who provided a service by conducting the actual testing. It may be that the parties (or at least plaintiffs) envisioned a larger role for plaintiffs in the future, but this never came to fruition.

Defendants point to passages in the letter of intent that refer to services such as

“training,” “education” and “validation support.” However, it is disingenuous for defendants to suggest that these services were the primary basis for the parties’ relationship, particularly when defendants point to few examples in which plaintiffs provided such services. The letter of intent does not say that defendants would pay plaintiffs for a particular amount of time plaintiffs spent on training or education. Linden, 2005 WI 13, at ¶ 25, (concluding that contract to build house was not predominantly for services in part because “the project's cost was billed using a ‘fixed price contract,’ not changing based on the hours worked”). Rather, it says that plaintiffs “will provide the testing material (plates and all necessary components) to [defendants] and will include an invoice for the material at 50% of client price (50/50).” This provision suggests strongly that defendants were paying plaintiffs primarily for the testing material and that the services were incidental.

Throughout their brief defendants seem to assume that the testing methodologies plaintiffs provided were “services,” but defendants cite no authority for this proposition or otherwise develop an argument. That view might be debatable if defendants had paid plaintiffs to *create* the methodologies because then defendants could argue that they were paying plaintiffs for their labor. Cf. Stuart v. Weisflog's Showroom Gallery, Inc., 2008 WI 22, ¶ 33, 308 Wis. 2d 103, 124-25, 746 N.W.2d 762, 772-73 (three justices concluding that contract to design house was primarily for services, even though end result was architectural drawing). However, in this case, plaintiffs had already come up with the methodologies;

defendants were paying them to use what was in effect a finished product before defendants even got involved.

A second exception to the economic loss doctrine exists when a party uses fraud to induce another to enter into a contract and the “fraud is extraneous to, rather than interwoven with, the contract.” Kaloti Enterprises, Inc. v. Kellogg Sales Co., 2005 WI 111, ¶ 42, 283 Wis. 2d 555, 585, 699 N.W.2d 205, 219. Defendants are asserting a claim for fraud in the inducement, but it is not clear whether they believe they meet this exception to the doctrine because they do not directly address the question whether the alleged misrepresentations are extraneous to the contract. Rather, they argue only that plaintiffs are “mistaken” to “claim that all of Defendants’ allegations made in support of the fraudulent misrepresentation and fraud in inducement claims are identical to those set forth in their breach of contract claim.” Dfts.’ Br., dkt. #70, at 11.

To the extent defendants mean to argue that they satisfy the fraud in the inducement exception, they have failed. I agree with plaintiffs that it is difficult to discern any difference between defendants’ fraud and breach of contract claims. The argument in defendants’ brief is difficult to follow, but it seems to support *plaintiffs’* position. Defendants emphasize that one of the alleged misrepresentations is that plaintiffs’ “testing had been temporarily suspended due to ‘technical’ and ‘political’ issues unrelated to the quality of its laboratory operation.” Dfts.’ Br., dkt. #70, at 12 (emphasis in original). This allegation defeats

defendants' argument because it suggests that plaintiffs were deceiving defendants *about* the "quality of their laboratory" and, thus, about the quality of their testing materials by stating that the reasons they were shut down had nothing to do with quality issues.

Even if I assume that defendants' fraud and breach of contract claims do not rely on the same alleged conduct, defendants cannot argue plausibly that the alleged misrepresentations were extraneous to the business relationship. Defendants allege that plaintiffs failed to disclose their history of sanctions and lied about the ability of their testing materials to "be properly verified." The allegation about verification is directly related to the quality of plaintiffs' testing materials. The allegation about plaintiffs' sanctions are less obvious, but they too are ultimately related to the quality of the testing materials; plaintiffs were sanctioned *because* their tests were not properly verified. Defendants make it clear in their own proposed findings of fact that the information about sanctions was important to them because plaintiffs' "in-house validation and quality control standards had been at issue in the investigation." Dfts. PFOF ¶ 31, dkt. #69. Accordingly, I conclude that plaintiffs' are entitled to summary judgment on defendants' claims for fraud.

2. Breach of contract

Defendants allege that plaintiffs breached their agreement by failing to provide testing products that were "verifiable and could be utilized by [defendants] without further

verification to ensure accuracy.” Dkt. #5, ¶ 31. More generally, defendants say that plaintiffs “fail[ed] to provide proper and credible tests.” Id. at ¶ 34.

Plaintiffs point out in their brief that the lab conducting a test has a duty to verify the tests itself; it may not rely on a third-party vendor. 42 C.F.R. § 493.1253. Thus, plaintiffs argue that it “would violate federal law” to allow defendants to proceed on a breach of contract claim that is premised on plaintiffs’ alleged failure to verify testing materials before giving them to defendants.

Defendants do not challenge plaintiffs’ contention that they cannot maintain a breach of contract claim for plaintiffs’ failure to verify their testing materials, so I need not consider that argument. However, defendants point out that their breach of contract claim is not limited to that issue. Rather, defendants allege as well in both their complaint and proposed findings of fact that the general quality of plaintiff’s materials was low. E.g., Dfts.’ PFOF ¶ 51, dkt. #69 (“Approximately 50% of tests received from Vojdani had to be run multiple times due to inconsistent results.”). Although plaintiffs deny that there was anything wrong with their testing materials, I cannot say that plaintiffs are correct as a matter of law. Accordingly, plaintiffs’ motion for summary judgment must be denied with respect to this portion of defendants’ breach of contract claim.

However, I agree with plaintiffs that it is too late for defendants to raise new breach of contract claims related to plaintiffs’ alleged failure to provide promised “validation

support.” This claim was not included in the complaint, as defendants acknowledge implicitly by stating in their opposition brief that they “can amend Count III of the Counterclaim to specifically assert” the facts related to such a claim. Dfts.’ Br., dkt. #70, at 14. As courts have held repeatedly, a brief in opposition to a motion for summary judgment is not the proper vehicle for seeking to amend the complaint. EEOC v. Lee's Log Cabin, Inc., 546 F.3d 438, 443 (7th Cir. 2008); Conner v. Illinois Dept. of Natural Resources, 413 F.3d 675, 679 (7th Cir. 2005); Grayson v. O'Neill, 308 F.3d 808, 817 (7th Cir. 2002); Shanahan v. City of Chicago, 82 F.3d 776, 781 (7th Cir.1996).

ORDER

IT IS ORDERED that

1. The motion for partial motion summary judgment filed by defendants Gottfried Kellermann, Mieke Kellermann, Pharmasan Labs, Inc. and Neuroscience, Inc., dkt. #48, is DENIED with respect to the following claims:

- (a) defendants misappropriated trade secrets relating to the customer lists of plaintiffs Aristo Vojdani and Immunosciences Lab, Inc., individually and in the context of a conspiracy;
- (b) defendants breached the confidentiality agreement related to plaintiffs’ testing methodologies and customer lists, individually and in the context of a

conspiracy; and

(c) defendants committed civil theft by continuing to use hard copies of plaintiffs' testing methodologies and customer lists after their business relationship ended, individually and in the context of a conspiracy.

Defendants' motion is GRANTED in all other respects.

3. Plaintiffs' motion for summary judgment on defendants' counterclaims, dkt. #37, is DENIED with respect to defendants' claim that plaintiffs breached the contract by failing to provide quality testing materials. The motion is GRANTED in all other respects.

4. Plaintiffs' motion to strike defendants' "additional" proposed findings of fact, dkt. #94, is GRANTED.

Entered this 15th day of December, 2010.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge

