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News & Types: Commercial, Competition & Trade Update

Claimant Loses Big Jury Verdict Award of $1.1 Million by Waiving and Not Pursuing Damage Theory

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Practices: Litigation

Dr. Aristo Vojdani was the owner of Immunosciences Lab, Inc. In June 2007, Dr. Vojdani and Immunosciences (referred to for convenience as "Vojdani") arranged to ship to Pharmsan Labs, Inc. and NeuroScience, Inc. (sister companies referred to as "NeuroScience") medical testing plates and components. The arrangement was labeled a "letter of intent," but both sides treated it as a binding contract. But, as with many letters of intent, it was ambiguous on some key terms.

The letter of intent provided that Vojdani would invoice the items "at 50% of client price" and that NeuroScience would pay "according to [NeuroScience's] monthly sales." The letter of intent expired after 180 days, but was orally extended until June 2009, when it was terminated by NeuroScience.

Until then, the parties did business, but with a major disconnect. When Vojdani shipped the items, he included an invoice for 50% of all the items at 50% of "client price." But when NeuroScience paid the invoices, it paid only for the items it had actually sold "according to . . . monthly sales." In his first error, Vojdani accepted the payments without complaint and never sent a past-due invoice.

After NeuroScience terminated the arrangement in June, 2009, Vojdani responded by filing a lawsuit in the Federal Court for the Western District of Wisconsin for breach of contract, claiming payment for all shipments to NeuroScience. To decide this claim actually took two jury trials.

Vojdani lost the first trial and got nothing. But the jury, asked for special verdicts, answered in a way that did not make sense. The first question was whether Vojdani had proven that NeuroScience agreed to pay Vojdani the invoiced amount for each testing plate, whether sold by NeuroScience or not. The jury said yes, suggesting it agreed with Vojdani's interpretation of the letter of intent that NeuroScience owed the money for the items whether it sold them or not. The second question was whether Vojdani had proven that NeuroScience did not pay the full amount of the invoices. The jury answered no. These seemed inconsistent, especially coupled with NeuroScience's admission that it did not pay the full amount of the invoices, but only for the items NeuroScience had sold.

Not surprisingly, NeuroScience found a way to reconcile these conflicting results. The jury could have found that the parties had modified the letter of intent so that, as modified, it favored NeuroScience's interpretation

that NeuroScience only had to pay for items NeuroScience had sold. But the trial judge did not see it this way. It granted Vojdani a second trial on this issue.

The result of the second trial was better for Vojdani, but not by much. The jury awarded only $187,000, far less than Vojdani was claiming. Both sides appealed to the 7th Circuit Court of Appeals. Judge Hamilton of the 7th Circuit upheld the trial judge's decisions to a) permit a second jury trial because of the first jury's apparent inconsistent special verdict responses and b) allowing the second jury verdict to stand apparently on the basis that the second jury determined that the letter of intent had been modified to permit NeuroScience to pay only on the items that NeuroScience had sold. While Vojdani had won $187,000 from NeuroScience, this was far less than he expected.

But Vojdani had another claim. This one took only one jury trial, but the result was even more disappointing to Vojdani.

Two months before Vojdani and NeuroScience signed the letter of intent, they signed a confidentiality agreement. The nature of the confidential information was not specified. Later, in the letter of intent, Vojdani agreed to provide NeuroScience with certain testing methods he had developed for use with third-party testing kits and that Vojdani and NeuroScience would "split the revenue of such tests 50/50." NeuroScience paid Vojdani to use his testing methods through the end of 2008, then stopped paying but continued to use Vojdani's methods. Vojdani demanded return of his "confidential and proprietary information," but NeuroScience did not respond.

Vojdani claimed that the testing methods were confidential. NeuroScience's argument was that the testing methods were either publicly available or altered by NeuroScience, so not protected by the confidentiality agreement. Alternatively, NeuroScience argued that Vojdani could not prove damages, since he was not selling the tests, so NeuroScience's use of Vojdani's testing methods did not deprive him of sales. The jury found for Vojdani and awarded him $1,165,230.

NeuroScience asked the trial judge to overrule the jury verdict as a matter of law, on the basis that Vojdani had failed to present evidence of damages. At first, the trial judge denied the motion, explaining that Vojdani was entitled to a "reasonable royalty" for use of his testing methods and the letter of intent showed what a reasonable royalty would be (apparently the 50/50 split).

But then the trial judge reconsidered, noting that Vojdani had never argued for a reasonable royalty and that the jury had never been instructed on a reasonable royalty or any other measure of damages to justify such a large jury award of more than $1.1 million. Judge Hamilton of the 7th Circuit upheld the trial judge's decision to overrule the jury verdict.

Not only did Vojdani never argue for a reasonable royalty for breach of the confidentiality agreement, he even disclaimed a reasonable royalty as a measure of damages. Said Vojdani in his reply brief, "Contrary to NeuroScience's misplaced characterizations, Vojdani's damage theories do not assume that the relevant breach was failure to pay 50% of its gross revenues. Instead, the relevant breach was NeuroScience's use of Vojdani's confidential information after June 5, 2009, the day the parties' business relationship terminated."

Judge Hamilton gave due consideration to the damages that Vojdani could have claimed. For example, Vojdani could have argued a "diverted trade" theory, under which NeuroScience's profits would be a proxy for Vojdani's losses and, therefore, a suitable measure of damages. But, the court noted, Vojdani made no attempt to compete with NeuroScience and so did not lose a single sale that he would have made.

Judge Hamilton emphasized that the court was not holding that damages cannot be awarded for breach of a confidentiality agreement when the parties are not in direct competition. In such a case, one remedy and measure of damages is a reasonable royalty. This is the theory that the trial judge relied upon when initially upholding the jury verdict of $1.1 million, before changing her mind.

Because Vojdani had specifically disclaimed a reasonable royalty as a measure of damages, Judge Hamilton felt the trial judge was correct in changing her mind and overruling the jury verdict. As Judge Hamilton noted:

"We do not understand the reasons [Vojdani has taken the position that a reasonable royalty is not the measure of damages], but we cannot rescue the jury's verdict based on a reasonable royalty theory that [Vojdani] has abjured repeatedly in the district court and in this court, so that NeuroScience never had an opportunity or a reason to respond to the theory."

While there is a dearth of numbers in the appeals court's opinion, it is possible that Vojdani felt that the "reasonable royalty" that he could have claimed was insufficient and he wanted to go for the big payday. The jury's verdict of $1.1 million in his favor shows he nearly succeeded. But disclaiming the "reasonable royalty" and not arguing for a specific quantifiable measure of damages left a gap that the trial judge and the appeals court declined to fill. So Vojdani was left with damages of $187,000, not an insignificant sum, but far less than what he had hoped and expected.

(Aristo Vojdani and Immunosciences Lab, Inc. v. Pharmsan Labs, Inc. and NeuroScience, Inc. 7th Circuit Court of Appeals, Nos. 13-1354 and 13-1242, December 20, 2012)