IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA

MISCELLANEOUS NO. 3:07-MC-47
(Doc. No. 5)

IN RE:	)
	)
STANDING ORDER GOVERNING	)
JURY SELECTION AND	)
INSTRUCTION IN CIVIL CASES	)
BEFORE THE HONORABLE	)
FRANK D. WHITNEY	)
	)

The terms of this Order shall apply to all pending and future civil cases on the docket of the Honorable Frank D. Whitney in which a trial by jury has been demanded.

1. VOIR DIRE. Pursuant to Rule 47(a) of the Federal Rules of Civil Procedure, the Court will conduct all jury voir dire according to the following procedures.

a. Prior to a scheduled trial term of Court, the Jury Coordinator will mail to each person selected for jury service a "Confidential Juror Questionnaire," a copy of which is attached to this Order as Exhibit A. Counsel shall be provided copies of the completed juror questionnaires prior to jury selection and voir dire. Counsel should be aware that, because it is the Court's custom to hold mixed criminal/civil trial terms which draw on a common juror pool, some of the questions asked on the Confidential Juror Questionnaire may not seem especially relevant to civil jury selection.

b. After the prospective jurors are sworn, the Court will:

i. Explain to the jury panel the purpose of voir dire;

ii. Indicate to the jury panel how long the case is expected to take to try, and ask

if any member of the jury panel has special circumstances (including personal obligations and/or medical conditions) that would make serving as a juror difficult;

iii. Read the joint statement of the case provided by counsel in advance of trial, and ask if any member of the jury panel has previously heard or read anything about the case;

iv. Have counsel introduce themselves and their clients, and ask if any member of the panel has any relationship with any of them.

v. Have counsel identify all potential witnesses, and ask if any member of the panel has any relationship with any of them.

vi. Ask any necessary follow-up questions that may arise from a juror's answer to any question (including written answers to questions on the Confidential Juror Questionnaire);

vii. Ask any questions requested by counsel, as the Court may allow in its discretion;

viii. Ask if any other reason suggests itself to any member of the jury panel as to why he or she could not sit on this jury and render a fair and impartial verdict based on the evidence presented in the context of the Court's instructions on the law.

2. JURY SELECTION.

a. **Method.** Jury selection will be conducted according to a modified "strike and replace" method. This method generally works as follows: A number of jurors equal

to the size of the trial jury are called into the box. Only the jurors seated in the box initially are examined by the judge. Requests to excuse jurors for cause and hardship are made, in writing on a form to be provided by the Court, and may be heard and ruled upon in sidebar. Peremptory challenges are then indicated on a form to be provided by the Court and are announced by the Judge. Failure to exercise a peremptory challenge as to a juror during the round in which he/she is first seated in the box will result in waiver of counsel's right to challenge that juror during later rounds. When a juror is removed for cause or hardship or is peremptorily removed by one of the parties, another juror is called forward to replace the departing juror. The replacement is then asked for his or her answers to all previous questions. This process continues until all challenges for cause and peremptory challenges have been exhausted and the required number of jurors remain. Counsel should note that jurors will be called at random and counsel will not know the order in which jurors in the pool will be called to fill vacant seats in the box.

b. **Number of Peremptory Challenges.** All plaintiff(s) collectively shall be entitled to three (3) peremptory challenges. All defendant(s) collectively shall likewise be entitled to three (3) peremptory challenges. The Court may allow additional peremptory challenges (no more than three per party) in exceptional cases.

c. **Number of Trial Jurors.** Civil juries will consist of eight (8) jurors with no alternates; however, no mistrial will result if a juror must be excused mid-trial so long as at least six (6) jurors remain at the time a verdict is returned.

3. **JURY INSTRUCTIONS.** Jury instruction will be conducted in four (4) phases. The purpose of this methodology is to break up the monotony of a single final charge, instruct the jury at points in time in which the Court's directives will have the greatest efficacy, and allow the jury to retire to deliberate with counsel's summations fresh in mind.

a. **Phase One.** Phase one instructions will be given after the jury is empaneled and before opening statements. Topics covered in phase one instructions include: (i) juror conduct during trial; (ii) the province of the judge and jury; (iii) what is/is not evidence; and (iv) assessment of witnesses. The Court's phase one pattern instructions are attached to this Order as Exhibit B. Ordinarily, these instructions WILL NOT be repeated during the final jury charge but WILL be included in a set of written jury instructions that will be sent back with the jury during deliberations.

b. **Phase Two.** Phase two instructions will be given during the course of trial as needed to explain why certain evidence has been admitted or excluded. Issues arising during trial that would warrant an instruction include: (i) if judicial notice of a fact is taken, or a stipulation is read into the record, or an expert witness is qualified to testify concerning matters of opinion, the Court will explain these procedures to the jury at the appropriate time; (ii) if charts, summaries, or transcripts are used to aid the jury but not admitted into evidence, an appropriate instruction concerning the use of the aid will be given; and (iii) if evidence is admitted for a limited purpose (*e.g.*, prior bad acts, impeachment by prior inconsistent statement or criminal conviction), an appropriate cautionary instruction will be given at that time. Ordinarily, these instructions WILL NOT be repeated during the final jury charge and WILL NOT be

included in a set of written jury instructions that will be sent back with the jury during deliberations. Accordingly, if counsel believe that a cautionary or explanatory instruction is needed at any time during trial, counsel shall immediately make himself heard or any objection to the Court's failure to instruct shall be deemed waived.

c. **Phase Three.** Phase three instructions will be given after the close of all evidence but before closing arguments. Topics covered in phase three instructions include: (i) the burden of proof; (ii) a reading of each jury interrogatory on the verdict form, together with the elements of each claim or defense and relevant definitions of terms; and (iii) damages. The Court's phase three pattern instructions are attached to this Order as Exhibit C, although the Court will be guided by the parties' requests as this phase of jury instructions is largely case-specific. These instructions WILL be included in a set of written jury instructions that will be sent back with the jury during deliberations.

d. **Phase Four.** Phase four instructions will be given after closing arguments and before the jury retires to deliberate. The Court's phase four pattern instructions are attached to this Order as Exhibit D. These instructions WILL be included in a set of written jury instructions that will be sent back with the jury during deliberations.

IT IS SO ORDERED.

Signed: May 14, 2007

Frank D. Whitney
United States District Judge

Exhibit A

CONFIDENTIAL JUROR QUESTIONNAIRE
(To be Reviewed Only by Counsel and the Court)

Name:_____Age: _____

Town/City of Residence: _____

County of Residence:_____How long have you lived there: _____

Highest Level of Formal Education: _____

What is your current job status (working full-time, working part-time, unemployed, retired, student, etc.)?

_____

If working, where do you work? _____

Describe your position and what you do at work? _____

(If retired or previously employed, please answer these questions for where you worked and what you did before you retired or were unemployed /became a student, etc.)

Has your occupation changed in the last five years? _____. If so, what was your previous occupation?

Military service: _____ If so, branch, number of years of service and rank at discharge:_____

Marital Status (Check One):
___Single
___ Married/Remarried: If married, years married: _____
___ Divorced and not remarried
___ Widow/Widower

Spouse's (or former spouse's) employment (if any): _____. Years at this employment: _____

Children (Check One): ___No
___ Yes: If yes, ages and occupation (if any): _____

_____

What are your hobbies or recreational / spare-time activities? _____

Last books read or favorite books: _____

Favorite movies or television shows: _____

Have you ever sat on a jury before? ____No
____ Yes: If yes, was it a Civil Jury ___
or a Criminal Jury ___
If yes, did you reach a verdict:____No or Yes
(Do **NOT** indicate what the verdict was)

PLEASE COMPLETE BOTH FRONT AND BACK OF THIS QUESTIONNAIRE

Other than serving as a juror and other than minor traffic violations, have you ever had any other involvement in a court proceeding (as a party, witness, or other role)?_____No or____Yes
If yes, briefly describe:

_____

_____

Do you know any attorney or employee in the United States Attorney's Office? ___ No or ____ Yes

Do you **personally** know any other law enforcement officer or special agent? ___ No or ____ Yes

If yes, briefly describe:

_____

Other than minor traffic violations, have you ever had any negative or unpleasant encounter with a law enforcement officer or law enforcement agency? _____No or ___Yes

If yes, briefly describe:

_____

Has anyone close to you, such as a friend or relative, had any negative or unpleasant encounter with a law enforcement agency or other government agency?_____No or _____Yes

If yes, briefly describe:

_____

Do you have any religious convictions or moral scruples against sitting as a juror in a criminal case and deciding whether a defendant is guilty or not guilty? _____ No or ____ Yes

Exhibit B

Members of the Jury:

Now that you have been sworn, I will give you some preliminary instructions to guide you in your participation in this trial.

First, a few words about your conduct as jurors.

1. I instruct you that during the trial you are not to discuss the case with anyone or permit anyone to discuss it with you. Until you all retire to the jury room at the end of the case to deliberate on your verdict, you must not to talk about this case.

2. Do not read or listen to anything touching on this case in any way – that includes newspaper articles or television or radio reports on this case. If anyone should try to talk to you about it, bring it to my attention promptly.

3. Do not try to do any research or make any investigation about the case on your own.

4. Finally, do not form any opinion until all the evidence is in. Keep an open mind until you start your deliberations at the end of the case.

If you wish, you may take notes. If you do, remember that they serve merely as an aid to your memory; they are not a substitute for your own memory or the memory of any other juror. It is each juror's individual responsibility to listen carefully to and remember the evidence. Remember that your notes are not evidence, and your individual recollections must control your deliberations. Those of you who take notes should leave them in the jury room when you leave the courthouse each evening.

As members of the jury, you are the sole and exclusive judges of the facts. You determine the credibility of the witnesses and resolve such conflicts as there may be in the testimony. You draw whatever reasonable inferences you decide to draw from the facts as you have determined them, and you determine the weight of the evidence. You are to perform the duty of finding the facts without bias, prejudice, or sympathy to any party.

As judge, it is my responsibility to preside over the trial, decide what testimony and evidence is admissible under the law for your consideration, and instruct you as to the legal principles governing this case. It is your duty to accept my instructions of law and apply them to the facts as you determine them. You should not single out any instruction as alone stating the law, but must consider all of my instructions as a whole. You may not substitute or follow any personal or private notion or opinion as to what the law is or ought to be. Nothing that I may say or do during the course of the trial is intended to indicate, or should be taken by you as indicating, what your verdict should be.

The evidence from which you will find the facts will consist of the testimony of witnesses, documents and other things received into the record as exhibits, and any facts that the lawyers agree to or stipulate to or that the court may instruct you to find. Certain things are not evidence and must not be considered by you. I will list them for you now:

1. Statements, arguments, and questions by the lawyers or myself are not evidence.

Exhibit B

It is the witnesses' sworn testimony that is evidence. Thus, if a lawyer makes a statement or propounds a question that assumes certain facts to be true, this must not be taken as evidence unless a witness adopts or agrees to the assumed facts in his answer.

2. Objections to questions are not evidence. Lawyers have an obligation to their clients to make objections when they believe evidence being offered is improper under the rules of evidence. You should not be influenced by the objection or by the court's ruling on it. If the objection is overruled, treat the answer like any other. If the objection is sustained, ignore the question. Do not attempt to guess what answer might have been given had I allowed the question to be answered.

3. Testimony that the court has excluded or told you to disregard is not evidence and must not be considered. If you are instructed that some item of evidence is received for a limited purpose only, you must follow that instruction.

4. Anything you may have seen or heard outside the courtroom is not evidence and must be disregarded. You are to decide the case solely on the evidence presented here in the courtroom.

There are two types of evidence which you may properly assess in determining whether a party has met its burden of proof – direct evidence and circumstantial evidence. Direct evidence is direct proof of a fact, such as the testimony of an eyewitness to something he knows by virtue of his own senses. Circumstantial evidence is proof of a set of facts from which you may infer or conclude, on the basis of your reason, experience, and common sense, that some other fact exists. As a general rule, the law makes no distinction between direct and circumstantial evidence, but simply requires that your verdict must be based on a preponderance of all the evidence presented.

In deciding the facts in this case, you may have to decide which testimony to believe and which testimony not to believe. You may believe everything a witness says, or none of it, or believe part and disbelieve part. In addition, the weight of the evidence is not necessarily determined by the number of witnesses testifying to the existence or nonexistence of a fact. You may find that the testimony of a smaller number of witnesses on one side is more credible than the testimony of a greater number of witnesses on the other side.

In considering the testimony of any witness, you should use all the tests for truthfulness that you would use in determining matters of importance to you in your daily life. You should consider any bias or hostility the witness displays for or against any party as well as any interest the witness has in the outcome of the case. You should consider the opportunity the witness has to see, hear, and know the things about which he testifies, the accuracy of his memory, his candor or lack of candor, his intelligence, the reasonableness and probability of his testimony and its consistency or lack of consistency and its corroboration or lack of corroboration with other credible testimony. Always remember that you should use your common sense, your good judgment and your own life experience.

The trial will now begin. First, each side may make an opening statement. An opening statement is neither evidence nor argument; it is an outline of what that party intends to prove, offered to help you follow the evidence. Next, the plaintiff will present his [her] witnesses, and

Exhibit B

the defendant may cross-examine them. Then the defendant will present his [her] witnesses, and the plaintiff may cross-examine them. After the evidence is in, I will instruct you on the law, and the attorneys will make their closing arguments to summarize and interpret the evidence for you. You will then retire to deliberate on your verdict.

Exhibit C

Members of the Jury:

Now that you have heard the evidence and soon will hear the arguments of counsel, I will instruct you as to the law that applies in this case. If any difference appears to you between the law as stated by the attorneys in closing arguments and that stated by me in these instructions, you are to be governed by my instructions.

I remind you that it is your duty and your responsibility in this trial to judge the facts in accordance with the law as I instruct you. You may find the facts only from the evidence which I have allowed to be admitted during this trial. You must not consider anything which I have instructed you to disregard, and evidence which I have admitted only for a limited purpose you must consider only for that purpose.

[Insert any additional general instructions as may be necessary here.]

In a civil case, the party with the burden of proof on any given issue has the burden of proving every disputed element of his claim or affirmative defense to you by a preponderance (or the greater weight) of the evidence. To establish a fact by a preponderance (or the greater weight) of the evidence means to prove that the fact is more likely true than not true. It refers to the quality and persuasiveness of the evidence, not to the number of witnesses or documents. If you conclude that the party bearing the burden of proof has failed to establish any essential part of his (her) claim or affirmative defense by a preponderance of the evidence, you must decide against him (her) on the issue you are considering.

Some of you may have heard of proof beyond a reasonable doubt, which is the proper standard of proof in a criminal trial. That requirement does not apply to a civil case such as this and you should put it out of your mind.

[Insert instructions specific to the claims and defenses at issue here. The following italicized language is included as an example.]

*** * * * ***

The first issue on the verdict form reads: "Do you find that the Defendant is liable to the Plaintiff on account of violating the Racketeer Influenced and Corrupt Organizations Act?"

To establish that the defendant has violated RICO, the plaintiff must prove each of the following six elements by a preponderance of the evidence:

1. *That an "enterprise" existed;*

2. *That the enterprise engaged in, or had some effect upon, interstate or foreign commerce;*

3. *That the defendant was employed by or associated with the alleged enterprise;*

4. *That the defendant knowingly and willfully conducted or participated, directly or indirectly, in the conduct of the affairs of the alleged enterprise;*

Exhibit C

5. *That the defendant did so knowingly and willfully through a "pattern of racketeering activity;" and*

6. *That the plaintiff was injured in its business as a proximate result of the defendant's commission of the pattern of racketeering activity.*

The term "enterprise" includes any individual, sole proprietorship, partnership, corporation, association or other legal entity, and any union or other group of individuals associated in fact although not a legal entity, that is engaged in, or the activities of which affect, interstate or foreign commerce.

The term "racketeering activity" includes, among other things, any act in violation of 18 U.S.C. § 1341 (relating to mail fraud) and 18 U.S.C. § 1343 (relating to wire fraud). Under those laws it is a criminal offense for anyone, knowingly and with intent to deceive, to participate in a scheme to defraud another out of money or property by making materially false and fraudulent representations, and then to attempt to execute or carry out the fraudulent scheme through use of the mails or interstate wire communication facilities. The failure to disclose information may constitute a fraudulent representation if the defendant was under a legal, professional or contractual duty to make such a disclosure, the defendant actually knew such disclosure ought to be made, and the defendant failed to make such disclosure with the intent to defraud.

Each separate use of the mails or wires in connection with a scheme to defraud is a separate offense or what is commonly referred to in the RICO context as a "predicate act." In order to constitute a "pattern of racketeering activity" under RICO, you must find that the defendant committed at least two such predicate acts within 10 years of each other.

To prove that the predicate acts constituted a "pattern of racketeering activity," the plaintiff must also prove that the two or more predicate acts are related to each other and that they pose a threat of continued criminal activity. A series of disconnected crimes alone does not constitute a pattern of racketeering activity, nor do they alone amount to, or pose a threat of, continued racketeering activity. To prove that the acts of racketeering are related, the plaintiff must prove that the acts had the same or similar purposes, results, participants, victims, or methods of commission, or that they are otherwise interrelated by distinguishing characteristics and are not isolated events. To prove that the racketeering acts pose a threat of continued racketeering activity, the plaintiff must establish that (1) the acts are part of a long-term association that exists for criminal purposes, (2) the acts are a regular way of conducting the defendant's ongoing business, or (3) the acts are a regular way of conducting or participating in an ongoing RICO enterprise.

Finally, for the plaintiff to prevail under RICO, it must prove by a preponderance of the evidence that the defendant's RICO violations were the proximate cause of injury to the plaintiff's business or property. Therefore you must find that the plaintiff justifiably relied, to its detriment, on the conduct of the defendant giving rise to the violation of RICO; and that as a direct consequence, the plaintiff suffered an injury to his business or property.

The second issue on the verdict form reads: "What amount of compensatory damages, if any, is the Plaintiff entitled to recover from the Defendant?"

If the plaintiff has proven any of its claims against the defendant by a preponderance of

Exhibit C

the evidence, you must determine the damages to which the plaintiff is entitled. You should not interpret the fact that I have given instructions about the plaintiff's damages as an indication in any way that I believe that the plaintiff should, or should not, win this case. It is your task first to decide whether the defendant is liable on any of the plaintiff's claims. I am instructing you on damages only so that you will have guidance in the event you decide that the defendant is liable and that the plaintiff is entitled to recover money from the defendant.

The purpose of the law of damages is to award, as far as possible, just and fair compensation for the loss, if any, which resulted from the defendant's wrongful conduct. If you find that the defendant is liable on the claims, as I have explained them, then you must award the plaintiff sufficient damages to compensate it for any injury proximately caused by the defendant's conduct. These are known as "compensatory damages." Compensatory damages seek to make the plaintiff whole – that is, to compensate it for the actual damage suffered. At a minimum, you may award some nominal amount of damages to the plaintiff even in the absence of proof of actual damages.

You may award compensatory damages only for injuries that a plaintiff proves were proximately caused by a defendant's allegedly wrongful conduct. The damages that you award must be fair and reasonable, neither inadequate nor excessive. You should not award compensatory damages for speculative injuries, but only for those injuries that a plaintiff has actually suffered. In awarding compensatory damages, you must be guided by dispassionate common sense. Computing damages may be difficult, but you must not let that difficulty lead you to engage in arbitrary guesswork. On the other hand, the law does not require a plaintiff to prove the amount of its losses with mathematical precision, but only with as much definiteness and accuracy as the circumstances permit. You are to use sound discretion in fixing an award of damages, drawing reasonable inferences where you deem appropriate from the facts and circumstances in evidence.

*** * * * ***

With these instructions in mind, you will now hear the closing arguments of counsel.

Exhibit D

Now, members of the jury, you have heard the evidence and the arguments of counsel. It is your duty to remember the evidence whether it has been called to your attention or not, and if your recollection of the evidence differs from that of the attorneys, you are to rely solely upon your recollection of the evidence in your deliberations.

It is your duty not only to consider all the evidence, but also to consider all the arguments, the contentions and positions urged by the attorneys and any other contention that arises from the evidence, and to weigh them all in the light of your common sense, and as best you can, to determine the truth of this matter.

The law, as indeed it should, requires the presiding judge to be impartial. Therefore, do not assume from anything I may have done or said during the trial that I have any opinion concerning any of the issues in this case.

I instruct you that a verdict is not a verdict until all [eight] jurors agree unanimously as to what your decision shall be. Each one of you must decide the case for yourself. However, you should do so only after a consideration of the case with your fellow jurors, and you should not hesitate to change an opinion when convinced that it is erroneous. Discuss and weigh your respective opinions dispassionately, without regard to sympathy, without regard to prejudice or favor for either party, and adopt that conclusion which in your good conscience appears to be in accordance with the truth.

I suggest that as soon as you reach the jury room, before beginning deliberations, you select one of your members to serve as foreperson. This individual has the same vote as the rest of the jurors, but simply serves to preside over the discussions. Once you begin deliberating, if you need to communicate with me, the foreperson should send a written message to me by ringing the buzzer next to the door and handing your note to the Marshal. However, you are not to tell me how you stand numerically as to your verdict – for instance, should you be split in your voting at any particular time, you would not tell me the specific numbers of division in your note.

We use a verdict sheet. This is simply the written notice of the decision that you reach in this case. As soon as you have reached a verdict as to the claims alleged in the pleadings, you will return to the courtroom and your foreperson will, on request, hand the verdict sheet to the Clerk. There are places on the verdict sheet for the foreperson to enter the verdict, sign it, and date it.

During the trial, several items were received into evidence as exhibits. You will not be taking the exhibits into the jury room with you at the start. If, after you have begun your discussions of the case, you think it would be helpful to have any of the exhibits with you in the jury room, have the foreperson send me a note asking for them.

If you need a break during deliberations, you may do so in the jury room, or if you need a break outside the jury room, a Marshal will escort you. But you must not deliberate during a break unless all [eight] of you are together. If you are not together, then do not talk about the case until all of you are all back together.

You may now take the case and see how you find.