

COLLOQUY

MORNING SESSION

1

2

October 13, 2004

3

(The following occurred out of
the presence of the jury:)

4

5

THE COURT: Be seated, please.

6

7

MR. KEMPER: Does Your Honor wish to take up
jury instructions before rebuttal case?

8

9

10

THE COURT: I didn't know you were going to put
on a rebuttal case, but yes, I do wish to take up
jury instructions.

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

Here's what it spins down to after looking at
what I received. The plaintiff's originally
submitted instruction is an incomplete instruction,
and I would never have given it. The defense
instruction is not an instruction on unjust
enrichment, but at least it was a try at having a
proper instruction. It is on quantum meruit, which
is not plaintiff's theory. So the theory comes down
to unjust enrichment. And the plaintiff has
submitted an instruction that says, In order to
prevail on his claim of unjust enrichment, plaintiff
Kim must prove the following, that a benefit was
conferred upon the Deans by Mr. Kim. That the Deans
had an appreciation or knowledge of the benefit, and
that retention of the benefit by the Deans without

COLLOQUY

1 the payment of its value would be unjust.

2 And the questions that I would have of the
3 plaintiff is, What is the benefit? And what
4 evidence, if any, is there in the case of the value
5 of the benefit? We have an employee who worked for
6 the company who was compensated. Now the employee
7 is claiming that I should have got more, and I
8 should have got more on a promise that was made to
9 me and others that we would participate in the
10 distribution. Notice I said promise. That is the
11 thrust of this case, which is promissory estoppel.
12 I said, yes, that my belief was that this was a
13 tortured theory of this case, a theory to apply to
14 this case, and I'm coming right back to it in trying
15 to analyze it, and I'll be glad to now listen to the
16 plaintiffs to explain to me what the benefit is and
17 what evidence, if any, has been produced by the
18 plaintiff of the value of the benefit.

19 MR. KEMPER: In its essence, Your Honor, our
20 theory is that benefit that's provided is the value
21 that Mr. Kim provided to the company that was sold,
22 and the Deans appreciated and knew of that value.
23 In fact they recognized it by making payments to
24 other valued employees based on the proceeds of that
25 sale. And even prior to that sale they had decided

COLLOQUY

1 they would give a proportion of it, and again, some
2 of the factual determinations have to be figured out
3 before the jury can do their math, but the fact of
4 the matter is before they even knew what the dollar
5 amount was going to be they had said, We're going to
6 give a proportion of either stock or the proceeds to
7 our valued employees, so work hard, make this thing
8 work and you'll be compensated. So the benefit
9 that's provided by Mr. Kim is the value of his
10 services that resulted in the sale. And that can be
11 computed by this jury.

12 THE COURT: How?

13 MR. KEMPER: By looking at the relative value
14 that the Deans placed upon the other employees that
15 they paid out of the proceeds of the sale, Your
16 Honor.

17 THE COURT: You're saying any time an employee
18 works for a company and is paid and the company does
19 well, the employee has an unjust enrichment claim?
20 I hope not, because I don't want to be in this
21 country anymore.

22 MR. KEMPER: No, Your Honor.

23 THE COURT: Forget about democracy.

24 MR. KEMPER: And I would certainly sympathize
25 with. And I think part of your frustration with

COLLOQUY

1 what we are arguing is unjust enrichment, we would
2 argue, is based on the promise made as well. Your
3 Honor takes the position that leads nicely into
4 promissory estoppel but I don't get it on unjust
5 enrichment. Let me cite you to one of the cases
6 that I handed up, specifically the Auburn Mechanical
7 case. And Auburn makes a -- on the version that I
8 handed up to Your Honor, it's on page 6 near the
9 bottom, and after discussing that equitable
10 principles have to be separated from equity
11 jurisdiction, it goes on to talk about why a claim
12 for unjust enrichment, while based on equitable
13 principles, is still a jury question. Now the last
14 paragraph on that page says thus. "The substance of
15 an action for unjust enrichment lies in a promise
16 implied by law that one will render to the person
17 entitled thereto that which in equity and good
18 conscience belonged to the latter."

19 So unjust enrichment, as you've already told us
20 you understand is different from quantum meruit,
21 it's a larger group of claim or cases of which
22 quantum meruit is a part, but in all unjust
23 enrichment cases there's still an implied promise.
24 It sounds, as the Auburn case also says, it sounds
25 in contract, and that is based upon a promise.

COLLOQUY

1 THE COURT: Let's go back. Are you saying that
2 your theory is that without Mr. Kim's services, this
3 business would not have been sold?

4 MR. KEMPER: I think that is a logical
5 conclusion, that without his services, without his
6 knowledge, without him signing the employment
7 agreement, without some of the things that he
8 contributed, while I don't know that we can say it
9 would not have been sold, what we can probably argue
10 is that it may have sold for a lesser value because
11 it now doesn't contain all the things that Global
12 thought it was buying.

13 Now Your Honor said yesterday, you're asking me
14 to give a range, zero to four million dollars. No,
15 I think you can safely assume we're not asking for
16 zero, and obviously we're not going to ask for four
17 million. What this jury is going to be asked to do
18 is figure out, based on their promises, what was it
19 that the Deans kept that they should have paid to
20 Tae Kim? And that comes in, again, through a number
21 of areas of proof. There's plenty of proof that Tae
22 Kim was valuable. There's plenty of proof that the
23 Deans recognized the value of their employees,
24 because they paid their employees a percentage of
25 what they got, again be it in stock or otherwise.

COLLOQUY

1 THE COURT: And I assume the upper limit that
2 you could argue would be what Elder got.

3 MR. KEMPER: Unless --

4 THE COURT: Unless percentages are wrong and
5 they find there was a promise of 25 percent.

6 MR. KEMPER: I think the upper limit would be
7 the percentage that was paid to Elder, but we're
8 going to ask this jury to enforce the promise that
9 was made, because we don't think the Deans carried
10 through on the promise that was made. Frankly we
11 don't think Elder got paid what he was supposed to
12 get paid.

13 THE COURT: That's just what I said. Unless you
14 convince the jury that the promise was a higher
15 amount.

16 MR. KEMPER: Well, yes, Your Honor, but I don't
17 want to misrepresent what I'm sure Mr. Allred's
18 going to argue, and that is Mr. Kim was employee
19 number one and Mr. Elder was employee number two.
20 So I think there has to be a reasonable range above
21 what Mr. Elder got that Mr. Kim would have been
22 entitled to. And obviously it can't be ridiculously
23 more or it wouldn't fit with the proof here. But I
24 think there's a reasonable range, and it's going to
25 be a function of the percentages of what was paid

COLLOQUY

1 based on the recognition of the relative value of
2 these employees. That's an analysis that the Deans
3 did when they sat down and finally distributed this
4 money, and it's certainly an analysis that this jury
5 -- ultimately we're asking for money damages, and
6 that's something that this jury can figure out.
7 That's something juries are asked to do all the
8 time.

9 THE COURT: I think that so far you have a --
10 you have a clean trial. You probably only have one
11 appealable issue, and I didn't make it, and that was
12 the issue as to whether or not you're entitled to a
13 jury in this case.

14 The second appealable issue, I believe, is this
15 unjust enrichment issue as to whether or not I
16 should give an instruction, and if so, what sort of
17 instruction should it be, if not, why not. And
18 that's it. Those are your two appealable issues
19 that I see in my humble opinion of this case.

20 I'll hear from the defense in regards to the
21 proposed handwritten instructions from the
22 plaintiff.

23 MR. MASON: Thank you, Your Honor. Auburn
24 Mechanical, I think Your Honor said it best
25 yesterday, most of these cases are about contractors

COLLOQUY

1 who actually put out a very quantifiable expense. I
2 think in Auburn we're talking about \$900,000.

3 There's another way too, I guess, we can
4 consider this issue, which is a motion for a
5 judgment as a matter of law under CR 50. I mean,
6 the evidence is all before us. This does not fit
7 everything embraced in all the case law of unjust
8 enrichment, and there's a lot of different angles to
9 look at it. I mean, I suppose we can get into the
10 percentage argument, but just the concept these
11 folks were enriched doesn't fit what the case law
12 embraces. Everything they need argue is covered
13 under their promissory estoppel theory. I guess
14 that's why I defaulted to the clause contract
15 instruction, and even in the notes in the comments
16 they start talking about unjust enrichment when you
17 look at the editor's comments. And if anything,
18 that's the closest fit to it.

19 It's not a matter of whether or not in some
20 cases someone has a right to put forward this
21 theory, of course they do. But that the -- only
22 when the facts fit it. And, as you said yesterday,
23 Your Honor, the facts here are so dramatically off
24 all the other facts and all the other cases that
25 address the issue of unjust enrichment. And for

COLLOQUY

1 those reasons, whether or not we consider it as to
2 whether or not you should put a jury instruction, or
3 whether or not, as we now ask you to render a
4 judgment as a matter of law, they have not met the
5 principle of unjust enrichment with the facts from
6 either side.

7 THE COURT: Well, the other thing, people, and
8 I'm really now talking plaintiff's counsel, is that
9 if I give this instruction and if it turns out that
10 I should not have given this instruction, and should
11 Mr. Kim get a verdict in his favor, an appellate
12 court is not going to be able to determine what
13 theory, if any, the jury relied upon. And if this
14 instruction should not have been given, this case is
15 going to come right back. And I know that this
16 hasn't been a cheap case to try. And a guiding
17 principle to experienced attorneys is that it's not
18 only getting a verdict, and that's not only
19 plaintiffs, defense, too, but keeping it on appeal.

20 I frankly thought that I would be faced this
21 morning with a request from the plaintiff to say,
22 We've got our argument based on promissory estoppel.
23 We don't want to get an appealable issue in this
24 case, we're going to withdraw our request to
25 instruct on this theory. I really thought that was

COLLOQUY

1 what was going to happen. It hasn't happened, and I
2 can't explain it anymore to you that I'm having a
3 difficult time of seeing how this applies in this
4 case. I've been doing this for a few years, and if
5 I'm having a difficult time, I know the Court of
6 Appeals is going to have a difficult time with it.
7 I haven't made up my mind as to whether or not I
8 give it.

9 If I do give it, it's going to be changed, that
10 a benefit was conferred upon the Deans by Mr. Kim to
11 which Mr. Kim was not compensated for. That
12 language is going to be added. And that the third
13 prong will be that retention of the benefit by the
14 Deans without payment of its value would be unjust.
15 The value to Mr. Kim, it is not the value to
16 Mr. Kim, and I don't want the jury, if I do give it,
17 to think that what value it was to Mr. Kim. That is
18 not unjust enrichment. It's not Mr. Kim that is
19 being enriched, it would be the Deans being
20 enriched. So it's not the value to Mr. Kim, it's
21 the value to the Deans which, once again, comes back
22 to what is the benefit that the employee gave.

23 I personally think plaintiff is rolling a dice
24 that. If they get a verdict, the verdict is not
25 worth half the amount that they get it for because

COLLOQUY

1 it's going to be reversed if I give this
2 instruction. That's my gut reaction.

3 MR. KEMPER: Your Honor, with all due respect to
4 the court's admonitions, can we take about five
5 minutes and confer counsel with client and see if we
6 come out in the same place?

7 THE COURT: Yes. I'll give you 5 minutes.

8 MR. KEMPER: Thanks, Your Honor.

9 (A recess was taken.)

10 THE COURT: Yes, counsel.

11 MR. KEMPER: I hate to say I feel like my hands
12 are tied, but we're going to withdraw the unjust
13 enrichment instruction.

14 THE COURT: I think that's a wise decision. I
15 had not made up my mind as to whether or not I was
16 going to give it, but it is withdrawn.

17 In regards to rebuttal, how long is your
18 rebuttal going to last?

19 MR. ALLRED: With Mr. Kim, Your Honor?

20 THE COURT: Yes.

21 MR. ALLRED: Ten or 15 minutes.

22 THE COURT: Any surrebuttal?

23 MR. MASON: I'd frankly like an offer of proof,
24 because we did discuss it quickly yesterday, and in
25 my mind I thought it was matters we had covered. So

COLLOQUY

1 if they could give a quick offer of proof to make
2 sure this isn't a rehash of what we've already
3 covered.

4 THE COURT: Mr. Allred?

5 MR. ALLRED: Your Honor, it is going to be
6 brief. I want to -- there was testimony that there
7 was some lines of the business that Mr. Kim just had
8 no involvement with whatsoever, and I want him to
9 have the opportunity not to go through them line by
10 line, but to state that in fact he dealt with every
11 line of business.

12 There was the allegation that he was angry at
13 not being the lead on the VoterView project which
14 came up in their case, I want to address that. That
15 he only dealt with one module on VoterView, I want
16 to address that. That he had made these allegations
17 that VoterView would be ready, I want to address
18 that. This alleged sabotage, and that the gift was
19 only going to be stock, and that would it.

20 THE COURT: Counsel.

21 MR. MASON: I'm checking my notes. I thought he
22 addressed the sabotage.

23 THE COURT: I don't believe he did.

24 MR. MASON: And there were a couple other things
25 I think that he might not have.

COLLOQUY

1 THE COURT: It sounds like proper rebuttal to
2 me.

3 Is there going to be any surrebuttal?

4 MR. MASON: I don't anticipate it after cross.

5 THE COURT: What's the length of plaintiff's
6 closing, opening and rebuttal closing?

7 MR. ALLRED: I would expect total to be an hour,
8 if I can push it, a little shy of an hour. I
9 anticipate 45 to 50 minutes to do mine and about 10
10 minutes on rebuttal.

11 THE COURT: What's the estimated length of
12 defense closing?

13 MR. FURUSHO: Approximately 45 minutes to 50
14 minutes.

15 THE COURT: Bring the jury in.

16 (The following occurred in the
17 presence of the jury:)

18 THE COURT: Good morning, please be seated. I'm
19 sorry to have kept you waiting. We have been going
20 over instructions, they don't just come out of the
21 air, we don't have a button to push and out pops
22 instructions for a case and you pop in the
23 principles of the case and then automatically a
24 machine gives us instructions. It doesn't work that
25 way. So that's what we've been doing.

KIM - Direct

1 We're now where both sides have rested. As I
2 indicated in my opening remarks, the plaintiff,
3 having the burden of proof, has the right to put on
4 rebuttal testimony.

5 Does the plaintiff wish to put on rebuttal
6 testimony?

7 MR. ALLRED: Yes, Your Honor. We have some
8 brief rebuttal testimony by Mr. Kim.

9 THE COURT: Please step forward, sir. And I've
10 already placed you under oath for the purpose of
11 your testimony. Once again, you're still under that
12 same oath. Please be seated.

13 TAE KIM, the plaintiff, called as a
14 rebuttal witness having been
15 previously duly sworn, further
 testified as follows:

16 DIRECT EXAMINATION

17 BY MR. ALLRED:

18 Q Good morning, Tae.

19 A Good morning.

20 Q During the defense case we heard allegations that
21 there were certain parts of Spectrum's business that
22 you just had no part of, and I want to confirm with
23 you, was there a data base and/or software component
24 to everything that Spectrum did that you were
25 involved in?

KIM - Direct

1 A Yes, there was.

2 Q The information that was eventually printed for
3 these various projects came out of data bases?

4 A Correct.

5 Q Does getting the information out of the data bases
6 happen automatically, or do you have to use computer
7 code to get it out?

8 A Correct. That's where the technical aspects comes
9 in. You have a data base, a container with all the
10 data, but you've got to be able to query things out,
11 to make the components that actually extracted the
12 data, to get it on to paper for the production crews
13 to manage. Without the data, without the technology
14 portion of it, we're just another Kinko's. You're
15 just another copy machine or print.

16 Q How do you determine, or how is it done that you get
17 the data out of the pool called the data base?

18 A Well, I mean, that's why you have to write the code.
19 The modules, you know, various mediums that actually
20 takes this data that's in this data base, and
21 whether it goes through the web, or applications, or
22 user interfaces, and people take it for granted, but
23 what you see surfing through the web or buying
24 product, that data that you see dynamically is
25 served by a data base of some sort. And that

KIM - Direct

1 interaction with the user and what is in the back
2 with all this data is where you would need technical
3 expertise in creating that interface.

4 Q Let's talk about VoterView for a minute. Mr. Dean
5 asserted that you were angry at not being the
6 original lead on VoterView. Is that accurate?

7 A No.

8 Q Did you experience or express any anger in that
9 regard?

10 A Absolutely not. I just did whatever Jeff asked me
11 to do in terms of getting the company, you know,
12 viable and such.

13 Q In regard to -- there was also the assertion that
14 you only dealt with one module. Well, let me -- let
15 me ask a question before that. You heard some
16 testimony that these different items in regard to
17 VoterView were referred to modules. Is that a term
18 that you used when dealing with those different
19 elements of VoterView?

20 A Well, based on -- a module, again, technically a
21 module is a container, that is technical term, that
22 has all these functions and subroutines, and you can
23 have hundreds of them in there. But from
24 clarification of what Mr. Mason said, you know, I
25 think he used the wrong term. I mean, if there was

KIM - Direct

1 -- talking about poll worker, new registration,
2 voter, and voter, voter, and all this other stuff, I
3 would categorize that as menus. And I think he was
4 trying to get at on the VoterView application, what
5 are the menu, what are the areas people can actually
6 go to. And there were components, several, the GIS
7 system --

8 Q Can you speak up?

9 A GIS system, which Harry Sanders testified, there was
10 a poll worker, there was a new voter registration.
11 But even within that new voter there was other menus
12 within that, too, which is the motor voter, the cart
13 standing portion of it, the people that just come
14 into the office and register through the secretary
15 of state. There's various ways people can register
16 to vote. And even those are menus. So I think what
17 he was trying to get at is what are the menus of
18 Vote Remote, not modules, because module is actually
19 a technical term.

20 Q Did you work just on what the defense called the
21 scanning module, or did you work on all the
22 components you talked about?

23 A I worked on all the components. When Harry has a
24 problem and there's a bug or there's something that
25 didn't work -- I mean, I have to know the code to

KIM - Direct

1 fix it. I have to be familiar with the application
2 to complete it. If I just worked on one component
3 of it, you know, I would be just twiddling my thumbs
4 because there's all these other components that
5 couldn't be done.

6 Q Moving from VoterView, which is the King County
7 project, to Vote Remote Three, which dealt with the
8 absentee process, when did you first identify that
9 Vote Remote Three was not on the right track and
10 notify Jeff of that?

11 A Immediately when I came back.

12 Q Came back from where?

13 A From King County working on the VoterView project.

14 MR. MASON: I'm going to object. This was
15 covered in his direct specifically.

16 THE COURT: I don't recall if it was, and so I'm
17 going to allow it to proceed. If it was, the jurors
18 will determine that.

19 A Immediately when I came back I realized that there
20 was things wrong with it.

21 Q And you told Jeff that?

22 A Absolutely.

23 Q Did you ever make assurances to Jeff or John Elder
24 that Vote Remote Three was going fine and that the
25 transition to the web based application was running

KIM - Direct

1 smoothly?

2 A Based on the architecture that I described, I would
3 have never promised that it would be fine.

4 Q Did you ever promise it would be fine, or give them
5 assurances?

6 A No, no.

7 Q There was an allegation that one time you were
8 needed and you came into the office in your sweats
9 and said, Hey, I'm not going to work, and took off.
10 Did that ever happen?

11 A No. And that's just a funny comment, because as I
12 was thinking about it, I mean, why would I come in
13 to say that I'm not coming in? Coming in in sweats
14 and saying I'm not coming in? It's just ridiculous.

15 Q That did not occur?

16 A No, it did not occur.

17 Q You heard the allegations by Mr. Elder that, to use
18 opposing counsel's words, you had sabotaged the
19 company. Mr. Elder was talking about this
20 allegation that you had said you were going to let
21 the company fail. Did you ever say that to
22 Mr. Elder or to anyone else?

23 A Never. And I don't even know why they would even
24 say that, because I had a vested interest in the
25 company succeeding. You know, all my promises and

KIM - Cross

1 stuff was tied into the company. Why would I want
2 it to fail when success of the company actually
3 directly benefits me? Just a ridiculous statement.

4 Q You also heard allegations that at this April
5 meeting, April, 2000 meeting, that it was told to
6 the employees that we're offering a distribution
7 only in stock. Was that stated at the April, 2000
8 meeting?

9 A No.

10 Q When did you sue the Deans?

11 A I actually sued them -- saw you guys December, 2001.

12 Q Thank you.

13 THE COURT: You may examine

14 CROSS EXAMINATION

15 BY MR. MASON:

16 Q Good morning, Mr. Kim.

17 A Good morning.

18 Q When you first testified on direct a couple -- a
19 number of days back, do you remember saying that you
20 weren't really involved in Vote Remote Three?

21 A I was involved in the sense that to fix the problem,
22 to try to Band-Aid it.

23 Q Do you blame Vote Remote Three's problem on Brian
24 Clubb?

25 A I don't blame him, because he actually said he

KIM - Cross

1 didn't have any web experience.

2 Q Do you blame them on the temp guys you hired?

3 A No, I don't blame it on the temp guys.

4 Q Do you blame it on yourself for hiring the temp guys
5 who weren't qualified?

6 A I don't blame myself.

7 Q Do you blame it on the owners of the company?

8 A Jeff or Deborah? Or Jeff, or Deborah?

9 Q Who was the owner of the company?

10 A Testimony says it was Deborah.

11 Q Was it her fault?

12 A No.

13 Q Was it Maryjane's fault?

14 A No.

15 Q Whose fault was it?

16 A Well, I don't want to say fault, but there was
17 issues, I think, that Jeff, based on Brian's
18 testimony, which he said that he told Jeff that he
19 has no web experience.

20 Q Your opinion, not based -- just your opinion I'm
21 asking.

22 A That's my opinion, it would have to be on, maybe on
23 Jeff, but I don't know. Maybe on Jeff.

24 Q You weren't involved in the first two versions of
25 Vote Remote, one and two, you didn't write it?

KIM - Cross

1 A I did the data base system but not the front end.

2 Q Is it your testimony that the data base is much more
3 important than writing the application itself?

4 A The application is an overall umbrella, so the data
5 base component would be an integral part of the
6 application.

7 Q I just want to clarify something for the jury. Are
8 you telling the jury that you were intimately
9 involved in every project that Spectrum did?

10 A With a data base application, absolutely. With the
11 front end applications, for the most part, yes. But
12 not as detailed as the data base portion.

13 Q You heard Harry Sanders name the modules, and you
14 heard this whole discussion of modules. Is it your
15 testimony this was just a misunderstanding of terms
16 and that's why you couldn't name them?

17 A Well, if you said menus, menus are what I would
18 consider. But when you said module, it is a known
19 fact a module is actually a technical term on the
20 systems that we use. If you create a new code base
21 it will say module first, and then you put functions
22 and subroutines within that module. So we had
23 literally hundreds of modules. And when you asked
24 me to name them, I'm thinking you're asking me to
25 name hundreds of function calls and stuff. Because

KIM - Cross

1 a module, all these function, subroutines are inside
2 a module. And these modules, you can break it up
3 into as many as you want. It's like a container of
4 things. So in a technical sense, I didn't know if
5 you wanted to get into the technical details, but
6 the -- what Harry -- or what I think subsequently
7 Jeff does was actually menu, because it was actually
8 a menu. You have poll worker menu, you can click
9 the application and the poll would come up. New
10 registration, it's a menu that drops down. You can
11 do that, or there's a tab that you click. Voters,
12 there's a tab and it's a menu. It's not a module I
13 would consider.

14 Q Is it your testimony to the jury that people who
15 write applications are less important than people
16 who work with the data base?

17 A I think there's a -- I think in some ways they can
18 be the same and of importance. It's -- they're kind
19 of married together in many ways, especially in a
20 small company where in a technical aspect you have
21 to wear many hats. You didn't have a testing
22 environment, didn't have an application section, you
23 just had to do everything.

24 Q It's probably more important in a small company to
25 help each other out in all sorts of areas when

COLLOQUY

1 things go wrong; right?

2 A Absolutely.

3 Q Did you hear Brian testify that with the big problem
4 with Vote Remote that he and Jeff were alone fixing
5 the problem?

6 A Vote Remote Three?

7 Q Correct.

8 A I did hear him say that.

9 Q Was that true?

10 A I don't know.

11 Q Is it your opinion that you were very important in
12 this company; correct?

13 A Correct.

14 Q Isn't it true that the more important you are, the
15 bigger your mistakes are?

16 A I don't know. I don't know what you mean by that.

17 Q Well, the higher your responsibility when you make
18 an error, doesn't it have a bigger effect than if
19 you're just Maryjane, the receptionist?

20 A I assume so. I don't know.

21 MR. MASON: Nothing further.

22 THE COURT: Any redirect?

23 MR. ALLRED: No, Your Honor.

24 THE COURT: You may step down, sir.

25 Any further rebuttal?

COLLOQUY

1 MR. ALLRED: No, Your Honor. That's it.

2 THE COURT: Any surrebuttal?

3 MR. MASON: No, Your Honor.

4 THE COURT: I'm sorry. I forgot to ask the
5 jurors, any proposed written questions of the last
6 witness?

7 Take the jury out.

8 (The following occurred out of
9 the presence of the jury:)

10 THE COURT: Please be seated. The question
11 reads as follows, bottom line, what amount are you
12 asking for, stock, money from the Deans?

13 Plaintiff's position?

14 MR. ALLRED: Your Honor, I don't think it's a
15 question for Mr. Kim, and we should be getting into
16 that shortly with summation.

17 THE COURT: Defense position?

18 MR. MASON: I didn't see which juror handed it.

19 THE COURT: One.

20 MR. MASON: I agree with plaintiff's counsel,
21 that should be argument.

22 THE COURT: I'm not going to ask it.

23 I'm besieged now up here on the bench with
24 papers all over the place, but as I recall that
25 instruction I've been reading to the jurors about

COLLOQUY

1 questions, that some questions may not be asked
2 because the matter will be dealt with later, or
3 something like that. So just going to indicate that
4 there is -- I'm not answering -- I'm not asking the
5 question, and should be self-evident why.

6 You have the instructions in front of you.

7 MR. MASON: We have one more motion to make.

8 THE COURT: Go ahead.

9 MR. MASON: Another motion for judgment as a
10 matter of law under CR 50. And now looking at
11 promissory estoppel. When you look at 301 A or 1 in
12 the comments, one of the most interesting comments
13 they make is that a number of courts -- on page 206
14 of the comments -- have limited jury awards upon
15 reliance damage upon finding promissory estoppel.
16 They note that we've talked about it and mentioned
17 it in Farm Crop Energy but didn't decide.

18 Here's my concern. The plaintiff's own
19 testimony was that in the April meeting when he
20 heard vested, he understood he didn't need to do
21 anything and he could have left and gone on to
22 another job. One of the primary profound elements
23 of promissory estoppel is the changed position
24 situation. If plaintiff's own theory proffered is
25 that, I didn't have to do anything, it doesn't meet

COLLOQUY

1 the elements.

2 THE COURT: It's also my recollection, however,
3 that if the plaintiff said that, and I don't recall
4 that, but it's my recollection that the plaintiff
5 was also asked a series of questions about, if you
6 weren't going to participate in the proceeds, would
7 you have stayed with the company? Would you work
8 the hours? And he said, No, no, no.

9 But anyway, plaintiff's position in regards to
10 the motion.

11 MR. ALLRED: You're correct with the line of
12 questioning that you just mentioned. And the -- I
13 think Mr. Mason's -- I can understand how he's
14 trying to parse it, but the reality is that Mr. Kim
15 testified, as you indicated, and he borrowed a
16 phrase from Mr. Elder, which is 25 percent of zero
17 is zero. Mr. Kim clearly identified that he stayed
18 there because he was relying on the fact that they
19 had promised him a share of the proceeds, and he was
20 going to do all he could to see that the company was
21 sold and to make sure that there was some proceeds
22 to sell. And I think the motion should be denied.

23 THE COURT: Thank you. In my opinion there's
24 sufficient evidence in front of the jury for the
25 issue to go to the jury. If the defendant had made

COLLOQUY

1 the statement that the defense says that way, he
2 also made the statement that he did rely upon. So
3 it's for the jury to deal with. Motion denied.

4 The instructions that have been placed in front
5 of you are -- they're all WPIC instructions. I
6 believe the first one is the defense submitted one
7 simply because the print's larger than the other. I
8 think there isn't any difference.

9 The second instruction, circumstantial evidence
10 instruction, is the plaintiff's.

11 The burden of proof is the defense proposed
12 instruction.

13 Four is in regards to a conviction, that's the
14 court's instruction with the small print. We'll
15 take care of that and get that larger for the
16 future.

17 Number five is a promissory estoppel
18 instruction, I think it was submitted by the
19 plaintiff.

20 Six was WPIC definition of promise submitted by
21 the plaintiff.

22 Seven is upon retiring WPIC submitted by the
23 defense. I don't think there's any difference other
24 than the plaintiff's referred to -- sign verdict
25 Form B. That's self-explanatory. I don't think it

COLLOQUY

1 was necessary.

2 Those are the proposed instructions. Does
3 plaintiff have exceptions and/or objections to the
4 Court's proposed instructions?

5 MR. KEMPER: None, Your Honor.

6 THE COURT: Does the defense have any objection?

7 MR. MASON: One moment, Your Honor.

8 No. We're fine with these instructions.

9 THE COURT: Okay. I'm going to have the jury
10 brought in and read the instructions. Is counsel
11 prepared to go right into closing then?

12 MR. ALLRED: Yes, Your Honor.

13 MR. KEMPER: Can I raise one other issue?

14 THE COURT: Yes.

15 MR. KEMPER: I guess I didn't foresee this at
16 the start, but there have been considerable line of
17 questioning that seems to suggest that the defense
18 would like to order that Spectrum was obligated on
19 this gift and not the Deans. That also is a defense
20 that has not been raised, and yet the suggestion by
21 a lot -- much of the line of questioning is that
22 they may attempt to argue this to this jury, that
23 Jeff and Deborah Dean are not the ones that made a
24 promise and therefore paid out, but that Spectrum,
25 the company, somehow was obligated on that promise.

COLLOQUY

1 THE COURT: And you're asking what, counsel?

2 MR. KEMPER: If in fact that's going to be a
3 line of argument, that they be precluded from making
4 that argument because it would be a complete defense
5 that some other entity other than the Deans were
6 responsible for the debt, and that was not raised
7 prior to trial.

8 THE COURT: Defendants' position?

9 MR. FURUSHO: We were not going to bring up this
10 issue just based on the time constraints that we
11 have; however, we are going to move now for a CR 50,
12 that anything that the jury may have -- may award
13 Mr. Kim as far as the promise of being vested would
14 naturally be a corporate obligation, and I have
15 briefed the issue. Corporation is a separate
16 entity, Your Honor, and it is an entity separate
17 from any shareholders, officers, or directors.

18 Mr. Kim testified that when he was promised he
19 was vested, he was vested in Spectrum, he wasn't
20 vested in the Deans' personal life. If he thought
21 Mr. Dean was the head of the company or officer or
22 director, which he did testify, then anything an
23 officer or director says regarding a corporation is
24 imputed on to the corporation. Same things goes
25 with Mrs. Dean, and even more so because she was an

COLLOQUY

1 actual officer and director of the company.
2 Anything that the plaintiff may argue that is value
3 because of that term vested is a term of art.
4 Vested can only occur in a corporation. Stock
5 vestment can only occur per the corporation. An
6 individual cannot give out stock. It's the
7 corporation that gives out stock.

8 So if the plaintiff believed that he is owed
9 something for his years of service as being vested
10 as promised by the Deans in their capacity as
11 directors, officers of Spectrum Corporation, then
12 the Deans have spoken on behalf of the corporation,
13 and therefore the liability for this term of
14 vesting, of how he was vested, must be imputed to
15 the corporation unless the plaintiffs can pierce the
16 corporate veil. They have not. There was testimony
17 from both sides that this was a valid corporation
18 and continued to be a valid corporation.

19 THE COURT: Don't you believe that you have to
20 bring that up by pleading otherwise? There's no way
21 that they could put on a piercing the veil situation
22 if they're not apprised that you're going to raise
23 that as a defense. So I think you're too late to
24 argue that.

25 Plaintiff's position.

COLLOQUY

1 MR. KEMPER: I agree with Your Honor. That,
2 number one, it's too late. And if it felt like we
3 had to pierce the corporate veil, it would have been
4 nice to know that earlier. I don't believe that we
5 have to. I think from one day we've believed the
6 promise was by the Deans that they would take the
7 proceeds after Spectrum was sold and was no longer
8 their company and they would, out of gratitude to
9 these people, pay them a portion of what it was that
10 they received. So at that point my client certainly
11 understood from the beginning that this was a
12 promise from the Deans, not a promise from Spectrum.
13 And I don't know how it could be otherwise, since it
14 would be the proceeds from the sale of Spectrum that
15 they would then distribute.

16 I also believe the testimony was that the funds
17 came from a personal account of Ms. Dean. And so at
18 this juncture I couldn't put on a case to the
19 contrary, it would -- it is a complete defense, it
20 should have been raised earlier if it provides one
21 at all.

22 THE COURT: First of all, defense will not be
23 entitled to argue that to the jury. You've said
24 that -- you started your argument now that you
25 weren't going to, in the constraint of time, and

COLLOQUY

1 that you were going to argue it later. You may, but
2 you're going to have an extreme laboring oar to
3 convince me that you can bring it up at this late
4 date.

5 So the plaintiff's motion is granted.

6 MR. FURUSHO: Your Honor, could I address that
7 timing issue? We were unaware that Mr. Kim would
8 testify that he was vested in Spectrum Corporation,
9 which he did testify. That brought up the issue of
10 to whom is this vesting a liability for? Mr. Kim
11 testified that he understood that being vested meant
12 being vested in Spectrum. That was on his direct
13 testimony.

14 THE COURT: Counsel, let me explain a thing to
15 you, what you don't know. We have one juror that we
16 almost lost, maybe we should have, and I don't know
17 what's going to happen to him. We have another
18 juror whose wife is going to be induced to commence
19 labor. The more time we spend parsing around here
20 on these matters, the greater chance you're going to
21 have of having a mistrial because you're not going
22 to have sufficient amount of jurors.

23 In regards to the vesting argument, you can make
24 it later to me if there is a verdict, not now, just
25 orally in response to -- the plaintiff's motion was

COLLOQUY

1 about what you're going to say at closing, and you
2 said out of interest of time, you weren't going to.

3 MR. FURUSHO: I wasn't going to bring up the CR
4 50 motion, I was planning to argue it in closing.

5 THE COURT: Well, no, you're not.

6 MR. FURUSHO: I'm not now, Your Honor, I
7 understand that.

8 THE COURT: Defense, I believe, said that they
9 had no exceptions and/or objections to the proposed
10 instructions.

11 MR. MASON: Correct.

12 THE COURT: Bring the jury in.

13 (Reading of the Court's
14 instruction was not reported.)

15 (Closing arguments were not
16 reported.)
17
18
19
20
21
22
23
24
25