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4 UNITED STATES DISTRICT COURT
5 NORTHERN DISTRICT OF CALIFORNIA
6

7 ZHIYUAN MIAO,
8 Plaintiff,

9 v.

10 PREFERRED RESTAURANT BRAND
11 INC.,
12 Defendant.

Case No. 3:15-cv-05531-CRB

PRETRIAL ORDER

13 **FINAL PRETRIAL CONFERENCE**

14
15 1. Please do not prepare a joint pretrial conference statement. Nor should counsel
16 invest time on deposition designations or extracts from interrogatories or requests for admissions
17 at the pretrial conference stage. Instead, please file **by Wednesday, January 17, 2018**, the
18 following:

19 (a) In lieu of preparing a joint pretrial conference statement, the parties shall meet,
20 confer and prepare a joint proposed final pretrial order, signed and vetted by all counsel, that
21 contains: (i) a brief description of the substance of claims and defenses which remain to be
22 decided, (ii) a statement of all relief sought, (iii) all stipulated facts, (iv) a list of all factual issues
23 which remain to be tried, stating the issues with the same generality/specificity as any contested
24 elements in the relevant jury instructions, all organized by counts, (v) a joint exhibit list in
25 numerical order, including a brief description of the exhibit and Bates number, a column for when
26 it is offered in evidence, a column for when it is received in evidence, and a column for any
27 limitations on its use, and (vi) each party's separate witness list for its case-in-chief witnesses
28 (including those appearing by deposition) providing, for all such witnesses other than an

1 individual plaintiff and an individual defendant, a short statement of the substance of his/her
2 testimony and, separately, what, if any, non-cumulative testimony the witness will give. If non-
3 cumulative testimony is not spelled out, then the Court will presume the witness is cumulative.
4 Time limits will be set based on the non-cumulative descriptions. Items (v) and (vi) should be
5 appendices to the proposed order. The proposed order should also state which issues, if any, are
6 for the Court to decide, rather than the jury. The objective is to convert the proposed order to a
7 final order with the benefit of any discussion at the final pretrial conference.

8 (b) A joint set of proposed instructions on substantive issues of law arranged in a
9 logical sequence. If undisputed, an instruction shall be identified as “Stipulated Instruction No.
10 ____ Re _____,” with the blanks filled in as appropriate. Even if stipulated, the instruction
11 shall be supported by citation. If disputed, each version of the instruction shall be inserted
12 together, back to back, in their logical place in the overall sequence. Each such disputed
13 instruction shall be identified as, for example, “Disputed Instruction No. ____ Re _____
14 Offered by _____,” with the blanks filled in as appropriate. All disputed versions
15 of the same basic topic shall bear the same number. Citations with pin cites are required. Any
16 modifications to a form instruction must be plainly identified. If a party does not have a counter
17 version and simply contends no such instruction in any version should be given, then that party
18 should so state (and explain why) on a separate page inserted in lieu of an alternate version. With
19 respect to form preliminary instructions, general instructions, or concluding instructions, please
20 simply cite to the numbers of the requested instructions in the current edition of the *Ninth Circuit*
21 *Manual of Model Jury Instructions (Civil 2017 edition)*. Other than citing the numbers, do not
22 include preliminary, general or concluding instructions in the packet.

23 (c) A separate memorandum of law in support of each party’s disputed instructions,
24 organized by instruction number. Please quote exact, controlling passages from the authorities
25 and give pin cites. No ellipses, please.

26 (d) A joint special verdict form with the questions arranged in a logical sequence.

27 (e) A joint set of proposed voir dire questions supplemented as necessary by separate
28 requests. Keep these to a minimum, please. The Court, in its discretion, may use a juror

1 questionnaire.

2 (f) Any motion *in limine*, and opposition, filed as follows: Any party wishing to have
3 motions in limine heard prior to the commencement of trial must file the moving papers by
4 **Monday, January 15, 2018**. Any party opposing a motion in limine shall file its opposition by
5 **Wednesday, January 17, 2018**. Each motion should be presented in a separate memo and
6 numbered as in, for example, “Plaintiff’s Motion in Limine No. 1 to Exclude” Please limit
7 motions *in limine* to circumstances that truly need a ruling in advance. Usually five or fewer
8 motions per side is sufficient. Each motion should address a single topic, be separate, and contain
9 no more than seven pages of briefing per side. Advance permission will be needed for more or
10 longer motions. Please be sure to three-hole punch the chambers copies so they can go into a trial
11 notebook.

12 (g) Trial briefs are optional but most helpful to the Court on any controlling issues of
13 law.

14 2. The joint proposed final pretrial order and instructions shall be submitted (A) on a
15 CD in WordPerfect 10.0 format, (B) in Judge Breyer’s proposed order email address
16 (crbpo@cand.uscourts.gov), as well as (C) in hard copies. All hard-copy submissions should be
17 three-hole punched on the left, so the chambers’ copy can be put in binders.

18 3. At the final pretrial conference, the above submissions shall be considered and
19 argued. The parties must take notes on rulings and submit a joint summary of all rulings in
20 proposed order format.

21 **PRETRIAL ARRANGEMENTS**

22 4. Should a daily transcript and/or real-time reporting be desired, the parties shall
23 make arrangements with Richard Duvall, Supervisor of the Court Reporting Services, at
24 (415) 522-2079, at least ten calendar days prior to the trial date.

25 5. During trial, counsel may wish to use overhead projectors, laser-disk/computer
26 graphics, poster blow-ups, models or specimens of devices. The Courtroom is set up with
27 equipment which allows evidence presentation. If equipment is necessary the United States
28 Marshal requires a court order to allow equipment into the courthouse. If both overhead projector

1 and video equipment are to be used, then a single projection screen is best, thus requiring a
2 projection-type video rather than a large monitor. If video equipment is used, equipment capable
3 of instantly accessing the relevant portions of transcripts and graphics should be used (rather than,
4 for example, raw video tapes made at depositions which take time to forward or to rewind). For
5 electronic equipment, either know how to fix it or have a technician handy at all times. For
6 overhead projectors, have a spare bulb. Tape extension cords to the carpet for safety. Please take
7 down and store the equipment (in the courtroom) at the end of each court day. Please work with
8 Lashanda Scott (415-522-2062) on courtroom-layout issues.

9 **SCHEDULING**

10 6. The normal trial schedule will be 9:00 a.m. to 4:00 with two fifteen-minute breaks
11 and lunch. Counsel must arrive by 8:45 a.m., or earlier as needed for any matters to be heard out
12 of the presence of the jury. Please be prepared to start with the jury at 9:00 a.m. The trial week is
13 Monday through Thursday except for any Wednesday afternoon and all federal court holidays.

14 **THE JURY**

15 7. No later than on the first day of jury selection, counsel shall jointly submit a
16 simplified statement of the case to be read to the jury during voir dire. This statement should not
17 exceed one page. The Court will usually conduct the voir dire.

18 8. In civil cases, there are no alternate jurors and the jury is selected as follows: All
19 potential jurors are called and seated in the jury box and courtroom benches in the order their
20 names are drawn from the drum. This placement will now determine their order in the selection
21 process. The Court will then conduct its voir-dire of the entire panel. Once this questioning is
22 accomplished, the Court will advise counsel at side-bar which potential jurors it would excuse for
23 cause. This determination is preliminary only. Counsel are then permitted to conduct limited
24 voir-dire of the entire panel. Once all voir-dire is completed, the Court will then address all
25 challenges for cause and excuse those potential jurors who have been successfully challenged.
26 The Court will then advise counsel as to the number of jurors which will be seated. After a short
27 recess, each side may exercise its allotment of peremptory challenges. Once the jury selection is
28 completed, the jurors' names will be read again and they will be seated in the jury box and sworn.

1 The Court may alter the procedure in its discretion.

2 9. Jurors may take notes. Steno notebooks will be distributed at the beginning of each
3 trial. The pads will remain in the jury room at the end of each day. Jurors will be instructed on
4 the use of notes both in the preliminary and final jury instructions.

5 **OPENING STATEMENTS**

6 10. Each side will have a predetermined time limit for its opening statement. Counsel
7 must cooperate and meet and confer to exchange any visuals, graphics or exhibits to be used in the
8 opening statements, allowing for time to work out objections and any reasonable revisions. Be
9 prepared for opening statements to commence as soon as the jury is sworn.

10 **WITNESSES**

11 11. Throughout the trial, all counsel are entitled to know a firm order of witnesses for
12 the next two full court days and the exhibits that will be used on direct examination (other than for
13 impeachment of an adverse witness). Within 24 hours of such notice, all other counsel shall
14 provide any objections to such exhibits and shall provide a list of all exhibits to be used with the
15 same witness on cross-examination (other than for impeachment). This requires that the first such
16 notice be provided before trial actually begins. All such notice should be provided in writing.

17 12. Always have your next witness ready and in the courthouse. Failure to have the
18 next witness ready or to be prepared to proceed with the evidence will usually constitute resting.
19 If counsel plans to read in a transcript of a deposition anyway, it is advisable to have a deposition
20 prepared and vetted early on to read just in case.

21 13. A witness or exhibit not listed in the joint pretrial statement may not be used
22 without good cause. This rule does not apply to true rebuttal witnesses (other than experts).
23 Defense witnesses are normally case-in-chief witnesses, not “rebuttal” witnesses.

24 14. Stand at or near the podium to ask questions, straying only to point out material on
25 charts or overheads.

26 **EXPERTS**

27 15. A recurring problem in trials is the problem of expert witnesses trying to go beyond
28 the scope of their expert reports on direct examination. FRCP 26(a)(2) and FRCP 37(c) limit

1 experts to the opinions and bases contained in their timely reports (absent substantial justification
2 or harmlessness). The Court regularly enforces these rules. FRCP 26(a) even requires that any
3 “exhibits to be used as summary of or support for the opinions” be included in the report.
4 Accordingly, at trial, the direct testimony of experts will be limited to the matters disclosed in
5 their reports. Omitted material may not ordinarily be added on direct examination. This means
6 the reports must be complete and sufficiently detailed. Illustrative animations, diagrams, charts
7 and models may be used on direct examination only if they were part to the expert’s report, with
8 the exception of simple drawings and tabulations that plainly illustrate what is already in the
9 report, which can be drawn by the witness at trial or otherwise shown to the jury. If cross-
10 examination fairly opens the door, however, an expert may go beyond the written report on cross-
11 examination and/or re-direct examination. By written stipulation, of course, all sides may relax
12 these requirements.

13 16. As to damages studies, the cut-off date for *past damages* will be as of the
14 expert report (or such earlier date as the expert may select). In addition, the experts may try to
15 project *future damages* (*i.e.*, after the cut-off date) if the substantive standards for future damages
16 can be met. With timely leave of Court or by written stipulation, the experts may update their
17 reports (with supplemental reports) to a date closer to the time of trial.

18 17. The case management order will already have set out the timetable for expert
19 reports.

20 **USE OF DEPOSITIONS TO IMPEACH AND SHORT READ-INS**

21 18. Depositions can be used at trial to impeach a witness testifying at trial or, in
22 the case of a party deponent, “for any purpose.” Please follow the following procedure;

- 23 (a) On the first day of trial, be sure to bring the original and clean copies of any
24 deposition(s) for which you are responsible. Any corrections must be readily
25 available. If you are likely to need to use the deposition during a witness
26 examination, then give the Court a copy with any corrections at the outset of your
27 examination. This will minimize delay between the original question and the read-
28 ins of the impeaching material. Opposing counsel should have their copy

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immediately available.

(b) When you wish to read in a passage, simply say, for example: “I wish to read in page 210, lines 1 to 10 from the witness’ deposition.” A brief pause will be allowed for any objection.

(c) The first time a deposition is read, state the deponent’s name, the date of the deposition, the name of the lawyer asking the question, and if it was FRCP 30(b)(6) deposition, please say so. The first time a deposition is read, the Court will give an appropriate explanation to the jury about depositions.

(d) When reading in the passage, state “question” and then read the question exactly. Then state “answer” and then read the answer exactly. Stating “question” and “answer” is necessary so the jury and the court reporter can follow who was talking at the deposition.

(e) Please do **NOT** ask, “Didn’t you say XYZ in your deposition?” The problem with such a question is that the “XYZ” rarely turns out to be exactly what the deponent said. Instead, ask for permission to read in a passage, as above, and read it in exactly, so that the jury can hear what was actually testified to.

(f) Subject to Rule 403, party depositions may be read in whether or not they contradict (and regardless of who the witness is on the stand). For example, a short party deposition excerpt may be used as foundation for questions for a different witness on the stand.

(g) Rather than reading the passage, counsel are free to play an audiovisual digitized version of the passage, but counsel must have a system for immediate display of the precise passage.

DEPOSITION DESIGNATION

19. The following procedure applies only to witnesses who appear by deposition. It does not apply to live witnesses whose depositions are read in while they are on the stand. To save time and avoid unnecessary work, it is not necessary to make all deposition designations before trial. Instead, the following steps should be followed.

1 (a) To designate deposition testimony, photocopy the cover page, the page where the
2 witness is sworn, and then each page from which any testimony is proffered. Line through or x-
3 out any portions of such pages not proffered. Also, line through objections or colloquy unless
4 they are needed to understand the question. Please make sure any corrections are interlineated and
5 that references to exhibit numbers are conformed to the trial numbers. Such interlineations should
6 be done by hand. The finished packet should then be the actual script and should smoothly
7 present the identification and swearing of the witness and testimony desired. The packet should
8 be provided to all other parties at least five calendar days before it will be used in court. For the
9 rare case of voluminous designations, more lead time will be required. Please be reasonable.

10 (b) All other parties must then promptly review the packet and highlight in yellow any
11 passages objected to and write in the margin the legal basis for the objections. If any
12 completeness objection is made, the objecting party must insert into the packet the additional
13 passages as needed to cure the completeness objection. A completeness objection should
14 normally be made only if a few extra lines will cure the problem. Such additions shall be
15 highlighted in blue and an explanation for the inclusion shall be legibly handwritten in the margin.
16 Please line out or x-out any irrelevant portions of the additional pages.

17 (c) The packets, as adjusted, must then be returned to the proffering party, who must
18 then decide the extent to which to accept the adjustments. The parties must meet and confer as
19 reasonable. Counsel for the proffering party must collate and assemble a final packet that covers
20 the proffer and all remaining issues. At least two calendar days before the proffer will be used, the
21 proponent must provide the Court with the final packet, with any objected-to portions highlighted
22 and annotated as described above. If exhibits are needed to resolve the objections, include copies
23 and highlight and tag the relevant passages. Alert the Court on the record that the packet is being
24 provided and whether any rulings are needed. Tag all passages that require a ruling. The Court
25 will then read the packet and indicate its rulings in the margin in a distinctive manner. Ordinarily,
26 argument will not be needed.

27 (d) Counter designations must be made by providing a packet with the counter-
28 designated passages to the proponent at the same time any objections to the original proffer are

1 returned to the first proffering party, who must then supply its objections in the same manner.

2 (e) When the packet is read to the jury, the examiner reads the questions (and any
3 relevant colloquy) from the lectern and a colleague sits in the witness stand and reads the answers.
4 When a video-taped deposition is to be played instead, the packets must still be prepared, as
5 above, in order to facilitate rulings on objections. The video should omit any dead time, long
6 pauses, and objections/colloquy not necessary to understand the answers.

7 **REQUESTS FOR ADMISSIONS AND INTERROGATORIES**

8 20. Please designate responses to requests for admissions and interrogatory answers in
9 the same manner and under the same timetable as depositions.

10 **EXHIBITS**

11 21. Prior to the final pretrial conference, counsel must meet and confer in person over
12 all exhibit numbers and objections and to weed out duplicate exhibits. Please be reasonable.

13 22. Use numbers only, not letters, for exhibits, preferably the same numbers as were used
14 in depositions. Blocks of numbers should be assigned to fit the need of the case (*e.g.*, Plaintiff has
15 1 to 100, Defendant A has 101 to 200, Defendant B has 201 to 300, etc.). A single exhibit should
16 be marked only once. If the plaintiff has marked an exhibit, then the defendant should not re-mark
17 it. Different versions of the same document, *e.g.*, a copy with additional handwriting, must be
18 treated as different exhibits. To avoid any party claiming “ownership” of an exhibit, all exhibits
19 shall be marked and referred to as “Trial Exhibit No. _____,” not as “Plaintiff’s Exhibit” or
20 “Defendant’s Exhibit.” If an exhibit number differs from that used in a deposition transcript,
21 however, then the latter must be conformed to the new trial number if and when the deposition
22 testimony is read to the jury (so as to avoid confusion over exhibit numbers). The jury should
23 always hear any given exhibit referred to by its unique number. You cannot have competing
24 versions of the same exhibit numbers.

25 23. The exhibit tag shall be in the following form:
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<p>UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF CALIFORNIA</p> <p>TRIAL EXHIBIT 100</p> <p>CASE NO. _____</p> <p>DATE ENTERED _____</p> <p>BY _____</p> <p>DEPUTY CLERK</p>

Counsel preferably will make the tag up in a color that will stand out (yet still allow for photocopying) but that is not essential. Place the tag on or near the lower right-hand corner or, if a photograph, on the back. Counsel should fill in the tag but leave the last two spaces blank. Deposit your exhibits with the deputy clerk (Lashanda Scott) on the first day of trial. The tags can be adhesive or stapled on. Each exhibit must be separated with a label divider and placed in a binder.

24. Counsel must consult with each other and with the deputy clerk at the end of each trial day and compare notes as to which exhibits are in evidence and any limitations thereon. If there are any differences, counsel should bring them promptly to the Court’s attention.

25. In addition to the record copies of exhibits, one or more bench binders containing a copy of each side’s exhibits must be provided to the Court on the first day of trial. Each exhibit must be separated with a label divider (an exhibit tag is unnecessary for the bench set). Please use 1-1/2-inch binders with locking rings. (Heavier binders are too hard to handle.)

26. Before the case goes to the jury, counsel must confer with the clerk to make sure the

1 exhibits to go into the jury room are all in evidence and in good order. Counsel may, but are not
2 required to, jointly provide a revised list of all exhibits actually in evidence (and no others) stating
3 the exhibit number and a brief, non-argumentative description (*e.g.*, letter from A. B. Case to D. E.
4 Frank, dated August 17, 1999). This list may go into the jury room to help the jury sort through
5 exhibits.

6 27. Publication must be by poster blow-up, overhead projection, or such other method
7 as is allowed in the circumstances. Poster blow-ups should be about 3' x 4' to be seen by all jurors.
8 Any overhead projector should have a powerful light to help in jury viewing. Counsel must have
9 a practical means for all important documents to be published to the jury. It is permissible to
10 highlight, circle or underscore in the enlargements so long as it is clear that it was not on the
11 original. Exhibit notebooks for the jury will not be permitted without prior permission by the
12 Court.

13 **OBJECTIONS**

14 28. Counsel shall stand when making objections and shall not make speeches. State
15 the legal basis only. Speak up promptly.

16 29. There can only be one lawyer per witness per party for all purposes, including
17 objections.

18 30. Side bar conferences are discouraged. The procedure described above should
19 eliminate the need for most side bars.

20 31. To maximize jury time, counsel must alert the Court in advance of any problems
21 that will require discussion outside the presence of the jury, so that the conference can be held
22 before court begins or after the jury leaves for the day.

23 **TIME LIMITS**

24 32. Ordinarily, the Court shall set fixed time limits at the final pretrial conference.
25 All of your examination time (whether direct, cross, re-direct or re-cross) for all witnesses must fit
26 within your time limit and you may allocate it as you wish. Opening and closing time limits shall
27 be separately considered. Counsel must keep track of everyone's usage. At the end of each day,
28 counsel must confer over the time used and the time remaining for all parties and advise the Court

1 daily. The Court will also try to keep track. The time taken at a side bar or on objections will still
2 be charged to the examining party unless otherwise ordered.

3 **SETTLEMENTS AND CONTINUANCES**

4 33. Shortly before trial or a final pretrial conference, counsel occasionally wish jointly
5 to advise the clerk that a settlement has been reached and seek to take the setting off calendar but
6 it turns out later that there was only a settlement “in principle” and disputes remain. Cases,
7 however, cannot be taken off calendar in this manner. Unless and until a stipulated dismissal or
8 judgment is filed or placed on the record, all parties must be prepared to proceed with the final
9 pretrial conference as scheduled and to proceed to trial on the trial date, on pain of dismissal of the
10 case for lack of prosecution or entry of default judgment. Only an advance continuance expressly
11 approved by the Court will release counsel and the parties from their obligation to proceed. If
12 counsel expect that a settlement will be final by the time of trial or the final pretrial conference,
13 they should notify the Court immediately in writing or, if it occurs over the weekend before the
14 trial or conference, by voice mail to the deputy courtroom clerk. The Court will attempt to confer
15 with counsel as promptly as circumstances permit to determine if a continuance will be in order.
16 Pending such a conference, however, counsel must prepare and make all filings and be prepared to
17 proceed with the trial.

18 34. Local rule 40-1 provides that jury costs may be assessed as sanctions for failure to
19 provide the Court with timely written notice of a settlement. Please be aware that any settlement
20 reached on the day of trial, during trial, or at any time after the jury or potential jurors have been
21 summoned without sufficient time to cancel, will normally require the parties to pay juror costs.

22 **CHANGE OF TRIAL DATE**

23 35. Because of scheduling conflicts with other cases on the docket, the Court retains the
24 discretion to change the trial date, either by way of advancement or continuance. In the event the
25 trial date is changed, the parties may seek an adjustment of the time limits for compliance with the

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requirements of this order, which shall be effective only upon Court approval.

IT IS SO ORDERED.

Dated: January 11, 2018



CHARLES R. BREYER
United States District Judge