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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

PASSPORT HEALTH, INC., a)	
Maryland corporation,)	2:09-cv-01753-GEB-JFM
)	
Plaintiff,)	
)	<u>FINDINGS OF FACT AND</u>
v.)	<u>CONCLUSIONS OF LAW</u>
)	
TRAVEL MED, INC., a California)	
corporation and GINA FLAHARTY,)	
an individual and citizen of the)	
State of California)	
)	
Defendants.*)	
_____)	

This decision decides the bench trial held on April 20, 2011, solely on the damages portion of Plaintiff Passport Health, Inc.'s ("Passport Health") claims. Before the bench trial, Passport Health moved for and was granted partial summary judgment on the liability portion of its following claims: breach of the Franchise Agreement, breach of the Guaranty, and Trademark Infringement alleged under 15 U.S.C. § 1114(1)(a).

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* The caption is amended since Defendants' counterclaims were dismissed. (ECF Nos. 69, 73.)

1 **I. FINDINGS OF FACT**

2 **A. BACKGROUND**

3 1. The February 10, 2011 Order granting Passport Health
4 partial summary judgment contains the following uncontroverted facts:

5 Plaintiff owns the trademark "PASSPORT
6 HEALTH" and has registered this "trademark with the
7 U.S. Patent and Trademark Office for travel-and
8 health-care-related services[.]" (Plaintiff's
9 Statement of Undisputed Facts ("SUF") ¶ 2.)

8 **A. Franchise Agreement**

9 Passport Health and Travel Med entered
10 into a Franchise Agreement in August 2007. Id. ¶ 3.
11 Under the Franchise Agreement, Passport Health
12 granted Travel Med the right, and Travel Med
13 assumed the obligation, to operate a Passport
14 Health franchise in a designated area for ten
15 years. Id. The Franchise Agreement's ten year term
16 commenced in September 2007, upon the opening of
17 Travel Med's franchise. Id. Travel Med made its
18 last royalty payment to Passport Health in March
19 2009. Id. ¶ 11. "After Travel Med breached the
20 Franchise Agreement by failing to make royalty
21 payments to Passport Health, Travel Med
22 unilaterally terminated the Franchise Agreement
23 effective June 12, 2009." Id. ¶ 13. Passport Health
24 "fully performed its obligations under the
25 Franchise Agreement." Id. ¶ 17.

18 In exchange for the right to own and
19 operate a Passport Health franchise and use the
20 Passport Health trademark, Travel Med promised to
21 pay royalties to Plaintiff for the ten year term of
22 the Franchise Agreement. Id. ¶ 4. The Franchise
23 Agreement does not provide Travel Med a right of
24 early termination. Id. Travel Med agreed in the
25 Franchise Agreement that Plaintiff owns the
26 Passport Health trademark. Id. ¶ 5. The Franchise
27 Agreement includes provisions concerning Travel
28 Med's post-termination obligations; specifically,
upon termination of the Franchise Agreement, Travel
Med was required to stop representing to the public
that it is or was affiliated with Plaintiff and to
stop using the Passport Health trademark. Id. ¶ 6.

26 **B. Guaranty**

27 When Travel Med executed the Franchise
28 Agreement, Flaharty personally executed a Guaranty,
guaranteeing that in the event Travel Med defaulted

1 on its obligations, Flaharty would personally
2 perform Travel Med's obligations under the
3 Franchise Agreement. (SUF ¶ 7.) Flaharty has not
4 performed Travel Med's obligations under the
5 Franchise Agreement. Id. ¶ 18.

6 C. Website

7 In September 2007, Defendants created a
8 website for Travel Med at "www.passporthealthnca.
9 com". (SUF ¶ 8.) "When Travel Med agreed to become
10 a Passport Health Franchise, Travel Med was not
11 provided with a URL to register by Passport Health.
12 Instead, Travel Med was instructed to find
13 something that was close to 'Passport Health' to
14 register and to use as Travel Med's own website."
15 (Separate Statement in Supp. of Defs.' Opposition
16 ("SSS") ¶ 12.) "Pursuant to that instruction,
17 Travel Med registered www.passporthealthnca.com as
18 its own website on August 12 2007 and pre-paid for
19 the registration for 4 years, ending in September
20 2011." Id.

21 "Even though Travel Med stopped making
22 royalty payments to Passport Health in March 2009,
23 Defendants admit that they used the PASSPORT HEALTH
24 Trademarks through at least June 12, 2009." (SUF ¶
25 12; SSS ¶ 15.) "[I]n preparation of ceasing to use
26 Passport Health's name[,]" Defendants created a
27 website for Travel Med at "www.travelmedinc.com".
28 (SUF ¶ 9; SSS ¶ 12.) "Until at least July 20, 2010,
Defendants' www.passporthealthnca.com website
automatically redirected visitors to Defendants'
www.travelmedinc.com website." (SUF ¶ 15.)

18 After Passport Health's attorneys
19 expressed concern regarding Travel Med's
20 URL www.passporthealth.com in the summer
21 of 2010, Travel Med added the statement:
22 "Due to ongoing litigation with Passport
23 Health, the owner of this URL and
24 website, Travel Med Inc., is unable to
25 redirect you at this time. We regret any
26 inconvenience this may cause you.["] Both
27 "Passport Health" and "Travel Med. Inc."
28 are hyper links that take any visitor to
the respective websites of Passport
Health and Travel Med.

(SSS ¶ 13.)

2. Flaharty testified at trial that the only reason she
terminated the Franchise Agreement was because of an event in the spring
of 2009, which caused her to believe the CEO of Passport Health acted

1 unethically when changing Travel Med's pharmaceutical account without
 2 Travel Med's approval. Flaharty also testified that this issue was
 3 ultimately rectified and Travel Med did not lose any money as a result
 4 of the matter.

5 **B. GROSS REVENUES OF TRAVEL MED**

6 3. Under the Franchise Agreement, Travel Med agreed to pay
 7 Passport Health monthly royalties in the amount of seven percent of
 8 Travel Med's gross revenues for the ten year term of the agreement. The
 9 ten year term would have concluded in August 2017. (Ex. 12.)

10 4. Travel Med's gross revenues from January 2008 through
 11 January 2011 are as follows:

MONTH	GROSS REVENUES	MONTH	GROSS REVENUES
September 2007	\$ 5,865.80	June 2009	\$ 61,292.35
October 2007	\$ 37,366.32	July 2009	\$ 53,755.67
November 2007	\$ 41,350.14	August 2009	\$ 43,776.16
December 2007	\$ 19,014.89	September 2009	\$ 54,934.75
January 2008	\$ 40,010.77	October 2009	\$ 86,878.56
February 2008	\$ 41,687.68	November 2009	\$ 62,102.45
March 2008	\$ 36,447.30	December 2009	\$ 35,067.81
April 2008	\$ 52,431.85	January 2010	\$ 84,752.77
May 2008	\$ 46,363.00	February 2010	\$ 45,592.63
June 2008	\$ 44,347.05	March 2010	\$ 58,607.89
July 2008	\$ 34,901.80	April 2010	\$ 42,862.63
August 2008	\$ 34,857.80	May 2010	\$ 66,655.03
September 2008	\$ 22,327.41	June 2010	\$ 57,560.05
October 2008	\$ 44,540.50	July 2010	\$ 48,043.41
November 2008	\$ 49,917.26	August 2010	\$ 38,475.47
December 2008	\$ 33,901.97	September 2010	\$ 54,823.92
January 2009	\$ 34,943.24	October 2010	\$ 100,813.67
February 2009	\$ 27,279.30	November 2010	\$ 44,663.82

March 2009	\$ 55,639.35	December 2010	\$ 44,590.88
April 2009	\$ 56,845.98	January 2011	\$ 49,477.14
May 2009	\$ 50,797.35		

(Exs. 1-5.)

5. Travel Med did not produce records of its gross revenues for February and March 2011, even though Plaintiff requested the production of this information, and Flaharty testified she did not know and could not testify regarding the gross revenue for those months.

6. Flaharty also testified at trial that Travel Med's future business cannot be determined by its past gross revenue since many factors can impact the travel medicine business involved in this case, including the economic climate, the public's desire for immunizations in a given year, and world events which could reduce travel.

C. MITIGATION

7. Passport Health found a replacement franchisee for the territory covered by its Franchise Agreement with Travel Med (the "Sacramento area franchise"). Passport Health sold the Sacramento area franchise to Dr. Rajwani for a reduced franchise fee of \$12,000. Dr. Rajwani opened his Passport Health clinic in Sacramento in December of 2010. In the four months since opening his clinic, Dr. Rajwani paid \$2,712.94 in royalties.

8. Frances Lessans, the CEO and President of Passport Health, testified that prior to Travel Med's termination of the Franchise Agreement, Passport Health had received inquiries from individuals interested in opening a franchise in the Sacramento area. Ms. Lessans testified that she filed that contact information and when Travel Med terminated its Franchise Agreement, she had someone contact those individuals to see if any were interested in purchasing the Sacramento

1 area franchise. However, no one was interested. She also testified
2 Passport Health had difficulty selling the Sacramento area franchise
3 given the competition from Travel Med and its previous connection to
4 Passport Health. Passport Health subsequently reduced the franchise fee
5 from \$35,000 to \$12,000 for the purpose of getting Dr. Rajwani Dr.
6 Rajwani to purchase the Sacramento area franchise.

7 9. Martin Lessans testified regarding the efforts made to find
8 a replacement franchisee; he testified that he called everyone who had
9 previously expressed an interest in a franchise in the area, he then
10 sent out a mailing to advertise, but both mediums used were unfruitful.
11 He also testified that late in 2009 he called Dr. Rajwani, who owns a
12 franchise in the San Francisco Bay Area, to see if he might be
13 interested. Mr. Lessans testified that Dr. Rajwani signed a Franchise
14 Agreement for the Sacramento area franchise in 2010 but it took time for
15 Dr. Rajwani to open his office in Sacramento.

16 **D. TRADEMARK INFRINGEMENT**

17 10. Flaharty testified that Travel Med did not get any
18 business from July 2009 through July 2010 from the automatic redirect of
19 the "www.passporthealthnca.com" website to the "www.travelmedinc.com"
20 website. She also testified that once the hyperlinks were added in July
21 2010, she was able to see how much traffic was redirected to the
22 "www.travelmedinc.com" website and she thought there were only eight
23 instances where someone was redirected via the hyperlink to the
24 "www.travelmedinc.com" website.

25 11. Flaharty also testified at trial that the
26 "www.passporthealthnca.com" website continued to hyperlink to the
27 "www.travelmedinc.com" website until the Court's Order was filed on
28

1 February 10, 2011 in which Travel Med was enjoined from using the
2 Passport Health trademark.

3 12. Ms. Lessans testified that after the Franchise Agreement
4 was terminated, Flaharty continued sending emails which identified
5 Flaharty as a Passport Health franchisee in the signature line.

6 13. Flaharty testified she was attempting to disassociate
7 Travel Med from Passport Health. Flaharty also testified that she had to
8 make multiple requests to get Travel Med's information changed on the
9 internet search engines and she was eventually successful.

10 14. Travel Med and Flaharty did not return Passport Health's
11 manuals and supplies when the Franchise Agreement was terminated, as
12 required by the Franchise Agreement. Flaharty testified that she sold
13 the supplies to other Passport Health franchisees.

14 **II. DISCUSSION**

15 **A. BREACH OF THE FRANCHISE AGREEMENT AND THE GUARANTY**

16 **1. Past-Due Royalties**

17 Travel Med failed to pay royalties in April and May, 2009,
18 prior to Travel Med's termination of the Franchise Agreement on June 12,
19 2009. Therefore, Travel Med, and Flaharty as guarantor, owe seven
20 percent of Travel Med's gross revenues for these months, \$3,979.22 for
21 April 2009 and \$3,555.81 for May 2009, totaling \$7,535.03 in past-due
22 royalties.

23 **2. Royalties Since Breach**

24 Travel Med, and Flaherty as guarantor, also owe royalties on
25 Travel Med's gross revenues since the breach in June 2009. However, the
26 evidence presented only concerned Travel Med's gross revenues from June
27 2009 through January 2011, during which period Defendants owe Passport
28 Health \$79,430.89 in royalties.

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3 **3. Future Royalties**

4 Passport Health also presented evidence of Travel Med's past
5 volume of business on the proposition of Travel Med's probable future
6 sales and the future royalties that Defendants owe Passport Health based
7 on such sales. Defendants argue this evidence is entirely speculative
8 since there are many variables that could impact Travel Med's business
9 in the future. However, "[s]ince defendant[s' breach of the Franchise
10 Agreement] made it impossible for plaintiff to realize any profits, it
11 cannot complain if the probable profits are of necessity estimated."
12 Natural Soda Products Co. v. City of Los Angeles, 23 Cal. 2d 193, 200
13 (1943).

14 "It is well-established under California law that while the
15 fact of damages must be clearly shown, the amount need not be proved
16 with the same degree of certainty, so long as the court makes a
17 reasonable approximation." Robi v. Five Platters, Inc., 918 F.2d 1439,
18 1443 (9th Cir. 1990).

19 Lost profits to an established business may be
20 recovered if their extent and occurrence can be
21 ascertained with reasonable certainty; once their
22 existence has been so established, recovery will
23 not be denied because the amount cannot be shown
with mathematical precision. The extent of such
damages may be measured by the past volume of
business and other provable data relevant to the
probable future sales.

24 Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc., 78
25 Cal. App. 4th 847, 889-90 (2000) (internal citation and quotation marks
26 omitted).

27 Passport Health's evidence shows Travel Med's gross revenues
28 from September 2007 through January 2011. This evidence is sufficient

1 for ascertainment of a reasonable approximation of Travel Med's gross
2 revenues, and the seven percent of that amount which Travel Med would
3 have paid to Passport Health if Travel Med had not breached the
4 Franchise Agreement. Travel Med's average monthly gross revenues from
5 September 2007 through January 2011 was \$47,452.78; seven percent of
6 that average is \$3,321.69 in royalties per month. Since Defendants owe
7 Passport Health future royalties from February 2011 through August 2017,
8 Defendants owe \$259,091.82 in future royalties.

9 **4. Mitigation**

10 The doctrine of mitigation of damages holds that a
11 plaintiff who suffers damage as a result of . . . a
12 breach of contract . . . has a duty to take
13 reasonable steps to mitigate those damages and will
14 not be able to recover for any losses which could
15 have been thus avoided. A plaintiff may not recover
16 for damages avoidable through ordinary care and
17 reasonable exertion. The duty to mitigate damages
18 does not require an injured party to do what is
19 unreasonable or impracticable.

20 Valle de Oro Bank v. Gamboa, 26 Cal. App. 4th 1686, 1691 (1994)
21 (citations and internal quotation marks omitted). "The burden of proving
22 that losses could have been avoided by reasonable effort and expense
23 must always be borne by the party who has broken the contract." Brandon
24 & Tibbs v. George Kevorkian Accountancy Corp., 226 Cal. App. 3d 442, 460
25 (1990).

26 Passport Health mitigated its damages by making a reasonable
27 effort to get a replacement franchisee. Therefore, Passport Health's
28 damages are reduced by the \$12,000 franchise fee paid by the replacement
franchisee, plus the \$2,712.94 in royalties paid from December 2010
through March 2011.

Defendants argue that since the replacement franchisee's
business is not yet established, its future income is likely to increase

1 over time. However, estimating an increase in gross revenue, and thereby
2 estimating an increase in the royalty payments, is too speculative. Dr.
3 Rajwani's Passport Health franchise in the Sacramento area is not yet
4 established and "the determination of . . . profits of a new business
5 presents problems of proof." Shade Foods, Inc., 78 Cal. App. 4th at 890.
6 Defendants offer no evidence regarding how much the replacement
7 Sacramento area franchise's future royalties might increase or how this
8 should be calculated. Therefore, an estimate of the future royalties of
9 the replacement Sacramento area franchise is based on the average
10 monthly royalties the replacement franchisee has paid thus far, which is
11 \$678.24. Therefore, the future royalties from the replacement franchisee
12 from April 2011 through August 2017 totals \$51,546.24.

13 **5. Total Damages for These Claims**

14 Travel Med and Flaherty, as guarantor, owe \$346,057.74 for the
15 breach of the Franchise Agreement and the Guarantee. These damages are
16 reduced by \$66,259.18 in mitigation. Therefore, Defendants are ordered
17 to pay Passport Health \$279,798.56 for the breach of the Franchise
18 Agreement and breach of the Guarantee claims.

19 **B. TRADEMARK INFRINGEMENT**

20 Passport Health argues that under 15 U.S.C. § 1117(a) it is
21 entitled to recover Travel Med's profits for the period Travel Med
22 infringed on Passport Health's trademark by using the
23 "www.passporthealthnca.com" website; Passport Health also argues the
24 award of profits should be tripled since Travel Med wilfully infringed
25 on Passport Health's trademark.

26 Under § 1117(a), "plaintiff shall be entitled, . . . subject
27 to the principles of equity, to recover (1) defendant's profits, (2) any
28 damages sustained by the plaintiff, and (3) the costs of the action." 15

1 U.S.C. § 1117(a). "The equitable limitation upon the granting of
2 monetary awards would seem to make it clear that such a remedy should
3 not be granted as a matter of right." Lindy Pen Co., Inc. v. Bic Pen
4 Corp., 982 F.2d 1400, 1404-05 (9th Cir. 1993) (quoting Maier Brewing Co.
5 v. Fleischmann Distilling Corp., 390 F.2d 117, 120 (9th Cir. 1968)).
6 Further, "[i]f the court shall find that the amount of the recovery
7 based on profits is . . . excessive the court may in its discretion
8 enter judgment for such sum as the court shall find to be just,
9 according to the circumstances of the case. Such sum . . . shall
10 constitute compensation and not a penalty." 15 U.S.C. § 1117(a).

11 "Because proof of actual damage is often difficult, a court
12 may award damages based on defendant's profits on the theory of unjust
13 enrichment." Lindy Pen Co., Inc., 982 F.2d at 1407 (citation omitted).

14 The plaintiff has only the burden of establishing
15 the defendant's gross profits from the infringing
16 activity with reasonable certainty. Once the
17 plaintiff demonstrates gross profits, they are
18 presumed to be the result of the infringing
19 activity. The defendant thereafter bears the burden
of showing which, if any, of its total sales are
not attributable to the infringing activity, and,
additionally, any permissible deductions for
overhead.

20 Id. at 1408 (internal citation omitted).

21 Passport Health produced evidence of Travel Med's gross sales
22 for the entire infringing period. However, Flaharty's testimony
23 demonstrated that during the time period when the
24 "www.passporthealthnca.com" website displayed the hyperlinks, from
25 August 2010 through February 2011, a de minimis number of individuals
26 were redirected to Travel Med's website from the "www.passporthealthnca.
27 com" website. For this period, Travel Med has shown that there were no
28 profits from the infringing activity. Travel Med failed to produce

1 evidence of its costs and overhead, which would be deducted from the
2 gross sales to determine Travel Med's profits. However, since Travel Med
3 is required to pay seven percent of its gross revenues in royalties to
4 Passport Health for these months, this amount is deducted from Travel
5 Med's gross sales to determine Travel Med's profits during these months.

6 Passport Health is awarded Travel Med's profits for the months
7 of April, May, and June 2009, the period during which Travel Med
8 continued use of the "www.passporthealthnca.com" website after the
9 Franchise Agreement was terminated. Travel Med's gross sales for these
10 three months were \$168,935.68, seven percent of that is \$11,825.50;
11 therefore, Travel Med's profits for this period were \$157,110.18.
12 Requiring Travel Med to pay Passport Health for the period from July
13 2009 through July 2010, when the "www.passporthealthnca.com" website
14 automatically redirected visitors to the "www.travelmedinc.com" website,
15 would be excessive and would constitute a punishment, rather than
16 compensation. The Court finds that a monetary award of \$157,110.18, plus
17 the permanent injunction which was previously ordered, fully compensates
18 Passport Health for Travel Med's trademark infringement.

19 Plaintiff may be awarded treble damages if the defendant's
20 conduct is willful. 15 U.S.C. § 1117(b). "Willful infringement carries
21 a connotation of deliberate intent to deceive. Courts generally apply
22 forceful labels such as 'deliberate,' 'false,' 'misleading,' or
23 'fraudulent' to conduct that meets this standard." Lindy Pen Co., Inc.,
24 982 F.2d at 1406 (citations omitted). The evidence demonstrates Travel
25 Med's conduct was not intentional or willful since Flaharty was
26 attempting to disassociate Travel Med from Passport Health. Further,
27 when Passport Health notified Travel Med that the automatic redirect was
28 problematic and infringing, Travel Med stopped the automatic redirect.

1 While the attempts to disassociate Travel Med and Passport Health were
2 not complete until February 2011, Flaharty's actions with respect to the
3 domain name were not deliberate, false, or misleading. Therefore, an
4 award of treble damages is not appropriate.

5 **III. CONCLUSIONS OF LAW**

6 1. Travel Med and Flaharty owe Passport Health \$7,535.03 in
7 royalties for April and May 2009.

8 2. Travel Med and Flaharty owe Passport Health \$79,430.89 in
9 royalties for the months of June 2009 through January 2011.

10 3. Travel Med and Flaharty owe Passport Health \$259,091.82 in
11 future royalties for the months of February 2011 through August 2017.

12 4. Passport Health mitigated its damages by making a
13 reasonable effort to get a replacement franchisee.

14 5. Through March 2011, the replacement franchise has paid
15 Passport Health \$14,712.94 and this mitigation reduces Passport Health's
16 damages.

17 6. Passport Health's damages are reduced by \$51,546.24, the
18 estimated future royalties Passport Health will collect from the
19 replacement franchisee.

20 7. Therefore, taking into account the mitigation, Travel Med
21 and Flaharty are jointly and severally required to pay Passport Health
22 \$279,798.56 in damages for breach of the Franchise Agreement and for
23 breach of the Guarantee.

24 8. Travel Med's profits for April, May, and June 2009 are
25 \$157,110.18.

26 9. A monetary award of \$157,110.18, plus the permanent
27 injunction that was previously ordered, fully compensates Passport
28 Health for Travel Med's trademark infringement; requiring Travel Med to

1 pay a larger monetary award would be excessive and would be punishment,
2 rather than compensation.

3 10. Travel Med's conduct was not willful and treble damages
4 are not awarded.

5 11. Therefore, Passport Health is awarded \$157,110.18 from
6 Travel Med for the Trademark Infringement claim.

7 12. Accordingly, judgment shall be entered in favor of
8 Plaintiff Passport Health, Inc.

9 Dated: September 6, 2011

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12 _____
13 GARLAND E. BURRELL, JR.
14 United States District Judge
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