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

ALEXX, INC.,

Plaintiff,

v.

CHARM ZONE, INC. ET AL,

Defendant.

No. C 09-03623 CRB

**ORDER GRANTING MOTION FOR
DAMAGES AND ATTORNEYS' FEES**

Plaintiff Alexx moves the Court to award it damages and attorneys' fees for Defendant Charm Zone's breach of the settlement agreement in this case. A motion hearing was held on January 7, 2011. The Court has considered the parties' briefs, arguments, and supplemental briefing, and hereby GRANTS Plaintiff's Motion.

I. Discussion

A. Damages

California Civil Code section 3300 provides that "[f]or the breach of an obligation arising from contract, the measure of damages . . . is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom." Alexx asks the Court to award it \$396,312 in damages to compensate it for its inability to sell the Charm Zone key locators that it was entitled to under the Settlement Agreement. Mot. at 2. This number represents

1 the 113,232 key locators Charm Zone was to deliver to Alexx by July 19, 2010, multiplied by
2 a price of \$3.50 per key locator. Id. at 2-3. Charm Zone argues that the Court should
3 consider specific performance, that no damages are appropriate, that if any damages are
4 awarded, the amount should be much lower than what Alexx seeks. Opp. at 1.

5 **1. Entitlement to Damages**

6 As an initial matter, the Court rejects Charm Zone’s offer of specific performance.
7 Ordering Charm Zone to produce more infringing key locators for Alexx to sell is not a
8 viable remedy for Charm Zone’s breach.

9 Charm Zone’s next argument, that the Settlement Agreement is void because there
10 was no meeting of the minds, Opp. at 6-7, is also unavailing. The Court already found a
11 breach of contract; it therefore also found that the contract was enforceable. See dckt. no.
12 107 at 5. Moreover, Charm Zone’s argument that it misunderstood the provision in the
13 Settlement Agreement about returning inventory is at best a unilateral mistake, and not a
14 basis for nullifying the contract given these facts. See Grenall v. United of Omaha Life Ins.
15 Co., 165 Cal. App. 4th 188, 193 (2008).

16 Charm Zone further contends that Alexx is not entitled to lost profits because it was
17 not reasonably foreseeable that Alexx would sell the Charm Zone key locators, as Alexx had
18 only expressed an interest in destroying them. Opp. at 7-8. While damages must be
19 foreseeable and reasonably certain, courts do “not require that the defendant should have had
20 the resulting injury actually in contemplation,” see Brandon & Tibbs v. George Kevorkian
21 Accountancy Corp., 226 Cal. App. 3d 442, 458 (1990), and damages need not be proven with
22 “mathematical precision,” see Lewis Jorge Constr. Mgmt., Inc. v. Pomona Unified School
23 Dist., 34 Cal. 4th 960, 975 (2004) (internal quotations omitted).

24 Here it was reasonably foreseeable that Alexx, having turned down a \$100,000 cash
25 payment as a term of settlement, would opt instead for Charm Zone’s remaining inventory
26 because it believed that it could make a profit from that inventory. See Reply at 5; Stein
27 Decl. ¶ 5 (“I chose the entire inventory of Key Locator Apparatus in lieu of the cash
28 settlement because I believed the \$100,000 cash settlement substantially undervalued the

1 value of the Charm Zone inventory”) and ¶ 6 (describing sales plan for Charm Zone units).
2 That Alexx’s principal apparently characterized the Charm Zone units as “junk” in the
3 context of a negotiation, see Kim Decl. ¶ 4, hardly renders unforeseeable Alexx subsequently
4 selling Charm Zone’s key locators. Lost profits are appropriate.

5 **2. Calculation of Damages**

6 At the motion hearing, the Court explained that it would calculate Alexx’s damages
7 award by determining the profits that Alexx would have made by selling the key locators,
8 and then subtracting whatever costs Alexx would have had to undertake to sell them.

9 The first question is therefore what profit Alexx would have realized by selling the
10 Charm Zone units. Alexx asks the Court to calculate its lost profits at \$3.50 per unit. Mot. at
11 2-3. But Alexx had represented to the Court that its plan was to sell the Charm Zone key
12 locators to “existing purchasers of the Charm Zone Key Locator Apparatus.” See Stein Decl.
13 ¶ 6. Those customers usually paid between \$2 and \$2.50 per unit. Kim Decl. ¶ 18.
14 Accordingly, the Court finds that Alexx would have earned approximately \$2.50 per unit,
15 multiplied by the 113,232 units, for \$283,080 of profits.

16 The second, and more difficult question, is what it would have cost Alexx to sell the
17 Charm Zone Units. At the motion hearing, the Court asked Alexx to submit a supplemental
18 declaration explaining how much it would cost to sell the Charm Zone key locators. Alexx
19 submitted a declaration from its principal asserting that Alexx would sell the Charm Zone
20 units to “house accounts” to which Alexx “regularly sell[s] the Alexx product,” and that it
21 would only cost \$400 in marketing expenses to sell all 113,232 Charm Zone units. See Stein
22 Decl. Per Court Order of Jan. 7, 2010 (dckt. no. 123) ¶¶ 5-8.¹ Charm Zone subsequently
23 filed a declaration, to which Alexx objects, see dckt. no. 125, asserting that \$6,721, and not
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28 ¹ Alexx reaches this number by assuming that it would only take 20 hours to call each of its
4,033 house accounts, and that its marketer is paid \$20 per hour, and so 20 x \$20 is \$400. Stein Decl.
Per Court Order of Jan. 7, 2010 (dckt. no. 123) ¶8.

1 \$400, is the appropriate measure of the marketing expenses. Kim Decl. in Opp. to Pltf's
2 Mot. for Order Setting Damages (dckt. no. 124) ¶ 15.²

3 The only numbers before the Court pertain to marketing the Charm Zone units to
4 Alexx house accounts, and not to Charm Zone's customers, as was Alexx's plan. In light of
5 this distinction, the Court finds Charm Zone's calculation more reasonable. Marketing the
6 infringing Charm Zone key locators would likely be more complicated and take more effort
7 than selling Alexx's own product (about which no explanation would be needed), and so
8 Alexx's estimate of 20 hours is unreasonably low. The Court will instead subtract from the
9 \$283,080 of profits Charm Zone's proposed \$6,720, yielding a total damages award of
10 \$276, 360, a number well above the \$100,000 figure that Alexx declined in settlement
11 negotiations.³

12 **B. Fees**

13 The parties' Settlement Agreement, at section 5.3, provides that the losing party pay
14 fees and costs in the event of an enforcement action. See dckt. no. 107 at 6. This Court's
15 order granting the motion to enforce the settlement specifically ordered Charm Zone to pay
16 Alexx's fees and costs. Id.⁴ Alexx requests a total of \$34,596.92 (\$33,867 in fees and
17 \$729.92 in costs). Reply at 1-2, n.1. Alexx submitted a declaration accounting for the hours
18 billed by the various Jones Day attorneys and one paralegal who worked on the case, see
19 Lovejoy Decl. in Support of Reply Ex. A, and those bills are reasonable. That is the only
20 requirement the fee award must meet under California Civil Code § 1717 ("[r]easonable
21 attorney's fees shall be fixed by the court"). Though Charm Zone argues that "the fee setting
22 inquiry in California ordinarily begins with the 'lodestar,' i.e., the number of hours
23 reasonably expended multiplied by the reasonable hourly rate," Opp. at 12 (citing PLCM

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25 ² Charm Zone reaches this number by assuming that each call to Alexx's 4,033 house accounts
26 would take about five minutes (for a total of 20,165 minutes, or about 336 hours), that Alexx's marketer
is paid \$20 per hour, and so 336 x \$20 is \$6,720. Id. ¶ 15.

27 ³ The Court declines to award Alexx Charm Zone's manufacturing costs, to which it is not
28 entitled under any plausible damages theory. See Reply at 3-4.

⁴ Charm Zone's argument that Alexx is not the prevailing party, Opp. at 2, is thus moot.

1 Group, Inc. v. Drezler, 22 Cal. 4th 1084, 1095 (2002)), Charm Zone does not argue either
2 that the hours expended (58.1) or the hourly rate charged (ranging from \$400 to \$800), see
3 Reply at 9, were unreasonable. The fees also reflect a 10% discount, and do not include the
4 cost of litigating this Motion. Reply at 2, 9. The amount requested is reasonable.

5 **II. Conclusion**

6 For the foregoing reasons, the Court GRANTS Plaintiff's Motion, awarding Alexx
7 \$276, 360 in damages and \$34,596.92 in fees and costs.

8 **IT IS SO ORDERED.**

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11 Dated: January 26, 2011



CHARLES R. BREYER
UNITED STATES DISTRICT JUDGE