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

ARROWROOT NATURAL PHARMACY, et al.	:	CIVIL ACTION
	:	
v.		
	:	
STANDARD HOMEOPATHIC COMPANY	:	NO. 96-3934

MEMORANDUM OF DECISION

THOMAS J. RUETER
United States Magistrate Judge

February 10, 1998

I. INTRODUCTION

Before the court for decision is an action filed by plaintiffs alleging that defendant breached the terms of a Joint Venture Agreement in which the defendant granted plaintiff Arrowroot Standard Direct, Ltd. exclusive rights and privileges regarding the sale of certain homeopathic drugs.[1] Plaintiffs seek damages and equitable relief. The defendant filed a counterclaim alleging that plaintiffs violated the terms of the Joint Venture Agreement. Defendant also seeks damages and equitable relief.

The parties consented to a trial before the undersigned, and the Honorable Jan E. DuBois referred the trial to this court pursuant to 28 U.S.C. § 636(c)(1) by order dated August 1, 1996. Trial commenced on June 16, 1997 and testimony was heard through June 23, 1997. Each party submitted proposed findings of fact and conclusions of law and memorandum in support

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[1] According to the U.S. Food and Drug Administration, "[t]he practice of homeopathy is based on the belief that disease symptoms can be cured by small doses of substances which produce similar symptoms in healthy people." (Def.'s Ex. 32.)

thereof. At the request of the parties, closing arguments were presented on October 28, 1997, after the notes of testimony were transcribed.

In accordance with Fed. R. Civ. P. 52(a), the court makes the following:

II. FINDINGS OF FACT

1. The defendant, Standard Homeopathic Company, is a corporation incorporated under the laws of the State of Nevada and has its principal place of business at 210 West 131st Street, Los Angeles, California 90061 (hereinafter referred to as "Standard").

2. The plaintiff, Arrowroot Natural Pharmacy, is a Pennsylvania business trust, with its registered and principal office located at 2 Central Avenue, Bryn Mawr, Montgomery County, Pennsylvania 19010 (hereinafter referred to as "Arrowroot Pharmacy").

3. The plaintiff, Arrowroot Standard Direct, Ltd., is a Pennsylvania corporation, with its registered and principal office located at 2 Central Avenue, Bryn Mawr, Montgomery County, Pennsylvania 19010 (hereinafter referred to as "Arrowroot Standard").

4. On November 29, 1994, in Los Angeles, California, Arrowroot Pharmacy and Standard entered into a written "Joint Venture Agreement", effective as of October 1, 1994. (Pls.' Ex. 1; Def.'s Ex. 28.)

5. In furtherance of the joint venture, Arrowroot Standard was incorporated with Arrowroot Pharmacy owning 667 of the outstanding shares of stock and Standard owning the remaining 333 shares. The parties hold the stock of Arrowroot Standard subject to a "Buy-Sell Agreement" that was executed contemporaneously with the Joint Venture Agreement. In paragraph 6.01 of the Buy-Sell Agreement, the parties valued the stock at $1,450,000.00. (Pls.' Ex. 2.)

6. Pursuant to Recital F and Article 1 of the Joint Venture Agreement, Standard granted Arrowroot Standard an exclusive right to sell certain products manufactured by Standard, i.e., the homeopathic products described in Schedule A to the Joint Venture Agreement and extemporaneous items, in specific markets within the United States. The markets are commonly referred to as the "Professional Mail Order" and "Retail Mail Order" classes of trade. Standard also granted Arrowroot Standard the exclusive right to compound, sell and distribute extemporaneous items to the "Professional Mail Order", "Retail Mail Order", "Pharmacy", and "Natural Foods" classes of trade. In addition, Standard agreed to turn over its base sales and mailing lists to Arrowroot Standard for these classes of trade.

7. Extemporaneous items are items not manufactured by Standard in bulk quantities. The definition of an "extemporaneous product" as used within the homeopathic industry is a product "produced in small quantity in reaction to an order received that are not intended to be stored in a shelf." (N.T., 6/20/97, at 138-39, 188.)

8. Throughout the parties' relationship, Arrowroot Standard has advertised and promoted Standard's products through radio advertising, advertising at facilities that sell the products, and attendance at homeopathic and natural conferences. The products have been further promoted by the preparation and circulation of a catalog, (Pls.' Ex. 7), and professional and retail price lists, (Pls.' Exs. 8 and 9), to thousands of existing customers and prospects identified on lists provided by Standard. These catalogs and price lists were produced at the sole expense of Arrowroot Standard. (N.T., 6/18/97, at 160-63, 169-74; 8/2/96 at 34-37.)

9. Under paragraph 3.07 of the Joint Venture Agreement, Arrowroot Standard was to provide the financial and physical resources to promote sales, including but not limited to, management and sales staff.

10. The Joint Venture Agreement provides in paragraph 7.01(a)(1) that Standard and Arrowroot Standard may, at their option, terminate this agreement if any of the following events occur:

> Breach or default by either party of any of the terms, obligations, covenants, under this Agreement which is not waived in writing by the affected non-breaching party. In such case the non-breaching party shall notify the breaching party of such alleged breach and the breaching party shall have a period of thirty (30) days to cure same.

11. Paragraph 8.05 of the Joint Venture Agreement provides that:

> failure of either party at any time to require performance of the other party of any provision hereof shall not affect in any way the full right to require such performance at any time thereafter. Nor shall the waiver of either party of a breach of any provision hereof be taken or held to be a waiver of the provision itself.

12. On May 1, 1996, an attorney for Standard sent a letter to the plaintiffs which notified them that they had breached the Agreement. The letter alleged that Arrowroot Standard breached ten (10) separate provisions of the Joint Venture Agreement. (Pls.' Ex. 3.) Specifically, Standard alleged that Arrowroot Standard breached paragraphs 3.07(h) and 4.01(f) of the Agreement by not preparing financial reports in accordance with Generally Accepted Accounting Principles ("GAAP"), and by failing to pay royalties.

13. The May 1, 1996 letter concluded with the following:

> PLEASE TAKE NOTICE that if each of the foregoing breaches of the terms of said agreement are not cured within thirty (30) days, Standard Homeopathic

> Company will exercise its option to terminate said Agreement pursuant to Paragraph 7.01.

14. On May 20, 1996, Arrowroot Pharmacy and Arrowroot Standard filed a civil Complaint in the Court of Common Pleas of Montgomery County, Pennsylvania seeking monetary damages and injunctive relief from Standard. Specifically, they sought a preliminary injunction precluding Standard from "terminating or otherwise violating the Agreement ... and from failing to fill plaintiffs' orders for merchandise placed in accordance with the terms of [the] Agreement." (Compl. at 5.) On that same date, the state court granted Arrowroot Pharmacy and Arrowroot Standard a special injunction.

15. On May 24, 1996, Standard removed this case to this court, citing the diversity of the parties and the requisite amount in controversy, see 28 U.S.C. § 1332. After doing so, Standard filed an answer and, in addition, filed a counterclaim which sought both monetary damages and injunctive relief which would allow it to terminate the Agreement due to the breach of it by Arrowroot Pharmacy and Arrowroot Standard. On June 3, 1996, the Honorable Jan E. DuBois, to whom this case was assigned, continued the state court injunction order in effect until further order of the court.

16. On August 2, 1996, this court held an evidentiary hearing on plaintiffs' motion for a preliminary injunction (the "Injunction Hearing"). Standard, at the time of the Injunction Hearing, withdrew its request for injunctive relief. By Memorandum of Decision dated August 30, 1996, this court denied plaintiffs' motion for a preliminary injunction and vacated the court's June 3, 1996 order continuing the special injunction of the Montgomery County Court of Common Pleas. See Arrowroot Natural Pharmacy v. Standard Homeopathic

Co., 1996 WL 515508 (E.D. Pa., Aug. 30, 1996). On November 19, 1996, plaintiffs filed an amended complaint.

A. Factual Background.

17. In 1978, Joseph Carapico purchased Arrowroot Natural Foods, a small business located in Rosemont, Pennsylvania. (N.T. 8/2/96 at 4-5.)

18. After six or seven months, the business moved to a larger and more prominent location at 834 West Lancaster Avenue in Bryn Mawr, Pennsylvania. Approximately five or six years ago, Mr. Carapico organized Arrowroot Pharmacy, and began the operation of that business in Paoli, Pennsylvania. (N.T. 8/2/96 at 5-6.) Arrowroot Pharmacy employed a registered pharmacist. Id. at 7-8. Between them, the two entities had approximately twenty employees. Id. at 7.

19. Mr. Carapico believed that the natural health care industry was going to expand over the next few years. (N.T. 8/2/96 at 7-8). He began to look for opportunities to take advantage of that anticipated growth.

20. Arrowroot Natural Foods sold the product of defendant Standard for many years. Standard's Vice President, John P. Borneman (known as Jay Borneman), suggested that his father, John A. Borneman, III, a pharmacist, would be an ideal candidate to serve as the spokesperson for advertising and promotion. Through meetings with the Bornemans, Mr. Carapico met individuals at Standard, including Jack Craig, its President, and Mark Phillips, Vice President of Technical Affairs. (N.T. 8/2/96 at 9-10.)

21. Those discussions led Mr. Carapico to the belief that a combination of his enterprises and those of Standard would be a "dynamite company". (N.T. 8/2/96 at 9). The

parties executed the Joint Venture Agreement on November 29, 1994, effective as of October 1, 1994. (Pls.' Ex. 1). The parties executed the Buy-Sell Agreement at the same time. (Pls.' Ex. 2.)

22. The initial drafts of the agreements were prepared by Standard. Mr. Carapico made some minor changes, which were accepted by Standard. (N.T. 8/2/96 at 10-11.)

23. In preparation for the parties' joint venture, Mr. Carapico located an 11,000 square foot building on 18,000 square feet of real estate in Paoli, Pennsylvania. Mr. Carapico along with his wife and daughter, trading as "Kuzu Partners", purchased that building, located at 83 Lancaster Avenue, Paoli, Pennsylvania. The purchase was financed initially by the seller, and subsequently by MidLantic Bank. (Pls.' Ex. 5.; N.T. 8/2/96 at 13-14.) On November 1, 1994, Arrowroot Standard, the corporation that implemented the joint venture between Arrowroot Pharmacy and Standard, entered into a lease for the premises. (Pls.' Ex. 4.)

24. It was necessary to convert the basic warehouse facility into a modern center for the preparation and distribution of homeopathic products. This required cleaning the building, testing for environmental purposes, and renovating it into a state-of-the-art laboratory and distribution facility. (N.T. 8/2/96 at 14-15.)

25. The facility was modified to meet state and federal requirements for pharmacy, medical compounding and storage. It also had a telephone and computer ordering system that integrated the wiring of the telephone and computer system, and permitted an order to be printed out at the appropriate location at the facility where the order was filled instantly. Arrowroot Standard installed a large cabinet drawer system to store over 40,000 potencies of dilutions that could be located in a matter of seconds, and modified or compounded as required. Mr. Carapico, a mechanical engineer, designed an elaborate environmental system to control

temperature, humidity and dust. This environmental control system is in two parts, so the facility could continue to operate if either portion breaks down. (N.T. 8/2/96 at 21-24.)

26. As of the opening of the new facility on or about February 15, 1995, Mr. Carapico and his family had invested at least $400,000 into Arrowroot Standard. (N.T. 8/2/96 at 18.) As of April, 1996, Arrowroot Standard had five or six full-time employees and nine or ten part time employees, not counting Mr. Carapico. Id. at 37.

27. Standard recommended, and Arrowroot Standard purchased, an initial inventory of finished goods. (N.T. 6/18/97 at 154.)

28. In the fourth quarter of 1995, the parties reached an oral agreement whereby the past due receivable created by the initial inventory purchase and smaller cash flow than expected would be paid down at the rate of $7,500.00 per month (the "Paydown Agreement"). The Paydown Agreement was conditioned on the immediate transfer of all the extemporaneous business required under the Joint Venture Agreement. (N.T. 8/2/96 at 27, 111.) At the time of the trial of this action, Arrowroot Standard has made timely payments in accordance with the agreed schedule. (N.T. 6/19/97 at 144-46, 186).

B. Plaintiffs' Claims.

29. In their Amended Complaint, plaintiffs request the court to enjoin the defendant from attempting to terminate the Joint Venture Agreement. Plaintiffs allege that defendant breached the Agreement by not turning over orders for extemporaneous products. In addition, plaintiffs allege fraud arising from representations of Standard, and assert Standard's breach of its duty of good faith as a joint venturer because it appropriated for itself, or a wholly owned subsidiary formed for that purpose, related business that was the subject of the joint

venture. The Amended Complaint also alleges the diversion of business by Standard for the purpose of harming plaintiffs and to take over the joint venture's business and induce the sale of Arrowroot Standard's facilities at a distress price.

a. <u>The Scope of the Joint Venture Agreement</u>.

30. Under the terms of the Joint Venture Agreement, Standard granted to Arrowroot Standard an exclusive right to sell certain products manufactured by Standard in specific markets within the United States. The markets are commonly referred to as the "Professional Mail Order" and "Retail Mail Order" classes of trade. Standard also granted to Arrowroot Standard the exclusive right to compound, sell and distribute extemporaneous items to the "Professional Mail Order", "Retail Mail Order", "Pharmacy", and "Natural Foods" classes of trade. Extemporaneous items are defined as "items not on the manufacturing list." In addition, Standard agreed to turn over its base sales and mailing lists to Arrowroot Standard for these classes of trade. (Pls.' Ex. 1.)

31. At the execution of the Joint Venture Agreement, the Agreement did not have attached thereto the respective schedules referencing the products subject to the Agreement.

32. Defendant later mailed the schedules referred to in the Joint Venture Agreement to plaintiffs. (Pls.' Ex. 12.)

33. Recital F of the Joint Venture Agreement declares that Standard desires to grant to Arrowroot Standard, and Arrowroot Standard desires to obtain from Standard, "the exclusive right and license to sell the homeopathic products described in Schedule A attached hereto and including extemporaneous items, i.e., those not on the manufacturing list, ... within the United States of America." Schedule A contained Arrowroot Standard's opening inventory

and P&S Laboratories' Price List. Pursuant to Paragraph 1.03, Standard reserved the right "to sell products described in Schedule A in the Market within the Territory through the catalogue division of P & S Laboratories, a subsidiary of Standard, without incurring any liability to" Arrowroot Standard.

34. The manufacturing list was a document distinct from "Schedule A". The manufacturing list, referenced in the Joint Venture Agreement, was forwarded on disk from defendant, by Daniel Krombach, Financial Controller of defendant, to Stephen McLarnon on behalf of plaintiffs. (N.T., 6/20/97, at 22-24.)

35. The extemporaneous items are neither listed in Schedule A nor in the manufacturing list. Schedule D of the Joint Venture Agreement provided that "[i]tems consumed in numbers too small to be considered 'industrial quality' goods will be manufactured extemporaneously at" Arrowroot Standard. Industrial quality goods is defined as: "those items which are consumed in sufficient quantities to warrant manufacture in batch quantities at Standard Homeopathic." Under Paragraph 4.01(c) of the terms of the Joint Venture Agreement, Standard retained the right to manufacture industrial quality goods, as described in Schedule D, not previously available from Standard.

36. In the Joint Venture Agreement, Standard declared that a demand for its product existed equal to $1,000,000 in annual sales. (Pls.' Ex. 1, Recital H.) The overhead structure of Arrowroot Standard was designed by Mr. Carapico in light of that representation. This figure could not be met by the sale of finished goods only. (N.T. 8/2/96 at 19-20.)

37. The exclusive rights granted Arrowroot Standard to sell Standard's products within the defined market are required to meet the overhead created in reliance on the

promises made in the Joint Venture Agreement by Standard. If the Joint Venture Agreement is terminated, Arrowroot Standard would be unable to continue operating as it does today. Specifically, several employees of Arrowroot Standard would have to be released and Arrowroot Standard would not be able to maintain its rental payments for the premises from where it operates. (N.T., 6/19/97, at 159-60; 8/2/96 at 60-61, 65-66, 80-83.)

b. Failure to Transfer Business.

38. Paragraph 4.01(a) of the Joint Venture Agreement states that

> Standard agrees to supply [Arrowroot Standard] with an inventory of Dilution Stock of homeopathic products described in Schedule B, as the same may be expanded from time to time and to continue to supply such supplemental amounts as will insure that [Arrowroot Standard] maintains an adequate supply of each product at all times. (emphasis supplied).

39. Standard supplied the dilution library slowly. Initially, Arrowroot Standard could fill orders only for finished goods, and could not fill orders for anything that required the dilution library. (N.T. 8/2/96 at 25.) By agreement of the parties, to avoid customer dissatisfaction, the full orders, including orders for finished goods, were referred back to Standard whenever Arrowroot Standard lacked dilution stock to fill any part of an order that required an extemporaneous item. (N.T., 6/18/97, at 155-57.)

40. Defendant's failure to timely provide the full dilution library to plaintiffs negatively impacted plaintiffs' cash flow. Instead of the anticipated $20,000.00 per week, Standard was receiving only $4,000.00 to $5,000.00 per week. (N.T., 6/18/97, at 158.)

41. Notwithstanding the execution of the Joint Venture Agreement, and the opening of the business on February 15, 1995, Arrowroot Standard could not implement its

business in a full and complete manner because the dilution library (also referred to as the dilution stock) had not been sent by Standard to Arrowroot Standard. (N.T. 6/18/97 at 157-58.)

42. Mr. Carapico later learned that certain orders for extemporaneous items (that is, those not on the manufacturing list and prepared in the dilution library) have never been turned over to Arrowroot Standard in full. Standard's Vice President, Jay Borneman, admitted that this has not been done, although he claimed it was and remains Standard's intention to do this. (N.T., 6/17/97, at 50, 65; 8/2/96 at 155.) See also N.T., 6/20/97, at 81 (Krombach's Testimony). This intentional decision by Standard not to forward all orders for extemporaneous items to Arrowroot Standard was a material breach of the Joint Venture Agreement.

43. Defendant supplied plaintiffs with a computer printout showing that the gross sales of the extemporaneous items not transferred to Arrowroot Standard for the Natural Food Stores and Pharmacy classes of trade for the period of November, 1994 through July, 1996 are approximately $145,000.00. (Pls.' Ex. 10.) The printout did not include any extemporaneous sales for the professional mail order and retail order classes of trade. (Pls.' Ex. 10; N.T., 6/16/97, at 60-1, 95-96, 104.)

44. The $145,000.00 represents a gross dollar figure for the sales, and defendant, through the testimony of Daniel Krombach, presented testimony that the net profit from the sales of the items listed on plaintiffs' Exhibit 10 was only $7,300.00. (N.T., 6/20/97, at 27.)[2]

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[2] Plaintiffs failed to present any competent evidence of the net profits Arrowroot Standard lost as a result of Standard's failure to turn over certain extemporaneous business. The bald statement of Mr. Carapico in his letter of August 12, 1996, (Pls. Ex. 26), that Arrowroot Standard lost a "net plus cash flow" of $36,816 from not receiving the business listed on Plaintiffs' Exhibit 10 is insufficient, alone, to prove Arrowroot's lost profits. During his

45. Plaintiffs' Exhibit 10 includes time periods for which the Joint Venture Agreement was not in operation. Specifically, for three and one half months' worth of business effective November 1, 1994 through February 15, 1995, Arrowroot Standard was not in operation. (N.T., 6/19/97, at 189; 6/20/97, at 25.)

46. Plaintiffs' Exhibits 14a and 14b, which purport to demonstrate that defendant withheld certain business required to be given to Arrowroot Standard, are based on speculation and an erroneous interpretation of the term "extemporaneous items" as used in the Joint Venture Agreement. These exhibits and related testimony show that Standard occasionally made a mistake but do not persuade the court that the defendant has not substantially fulfilled its obligations, except as found herein. See N.T., 6/20/97, at 154-60.

c. Walker Luyties.

47. Arrowroot Standard has continually expressed concern that all the business Standard was required to turn over by the Joint Venture Agreement has not been provided. (See, e.g., Pls.' Ex. 6.) Arrowroot Standard also informed Standard that it was concerned that Standard may have breached the Joint Venture Agreement by purchasing a competing organization, Walker Luyties ("Luyties"), located in St. Louis, Missouri.

48. Defendant purchased the assets of Luyties, and reorganized and transferred those assets to a wholly owned subsidiary incorporated by Standard known as Walker Laboratories, Inc. Defendant purchased Luyties for the sole purpose of expanding its manufacturing capabilities. (N.T. 6/20/97 at 192.)

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testimony at trial, Mr. Carapico never explained the basis for this calculation. See also N.T., 6/20/97, at 52 (Daniel Krombach testified that Stephen McLarnon told him that he had no information to show that the extemporaneous business was profitable.)

49. Walker Laboratories has continued the Luyties product line. (Murphy-Moore Dep. at 42.)

50. Walker Laboratories produces a small percentage of retail professional mail order, but does not prepare extemporaneous items. (Murphy-Moore Dep. at 77-79, 93.)

51. According to Margo Murphy-Moore, the Vice President of Walker Laboratories, the value of the retail mail orders placed with Walker Laboratories is in the range of $15,000.00 to $30,000.00 a month. (Murphy-Moore Dep. at 52-53, 85.) Defendant's Financial Controller, Daniel Krombach, testified that it is in the range of $10,000.00 to $25,000.00 a month and that the net value of this business is an actual loss. (N.T., 6/20/97, at 28.)

52. Standard's subsidiary, P & S Laboratories, does distribute some products manufactured by Walker Laboratories. (Murphy-Moore Dep. at 42.) Walker Laboratories does not sell any products manufactured by Standard. (Forrest Murphy Dep. at 57.) Each company's products are different. (N.T., 6/20/97, at 149.) Every product manufactured by Standard has a different National Drug Number from those made by Walker Laboratories. (N.T. 6/20/97 at 193.) Standard and Walker Laboratories do not share each other's price lists and brochures. (Murphy-Moore Dep. at 94.)

53. Ms. Moore testified that with the exception of Daniel Krombach, who offers accounting and computer design assistance, she has minimal contact with the principals of Standard. (Murphy-Moore Dep. at 36-39.) None of Walker Laboratories' officers or directors serve as officers, directors or employees of Standard. The management personnel, and

accounting systems, of the two companies are separate and distinct. (N.T., 6/17/97, at 17; 6/20/97, at 150.)

54. Ms. Moore testified that any assistance by Mr. Krombach is not in any way related to retail professional mail order. (Murphy-Moore Dep. at 36-39.)

55. In addition to its manufacturing capabilities, Walker Laboratories sells export products. (Murphy-Moore Dep. at 52.)

56. Employees of Walker Laboratories are not hired or employed by Standard. Walker Laboratories does not employ any of Standard's employees. However, Standard's employees have assisted the management of Walker Laboratories periodically. (Murphy-Moore Dep. at 39-41.)

d. Plaintiffs' Claims of Fraud.

57. Plaintiffs claim they were defrauded by defendant's representation that it was transferring business in the amount of $1,000,000 to the joint venture. Specifically, plaintiffs refer to Recital H of the Joint Venture Agreement, where, defendant declared that "a demand for Standard's products exists equal to $1,000,000.00 ... in annual sales".

58. Plaintiffs have not proven by clear and convincing evidence that defendant intended to defraud plaintiffs, or that defendant knowingly made any materially false representations. The undisputed testimony is that the representation was accurate since Standard's sales of the products at issue exceeded $1,000,000 for the 12-month period prior to the execution of the Agreement. (N.T., 6/19/97, at 116; 6/20/97, at 54-56.)

e. Plaintiffs' Discount Price.

59. Defendant, prior to the execution of the Joint Venture Agreement and subsequent thereto, offered to its wholesale customers, i.e., those whose invoices begin with the seven thousand series, a discount of "twelve for eleven". This discount is set forth in Standard's Wholesale Price List. (Pls.' Exs. 26a and 26b; N.T., 6/20/97, at 88-89.)

60. Paragraph 3.02(a) of the Joint Venture Agreement states as follows:

> All purchases made by [Arrowroot Standard] from Standard will be at a base price of twenty five percent (25%) off the net published wholesale price, or at fifty five (55) percent off the net published suggested retail price, whichever is lower. Published prices are subject to change by Standard at any time with 180 day notice without creating any liability on the part of Standard.

61. Defendant argues that Arrowroot Standard is not entitled to such a discount, nor was it offered such a discount, since it was not a wholesale customer of Standard. (N.T., 6/20/97, at 30.) However, the Joint Venture Agreement does not distinguish Arrowroot Standard from its wholesale customers. The agreement provides, without limitation, that Arrowroot Standard would be charged "twenty five percent (25%) off the net published wholesale price, or at fifty five (55) percent off the net published suggested retail price, whichever is lower." Thus, Arrowroot Standard is entitled to the application of the discount of "twelve for eleven" in determining Standard's charges for products delivered to Arrowroot Standard.

62. Plaintiffs have proven that Arrowroot Standard did not receive the benefit of the "twelve for eleven" discount. (N.T., 6/20/97, at 30.) Thus, Standard has materially breached paragraph 3.02(a) of the Joint Venture Agreement. Plaintiffs have established the

amount Standard overcharged Arrowroot Standard for the period of January 1, 1995 through May 31, 1997 was $41,520.00. (N.T., 6/18/97, at 5, 11.)[3]

C. Defendant's Counterclaims.

63. In its answer to plaintiffs' Amended Complaint, defendant asserts the following counterclaims: (1) breach of the terms of the Joint Venture Agreement; (2) declaratory judgment as to its rights under the Joint Venture Agreement; (3) actual fraud; (4) constructive fraud; and (5) a request for an accounting.

a. <u>Royalties</u>.

64. In its counterclaim, defendant alleged a breach of contract by plaintiffs' failure to pay defendant royalties on extemporaneous sales. In its May 1, 1996 letter, defendant cited plaintiffs' failure to pay royalties as a ground to terminate the Joint Venture Agreement under paragraph 7.01 thereof. (Pls.' Ex. 3.)

65. At the Injunction Hearing, plaintiffs acknowledged and the court found that royalties were due and owing by plaintiffs to the defendant. (N.T. 8/2/96 at 47, 72.)

66. Paragraph 4.01(f) of the Joint Venture Agreement requires Arrowroot Standard to remit royalty payments to Standard for Arrowroot Standard's use of Standard's dilution stock which Arrowroot Standard used in making extemporaneous products for sales to third parties.

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[3] Plaintiffs' Exhibit 26 lists the total overcharges as $49,714.97. Defense counsel pointed out that, on four occasions, the exhibit contains several inaccuracies . (N.T., 6/18/97, at 48-54, 124-29.) Accordingly, the court has adopted the lower figure of $41,520.00 testified to by Mr. McLarnon.

67. Arrowroot Standard has not remitted any royalty payments to Standard, although the Joint Venture Agreement contains no language specifying when, or at what periods, the royalty payments must be tendered. By letter dated December 2, 1996, defendant demanded from plaintiffs payment of royalties. (Def.'s Ex. 7; see also N.T. 8/2/96 at 72.)

68. Although royalties were owed by Arrowroot Standard under the Joint Venture Agreement, only a small amount, $7,856.00, had accrued as of the close of the 1994-95 fiscal year on June 30, 1995. (Def.'s Ex. 8; Pls' Ex. 29.) At a meeting with Jack Craig, President of Standard, after a trade show in Baltimore, Maryland, Mr. Craig told Mr. Carapico not to worry about payment of the royalties until Arrowroot Standard paid the monies it owed to Standard for merchandise delivered. (N.T. 8/2/96 at 47-48.)

69. The amount of accrued royalties has been reported by Arrowroot Standard to Standard on a monthly basis. (N.T. 8/2/96 at 133-34.) Although, it is unclear whether the amounts set forth on its financial statements are for royalties owed solely to Standard. (Def.'s Ex. 8.)

70. Mr. Carapico acknowledged receipt of Standard's written demand for payment of the royalties and plaintiffs' failure to pay the royalties. (N.T. 6/19/97 at 164-66.)

71. As explained below, plaintiffs' failure to pay defendant royalties was justified by defendant's material breach of the Joint Venture Agreement by intentionally failing to turn over all of the extemporaneous business required under the Agreement.

b. <u>Accounts Receivable</u>.

72. As of June 1, 1997, defendant claims that plaintiffs are indebted to it in the amount of $48,416.36. (Def.'s Ex. 6; N.T., 6/20/97, at 36-41.) In the fourth quarter of 1995,

however, the parties reached an agreement whereby plaintiffs could pay past due accounts receivable over time, and Arrowroot Standard has made timely payments in accordance with this schedule. (Pls.' Ex. 11; Def.'s Ex. 15; N.T., 6/19/97, at 144-46.)

73. Defendant has failed to convince the court that Mr. Carapico's testimony that Arrowroot Standard has been current in its payments to Standard as of the date of trial is incorrect. (N.T., 6/19/97, at 144-46, 186.)[4] Thus, the court finds that Arrowroot Standard has not breached the Joint Venture Agreement by failing to make timely payments for goods received.

c. Plaintiffs' Books and Records.

74. Paragraph 3.07(h) of the Joint Venture Agreement requires Arrowroot Standard to maintain "books and records detailing all transactions and prepare financial reports in accordance with general [sic] accepted accounting principles."

75. Based on the record made at the Injunction Hearing, this court determined that at that time the books and records of plaintiffs were on a cash not accrual basis, and, thus, were not prepared in accordance with GAAP in violation of the Agreement. See Arrowroot Natural Pharmacy v. Standard Homeopathic Co., 1996 WL 515508, at *8-9 (E.D. Pa., Aug. 30, 1996).

76. At trial, plaintiffs presented the testimony of Joseph Sullivan, C.P.A., who is the accountant for Arrowroot Standard.

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[4] Since the court has found that defendant has been overcharging Arrowroot Standard by neglecting to give it the twelve for eleven discount, it follows that amounts listed on Defendant's Exhibit 6 are incorrect. Therefore, the court cannot rely upon that exhibit and related testimony to find that Arrowroot Standard is in breach of the Joint Venture Agreement.

77. Mr. Sullivan prepared the federal tax returns for Arrowroot Standard for the years ending June 30, 1995 and 1996. (N.T., 6/19/97, at 88-89.) Mr. Sullivan identified the balance sheets of Arrowroot Standard attached to these tax returns and stated they were prepared on the accrual basis as opposed to the cash basis. Id. at 91-93, 104.

78. On behalf of the defendant, Ronald Forster, C.P.A., testified at trial that he had reviewed plaintiffs' records prior and subsequent to the Injunction Hearing, and offered an expert opinion regarding the financial reports and records of Arrowroot Standard. (N.T., 6/23/97, at 10.)

79. Contrary to his testimony at the Injunction Hearing, Mr. Forster testified that he did not know whether the books and records of Arrowroot Standard were kept on an accrual as opposed to cash basis. Compare N.T., 8/2/96, at 187 with N.T., 6/23/97, at 33-34.

80. Defendant presented no other evidence at trial to support its contention that Arrowroot Standard's records were not prepared on an accrual basis. In view of this ambiguous evidence, the court finds that defendant has not proven that Arrowroot Standard does not maintain its books, records and financial statements on the accrual basis.

81. Mr. Forster testified that Arrowroot Standard's financial statements were not prepared in accordance with GAAP because there were no explanatory notes in the statements, no disclosure of accounting policies, and goodwill was not amortized. (N.T., 6/23/97, at 12-16.)[5] Plaintiffs have not rebutted this testimony.

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[5] These GAAP requirements are not unimportant. If a financial statement is to provide users with meaningful information, it must be prepared in accordance with GAAP. Use of this universal accounting language "facilitates comparability, not only with the balance sheets of other corporations, but also -- for the same corporation -- with balance sheets from other accounting periods." D. Edward Martin, Attorney's Handbook of Accounting, Auditing, and

82. The court further finds that Mr. Forster's general and vague statement that Arrowroot Standard did not maintain "books and records detailing all transactions" to be conclusory, without any factual support, and cannot provide a basis upon which Standard can terminate the Joint Venture Agreement. (N.T., 6/23/97, at 13.) Moreover, this alleged breach was not specified in Standard's May 1, 1996 letter (Pls.' Ex. 3) as required by paragraphs 7.01(1) and 8.01 of the Joint Venture Agreement. (Def.'s Ex. 1.)

d. Fraud.

83. Defendant has not proven by clear and convincing evidence that plaintiffs intended to defraud defendant, or that plaintiffs knowingly made any materially false representations.

Having made the above Findings of Fact, the court makes the following:

III. CONCLUSIONS OF LAW.

1. The parties agree that Pennsylvania law governs the claims subject to this action.

A. Plaintiffs' Claims.

Financial Reporting, § 5.01[1], at 5-4 (1997). Notes to financial statements "are an essential element in the financial statement package -- indeed, they provide users with a wealth of background and information that simply cannot be obtained from reading the statements by themselves." Id. at § 7.01[1], at 7-2 (emphasis in original). To comply with GAAP, the notes to financial statements must disclose accounting policies. Id. at § 7.02[1], at 7-6. For example, the method used to account for inventory costs must be disclosed in a note, whether it be first-in, first-out (FIFO) method or the last-in, last-out (LIFO) method. The reader of the statement must know which method was used, for each method can produce significantly different financial results. Id. (N.T., 6/17/97, at 54-55.) Finally, good will must be amortized over the period estimated to be benefited by the asset. Id. at § 5.03[5], at 5-44.1. Failure to do so would have the effect of inflating the profit of the company. (N.T., 6/23/97, at 17.)

a. Failure to Transfer Business.

2. Plaintiffs have failed to prove that defendant has not transferred to Arrowroot Standard all orders for products required under the Joint Venture Agreement, with the exception of certain extemporaneous orders. Under the Joint Venture Agreement, Arrowroot Standard has the exclusive right to fill orders for extemporaneous products, i.e. those orders for small quantities of drugs not manufactured by Standard in bulk quantities, in those classes of trade and within the Territory specified in the Joint Venture Agreement. The intentional decision of Standard not to transfer all the extemporaneous orders required by the Joint Venture Agreement is a material breach of the Agreement. See Restatement (Second) of Contracts §§ 237, 241 (1981).

3. Under Pennsylvania law, plaintiffs have the burden of proving all essential elements of their breach of contract claim, including proof of damages. William B. Tanner Co., Inc. v. WIOO, Inc., 528 F.2d. 262, 271 (3d Cir. 1975). "[T]he measure of damages for breach of contract is compensation for the loss sustained." Id. (quoting Lambert v. Duralliam Products Corp., 364 Pa. 284, 286, 72 A.2d 66, 67 (1950)). "This loss may take the form of additional expenditures and failure to realize expected profits." Id.

4. When requesting damages for breach of contract, a party must be able to prove his damages with reasonable certainty. Damages cannot be awarded by guesswork. Id. at 271-72; American Air Filter Co., Inc. v. McNichol, 527 F.2d 1297, 1301 (3d Cir. 1975). Generally, under Pennsylvania law, however, "damages need not be proved with mathematical certainty, but only with reasonable certainty, and evidence of damages may consist of probabilities and inferences." Moore Push-Pin Co. v. Batching Systems, 1996 WL 131035, at*6

(E.D. Pa., Mar. 21, 1996) (quoting Delahanty v. First Pennsylvania Bank, 318 Pa.Super. 90, 118, 464 A.2d 1243, 1258 (1983)). See also Rochez Bros., Inc. v. Rhoads, 527 F.2d 891, 895 (3d Cir. 1975) ("Although the law does not command mathematical preciseness from the evidence in finding damages, sufficient facts must be introduced so that a court can arrive at an intelligent estimate without speculation or conjecture."), cert. denied, 425 U.S. 993 (1976).

5. With respect to the extemporaneous sales withheld by defendant, the measure of plaintiffs' damages is the profits they could reasonably expect to have received had defendant not breached the agreement. American Air Filter, 527 F.2d at 1300. Plaintiffs have failed to show with reasonable certainty the net profits Arrowroot Standard would have received from the sale of extemporaneous items withheld by defendant. Defendant has offered that the net profits from the sale of the extemporaneous items withheld would amount to $7,300. Thus, the court will award plaintiffs this amount, but no more since plaintiffs have failed to meet their burden of proving damages.

6. Plaintiffs' request for an accounting must be denied since plaintiffs' have an adequate remedy at law, i.e., a claim for damages. Dairy Queen, Inc. v. Wood, 369 U.S. 469, 478 (1962); American Filter Co., Inc. v. McNichol, 527 F.2d 1297, 1300 (3d Cir. 1975). "An accounting should not be used to aide [sic] a party who has otherwise failed to satisfy his burden of proof on the damages issue." Genica, Inc. v. Holophane Div. of Manville Corp., 652 F.Supp. 616, 619 (E.D. Pa. 1987). Plaintiffs had the opportunity, through discovery, to establish their damage claim. An accounting request is not a substitute for plaintiffs' obligation to establish their damages through discovery. First Commodity Traders, Inc. v. Heinold Commodities, Inc., 766 F.2d 1007, 1011 (7th Cir. 1985). See also United States v. Kithcart, No. 97-1168, slip op. at

15-16 (3d Cir. Jan. 12, 1998) (McKee, J. dissenting in part and concurring in part) ("I do not think it is asking too much to expect attorneys to attempt to meet their burdens of proof when issues are first litigated".)

b. Walker Luyties.

7. By purchasing the assets of the Luyties and forming Walker Laboratories, Inc., the defendant did not divert business that rightfully belonged to the joint venture.

8. "The rights, duties, and obligations of joint venturers, as between themselves, depend primarily upon the terms of the contract by which they assume that relationship." Snellbaker v. Herrmann, 315 Pa.Super. 520, 527, 462 A.2d 713, 716 (1983). Nothing in the Joint Venture Agreement prohibited the defendant from acquiring a separate company that competed with Arrowroot Standard. As found earlier by the court, Walker Laboratories, Inc. and Standard are distinct and separate entities, and plaintiffs have presented no evidence which would warrant this court to ignore the separate corporate identities of these companies.

9. While "a joint venturer owes a fiduciary duty of the utmost good faith and must act toward his associate with scrupulous honesty," Snellbaker, 462 A.2d at 718, the plaintiffs have not proven that defendant breached these fiduciary duties by purchasing the assets of Luyties and forming Walker Laboratories, Inc.

c. Fraud.

10. To prove a claim of fraud under Pennsylvania law, the plaintiffs must prove five elements by clear and convincing evidence: (1) a misrepresentation; (2) a fraudulent utterance thereof; (3) an intention by the maker that the recipient will thereby be induced to act;

(4) justifiable reliance by the recipient upon the misrepresentation; and (5) damage to the recipient as the proximate result. See City of Rome v. Glanton, 958 F.Supp. 1026, 1038 (E.D. Pa. 1997), aff'd, ___ F.3d ___ (3d Cir., Nov. 17, 1997) (Table).

11. Plaintiffs have not proven by clear and convincing evidence that defendant intended to defraud plaintiffs, or that defendant knowingly made any materially false misrepresentations.

12. At best, plaintiffs have proven that after the joint venture commenced, Arrowroot Standard did not receive a demand for the products in the amount of $1,000,000; plaintiffs have not established that at the time of the execution of the Joint Venture Agreement, the defendant knew that demand for its product would not meet this $1,000,000 figure and then intentionally misrepresented the amount of the demand.

d. Discount Price.

13. The Joint Venture Agreement provides that Arrowroot Standard would be charged "twenty five percent (25%) off the net published wholesale price, or at fifty five (55) percent off the net published suggested retail price, whichever is lower."

14. Standard's wholesale prices are found in the published wholesale price lists. (Pls.' Exs. 26a and 26b.) These lists clearly provide a discount when the purchaser buys a dozen or more quantities of the same item. For each dozen ordered, the purchaser would receive a discount equal to the price of one item.

15. Plaintiffs have proven that defendant materially breached the Joint Venture Agreement by not giving this discount as required by the terms of the Agreement. This court awards plaintiffs the amount of $41,520.00 on account of this claim. Plaintiffs have not proven

the amount of overcharges from May 31, 1997 to the date of trial. (Pls.' Ex. 26; N.T., 6/17/97, at 87, 6/18/97, at 5, 11.)

B. Counterclaims.

a. Royalties.

16. Arrowroot Standard owes Standard royalties pursuant to the Joint Venture Agreement. (Def.'s Exs. 7, 8; N.T., 6/19/97, at 166.) These royalties were for the sales of extemporaneous products.

17. The failure of Arrowroot Standard to remit royalty payments to Standard for sales of extemporaneous products cannot be a basis for termination of the Joint Venture Agreement at this time since Arrowroot Standard was justified in suspending its obligation to pay royalties because Standard materially breached the Joint Venture Agreement by not transferring all of the extemporaneous business to Arrowroot Standard. See United States ex re E.C. Ernst, Inc. v. Curtis T. Bedwell & Sons, Inc., 506 F.Supp. 1324, 1327 (E.D. Pa. 1981) ("A defaulting party to a contract ... cannot demand subsequent adherence to the terms of the contract by the other party"); Schlein v. Gross, 186 Pa.Super. 618, 624, 142 A.2d 329, 332 (1958) ("a material failure of performance by one party to a contract discharges the duty of the other party to perform the promise"). See also Restatement (Second) of Contracts § 237 (1981).

18. As explained below, Arrowroot Standard must pay all royalties owed to Standard within thirty (30) days if it wishes to avoid termination of the Joint Venture Agreement pursuant to paragraph 7.01 thereof. Standard's request for an accounting of the royalties must be denied since defendant has an adequate remedy at law should Arrowroot Standard not cure the breach. Paragraph 7.02 provides that on termination of the Agreement, any amounts owed by

Arrowroot Standard become immediately due and payable. Thus, after termination, Standard may pursue a breach of contract claim.

b. Accounts Receivable.

19. As explained in the court's Findings of Fact above, defendant has not proven that Arrowroot Standard has breached the Joint Venture Agreement by failing to pay the accounts receivable on a timely basis. The Paydown Agreement made in 1995 governs payment of outstanding receivables as of that date, and defendant has not shown that plaintiffs have not paid receivables in accordance with the terms of the Paydown Agreement since that date.

c. Plaintiffs' Books and Records.

20. As stated in the above Findings of Fact, defendant has proven that plaintiffs failed to comply with GAAP when it prepared its financial statements. Defendant claims that Arrowroot Standard's failure to provide financial statements which completely comply with GAAP inhibits its ability to assess its investment in Arrowroot Standard, and jeopardizes its relationship with its lender Merrill Lynch Business Management Services ("Merrill Lynch"). However, defendant has neither demonstrated that Merrill Lynch has refused to extend credit to Standard because of these three deficiencies in the financial statements, nor has Standard shown any appreciable harm from its inability to rely on Arrowroot Standard's financial statements. (See N.T. 6/20/97, at 48-50, 74-77.)

21. In contrast to these vague and nebulous allegations of harm to Standard, if the joint venture is terminated because of these three deficiencies in the financial statements, the majority shareholder of Arrowroot Standard will sustain a forfeiture of hundreds of thousands of dollars in assets that were invested in Arrowroot Standard.

22. In paragraph 7.01, the parties to the Joint Venture Agreement provided that either party could elect to terminate the Agreement if the other breached one of its terms, and the breach was not cured within 30 days after notification by the non-breaching party. Such a provision is not uncommon and "is operative in accordance with its own interpretation." 5A Corbin on Contacts § 1227, at 502 (1964).

23. Nonetheless, while this termination clause is enforceable, if its operation will result in a forfeiture, "equity should scrutinize the transaction to assure that all of the rights of the party from whom forfeiture is sought have been respected." Barraclough v. Atlantic Refining Co., 230 Pa.Super. 276, 281, 326 A.2d 477, 479 (1974). As noted earlier, Standard's exercise of the termination provision will result in the forfeiture of the majority shareholder's investment in the joint venture which amounts to over $400,000. The company will be forced to lay off most of its sixteen employees and will not be able to pay rent on the building it leases. "Equity, it has been said, abhors a forfeiture and is greatly hesitant to enforce one." Kalina v. Eckert, 345 Pa.Super. 220, 222, 497 A.2d 1384, 1385 (1985). The equitable doctrine of substantial performance has been developed by the courts to prevent forfeitures. As the Pennsylvania Superior Court in Barraclough stated:

> When a party has honestly and faithfully performed all material elements of its obligation under a contract, but has failed to fulfill certain technical obligations, causing no serious detriment to the injured party, it would be odious and inequitable to compel forfeiture of the entire contract.

Id., 230 Pa.Super. at 282, 326 A.2d at 480. Under the doctrine, the presence or absence of good faith of the party who would suffer the forfeiture is extremely important. Schlein v. Gross, 186 Pa.Super. 618, 625, 142 A.2d 329, 333 (1958). Conversely, the conduct of the party seeking

termination of the contract is also relevant. As the Pennsylvania Supreme Court has stated: "A party will not be permitted to take advantage of his own independent act to work a forfeiture of his own contract." Cerbo v. Carabello, 376 Pa. 571, 574, 103 A.2d 908, 909 (1954).

24. Applying these equitable principles, the court finds that Arrowroot Standard's non-performance of all of the terms of the Joint Venture Agreement -- the failure to maintain financial statements in accordance with GAAP and to pay royalties -- was justified by Standard's material breaches of the Agreement. Standard materially breached the Agreement first by intentionally not turning over all the extemporaneous business as required by the Agreement. This breach prompted Arrowroot Standard's refusal to pay royalties and to prepare its accounting records in accordance with GAAP. The earlier material breach by Standard justified the later non-performance by Arrowroot Standard. Furthermore, Arrowroot Standard later learned that Standard was not affording it the best wholesale price as required by paragraph 3.02(a) of the Joint Venture Agreement. This breach further justified Arrowroot Standard's non-performance of all the terms of the Agreement. See United States ex rel. E.C. Ernst, Inc., 506 F.Supp. at 1327; Totten v. Lampenfeld, 319 Pa.Super. 516, 520-21, 466 A.2d 663, 665 (1983); Schlein, 186 Pa.Super. at 624, 142 A.2d at 332; ; Restatement (Second) of Contracts § 237, at 237 (1981); II Farnsworth on Contracts § 8.15, at 435-36 (1990).

25. The court further finds that, other than the two instances cited above, Arrowroot Standard has substantially performed all of its obligations under the Joint Venture Agreement. Furthermore, Mr. Carapico, on behalf of Arrowroot Standard, acted in good faith and dealt fairly with Standard. Mr. Carapico suggested to Standard that he would pay royalties and cause Arrowroot Standard's records to be prepared in accordance with GAAP when Standard

fulfilled all of its obligations under the Joint Venture Agreement. See, e.g., Pls.' Ex. 6, 11, 30 and 35; N.T. 6/23/97 at 102-03; N.T. 8/2/96 at 28-29.) Furthermore, it was not until this litigation commenced, that Standard notified Arrowroot Standard specifically how its financial records were not in compliance with GAAP. (N.T., 6/20/97, at 109-11.)

26. For all the above reasons, defendant cannot terminate the Joint Venture Agreement, at this time, on the grounds that Arrowroot Standard has not paid royalties or prepared accounting records in accordance with GAAP.[6]

27. Therefore, plaintiffs' request for an injunction is partially granted. For a period of thirty (30) days from plaintiffs' receipt of this Memorandum of Decision,[7] defendant is enjoined from terminating the Joint Venture Agreement. During this thirty day period, plaintiffs shall be given an opportunity to cure the two defaults alleged by defendant, i.e., the payment of all royalties owed, and compliance of accounting records with GAAP[8], as provided in paragraph

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[6] At the Injunction Hearing and at trial, defendant failed to prove any of the other breaches of the Agreement by plaintiffs as alleged in the May 1, 1996 letter addressed to Mr. Carapico. (Pls.' Ex. 3.)

[7] This injunction shall terminate on **March 13, 1998**, which will allow three days for delivery of this Memorandum of Decision and accompanying orders to plaintiffs.

[8] In order to fulfill their obligation to maintain their financial records in accordance with GAAP by March 13, 1998, plaintiffs, at a minimum, must provide defendant with a letter of engagement from a certified public accountant and a detailed written statement from such accountant outlining the steps he or she intends to take to bring plaintiffs' financial records into compliance with GAAP. This court does not require plaintiffs to reconstruct all of their past financial records so that they comply with GAAP.

7.01 of the Agreement. Should plaintiffs not cure the two defaults within this time period, defendant may terminate the Agreement according to the terms of the Agreement.[9]

d. Fraud.

28. For the reasons set forth in the court's Findings of Fact, defendant has not established by clear and convincing evidence that plaintiffs committed fraud.

e. Punitive Damages.

29. Plaintiffs' request for punitive damages is denied since the court has found that the defendant did not commit fraud and these damages are not recoverable in an action for breach of contract. Thorsen v. Iron and Glass Bank, 328 Pa.Super. 135, 143, 476 A.2d 928, 932 (1984).

IV. CONCLUSION

For all the foregoing reasons, judgment will be entered in favor of plaintiffs and against defendant in the amount of $41,520.00 on plaintiffs' claim that Standard breached the terms of the Joint Venture Agreement by failure to provide its products to Arrowroot Standard at the prices specified in the agreement; and in the amount of $7,300.00 on their claim that Standard breached the terms of the Joint Venture Agreement by neglecting to transfer all of the extemporaneous business as required. On all other claims asserted by plaintiffs in the Amended Complaint, judgment will be entered in favor of defendant and against plaintiffs. A separate order granting plaintiffs' request for an injunction will be entered as set forth above.

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[9] Since plaintiffs elected to sue for damages for defendant's failure to turn over extemporaneous business and for overcharges, and the court has ruled on those claims, plaintiffs are no longer justified in nonperformance of all the terms and conditions of the Joint Venture Agreement because of defendant's infractions.

With respect to defendant's counterclaims, judgment will be entered in favor of plaintiffs and against defendant, without prejudice to defendant's right to terminate the Joint Venture Agreement, pursuant to Paragraphs 7.01 and 7.02, in the event that plaintiffs do not cure the two violations of the Agreement as explained more fully in this Memorandum of Decision and accompanying orders.

BY THE COURT:

_____

THOMAS J. RUETER
United States Magistrate Judge

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

ARROWROOT NATURAL PHARMACY, et al.	:	CIVIL ACTION
	:	
v.		
	:	
STANDARD HOMEOPATHIC COMPANY	:	NO. 96-3934

JUDGMENT ORDER

AND NOW, this 10th day of February, 1998, after trial and in accordance with the Memorandum of Decision issued this date, it is hereby

ORDERED

1. Judgment is entered in favor of plaintiffs and against defendant in the amount of $41,520.00 on plaintiffs' claim that Standard breached the terms of the Joint Venture Agreement by failing to provide its products to Arrowroot Standard at the prices specified in the Agreement;

2. Judgment is entered in favor of plaintiffs and against defendant in the amount of $7,300.00 on plaintiffs' claim that Standard breached the terms of the Joint Venture Agreement by neglecting to transfer all of the extemporaneous business as required;

3. On all other claims asserted by plaintiffs in the Amended Complaint, judgment is entered in favor of defendant and against plaintiffs; and

4. On all counterclaims asserted by defendant, judgment is entered in favor of plaintiffs and against defendant, without prejudice to defendant's right to terminate the Joint Venture Agreement, in the event that plaintiffs do not cure the two violations of the Agreement, as explained more fully in the court's Memorandum of Decision and accompanying orders.

BY THE COURT:

_____
THOMAS J. RUETER
United States Magistrate Judge

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

ARROWROOT NATURAL PHARMACY, et al.	:	CIVIL ACTION
	:	
v.		
	:	
STANDARD HOMEOPATHIC COMPANY	:	NO. 96-3934

O R D E R

AND NOW, this 10th day of February, 1998, after trial and in accordance with the Memorandum of Decision issued this date, it is hereby

ORDERED

that plaintiffs' request for an injunction is GRANTED IN PART. For a period of thirty (30) days from plaintiffs' receipt of this Order and accompanying Memorandum of Decision, defendant is enjoined from terminating the Joint Venture Agreement, pursuant to paragraph 7.01 thereof. During this (30) thirty day period, plaintiffs shall be given an opportunity to cure the two defaults found by this court, i.e., the payment of all royalties due under the Joint Venture Agreement and compliance of accounting records with GAAP, as provided in paragraph 7.01. Should plaintiffs fail to cure these two defaults within this time period, defendant may terminate

the Agreement according to its terms. This injunction shall terminate on **March 13, 1998 at 5:00 p.m., E.S.T.** , which will permit three days for delivery of this order and the court's Memorandum of Decision to the parties.

BY THE COURT:

_____

THOMAS J. RUETER
United States Magistrate Judge