Sandra C. Goldstein, P.C.
Atif N. Khawaja, P.C.
John P. Del Monaco
Alexandra Strang
KIRKLAND & ELLIS LLP
601 Lexington Avenue
New York, NY 10022
United States
Telephone: +1 212 446 4800
Facsimile: +1 212 446 4900

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

AVI DORFMAN and RENTJOLT, INC., Plaintiffs, - against - ROBERT REFFKIN and URBAN COMPASS, Defendants.	Index No.: 652269/2014 I.A.S. Part: Part 48 Justice Andrea Masley Motion Seq. No.: 010 Oral Argument Requested

MEMORANDUM OF LAW IN SUPPORT OF PROPOSED ORDER TO SHOW CAUSE TO PRECLUDE EVIDENCE REGARDING DORFMAN'S ALLEGED DAMAGES THEORY

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Defendants Robert Reffkin and Urban Compass ("Compass") respectfully move to preclude Plaintiff Avi Dorfman from arguing that the jury should award him damages premised on the current value of Compass stock. New York law does not permit such an expectation remedy for the two quasi-contract claims still pending, and, as a result, any evidence or argument in support of such a damages theory would be irrelevant and confusing to the jury.

PRELIMINARY STATEMENT

The Plaintiff in this case intends to ask the jury to award him the present value of an equity stake in Compass as a remedy for his unjust enrichment and quantum meruit claims. This Court should preclude him from doing so. Never before has any New York court allowed a plaintiff to recover an equity stake (or its monetary equivalent) for a successful unjust enrichment or quantum meruit claim. The reason why is straightforward: under New York law, the remedy for quasi-contractual claims like unjust enrichment and quantum meruit is restitution. Restitution is a limited remedy that is meant to return parties to the position they would have been in had the alleged misconduct never occurred. *See, e.g.*, *N.Y.C. Econ. Dev. Corp. v. T.C. Foods Imp. & Exp. Co*., 819 N.Y.S.2d 849 (Sup. Ct. 2006) (restitution is meant to "put the parties back into the position they were in before the unjust enrichment occurred"), *aff'd*, 46 A.D.3d 778 (2d Dep't 2007). It is backward looking and focused on remediating costs to the plaintiff.

Here, however, Dorfman is seeking damages based on what he now says he ***expected*** to receive in exchange for, by some measures, approximately 80 hours of work that he allegedly performed while Defendant Reffkin was developing the idea for Compass. This work consisted of tasks like drafting a rudimentary business plan and helping prepare slides for use with potential investors. Although Dorfman cannot point to a single instance in which he asked for any compensation for these services *before* doing this work, he nevertheless now maintains he should receive the equivalent of between 5.96% and 6.91% of Compass's stock, which his experts say

would be worth between $68,434,252 and $79,292,687. (*See* NYSCEF Doc. No. 444, Ex. 1 Expert Report of P. Garth Gartrell ¶ 2; NYSCEF Doc. No. 445, Ex. 2 Pls.' Suppl. Resps. & Objs. Compass & Reffkin's Interrogs. No. 14.)[1]

Awarding Dorfman this type of windfall would go far beyond the limited remedy available under New York law for unjust enrichment and quantum meruit. It would instead provide a forward-looking recovery based on what Dorfman allegedly expected to receive. That type of "benefit-of-the-bargain"-like recovery might be allowable in a breach-of-contract case, but Dorfman has no such claim remaining here—the Court already rejected Dorfman's breach-of-implied-contract arguments. (NYSCEF Doc. No. 446, Ex. 3 Mot. Dismiss Hr'g Tr. at 51:13-17 (dismissing Dorfman's breach of implied contract claim).) In seeking to recover sums tied only to what he claims he ***expected*** to receive, Dorfman's damages theory is incongruous with the remedy afforded to him under New York law. Allowing him to present that theory to the jury would accordingly be prejudicial and confusing. This Court should preclude it.

BACKGROUND

In this case, Dorfman seeks damages calculated as a percentage of Compass stock as compensation for work he alleges he performed between mid-July 2012 and early September 2012, before Compass was incorporated. (NYSCEF Doc. No. 47 Am. Compl. ¶¶ 31, 40, 66.) These "contributions" allegedly included preparing a 120-day business plan, composing slides for an investor presentation, and helping to "recruit[]" an engineer—work that took around 80 hours total. (*Id*. ¶¶ 41-43, 45, 53-54.) Over two years after Dorfman purportedly performed these services—and only after Compass grew to enormous success without him—Dorfman sued, alleging that he

[1] All exhibits are attached to the affirmation of John P. Del Monaco, Esq., NYSCEF Doc. No. 443, filed contemporaneously herewith.

performed those services with an expectation that "he would be given a role as a founding team member, with a founder's share of at least 10% of the equity in the new company." (*Id.* ¶ 57.) On this theory, Dorfman and RentJolt brought this seven-count action seeking a multi-million dollar payday in the form of an equity stake as compensation for a few weeks' worth of work.[2] This Court has already dismissed most of Dorfman's claims, including an implied contract claim between Dorfman and Defendants. (NYSCEF Doc. No. 446, Ex. 3 Mot. Dismiss Hr'g Tr. at 51:13-17.)[3] Dorfman has just two causes of action remaining: unjust enrichment and quantum meruit.[4]

At trial, Dorfman intends to ask the jury to award him a significant percentage of the present value of Compass as damages for those claims. To support that damages theory, Dorfman will proffer the testimony of two purported experts, P. Garth Gartrell and Edward S. O'Neal, to corroborate Dorfman's expectation interests. Gartrell purports to opine on the amount of equity that Dorfman would have been entitled to if he had not been "excluded" from Compass (*see* NYSCEF Doc. No. 444, Ex. 1 Expert Report of P. Garth Gartrell ¶¶ 1-2, 5), and O'Neal will then attempt to value the Compass equity stake put forward by Gartrell (*see* NYSCEF Doc. No. 445, Ex. 2 Pls.' Suppl. Resps. & Objs. Compass & Reffkin's Interrogs. No. 14).

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[2] The seven causes of action that Dorfman and RentJolt brought against Reffkin and Compass were breach of contract (brought by RentJolt only), fraud in the inducement, unjust enrichment, quantum meruit, misappropriation of trade secrets (brought by RentJolt only), negligent misrepresentation (brought by Dorfman only), and breach of implied contract. (NYSCEF Doc. No. 47 Am. Compl. ¶¶ 73-121.)

[3] *See also* NYSCEF Doc. No. 446, Ex. 3 Mot. Dismiss Hr'g Tr. at 19:9-21, 28:4-15 (dismissing fraud in the inducement claim); *id.* at 52:25-53:4 (dismissing RentJolt's unjust enrichment and quantum meruit claims); *id.* at 39:17-25 (dismissing RentJolt's misappropriation of trade secrets claim); *id.* at 40:15-23 (dismissing Dorfman's negligent misrepresentation claim).

[4] RentJolt's claim for breach of contract, predicated on an alleged breach of a non-disclosure agreement, is the only other surviving claim. It is not pertinent to this motion.

Notably, O'Neal does not attempt to value the equity stake of the new venture as of 2012 when Dorfman performed the alleged services (which would account for the risks and uncertainties the venture faced before it was even formed and had a product). *Cf. Simon v. Electrospace Corp.*, 28 N.Y.2d 136, 145 (1971) (noting in breach of contract case that damages awards of stock value are properly measured at the time of the alleged breach). Instead, O'Neal purports to calculate the monetary value of Dorfman's theoretical equity stake based on Compass's value seven years after the time that Dorfman alleges he performed services on Compass's behalf. (NYSCEF Doc. No. 445, Ex. 2 Pls.' Suppl. Resps. & Objs. Compass & Reffkin's Interrogs. No. 14.) According to O'Neal's most current expert report, Dorfman's work in the summer of 2012 entitles him to damages, using Gartrell's equity ranges of 5.96% to 6.91% of Compass stock, equaling between $68,434,252 and $79,292,687. (NYSCEF Doc. No. 444, Ex. 1 Expert Report of P. Garth Gartrell ¶ 2; NYSCEF Doc. No. 445, Ex. 2 Pls.' Suppl. Resps. & Objs. Compass & Reffkin's Interrogs. No. 14.)

ARGUMENT

Dorfman's request for the value of an equity stake in Compass for services he allegedly rendered in the summer of 2012 is untenable. Unjust enrichment and quantum meruit theories are restitutionary in nature; if successful, they would allow Dorfman to recover the opportunity cost of the time he spent working for Reffkin, but they would not entitle him to the money he claims he expected to earn from doing the same. This Court should accordingly preclude Dorfman from presenting evidence or argument regarding his alleged entitlement to an equity stake. Any such evidence or argument would be irrelevant to the damages that are legally cognizable for Dorfman's remaining claims and would accordingly be prejudicial and confusing to the jury. *See Caster v. Increda-Meal, Inc.*, 238 A.D.2d 917, 918 (4th Dep't 1997) (excluding evidence that was irrelevant and had "significant potential to unduly prejudice defendant"); *see also Mazella v. Beals*, 27

N.Y.3d 694, 709 (2016) ("To be admissible, evidence must be relevant and its probative value outweigh the risk of any undue prejudice.").

I. RECOVERY FOR UNJUST ENRICHMENT AND QUANTUM MERUIT IS LIMITED TO RESTITUTION.

As noted, Dorfman's only remaining claims are for unjust enrichment and quantum meruit. Claims for unjust enrichment sound in restitution, *see Edelman v. Starwood Capital Grp., LLC*, 70 A.D.3d 246, 250 (1st Dep't 2009), which requires the plaintiff to be "restored to the position he formerly occupied either by the return of something which he formerly had or by the receipt of its equivalent in money." *Rest. (First) of Restitution* § 1 cmt. a. Therefore, "[r]ecovery on a claim premised upon quasi-contract or unjust enrichment is limited to the reasonable value of the services rendered by the plaintiff." *Collins Tuttle & Co. v. Leucadia, Inc.*, 153 A.D.2d 526, 527 (1st Dep't 1989); *see also DG&A Mgmt. Servs., LLC v. Sec. Indus. Ass'n Compliance & Legal Div.*, 78 A.D.3d 1316, 1318 (3d Dep't 2010) ("[T]he proper measure of plaintiff's damages is the reasonable value of the services performed for defendant."). Likewise, a quantum meruit claim implies "[t]he obligation of the defendant to pay reasonable compensation for the services" provided. *Blye v. Colonial Corp. of Am.*, 102 A.D.2d 297, 299 (1st Dep't 1984) (internal quotation marks omitted); *see also* 22A N.Y. Jur. 2d Contracts § 605 ("[W]hen the law implies a promise to pay for services, the promise is to pay the reasonable value of such services.").

II. DORFMAN CANNOT RECOVER DAMAGES BASED ON HIS EXPECTATIONS OR THE RESULTING BENEFIT OF HIS SERVICES TO COMPASS.

Given this backdrop, courts in New York and elsewhere have consistently held that plaintiffs seeking to recover for unjust enrichment or quantum meruit cannot recover damages based on expected profits or based on the value of the resulting benefit their services inure to the recipient. Dorfman's request for equity, however, falls into both of these impermissible categories, providing additional bases for preclusion.

A. Dorfman's Alleged Expectation that He Would Receive Equity Is Irrelevant.

First, courts have consistently held that plaintiffs bringing quasi-contract claims cannot recover damages based on their expected profits from providing the relevant goods or services. *See, e.g.*, *Martin H. Bauman Assocs., Inc. v. H&M Int'l Transp., Inc.*, 171 A.D.2d 479, 484 (1st Dep't 1991) (noting quasi-contract actions are "not a device wherein a plaintiff may enforce a purported agreement which might ultimately be found not to be viable"); *Fallon v. McKeon*, 230 A.D.2d 629, 630 (1st Dep't 1996) (holding that the plaintiff "fail[ed] to make out a claim for unjust enrichment" when, "instead of identifying the reasonable value of services rendered by plaintiff," the plaintiff claimed expectation damages on a failed contract); *Gonick v. Adirondack Research & Mgmt., Inc.*, 57 Misc.3d 1203(A), 2017 WL 4228900, at *10, 2017 N.Y. Misc. LEXIS 3569, at *10 (Sup. Ct. Sept. 20, 2017) (holding that the plaintiff "cannot recover the benefit of his alleged bargain" on quasi-contract claims because "[r]ecovery in quasi contract is restitutionary in nature and generally is limited to the reasonable value of the services or contributions rendered by the plaintiff to the defendants"). That is because expected profits, like expectation damages in a breach-of-contract case, go beyond what is allowed in restitution.

In *Davis v. Cornerstone Telephone Co.*, for example, the plaintiff sought to recover a share of the profits accruing to a defendant startup, for which he allegedly provided seed money, discounted office space, and telephone services. 25 Misc.3d 1071, 1072 (Sup. Ct. 2009), *aff'd*, 78 A.D.3d 1263, 1265 (3d Dep't 2010). With the case trimmed to just an unjust enrichment claim, the court denied the plaintiff's discovery requests regarding the startup's profits, finding them irrelevant to the plaintiff's potential damages. *See id.* at 1073. The court explained that the plaintiff might "be entitled to restitution for the value of his contributions to defendants," but his pursuit of a portion of the startup's profits "would improperly establish something like [the plaintiff's] expectation interest under the failed contract, not the restitution . . . interest that is the

proper focus of quantum meruit." *Id.* (alterations omitted) (internal quotation marks omitted); *see also id.* at 1074 (concluding that the "defendants' subsequent profits or losses, whether related to plaintiff's contributions or not, are irrelevant"). Instead, the plaintiff's damages rate would be based "on a reasonable hourly rate multiplied by the actual number of hours Plaintiff provided services to the Defendants." *Id.* at 1075 (internal quotation marks omitted).

Collins Tuttle & Co. v. Leucadia, Inc. is equally instructive. 153 A.D.2d 526. That case involved a renting agent whose sole contribution to a lease of property was preparing a real estate brochure that described the premises for rent. *Id.* at 526. When a second renting agent found a tenant for the premises, the plaintiff agent sued for half the commission. *Id.* at 527. The First Department denied this relief. Because the plaintiff renting agent did not have an exclusive agreement with the seller, the court held that he could not recover his expectation interest—that is, half the commission—but was instead limited to the "reasonable value of the services" that he rendered, which was "the value of the brochure . . . [he] prepared." *Id.*

As in those cases, Dorfman's allegedly expected equity stake in Compass is not a measure of the reasonable value of his supposed contributions. It instead generously approximates the value Dorfman alleges he unilaterally ***expected*** to receive for his purported services to the company. (*See* NYSCEF Doc. No. 47, Am. Compl. ¶ 57 (alleging that "Dorfman performed all the work . . . with the understanding that . . . he would be given a role as a founding team member, with a founder's share of at least 10% of the equity in the new company").) But that is fundamentally a breach-of-contract remedy, not restitution. *See Emposimato v. CICF Acquisition Corp.*, 89 A.D.3d 418, 421 (1st Dep't 2011).[5] Notably, Defendants are unaware of a single New

[5] Expectation damages are an appropriate remedy for a breach-of-contract claim in part because the law imposes certain protections on parties that have entered contracts, including that the contract must state a sufficiently definite compensation term in order to be enforced. *See, e.g.*,

York court that has ***ever*** awarded a plaintiff an equity stake in a company (or the monetary equivalent) as a remedy for a successful unjust enrichment or quantum meruit claim.[6] The absence of any such case further confirms that such damages would be inappropriate in this context.

B. Dorfman Cannot Recover Damages Based on the Alleged Benefit of His Services to Compass Over the Past Seven Years.

Dorfman's damages theory also fails because it would award him damages that reflect Compass's growth over the past seven years, which would give him a windfall. Again, unjust enrichment and quantum meruit remedies should return to Dorfman only his opportunity cost—that is, the market value of his services. In seeking to recover an ownership interest in Compass, Dorfman goes well beyond that amount.

Reflecting this limitation, courts in other jurisdictions have held that attempting to award compensation based on the "resulting benefit" to the recipient of services is improper. In *Maglica*

Freedman v. Pearlman, 271 A.D.2d 301, 303 (1st Dep't 2000) (declining to give effect to a contract where compensation terms "were too indefinite to be enforced"). No such protection exists for a quasi-contract claim, which, by definition, can only lie where a contract does not exist. *See Clark-Fitzpatrick, Inc. v. Long Island R. Co.*, 70 N.Y.2d 382, 388-89 (1987) ("[A] quasi-contractual obligation is one imposed by law where there has been no agreement or expression of assent, by word or act, on the part of either party involved." (internal quotation marks omitted) (emphasis omitted)).

[6] In a minority of cases, courts have found that a plaintiff can seek a damages measure different from an hourly rate as the reasonable value of services if the plaintiff can show a "clear and accepted marketplace convention" for valuing the services at issue. *See, e.g.*, *Learning Annex Holdings, LLC v. Rich Global, LLC*, No. 09 Civ. 4432(SAS), 2012 WL 2878124, at *4-5, 2012 U.S. Dist. LEXIS 97837, at *15 (S.D.N.Y. July 13, 2012) (granting licensing agent standard 35% commission based on expert testimony and a "Licensing Handbook" stating that this commission was a marketplace convention); *Abrams Realty Corp. v. Elo*, 279 A.D.2d 261, 261 (1st Dep't 2001) (permitting real estate broker to earn a commission in a quasi-contract claim because the commission was "the prevailing, normal and accepted rate[]" for brokerage services). These cases have no bearing here because a stock grant in a company is very different from commission-based compensation for the reasons discussed. As noted, no New York court appears to have ever awarded equity as a remedy for an unjust enrichment or quantum meruit.

v. Maglica, for example, the court considered the claim of a plaintiff who had helped her long-term boyfriend build a machine-shop business. 78 Cal. Rptr. 2d 101, 103 (Ct. App. 1998). Although the plaintiff had "worked side by side" with her boyfriend to build the business, he incorporated the business and kept all the corporation's shares in his own name. *Id.* The plaintiff sued for an equity stake in the business on theories of quantum meruit, among others, claiming that she should be entitled to the "resulting benefit" of her services through an award of equity. *Id.* at 103, 105 (internal quotation omitted). The court, however, rejected the plaintiff's argument. It held that the "[r]esulting benefit is an open-ended standard, which . . . can result in the plaintiff obtaining recovery amounting to de facto ownership in a business all out of reasonable relation to the value of services rendered." *Id.* at 105. The resulting benefit of services, the court explained, "is not necessarily related to the reasonable value of a particular set of services. Sometimes luck, sometimes the impact of others makes the difference. Some enterprises are successful; others less so." *Id.* at 105-06; *see also Galaxy Networks, Inc. v. Kenan Sys. Corp.*, 225 F.3d 662 (9th Cir. 2000) (unpublished) (holding that the law "does not allow quantum meruit recovery to be based exclusively on the resulting benefit of services rather than the reasonable value of beneficial services" (internal quotation marks omitted)).

Stock is therefore an inapt measure of the reasonable value of services because it could "result in a windfall" in some cases and "a serious shortfall in others." *Maglica*, 78 Cal. Rptr. 2d at 106. Neither value would be tied to the amount that would restore the plaintiff. Thus, courts cannot award the monetary value of a stock or equity interest and thereby "use quantum meruit to impose a highly generous and extraordinary contract that the parties did not make." *Id.*

Another court reached a similar result in *Fail-Safe, L.L.C. v. A.O. Smith Corp.*, where the plaintiff, pursuing an unjust enrichment claim, sought a portion of the actual and future proceeds

of a product that the plaintiff argued incorporated its "technical information, instruction, and assistance." 744 F. Supp. 2d 870, 896 (E.D. Wis. 2010). The court rejected this request and refused to "restore the benefit of some sort of bargain related to a breach of a contract" because "the purpose of an unjust enrichment [claim] is to restore the aggrieved party to its former position by return of the goods and services provided or the money equivalent." *Id.* at 897.

Similarly here, Dorfman seeks to transform a few weeks of time into a windfall approaching $80 million. Such a value is grossly out of proportion to the value it would take to restore Dorfman for the purported services he performed, again demonstrating that equity is the wrong measure of restitution. *See Maglica*, 78 Cal. Rptr. 2d at 105-06. Dorfman cannot parlay a quasi-contract claim into an equity stake in Compass because his recovery—if any—is limited to the reasonable value of his services. *See Moors v. Hall*, 143 A.D.2d 336, 337-38 (2d Dep't 1988). An equity stake, which seeks to approximate the purported resultant benefit of Dorfman's services, is simply not an appropriate measure of the reasonable value of Dorfman's services.[7]

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court preclude Dorfman from introducing argument or evidence that would calculate his alleged damages by reference to an equity stake in Compass.

[7] Even if the Court were to allow Dorfman to seek damages based on an expected equity stake in Compass (which, to be clear, it should not do as a matter of New York law), the value of that equity should be fixed at the time Dorfman's claim accrued. *See, e.g.*, *Lionhart Global Appreciation Fund, Ltd. v. Essential Resources, Inc.*, 302 A.D.2d 334, 334 (1st Dep't 2003) (holding that "[t]he court . . . reasonably valued the subject stock on the basis of their average trading value during the week that plaintiff attempted to have them transferred" in a breach-of-contract case). Thus, any evidence or argument regarding Compass's subsequent valuations is irrelevant, prejudicial, and should be precluded.

Dated: New York, New York
October 28, 2019

Kirkland & Ellis LLP

By: */s/ Atif N. Khawaja, P.C.*
Atif N. Khawaja, P.C.

Sandra C. Goldstein, P.C.
Atif N. Khawaja, P.C.
John P. Del Monaco
Alexandra Strang
KIRKLAND & ELLIS LLP
601 Lexington Avenue
New York, NY 10022
United States
Telephone: +1 212 446 4800
Facsimile: +1 212 446 4900

Attorneys for Defendants
Robert Reffkin and Urban Compass

CERTIFICATE OF LENGTH COMPLIANCE

The foregoing memorandum complies with Rule 17 of Section 202.70 of the Uniform Rules of the Supreme Court and County Court because it is less than 7,000 words, excluding the parts of the memorandum otherwise exempted.

/s/ Atif N. Khawaja, P.C.

Atif N. Khawaja, P.C.
KIRKLAND & ELLIS LLP
601 Lexington Avenue
New York, New York 10022
Telephone: (212) 446-4800
Facsimile: (212) 446-4900
Email: atif.khawaja@kirkland.com

Counsel for Defendants
Robert Reffkin and Urban Compass