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

PRESENT: Hon. KARLA MOSKOWITZ PART 03
Justice

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STEPHEN RICH,

Plaintiff,

-against-

JPMORGAN CHASE & CO. and J.P. MORGAN INVESTMENT MANAGEMENT INC.,

Defendants.

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INDEX NO 604460/2005

MOTION DATE _____

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits _____	_____
Answering Affidavits — Exhibits _____	_____
Replying Affidavits _____	_____

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is

ORDERED that this motion is decided in accordance with the accompanying Decision and Order.

Dated: October 03, 2006

KARLA MOSKOWITZ J.S.C.

Check one: ☐ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 3

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STEPHEN RICH,

Plaintiff,

Index No. 604460/05

-against-

JPMORGAN CHASE & CO. and J.P. MORGAN INVESTMENT MANAGEMENT INC.,

Decision and Order

Defendants.

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KARLA MOSKOWITZ, J.:

This lawsuit involves a dispute between a former employee, plaintiff Stephen Rich ("Rich"), and his former employer, defendants JPMorgan Chase & Co. ("JPMC") and J.P. Morgan Investment Management, Inc. ("JPMIM"), over the retention of unvested restricted stock and unexercised stock options. Specifically, plaintiff alleges wrongful withholding of wages in violation of New York Labor Law Article 6 and breach of contract with regard to the bonus plan for restricted stock and stock options that defendants (collectively "JPM") offer employees. (Complaint ¶¶ 42, 46). By this motion (sequence number 001), JPM moves to dismiss all causes of action against it pursuant to CPLR 3211(a)(1) and (a)(7). Plaintiff also seeks leave to replead his complaint to add claims for breach of oral contract and quantum meruit. (Plaintiff's Memorandum of Law in Opposition to Defendants' Motion to Dismiss, pp 13-14). The court grants defendants' motion to dismiss and denies plaintiff's request to replead his complaint.

FACTS

The following facts are primarily from the complaint and other papers the parties submitted on this motion.

Plaintiff initially worked for JPM from 1991 to 1999 as an Assistant Vice President and Vice President in the Structured Equity, Balance Group and Small Cap Group but left in August 1999 to join Citigroup Asset Management as Vice President. (Complaint ¶¶ 5-6). By summer 2001, however, Rich had returned to JPM because the company made him Vice President in the U.S. Equity Small Cap department and promised eventually to name him head of that department. (*Id.* ¶¶ 8-9). In addition to his base salary, Rich received a signing bonus, a guaranteed bonus for 2001, a cash payment in January 2002 for his forfeited Citigroup stock and an award of JPM stock options in January 2002 for forfeited Citigroup stock options. (*Id.* ¶ 10; Defendants' Memorandum of Law in Support of Their Motion to Dismiss, pp 2-3).

In August 2002, JPM experienced management problems, and, as a result, it fired eight of the fourteen people in the Small Cap group but asked Rich to restructure the group. (*Id.* ¶¶ 14-15). During 2003 and 2004, other key personnel left JPM (Marian Pardo, Manager of the Small Cap portfolio and strategy; Rich Nelson, Managing Director at JPM; and Juliet Ellis, Manager of the Chase Heritage team). (*Id.* ¶¶ 17, 19, 22). Plaintiff claims that none of these individuals forfeited restricted stock or stock options despite their voluntary departure from JPM for competitors. (*Id.* ¶¶ 18, 20, 23). JPM, however, maintains that it eliminated Marian Pardo's position, so her restricted stock immediately vested pursuant to JPMC's Terms and Conditions for Restricted Stock. (Pilbat Aff. ¶ 18; *see also* Pilbat Aff., Exh. G at ¶ 2(b) [listing job elimination as one condition for the vesting of restricted stock]). Regarding Rich Nelson and Juliet Ellis, defendants assert that neither one retained unvested restricted stock or unexercised stock options because both left voluntarily and voluntary departure does not confer rights to the vesting or retention of restricted stock or stock options. Instead, JPM cancels the unvested

restricted stock and outstanding stock options of employees who resign. (Pilbat Aff. ¶¶ 19-20).

Plaintiff made his decision to leave JPM in January 2004. He states that changes in job responsibilities and greatly reduced prospects for managing his own fund at JPM led to his resignation. (Complaint ¶ 24). In a letter to JPMIM dated January 30, 2004, Rich informed the company of his departure. (Mormando Reply Aff. ¶6). He wrote, "This letter serves as formal notification of my resignation from JP Morgan Fleming Asset Management." (Mormando Reply Aff., Exh. A). In addition, plaintiff requested, "As a condition of my separation I would like to retain my unvested and restricted JP Morgan stock and options that have been granted to me as part of my past compensation. It is my belief that I satisfy the conditions to retain these awards." (*Id.*). According to plaintiff, defendants assured him they would give "complete consideration" to his request. (Complaint ¶ 28). Explaining that Rich did not meet the vesting requirements, JPM denied his request and informed him by voicemail on his last day of work. (*Id.* ¶ 30).

JPM provides vesting requirements for its Long-Term Incentive Plan ("LTIP") in the Prospectus and the Terms and Conditions. JPM reserves the right, through its Compensation and Management Development Committee of its Board of Directors ["Committee"], to determine the Terms and Conditions of the Plan and specifically any provisions "restricting or terminating [an employee's] right to exercise an award following termination of [] employment or other forfeiture provisions." (Pilbat Aff., Exh. C, p 2 [1996 Long-Term Incentive Plan Prospectus]). The availability of LTIP awards depends on the performance of the company. Specifically, the Committee may "make awards subject to satisfaction of performance targets . . . . [that] may include, among others, targets based on [JPM] stock price, shareholder value added, earnings per share, income before or after income tax expense, return on common equity, revenue growth . . .

or the profitability or performance of an identifiable business unit. The foregoing targets may be applied to JPMorgan Chase, one or more JPMorgan subsidiaries, or one or more of JPMorgan Chase's divisions or business units." (Pilbat Aff., Exh. C, p 2).

JPM treats restricted stock and stock options differently, but the company delays both the vesting of restricted stock and the exercising of stock options "to encourage selected employees . . . to acquire a proprietary and vested interest in the growth and performance of the Company, to generate an increased incentive to contribute to the Company's future success and prosperity . . . ." (Pilbat Aff., Exh. B, ¶ 1; *see also* Defendants' Memorandum of Law in Support of Their Motion to Dismiss, p 3 [stating restricted stock will not vest for a specified number of years and stock options may not be exercisable later than ten years after the initial grant]). Selected employees must be eligible for awards. The LTIP defines eligibility as "[a]ll employees who have demonstrated significant management potential, have contributed to the successful performance of the Company, or have the potential of making such contributions to the Company in the future, in each case as determined by the Committee, are eligible to be Participants in the Plan." (Pilbat Aff., Exh. B, ¶ 4).

For restricted stock, JPM applies special vesting provisions for voluntary termination and will allow restricted stock to continue to vest if:

> (i) As of the date of termination, the Grantee has at least 5 years of continuous service as an employee.
> (ii) As of the date of termination, the sum of the Grantee's age and cumulative service, as determined by the Director Human Resources, with J.P. Morgan Chase equals or exceeds 45.
> (iii) During the vesting period, the Grantee does not perform services for a competitor in any capacity.

(Pilbat Aff. ¶ 14; Pilbat Aff., Exh. I, ¶ 2(d)). In defendants' assessment, plaintiff satisfied neither

the first nor the last condition because, during his most recent period of employment with JPM (2001 to 2004), he had approximately two and one-half years of employment and he left JPM for a competitor, Mutual of America Life Insurance Company ("Mutual"). (Pilbat Aff. ¶ 14). Defendants explain that Mutual competes with JPMC "because it provides financial services that various subsidiaries of JPMC also provide." (Defendants' Memorandum of Law in Support of Their Motion to Dismiss, p 6). According to the Terms and Conditions, only the defendants determine if a company is a competitor. They define competitor as a business enterprise that, in any way, "competes with any activity in which JPMorgan Chase or any of its subsidiaries is engaged in any place in the world." (Pilbat Aff., Exh. I, ¶ 2[d]). Plaintiff contests defendants' assessment of conditions one and three by asserting that his employment from 1991 to 1999 satisfies the first condition and that Mutual is not a competitor so he meets the third condition. (Complaint ¶¶ 34, 36). Plaintiff and defendants agree that 1,967 restricted shares of JPM stock from 2003 and 1,527 shares from 2004 are at issue and that JPM cancelled those shares. (Complaint ¶¶ 38-39; Pilbat Aff. ¶ 13).

For stock options, JPM does not use the special vesting provisions, but certain exceptions will permit employees to exercise outstanding stock options, such as retirement, job elimination, disability or death. (Pilbat Aff., Exh. E, ¶ 3). According to defendants, no exceptions apply to plaintiff. (Pilbat Aff. ¶ 16). Plaintiff, however, believes his stock options constituted part of his overall compensation package that JPM promised in 2001 to convince plaintiff to re-join the company. (Complaint ¶ 38). Defendants state plaintiff received 4,601 stock options, but 2,563 of them had not yet become exercisable when plaintiff resigned. (Defendants' Memorandum of Law in Support of Their Motion to Dismiss, p 5). JPM thus cancelled the unexercised options

pursuant to the Terms and Conditions. (*See* Pilbat Aff., Exh. E, ¶ 3). Plaintiff and defendants agree that JPM cancelled 2,563 stock options on February 13, 2004. (Complaint ¶ 38; Pilbat Aff. ¶ 15).

DISCUSSION

Defendants move to dismiss this action on the grounds that "a defense is founded upon documentary evidence" (CPLR 3211[a][1]) and that "the pleading fails to state a cause of action" (CPLR 3211[a][7]). On a motion to dismiss for failure to state a claim, "the court should accept as true the facts as alleged in the complaint, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." (*Ark Bryant Park Corp. v Bryant Park Restoration Corp.*, 285 AD2d 143, 150 [1st Dept 2001] [citations omitted]). In addition, "[i]n those circumstances where the legal conclusions and factual allegations are flatly contradicted by documentary evidence, they are not presumed to be true or accorded every favorable inference and the criteria becomes 'whether the proponent of the pleading has a cause of action, not whether he has stated one.'" (*Id.*, quoting *Guggenheimer v. Ginzburg*, 43 NY2d 268, 275 [1977]). Specifically, a court may grant a motion to dismiss on documentary evidence "only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." (*Ladenburg Thalmann & Co. v. Tim's Amusements, Inc.*, 275 AD2d 243, 246 [1st Dept 2000] [citation omitted]).

I. Defendants' Motion to Dismiss Plaintiff's Labor Law Claims

Under Article 6 of New York Labor Law, wages include "the earnings of an employee for labor or services rendered, regardless of whether the amount of earnings is determined on a time, piece, commission or other basis. The term 'wages' also includes benefits or wage supplements .

. . ." (Labor Law § 190 [1]). Labor Law § 198-c defines "benefits or wage supplements" as "reimbursement for expenses; health, welfare and retirement benefits; and vacation, separation or holiday pay." Plaintiff seeks retention of his unvested restricted stock and his unexercised stock options because, he argues, they constitute wages within the meaning of Labor Law § 190 (1). (Complaint ¶ 41). Defendants contest this classification, for "[s]tate and Federal courts in New York uniformly have held that discretionary incentive compensation or bonus plans similar to the LTIP do not constitute 'wages' as defined by the Labor Law." (Defendants' Memorandum of Law in Support of Their Motion to Dismiss, p 14).

"Courts have construed this statutory definition [of wages in Labor Law § 190(1)] as excluding certain forms of 'incentive compensation' that are more in the nature of a profit-sharing arrangement and are both contingent and dependent, at least in part, on the financial success of the business enterprise." (*Truelove v Northeast Capital & Advisory, Inc.*, 95 NY2d 220, 223-24 [2000] [citations omitted]; *see also Dean Witter Reynolds, Inc. v Ross*, 75 AD2d 373, 380 [1st Dept 1980] ["The term 'wages,' despite its broad definition [under § 190], does not encompass an incentive compensation plan."]). When an employer offers compensation based neither on a "plaintiff's own personal productivity" nor on "a contractual right to bonus payments," the compensation does not qualify as wages that Labor Law Article 6 protects. (*Id.* at 224). If the employer exercises discretion over the bonuses and can review all rewards, "[t]hese factors . . . take plaintiff's bonus out of the statutory definition of wages." (*Id.*). Moreover, "[d]iscretionary additional remuneration, as a share in a reward to all employees for the success of the employer's entrepreneurship, falls outside the protection of the statute." (*Id.*).

The relevant provisions of defendants' LTIP reveal that the compensation it offers

employees falls into the category of "incentive compensation" and not "wages." First, the Committee has discretion to make the awards based on targets that it may apply to JPMC or any of the JPMorgan subsidiaries or business units. (*See supra* p 3). Thus, the LTIP awards of restricted stock and stock options to plaintiff depend less on his "own personal productivity" and more "on the financial success of the business enterprise" (*Truelove*, 95 NY2d at 224), in this case the financial success of defendants. In addition, any eligible employee that the Committee selects may participate, so all JPM employees can potentially share in this success (*see supra* p 4). Unlike wages, the LTIP awards do not stem from work already performed but acknowledge the commitment and future contributions of valued employees. Once defendants make an LTIP award, they continue to use their discretion, for their Committee may "restrict[] or terminat[e] [an employee's] right to exercise an award following termination of [] employment or other forfeiture provisions." (Pilbat Aff., Exh. C, p 2 [1996 Long-Term Incentive Plan Prospectus]). In a very recent opinion from 2006, the First Department recognized an employer's right to demand continued employment as a requirement for the vesting of restricted stock and stock options and identified such "deferred equity-based compensation" as incentive compensation that did not meet the criteria of "wages" under Labor Law § 190(1). (*Guiry v Goldman, Sachs & Co.*, 814 NYS 2d 617, 617-18 [1st Dept 2006]).

Finally, JPM employees do not earn LTIP awards as part of "labor or services rendered," as required by Labor Law § 190(1). Instead, JPM envisions LTIP awards as a means to encourage employees to stay, that is "to acquire a proprietary and vested interest in the growth and performance of the Company, to generate an increased incentive to contribute to the Company's future success and prosperity . . . ." (Pilbat Aff., Exh. B, ¶ 1). "It has long been held

that stock award plans . . . whose objectives are to retain talented executives by providing them with a proprietary interest in the growth and performance of the company, are not 'wages' under § 190 of the New York Labor Law." (*IBM v Martson*, 37 F Supp 2d 613, 617 [SDNY 1999] [citations omitted]). Offering a similar plan, JPM does not provide the LTIP as wages subject to Labor Law Article 6. JPM's LTIP resembles a bonus plan for which it may enforce a strict policy of continued employment to receive LTIP awards because "an 'employee's entitlement to a bonus is governed by the terms of the employer's bonus plan.'" (*Truelove*, 95 NY2d at 224, quoting *Hall v United Parcel Serv.*,76 NY2d 27, 36 [1990]). Because plaintiff voluntarily resigned his position and no exceptions to the LTIP Terms and Conditions apply to plaintiff, he must abide by the LTIP as defendants perceive it.

Accordingly, the court grants defendants' motion to dismiss the claim under New York Labor Law Article 6 because the unvested restricted stock and the unexercised stock options are not wages as defined by Article 6 and the relevant case law. Further, as a trial court in the First Department, this court is bound by its decisions. These decisions "ha[ve] made clear that executives do not qualify as employees for the purposes of asserting wage claims under Article 6." (*Carlson v Katonah Capital, L.L.C.*, 10 Misc 3d 1076A [Sup Ct, NY County 2006, Fried, J.] [internal citations omitted]). Even though a recent appellate decision in the First Department refused to address whether the plaintiff qualified as an executive and thus did not deserve Article 6 protection, that court did so on issues of fact. (*See Guiry,* 814 NYS 2d at 618 n 1 [concluding plaintiff's status did not matter because his incentive compensation would not be wages, so plaintiff could not avail himself of Article 6 protection anyway]). Here, the court can look at allegations in the complaint to determine that Rich is an executive and outside of Article 6.

"An employee qualifies as an executive if he or she 'exercises independent judgment' in performing his or her duties." (*Carlson*, 10 Misc 3d at 1076A [citations omitted]; *see also Nornberg v Thai Magic Co.*, 10 Misc 3d 1076(A) [Sup Ct, NY County 2006, Fried, J.] ["[E]mployees entitled to statutory protection under Labor Law Section 191 are limited by definitional exclusions of one form or another for employees serving in an executive, managerial or administrative capacity." [citations omitted]). In *Carlson*, the court classified the plaintiffs as executives because they held positions of senior analyst, chief operating officer, portfolio manager and managing principal and they possessed some kind of supervisory authority. *(Id.*; *see also Nornberg,* 10 Misc 3d at 1076A [dismissing plaintiff's claims under Sections 191 and 193 because, as president, her duties to maintain accounts and oversee employees made her an executive]). Likewise, Rich admits he worked as a Vice President and "was responsible for managing the value portfolio and as co-manager of the small cap strategy with Pardo." (Complaint ¶ 12). In addition to management, Rich assumed supervisory tasks because he states JPM asked him to "restructure" the Small Cap group and to take a "leadership role" in the Morgan Heritage Small Cap groups. (*Id.* ¶¶ 15-16). Finally, the First Department recently reaffirmed its stance that New York Labor law does not protect executives. (*Zito v Fishbein, Badillo, Wagner & Harding*, 2006 WL 2728834, *1 [1st Dept Sept. 26, 2006] ["[W]e note that plaintiff, as a highly compensated professional, has no cognizable claim under Labor Law . . . article 6."]). Accordingly, this court also grants defendants' motion to dismiss the Labor Law Article 6 claim on the grounds that Article 6 does not cover plaintiff because he is an executive.

II. Defendants' Motion to Dismiss Plaintiff's Breach of Contract Claim

As stated above, an employee must follow the "terms" an employer creates for its bonus

and incentive plans. (*See Truelove*, 95 NY2d at 224). "The rule with respect to bonuses is that an employee's entitlement to a bonus is governed by the terms of the employer's bonus plan." (*Brennan v J.P. Morgan Securities, Inc.*, 7 Misc 3d 1013A [Sup Ct, NY County 2004, Lowe, J.] [citations omitted]). In *International Paper Co. v Suwyn*, a former executive vice president sought retention of unvested restricted stock and stock options that his employer had awarded him before his voluntary departure. After looking at the terms of the Management Incentive Plan for annual bonuses and the Executive Continuity Award for restricted stock and stock options, the court found that both call for the forfeiture of awards, except in the case of death, retirement or disability. (*Intl. Paper*, 978 F Supp 506, 509-510 [SDNY 1997]). The court then concluded that only the terms of these plans and awards controlled the final disposition of any bonuses, restricted stock or stock options and dismissed the former employee's breach of express contract claim because "[u]nder the terms of the [Management Incentive Plan], [employee's] resignation, tendered before the 1995 bonus awards were made, resulted in the cancellation of his bonus award." (*Id.* at 512-513).

Rich acknowledges that JPM's bonus plan contains conditions but claims his voluntary resignation meets those conditions. (Complaint ¶¶ 46-47). Defendants argue that JPM's plan does not allow plaintiff to retain unvested restricted stock and unexercised stock options and that the documentary evidence, namely the LTIP Prospectus, plaintiff's Award Agreements and the LTIP Terms and Conditions, does not support plaintiff's claim for breach of contract. (Defendants' Reply Memorandum of Law in Further Support of Their Motion to Dismiss, p 2). The Terms and Conditions for stock options require forfeiture upon termination, except for retirement, job elimination, disability or death. (*See* Pilbat Aff., Exh. E, ¶ 3). The Terms and

Conditions for restricted stock allow retention after voluntary termination only if the employee has five continuous years of service, the sum of the employee's age and cumulative service totals 45, and the employee does not leave for a competitor. (*See* Pilbat Aff., Exh. I, ¶ 2(d)). Thus, as the court analyzed, the Management Incentive Plan and the Executive Continuity Award in *International Paper* (*see Intl. Paper*, 978 F Supp at 512-13), this court must honor the terms of the LTIP that the Prospectus and the Terms and Conditions contain.

Specifically, for the purposes of stock options, JPM decides if an employee's termination qualifies as a job elimination or as a voluntary resignation. (*See* Pilbat Aff., Exh. E, ¶ 3[b]). For restricted stock, JPM's "Director [of] Human Resources determines in his sole discretion that the following criteria are satisfied as of the date of termination of employment and during the remaining vesting period." (Pilbat Aff., Exh. I, ¶ 2[d]). Again, employers may decide, in their sole discretion, the criteria for bonus plans and incentive compensation. (*See Truelove*, 95 NY2d at 224; *see also Gershon v CDC Ixis Capital Mkts., Inc.*, 1 AD3d 137, 138 [1st Dept 2003] [denying a breach of contract claim because the express terms of the agreement made bonuses "discretionary"]; *Brennan*, 7 Misc 3d at 1013A ["An employee has no enforceable right to compensation under a discretionary compensation or bonus plan."] [citation omitted]). Rich must accept JPM's assessment that 1) he may not retain the 2,563 stock options because, pursuant to the Terms and Conditions, no exception applies to his termination; and 2) he may not retain the 1,967 restricted shares from 2003 or the 1,527 shares from 2004 because Rich did not have five years of continuous employment (i.e., JPM exercised its discretion, pursuant to the Terms and Conditions and decided only to count his second period of employment, approximately two and one-half years from 2001 to 2004, and not the first period, from 1991 to

1999, as the relevant period) and he left for a competitor (another discretionary decision for defendants).

Because all the Terms and Conditions of the awards undeniably leave analysis of an employee's eligibility to JPM, the court can find no breach of contract. "If a written agreement 'unambiguously contradicts' a plaintiff's claim that the defendant breached it, the agreement constitutes 'documentary evidence' that warrants dismissing the complaint under CPLR 3211(a)(1). 'This follows from the bedrock principle that it is a court's task to enforce a clear and complete written agreement according to the plain meaning of its terms.'" (*SportsChannel Assocs. v Sterling Mets, LP*, 7 Misc 1007A [Sup Ct, NY County 2005, Freedman, J.], quoting *150 Broadway NY Assocs. v Bodner*, 14 AD3d 1, 5 [1st Dept 2004]; *see also Freeman v DL Rothberg & Assocs.*, 814 NYS 2d 561, 561 [1st Dept 2005] [denying recovery of a bonus based on breach of contract because bonus agreement made payment "purely discretionary" and "it should have been enforced according to the plain meaning of its terms"). Indeed, "[t]he fundamental, neutral precept of contract interpretation is that agreements are construed in accord with the parties' intent." (*Greenfield v. Philles Records*, 98 N.Y.2d 562, 569 [2002] [citation omitted]). The LTIP agreements clearly reveal defendants' intent to control awards at their discretion. Plaintiff's acceptance of his award agreements reflects his intent to abide by the LTIP terms. On the basis of defendants' documentary evidence, the court grants defendants' motion to dismiss the breach of contract claim.

The court likewise dismisses plaintiff's related claim of a breach of the covenant of good faith and fair dealing. Plaintiff contends that defendants did not exercise their discretion over the LTIP in good faith. (*See* Plaintiff's Memorandum of Law in Opposition to Defendants' Motion

to Dismiss, p 7). "Where the contract contemplates the exercise of discretion, this pledge includes a promise not to act arbitrarily or irrationally in exercising that discretion." (*Dalton v Educational Testing Serv.*, 87 NY2d 384, 389 [1995]). Plaintiff, however, simply alleges that "[d]efendants used their discretion to interpret the terms of the LTIP to the detriment of Mr. Rich yet to the benefit of other similarly situated individuals." (*Id.* at 8). He suggests that Marian Pardo, Rich Nelson, and Juliet Ellis did not forfeit restricted stock or stock options despite their voluntary departure from JPM for competitors. (Complaint ¶¶ 18, 20, 23). Nothing in the record supports these suggestions. Defendants submitted conclusive documentary evidence that Pardo deserved her restricted stock under the LTIP Terms and Conditions. (Pilbat Aff. ¶ 18 [explaining JPM eliminated Pardo's position, so she became entitled to her restricted stock]) and that neither Nelson nor Ellis received either restricted stock or stock options (*see* Pilbat's Aff., Exhs. N and O).

Finally, the court finds no breach of the covenant of good faith and fair dealing in defendants' classification of Rich's departure as a voluntary resignation. Rich wants this court to believe JPM eliminated his job, but, once again, the documentary evidence indicates otherwise. Rich's very own letter of termination, dated January 30, 2004, reads, "This letter serves as formal notification of my resignation from JP Morgan Fleming Asset Management." (Mormando Reply Aff., Exh. A). Plaintiff initiated his own departure from JPM and thus cannot claim defendants "arbitrarily" and in bad faith labeled his resignation "voluntary." (*See* Plaintiff's Memorandum of Law in Opposition to Defendants' Motion to Dismiss, p 9). Under the LTIP, a voluntary resignation results in the forfeiture of all rights to unexercised stock options and unvested restricted stock. All Terms and Conditions recite this forfeiture.

"A party's action may implicate the implied covenant of good faith only when that action destroys or injures the contract rights of the other party. (*IBM v Martson*, 37 F Supp 2d at 616, 619 [finding that employer did not administer its Long Term Performance for stock options "arbitrarily," despite former employee's contention that mandatory forfeiture upon resignation breached the covenant of good faith and fair dealing]). As the former employee in *IBM v. Martson*, Rich had no contract right to the stock options or restricted stock, but JPM, as Rich's former employer, had every right, due to the LTIP Terms and Conditions, to divest him of the options and stock. "[T]his duty [of good faith and fair dealing] will not be expanded to a point of conflict with the express terms of the bargained-for exchange . . . ." [*Patterson, Inc. v Bowie*, 237 AD2d 184 [1st Dept 1997]. Because Rich knew and accepted the terms of the LTIP, he cannot now question the discretion those terms afford JPM or JPM's final determination in accord with those terms. Thus, the court grants defendants' motion to dismiss plaintiff's breach of contract claim, including plaintiff's allegation of a breach of the covenant of good faith and fair dealing.

III. Plaintiff's Request for Leave to Replead the Complaint

Plaintiff seeks leave to replead his complaint pursuant to CPLR 3025(b). "A party may amend his pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties." (CPLR 3025[b]). "Although leave to amend a pleading should be freely given (CPLR 3025[b]), an amendment which is devoid of merit should not be permitted." (*Goldstein v Barco of California, Inc.*, 109 AD2d 817, 818 [2d Dept 1985]). In spite of this freedom to amend as long as the additional claims have merit, "[t]he purpose of this procedural device [CPLR 3025] is to permit the plaintiff to amend his theory of recovery to comply with the facts as they unfold, not to permit the

plaintiff to alter his representation of material facts to best suit his theory of recovery and thereby overcome defenses raised in opposition." (*Bogoni v. Friedlander*, 197 AD2d 281, 291 [1st Dept 1994]).

In his proposed amended complaint, Rich would add claims for breach of oral contract and for quantum meruit/unjust enrichment. (Plaintiff's Memorandum of Law in Opposition to Defendants' Motion to Dismiss, pp 13-14). For the breach of oral contract claim, plaintiff contends he promised to remain at JPM for a "transition period" if defendants would "give complete consideration" to his request to retain his unvested restricted stock and unexercised stock options. (*Id.* at 13). Specifically, Rich claims defendants breached the implied covenant of good faith and fair dealing in the alleged oral agreement because defendants "arbitrarily and capriciously" denied his request and treated Rich differently from the three previously discussed former employees (Pardo, Nelson and Ellis). (Plaintiff's Memorandum of Law in Opposition to Defendants' Motion to Dismiss, pp 13-14). Defendants contest the existence of any oral agreement. Even if one did exist, defendants argue they did not breach because they "performed exactly what they are alleged to have agreed to do, i.e., to *consider* his request that he be permitted to retain the stock." (Defendants' Reply Memorandum of Law in Further Support of Their Motion to Dismiss, p 13 [emphasis in original]). Defendants also argue that the alleged oral agreement would be void for vagueness.

First, as to Rich's claim for breach of good faith and fair dealing implied in his alleged oral agreement with defendants, this claim resembles the one he asserts for breach of contract. (*See supra* pp 13-15). Given that the court has dismissed the breach of contract causes of action, the court does not grant leave to amend for an identical claim that plaintiff now identifies as

breach of an oral contract. The claim of breach of good faith and fair dealing fails because it is simply "devoid of merit." (*Goldstein*, 109 AD2d at 818). In fact, the entire breach of oral contract claim strikes this court as plaintiff's attempt "to alter his representation of material facts to best suit his theory of recovery." (*Bogoni*, 197 AD2d at 291). In alleging an oral contract with defendants to "consider" his request to retain the stock and the options, Rich in essence asks JPM to reconsider the entire LTIP contract. As explained above (*see supra* pp 10-12), the court grants defendants' motion to dismiss the breach of contract claim, and, for similar reasons, will not allow plaintiff to replead his complaint to add breach of oral contract.

Second, Rich would like to add a claim for quantum meruit/unjust enrichment. (Plaintiff's Memorandum of Law in Opposition to Defendants' Motion to Dismiss, p 14). To state such a claim, a party must establish "the performance of services in good faith; the acceptance of those services by the entity to which they were rendered; an expectation of compensation therefor; and the reasonable value of the services." (*Lehrer McGovern Bovis, Inc. v. New York Yankees*, 207 A.D.2d 256, 259 [1st Dept 1994]). In addition, "the claimant must have a *reasonable* expectancy of receiving compensation." (*Intl. Paper*, 978 F Supp at 513 [emphasis added]). The Southern District of New York did not find a "reasonable expectancy" of compensation for a bonus plan that New York law governed because the former employee knew the Management Incentive Plan required continued employment and that voluntary resignation resulted in automatic disqualification. (*See id.*). Rich, too, knew the terms of the LTIP and knew his resignation could jeopardize his award if he did not meet the required conditions or exceptions. (*See supra* pp 4-5). Thus, Rich did not have a "reasonable expectancy" of compensation because he knew JPM could decide, as per the LTIP Terms and

Conditions, that he must forfeit his unvested restricted stock and his unexercised stock options.

The court does, however, note plaintiff's argument based on *Xu v. J.P. Morgan Chase* that the Southern District of New York decided in 2003. (*See* Plaintiff's Memorandum of Law in Opposition to Defendants' Motion to Dismiss, p 14). *Xu* involved the same defendant as this case, JPMorgan Chase, and presented a similar dispute over failure to pay a bonus. Specifically, Xu alleged breach of express oral contract and asserted a claim under quantum meruit when defendant failed to pay the bonus. (*Xu v J.P. Morgan Chase*, US Dist Ct, SDNY, Pauley, J., 01 Civ 8686). Unlike the oral contract Rich alleges, that defendants promised to "consider" his request to retain his unvested restricted stock and unexercised stock options (Plaintiff's Memorandum of Law in Opposition to Defendants' Motion to Dismiss, pp 13), Xu claimed his supervisors offered a very specific bonus, "8% - 10% of the sum of his trading revenue plus 20% of client revenue" (*Xu* at 4). JPMorgan then terminated Xu and denied him any bonus for the same reasons as it denied Rich his stock and options (i.e., employee's termination and defendant's complete discretion to administer the bonus plan). (*Id.* at 6).

The claims in *Xu* are distinguishable from Rich's claims. That is, Xu does not claim breach of the terms of the incentive plan, as Rich does; rather, he claims breach of a very specific oral agreement. *Id.* at 7. Because the Southern District found material questions of fact about the existence of the oral contract, it denied defendant's motion for summary judgment. (*Id.* at 9). The very same questions of fact also caused the court to allow Xu's quantum meruit claim. However, Xu's claim in quantum meruit differs importantly from Rich's. First, he actually rendered services linked to the bonus because JPMorgan would base any bonus on his performance, "8% - 10% of the sum of *his* trading revenue plus 20% of client revenue." (*Id.* at 4

[emphasis added]). Rich's stock options and unrestricted stock, as explained above, did not depend on his own productivity. (*See supra* pp 7-8). Second, Xu's expectation of this very specific bonus is more reasonable than Rich's expectation of retaining his stock and options because Xu had been awarded bonuses based on his own trading activity in the past. (*See* Xu at 3). Thus, Xu has stronger arguments to meet the required elements for quantum meruit. Because this court can distinguish the nature of Rich's oral contract from that of Xu's and because this court can distinguish the type of services performed and the reasonable expectation of a bonus for the quantum meruit action, the court does not find plaintiff's argument convincing that his oral contract and quantum meruit claims should stand due to the Southern District's ruling in *Xu*.

The First Department has also addressed whether an employee can bring a claim based on quantum meruit when the parties have a written contract for the matter in dispute. For example, for a bonus that a company's handbook clearly labeled "discretionary," the court would not allow a plaintiff "to recover bonus compensation in quantum meruit . . . [because] the company policy that the payment of bonus compensation was purely discretionary" made this theory unviable. (*Kaplan v. Capital Co. of Am. LLC*, 298 A.D.2d 110 [1st Dept 2002]. Indeed, "it is impermissible to seek damages under a quantum meruit theory where . . . there is an express written contract between those parties." (*Tierny v Capricorn Investors L.P.*, 189 AD2d 629, 632 [1st Dept 1993); *see also Skillgames, LLC v Brody*, 1 AD3d 247, 251 [1st Dept 2003] ["[A] claim for quantum meruit generally will not lie where a contract between the parties governs the dispute."] [citations omitted]). In this case, a contract, the LTIP, does control the disposition of the unvested restricted stock and unexercised stock options, and plaintiff simply does not qualify for compensation of any kind, either by right of contract or under quantum meruit. Thus, this

court denies plaintiff's request for leave to replead his complaint to add a claim for quantum meruit.

CONCLUSION

Accordingly, it is

ORDERED that defendants' motion to dismiss, motion sequence 001, is granted; and it is further

ORDERED that plaintiff's request for leave to replead the complaint is denied; and it is further

ORDERED, the Clerk is directed to enter judgment dismissing the complaint accordingly.

Dated: October 03 2006

ENTER

J.S.C.