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

PRESENT: Lowe Justice

PART 56m

RICHARD B. LOWE III

US East Company of NY

INDEX NO. 603558/05

MOTION DATE 10/26/07

- v -

MOTION SEQ. NO. 004

MOTION CAL. NO.

JP Morgan Chase Bank, N.A.,

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

FILED
NOV 05 2007
COUNTY CLERK'S OFFICE
NEW YORK

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 10/26/07

RICHARD B. LOWE III 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 56

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US EAST COMPANY OF NEW YORK, LTD.,

Plaintiff

-against-

JPMORGAN CHASE BANK, N.A.,

Defendant.

Index No: 603558/05

DECISION AND ORDER

RICHARD B. LOWE III, J:

This action arises out of a dispute over alleged tortious interference with prospective business relations and breach of the implied covenant of good faith and fair dealing. In motion sequence 009, Defendant JPMorgan Chase Bank ("Chase") moves to preclude the introduction of evidence by Plaintiff US East Company ("US East").

BACKGROUND

The general facts of this matter were discussed in this Court's prior decisions and shall not be repeated here, except to the extent necessary to decide this motion.

The underlying action contained five causes of action: wrongful interference with prospective contractual relationships (first cause of action); breach of oral agreement (second cause of action); unjust enrichment (third cause of action); breach of the Master Agreement (fourth cause of action); and promissory estoppel (fifth cause of action). In this Court's decision dated May 10, 2006, Chase's motion to dismiss was granted to the extent that the second, third, and fifth causes of action were dismissed leaving US East's causes of action for interference and

breach of contract. In this Court's decision dated October 18, 2007, Chase's motion for summary judgment was denied. As the parties prepared for trial, US East indicated in its Expert Disclosure Statement made pursuant to CPLR 3101(d)(1) that if it failed to prove damages based on lost profits, it would put forth testimony as to an alternative measure of damages based on unjust enrichment. Defendant now seeks an order precluding plaintiff from introducing at trial any evidence in support of its claim for unjust enrichment damages.

DISCUSSION

Chase argues that despite having its unjust enrichment claim dismissed, US East is attempting to restore its unjust enrichment claim by putting forth an alternative measure of damages based on unjust enrichment. US East argues that it is entitled to an alternative measure of damages based on the benefit received by Chase. With both arguments thus framed, the issue presented for determination in this motion *in limine* is whether evidence of unjust enrichment, e.g., cost savings, is admissible as an alternative measure of contract damages.

In order to prevail on a motion *in limine* seeking to preclude the introduction of evidence, the movant must demonstrate that the evidence being introduced would unduly prejudice the defendant or is not materially relevant (*Kish v Board of Educ.*, 76 NY2d 379, 385 [1990]; *Caster v Increda-Meal, Inc.*, 238 AD2d 917, 918 [4th Dept 1997]).

Here, Chase does not argue that the evidence US East seeks to introduce will unduly prejudice Chase or that the evidence is not materially relevant. Indeed, Chase does not even articulate a standard for determining whether to exclude the evidence. Instead, Chase only argues that the measure of damages US East offers is unavailable as an alternative to its lost profits measure. However, Chase fails to cite any case law that supports this proposition.

Notably, neither party has put forth any cases that directly support or contradict the proposition that the measure of contract damages may be based on unjust enrichment. Nor has the Court found any New York cases on point. Nonetheless, Chase acknowledges and US East argues that a nonbreaching party's restitution interest is sometimes recognized as a remedy for breach of contract. Indeed, the Restatement (Second) of Contracts has stated: "[i]n some situations a court will recognize yet a third interest [aside from the expectation and reliance interests] and grant relief to prevent unjust enrichment. * * * The interest of the claimant protected in this way is called the 'restitution interest.'" (Restatement (Second) of Contracts, § 344.) In these situations, the claimant "claims relief on the ground that the other party has been unjustly enriched as a result of some benefit conferred under the agreement." (Restatement (Second) of Contracts, § 344, comment d.) Though not addressed in New York courts, a nonbreaching party's restitution interest has been recognized in a District Court for the Southern District of New York considering New York state claims. In *Boule v. Hutton*, the plaintiffs received judgment on their breach of contract claim because the district court found, among other things, that the defendant breached the implied covenant of good faith and fair dealing (138 F Supp 2d 491, 509-10 [SDNY 2001], affirmed in part and vacated in part). On this basis, plaintiffs were awarded restitution, but not expectation damages. (*Id.*)

Accordingly, in light of persuasive authority this Court holds that, under the circumstances of this case, evidence of unjust enrichment is admissible as an alternative measure of contract damages.

The Court is aware that restitution requires the conferral of a benefit. (Restatement (Second) of Contracts, § 370.) However, the parties have not addressed this issue in their

moving papers, the issue involves some factual determinations, and whether US East will need to prove damages based on unjust enrichment will not be clear until trial. Accordingly, resolution is appropriately reserved for trial (*see Feldsberg v Nitschke*, 49 NY2d 636, 643 [1980] [the order and timing of introducing evidence are matters within the sound discretion of the trial court]; *Matter of Hover v Shear*, 232 AD2d 749, 750 [3d Dept 1996]). Indeed, the determination of whether to preclude the introduction of evidence is better left to the trial judge (*Clorofilla v Town of New Castle*, 32 AD3d 976, 977 [2d Dept 2006]). Moreover, courts considering a motion *in limine* may reserve judgment until trial, so that the motion is placed in the appropriate factual context *(see c.f. Rosenblatt v Jiudice*, 47 AD2d 721, 721 [2d Dept 1975]).

CONCLUSION

Accordingly, it is hereby

ORDERED that Defendant's motion to preclude introduction of evidence as to unjust enrichment is denied with leave to renew at the conclusion of the trial;

Dated: October 26, 2007

ENTER:

J.S.C.