SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ANDREA MASLEY **PART** **IAS MOTION 48EFM**

Justice

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AVI DORFMAN and RENTJOLT, INC.

Plaintiffs,

- v -

ROBERT REFFKIN and URBAN COMPASS, INC.,

Defendants.

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INDEX NO. 652269/2014

MOTION DATE 01/21/2020

MOTION SEQ. NO. 010 011 012 013

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 010) 441, 442, 443, 444, 445, 446, 464, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479

were read on this motion to/for PRECLUDE.

The following e-filed documents, listed by NYSCEF document number (Motion 011) 447, 448, 449, 450, 451, 466, 480, 481, 482

were read on this motion to/for PRECLUDE.

The following e-filed documents, listed by NYSCEF document number (Motion 012) 452, 453, 454, 455, 456, 465, 483, 484, 485

were read on this motion to/for PRECLUDE.

The following e-filed documents, listed by NYSCEF document number (Motion 013) 457, 458, 459, 460, 461, 462, 463, 486

were read on this motion to/for PRECLUDE.

Upon the foregoing documents, it is

Defendants Robert Reffkin and Urban Compass, Inc. (UCI), move to preclude certain evidence at trial: any evidence that the parties came to an agreement of any kind (motion sequence number 013); plaintiff's[1] damages theory (motion sequence number 010); and plaintiff's two experts (motion sequence numbers 011 and 012).

[1] This decision is limited to plaintiff Avi Dorfman's third and fourth causes of action in the amended complaint. (NYSCEF Doc No. 47, Amended Complaint ¶¶ 90-99.) Plaintiff RentJolt Inc. (RentJolt) pled those claims as an alternative to its breach of contract

Plaintiff Avi Dorfman asserts that he is a founder of defendant UCI and seeks equity in UCI as restitution. Defendants assert that if Dorfman did anything, it consisted of 80 hours of work for which the equitable damages should be calculated on an hourly basis.

The remaining causes of action for trial are: (1) Dorfman's claims for unjust enrichment, and (2) quantum meruit both "for services that went beyond the negotiation or consummation of a business opportunity." (*Dorfman v Reffkin*, 144 AD3d 10, 17-18 ([1st Dept 2016]); NYSCEF Doc. No. [NYSCEF] 383, Decision 9/28/19 on motion 08 for summary judgment; *Dorfman v Reffkin*, 180 AD3d 567 [1st Dept 2020](affirming 9/28/19 decision except modifying as to RentJolt breach of contract; NYSCEF 492, Stipulation of Partial Discontinuance Breach of Contract Claim.) These motions in limine raise the issues of (1) what precisely was dismissed and what remains of Dorfman's claims; and (2) whether Dorfman can recover shares of UCI as damages under either of Dorfman's equitable claims or both.[2]

In a pre-answer motion to dismiss, defendants argued for dismissal of Dorfman's quasi-contract claims as barred by the statute of frauds, General Obligations Law (GOL) § 5-701(a)(1). The court dismissed Dorfman's claims, but only to the extent that Dorfman was acting as a broker, finder or negotiator of a business opportunity because the court agreed that Dorfman alleged that he did more. (*Dorfman v Reffkin*, 144 AD3d

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claim arising from the non-disclosure agreement. Therefore, the court uses the singular plaintiff to reference Dorfman. The court notes that RentJolt's breach of contract claim was discontinued. (NYSCEF 492, Stipulation of Partial Discontinuance.)

[2] To illustrate how the two claims will be presented to the jury in a way to ensure that there is no double recovery, the court attaches a proposed verdict sheet. The court expects to review the verdict sheet and jury charge in a charge conference with counsel.

10, 16-17 [1st Dept 2016].) In denying defendants' summary judgment motion, the court found that Dorfman raised an issue of fact as to when UCI came to fruition because any compensation for services Dorfman rendered after UCI came to fruition are not barred by the statute of frauds. *(Dorfman v Reffkin*, 180 AD3d 567, 568 [1st Dept 2020].) Accordingly, another jury question is whether Dorfman rendered services after fruition of the new venture and if so, what is the value of those services. *(Dorfman v Reffkin*, 180 AD3d 567, 568 [1st Dept 2020].)

The remaining quasi-contract claims that are going to trial are limited to Dorfman's "services that went beyond negotiation or consummation of a business opportunity." (*Dorfman v Reffkin*, 144 AD3d 10, 16-17 [1st Dept 2016].) Specifically, the statute of frauds does not bar evidence of Dorfman's efforts to "develop[] materials to secure financial backing from investors—including Goldman Sachs" and "to introduce[] and recruit[] Paul Goudas to Urban Compass." (*Dorfman v Reffkin*, 180 AD3d 567, 568 [1st Dept 2020].) This makes sense because the statute of frauds does not bar joint ventures or partnerships if the venture could be performed in one year. (*Freedman v Chem. Const. Corp.*, 43 NY2d 260, 266 [1977] ["Until 1949, there was no requirement that agreements with business brokers be in writing. To protect principals from 'unfounded and multiple claims for commissions', and in response to the substantial number of cases involving sales of businesses and business opportunities, the predecessor to subdivision 10 of section 5-701 was enacted" (L 1949, ch 203; 1949 Report of NY Law Rev Comm, p 615)]".) Rather, Dorfman's' claims for "negotiating a business opportunity for defendants by providing know-how in bringing a business enterprise to fruition" were dismissed. (*Dorfman v Reffkin*, 180 AD3d 567, 568 [1st Dept

2020].) By definition, "negotiating" includes both "procuring an introduction to a party to the transaction" and "assisting in the negotiating or consummation of the transaction." (GOL § 5–701[a][10].) "Courts interpreting section (a)(10) have generally held that where the transaction results in the acquisition of an existing enterprise or the formation of a new one, it is a business opportunity." (*Gutkowski v Steinbrenner*, 680 F Supp 2d 602, 613 [SDNY 2010] [citation omitted] [where plaintiff alleged that defendant promised to fairly compensate plaintiff for his idea to create a Yankees cable TV network to rival the MSG network, but there was no written contract, complaint dismissed on pre-answer motion because the formation of the YES Network constitutes a "business opportunity" as contemplated by § 5–701 (a) (10)].)

In motion sequence number 013, defendants seek to preclude evidence regarding Dorfman's alleged agreements with defendants.[3] Specifically, defendants object to Dorfman's testimony that he had an agreement with defendants to merge RentJolt and UCI. (NYSCEF 461, tr. 47:23-48:3.) Defendants argue that since Dorfman's alleged contract claim is barred by the statute of frauds, any testimony regarding the alleged agreements would be improper. Rather, defendants insist that introduction of the alleged agreements would confuse or mislead the jury. "To be clear, defendants do not seek to prevent plaintiffs from arguing or presenting testimony regarding statements made to them, or even that they thought they had reached an

[3] As defendants concede, excepted from this motion is the NDA, as Rentjolt's breach of contract claim was sustained by the Appellate Division with damages limited to "either declaratory relief or an award of attorneys' fees upon a finding of breach." (NYSCEF 486, Defendants' Reply Memorandum of Law for Motion 13; *Dorfman v Reffkin*, 180 AD3d 567 [1st Dept 2020].) Since the filing of this motion, the breach of contract claim was discontinued. (NYSCEF 492, Stipulation of Discontinuance.)

agreement with defendants." (NYSCEF 486, Defendants' Reply Memorandum of Law at 1). "Rather, Defendants seek to preclude Plaintiffs' attorneys from arguing to the jury that the parties actually reached an agreement ..., only for Defendants to renege." (*Id.*) "Similarly, Defendants seek to preclude testimony, like the testimony that Dorfman gave at his deposition, that Reffkin made Dorfman an offer of employment that Dorfman purportedly accepted." (*Id.*; NYSCEF 461, Dorfman depo. tr. at 41:4-6; 44:16-21; 44:24-25; 45:3-5; 45:8-11; 45:13-16; 47:3-5; 47:7-9; 49:16-23; 55:14-19; 106:19-107:6; 108:16-18; 108:24-25; 109:8- 15; 110:2-3; 110:14-17; 284:8-13; 285:25-286:2; 286:17-21; 290:20-25; 307:13-24; NYSCEF 462, Dorfman for RentJolt depo. tr. at 57:14-19; 63:20-64:3; 68:18-23; 111:16-21; 112:1-2; 112:7-20; 232:4-17.)

While Dorfman concedes that he is barred from offering any evidence that the parties reached any agreements, plaintiff also asserts that such evidence would not do harm and could be cured with a jury instruction.

There will be no testimony or evidence that the parties reached any agreements. "[I]t is well settled that a party cannot use a failed contract to establish the reasonable value of the services or contributions rendered." (*Gonick v Adirondack Research & Mgt., Inc.*, 57 Misc 3d 1203[A], 2017 NY Slip Op 51216[U], *11 [Sup Ct, Albany County 2017] citing *Isaacs v Incentive Sys.*, 52 AD2d 550, 550 [1st Dept 1976].) Dorfman's reliance on federal cases otherwise is misplaced. (*Zaitsev v Salomon Bros., Inc.*, 60 F3d 1001, 1004 [2d Cir 1995] ["Under New York law, a contract that is unenforceable under the Statute of Frauds is inadmissible as evidence of the reasonable value of services"] [citations omitted].) Likewise, evidence of agreements is not relevant or admissible to establish any of the elements of Dorfman's claims for unjust enrichment or

quantum meruit. Indeed, a contract would preclude these claims. (*Clark–Fitzpatrick, Inc. v Long Island R.R.*, 70 NY2d 382, 388 [1987].)

While agreements are not admissible here, defendants' offer to plaintiff (Offer) is not a contract, and thus, admissible. (NYSEF 471, August 13, 2012 "Offer Package" Email.) Dorfman proposes to rely on the Offer and two experts who will explain the present value of that Offer. (NYSCEF 455, Gregg Larson June 26, 2017 Expert Report; NYSCEF 450, P. Garth Gartell June 26, 2017 Expert Report.) Dorfman contends that the Offer is sufficient evidence from which a jury could conclude: "(i) Defendants considered Dorfman to be a founder or at least on the founding team; (ii) defendants expected ... that Dorfman would be compensated for his services by receiving a percentage of the Company's equity; (iii) it is a convention of the marketplace for founders to receive a percentage of the equity of a new company; (iv) the agreed-upon percentage of such equity could readily be valued in dollars based upon the ultimate valuation of the Company; and (v) defendants were well-aware that Dorfman's compensation could exceed $32 million" at a company which is valued at $2 billion or more." (NYSCEF 469, Plaintiff's Omnibus Memorandum of Law in Opposition to Defendants' Motions in Limine at 3-4.)

The Offer is admissible and relevant to Dorfman's quasi-contract claims. For quantum meruit, plaintiff must prove "(1) the performance of services in good faith, (2) the acceptance of the services by the person to whom they are rendered, (3) an expectation of compensation therefor, and (4) the reasonable value of the services." (*Soumayah v Minnelli*, 41 AD3d 390, 391 [1st Dept 2007] [citation omitted]; *see also* PJI 4:2.) For example, the Offer may support Dorfman's contention that he was involved in

founding UCI and had reason to expect compensation. Likewise, Dorfman may testify to defendants' statements that he would be compensated. Unlike the plaintiff in *Gutkowski v Steinbrenner*, 680 F Supp 2d 602, here, Dorfman asserts that he is a founder and therefore the Offer is admissible.

With regard to unjust enrichment, the jury will be instructed that Dorfman has the burden to prove: "(1) the other party was enriched, (2) at that party's expense, and (3) that it is against equity and good conscience to permit the other party to retain what is sought to be recovered." (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 182 [2011] [brackets and internal quotation marks omitted]; *see also* PJI 4:2.1.) The Offer is relevant to whether Dorfman was an hourly employee, as defendants contend, or a founder, as Dorfman contends which will affect the calculation of damages, if any. (*See Stillman v Inservice Am., Inc*, 2012 WL 75345 [2d Cir 2012] [unenforceable oral contract allowed into evidence to establish whether plaintiff was an employee or broker].)

Thus, this motion to preclude any evidence the parties came to any agreements is granted.

In motion sequence number 010, defendants seek to preclude evidence regarding Dorfman's damages theory. Specifically, Dorfman seeks an equity interest in UCI arguing that it is the marketplace convention of the real estate technology industry to issue equity to founders and employees in nascent businesses. Dorfman is not limited to money damages but may establish a measure of damages consistent with the customs and practices of the industry. (*Davis v Cornerstone Tel. Co., LLC*, 25 Misc 3d 1071 [Sup Ct, Albany County 2009], *affd* 78 AD3d 1263 [3d Dept 2010].) Here, Dorfman has opted for an equity interest as damages

Regarding unjust enrichment, the jury will be instructed on damages, based on PJI 4:2 and tailored to this case:

> "If you decide that [*state the facts on which the plaintiff bases (his, her, its) claim*], you will find that CD is liable to AB and you will go on to consider the value of the (property, benefit) CD obtained. [*Where appropriate, set forth the parties' contentions regarding the value of the property/benefit that defendant obtained as follows*: AB contends (*state plaintiff's contentions regarding value*). CD contends (*state defendant's contentions regarding value*). You will determine the **value of the (property, benefit)** based on the evidence you have heard.] [*Where appropriate, set forth the legal rules for measuring the value of the particular type of property.*]" (emphasis added.)

Regarding quantum meruit, the jury will be instructed on damages according to PJI 4:2.1 modified to the facts of this case:

> "If you decide that CD did not [*state the facts on which the plaintiff bases (his, her) claim*], you will find for CD [*add where appropriate*: on this claim]. If you decide that [*state the facts on which the plaintiff bases (his, her, its) claim*], you will find that CD is liable to AB and you will go on to consider the value of the (work, services) AB performed. AB contends (*state plaintiff's contentions regarding the value of the work*). CD contends (*state defendant's contentions regarding the value of the work*). You will determine **the value of AB's (work, services)** based on the evidence you have heard." (emphasis added.)

These charges are different, and the court rejects any assertions or proposed jury charges or verdict sheets otherwise.

The measure of Dorfman's recovery for unjust enrichment is "'... what the defendant has received which in good conscience should belong to the plaintiff; and this may be either more or less than the amount of plaintiff's actual loss.'" (PJI 4:2 at 165 [2d ed 2020], quoting Prosser & Keeton, Torts [5th Ed] 673, § 94.) "It is not always true that the value of what was received by defendant and what was lost by plaintiff are equal." (*Id.*) If the jury determines that it is unjust for defendants to keep whatever benefit defendants acquired from Dorfman, e.g. defendants tortiously acquired the benefit, then defendants may pay "all that plaintiff lost although it is more than

defendant received, and will also be deprived of any profit from defendant's subsequent dealing with it." (*Id.*, citing Restatement, Restitution [First] Measure of Recovery, Introductory Note at 596.) Likewise, "the amount required to be returned may be less than that received." (*Id.* [citation omitted].)

However, Dorfman may not use custom and practice to calculate damages and effectively write the contract which the parties did not draft and sign, nor the alleged oral agreement that plaintiff is barred by the statute of frauds from introducing. (*See Davis*, 25 Misc 3d 1071.) Dorfman is not entitled to the benefit of the bargain under the contract claims that have been dismissed. (*Id.* at 1074.) "Unjust enrichment is not a catchall cause of action to be used when others fail, and it may not be asserted where it merely duplicates or replaces a conventional contract...claim." (PJI 4:2 at 148.) For example, inventors have been compensated based on the savings or gains to the party unjustly enriched by improper use of the invention. In *Matarese v Moore-McCormack Lines Inc.*, 158 F2d 631 (2d Cir 1946), plaintiff created a loading apparatus for defendant, benefiting defendant with extensive, proven savings. "The judge properly charged that recovery must be based upon the 'reasonable value of the use' of the devices and the 'reasonable value of the services' rendered by the plaintiff." (*Id.* at 635 [citations omitted].)

Under quantum meruit, the damages will be the reasonable value of the services provided because the focus is on services unlike unjust enrichment which is not so limited. (*Collins Tuttle & Co. v Leucadia, Inc.*, 153 AD2d 526 [1st Dept 1989].) In *Collins Tuttle & Co.*, where plaintiff prepared a brochure describing the premises where he was the renting agent, he was not entitled to unjust enrichment of half the brokerage

commission paid to the broker who sold the premises. Plaintiff's equitable damages under a quantum meruit theory was limited to plaintiff's services for creation of the brochure. (*Id.*; *See also Dean v Kenyon & Eckhardt, Inc*, 39 Misc 2d 184 [Sup Ct, NY County 1963] [making distinction between valuing plaintiff's services under quantum meruit and valuing defendant's use of plaintiff's idea to insert premiums in cereal boxes for which the nature and extent of defendant's use is relevant to the reasonable value chargeable to defendant because plaintiff's idea resulted in proved and substantial increases in defendant's revenues and profits under unjust enrichment].)

Juries are permitted to consider "multiple factors" when "measuring reasonableness." (*Toporoff Engrs., P.C. v Fireman's Fund Ins. Co.*, 371 F3d 105, 109 [2d Cir. 2004] [quantum meruit case]; *Matarese v Moore-McCormack Lines*, 158 F2d 631, 635 [2d Cir 1946] [unjust enrichment].) The jury may be instructed "to consider the character of the services; the nature and importance of the services to the projects; the amount in value; the length of time spent; the ability, skill, and expertise required and exercised; and the character, qualifications, and professional standing of [plaintiff]." (*Toporoff,* 371 F3d at 109.) Relevant factors include the qualitative value of the services rendered. (*See Padilla v Sansivieri*, 31 AD3d 64, 65 [2d Dept 2006] [quantum meruit attorneys' fees].) Here, Dorfman refers to these factors, as "marketplace conventions." (*See Learning Annex Holdings, LLC v Rich Glob., LLC*, 2012 WL 2878124, *5 [SD NY 2012] [in quantum meruit claim by licensing agent evidence of marketplace convention admitted for jury determination of commission].)

In quantum meruit cases, "real estate and other business brokers and finders are generally compensated by percentages of the purchase price customary to the locality

or the business." (*Carlino v Kaplan,* 139 F Supp. 2d 563, 565 [SD NY 2001]*; see also Thomas J. Hayes & Associates, LLC v. Brodsky*, 101 AD3d 1560, 1562-1563 [3d Dept 2012] [expert testified that a broker's compensation in the automobile industry is based primarily on commission, with the major objective being the completion of the transaction, as compared to the actual time expended by the broker, and that the customary rate of commission for the sale of real estate on which an automotive dealership is situated is five percent to six percent of the sale price].) Generally, the standard may also be defined as "the amount for which such services could have been purchased from one in the plaintiff's position at the time and place the services were rendered." (*United States v Algernon Blair, Inc.,* 479 F.2d 639, 641 [4th Cir 1973] (applying federal law under the Miller Act).

Whether there is a marketplace convention is an issue of fact for the jury. (*Davis*, 25 Misc 3d at 1073.) For example, in action by financial advisor as to quantum meruit claim, then Judge Sotomayor stated, "[s]ignificantly, if Springwell convinces the finder of facts on these and other predicate questions, the finder of facts will also have to resolve the conflict between experts on industry practice as to the amount of compensation to which Springwell is entitled." (*Springwell Corp. v Falcom Drilling*, 16 F Supp 2d 300, 317 [SD NY 1998].)

The relevant time frame is when plaintiff provided the services; defendants' subsequent profits or losses are not relevant. (PJI 4:2 at 148.) If the jury awards Dorfman shares of UCI as equitable damages, 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 AD2d 334, 334 [1st Dept 2003] [in a breach of

contract case, stock valued "on the basis of their average trading value during the week that plaintiff attempted to have them transferred"].) There will be no evidence or argument regarding UCI's subsequent valuations. As to the Offer, Reffkin's proposed capitalization values therein are clearly wishful and hypothetical. They are also not relevant to this action demonstrated by the title of the lower section of the document entitled "$5 mm Aggregate Note Scenario." That section shall be redacted. Otherwise, this motion is denied and Dorfman may present evidence of his marketplace convention damages theory.

Dorfman plans to use expert testimony to establish the marketplace convention that the jury should apply to determine the equitable damages award to Dorfman.

In motion sequence number 011, defendants move to exclude the expert testimony of P. Garth Gartrell. Gartrell is an executive compensation consultant with degrees in accounting and law. Gartrell states that he was "hired to opine upon the amount of damages that [plaintiff] is entitled to receive from [UCI] in light of his contributions in helping to found the Company." (NYSCEF 450, Gartell Report ¶1.) Defendants assert that Gartrell is not qualified to opine that Dorfman is a founder and that his opinions are impermissibly speculative.

In his report, Gartrell explains why Dorfman qualifies as a "founder" of UCI, as that term is commonly used in the industry. (*Id.* ¶ 17.) In support of his determination, Gartrell relies on Reffkin's deposition testimony and work product contributed by Dorfman to UCI and emails exchanged between the key early UCI employees. (*Id.* ¶¶ 13–16.) Gartrell opines that Dorfman is on similar footing as Reffkin and Ori Allon who received signicant shares of UCI. (*See id.* ¶ 11.) Gartrell determines the equity

Dorfman should have been allocated at UCI's inception, working first from the premise that Dorfman was one of the three co-founders, and therefore, would be entitled to a share equal to that received by the other two. (*Id.* ¶¶ 18–23.) Under the equal allocation formula, which takes into consideration typical practices in the market and the role played by the three founders in raising seed financing, Gartrell finds that Dorfman would be entitled to 17.87% of UCI's initial equity. (*Id.* ¶¶ 20–23 & n 20.) Gartrell factors in Reffkin's title as CEO and Allon's title as Executive Chairman which would give them greater respective percentages of the total founders' equity. (*Id.* ¶ 24.) Under a hierarchical allocation formula, Gartrell concludes that Dorfman would be entitled to 15.43% of UCI's total equity. (*Id.* ¶¶ 24–25.)

Finally, Gartrell opines on the percentage of Dorfman's shares that would have vested. Gartrell explains both how shares typically vest, and then considers the specific terms applied to the shares of Reffkin and Allon—namely, 7.5% immediate vesting—to determine how the shares of Dorfman, a co-founder on the same footing as Reffkin and Allon, would have vested. (*Id.* ¶¶ 27– 28.) Gartrell states that "termination of a founder is frequently addressed in stock award agreements up front," and that typically "the vesting acceleration is twelve to twenty-four months, and in rare cases the acceleration can be 100%." (*Id.* ¶ 29.) He further explains that termination of a founder may also be addressed through a buy-out, and notes that another UCI employee, Michael Weiss, received a buy-out with twelve months' accelerated vesting after seventeen months with UCI. (*Id.* ¶ 30.) Based on market norms and the fact of Dorfman's founding role, Gartrell concludes that Dorfman "should have warranted significantly more—to the top of twelve to twenty-four-month range." (*Id.*)

Gartrell's testimony on vesting is rejected as speculative. Moreover, it impermissibly violates the rule that damages are to be determined at the time the claim accrued. There is no stock award agreement here, and thus, Gartrell's reliance on such agreements is misplaced. Defendants challenge Gartrell's statement that "[t]here is no way to know what vesting would have accrued to Dorfman had he been treated as a founder and allowed to participate in discussions concerning the appropriate allocation and form of the founders' stock awards" as supporting the purportedly "speculative" nature of his testimony. (NYSCEF Doc. No. 448, Defs' MOL at 10.) The next sentence of Gartrell's report demonstrates the speculative nature of the vesting testimony. He states that notwithstanding the inevitable impossibility of determining with 100% certainty what would have happened in the "but for" world, Dorfman "likely would have vested 100%, as Reffkin has, or even been topped up with further equity, as often happens in companies." (NYSCED Doc. No. 450, Gartrell Report ¶ 28).

Likewise, the court is compelled to bar Gartrell's testimony on dilution because it impermissibly incorporates the speculative vesting. Gartrell determines the amount of equity owing to Dorfman today by accounting for dilution of UCI's stock. (*Id.* ¶ 32). Gartrell bases his analysis on his knowledge of market norms and the specific facts of this case, and ultimately concludes that "because Dorfman was wrongfully forced out of the Company, between 10.67% and 12.36% of his [UCI] equity should have vested—or, between 5.96% and 6.91%," accounting for dilution. (*Id.* ¶ 35.) [4]

[4] If the jury awards shares of UCI stock that Dorfman would have received in 2012, then consideration of dilution is essential to yield the correct present number of the shares. However, dilution is a formula as illustrated by Gartell's Table 5. (NYSCEF 450, Gartell Report p.12.) At the charge conference, the court will discuss how to apply a dilution factor after trial.

Finally, Gartrell considers external market survey data to perform a "bottom-up" analysis of the equity owed to Dorfman in order to provide an additional check on his conclusions. (*Id.* ¶ 36.) While this additional check bolsters Gartrell's analysis, the court is compelled to reject this analysis because it is from the wrong time period. Gartrell considers equity provided to corporate officers holding comparable positions as set forth in the 2013 Venture Capital Executive Compensation Survey Technology Sector Trend Report (VCECS), which compiles data on 797 venture-funded technology companies. (*Id.* ¶¶ 37–49.) He performs two calculations, one based on the significance of an employee's role and one based on specific title. He finds that 10.1% is a reasonable amount of fully diluted equity owing to Dorfman (which becomes 6.99% accounting for vesting). (*Id.* ¶ 50.) This market analysis confirms Gartrell's conclusions based on the specific facts of this case, which, accounting for both dilution and vesting, would result in 6.91% equity to Dorfman under the Equal Allocation framework and 5.96% equity to Dorman under the more conservative Hierarchical Allocation framework. (*Id.* ¶ 51 & tbl. 8.) In addition, the court must reject this check because it involves speculative vesting and dilution which presumes vesting.

An expert's opinion may be excluded where it is "entirely speculative or devoid of factual support in the record." (*Pember v Carlson*, 45 AD3d 1092, 1094 [3d Dept 2007].) Here, Gartrell is limited to testifying about founders and valuing Dorfman's services when provided which is certain and calculable; how long Dorfman would have remained employed is speculative. The questions whether Dorfman would be been compensated with shares for the services he provided that are at issue in this case, and if so, how many shares would have been allocated to Dorfman is a jury question.

Otherwise, Gartell's testimony is grounded in the record and not speculative. Whether Gartell is sufficiently familiar with compensation in the field at issue here is question of weight and for the jury to determine. (*Rojas v Palese*, 94 AD3d 557, 558 [1st Dept 2012]; *Williams v Halpern*, 25 AD3d 467, 468 [1st Dept 2006].)

Although Gartrell notes that "when joining a young startup firm, it is not uncommon for employees to be paid substantially in equity. Startups are known for being relatively cash-strapped and offer equity out of a need to preserve cash and recycle whatever funds they generate back into their business operations. In return for giving a below-market salary, start-up firms frequently give employees a stake in the company in the form of equity compensation," his analysis focuses exclusively on Dorfman's status as a founder. (NYSCEF 450, Gartrell Report ¶18.) Accordingly, his testimony will be limited to Dorfman as a founder which falls under the first claim for unjust enrichment.[5] His opinion is forward looking while unjust enrichment looks back to when the unjust enrichment occurred.

Thus, defendants' motion to exclude the expert testimony of P. Garth Gartrell is granted, in part, as detailed above.

In motion sequence number 012, defendants seek to preclude Dorfman's witness, Gregg Larson, from giving an opinion at trial as to whether Dorfman's assistance was essential to the successful launch of UCI. (NYSCEF 455, Larson Report ¶¶17-19.) Defendants insist that Larson did no analysis and is not qualified to testify about UCI's financing.

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[5] See proposed verdict sheet attached.

Larson has 30 years of experience in technology and real estate information and multiple listing services such as online and web-based computer applications for real estate professionals and real estate advertising web sites for consumers. (NYSCEF 455, Larson Report ¶ 2.) His consulting work has also included leading clients through structured software evaluation processes, analyzing potential new systems and services, implementation planning, and reviewing new business plans and system specifications." (*Id.* ¶ 3.)

Dorfman offers Larson to testify as to the intrinsic value of Dorfman's services and the use of that information within the real estate technology industry. Larson investigated whether UCI used Dorfman's work and found evidence of Dorfman's work on UCI's web site. He also found the investor materials Dorfman created were sent to Goldman Sachs which invested in UCI. (NYSCEF 456, Larson depo tr 226:15-18.)[6] Otherwise, defendants are welcome to testify that they did not use Dorfman's work and show the jury what they used instead. Therefore, Larson's testimony is admissible to counter defendants' proposition that defendants did not use Dorfman's work and that Dorfman's contributions were of no value.

Defendants object to Larson's financial qualifications or the lack thereof. Defendants focus on Larson's statement that he had no idea what "venture capital and private equity guys look for in real estate." (NYCEF 456, Larson depo tr 234:18-23.) Dorfman is offering Larson's testimony to give context to the use of Dorfman's materials. He will give a historical perspective of capital flowing into the real estate

[6] Plaintiff references Larson's deposition at 321:13-322:10, but the pages were not included in the excerpt and plaintiff did not submit a complete mini-script searchable transcript. (See Part 48 Rule 6(G)).

technology industry at the time. (NYSCEF 455, Larson Report ¶¶ 23-24.) Whether Larson is sufficiently familiar with the real estate technology industry is an issue of weight and for the jury to determine. (*Rojas v Palese*, 94 AD3d at 558; *Williams v Halpern*, 25 AD3d at 468.) Thus, the motion is denied.

The court has considered the parties' remaining arguments and finds them unavailing, without merit, or otherwise not requiring an alternate result.

Accordingly, it is

ORDERED that motion 010 is denied and Dorfman may present his damages theory of marketplace convention; and it is further

ORDERED that motion 011 is granted in part and Gartell may testify except as to vesting and dilution; and it is further

ORDERED that motion 012 is denied and Larson may testify; and it is further

ORDERED that motion 013 is granted and there will be no testimony or evidence that the parties entered into any agreements.

Motion Seq. No. 010 :

7/27/2020
DATE

ANDREA MASLEY, J.S.C.

CHECK ONE: ☐ CASE DISPOSED ☐ NON-FINAL DISPOSITION

APPLICATION: ☐ GRANTED ☒ DENIED ☐ GRANTED IN PART ☐ OTHER
☐ SETTLE ORDER ☐ SUBMIT ORDER

CHECK IF APPROPRIATE: ☐ INCLUDES TRANSFER/REASSIGN ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

Motion Seq. No. 011 :

7/27/2020
DATE

ANDREA MASLEY, J.S.C.

CHECK ONE: ☐ CASE DISPOSED ☐ NON-FINAL DISPOSITION

☐ GRANTED ☐ DENIED ☒ GRANTED IN PART ☐ OTHER

652269/2014 DORFMAN, AVI vs. REFFKIN, ROBERT
Motion No. 010 011 012 013

APPLICATION: ☐ SETTLE ORDER ☐ SUBMIT ORDER
CHECK IF APPROPRIATE: ☐ INCLUDES TRANSFER/REASSIGN ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

Motion Seq. No. 012

7-27-2020
DATE

ANDREA MASLEY, J.S.C.

CHECK ONE: ☐ CASE DISPOSED ☐ NON-FINAL DISPOSITION
☐ GRANTED ☒ DENIED ☐ GRANTED IN PART ☐ OTHER
APPLICATION: ☐ SETTLE ORDER ☐ SUBMIT ORDER
CHECK IF APPROPRIATE: ☐ INCLUDES TRANSFER/REASSIGN ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

Motion Seq. No. 013

7-27-2020
DATE

ANDREA MASLEY, J.S.C.

CHECK ONE: ☐ CASE DISPOSED ☐ NON-FINAL DISPOSITION
☒ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
APPLICATION: ☐ SETTLE ORDER ☐ SUBMIT ORDER
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