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

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| **RICHARD BURTON,**<br><br>Plaintiff,<br><br>– against –<br><br>**HAYDEN ADAMS,**<br><br>Defendant. | Index No. 506967/2021<br><br>**DEFENDANT HAYDEN ADAMS'S REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS THE COMPLAINT PURSUANT TO CPLR 3211** |

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## PRELIMINARY STATEMENT[1]

Plaintiff Richard Burton ("Burton") is disgruntled that he chose not to invest early in a company that turned out to be a great financial success and seeks to use the court system to go back in time to create an investment contract that does not exist. Despite being unable to allege facts in the Complaint to establish the existence of an agreement with defendant Hayden Adams ("Adams"), Burton argues that he is entitled to a "lost opportunity" contract-based measure of damages worth around $100 million under all three of his claims for breach of contract, unjust enrichment and quantum meruit. Yet, Burton has not identified specific facts in his opposition that would establish the existence of an enforceable agreement, nor does the law permit Burton to use quasi-contract claims to obtain contract-based damages.

Burton's first claim for breach of contract claim fails because he has not alleged that the parties reached agreement on definite and certain contract terms. The "oral contract" pleaded in Paragraph 17 of the Complaint – *i.e.*, that Burton promised to provide "assistance" and Adams promised to give Burton an "ability to be an early investor" – is too vague to enforce and leaves material terms such as the exact timing of any investment and a purchase price open for future negotiations. Burton does not contend otherwise. Instead, in an attempt to establish that the parties reached an enforceable agreement, Burton's opposition cobbles together scattered factual

[1] All capitalized terms are defined in the Memorandum of Law in Support of Defendant's Motion to Dismiss the Complaint, Dkt. No. 11 (the "Opening Brief"). Some terms are redefined herein for the Court's convenience.

allegations from events that took place *after* there was a supposed agreement. (*See* Opposition ("Opp."), Dkt. No. 13 at 6 (citing Compl. ¶¶ 26, 30).) Even then, the Complaint still fails to plead facts showing that the parties reached agreement on *when* Burton would be able to invest, a purchase price, and other essential terms.[2] The Complaint does not describe the terms of the unsigned term sheet that Adams allegedly gave to him, does not allege that Adams agreed that Burton could wait until a lead investor was found to jump on the train and invest himself, and does not allege how a lead investor would set the terms and price of a deal between Burton and Adams. As the authority in Adams' Opening Brief establishes (which Burton largely ignores), the Complaint's allegations are legally insufficient to establish the existence of an enforceable agreement or a breach.

Burton's quasi-contract claims for unjust enrichment and quantum meruit also fail. Though a "plaintiff is entitled to plead *inconsistent* causes of action in the alternative" (*Winick Realty Grp. LLC v. Austin & Assocs.*, 51 A.D.3d 408, 408 (1st Dep't 2008) (italics added)), this rule does not permit a plaintiff, like Burton, to use equitable causes of action as a vehicle to *duplicate* a legal claim for breach of contract. But that is what Burton seeks to do here. Burton improperly attempts to use equitable doctrines to enforce an otherwise unenforceable agreement to agree. (*See, e.g.*, Compl. ¶¶ 33, 44, 49, 53; Opp. at 11.) And rather than limit his purported damages to the reasonable value of

[2] Among other things, Burton— presumably attempting to keep his options open— still does not state in his opposition if Adams promised him shares in a future company or if he was promised tokens or other digital assets associated with the Uniswap technology. Nor does Burton identify any other interests or rights that he was or was not promised.

his services, Burton admits that he seeks a "lost opportunity" contract-based measure of damages totaling $100 million based on the exact same facts as his contract claim. (*See* Opp. at 11 (asserting that the "reasonable value of Mr. Burton's services is the early investment opportunity that is described in the Complaint—that is, investing $100,000 in Uniswap at a $10 million valuation").) As pleaded, Burton's claims for unjust enrichment and quantum meruit merely duplicate his contract claim and should be dismissed.

Nothing Burton has argued salvages the Complaint. This Court should dismiss it in its entirety and not permit leave to amend.

## ARGUMENT

### I. Burton's Breach of Contract Claim Should Be Dismissed

Burton has not met his burden of alleging the existence of an enforceable contract with "sufficiently certain and specific" terms. *See Balco Dev. Corp. v. Peters*, 276 A.D.2d 729, 729 (2d Dep't 2000) (citations omitted). Regardless of the contract theory, Burton has failed to adequately allege an agreement or a breach.

#### A. The "Oral Contract" Alleged in Paragraph 17 Is an Unenforceable Agreement to Agree

Burton has not alleged in the Complaint – and does not argue in his opposition – that the parties reached an agreement on specific contract terms in the spring of 2018 when they allegedly made the oral contract. Even assuming Burton promised at that time to provide "assistance" and Adams promised to give Burton an "ability to be an early investor" (Compl. ¶ 17), those promises are far too vague and indefinite to enforce

in court. *See, e.g., Brembo, S.P.A. v. T.A.W. Performance LLC*, 176 A.D.3d 535, 536 (1st Dep't 2019); *Kunica v. St. Jean Financial, Inc.*, 1998 WL 437153, *6 (S.D.N.Y. Aug. 3, 1998) (claim for breach is insufficient when the complaint "is silent with respect to the amount of stock options [plaintiff] is to be awarded, the exercise price of the stock options or the date on which [plaintiff] could exercise the options.")

Burton does not seriously debate this, but instead, asserts the red herring argument that he *did* plead "the kinds of support that Mr. Burton provided to Mr. Adams in the form of advice and money[.]" (*See* Opp. at 6.) But the Complaint's allegations that Burton provided Adams with money and other assistance do not establish the existence of a contract – *i.e.*, a *legally enforceable promise* to provide that support.[3] The Complaint nowhere alleges that the parties bargained over and reached agreement on the scope of Burton's services in the spring of 2018 or at any other time, rendering it hopelessly vague. The Complaint's vague and indefinite promises to "provide assistance" in Paragraph 17 do not provide any "basis or standard for deciding whether the agreement had been kept or broken, or to fashion a remedy" and thus are legally insufficient to state a claim for breach of contract. *See Foros Advisor LLC v. Digital Globe, Inc.*, 333 F. Supp. 3d 354, 360 (S.D.N.Y. 2018).

[3] At most, the Complaint may establish that the parties exchanged gratuitous promises, which are not legally enforceable. *See Startech, Inc. v. VSA Arts*, 126 F. Supp. 2d 234, 236–37 (S.D.N.Y. 2000) ("when it is clear from the face of the pleading and terms of the contract that a promise is gratuitous, the complaint will be dismissed"); *Citibank, Nat'l Assoc. v. London*, 526 F. Supp. 793, 803 (S.D. TX 1981) ("in order for a promise to be enforceable as a contract, the promise must be supported by valid consideration"); *Municipal Grocery Stores, Inc. v. Eastern Milk & Cream Co., Inc.*, 233 A.D. 764 (2d Dep't 1931) (a promise or performance of a clearly gratuitous act is not good consideration).

**B. Burton's Other Allegations Fail to Establish the Existence of an Agreement or a Breach**

Unable to establish specific terms for the oral contract in Paragraph 17, Burton instead argues that the "*particulars* of the investment opportunity [were] based on the term sheet that Mr. Adams gave Mr. Burton" at a later time. (Opp. at 6 (italics added).)[4] This argument is meritless for multiple reasons.

First, the Complaint does not describe any of the specific terms in the term sheet. Nor did Burton attach a copy of the term sheet to his Complaint or to his opposition. Thus, Burton has not met his burden.

Second, even assuming Burton could produce a (draft and unsigned) term sheet, the Complaint does not allege facts showing that the parties signed or mutually agreed on the term sheet. Paragraph 26 alleges that Burton responded to the term sheet by expressing a "desire and intention to invest when Mr. Adams had found a lead investor to set the terms and price the deal." If anything, this allegation demonstrates that the parties had not reached any agreement at that time.

Third, Burton's argument that "the parties agreed that Mr. Burton would invest 'when Mr. Adams had found a lead investor to set the terms and price the deal'" misquotes his own Complaint. (*See* Opp. at 6 (citing Compl. ¶ 26).) Paragraph 26 states that Burton expressed the desire to invest at a later time "when Mr. Adams had found a

[4] Notably, Burton's argument that a lead investor would set the price, or that the price was later agreed to via a "term sheet" prove that the oral contract alleged in Paragraph 17 was nothing more than an unenforceable agreement to agree. *See New York Military Academy v. New Open Group*, 142 A.D.3d 489, 490 (2d Dep't 2016).

lead investor to set the terms and price the deal." The Complaint nowhere alleges that Adams agreed that Burton could invest *on the same terms* as a future lead investor. At most, the Complaint alleges that "Adams agreed that Mr. Burton would have the ability to be an early investor" (Compl. ¶ 17), and that Adams allegedly "assure[d]" Burton in the summer of 2018 that he would be given "an opportunity to be an early investor if and when a lead investor for the Uniswap project was identified." (*Id*. ¶ 25.) Even assuming these facts to be true, they do not establish that the parties had mutually agreed that a lead investor would set the terms of Burton's opportunity. Further, the Complaint does not allege that he provided any consideration for an opportunity to invest on the same terms as a lead investor.[5]

Fourth, the Complaint's vague assertion that a lead investor would "set the terms and price the deal" (*id*. ¶ 26) does not provide an objective measure to determine a purchase price or any other specific contract terms. Burton does not allege – and does not argue in his opposition – that the parties agreed on a formula or any other methodology that would be used by them or a lead investor to set the terms of a deal with Burton. In the absence of an objective measure to determine the contract terms, Burton has not alleged an enforceable agreement. *See Grasso v. Donnelly-Schoffstall*, 2021 WL 1224052, at *3 (N.D.N.Y. Mar. 31, 2021).

[5] To the contrary, Burton alleges he provided Adams with money and personal assistance pursuant to the prior "oral contract described [] in paragraph 17" that was entered into the spring of 2018. (Compl. ¶ 19; *see also* ¶¶ 23, 29.)

Finally, the Complaint's barebones allegation in Paragraph 30 that "Adams initially agreed to allow Mr. Burton to invest in Uniswap at a $10 million valuation for $100,000" does not save his claim, as notice pleading standards provide safeguards against this type of elusive pleading. None of the factual allegations in the Complaint support the conclusory assertions in Paragraph 30. The Complaint does not allege when Adams allegedly agreed to allow Burton to invest $100,000 at a $10 million valuation, whether that agreement was part of the alleged "oral contract," or, if part of the alleged term sheet, whether the term sheet included a purchase price at $100,000. "The allegations of the pleading cannot be vague and conclusory (citations omitted), but must contain sufficiently particularized allegations from which a cognizable cause of action reasonably could be found." *V. Groppa Pools, Inc. v. Massello*, 106 A.D.3d 722, 712 (2d Dep't 2013); s*ee also Schuckman Realty v. Marine Midland Bank*, 244 A.D.2d 400, 401 (2d Dep't 1997) (dismissing interference with contract claim when "the allegations in support of this cause of action are devoid of a factual basis and are vague and conclusory"); *McNeary v. Niagara Mohawk Power Corp.*, 286 A.D.2d 522, 524 (3d Dep't 2001) (a "conclusory characterization" that there was a valid contract is insufficient). Burton does not state a claim for breach of contract under any theory, warranting dismissal of the breach of contract claim with prejudice.

### C. Burton Concedes that the Statute of Frauds Bars Any Contract Claims Based on Plaintiff's "Know How" or "Know Who"

This Court should rule that the statute of frauds bars Burton's contract claim to the extent it is based on allegations that Burton helped Adams "pitch to prospective

investors" and "did whatever possible to help [Adams] connect with the right people to work and partner with[.]" (Compl. ¶¶ 20-21.) Though Burton denies that these allegations "contemplate[] the use of Mr. Burton's 'know how' or 'know who' to facilitate investments" (Opp. at 3),[6] the Complaint repeatedly suggests that Burton's contract claim is based at least in part on assistance that Burton provided to identify, pitch, or otherwise facilitate investments and the capitalization of the company. (*See* Compl. ¶¶ 20-21, 27, 38.)

Moreover, Burton's reliance on *Dorfman* to argue his claim is not subject to the statute of frauds is misplaced. In *Dorfman v. Refkin*, 144 A.D. 3d 10, 16, 19 (1st Dep't 2016), the court held that the alleged services, "including developing materials to secure investor backing, recruiting engineers and others to [the company], and developing the details of how [the company's] software . . . would be 'architected,'" consisted of more than just assisting in the negotiation or consummation of the business opportunity and thus did not fall within Section 5-701(a)(10). However, unlike in *Dorfman*, the Complaint's allegations of "advice and personal assistance" do not rise to the level of the "technical support" that extend beyond the reach of the statute of frauds. In fact, the Complaint's allegations plainly describe his efforts to negotiate the business opportunity by helping Adams "pitch to prospective investors" and by doing

[6] Notably, the argument that his claims rest on the "use of Mr. Burton's dollars" (*See* Opp. at 8) rather than his services is fatal to his quantum meruit claim. *See Skillgames, LLC v. Brody*, 1 A.D.3d 247, 251 (1st Dep't 2003) (affirming dismissal of quantum meruit claim and stating that the claim does not apply "to the provision of money rather than services").

"whatever possible to help [Adams] connect with the right people to work and partner with[.]" (Compl. ¶¶ 20-21.) Any argument by Burton that these allegations form the basis for the consideration he provided to Adams in accordance with the alleged agreement place the contract within the statute of frauds.

## II. Burton's Equitable Claims Should Be Dismissed

### A. Burton's Request for Contract Damages Leaves No Doubt He is Using the Unjust Enrichment and Quantum Meruit Claims in an Attempt to Enforce an Unenforceable Contract

Although Burton asserts that his quasi-contract claims may be pleaded in the alternative and "exist to fill the vacuum and provide Mr. Burton a remedy" in the absence of a contract (Opp. at 5, 9), unjust enrichment and quantum meruit cannot be used to duplicate a contract claim or enforce an otherwise unenforceable agreement to agree. *See Doller v. Prescott*, 167 A.D.3d 1298, 1301 (3d Dep't 2018) (affirming dismissal of contract claim as an unenforceable agreement to agree and holding that "'[a]n unjust enrichment claim is not available where it simply duplicates, or replaces, a conventional contract or tort claim.")

Burton does not distinguish *Doller* or any of the other cases in Adams' Opening Brief that establish that equitable claims cannot be used to duplicate a contract claim or enforce an otherwise unenforceable contract. (*See* Opening Brief at 14-17.) Nor does Burton cite any authority to support his legally erroneous argument that he can seek a "lost opportunity" contract-based measure of damages based on the exact same facts as his contract claim through quasi-contract theories. (*See* Opp. at 11 (asserting, without any legal support, that the "reasonable value of Mr. Burton's services is the early

investment opportunity that is described in the Complaint—that is, investing $100,000 in Uniswap at a $10 million valuation").)

The Complaint's allegations regarding Burton's 'provision of services' and funds totaling $25,000 do not plausibly support a claim for $100 million in restitution under unjust enrichment or quantum meruit theories. (*See* Compl. ¶¶ 19-24, 27.) "Recovery 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, 526 (1st Dep't 1989). The "reasonable value" of services provided must be calculated on a *reasonable* basis, such as "hours purportedly spent" (*Hindsight Sols., LLC v. Citigroup Inc.*, 53 F. Supp. 3d 747, 776–77 (S.D.N.Y. 2014)), "cost estimates" for developing a project (*Caribbean Direct, Inc. v. Dubset, LLC*, 100 A.D.3d 510, 511 (1st Dep't 2012)), or a record acknowledging fees owed for work purportedly performed. *Moses v. Savedoff*, 96 A.D.3d 466, 471 (1st Dep't 2012) (relying on "emails purportedly sent by defendant to plaintiff acknowledging that defendant owes plaintiff certain fees" to calculate reasonable value of services).

Because Burton's second and third causes of action merely duplicate his first cause of action for breach of contract, they should be dismissed as a matter of law. *See Doller*, 167 A.D.3d at 1301; *Akerson Advertising & Marketing, Inc. v. St. John & Partners Advertising*, 89 F. Supp. 3d 341, 345-46 (N.D.N.Y. 2015) (dismissing equitable claims when plaintiff "clearly seeks the benefit of the bargain.")

**B. Burton Has Not Sufficiently Alleged the "Services" that He Performed**

While Burton argues that the Complaint "identifies with specificity the services that Mr. Burton performed," this is simply not true. (*See* Opp. at 10.) At best, the Complaint describes the services allegedly performed by Burton in a vague and conclusory manner, all masked in the form of "services," including ambiguous activities such as: "thinking through a project" while "spen[ding] countless hours in front of a whiteboard" (Compl., ¶ 20), "doing whatever was possible to help [Defendant] connect with the right people to work and partner with" (*id.*, ¶ 21), and "providing technical, financial and other assistance[.]" (*Id.*, ¶ 45.) This is fatal. "Because plaintiff[] ha[s] set forth no more than vague and conclusory allegations regarding what services [he] provided to defendants or what the reasonable value for these services was, [he] ha[s] failed to state a claim for quantum meruit." *Desilva v. North Shore-Long Island Jewish Health System, Inc.*, 770 F. Supp. 2d 497, 535 (E.D.N.Y. 2011). Further, the Complaint's inadequate description of the services that Burton allegedly performed certainly falls far short of supporting his allegation that the reasonable value of his services is $100 million. (*See supra* at II.A.)

Because Burton fails to meet his burden of pleading the services that he provided and the reasonable value of those services, the Complaint's quantum meruit claim should be dismissed.

**III. The Court Should Deny Burton Leave to Amend**

Finally, this Court should deny Burton's request for leave to amend. In determining whether to grant leave, "the court must examine the underlying merits of

the causes of action asserted . . . to do otherwise, would constitute a waste of judicial resources." *Scott v. Bell Atl. Corp.*, 282 A.D.2d 180 (1st Dep't 2001); *see also Dionisio v. George De Rue Contractors, Inc.*, 38 A.D.3d 1172, 1174 (4th Dep't 2007) (denying leave to amend where a proposed amendment plainly lacked merit.) Granting Burton's request to "incorporate the term sheet and written communications identified in Paragraph 26 of the Complaint" (*see* Opp. at 11-12)—a term sheet which Burton notably did not attach to his Opposition—would not save his claims. *See 25 Bay Terrace Ass'ns v. Pub. Serv. Mut. Co.*, 144 A.D.3d 665, 667 (2d Dep't 2016) (stating that in opposing a motion to dismiss a complaint, plaintiff may submit other documents to remedy a defective complaint.) Burton's admissions already establish that the parties never reached an enforceable agreement. (*See supra* at I.B.) Additionally, Burton cannot and should not be permitted to use the equitable doctrines of unjust enrichment and quantum meruit to pursue "lost opportunity" or any other contract-based damages.

## CONCLUSION

A review of the Complaint and Burton's opposition makes clear that Burton is not able to plead a breach of contract because it is hopelessly indefinite and uncertain. Burton's other claims of unjust enrichment and quantum meruit also do not pass muster because they are merely seeking to enforce an otherwise unenforceable contract. The motion to dismiss should be granted (Dkt. No. 10), and the Complaint's three causes of action—breach of contract, unjust enrichment, and quantum meruit—should be dismissed with prejudice.

Dated: Los Angeles, CA
August 20, 2021

By:_____

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