LexisNexis®

4 of 4 DOCUMENTS

DIALAMERICA MARKETING, INC, A Delaware Corporation, Plaintiff, v. CITICORP CREDIT SERVICES, INC., A Delaware Corporation, Defendant.

DOCKET NO.: BER-L-11180-04

SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, BERGEN COUNTY

2008 N.J. Super. Unpub. LEXIS 3039

November 19, 2008, Decided

NOTICE: NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS.

PLEASE CONSULT NEW JERSEY *RULE 1:36-3* FOR CITATION OF UNPUBLISHED OPINIONS.

COUNSEL: [*1] Jeffrey M. Garrod and Craig Ollenschleger, attorneys for plaintiff (Orloff, Lowenbach, Stiffelmlan & Siegel, attorneys).

Joseph L. Buckley, Richard H. Epstein, and Theodora McCormick, attorneys for defendant (Sills Cummis & Gross, attorneys).

JUDGES: Honorable Robert L. Polifroni, J.S.C.

OPINION BY: Robert L. Polifroni

OPINION

CIVIL ACTION

Non-Jury Trial: May 27 through June 26, 2008

PROCEDURAL BACKGROUND

This matter arises out of a Telemarketing Service Agreement (TSA) entered into by plaintiff, DialAmerica Marketing, Inc. (DialAmerica), and defendant, Citicorp Credit Services, Inc. (Citicorp or CCSI) in October 2002. Pursuant to the TSA, DialAmerica's telemarketing services representatives (TSRs) made telemarketing calls to sell Citicorp credit card enhancement programs to existing customers. Each party alleges the other materially breached the Agreement. DialAmerica subsequently filed If four-count complaint alleging, among other things, breach of contract against CCSI. The trial commenced with this Court sitting without a jury on May 27, 2008, and concluded on June 26, 2008. The parties stipulated that substantive legal issues involving the contract are to be decided by applying New York law. The parties requested, [*2] and were granted, permission from this Court to submit post-trial briefs, limited to fifty pages, and both parties simultaneously filed same on July 25, 2008. Subsequently, on August 27, 2008, this Court conducted a telephone conference among counsel wherein counsel, via a letter dated September 2, 2008 to the Court, agreed they would not be submitting additional briefs.

FACTUAL BACKGROUND

In October 2002, Citicorp and DialAmerica entered into a Telemarketing Services Agreement for DialAmerica to provide outbound telemarketing services to sell Citicorp credit card enhancement programs. The Agreement provided that DialAmerica was to be compensated for each telemarketing call hour at the rate of $24.50 per hour, for each training hour at the rate of $15 per hour, and for each programming hour at the rate of $75 per hour. Pursuant to the Agreement, DialAmerica made outbound telemarketing calls to existing CCSI customers concerning credit card enhancement programs. The initial Citicorp program for which DialAmerica started calling was Drive America in October 2002. Thereafter, Citicorp added three other programs, Fee Card, Credit Protector and Watch Guard Premier, for DialAmerica to provide [*3] telemarketing services pursuant to the Agreement.

DialAmerica performed outbound telemarketing services for Citicorp as to one or more Citicorp programs continuously from October 2002 until February 13, 2004.

During the approximately eighteen (18) months that DialAmerica made telemarketing calls on behalf of Citicorp, DialAmerica utilized TSRs, located at four call centers (Tallahassee, Florida; Rochester, New York; Providence, Rhode Island; and Richardson, Texas) to make telemarketing calls for Citicorp programs. DialAmerica produced 171,709 sales of Citicorp enhancement programs for Citicorp.

The Agreement provided for the terms of services to be provided, including DialAmerica's use of scripting approved by CCSI, which was programmed into DialAmerica's calling systems for each campaign. The controversy which resulted in the severance of the business relationship between the parties arose from the events and consequences of a February 13, 2004 unannounced visit made by CCSI senior employees Kathy Taff, Andre Smith and Angela Grate to DialAmerica's Richardson, Texas call center. Ms. Taff observed TSRs calling customers using what appeared to be paper scripts while their computer screens [*4] appeared to be locked on the verification page of the programmed script. Considering this to be a significant departure from the requirement of CCSI's contract, CCSI immediately directed DialAmerica to cease all operations on behalf of CCSI. Subsequently, DialAmerica was directed to return all call leads, and the relationship was formally severed via letter from Neva Petrovich, CCSI Senior Vice President, to Mary Conway, DialAmerica Senior Vice President, on April 5, 2004.

Citicorp received monthly invoices from DialAmerica, dated November and December 2003 and January and February 2004, for TSRs calling hours and training and programming hours that DialAmerica had performed for Citicorp during the months of October 2003 through February 13, 2004.

The outstanding invoices at issue cover the period of October 2003 through February 2004. Citicorp does not contest the number of telemarketing call hours, training hours and program hours set forth in the invoices as having been performed by DialAmerica.

The total amount of DialAmerica's invoices for the period of October 2003 through February 2004 (the invoice period) was $2,073,042.32. CCSI paid DialAmerica $621,497.88 for telemarketing services [*5] performed during the invoice period. Certain of these invoices, totaling $1,451,544.44, remain unpaid by Citicorp.

The complaint alleges that Citicorp breached the Agreement by failing to pay the $1,451,544.44 DialAmerica invoiced for performance of outbound telemarketing services for Citicorp credit card enhancement programs during the period of October 2003 through February 13, 2004. The Agreement was drafted by Citicorp for DialAmerica to perform outbound telemarketing services to sell certain Citicorp programs to existing Citicorp customers. The Agreement was non-exclusive, and gave Citicorp the right to provide DialAmerica with customer names at Citicorp's sole discretion. The purpose of the Agreement was to generate sales of Citicorp programs through the performance of outbound telemarketing calls made by DialAmerica telephone sales representatives. The Agreement provided that in consideration of the services to be performed CCSI would pay the vendor (DialAmerica) the fees set forth above. Those services were defined as TSR call hours, training of TSRs and programming.

As part of the Agreement, DialAmerica promised they would perform pursuant to the terms of the Agreement which [*6] included securing CCSI's prior written approval of all scripts, screens and other training/guidance materials to be used in connection with the services rendered. Plaintiff's witnesses confirmed that at the beginning of each campaign, DialAmerica was provided with scripts that had been approved by Citicorp's legal department, and that DialAmerica was required to use only legally approved scripts. The evidence at trial established that DialAmerica's telemarketing calls, during the period in dispute, produced 76,899 sales. Said sales consist of Citicorp customers agreeing to pay monthly fees for enhanced programs offered by Citicorp.

In addition to seeking damages for unpaid invoices, plaintiff seeks lost profits of $300,415 caused by defendant's alleged wrongful termination of the Agreement without proper notice and without affording the plaintiff the opportunity to cure as per the provisions of the contract.

It is critical to note that this dispute arose in February 2004 at a time when there was intense governmental and public interest regarding unsolicited marketing calls to consumers. The parties acknowledge that between 2002 and 2004 the telemarketing industry, and its clients, were [*7] under increased pressure to comply with state and federal regulations regarding their telemarketing practices, illustrated by federal "Do Not Call" legislation. Managerial employees from Citicorp acknowledged that this regulatory requirement was of great concern to the company, and witnesses from the plaintiff acknowledged the significant impact this increased scrutiny had on its business. With this background, the telemarketing agreement was reached between the two entities, wherein calls would be made not to "strangers" but only to pre-existing Citicorp customers.

It is within this context that the Agreement provided that all telemarketing scripts, which were prepared internally by Citicorp's telesales division in conjunction with its marketing department, had to be approved by CCSI's

legal department. Incorporated within the Agreement through Article 5.4 was a document entitled Citibank Telemarketing Standards and Practices which was updated as business needs, strategies or regulations required.

It is the defendant's contention that a material provision in the Agreement between the parties was that all its telemarketing vendors, specifically including DialAmerica, strictly adhere [*8] to the approved scripting. Further, CCSI asserts that DialAmerica was obligated to follow the Citicorp scripts "100% verbatim," and their failure to do so was a material breach of the contract. These scripts were provided by CCSI to DialAmerica at the onset of each campaign. A cooperative monitoring program was utilized wherein CCSI would conduct weekly monitoring sessions and a representative of DialAmerica would listen to TSRs making calls on the various programs.

In a nutshell, it is CCSI's contention that DialAmerica materially breached the Agreement by failing to use CCSI approved telemarketing scripts as expressly required by Article 1.8 of the Agreement:

> Vendor shall obtain CCSI's prior written approval of all scripts, screens and other training/guidance materials to be used in connection with the Services. (Art. 1. 8)

More specifically, Citicorp produced evidence that TSRs at the various branches of DialAmerica used "paper" or "power" scripts which generally consisted of one page of verbiage. The evidence revealed that use of these abbreviated scripts made it easier for the TSRs to connect with customers and make sales as compared to the seven to ten page approved scripts provided [*9] by CCSI. DialAmerica does not contest the argument that it would have been inappropriate for its sales representatives to simply read a one page script and close with a verbatim reading of the online confirmation portion of the script, but denies that occurred.

Defendant's witness David Palladino testified as to his involvement with script deviation by DialAmerica TSRs in August and December 2003. It is obvious from the testimony that both incidents were relatively insignificant, and that Palladino was satisfied with the response from DialAmerica when the issues were brought to its attention. However, the script adherence issue came to a head in February 2004. A former TSR from the Rochester, New York branch of DialAmerica, Shawn Cudo, wrote to CCSI regarding sales practices being utilized at DialAmerica and he enclosed what purported to be an unapproved handwritten script created by his supervisor, Richard Waters, and used during live calling. CCSI contacted DialAmerica management and was told that Mr. Cudo was a disgruntled former employee and his allegations were unfounded. About one week later, CCSI's witnesses testified that they received calls from individuals within DialAmerica's [*10] branch in Richardson, Texas who reported using unapproved paper scripts during telemarketing calls. A managerial decision was made by CCSI to make an unannounced site visit at the Richardson, Texas branch. One of the CCSI employees who made the visit, CCSI Vice President for Telesales Kathy Taff, observed TSRs calling customers by utilizing paper scripts while at the same the computer screen in front of every TSR was "locked on" the verification page of the scrip. As a result of these observations, Ms. Taff ordered DialAmerica to stop all calling in the Richardson, Texas branch. Subsequently, managerial employees of CCSI met and discussed the situation and, on February 17, 2004, a meeting was held between principals of DialAmerica and CCSI's Vice President for Telesales Neva Petrovich wherein Ms. Petrovich announced that DialAmerica was not to make any further telemarketing calls on behalf of CCSI. During that meeting, Ms. Petrovich advised DialAmerica executives Arthur Conway and Mary Conway that the decision was made over the prior weekend to have DialAmerica stop calling in all facilities. During the meeting of February 17, 2004, Ms. Petrovich communicated to the Conways that the [*11] observations at the Richardson, Texas facility on February 13, 2004 had been reported to the highest levels of the organization, the people there were very upset, and it was decided that DialAmerica would not make another call for Citicorp. Said decision was confirmed in an April 5, 2004 letter from Petrovich explaining Citicorp's position, stating "we could not in good faith continue any existing telemarketing campaigns with your company."

Defendant contends there should be no written materials on the desks of any TSRs during live calling, citing Article 3.2 of the Agreement which provided that in lieu of background checks for each employee, the vendor may elect to have its employees work in a strictly penless and paperless environment. Since DialAmerica did not conduct background checks, it was understood that employees would not be permitted to have paper and pens at their workstation.

> Each employee of Vendor who works on Services and who has or will have access to sensitive Information (as defined hereinafter) must have a background check completed for crimes of fraud and breach of trust. If it is determined that any employee has been convicted of either of these crimes, such employee [*12] may not work perform work related to the Ser-

> vices. In lieu of such background checks, Vendor may elect to have its employees work in a strictly penless and paperless environment, provided such policy is strictly enforced and communicated clearly to all employees. Under these circumstances, employees shall not be permitted to have access to paper and pens or other writing implements at their work stations, whether in their personal belongings or otherwise. (Art. 3.2)

The purpose of this restriction was to protect the personal identity and security of the Citicorp customers who were receiving calls.

Plaintiff DialAmerica denies that it was in violation of the Agreement to have paper scripts present in call centers noting that Citicorp permitted such paper scripts to be used during training of new representatives. DialAmerica produced evidence that CCSI employees actively participated in training of DialAmerica TSRs of Citicorp programs when paper scripts were being utilized. Plaintiff cited to audit reports authored by Citicorp Project Manager Andre Smith, as well as testimony of CCSI's Vice President David Palladino, regarding Citicorp's knowledge and approval of DialAmerica's use of [*13] printed scripts and additional script aids in conjunction with the training of TSRs.

DialAmerica denies that CCSI established via competent evidence that there was ever a significant trend involving multiple TSRs from all four branches demonstrating a material breach of script adherence, noting testimony from both Palladino and Petrovich to the effect that an isolated event or problems with an individual representative would only require a counseling session or actions involving that particular representative, and would not challenge the business relationship between the two organizations. DialAmerica points out that Ms. Taff failed to testify that she observed a TSR actually using a paper script during a telemarketing call, and the testimony from the individual DialAmerica TSRs failed to specifically identify any of the printed scripts introduced into evidence in this case as being utilized during a live call to a customer. Further, it was conceded that TSRs could only make a sale by reciting verbatim the confirmation/disclosure section of the Citicorp approved script, the purpose of which was to insure that the customer understood the offer and was intending to enroll. With the approval [*14] of Citicorp, the TSRs were encouraged and trained to be assumptive and conversational with their customers and were encouraged to develop a rapport with the customer by making "small talk" which was not in the approved script. All TSRs testified that they were not instructed by DialAmerica management to lie or mislead Citicorp customers as to the terms and conditions of a program offer. DialAmerica contends that Citicorp has not presented a specific identifiable script containing terms and conditions that were in any way significantly different than the approved script, and argues that the "Sutton memo" introduced into evidence by Citicorp should not be given any weight by the Court. Briefly stated, DialAmerica argues that Citicorp has not proven the violation of its script adherence policy through the production of some partial scripts, an unclear memorandum, three quality assurance forms, and the testimony of unreliable witnesses Cudo and Frary, all of which fail to demonstrate a systemic widespread failure to use the approved scripts which would justify Citicorp's decision to terminate the relationship on or about February 17, 2004.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Notwithstanding [*15] plaintiff DialAmerica's protestations regarding the quality of the evidence produced by Citicorp regarding widespread use of unauthorized use of paper or power scripts, this Court finds the preponderance of the evidence reveals that there was systemic use of unauthorized paper or power scripts throughout the DialAmerica branch offices to facilitate sales of Citicorp credit card programs. The use of these scripts at different locations were essentially conceded by Mary Conway in her testimony, albeit with the unacceptable explanation that said use was not known by upper management of DialAmerica. Unauthorized use of paper or power scripts by personnel in the sales branches violated the conditions of the Agreement and such practices should have been discovered by reasonable management practices. The testimony of DialAmerica's Vice President of Financial Services, Lissa Love, that said paper scripts were only used "for training purposes" rings hollow, in light of the totality of the evidence presented via testimony of various witnesses and the documentation produced at trial. The testimony of former employee Shawn Cudo was not given particular weight by this Court in light of Mr. Cudo's [*16] inconsistencies and his admitted willingness to mislead and bend the truth for his own purposes. DialAmerica is accurate in describing Mr. Cudo as a "disgruntled" employee who was seeking retribution against his former employer who had terminated him for good cause. [1] However, the use of paper or power scripts in conjunction with telemarketing sales was established through documentation this Court deemed to be authentic and reliable, such as the "Sutton memo," as well as the testimony of DialAmerica's Branch Manager Richard Waters and various TSRs.

> 1 Nevertheless, this Court did accept as credible Shawn Cudo's testimony regarding certain as-

pects of the use of paper or power scripts when that testimony was consistent with other believable evidence in this case on that issue.

Mr. Waters was a supervisor in Rochester, New York. He noted the importance of script adherence. He was promoted to a full-time team leader in 2002 and was subsequently promoted in 2003 as shift manager which included responsibilities to oversee team leaders. He was subsequently promoted to branch manager. He acknowledged that team leaders used paper scripts and physically saw some TSRs using a paper script on Citicorp [*17] promotions. Before permitting sales representatives to use paper scripts, he reviewed them to make sure they fulfilled the requirements of Citicorp. He also noted that paper scripts were not used by themselves but were used simultaneously with online scripting. He considered paper scripts to be powerful tools and he heard the use of the phrase "power script" early in his career in connection with Citicorp programs but he was not sure if the paper scripts he used were called "power scripts."

The testimony of Michael Frary, although far from compelling, nevertheless was credible to this Court in that he used a paper script which came from the floor supervisor and given to TSRs to use as an aid in making a sale. Frary noted he wrote his own script to help make sales indicating that he only used the online script during training and only for the first week or two when he worked the desk. He testified that floor supervisors would tell TSRs to use the online script when monitoring was being done. He was relatively certain that Mr. Waters wrote the paper script. He testified he did not use the online script after the first couple days on the job.

Patricia Phillips, a TSR from Providence, Rhode [*18] Island, testified that she used a one page paper script received from her supervisors when calling on behalf of Citicorp. These "power scripts" were kept in a folder inaccessible to TSRs. She never used the online scripting nor did her fellow sales representatives, and she observed the paper scripts at the desks of her fellow TSRs.

Krystal Segura, a TSR from Tallahassee, Florida, testified that she used the online script for the "close," noting that new employees were required to use the online script for the first week or so but after that they were not required to use those scripts word for word. Instead, the TSRs were expected to follow the main points which were produced in a laminated script made available to the TSRs. Amanda Degray, a supervisor in Richardson, Texas, was present during the meeting when TSRs were provided with a paper script to use on Citicorp campaigns. Casey Walker, a branch manager from Richardson, Texas, also acknowledged use of a one page paper script when calling customers on Citicorp programs.

The "Sutton memo" was found in five different employee folders. John Sutton was identified as an assistant branch manager in Tallahassee, Florida, whose job, according [*19] to Mrs. Conway, was to insure that representatives were following directions generated from the home office. This Court finds the "Sutton memo" to be authentic and reliable as evidence in this trial. The memo explains to TSRs that they are given the power script to use during calling as a way to veer off online scripting. It further provided that the power script was not to be used for new trainees, but that it was to be worked into the sales approach during the second and third week.

DialAmerica's practice as represented by Mrs. Conway during the meeting with Neva Petrovich and the evidence produced belies DialAmerica's position at trial that the use of paper scripts was isolated occurrences. The clear and credible inference from the testimony of DialAmerica employees was that the lengthy and convoluted language of the "vetted" scripts, while passing muster with corporate lawyers, could not be effectively used to sell the product.

The totality of the testimony reveals to this Court that, in reality, the paper scripts were not simply used as a way to train new sales representatives in sales techniques. Rather, the credible evidence established that brand new employees would rely solely [*20] on the online scripting until they developed some experience in handling customers and making sales. Once a TSR had some experience, it was common practice for the supervisors to have them use abbreviated, abridged paper scripting as the most effective means of accomplishing the goal of making sales.

The above findings notwithstanding, Citicorp's argument that the Citicorp sales Agreement, and its relationship with DialAmerica, was not simply to "make sales" is not convincing. The crux of this case, as this Court sees it, is whether DialAmerica's use of "training" or "power" or "paper" or "abbreviated" scripting is a material violation, a material breach, of the contract. The defendant cites the requirement of its "penless and paperless" environment as set forth in Section 3.2 of the Agreement, along with the requirement for verbatim scripting, as necessary building blocks for its defense that the existence of a paper script -- regardless of its characterization -- was a material breach of the contract. Citicorp produced reasonable evidence expressing legitimate concerns of Citicorp in protecting personal information relating to its customers' personal and financial identity. The Court [*21] finds that Citicorp's concerns were reasonable and appropriate, including its contention that all customer information is, by definition, sensitive.

After all, the telemarketer and its employees would not have access to this information but for the fact that the names and contact information was provided by Citicorp. This approach is particularly meaningful in light of the legislative and regulatory pressure on the industry in 2003 and 2004. However, defendant's argument regarding the violation of the penless and paperless environment is a bootstrap, a mechanism to collaterally support the substantive complaint of defendant that the use of the unauthorized scripting was a material breach of the contract. The bootstrap argument fails to impress this Court. There was no evidence whatsoever produced at trial to establish a nexus between the laudable purposes of the penless and paperless environment and the use of the paper scripts during sales calls. The use of abbreviated, abridged paper scripts in no way impacted upon or violated the security concerns of Citicorp, which was the fundamental purpose behind Section 3.2. The existence of a paper script at a TSR desk was, at best, a technical [*22] violation of Section 3.2 and cannot be characterized as a material breach of the contract.

Nevertheless, Citicorp had good and valid reasons for wanting its vendors to read verbatim from scripts vetted by their legal department, particularly in light of the enhanced legislative regulatory and public pressures which impacted the telemarketing industry in 2003 and 2004. Citicorp would have reason to be concerned about claims filed against it relating to telemarketing including class action lawsuits. That reasonable concern on the part of Citicorp is reflected in Article 10 of the Agreement, "Indemnification."

> 10.1 Vendor shall hold CCSI, its corporate affiliates, and their directors, officers, employees and agents harmless from and indemnify them against any and al claims, suits or proceedings, liabilities, losses, [damages] and expenses whatsoever, including reasonable outside attorneys' and experts' fees (collectively, Losses) arising out of or in connection with:
>
> > (i) Any claim by a third party, including but not limited to cardmembers or any other individuals with whom Vendor's employees and agents speak with respect to Vendor's provision of the Services, including, without limitation, [*23] any material deviation from materials of scripts provided to Vendor by CCSI, violates any right or property interest of a third party, including, without limitation, any such right or property interest based upon copyright, defamation, privacy, plagiarism, privacy, trademark or trade secret;
> >
> > (ii) A breach by Vendor of any representation, warranty or covenant, including, but not limited to, those herein, made by Vendor to cardmembers or potential cardmembers or CCSI; and
> >
> > (iii) Any violation by Vendor or any agent of federal, state or local laws or regulations applicable to Vendor's activities under this Agreement.

As a result, Citicorp is in a solid legal position against any third party claims arising out of telemarketing issues if it requires vendors to use scripting vetted by its legal department, and it also has the indemnification protection in the event the vendor deviates from the scripting or participates in any other conduct which would result in claims against Citicorp. More directly put, if DialAmerica's deviations from verbatim scripting resulted in damages asserted by third parties against Citicorp, Citicorp would have ample protection under the contract to seek full indemnification [*24] from DialAmerica.

It is within this context that the Court has determined that DialAmerica's deviations from the approved scripting do not constitute a material breach of the sales agreement. In its analysis, the Court makes the obvious observation that while corporate lawyers endeavor to protect the corporation from legal consequences and damages, corporate sales and marketing employees are charged with generating income and profit for the corporation.

In February 2003, Neva Petrovich succeeded Linda Goldstein as Citicorp vice president for its telesales department. At that time, there were no issues or problems with DialAmerica's performance. Citicorp was so satisfied with DialAmerica's performance of services they increased the number of Citicorp programs and increased leads and call hours for three additional programs. As per

the testimony of Vice President Kathy Taff, this expansion was due to the fact that DialAmerica was satisfying Citicorp's cost per sale goal. Petrovich acknowledged that DialAmerica's performance was good overall and that Citicorp was pleased. In fact, Petrovich testified the organization was "thrilled" to have DialAmerica's Richardson, Texas site up and running. [*25] For example, the fourth quarter of 2003 Fee Card Report indicated DialAmerica had the most sales per hour of telemarketing vendors calling for that program in the months of April through August 2003. In addition, in a memorandum dated February 6, 2004, CBSI, a third party monitoring company hired by Citicorp, reported to Citicorp that "Dial exceeded their sales per hour conversion and enrollment goals in January."

A material breach is a failure to do something that is so fundamental to a contract that the failure to perform that obligation defeats the essential purpose of the contract or makes it impossible for the other party to perform under the contract. In other words, for a breach of contract to be material, it must "go to the root" or "essence" of the agreement between the parties, or be "one which touches the fundamental purpose of the contract and defeats the object of the parties in entering into the contract." *Septembertide Publishing v. Stein and Day, Inc., 884 F.2d 675, 678 (2d Cir. 1989)*. Although the determination of whether a material breach has occurred is generally a question of fact, there is no simple test to ascertain whether a breach is material. *See Williston on* [*26] *Contracts* § 63:3. Among the factors to be considered are: (1) deprivation of expected benefit, *i.e.*, the more the non-breaching party is deprived of the benefit which he reasonably expected, the more likely it is that the breach was material; (2) part performance, *i.e.*, the greater the part of the performance which has been rendered, the less likely it is that a breach will be deemed material and a breach occurring at the very beginning of the contract is more likely to be deemed material than the same breach coming near the end; (3) likeliness of cure, *i.e.*, if the breaching party seems likely to be able and willing to cure, the breach is less likely to be material than where cure seems impossible; and (4) whether the breach is willful, *i.e.*, a willful breach is more likely to be regarded as material than a breach caused by negligence or other factors. *See Restatement (Second) of Contracts § 241*.

It is the finding of this Court that the contract between the parties was for services to be rendered by plaintiff DialAmerica to CCSI to generate sales of various products offered by CCSI to its cardholding customers. Simply put, the primary purpose of the contract was to generate sales of [*27] products for CCSI. This Court does not dismiss CCSI's impassioned argument regarding its concerns of maintaining good customer relations with its cardholders, and its companion "desire to avoid alienating said cardholders." However, this Court finds that these considerations were collateral to the primary purpose of the contract. The reality is that CCSI intentionally and specifically contracted with DialAmerica, a telemarketing corporation, to generate a volume of sales. DialAmerica is not, and has never been, a public relations company, and CCSI knew that when the contract was formed. Therefore, the testimony of CCSI witnesses characterizing the company's concern for its cardholders as the critical component central to its contract with DialAmerica is not convincing. The reality is that CCSI was not content with the profit generated by interest charged on their credit cards, and they were desirous of increasing their profits from the business they had with their existing cardholders by introducing various programs which would enhance, to CCSI's financial benefit, the relationship it had with its cardholders. The testimony of CCSI witnesses made it clear that they were quite familiar [*28] with the telemarketing industry. CCSI contracted with DialAmerica to make telemarketing calls to its customers in order to sell additional products. While it is fair and reasonable to conclude that CCSI did not want the telemarketing process to alienate cardholders to the point that the cardholders would cancel their card or to decrease the usage of same, it is not reasonable to conclude that this concern should be elevated to a material component of the contract. The Court observes that no such specific concerns are expressed in the contract itself. To the extent any said concerns can be reasonably read into the quality assurance aspects of the contract, said concerns must be considered secondary to the overall primary purpose of the contract, *i.e.*, generation of sales. If Citicorp received negative feedback from cardholders, said input could factor into decisions regarding the volume of call leads assigned to DialAmerica. Similarly, while the Agreement demonstrates Citicorp's concerns regarding exposure to potential claims and damages connected with telesales of products, the Agreement provides specific remedies for same, *i.e.*, indemnification from the vendor.

As indicated above, [*29] the alleged breach was not material because it is this Court's finding that DialAmerica substantially performed its side of the bargain, and that the alleged breach did not substantially impact upon the fundamental purpose of the contract nor did it defeat the object of the parties in entering into the contract. *See Merrill Lynch & Co. v. Allegheny Energy, Inc., 500 F.3d 171, 186 (2d Cir. 2007)* (citing *Hadden v. Consol. Edison Co. of New York, 34 N.Y.2d 88, 312 N.E.2d 445, 356 N.Y.S.2d 249 (1974)*); *Frank Felix Assocs. Ltd. v. Austin Drugs, Inc., 111 F.3d 284, 289 (2d Cir. 1997)* (citing *Babylon Assocs. v. County of Suffolk, 101 A.D.2d 207, 475 N.Y.S.2d 869, 874 (N.Y.A.D. 1984)* (citing *Callanan v. Powers, 199 N.Y. 268, 92 N.E. 747 (1910))*).

With these principles as our benchmark, it is, therefore, this Court's opinion that DialAmerica did not materially breach the telemarketing services agreement by TSRs utilizing paper scripts during their sales calls, or by failing to read approved scripts "100% Verbatim." [2] Absent here is a party failing to perform a substantial or essential part of the contract, or a breach which substantially defeats the contract's purpose, or a breach of a [*30] condition so vital to the existence of the contract that said breach would render performance impossible. As previously noted, this Court has found that the primary purpose of the contract was for DialAmerica to generate sales of CCSI programs to its existing cardholders. DialAmerica fulfilled that material aspect of the contract.

> 2 The "100% Verbatim" aspect of Citicorp's defense was developed late in the game, and was not asserted by Petrovich in her letter to DialAmerica nor was it included in the defendant's pre-trial memoranda nor in its answers to interrogatories. Citicorp had made the point that it did not terminate the parties' agreement because of an alleged "deviation or departure by plaintiff from any standards and/or procedures applicable to the plaintiff's performance of outbound telemarketing services," rather it asserted the breach was due to a violation of Article 1.8 use of unapproved scripts. This may have been strategic on the defendant's part, since the "departure or deviation" might trigger the notice and obligation to cure requirements under the contract. Further, as confirmed by the testimony of Neva Petrovich and David Palladino, Citicorp had a policy of strict [*31] adherence which was not the same as the 100% verbatim. Trial evidence revealed various illustrations, provided by Citicorp's own witnesses, Petrovich, Lombardo and Palladino, that something less than 100% word for word verbatim reading of the scripts was indeed acceptable and approved by Citicorp.

CCSI accuses DialAmerica management of taking an "ostrich" approach regarding the use of unauthorized paper scripts at various branch locations. Although there is validity to that argument, Citicorp fails to address or adequately explain its own "ostrich" approach to this issue. Under the arrangement developed by Citicorp at the time of the contract, Citicorp made it the responsibility of the vendor, whose primary job was to make sales, to be the guardian to make sure its TSRs did the verification correctly. It was Citicorp who arranged a monitoring program which would provide the vendor with advance notice of when the monitoring would take place. On this subject, the Court notes the testimony of David Palladino regarding CCSI's subsequent and retrospective reviews of sales tapes which resulted in a finding of problems in 63 of the 1,720 tapes subsequently reviewed. Mr. Palladino testified [*32] that Citicorp had the right to listen to all tapes on sales confirmation. The Court is curious as to why Citicorp did not utilize this relatively simple method of verifying that sales were properly made throughout the course of the contract. In any event, Citicorp was content with responsibilities delegated to the vendor supplemented by monitoring by third party quality assurance vendors, along with occasional planned audits performed by CCSI telemarketing personnel. The inference this Court draws is that CCSI was content with the sales generated by the telemarketing vendors, and felt insulated from claims because they had a quality assurance system in place and, as stated previously, they had an indemnification provision in their contract so that the vendor would indemnify CCSI if any problems developed. It strikes this Court that this situation is analogous to a parent who sends his or her child to college and sets forth a specific behavior code along with expectations of academic performance. The agreement is that if the child performs well academically and stays out of trouble, the parent will pay the college expenses. The better the academic performance, the less likely it is [*33] that the parent will aggressively look into violations of the social and behavioral code. Since all appears to be going well academically, the parent lets the student know when he or she plans to come to visit, thereby avoiding seeing anything which would require disciplinary action. If, however, the parent receives information from a former roommate or other interested party of social and/or behavioral problems, and if the parent subsequently makes an unannounced and surprise visit to the campus and is confronted with activities which violate the prescribed social and behavioral code, only then is the parent forced, reluctantly, to deal with the situation.

Here, in its informal audit reports, CCSI complimented DialAmerica for developing "printed scripts" and "script aids" in training; David Palladino confirmed that Citicorp knew and approved of DialAmerica's use of printed scripts and additional script aids; and Smith's audit report of September 8, 2003 in Rochester, New York referred to the use of "laminated job aids which allows representatives to see important product materials posted for reference to calls." Further, DialAmerica received consistently high performance scores from [*34] the third party monitors, AON, CBSI, and Concentra.

It is in this context that the Court deals with the issue of Mr. Andre Smith. The Court views Mr. Smith as an important "point person" of CCSI in its dealing with DialAmerica. Smith was Citicorp's assistant vide president for telesales directly managing one Citicorp program and being actively involved with DialAmerica on at least two other programs. The evidence is that Mr.

Smith received and approved the training manual that was prepared for DialAmerica for use in training TSRs on Citicorp programs and he actively participated in the actual training of DialAmerica TSRs at the branch offices. He would visit call centers as part of Citicorp's monitoring evaluation of DialAmerica's performance and was ultimately responsible for approving payment invoices submitted by DialAmerica. Mr. Smith was identified by Citicorp as a person with relevant knowledge as to a variety of facts relevant to this litigation including Citicorp's affirmative defenses. Mr. Smith was specifically cited in two court orders compelling defendant to produce witnesses for depositions. The orders were entered on October 10, 2006 and February 14, 2007. Immediately [*35] prior to the entry of the second order, Citicorp's counsel advised plaintiff's counsel that Mr. Smith may no longer be employed by Citicorp. Subsequently, on or about January 23, 2007, Citicorp confirmed that Smith was no longer employed. In fact, Smith had ceased to be employed by Citicorp in July 2005. Plaintiff urges this Court to draw various adverse inferences from Citicorp's failure to produce Mr. Smith.

The Court will not engage in a lengthy analysis of *N.J.R.E. 804(a)(4)* regarding the definition of "unavailability" and the holdings of seminal cases on the subject, including, of course, *State v. Clawans, 38 N.J. 162, 183 A.2d 77 (1962)*; *Wild v. Roman, 91 N.J. Super. 410, 220 A.2d 711 (App. Div. 1966)*; and *Parentini v. S. Klein Dep't Stores, Inc., 94 N.J. Super. 452, 228 A.2d 725 (App. Div. 1967)*. Defendant Citicorp has an obligation to know the status of an employee when it identifies that employee as having relevant and important knowledge regarding issues raised in a contentious lawsuit. The situation is analogous to a company taking steps to avoid having a document subject to "routine" records destruction when the company knows that the records may be relevant to issues in pending litigation. [*36] In any event, since this Court is deciding this case without a jury, a formal finding of an "adverse inference" is not necessary. Rather, it is enough that the testimony of DialAmerica employees regarding Mr. Smith's role in sanctioning and approving DialAmerica' s performance of the contract is found to be credible, not simply because Mr. Smith was not produced to testify to the contrary, but because the other credible evidence in the case reveals to this Court that Mr. Smith was satisfied with DialAmerica's performance of the contract, certainly at least up to the night of February 13, 2004 when he accompanied Ms. Taff on the unannounced visit. The evidence revealed that Mr. Smith received, approved and utilized the Citicorp/DialAmerica training manual on behalf of Citicorp, and the Court notes that Citicorp did not and could not produce a copy of same because one could not be located in their files. The evidence reveals that Mr. Smith understood and approved the use of paper scripts at least in the training of DialAmerica TSRs. More importantly, as a result of his periodic visits to various DialAmerica call centers when he would make evaluations of the performance of the call centers, [*37] he concluded in his audits that (a) DialAmerica was compliant in regards to Citicorp's standards and practices; (b) that DialAmerica had many positive processes in place to continue a strong relationship with Citicorp; and (c) that quality was a strong emphasis of DialAmerica. The evidence further revealed that Mr. Smith's conclusion based upon his evaluation and monitoring of DialAmerica TSRs calling on Citicorp programs was that DialAmerica continued to score well during monitoring sessions. As late as December 2003, Smith reached an overall evaluation that the Tallahassee, Florida call center was compliant in regards to the Citicorp standards and practices, with no negative areas to report.

It is the conclusion of this Court that until February 13, 2004 CCSI was content and satisfied with the business relationship, *i.e.*, DialAmerica's performance under the contract and the financial benefits Citicorp received from sales generated without any demonstrative detriment to CCSI. Said lack of detriment or damage to Citicorp arising out of DialAmerica's departures from contract language requires further discussion.

Implicit in all commercial contracts is a covenant of good faith and fair [*38] dealing in the course of contract performance. *Dalton v. Educational Testing Serv., 87 N.Y.2d 384, 389, 663 N.E.2d 289, 639 N.Y.S.2d 977 (N.Y. 1995)*. A corollary to the implied obligation of each promisor to exercise good faith and fair dealing is the pledge that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of their contract. *Id*. The proper aim of a court is to arrive at a construction which will give fair meaning to all of the language employed by the parties, and to reach a "practical interpretation of the expressions of the parties to the end that there is a realization of reasonable expectations." *Partrick v. Guarniere, 204 A.D.2d 702, 612 N.Y.S.2d 630, 632 (N.Y.A.D. 1994)* (citing *Brown Bros. Elec. Contractors, Inc. v. Beam Const. Com., 41 N.Y.2d 397, 400, 361 N.E.2d 999, 393 N.Y.S.2d 350 (N.Y. 1977))*. In construing the provisions of a contract, we should give due consideration to the circumstances surrounding its execution, and if possible, we should give to the agreement a fair and reasonable interpretation. *Aron v. Gillman, 309 N.Y. 157, 163, 128 N.E.2d 284 (1955)*. The court looks then [*39] not to the parties' after-the-fact professed subjective intent, but rather to their objective intent as manifested by their expressed words and conduct at the time of the agreement. *Id*.

Further, it is axiomatic under New York law (as well as the law in most other jurisdictions) that for an alleged

breach of a contract to be material, the party claiming the breach must establish a clear showing of actual damages. A breach is not material if it does not cause any damages. *Williston on Contracts* § 63.3. Citicorp failed to prove to the satisfaction of this Court any significant adverse impact on its business. In other words, whatever the concerns of Citicorp management resulting from the visit to the Richardson, Texas branch, same were not realized from any proofs adduced during this trial.

As noted in the Comment section to the *Restatement (Second) of Contracts § 241*, in many cases a material breach of contract is proved by the established amount of the monetary damages flowing from the breach. Conversely, where a breach causes no damages or prejudice to the other party, it may be deemed not to be material. *See Milan Music, Inc. v. Emmel Comms. Booking, Inc., 37 A.D.3d 206, 829 N.Y.S.2d 485 (N.Y.A.D. 2007)*; [*40] *Marbax Assocs. Ltd. P'ship v. Resources Prop. Imp. Com., 196 A.D.2d 727, 601 N.Y.S.2d 917 (N.Y.A.D.), leave den., 82 N.Y.2d 662,632 N.E.2d 459, 610 N.Y.S.2d 149 (N.Y. 2003)*.

New York law is clear that in order for a breach to be material, the aggrieved party must establish damages. CCSI has not proven that DialAmerica's improper techniques caused CCSI any damages in terms of lost customers or lost profits. CCSI has not come forward with any proof, statistical, anecdotal or otherwise, indicating the existing cardholders cancelled their cards, reduced their usage, or chose not to renew as a result of the alleged wrongdoing of DialAmerica. Neva Petrovich testified that Citicorp did nothing to investigate the alleged use of unapproved scripts vis-á-vis their customers, and their audit of recorded sales confirmations could not reveal whether unapproved scripts had been used. Nevertheless, Citicorp acknowledged that it accepted all of the sales made by DialAmerica TSRs, whether or not those sales were closed with the aid of a printed or power script. Beyond the fact that Citicorp did not prove actual damages or adverse impact, in accepting sales made by DialAmerica TSRs during the disputed period, Citicorp [*41] reaped a financial benefit from the sales calls. The uncontradicted evidence was that Citicorp generated revenue from customers who enrolled in the Citicorp program as a result of plaintiff's performance of services under the Agreement.

Professor Farnsworth has commented that the materiality of a party's breach is questioned when the injured party seeks to use that breach to justify its own refusal to proceed with performance. *Farnsworth on Contracts* § 8.16. Here, DialAmerica, in pursuance of its telemarketing service agreement, rendered, performed, and furnished services to and for CCSI. Even though there was a deviation from the conditions of the contract with regard to certain details as set forth above, DialAmerica did not materially detract from the benefit CCSI derived from the performance, and CCSI has received substantially the benefit expected. Therefore, based on ordinary contract principles, a non-material breach by DialAmerica would not justify non-performance by CCSI. In other words, CCSI has still received, under the contract, valuable services, for which it refuses to pay. This Court views these facts as establishing a cause of action in favor of DialAmerica, and against [*42] CCSI, for the damages sustained by DialAmerica based on the breach of the contract, and for the value of the services rendered by it pursuant to the contract.

It is a basic tenet of contract law that "a party may terminate a contract only because of substantial nonperformance by the other party so fundamental as to defeat the objects of the parties who are making the agreement." *United Airlines, Inc. v. Austin Travel Corp., 867 F.2d 737, 741 (2d Cir. 1989)*. In order to justify termination, the breach must be so substantial and fundamental as to strongly tend to defeat the object of the parties who are making the contract. *Babylon Assocs. v. County of Suffolk, 101 A.D.2d 207, 475 N.Y.S.2d 869, 874 (N.Y.A.D. 1984)*, quoting *Callanan v. Powers 199 N.Y. 268, 284, 92 N.E. 747 (1910)*. Termination is an "extraordinary remedy" to be permitted only when the breach goes to "the root of the agreement." *Septembertide Publishing, B.V. v. Stein & Day, Inc., 884 F.2d 675, 678 (2d Cir. 1989)*.

CCSI denies it terminated the contract. Although it is uncontroverted that Citicorp did not give DialAmerica the prior written notice of termination required by Article 12.1 of its contract, Citicorp denies that [*43] its order to cease all calling constituted a "termination" of the contract. Citicorp argues that it simply elected not to give DialAmerica any more work, a decision authorized by Article 1.2 of the contract giving CCSI the "sole discretion" regarding how many, if any, leads to provide DialAmerica.

> CCSI shall retain Vendor, on a non-exclusive basis, from time to time, at CCSI's sole discretion, in connection with the Services recited herein. (Art. 1.2)

Citicorp's argument in this regard is unpersuasive. A reasonable reading of the "sole discretion" provision is that it gives to Citicorp the right to allocate its telemarketing business as among various vendors under contract. The evidence in this case reveals that Citicorp constantly monitors the sales performance of its vendors and Article 1.2 makes it clear that, as the customer, they retain the right to reward vendors who perform well with more business, and to restrict the amount of work par-

celed out to non-performing vendors. There was no competent evidence presented by Citicorp through any witnesses that this provision was designed to end the relationship with the vendor over a dispute or a claim of poor or improper performance. [*44] Such a reading would eviscerate Article 12.1 which provides specific terms and details regarding termination of the Agreement. If Citicorp could end the relationship by citing the "sole discretion" language of Article 1.2, why would they need Article 12? Why would Citicorp need to author an agreement which provides for written notification of termination, opportunities to cure defects, and the like? The questions are rhetorical because there are no reasonable answers. Further, as per the testimony of Kathy Taff, Neva Petrovich directed CCSI to stop making payments on all invoices for calls made prior to February 13, 2004. This unrefuted evidence that Citicorp decided to withhold payments for past services rendered is clear evidence of termination based upon Citicorp's internal determination that DialAmerica materially breached its contract. Although reference to Citicorp's "sole discretion" to provide sales is relevant to Citicorp's future obligations to provide business to DialAmerica subsequent to February 13, 2004, [3] it is not controlling or applicable to Citicorp's determination not to pay for invoices generated within the disputed period.

3 See discussion below concerning "Loss of [*45] Profits."

When Neva Petrovich assumed her position as Senior Vice President of Telemarketing Sales, there had been a good pre-existing relationship between her company and DialAmerica, and she had received glowing reports from Andre Smith that DialAmerica was continuing to increase business. That success continued through February 2004. It is a reasonable deduction that when Ms. Petrovich received the report of February 13, 2004 from Kathy Taff, in conjunction with other reports of questionable activity at DialAmerica branches, her reaction, and that of the company, was that the "sky was falling." Ms. Petrovich, and upper management at CCSI, immediately concluded that Citicorp was at risk and exposed to potential violation of telemarketing rules and regulations and perhaps civil damages. As set forth in more detail below, although this concern may have provided a good faith reason to cease future calling, it did not provide sufficient reason to terminate CCSI's obligations to pay DialAmerica for the value of services rendered by it to CCSI. As noted by Professor Farnsworth, "an injured party that acts precipitously and terminates before he is entitled to do so loses his defense, as [*46] well as the possibility of claiming damages for total breach, and will itself be liable for damages for total breach." *Farnsworth on Contracts*, § 8.15.

It is uncontroverted that Citicorp did not provide DialAmerica with written notice of any claimed breach or an opportunity to cure any alleged breach, prior to the discontinuation of the relationship. The two Citicorp executives who signed the Agreement, Vice President Peter Knitzer and Linda Goldstein, both testified that Article 12.2, *i.e.*, [*47] the provision requiring written notice and the opportunity to cure claimed breaches, was a material provision of the Agreement. Although Goldstein indicated that on each prior occasion of a claimed breach the vendor was given written notice and opportunity to cure, she and Petrovich indicated that there were circumstances where the provisions would not be enforceable or practical. Neva Petrovich clearly and unequivocally stated that she did not give DialAmerica either notice of the alleged breach or any opportunity to cure or remedy said breach, indicating that there was nothing that DialAmerica could do or say which would change the decision that had been made over the weekend of February 13, 2004.

Further, defendant asserts that its actions were appropriate pursuant to Article 1.7 of the Agreement, which provided, in pertinent part:

> Vendor shall: (a) comply with all applicable laws while performing Services (including, without limitation, federal and state telemarketing sales laws and regulations); (b) obtain all necessary consents and authorizations, and comply with any licensing requirements with respect to its business prior to providing Services; (c) ensure that none of the Services [*48] will infringe on the proprietary or ownership rights of any party; (d) calculate, report, and remit all sales, use, excise, or similar taxes related to its performance of Services; and (e) be solely liable for any taxes, penalties, or interest which may be imposed due to Vendor's failure to timely file returns or deposit appropriate taxes of any nature whatsoever. Vendor shall provide to CCSI, at least once each calendar year upon request, Vendor's certification of compliance and supporting compliance manual relating to the Services.

Defendant cites to the Telemarketing and Consumer Fraud and Abuse Prevention Act, *15 U.S.C. § 6101-6107 (2000)* and regulations promulgated by the Federal Trade Commission to prohibit deceptive telemarketing acts or practices in support of its "illegality" defense. Defendant cites to DialAmerica's use of unapproved scripts which,

CCSI contends, failed to make appropriate disclosures and provided misleading information to consumers. The Court finds defendant's proofs inadequate regarding this assertion of an "illegality" defense, as well as defendant's claim that plaintiff violated Article 1.7.

The testimony of Ms. Petrovich established that there were no [*49] complaints, to the company's knowledge, made to the Federal Trade Commission by customers, nor were there any claims asserted by the Federal Trade Commission or any other governmental authority. Simply put, defendant did not provide adequate proof to this Court that there was, in fact, any violation of law specifically but not limited to rules of the Federal Trade Commission. The Court does not accept conclusory comments by witnesses interpreting words in FTC regulations such as "promptly" in identifying the purpose of the call as convincing evidence of said violations, particularly in the absence of any complaints made to or by the FTC. Nor did Citicorp satisfactorily demonstrate to this Court that the existence of paper scripts violated the "clean desk policy" which clearly intends to restrict the ability of TSRs to record or note personal information from customers. Defendant has come forward with no proof whatsoever to indicate that use of abbreviated scripts would threaten customer security or privacy in any way. Finally, the Court references its findings above regarding the defendant's enforcement of its quality assurance program, and its right to indemnification upon receipt [*50] of a claim.

Pursuant to the above findings, this Court finds, by a preponderance of the evidence, the existence of an enforceable contract, plaintiff's substantial performance of same, and plaintiff's incurrence of damages caused by the defendant's breach. *See Pfizer, Inc. v. Stryker Corp., 348 F. Supp. 2d 131 (S.D.N.Y. 2004)*; *In re Lloyd's American Trust Fund Litig., 954 F. Supp. 656 (S.D.N.Y. 1997)*. It is axiomatic that the failure to tender payment for services rendered is a material breach of the contract under New York law. *See Wechsler v. Hunt Health Syst., Ltd., 330 F. Supp. 2d 383, 417 (S.D.N.Y. 2004)*; *Franklin Pavkov Constr. Co. v. Ultra Roof, Inc., 51 F. Supp. 2d 204, 215 (N.D.N.Y. 1999)*; *Jafari v. Wally Findlay Galleries, 741 F. Supp. 64, 67 (S.D.N.Y.1990)*.

As set forth above, it is the finding of this Court that any deviations or departures from the expressed terms of the contract on the part of DialAmerica do not rise to a level of a material breach for the following reasons: the defendant was not deprived of the benefit which it reasonably expected in that DialAmerica substantially performed its obligations under the contract; the defendant substantially received the benefit [*51] of its bargain; the plaintiff substantially met the expectations of the defendant; the defendant has not proven bad faith on the part of DialAmerica regarding its non-material breaches of the contract; and the defendant has not paid for services rendered by the plaintiff.

> The related doctrines of cure and forfeiture avoidance are but reflections of the very basic role which the principle of materiality plays in the law of contracts.... The basic purpose of these correlative principles is to enforce the societal interest that the contracting parties be accorded security for their justified expectations and, at the same time, to preclude abuse of that protection by foreclosing contract cancellation on the basis of an insignificant breach. *See RW Power Partners, L.P. v. Virginia Elec. & Power Co., 899 F. Supp. 1490, 1501 (E.D. Va. 1995)* (citing *Farnsworth on Contracts* § 8.15).

It is not necessary for this Court to award damages to DialAmerica on the basis of the doctrine of "unjust enrichment" because this Court has held that Citicorp was in breach of their agreement to pay DialAmerica for services rendered. Nevertheless, for purposes of a complete record, it is this Court's view that permitting [*52] Citicorp to reap the benefits of the bargain, without paying for the services rendered, would be inequitable, as said result would result in a forfeiture of monies due to the plaintiff, and cause unjust enrichment to the benefit of defendant Citicorp. *See Paragon Restoration Group, Inc. v. Cambridge Square Condos., 14 Misc. 3d 1236A, 836 N.Y.S.2d 501 (N.Y. Supr. Ct. 2006)*.

DAMAGES

For the reasons stated above, it the finding of this Court that DialAmerica is entitled to payment under terms of its agreement with CCSI for 56,489.74 call hours at $24.50 per hour, totaling a gross sum of $1,374,950.73 subject to a deduction further discussed below.

This Court also finds that plaintiff DialAmerica is responsible for non-material breaches regarding the systematic use of paper or power scripts, contrary to its agreement with Citicorp as discussed with more specificity above. Defendant CCSI, in its post-trial brief, while vigorously arguing that DialAmerica was not entitled to judgment, or for payment of any damages, nevertheless considered the possibility that the Court might find that DialAmerica is entitled to some relief and therefore proposed that CCSI might be obligated to pay DialAmerica [*53] for its training of the TSRs and its programming costs during disputed period. The Court's view is directly opposite to that position. It is the Court's finding that

DialAmerica failed in its obligation to effectively train its TSRs in a manner prescribed by Citicorp. Therefore, it is the finding of this Court that although DialAmerica should be compensated for the call hours spent by its TSRs, DialAmerica should *not* be compensated for training and programming during the disputed hours. The point of the programming was to have the CCSI information on screen for TSRs to utilize as per the provisions of the Agreement. DialAmerica effectively deviated from the programming by the widespread use of paper or power scripts. The reasons for CCSI's lengthy scripting, as vetted by the legal department, are beside the point in regard to this analysis, as are the reasons for DialAmerica's use of the paper scripts. The fact is that Citicorp proposed in the Agreement to have programming and training done in a particularized way, and DialAmerica agreed to follow those instructions. Although the failure to specifically follow those instructions does not constitute a material breach of the overall [*54] agreement, it nevertheless is conduct that ought not to be rewarded by payment for these particular services not effectively rendered within the disputed period. Therefore, this Court denies DialAmerica's claim to have defendant pay for training during the disputed timeframe, (*i.e.*, $42,845), as well as programming (*i.e.*, $33,748.71).

Further, this Court finds that defendant is entitled to an offset of $9,000 for monies spent on its audit which was reasonably ordered by the defendant as a result of developments which are at the center of this litigated dispute. However, the Court is not convinced that Citicorp has sufficiently proved that the sixty-three customers whose accounts were credited after the audit were directly connected to specific wrongdoing on the part of DialAmerica. In this regard, it is noted that not all of the sixty-three customers identified by the defendant were actually enrolled in Citicorp programs; a number of customers cancelled their enrollment after being enrolled and before they were charged; and there was a lack of evidence that any customers specifically asked for a refund based upon any complaints arising out of the telemarketing sales calls made by DialAmerica. [*55] Thereafter, CCSI is not entitled to a further offset for refunds to customers amounting to $3,346.

LOSS OF PROFITS

This Court's finding that DialAmerica did not materially breach their service agreement with CCSI is a finding that DialAmerica substantially performed under the contract. *Bernard v. Las Americas Communications, Inc., 84 F.3d 103, 109 (2d Cir. 1996)*. Put simply, insofar as the Court has determined that any breach of DialAmerica was not material, it logically follows a substantial performance has been rendered. Substantial performance is the antithesis of the material breach, and as such, it is the opinion of this Court, as set forth at length above, that DialAmerica performed a substantial portion of the obligations which arose from the contractual relationship. While substantial performance is not full performance, it is performance in good faith and in compliance with the contract except for individual deviations, *see generally Callanan Industries, Inc. v. Smiroldo, 100 A.D.2d 717, 474 N.Y.S.2d 611, 612 (N.Y.A.D. 1984)*. Although this Court has found that DialAmerica did not materially breach the contract, this Court has concluded, for the reasons set forth above, that [*56] DialAmerica did not comply with all of the requirements set forth in the contract. It is appropriate therefore that DialAmerica bear the consequence of non-material breaches of said contract. For this reason, although this Court has found the Citicorp's concerns regarding its cardholder relationship was not material to its telemarketing services contract with DialAmerica, the Court nevertheless finds that Citicorp was entitled to establish that certain procedures be employed and executed, regardless of its motivation. Simply put, Citicorp was entitled by way of their contractual agreement to direct that DialAmerica does its job in a particular way, and DialAmerica agreed to the conditions set forth in that agreement. Although it is the finding of this Court that DialAmerica did substantially perform material terms of the contract, it is equally clear that DialAmerica failed its mission to properly train and execute the sales program as orchestrated by Citicorp.

In Count One of its complaint, DialAmerica asserted that it was entitled to lost profits based on CCSI's breach of their service agreement without prior notice. The law in New York is well settled that to recover lost profits [*57] damages on a breach of contract claim, a plaintiff must establish (l) that such damages were actually caused by the breach; (2) the particular damages were fairly within the contemplation of the parties to the contract at the time it was made; and (3) the alleged loss is capable of proof with reasonable certainty. *Kenford Co. v. County of Erie, 73 N.Y.2d 312, 319, 537 N.E.2d 176, 540 N.Y.S.2d 1 (N.Y. 1986)*. As the first element sets forth, plaintiffs are entitled to recover only for such incidental damages as flow directly from, and are probable and natural result of, breach, and for lost profits that are reasonably certain in amount and traceable with reasonable certainty to the breach. *Kasem v. Phillip Morris, USA, 244 A.D.2d 532, 664 N.Y.S.2d 469, (N.Y.AD. 1997)*.

Further, under the second element, in order to impose on the defaulting party a further liability than for damages which naturally and directly flow from the breach, i.e., in the ordinary course of things, arising from a breach of contract, such unusual or extraordinary damages must have been brought within the contemplation of

the parties as the probable result of a breach at the time of or prior to contracting. *Kenford, supra, 73 N.Y.2d at 319.* [*58] Thus, under New York law, "a party is not liable for lost profits unless the contract provided that party would assume such a heavy responsibility." *T.P.K. Construction Corp. v. South American Insurance Co., 752 F. Supp. 105, 110 n.7 (S.D.N.Y. 1990).* To determine whether lost profits were reasonably contemplated by the parties, courts must look to "the nature, purpose and particular circumstances of the contract known by the parties ... as well as what liability the defendant fairly may be supposed to have assumed consciously, or to have warranted the plaintiff reasonably to suppose that it assumed, when the contract was made." *Kenford, supra, 73 N.Y.2d at 319.*

Consistent with said case law, it is the finding of this Court that plaintiff DialAmerica has not met its burden of persuasion in establishing its entitlement to compensatory damages as set forth in its loss of profits claim arising out of CCSI's termination of the Telemarketing Sales Agreement.

Article 1.2 of the Agreement is relevant to DialAmerica's claim for lost profits. As set forth above, said provisions provided that "CCSI shall retain vendor, under a non-exclusive basis, from time to time, at CCSI's sole discretion, in [*59] connection with the services recited." The language clearly establishes that the service agreement did not guarantee DialAmerica any minimum amount of leads. Mary Conway's testimony essentially confirmed that CCSI never gave DialAmerica a commitment for any volume of calls. The express provision in the contract gave CCSI the authority to withhold permission for DialAmerica to make any further calls on behalf of CCSI. *See VTR, Inc. v. Goodyear Tire & Rubber Co., 303 F. Supp. 773, 778 (S.D.N.Y. 1969).* A party who contractually has the right to act in its sole discretion will not be liable for breach of contract or lost profits where the party has a "good faith basis for exercising sole discretion." *Mickle v. Christie's. Inc., 207 F. Supp.2d 237, 246 (S.D.N.Y. 2002).* It is the finding of this Court that in light of the totality of the circumstances faced by Neva Petrovich and the managerial staff at Citicorp, including the aforementioned regulatory and public pressures facing companies that utilized telemarketing services in 2003 and 2004, CCSI's decision to exercise its discretion in not permitting any further calling was not an arbitrary or irrational act, and therefore did not violate [*60] the covenant of good faith and fair dealing. *See Tedeschi v. Wagner College, 49 N.Y.2d 652, 404 N.E.2d 1302, 427 N.Y.S.2d 760 (N.Y. 1980).* Based upon the information and the position of CCSI on, and immediately subsequent to, February 13, 2004, it is the finding of this Court that CCSI did not violate the covenant of good faith and fair dealing in exercising its sole discretion in not having DialAmerica make any further calls on its behalf. The notice and cure provisions of the contract are not relevant to this analysis. In any event, it is clear from the evidence that DialAmerica was not willing or anxious to make efforts to dramatically change its way of doing business. Finally, this Court is not convinced that any meaningful "cure" of the problems articulated by Citicorp would have been effectuated prior to the natural expiration of the contract. In light of Citicorp's sole discretion to provide calling leads and the fact that no minimum number of leads were guaranteed by Citicorp, and in light of this finding that Citicorp did not suspend the calling in bad faith, plaintiff has not met the standards of proof under New York law to establish damages for lost profits.

Further, it is [*61] the finding of this Court that DialAmerica did not prove by a preponderance of the evidence its lost profits claim of $300,000. No independent accounting expert was produced and there was no specific testimony reflecting a true net loss on the part of DialAmerica. The figures cited by DialAmerica's vice president and comptroller, William Kirchner, provided only numbers from the respective branches, without accounting for centralized corporate costs and expenses. No testimony was produced by DialAmerica which tracked profit margins for its individual financial services client, nor was there any specific, reliable analysis provided from Mr. Kirchner's conclusory testimony regarding the profit realized by DialAmerica from the $24.50 figure charged to CCSI. Mr. Kirchner's evaluation of $21 per hour for costs with the remainder representing net profit was not convincing to this Court. Mr. Kirchner acknowledged that the profit margins could be less than $3.50 per hour, or more. The evidence proffered by DialAmerica was too speculative to support a finding of lost profits. *See Nineteen N.Y. Props, Ltd. Partnership v. 535 Operating, 211 A.D.2d 411, 621 N.Y.S.2d 42 (1995); Kenford Co. v. County of Erie, 67 N.Y.2d 257, 261, 493 N.E.2d 234, 502 N.Y.S.2d 131 (1986).*

CONCLUSIONS

In [*62] conclusion, this Court finds that defendant CCSI is liable to plaintiff for its breach of the telemarketing sales agreement, and plaintiff DialAmerica is awarded the sum of $1,365,950.73, plus appropriate pre-judgment interest. [4]

> 4 The pre-judgment interest shall be calculated pursuant to New Jersey law. The Court finds without merit plaintiffs argument that since defendant cited to New York law to govern the rights and obligations of the parties, it is estopped from asserting that New Jersey law should apply to the pre-judgment interest calculations, reject-

ing the applicability of *Busik v. Levine, 63 N.J. 351, 307 A.2d 571 (1973)*, as support for plaintiffs position. The Court finds *North Bergen Rex Transport, Inc. v. Trailer Leasing Co., 158 N.J. 561, 569, 730 A.2d 843 (1994)*, controlling. In that case, the New Jersey Supreme Court, in holding that pre-judgment interest is a procedural, rather than a substantive, issue held that the New Jersey pre-judgment interest rule applied to a contract dispute governed by Illinois law.

/s/ Robert L. Polifroni

Hon. Robert L. Polifroni, J.S.C.