

# Mitigation

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In this module, and the modules on foreseeability and certainty, we see courts imposing limits on contract damages for reasons of fairness or practicability. The expectation interest places the aggrieved party in the position he would have occupied had the contract been performed. If the breach happens after completion of performance – if the defendant is simply refusing to pay – the plaintiff is likely entitled to the full price of the contract. But what happens if the breach occurs in the middle of the performance? The mitigation principle helps us understand the obligation of the non-breaching party to reduce the severity of damages to the contract, so long as they can do so without damage to themselves.

## **Rockingham County v. Luten Bridge Co.**

35 F.2d 301 (4th Cir. 1929)

PARKER, Judge.

This was an action at law instituted in the court below by the Luten Bridge Company, as plaintiff, to recover of Rockingham County, North Carolina, an amount alleged to be due under a contract. [The County] contends that notice of cancellation was given to the bridge company before the erection of the bridge was commenced, and that it is liable only for the damages which the company would have sustained, if it had abandoned construction at that time. The judge below ... instructed a verdict for plaintiff for the full amount of its claim. From judgment on this verdict the county has appealed.

... On January 7, 1924, the board of commissioners of Rockingham county voted to award to plaintiff a contract for the construction of the bridge in controversy. Three of the five commissioners favored the awarding of the contract and two opposed it. Much feeling was engendered over the matter, with the result that on February 11, 1924, W. K. Pruitt, one of the commissioners who had voted in the affirmative, sent his resignation to the clerk of the superior court of the county. The clerk received this resignation on the same day, and immediately accepted same and noted his acceptance thereon. Later in the day, Pruitt called him over the telephone and stated that he wished to withdraw the resignation, and later sent him written notice to the same effect. The clerk, however, paid no attention to the attempted withdrawal, and proceeded on the next day to appoint one W. W. Hampton as a member of the board to succeed him.

After his resignation, Pruitt attended no further meetings of the board, and did nothing further as a commissioner of the county. Likewise Pratt and McCollum, the other two members of

the board who had voted with him in favor of the contract, attended no further meetings. [The new commissioner,] Hampton ... took the oath of office immediately upon his appointment and entered upon the discharge of the duties of a commissioner. He met regularly with the two remaining members of the board, Martin and Barber, in the courthouse at the county seat, and with them attended to all of the business of the county. Between the 12th of February and the first Monday in December following, these three attended, in all, 25 meetings of the board.

At one of these meetings, a regularly advertised called meeting held on February 21st, a resolution was unanimously adopted declaring that the contract for the building of the bridge was not legal and valid, and directing the clerk of the board to notify plaintiff that it refused to recognize same as a valid contract, and that plaintiff should proceed no further thereunder. This resolution also rescinded action of the board theretofore taken looking to the construction of a hard-surfaced road, in which the bridge was to be a mere connecting link. The clerk duly sent a certified copy of this resolution to plaintiff.

At the regular monthly meeting of the board on March 3rd, a resolution was passed directing that plaintiff be notified that any work done on the bridge would be done by it at its own risk and hazard, that the board was of the opinion that the contract for the construction of the bridge was not valid and legal, and that, even if the board were mistaken as to this, it did not desire to construct the bridge, and would contest payment for same if constructed. A copy of this resolution was also sent to plaintiff.... At the time of the passage of the first resolution, very little work toward the construction of the bridge had been done, it being estimated that the total cost of labor done and material on the ground was around \$1,900; but, notwithstanding the repudiation of the contract by the county, the bridge company continued with the work of construction.

On November 24, 1924, plaintiff instituted this action against Rockingham [C]ounty, and against Pruitt, Pratt, McCollum, Martin, and Barber, as constituting its board of commissioners. Complaint was filed, setting forth the execution of the contract and the doing of work by plaintiff thereunder, and alleging that for work done up until November 3, 1924, the county was indebted in the sum of \$18,301.07. On November 27th, three days after the filing of the complaint, and only three days before the expiration of the term of office of the members of the old board of commissioners, Pruitt, Pratt, and McCollum met with an attorney at the county seat, and, without notice to or consultation with the other members of the board, so far as appears, had the attorney prepare for them an answer admitting the allegations of the complaint. This answer, which was filed in the cause on the following day, did not purport to

be an answer of the county, or of its board of commissioners, but of the three commissioners named.

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[The other three board members provided a different answer and] denied that the contract sued on was legal or binding, and for a further defense set forth the resolutions of the commissioners with regard to the building of the bridge, to which we have referred, and their communication to plaintiff. A reply was filed to this, and the case finally came to trial.

At the trial, ... the jury was instructed to return a verdict for plaintiff for the full amount of its claim.

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As the county now admits the execution and validity of the contract, and the breach on its part, the ultimate question in the case is one as to the measure of plaintiff's recovery, and the exceptions must be considered with this in mind. Upon these exceptions, three principal questions arise for our consideration, viz. (1) Whether the answer filed by Pruitt, Pratt, and McCollum was the answer of the county. If it was, the lower court properly refused to strike it out, and properly admitted it in evidence. (2) Whether, in the light of the evidence offered and excluded, the resolutions to which we have referred, and the notices sent pursuant thereto, are to be deemed action on the part of the county. If they are not, the county has nothing upon which to base its position as to minimizing damages, and the evidence offered was properly excluded. And (3) whether plaintiff, if the notices are to be deemed action by the county, can recover under the contract for work done after they were received, or is limited to the recovery of damages for breach of contract as of that date.

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With regard to the first question the learned District Judge held that the answer of Pruitt, Pratt, and McCollum was the answer of the county, but we think that this holding was based upon an erroneous view of the law. It appears, without contradiction, not only that their answer purports to have been filed by them individually, and not in behalf of the county or of the

board of commissioners, but also that it was not authorized by the board of commissioners, acting as a board at a meeting regularly held.

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[T]o the second inquiry— i.e., whether the resolutions to which we have referred and the notices sent pursuant thereto are to be deemed the action of the county, and hence admissible in evidence on the question of damages— it is to be observed that, along with the evidence of the resolutions and notices, the county offered evidence to the effect that Pruitt's resignation had been accepted before he attempted to withdraw same, and that thereafter Hampton was appointed, took the oath of office, entered upon the discharge of the duties of the office, and with Martin and Barber transacted the business of the board of commissioners until the coming into office of the new board. We think that this evidence, if true, shows (1) that Hampton, upon his appointment and qualification, became a member of the board in place of Pruitt, and that he, Martin, and Barber constituted a quorum for the transaction of its business; and (2) that, even if this were not true, Hampton was a de facto commissioner, and that his presence at meetings of the board with that of the other two commissioners was sufficient to constitute a quorum, so as to give validity to its proceedings.

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Coming, then, to the third question— i.e., as to the measure of plaintiff's recovery— we do not think that, after the county had given notice, while the contract was still executory, that it did not desire the bridge built and would not pay for it, plaintiff could proceed to build it and recover the contract price. It is true that the county had no right to rescind the contract, and the notice given plaintiff amounted to a breach on its part; but, after plaintiff had received notice of the breach, it was its duty to do nothing to increase the damages flowing therefrom. If A enters into a binding contract to build a house for B, B, of course, has no right to rescind the contract without A's consent. But if, before the house is built, he decides that he does not want it, and notifies A to that effect, A has no right to proceed with the building and thus pile up damages. His remedy is to treat the contract as broken when he receives the notice, and sue for the recovery of such damages, as he may have sustained from the breach, including any profit which he would have realized upon performance, as well as any other losses which may have resulted to him. In the case at bar, the county decided not to build the road of which the bridge was to be a part, and did not build it. The bridge, built in the midst of the forest, is of no value to the county because of this change of circumstances. When, therefore, the county gave notice to the plaintiff that it would not proceed with the project, plaintiff should have

desisted from further work. It had no right thus to pile up damages by proceeding with the erection of a useless bridge.

The contrary view was expressed by Lord Cockburn in *Frost v. Knight*, L.R. 7 Ex. 111, but, as pointed out by Prof. Williston (Williston on Contracts, vol. 3, p. 2347), it is not in harmony with the decisions in this country. The American rule and the reasons supporting it are well stated by Prof. Williston as follows:

“There is a line of cases running back to 1845 which holds that, after an absolute repudiation or refusal to perform by one party to a contract, the other party cannot continue to perform and recover damages based on full performance. This rule is only a particular application of the general rule of damages that a plaintiff cannot hold a defendant liable for damages which need not have been incurred; or, as it is often stated, the plaintiff must, so far as he can without loss to himself, mitigate the damages caused by the defendant’s wrongful act. The application of this rule to the matter in question is obvious. If a man engages to have work done, and afterwards repudiates his contract before the work has been begun or when it has been only partially done, it is inflicting damage on the defendant without benefit to the plaintiff to allow the latter to insist on proceeding with the contract. The work may be useless to the defendant, and yet he would be forced to pay the full contract price. On the other hand, the plaintiff is interested only in the profit he will make out of the contract. If he receives this it is equally advantageous for him to use his time otherwise.”

We have carefully considered the cases [cited by the plaintiff] but in none of them was the point involved which is involved here, viz. whether, in application of the rule which requires that the party to a contract who is not in default do nothing to aggravate the damages arising from breach, he should not desist from performance of an executory contract for the erection of a structure when notified of the other party’s repudiation, instead of piling up damages by proceeding with the work. As stated above, we think that reason and authority require that this question be answered in the affirmative. It follows that there was error in directing a verdict for plaintiff for the full amount of its claim. The measure of plaintiff’s damage, upon its appearing that notice was duly given not to build the bridge, is an amount sufficient to compensate plaintiff for labor and materials expended and expense incurred in the part performance of the contract, prior to its repudiation, plus the profit which would have been realized if it had been carried out in accordance with its terms....

Our conclusion, on the whole case, is that there was error ... in excluding the testimony offered by the county to which we have referred, and in directing a verdict for plaintiff. The judgment below will accordingly be reversed, and the case remanded for a new trial.

Reversed.

### Notes and Questions

1. At first glance, it may seem unfair for Luten Bridge to be required to mitigate damages by ceasing construction on the bridge. But for Luten Bridge, the benefit of the bargain is not actually the entire cost of the bridge. Rather, all Luten Bridge is entitled to is the *profit* to be made from taking on the project. Bridges are expensive, requiring planning, supplies and labor. But if the contract has been cancelled, Luten may well be able to reassign its labor and resell the supplies or repurpose them for work on another bridge. In that light, we see why the mitigation rule doesn't make anyone worse off – Luten Bridge can still recover its expectation damages.
2. Imagine Luten bid \$18,000 when it initially contracted with the county. That bid should include both Luten's construction costs and profits for the company. Thus, **Bid = Costs + Profits**. If the county had breached the contract shortly thereafter, but before Luten began construction, the builder would be entitled to its profits under an expectation damages principle. Profits would equal the bid less costs. Thus, **Profits = Bid – Costs**. Hypothetically, if the bridge would cost \$15,000 to build, profits would be \$3,000. Luten would be entitled to that amount under an expectation principle, even if it had not laid one stick upon another.
3. The issue gets more complicated when the county breaches after construction commences, but not terribly complicated. Costs can be split into expenditures already made and expenditures yet to be made. The profit amount should be equal to the bid less expenditures made and expenditures saved. Thus, **Profits = Bid – Expense Incurred – Expenses Saved**. In the case as reported, Luten spent \$1,900 at the time of repudiation. This is money that could not be recovered or saved by ceasing production. That amount, less our hypothetical costs of \$15,000, would lead to a savings of \$13,100. We could calculate Luten's damages by subtracting those savings (\$13,100) from the bid (\$18,000), yielding \$4,900. Thus, **Damages = Bid – Expenses Saved**. Of course, we could also calculate that number by adding the profits (\$3,000) to expenditures (\$1,900). Thus, **Damages = Profits + Expense Incurred**. Either way,

Luten would be entitled to the same amount, although we can reach the result via two different methods.

4. Assume that the \$1,900 Luten spent prior to repudiation divided out into \$900 of labor costs and \$1,000 in supplies. On these facts, what would Luten's *reliance* damages be?
5. The court concludes that Luten Bridge should have ceased building the bridge on receipt of the letter sent by the county commission on Feb. 21, 1924. But in light of the attempt by Pruitt—the retiring commissioner who favored the bridge project—to rescind his retirement, there was some controversy over whether the commission as constituted on Feb. 21 could be replaced by a different commission more enthusiastic about the bridge. Had the contractor ceased building, and the commission changed again, could the reconstituted commission prevail in a breach of contract suit against the contractor? Does that possibility change your view of the mitigation principle at issue?

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**Parker v. Twentieth Century-Fox Film Corp.**

3 Cal.3d 176 (California Supreme Court 1970)

BURKE, Justice.

Defendant Twentieth Century-Fox Film Corporation appeals from a summary judgment granting to plaintiff the recovery of agreed compensation under a written contract for her services as an actress in a motion picture. As will appear, we have concluded that the trial court correctly ruled in plaintiff's favor and that the judgment should be affirmed.

Plaintiff is well known as an actress, and in the contract between plaintiff and defendant is sometimes referred to as the 'Artist.' Under the contract, dated August 6, 1965, plaintiff was to play the female lead in defendant's contemplated production of a motion picture entitled 'Bloomer Girl.' The contract provided that defendant would pay plaintiff a minimum 'guaranteed compensation' of \$53,571.42 per week for 14 weeks commencing May 23, 1966, for a total of \$750,000. Prior to May 1966 defendant decided not to produce the picture and by a letter dated April 4, 1966, it notified plaintiff of that decision and that it would not 'comply with our obligations to you under' the written contract.

By the same letter and with the professed purpose 'to avoid any damage to you,' defendant instead offered to employ plaintiff as the leading actress in another film tentatively entitled 'Big Country, Big Man' (hereinafter, 'Big Country'). The compensation offered was identical,

as were 31 of the 34 numbered provisions or articles of the original contract. Unlike ‘Bloomer Girl,’ however, which was to have been a musical production, ‘Big Country’ was a dramatic ‘western type’ movie. ‘Bloomer Girl’ was to have been filmed in California; ‘Big Country’ was to be produced in Australia. Also, certain terms in the proffered contract varied from those of the original.<sup>2</sup> Plaintiff was given one week within which to accept; she did not and the offer lapsed. Plaintiff then commenced this action seeking recovery of the agreed guaranteed compensation.

The complaint sets forth two causes of action. The first is for money due under the contract; the second, based upon the same allegations as the first, is for damages resulting from defendant’s breach of contract. Defendant in its answer admits the existence and validity of the contract, that plaintiff complied with all the conditions, covenants and promises and stood ready to complete the performance, and that defendant breached and ‘anticipatorily repudiated’ the contract. It denies, however, that any money is due to plaintiff either under the contract or as a result of its breach, and pleads as an affirmative defense to both causes of action plaintiff’s allegedly deliberate failure to mitigate damages, asserting that she unreasonably refused to accept its offer of the leading role in ‘Big Country.’

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<sup>2</sup> Article 29 of the original contract specified that plaintiff approved the director already chosen for ‘Bloomer Girl’ and that in case he failed to act as director plaintiff was to have approval rights of any substitute director. Article 31 provided that plaintiff was to have the right of approval of the ‘Bloomer Girl’ dance director, and Article 32 gave her the right of approval of the screenplay.

Defendant’s letter of April 4 to plaintiff, which contained both defendant’s notice of breach of the ‘Bloomer Girl’ contract and offer of the lead in ‘Big Country,’ eliminated or impaired each of those rights. It read in part as follows: ‘The terms and conditions of our offer of employment are identical to those set forth in the ‘BLOOMER GIRL’ Agreement, Articles 1 through 34 and Exhibit A to the Agreement, except as follows:

‘1. Article 31 of said Agreement will not be included in any contract of employment regarding ‘BIG COUNTRY, BIG MAN’ as it is not a musical and it thus will not need a dance director.

‘2. In the ‘BLOOMER GIRL’ agreement, in Articles 29 and 32, you were given certain director and screenplay approvals and you had preapproved certain matters. Since there simply is insufficient time to negotiate with you regarding your choice of director and regarding the screenplay and since you already expressed an interest in performing the role in ‘BIG COUNTRY, BIG MAN,’ we must exclude from our offer of employment in ‘BIG COUNTRY, BIG MAN’ any approval rights as are contained in said Articles 29 and 32; however, we shall consult with you respecting the director to be selected to direct the photoplay and will further consult with you with respect to the screenplay and any revisions or changes therein, provided, however, that if we fail to agree \* \* \* the decision of \* \* \* (defendant) with respect to the selection of a director and to revisions and changes in the said screenplay shall be binding upon the parties to said agreement.’

Plaintiff[s motion for summary judgment] was granted, and summary judgment for \$750,000 plus interest was entered in plaintiff's favor. This appeal by defendant followed.

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...[D]efendant's sole defense to this action which resulted from its deliberate breach of contract is that in rejecting defendant's substitute offer of employment plaintiff unreasonably refused to mitigate damages.

The general rule is that the measure of recovery by a wrongfully discharged employee is the amount of salary agreed upon for the period of service, less the amount which the employer affirmatively proves the employee has earned or with reasonable effort might have earned from other employment. (Citations omitted.) However, before projected earnings from other employment opportunities not sought or accepted by the discharged employee can be applied in mitigation, the employer must show that the other employment was comparable, or substantially similar, to that of which the employee has been deprived; the employee's rejection of or failure to seek other available employment of a different or inferior kind may not be resorted to in order to mitigate damages. (Citations omitted.)

In the present case defendant has raised no issue of reasonableness of efforts by plaintiff to obtain other employment; the sole issue is whether plaintiff's refusal of defendant's substitute offer of 'Big Country' may be used in mitigation. Nor, if the 'Big Country' offer was of employment different or inferior when compared with the original 'Bloomer Girl' employment, is there an issue as to whether or not plaintiff acted reasonably in refusing the substitute offer. Despite defendant's arguments to the contrary, no case cited or which our research has discovered holds or suggests that reasonableness is an element of a wrongfully discharged employee's option to reject, or fail to seek, different or inferior employment lest the possible earnings therefrom be charged against him in mitigation of damages.<sup>5</sup>

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<sup>5</sup> Instead, in each case the reasonableness referred to was that of the *efforts* of the employee to obtain other employment that was not different or inferior; his right to reject the latter was declared as an unqualified rule of law. Thus, *Gonzales v. Internat. Assn. of Machinists*, 213 Cal.App.2d 817, 823-824, 29 Cal.Rptr. 190, 194, holds that the trial court correctly instructed the jury that plaintiff union member, a machinist, was required to make 'such *efforts* as the average (member of his union) desiring employment would make at that particular time and place' (italics added); but, further, that the court *properly rejected* defendant's *offer of proof of the availability of other kinds of employment* at the same or higher pay than plaintiff usually received and all outside the jurisdiction of his union, as plaintiff could not be required to accept different employment or a nonunion job.

[The court also cited to several other cases that provided somewhat competing standards for the type of job a plaintiff need not accept to meet a duty to mitigate: "The duty of mitigation of damages \* \* \* does not require the plaintiff 'to seek or to accept other employment of a *different or inferior kind*'"; plaintiff must make "honest effort to find *similar employment*";

Applying the foregoing rules to the record in the present case, with all intendments in favor of the party opposing the summary judgment motion—here, defendant—it is clear that the trial court correctly ruled that plaintiff’s failure to accept defendant’s tendered substitute employment could not be applied in mitigation of damages because the offer of the ‘Big Country’ lead was of employment both different and inferior, and that no factual dispute was presented on that issue. The mere circumstance that ‘Bloomer Girl’ was to be a musical review calling upon plaintiff’s talents as a dancer as well as an actress, and was to be produced in the City of Los Angeles, whereas ‘Big Country’ was a straight dramatic role in a ‘Western Type’ story taking place in an opal mine in Australia, demonstrates the difference in kind between the two employments; the female lead as a dramatic actress in a western style motion picture can by no stretch of imagination be considered the equivalent of or substantially similar to the lead in a song-and-dance production.

Additionally, the substitute ‘Big Country’ offer proposed to eliminate or impair the director and screenplay approvals accorded to plaintiff under the original ‘Bloomer Girl’ contract (see fn. 2, Ante), and thus constituted an offer of inferior employment. No expertise or judicial notice is required in order to hold that the deprivation or infringement of an employee’s rights held under an original employment contract converts the available ‘other employment’ relied upon by the employer to mitigate damages, into inferior employment which the employee need not seek or accept. (See *Gonzales v. Internat. Asst. of Machinists*, *supra*, 213 Cal.App.2d 817, 823—824; and fn. 5, ante.)

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In view of the determination that defendant failed to present any facts showing the existence of a factual issue with respect to its sole defense—plaintiff’s rejection of its substitute employment offer in mitigation of damages—we need not consider plaintiff’s further contention that for various reasons, ... plaintiff was excused from attempting to mitigate damages.

The judgment is affirmed.

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employee, “by the exercise of reasonable diligence and effort, could have procured *comparable employment*”; “work for a *lesser compensation* was not to be considered in mitigation,” and an employee need not accept it; employee not required to obtain employment in a *location* “*other than ... where he resided*” (citations omitted) (emphases added).]

McCOMB, PETERS, and TOBRINER, JJ., and KAUS, J. pro tem., and ROTH, J. pro tem., concur.

SULLIVAN, Acting Chief Justice (dissenting).

The basic question in this case is whether or not plaintiff acted reasonably in rejecting defendant's offer of alternate employment. The answer depends upon whether that offer (starring in 'Big Country, Big Man') was an offer of work that was substantially similar to her former employment (starring in 'Bloomer Girl') or of work that was of a different or inferior kind. To my mind this is a factual issue which the trial court should not have determined on a motion for summary judgment. The majority have not only repeated this error but have compounded it by applying the rules governing mitigation of damages in the employer-employee context in a misleading fashion. Accordingly, I respectfully dissent.

The familiar rule requiring a plaintiff in a tort or contract action to mitigate damages embodies notions of fairness and socially responsible behavior which are fundamental to our jurisprudence. Most broadly stated, it precludes the recovery of damages which, through the exercise of due diligence, could have been avoided. Thus, in essence, it is a rule requiring reasonable conduct in commercial affairs. This general principle governs the obligations of an employee after his employer has wrongfully repudiated or terminated the employment contract. Rather than permitting the employee simply to remain idle during the balance of the contract period, the law requires him to make a reasonable effort to secure other employment. He is not obliged, however, to seek or accept any and all types of work which may be available. Only work which is in the same field and which is of the same quality need be accepted.<sup>2</sup>

Over the years the courts have employed various phrases to define the type of employment which the employee, upon his wrongful discharge, is under an obligation to accept. Thus in California alone it has been held that he must accept employment which is 'substantially similar'; 'comparable employment'; employment 'in the same general line of the first employment'; 'equivalent to his prior position'; 'employment in a similar capacity'; employment which is 'not \* \* \* of a different or inferior kind. \* \* \*' (*citations omitted*).

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<sup>2</sup> This qualification of the rule seems to reflect the simple and humane attitude that it is too severe to demand of a person that he attempt to find and perform work for which he has no training or experience. Many of the older cases hold that one need not accept work in an inferior rank or position nor work which is more menial or arduous. This suggests that the rule may have had its origin in the bourgeois fear of resubmergence in lower economic classes.

For reasons which are unexplained, the majority cite several of these cases yet select from among the various judicial formulations which contain one particular phrase, 'Not of a different or inferior kind,' with which to analyze this case. I have discovered no historical or theoretical reason to adopt this phrase, which is simply a negative restatement of the affirmative standards set out in the above cases, as the exclusive standard. Indeed, its emergence is an example of the dubious phenomenon of the law responding not to rational judicial choice or changing social conditions, but to unrecognized changes in the language of opinions or legal treatises. However, the phrase is a serviceable one and my concern is not with its use as the standard but rather with what I consider its distortion.

I believe that the approach taken by the majority (a superficial listing of differences with no attempt to assess their significance) may subvert a valuable legal doctrine.<sup>5</sup> The inquiry in cases such as this should not be whether differences between the two jobs exist (there will always be differences) but whether the differences which are present are substantial enough to constitute differences in the *kind* of employment or, alternatively, whether they render the substitute work employment of an *inferior kind*.

It seems to me that *this* inquiry involves, in the instant case at least, factual determinations which are improper on a motion for summary judgment. Resolving whether or not one job is substantially similar to another or whether, on the other hand, it is of a different or inferior kind, will often (as here) require a critical appraisal of the similarities and differences between them in light of the importance of these differences to the employee. This necessitates a weighing of the evidence, and it is precisely this undertaking which is forbidden on summary judgment....

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It is not intuitively obvious, to me at least, that the leading female role in a dramatic motion picture is a radically different endeavor from the leading female role in a musical comedy film. Nor is it plain to me that the rather qualified rights of director and screenplay approval contained in the first contract are highly significant matters either in the entertainment industry

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<sup>5</sup> The values of the doctrine of mitigation of damages in this context are that it minimizes the unnecessary personal and social (e.g., nonproductive use of labor, litigation) costs of contractual failure. If a wrongfully discharged employee can, through his own action and without suffering financial or psychological loss in the process, reduce the damages accruing from the breach of contract, the most sensible policy is to require him to do so. I fear the majority opinion will encourage precisely the opposite conduct.

in general or to this plaintiff in particular. Certainly, none of the declarations introduced by plaintiff in support of her motion shed any light on these issues.

Nor do they attempt to explain why she declined the offer of starring in ‘Big Country, Big Man.’ Nevertheless, the trial court granted the motion, declaring that these approval rights were ‘critical’ and that their elimination altered ‘the essential nature of the employment.’

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I believe that the judgment should be reversed so that the issue of whether or not the offer of the lead role in ‘Big Country, Big Man’ was of employment comparable to that of the lead role in ‘Bloomer Girl’ may be determined at trial.

### Notes and Questions

1. What will it mean for parties if a case like *Parker* can be disposed of on a motion for summary judgment, rather than advancing to trial?
2. *Bloomer Girl* is not only a “musical review.” Its subject is Amelia Jenks (‘Dolly’) Bloomer, a 19th century feminist reformer and leading advocate of women’s rights. The musical is noted for its feminist framing. Parker herself was allied with feminist causes. See Mary Jo Frug, *Re-Reading Contracts: A Feminist Analysis of a Contracts Casebook*, 34 AM. U. L. REV. 1065, 1114-25 (1985); CHARLES KNAPP, PROBLEMS IN CONTRACT LAW: CASES AND MATERIALS 1118 n.1 (1976).
3. Consider the following hypotheticals:
  - a. Imagine that the studio was offering to complete filming of *Bloomer Girl* but sought to change the nature of Parker’s control over the direction and the screenplay (see *Parker*, n. 2, *supra*). Would the work (same movie, less control) be “different and inferior?”
  - b. What if the studio had offered control over director and screenplay to Parker, but to film *Big Country, Big Man*, rather than *Bloomer Girl*? Would *that* work (different movie, same control) be “different and inferior”?
  - c. If the studio had moved production of *Bloomer Girl* to Australia, to save costs, would that job (assuming Parker retains the same contractual level of control) be “different and inferior?” What if Parker was offered a

chance to film *Big Country*, *Big Man* on a studio lot in Los Angeles, maintaining the same control she was promised on *Bloomer Girl*?

4. Should the answers to these questions be decided by judges on summary judgment or are there material facts at issue?

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**In re WORLDCOM, INC., et al.,**

361 B.R. 675 (United States Bankruptcy Court, Southern District of New York 2007)

GONZALES, Bankruptcy Judge.

**BACKGROUND**

On or about July 10, 1995, [Michael] Jordan and the Debtors entered into an endorsement agreement (the “Agreement”). At that time, Jordan was considered to be one of the most popular athletes in the world. The Agreement granted MCI a ten-year license to use Jordan’s name, likeness, “other attributes,” and personal services to advertise and promote MCI’s telecommunications products and services beginning in September 1995 and ending in August 2005. The Agreement did not prevent Jordan from endorsing most other products or services, although he could not endorse the same products or services that MCI produced. In addition to a \$5 million signing bonus, the Agreement provided an annual base compensation of \$2 million for Jordan. The Agreement provided that Jordan would be treated as an independent contractor and that MCI would not withhold any amount from Jordan’s compensation for tax purposes. The Agreement provided that Jordan was to make himself available for four days, not to exceed four hours per day, during each contract year to produce television commercials and print advertising and for promotional appearances. The parties agreed that the advertising and promotional materials would be submitted to Jordan for his approval, which could not be unreasonably withheld, fourteen days prior to their release to the general public. From 1995 to 2000, Jordan appeared in several television commercials and a large number of print ads for MCI.

[MCI filed for bankruptcy under chapter 11 of title 11 of the United States Code (the “Bankruptcy Code”). Among other claims, Jordan filed claims for breach of contract and for \$2 million in damages for each of contracts years 2004 and 2005.]

### The Parties' Contentions

MCI argues that Jordan had an obligation to mitigate his damages and failed to do so. MCI argues [it is entitled] to summary judgment with respect to its objection to the Claim, and [that] the Claim should be reduced to \$4 million. MCI argues that it is under no obligation to pay Jordan for contract years 2004 and 2005.

... Regarding MCI's mitigation argument, Jordan argues that the objection should be overruled and dismissed for three independent reasons (1) Jordan was a "lost volume seller" and thus mitigation does not apply, (2) there is no evidence that Jordan could have entered into a "substantially similar" endorsement agreement, and (3) Jordan acted reasonably when he decided not to pursue other endorsements after MCI's rejection of the Agreement.

### DISCUSSION

#### 1. Whether Jordan Was a "Lost Volume Seller"

Jordan argues that MCI's mitigation defense does not apply here because Jordan is akin to a "lost volume seller." Jordan points to testimony demonstrating that he could have entered into additional endorsement contracts even if MCI had not rejected the Agreement. Thus, he argues, any additional endorsement contracts would not have been substitutes for the Agreement and would not have mitigated the damages for which MCI is liable.

"A lost volume seller is one who has the capacity to perform the contract that was breached in addition to other potential contracts due to unlimited resources or production capacity." *Precision Pine & Timber, Inc. v. United States*, 72 Fed.Cl. 460, 490 (Fed.Cl.2006)....

This case offers a twist on the typical lost volume seller situation. In what the Court regards as the typical situation, the non-breaching seller has a near-inexhaustible supply of inventory. *See, e.g., Katz Commc'ns, Inc. v. Evening News Ass'n*, 705 F.2d 20, 26 (2d Cir.1983).... Here, Jordan lacked a nearly limitless supply and had no intention of continuing to market his services as a product endorser.

... To claim lost volume seller status, Jordan must establish that he would have had the benefit of both the original and subsequent contracts if MCI had not rejected the Agreement....

In his arguments, Jordan focuses primarily on his *capacity* to enter subsequent agreements, arguing that the loss of MCI's sixteen-hour annual time commitment hardly affected his ability to perform additional endorsement services. On this prong alone, Jordan likely would be

considered a lost volume seller of endorsement services because he had sufficient time to do multiple endorsements. Although he does not have the “infinite capacity” that some cases discuss, a services provider does not need unlimited capacity but must have the requisite capacity and intent to perform under multiple contracts at the same time....

Contrary to Jordan’s analysis, courts do not focus solely on the seller’s capacity. The seller claiming lost volume status must also demonstrate that it *would* have entered into subsequent transactions. See *Diasonics*, 826 F.2d at 684; *Green Tree Financial*, 2002 WL 31163072, at \*9; *Gianetti*, 779 A.2d at 853 (“for sellers of personal services to come within the purview of the Restatement’s lost volume seller theory ..., they must establish,” in addition to capacity, that additional sales would have been profitable and that they would have made the additional sale regardless of the buyer’s breach). Jordan has not shown he could and *would have* entered into a subsequent agreement. Rather, the evidence shows that Jordan did not have the “subjective intent” to take on additional endorsements. See *Ullman–Briggs*, 754 F.Supp. at 1008. The testimony from Jordan’s representatives establishes that although Jordan’s popularity enabled him to obtain additional product endorsements in 2003, Jordan desired to scale back his level of endorsements. Jordan’s financial and business advisor, Curtis Polk (“Polk”), testified that at the time the Agreement was rejected, Jordan’s desire was “not to expand his spokesperson or pitchman efforts with new relationships.” See Debtors’ Mot. Summ. J., App. 5, at 32. Polk testified that had Jordan wanted to do additional endorsements after the 2003 rejection, he could have obtained additional deals. See *id.* at 64–65. Jordan’s agent, David Falk (“Falk”), testified that “there might have been twenty more companies that in theory might have wanted to sign him” but that Jordan and his representatives wanted to avoid diluting his image. See Debtors’ Mot. Summ. J., App. 6, at 24. Jordan’s Memorandum for Summary Judgment stated that at the time the Agreement was rejected, Jordan had implemented a strategy of not accepting new endorsements because of a belief that new deals would jeopardize his ability to achieve his primary goal of National Basketball Association (“NBA”) franchise ownership.

Because the evidence establishes, among other things, that Jordan would not have entered into subsequent agreements, Jordan has not established that he is a lost volume seller. This theory thus does not relieve Jordan from the duty to mitigate damages.

## 2. Whether Jordan Made Reasonable Efforts to Mitigate

Jordan argues at length that MCI must show that Jordan could have entered a “substantially similar” endorsement contract in order to mitigate damages. However, this is not the law of the mitigation of damages or the avoidable consequences theory....

...MCI must show the absence of reasonable efforts by Jordan to avoid consequences or minimize his damages. See *Norris v. Green*, 656 A.2d 282, 287 (D.C. 1995); JOSEPH M. PERILLO, CALAMARI & PERILLO ON CONTRACTS, § 14.15, at 584 (5th Ed.2003) (“The doctrine of avoidable consequences merely requires reasonable efforts to mitigate damages”)....

Since “reasonable efforts in the form of affirmative steps are required to mitigate damages,” see *Robinson v. United States*, 305 F.3d 1330, 1334 (Fed.Cir.2002) (emphasis added) (citing Restatement (2d) § 350), MCI carries its burden by showing that Jordan has not taken affirmative steps to mitigate damages. Jordan admits in his brief that at the time of the rejection of the Agreement, “Jordan had already implemented a business strategy of not accepting new endorsements.” See Jordan’s Memo. in Support of Mot. Summ. J. at 1.... Although Jordan points to his discussions with another company, Nextel, as showing that he was willing to listen to endorsement agreements after MCI’s bankruptcy, MCI effectively responds that responding to an inquiry by giving them contact information and indicating a willingness to respond to another call “is not trying to find an alternative” agreement—it is, in effect, “doing nothing.” See Transcript of Sept. 12, 2006 Hearing, at 32–33. Based on the foregoing, and drawing all permissible factual inferences in favor of Jordan, the Court determines that MCI has established that Jordan did not take affirmative steps to mitigate damages.

### 3. Whether Jordan’s Beliefs that Another Endorsement Would Dilute His Impact as an Endorser or Harm His Reputation Were Reasonable Justifications for not Mitigating Damages

Jordan cites the risk that entering another endorsement contract could dilute his impact as an endorser or damage his reputation or business interests.

#### a. Dilution

... The only statements Jordan offers to support his argument that he behaved reasonably by not seeking another endorsement in 2003 because of a concern with diluting his image are conclusory in nature and contradicted by the available evidence....

#### b. Risk to Reputation

Under the risk to reputation theory Jordan cites, an injured party is not allowed to recover from a wrongdoer those damages that the injured party “could have avoided without undue risk, burden or humiliation.” See Restatement (2d), § 350(1). Jordan’s “harm to reputation” argument is flawed because the envisioned harm to Jordan’s reputation does not rise to the level of harm found in the cited case law....

The cases cited by Jordan illustrate the harm to reputation that will excuse a party's duty to mitigate. In *Eastman Kodak Co. v. Westway Motor Freight, Inc.*, 949 F.2d 317 (10th Cir. 1991), Kodak shipped a load of sensitized photographic material on a truck operated by the defendant. Most of the material was destroyed in transit because of the defendant's mishandling. The Tenth Circuit held that Kodak was not required to sell the damaged merchandise to mitigate damages, stating that the record revealed that Kodak's reputation, which it spent considerable resources in developing, "could be harmed if it was required to sell damaged merchandise in order to mitigate damages." *Id.* at 320.

While Jordan's reputation is considerable and obviously the result of careful development, there are no factual assertions that support the proposition that Jordan's choosing another endorsement opportunity is akin to being forced to sell damaged goods....

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### **The Need for a Further Determination of Damages**

...[T]he burden of proving that the damage could have been avoided or mitigated rests with the party that committed the breach."); *In re Rowland*, 292 B.R. 815, 820 (Bankr.E.D.Pa. 2003) ("To prove a failure to mitigate, a defendant must show: (1) what reasonable actions the plaintiff ought to have taken, (2) that those actions would have reduced the damages, and (3) the amount by which the damages would have been reduced") (quoting *Koppers Co., Inc. v. Aetna Cas. & Surety Co.*, 98 F.3d 1440 (3rd Cir. 1996)). Thus, even though the Court finds that Jordan has failed as a matter of law to mitigate damages, the Court does not disallow the Claim in full.

In this case, there has been no determination and no evidence presented of what Jordan could have reasonably earned had he fulfilled his obligation to mitigate damages by entering the endorsement marketplace following MCI's rejection of the Agreement. \*\*\* Although the Court finds that as a matter of law Jordan has not mitigated damages, there must be an evidentiary hearing on how much his claim should be reduced to reflect what portion would have been mitigated had he used reasonable efforts to do so.

### **CONCLUSION**

Jordan's motion for summary judgment is granted in part and denied in part.... To the extent MCI claimed that Jordan failed to mitigate damages, MCI's motion is granted in part. The Court finds that Jordan failed to mitigate damages but a further evidentiary hearing is necessary

to determine what Jordan could have received had he made reasonable efforts to mitigate, a determination that consequently will affect the Claim.

The Debtors are to settle an order consistent with this opinion.

### Notes and Questions

1. Is it clear to you how Jordan's case differs from Parker's? Note that the studio in *Parker* did not argue that Parker failed to meet a general duty to mitigate, only that she failed to mitigate by refusing the role in *Big Country*, *Big Man*.
2. If you thought Parker should be able to determine the trajectory of her career, did you feel the same way about Jordan's choices here? Why or why not?
3. In an omitted portion of the discussion of Jordan's lost volume seller argument, the court cites to *Neri v. Retail Marine Corp*, 30 N.Y.2d 393, 285 N.E. 2d 311, 399-400 (1972). *Neri* was a case where a purchaser breached his promise to buy a boat. The commercial boat seller argued that although it sold the boat to another buyer, it had access to a virtually limitless supply of boats, so the loss of the sale to Neri meant it sold only one boat instead of two. The boat seller in *Neri* prevailed, but Jordan did not. The court likened Jordan's position to a car dealer who, after breach by the buyer, "put the car back onto a deserted car lot, made no attempts to sell it, and kept the dealership shuttered to new customers."

Note also that *Neri* is a sales of goods case, governed by the Uniform Commercial Code. In *Worldcom*, the court reasons by analogy from a case interpreting the statute that governs sales of goods and applies it to a personal services contract. Caselaw interpreting the UCC has been applied in other contexts as well, and the Restatement (Second) of the Law of Contracts cites to the UCC on occasion. *See, e.g.*, Restatement (Second) of Contracts § 205, *cmt a* (citing UCC §§ 1-201(19), 2-103(1)(b)).