MITIGATION OF DAMAGES IN BREACH OF ENTERTAINMENT AND OTHER SERVICE CONTRACTS

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I. BACKGROUND

"One who commits a breach of contract must make reparation in the form of paying compensatory damages to the aggrieved party. In determining the amount to be awarded, the aim is to put the aggrieved party in as good a position as that party would have been if performance had been rendered as promised."[1] " It is also an almost inflexible proposition that a party who has been wronged by a breach of contract may not sit idly by and allow damages to accumulate, but rather must make reasonable efforts to minimize those damages".[2] Although applications of the mitigation principle pervade the rules of contracts, it is unsettling to consider just how many issues and questions arise as to the precise efforts required by the mitigation duty.[3]

Although the principles of mitigation of damages permeate all areas of contract law, nowhere do the issues and questions regarding

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[1] 11 ARTHUR LINTON CORBIN & JOSEPH M. PERILLO, CORBIN ON CONTRACTS § 55.3, at 7 (West Pub. Co. rev. ed. 2005).

[2] *Id.* at § 57.11, at 301; RESTATEMENT (SECOND) OF CONTRACTS § 350; *see* Charles J. Goetz & Robert E. Scott, *The Mitigation Principle*: *Toward a General Theory of Contractual Obligation*, 69 VA. L. REV. 967 (1983).

[3] *See* Goetz & Scott, *supra* note 2, at 967-68 (stating,

> for example, under what circumstances does mitigation require an injured party to deal with the contract breacher? Why does the duty to minimize losses mature only after the breach, even where the injured party became aware much earlier of a significant danger of breach and had a cost-effective opportunity to mitigate the prospective loss?) *Id.* This has been pointed out that principles concerning mitigation of damages are often improperly referred to as a "duty to mitigate." *See* CORBIN, *supra* note 1, (stating, it is not infrequently said that it is the 'duty' of the injured party to mitigate damages so far as can be done by reasonable effort. Since there is no judicial penalty, however, for the failure to make this effort, it is not desirable to say that the injured party is under a 'duty.' The recovery against the defendant will be exactly the same whether the effort is made and the loss mitigated, or not, but if the injured party fails to make the reasonable effort, with the result that the injury is greater than it would otherwise have been, the court will not enter judgment for the amount of this avoidable and unnecessary increase. The law does not penalize the injured party's inaction; it merely does nothing to compensate for the loss that the injured party helped to cause by not avoiding it.) *Id.*

application thereof arise more frequently and vividly than in breaches of service contracts, particularly in the entertainment industry.[4] Many aspects of the entertainment business are highly speculative and entertainment entities are known to invest heavily in developing and marketing the various products they create.[5] While revenues from successful entertainment projects can be enormous, these successes are frequently offset by other expensive failures.[6] As performers become more individually successful they become generally more concerned with maximizing their own personal profits than with helping to subsidize entertainment projects to benefit their successors.[7] When it comes to remedies for breach of entertainment service contracts, it is a constant battle to find a fair balance between the competing financial interests, thereby leading to myriad issues regarding mitigation of damages.

Vague and/or ambiguous drafting of compensation provisions and specific service duties, coupled with a lack of appreciation of the subtle distinctions often drawn in judicial interpretation, have led to confusion for courts, lawyers and litigants. This article will scrutinize the most relevant cases and legal reasoning to demonstrate how courts pragmatically deal with and decide various issues regarding mitigation of damages, particularly in breach of entertainment service contracts. It will also thereby provide all concerned parties with important guidelines for negotiating, drafting, and interpreting entertainment service contracts with a focus on avoidance of incurring post-breach mitigation of damages issues.

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[4] *See* Elliot Axelrod, *The Efficacy of the Negative Injunction in Breach of Entertainment Contracts*, 46 J. MARSHALL L. REV. 409, 409-410 (2013).

[5] *Id.*

[6] *See* Patrick Healy, *Broadway Hits Gold in Buffalo*, N.Y. TIMES (Dec. 23, 2011), http://theater.nytimes.com/2011/12/24/theater/sheas-performing-arts-center-in-buffalo.html?_r=0 (noting that "only 20-30 percent of Broadway shows ever turn a profit."); Chris Jones, *Rialto Hits Miss a Payback*, VARIETY (May 21, 2011), http://variety.com/2011/legit/news/rialto-hits-still-missing-a-payback-1118037392/ (stating that "it's a perennial Broadway truth that only 20%-30% of shows pay back their investors. 'The percentages really haven't changed much over the last 60 years.'" (quoting Charlotte St. Martin, Executive Director of Broadway League)).

[7] *Id.*

II. JUDICIAL

It is not unusual for theatrical producers and motion picture studios to change their minds about using certain actors in stage or film projects as they evolve. Upon cancellation of an actor's contract, the doctrine of mitigation of damages frequently arises creating numerous distinctive legal issues. A leading case dealing with this is *Parker v. Twentieth Century-Fox Films*.[8]

The plaintiff in *Parker*, who was a well-known actress,[9] was to play the female lead role in defendant's contemplated production of a film entitled "Bloomer Girl".[10] The contract provided that the defendant would pay plaintiff a minimum "guaranteed compensation" of $53,371.42 per week for 14 weeks for a total of $750,000.[11] The defendant decided not to produce the picture, and notified the plaintiff by letter of its decision to not comply with its obligations under the written contract.[12] By that same letter and with the professed purpose of avoiding any damages to the plaintiff, defendant instead offered to employ plaintiff as the leading actress in another film tentatively entitled "Big Country, Big Man" with the same level of compensation.[13] Unlike "Bloomer Girl," which was to be a musical production to be filmed in Hollywood, "Big Country Big Man" was a dramatic western-style movie to be filmed in Australia.[14]

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[8] 474 P.2d 689 (Cal. 1970).

[9] The actress in this case was Shirley MacLaine, a television and theater actress, singer, dancer and author. She is a six-time Academy Award nominee and recipient of the 40th American Film Institute Life Achievement Award.

[10] *Parker,* 474 P.2d at 690. This movie project was based on the life of Amelia Bloomer, and early 19th century feminists, suffragist, and abolitionist whose magazine, "The Lily," was the first magazine published by and for women. That was why "bloomers," the loose trousers that could be worn by women under a short shirt in place of hoops and petticoats were named after her, during an era when feminists were trying to be in more control of their dress. A century later, "Bloomer Girl" was authored as a play and then as a successful Broadway musical.

[11] *Parker,* 474 P.2d at 690.

[12] *Id.*

[13] *Parker*, 474 P.2d at 691.

[14] *Id.*

Plaintiff was given one week to accept the new offer, which she did not, and the offer lapsed.[15] Plaintiff then commenced an action seeking recovery of the full-agreed compensation of $750,000.[16]

Defendant admitted its anticipatory breach of contract and pleaded an affirmative defense.[17] Defendant asserted that plaintiffs deliberately failed to mitigate damages by unreasonably refusing to accept the offer of substitute employment.[18] The court, after acknowledging the general rule 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, or with reasonable efforts might have earned from other employment,[19] noted importantly that

> [B]efore 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.[20]

The court, in affirming the trial court's summary judgment for plaintiff, held that the substitute offer by defendant was, as a matter of fact, not of the nature that could be used to mitigate plaintiff's damages.[21] It said:

> [T]he 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

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[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] *Parker,* 474 P.2d at 691-92.

[19] *Id.* at 692-93.

[20] *Id.* at 692.

[21] *Id.*

> "Bloomer Girl" was to be a musical revue 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 the imagination be considered the equivalent of or substantially similar to the lead in a song-and-dance production.[22]

The court additionally noted certain other differences in the substituted contract as buttressing the notion that the substitute offer was of "inferior" employment. [23]

While agreeing with the decision in the *Parker* case, this author finds it troubling that the court's determination of dissimilar employment and judgment for plaintiff was granted as an affirmation of a summary judgment by the trial court.[24] A strong dissenting opinion was rendered by the acting chief judge who said, "[T]his is a factual issue which the trial court should not have determined as a motion for summary judgment."[25] Another analyst suggests that

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[22] *Id.* at 693-94.

[23] *Parker,* 474 P.2d at 694. In the "Bloomer Girl" contract, the plaintiff was given certain director and screenplay approvals, which she had pre-approved. *Id.* at 691 n. 2. The substitute "Big Country" contract excluded these approvals on the basis that there simply was insufficient time to negotiate these items for the "Big Country" filming schedule. *Id.*

[24] *Id.* at 692 (stating,

> Summary judgment is proper only if the affidavits or sustain a judgment in his favor and his opponent does not by affidavit show facts sufficient to present a triable issue of fact. The affidavits of the moving party are strictly construed, and doubts as to the propriety of summary judgment should be resolved against granting the motion. Such summary procedure is drastic and should be used with caution so that it does not become a substitute for the open trial method of determining facts.) *Id.*

[25] *Parker*, 474 P.2d at 694. Justice Sullivan points out that courts have employed various phrases to define what type of employment is embraced by the notion of mitigation of damages, such as "substantially similar," "in the same general line," "equivalent to prior position," "similar capacity,"

there might be a plausible and unique feminist component in the determination and consideration of the case, and that gender constraints often affect these interpretations.[26]

Notwithstanding the clarity with which the *Parker* court held a substitute offer to be inherently inferior and dissimilar to the breached contract,[27] it can be very difficult in the entertainment industry to make such clear distinctions. In one case, compensation received by a movie actress for two radio performances was deducted by way of mitigation of damages sustained by defendant's cancellation of a film commitment to the actress.[28] The court said, "[W]hile such work might be denominated different in character from that required of a moving picture actress, it cannot be said to be inferior thereto."[29]

As previously noted, to mitigate damages, the employer bears the burden of proving that comparable or substantially similar employment was available to the employee.[30] Where a jury, properly instructed, finds that the breaching employer failed to establish such predicates, great weight is given to such factual finding

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"not of a different kind," etc. He concludes that there was nothing properly before the trial court by which the importance of the analysis could be ascertained or evaluated, and that the trial court misused judicial notice. *Id.* at 694. *See* also De La Falaise v. Gaumont-British Picture Corp., 103 P.2d 447, 452 (Cal. Ct. App. 1940). He additionally noted with respect to the change in director and screenplay approval in the "Big Country" offer, that these rather qualified rights are not as a matter of law necessarily significant matters so as to make the substitute offer inferior. *Id.* at 452.

[26] *See* Marry Joe Frug, Note: *A Symposium of Critical Legal Study: Re-Reading Contracts: A Feminist Analysis of a Contract Casebook*, 34 AM. U. L. REV. 1065 (1985) at 1118. (One might "assume MacLaine not only sought to refuse a role that would be demeaning to her as a woman, but that she also wanted to avoid contributing to the oppressed images of women in popular culture.").

[27] *Parker*, 474 P.2d at 692-93.

[28] *See De La Falaise*, 103 P.2d 447

[29] *Id.* at 470.

[30] *See Parker*, 474 P.2d at 692.

notwithstanding evidence to the contrary.[31] In *Boehm v. American Broadcasting Co.*, the plaintiff, after being terminated as Vice President of ABC Radio in charge of Los Angeles regional sales, was offered a newly created position at ABC, with the same base salary, which the plaintiff rejected.[32] Nevertheless, the court held for the plaintiff in awarding full damages concluding that ABC had not met its burden of proving that plaintiff's efforts to mitigate damages was unreasonable.[33] An additional cogent claim by ABC was that the plaintiff had voluntarily removed himself from the job market by moving out of the area and thereby making it difficult, if not impossible, to fulfill his obligation to mitigate damages.[34] The court said that this issue was a question of reasonableness based on plaintiff's efforts to obtain other employment and was a question of fact, which was considered and decided by the jury.[35]

Phillips v. Playboy Music represents another significant case where unique dealings and circumstances in the entertainment industry dictated that mitigation of damages by the aggrieved party was inherently nearly unobtainable.[36] Under the contract, plaintiffs, who were well known talent-finders,[37] agreed to produce and deliver eight LPs[38] per year for two years in exchange for a $40,000 advance payment on signing the contract, as well as advances of $5,000 per month during the first year, $14,166 per month during the second

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[31] *See* Kern v. Levolor Lorentzen Inc., 899 F.2d 772, 775 (9th Cir. 1990) (stating "Jury verdicts are due considerable deference.").

[32] 929 F.2d 482 (9th Cir. 1991). However, the equivalence of the total compensation factoring in commissions earned in the old job and the equivalence of responsibilities in the two jobs were disputed. *Id.* at 484-85.

[33] *See Id.*

[34] *Id.* at 488.

[35] *Id.* at 487.

[36] 424 F. Supp. 1148 (N.D. Miss. 1976).

[37] The plaintiffs were Sam Phillips, who discovered and recorded many artists including Elvis Presley, Carl Perkins, Johnny Cash and others, and Ray Harris who was extremely well known as an expert record producer, mixer and sound engineer and for locating and developing new musical talent. *Id.* at 1150.

[38] A long-playing $33^{1}/_{3}$ RPM vinyl record usually containing about twelve individual song or tracks.

year, and $5,000 each time an LP was delivered.[39] The defendant breached the contract by not paying two monthly payments during the first year and not paying at all for the second year, totaling $60,000.[40] The defendants argued that plaintiffs could not recover in their action because they did not attempt to mitigate damages by seeking a substitute contract for the balance of the term.[41] The court, in holding that plaintiffs had not failed in their duty to mitigate damages, said:

> "Here, the contract relates to a rather restricted, limited and sensitive area of personal services to be performed by plaintiffs. The agreement does not constitute a contractual arrangement which can be readily or easily negotiated in the average or usual market place . . . the evidence also creates the inference that a contract in the recording industry providing for the payment of non-returnable advances is difficult to obtain."[42]

Case law shows that there are myriad factors that must be considered in deciding if particular substitute employment is indeed "different" or "inferior" so as not to be applied by way of mitigation of damages. [43] In a recent case, the court held that the new employment was "inferior" based on the burden imposed by its location.[44] The evidence in the record reflected that the new job was located two to three hours away from the plaintiff's home and family, and that as a result, the plaintiff had to rent a room to be near the job and not see his wife and two children except on weekends.[45] Another case held that engaging in self-employment even if unprofitable, can

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[39] *Phillips,* 424 F. Supp. at 1150.

[40] *Id.* at 1151.

[41] *Id.* at 1149.

[42] *Id.* at 1153.

[43] *See* Mize-Kurzman v. Main Cmty. Coll. Dist., 136 Cal. Rptr.3d 259, 291-92 (Cal. Ct. App. 2012).

[44] Villacorta v. Cemex Cement, Inc., 165 Cal. Rptr.3d 441, 446 (Cal. Ct. App. 2013).

[45] *Id.* The burden also included the fact that plaintiff had to pay for the second residence as well. *Id.*

constitute satisfaction of the duty to mitigate damages as long as the discharged employee applies sufficient effort in trying to make the business successful.[46] Most cases dealing with substitute employment have concluded that these mitigation issues are matters of fact, rather than of law, with exceptions.[47]

Further regarding the burden of proof in mitigation issues, in *Hope v. Cal. Youth Auth.*, the plaintiff, a gay man, won his lawsuit based on severe sexual orientation harassment.[48] The defendant claimed that the plaintiff did not offer sufficient evidence to prove his allegation that he could never work again, particularly in light of "dueling" experts testifying about this issue.[49] The court said the defendant's argument was "[B]ased on a faulty legal premise, namely, that the employee has the burden of proving inability to work."[50] Rather, the court held that the mitigation amount if any, must be the amount "which the employer affirmatively proves the employee has earned or with reasonable effort might have earned from other employment . . . ."[51] Another important case, *Mayer v.*

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[46] Cordero-Sacks v. Hous. Auth. of City of Los Angeles., 134 Cal. Rptr.3d 883, 897-98 (Cal. Ct. App. 2011) ("The notion that starting one's own business cannot constitute comparable employment for mitigation purposes not only lacks support in the cases, but has a distinctly un-American ring.") *Id.* at 898 (quoting Smith v. Great Am. Rest., Inc., 969 F.2d 430, 438 (7th Cir. 1992)).

[47] *See* Manuma v. Blue Haw. Adventures, Inc., No. 24433, 2002 Haw. App. LEXIS 369, at *3 (Haw. App. Ct. Dec. 6, 2002) (holding that because the plaintiff's original position was as an entertainment director, that offer of substitute employment which involves essentially maintenance or custodial work were as a matter of law not substantially similar.); *see also* Flanigan v. Prudential Fed. Sav. & Loan Ass'n, 720 P.2d 257, 264-65 (Mont. 1986) (holding that the trial court did not err by refusing to reduce the employee's damages for her refusal to take a part-time job from the employer, in essence saying that as a matter of law, it is inferior to a full-time job.).

[48] 36 Cal. Rptr.3d 154, 158 (Cal. App. Ct. 2005) (stating that the plaintiff, an employee at a youth correctional facility, was called derogatory names every day by his immediate supervisor and others and was made to complete his work alone while others received help.) *See generally* Candari v. Los Angeles Unified Sch. Dist., 122 Cal. Rptr. 53 (Cal. App. Ct. 2011).

[49] *Hope*, 36 Cal. Rptr.3d at 168.

[50] *Id* (quoting Parker v. Twentieth Century-Fox Film Corp., 474 P.2d 689, 692 (Cal. 1970)).

[51] *Id.*

Multistate Legal Studies, Inc., concluded that receiving disability benefits could not, as a matter of law, be deducted as part of a mitigation of damages.[52]

III. THE LOST VOLUME SELLER

"Gains made by an injured party on other transactions after a breach are generally not to be deducted by way of mitigation if such gains could not have been made had there been no breach."[53] As previously stated, a wrongfully discharged full-time employee must mitigate damages, which damages will be reduced by any earnings on employment the employee secures or could with reasonable diligence secure during the contract period because if it were not for the breach, such employment ordinarily could not lawfully be obtained due to the full-time nature of the original employment.[54]

"However, if the relationship between the parties is such that the wronged party was legally free to enter into similar contracts with others, and that after the breach the wronged party could have or actually had made similar contracts, that would not reduce the entitlement to or amount of damages emanating from the breach."[55]

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[52] 61 Cal. Rptr.2d 336, 338 (Cal. App. Ct. 1997). *But see* Pichon v. Pac. Gas & Elec. Co., 260 Cal. Rptr. 677 (Cal. App. Ct. 1989) (showing where the court foreclosed double recovery of economic damages that were compensated by workers' compensation benefits.) *See also* Bevli v. Brisco, 260 Cal. Rptr. 57 (Cal. App. Ct. 1989). *See* "Symposium, *The Fifth Remedies Discussion Forum: Restitutionary Disgorgement of Damages*," 42 LOY. L.A. L. REV. 131 (2008) for an interesting discussion of whether a disgorgement remedy for certain breaches of contract is compatible with the principle of mitigation of damages. The author posits that while disgorgement conflicts with underlying rationales for mitigation, he could ultimately foresee an environment in which parties operate conscientiously to mitigate avoidable consequences, Id at 131.

[53] CORBIN & PERILLO, *supra* note 1, § 57.13.

[54] *See* Hope v. Cal. Youth Auth., 36 Cal. Rptr.3d 154, (Cal. App. Ct. 2005).

[55] CORBIN & PERILLO, *supra* note 1, § 57.13; *see* Gianetti v. Norwalk Hosp., 833 A.2d 891 (Conn. 2003); *see also* Jetz. Serv. v. Salina Prop., 865 P.2d 1051 (Kan. Ct. App. 1993). The term "lost volume seller" was first used by Professor Robert O. Harris in his article entitled "A Radical Restatement of the Law of Seller's Damages: Sales Act and Commercial Code Results Compared," 18 STAN. L. REV. 66 (1965).

Non-exclusive service contracts are within this area.[56] In a leading case, recovery by an exclusive national advertising representative for a subsidiary television station for breach of the representation contract by the subsidiary and its parent was not subject to reduction of otherwise recoverable damages on account of revenue it received from five new clients it procured upon learning of the breach.[57] The court said:

The ability of [plaintiff] . . . to secure contracts to act as an advertising agent for stations located elsewhere is irrelevant, because such contracts would have been available . . . had there been no breach [of] contract . . . The evidence is clear that the new markets penetrated by [plaintiff] . . . were not "substitutes" . . . but constituted additional volume[.][58]

The definition and application of the "lost volume seller" concept is unique in the context of endorsement service contracts involving persons famous in the entertainment and/or professional sports world. In the significant case of *In re Worldcom, Inc.*, the basketball star Michael Jordan, one of the most popular athletes in the world at that time, entered into a ten year contract to promote MCI telecommunication services.[59] The contract required Jordan to make himself available four days each year to allow for the production of television commercials and print advertising for promotional appearances.[60] The agreement also granted MCI the license to use his name, likeness, and other attributes to advertise and promote MCI's telecommunication products and services.[61] The agreement did not prevent Jordan from endorsing other products,

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[56] *See generally* Katz Commc'ns, Inc. v. Evening News Ass'n, 705 F.2d 20 (2d Cir. 1983).

[57] *Id.*

[58] *Id.* at 26. *See also* Collins Entm't Corp. v. Coats & Coats Rental Amusement, 629 S.E.2d 635 (S.C. 2006) (holding as to a breach of a contract by the buyer in a contract with a provider to lease video poker machines to buyer's two bingo hall operations, the court found that the provider actually had surplus machines on hand which they could have supplied to other locations had they become available, hence the provider was a lost volume seller).

[59] 361 B.R. 675 (Bankr. S.D.N.Y. 2007).

[60] *Id.*

[61] *Id.* at 679.

with some specific restrictions.[62] Prior to the end of the contract term, MCI commenced bankruptcy proceedings and Jordan filed claims for payments due under the contract.[63] MCI defended these claims based on the assertion that Jordan had failed to mitigate damages.[64] Jordan argued that as a "lost volume seller", he was under no obligation to mitigate damages.[65]

In an interesting twist on the typical lost volume seller scenario, the court held that Jordan did not qualify and indeed was required to make reasonable affirmative efforts to mitigate damages.[66] This result was reached primarily due to the court finding that at the time MCI breached their obligation, Jordan had already begun a business strategy of not accepting additional endorsement opportunities.[67] The court said:

> "[...] [C]ourts 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 [. . .] Jordan has not shown he could and would have entered into a subsequent agreement."[68]

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[62] *Id.* at 679. The restrictions were that Jordan could not endorse the same products or services that MCI produced. Jordan secured a $5,000,000 signing bonus and was also entitled to annual base compensation $2,000,000. *Id.*

[63] *Id.* at 679-80.

[64] *Id.* at 680.

[65] *Id.* at 684 (identifying testimony demonstrating that he could have entered into additional endorsement contracts even if MCI had not rejected the agreement).

[66] *In re Worldcom,* 361 B.R. at 687.

[67] *Id.* at 687 (finding that Jordan's financial and business advisor had testified that at the time of MCI's breach that Jordan's desire was "not to expand his spokesperson or pitchman efforts with new relationships" and wanted to avoid diluting his image).

[68] *Id.* at 687. The court did agree however, over MCI's objection, that as to capacity alone, to enter into subsequent agreements, Jordan met the test of a lost volume seller. The court said, "[a]lthough he does not have the infinite capacity that some cases discuss, a service provider does not need unlimited capacity but must have the requisite capacity and intent to perform under multiple contracts at the same time." *See also* Gianetti v.

Some jurisdictions do not recognize the concept of a lost volume seller.[69] Of those which do, the central question to giving recognition is the seller's ability to provide the service or product to both the breaching party and the resale buyer at the same time.[70] It should also be noted that the doctrine of mitigation will not apply in actions to rescind a contract because it only arises out of a breach of a valid contract.[71] If a contract is invalidated, say, on the ground of mutual mistake, both parties are excused from performing, and the only remaining issue is returning the parties to the status quo before the contract was made.[72]

IV. PAY OR PLAY / LIQUIDATED DAMAGES

A "pay or play" provision in an entertainment service contract means that the artist is guaranteed payment as provided for in the

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Norwalk Hosp., 833 A.2d 891, 903 (Conn. 2003) (holding that it was error to conclude that the doctor plaintiff was a lost volume seller based solely on his testimony and that in considering the lost volume seller theory, the court needed to make factual determinations to that end).

[69] *See* Ne. Vending Co. v. PDO, Inc., 606 A.2d 936, 938 (Pa. 1992) (denouncing the lost volume seller doctrine, the court said, "[t]he theory of lost volume erodes the duty to mitigate. Application of the doctrine would encourage the non-breaching party to do nothing to minimize his damages. Moreover, if compensation for "lost volume" was permitted, the non-breaching party would recover lost profits from the breached contract and the profits it would have made had it contracted with someone else. This directly conflicts with the purpose behind awarding contract damages.").

[70] *Id. See also* Penncro Assocs.' v. Sprint, Spectrum L.P., No. 04-2549-JWL, 2006 U.S. Dist. LEXIS 48571, at *20-21 (D. Kan. July 17, 2006); *Am. Nat'l Prop. & Gas, Co. v. Campbell Ins. Inc.*, No. 3:08-cv-00604, 2011 U.S. Dist, LEXIS 68704 (M.D. Tenn. June 27, 2011).

[71] S.T.S. Transp. Serv., Inc. v. Volvo White Truck Corp., 766 F.2d 1089, 1092 (7th Cir. 1985).

[72] *Id.* at 1092; *see also* TruServ Corp. v. Morgan's Tool & Supply Co., Inc., 39 A.3rd 253 (Pa. 2012) (holding a plaintiff is not under a duty to mitigate damages when both the plaintiff and the liable party have an equal opportunity to reduce damages); Delliponti v. DeAngeles, 545 Pa.434 (1996).

contract regardless of whether or not she actually renders services.[73] In other words, the employer is free to utilize or not utilize the artist's services, but in any event, the artist will get paid. In actuality, "pay or play" is essentially a form of liquidated damages. These provisions are particularly popular in entertainment service contracts due to the difficulty in many instances of computing actual damages.[74] Of course, when drafting a liquidated damages clause, one must be careful not to overreach as it is well established that courts will not enforce penalty provisions as a basic notion of public policy.[75] Damages in civil lawsuits are compensatory and not punitive.[76]

It has been generally held that there is no duty to mitigate damages when a contract contains a valid liquidated damages clause,[77] which would include a "pay or play" clause that is typically used in entertainment service contracts.[78] This is well illustrated in the case of *Lynch V. CIBY 2000*,[79] in which the plaintiff, a well-

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[73] Donald E. Biederman, LAW AND BUS. OF THE ENTM'T INDUS. 498 (5th ed. 2007); *see* Garfein v. Garfein, 93 Cal. Rptr. 714, 717 (1971).

[74] *See* Elliot Axelrod, *A Pragmatic Scrutiny of Liquidated Damages*, 19 LINCOLN L. REV. 79, 79 (1991).

[75] *See* CORBIN, supra note 5 (But we are reminded that "[t]he pendulum of judicial opinion shifts between two extremes, one holding that the public interest requires frequent refusal to enforce agreements and the other that freedom of contract is the paramount public policy.").

[76] *See* CORBIN, supra note 5 ("... in case of breach of contract, justice requires nothing more than compensation measured by the amount of harm suffered. Penalties and forfeitures are not so measured."); s*ee generally* Elliot Axelrod, *A Pragmatic Scrutiny of Liquidated Damages*, 19 LINCOLN L. REV. 79 (1991). *See also* Scott M. Tyler, Note, *No (Easy) Way Out: "Liquidating" Stipulated Damages for Contractor Delay in Public Construction Contracts*, 44 DUKE L.J. 357 (1994).

[77] *See* NPS, LLC v. Minihane, 886 N.E.2d 670, 675 and n.9 (Mass 2008). The following were cited by the court to support its holding: Barrie Sch. v. Patch, 933 A.2d 382 (Md. 2007); Fed. Realty Ltd. P'ship v. Choices Women's Med. Ctr., Inc., 735 N.Y.S.2d 159 (App. Div. 2001); Lake Ridge Acad. v. Carney, 613 N.E.2d 183 (Ohio 1993).

[78] *See* Biederman, *supra* note 68.

[79] 1998 U.S. Dist. LEXIS 23496 (C.D. Cal. 1998).

known and successful movie director[80] entered into a contract with defendants to provide his exclusive services for the production of three movies over a seven year period.[81] The contract provided that defendant would produce three movies utilizing plaintiff's services at a cost of up to $15 million per picture or pay the plaintiff his guaranteed compensation of about $3 million per picture.[82] After the defendants wrongfully terminated the agreement, plaintiff sought to recover the appropriate remaining balance of his guaranteed compensation.[83] In deciding for plaintiff, the court rejected defendants' claims that plaintiff had a duty, but failed to mitigate damages.[84] It held that the duty did not apply because of the minimum compensation guaranteed under the "pay or play" clause.[85] Specifically the court said: " . . . the duty to mitigate does not apply when an employee seeks minimum compensation guaranteed under a contract containing a clause which entitles the employee to compensation even if the employer opts not to avail itself of the employee services."[86]

It will be recalled that in the *Parker* case, the bulk of the opinion is devoted to the court's conclusion that the duty to mitigate damages did not require the actress plaintiff to accept different or inferior employment. The court held that the defendant's offer of the role in "Big Country, Big Man," a straight western-type movie was not substantially similar to the original musical dance type "Bloomer

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[80] David Lynch - an American director, screenwriter and producer who has been described as "the most important director of this era," Peter Bradshaw et al., *The world's 40 best directors*, THE GUARDIAN, Nov. 13, 2003, https://www.theguardian.com/film/2003/nov/14/1.

[81] *Lynch*, U.S. Dist. LEXIS 23496 at 2.

[82] *Id.* at 2.

[83] *Id.* The contract also provided that the defendant could abandon the third picture after the commencement of principal photography for the second picture. However, the subject contract was terminated before that time.

[84] *Id.* at 16.

[85] *See* Biederman, *supra* note 68.

[86] *Lynch*, U.S. Dist. LEXIS 23496. *See also* Payne v. Pathe Studios, Inc., 44 P.2d 598 (Cal. Dist. Ct. App. 1935); RKO Radio Pictures, Inc. v. Sheridan, 195 F.2d 167, 170 (9th Cir. 1952).

Girl" movie. [87] Based on this, the defendants in the Lynch case put forth a unique defense.[88] They argued that the *Parker* court impliedly held that a pay or play provision was indeed subject to the duty to mitigate, otherwise the *Parker* court would not have even reached the question of whether the two movies were substantially similar.[89] The *Lynch* court however was not persuaded by this argument as it pointed out that the *Parker* court specifically reserved this question. It stated, ". . . by finding that [defendants'] substitute offer could not be used in mitigation it [did not] need to reach the question of whether mitigation was required."[90] Another analyst however pointed out the confusion created by this reasoning:

> By posing the problem in terms of the "different or inferior" question, the California Supreme Court deflected attention from the essence of the contract. The contract had a "pay-or-play" provision, common in the motion picture industry. The studio had, in effect, purchased an option on her time; they would pay her to be ready to make a particular film, but they made no promise to actually use her in making the film. When Fox canceled the project, they did not breach; they merely chose not to exercise their option. There was no breach and, therefore, there was no need to mitigate. And the Supreme Court knew it. Nonetheless they chose to ignore it (or nearly so). By framing the case as it did, the Parker court managed to convert an easy case into a harder one. That it gave the right answer is a fortuitous result.[91]

To this author however, the court's reasoning seems to be backwards in that a finding of a valid liquidated damages provision should preclude any examination of mitigation of damages issues, including whether other employment offers exist, or consist of comparable work.

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[87] *See Parker*, 474 P. 2d at 689.

[88] *See Lynch*, U.S. Dist. LEXIS 23496 at 6.

[89] *Id.*

[90] *Id.* (citing Parker v. Twentieth Century-Fox Film Corp., 474 P.2d 689, 684 (Cal. 1970)

[91] *See* Forum, *Bloomer Girl Revisited or How to Frame An Unmade Pic*ture, 1988 WIS. L. REV. 1051.

Another aspect of the liquidated damages/mitigation of damages issue deals with what English courts have called "garden leave", pursuant to which an employer generally continues to pay the employee her full salary and benefits, without utilizing her services. The purpose of which is to prevent her from moving to a competitor, usually during an extended contractual period of employment, such as a television series or otherwise.[92] The phrase "garden leave" refers to the assumption that the employee will stay home and work in her garden during the period while remaining financially secure but no longer have access to the employer's confidential information.[93] Garden leave has been cited as an effective way for companies and entertainment entities to protect themselves from the threat of opportunistic employees joining competitors.[94] Ultimately however, the question may arise as to whether the employer can demand that the employee reduce the employer's costs by trying to find alternate employment of a non-competing nature, essentially requiring mitigation of damages.[95]

V. WINDFALL

Inasmuch as the general rule is that there is no need for non-breaching parties to mitigate damages in the face of a liquidated damages clause, one need not be concerned as to the semantics of whether or not a pay or play provision involves inherent breach of contract to be enforceable.[96] Liquidated damages clauses are favored

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[92] *See generally* Greg T. Lembrich, *Garden Leave: A Possible Solution to the Uncertain Enforceability of Restrictive Employment Covenants*, 102 COLUM. L. REV. 2291 (2002).

[93] *Id.* at 2305.

[94] *Id.* at 2323. The restrictive covenants traditionally used for this purpose, including non-compete agreements, have proven to be largely ineffective because courts view them with considerable skepticism and enforce them inconsistently. Garden leave however, can succeed because it overcomes the traditional objections to restrictive covenants by being a much more equitable arrangement. *See also* Elliot Axelrod, *The Efficacy of the Negative Injunction in Breach of Entertainment Contracts*, 46 J. MARSHALL L. REV. 409 (2013).

[95] While the subject period of the garden leave will likely be during the extended term of employment, it is possible to provide for similar garden leave after the term of employment, by option exercisable the employer.

[96] *See* NPS, LLC v. Minihane, 886 N.E.2d 670, 675 (Mass. 2008).

by the courts when damages are essentially uncertain or there is a lack of market standards; especially with respect to an entertainer's pecuniary value.[97] Nevertheless, arguments have been made that liquidated damages should be subject to mitigation. The issue involves philosophically, at least in part, the desire to balance freedom of contract with the inequity that can result if a party could recover liquidated damages even if no actual harm was caused, thereby giving the party a "windfall".[98]

The perception and issue of "windfall" can be a powerful influence in courts' deciding as to whether or not to impose a mitigation duty on a liquidated damages clause. *In Hewitt School v. Mellon*, a liquidated damages clause in a contract of enrollment to a private school required payment of the full year's tuition unless the school received written notice of withdrawal by a fixed date.[99] The clause having been breached, the plaintiff school moved for summary judgment and the defendant contended that the provision was an unenforceable penalty.[100] The court held that the liquidated damages were proportionate to the plaintiff's reasonably anticipated damages[101] and therefore not a penalty, but it was very concerned about the issue of "windfall."[102] It reasoned that while the plaintiff

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[97] They save time and expense at trial by vitiating the need to litigate actual damages. *See* Consol. Flour Mills Co. v. File Bros. Wholesale Cr., 110 F. 2d 926 (10th Cir. 1940).

[98] *See* Lisa A. Fortin, Note, *Why There Should Be A Duty To Mitigate Liquidated Damage Clauses*, 38 HOFSTRA L. REV. 285, 299 (2009) ("The very purpose of contract damages laws are defeated by courts that hold that mitigation does not apply if there is a liquidated damages clause. That the parties have specified in advance the amount of damages appropriate in the event of a breach does not mean that the non-breaching party does not retain benefits.").

[99] 132 Misc. 2d 862, 864 (Civ. Ct. 1986). The fixed date was ten weeks prior to the start of the school year. The actual notice was given five days before the start of the school year.

[100] *Id.*

[101] *Id.* ("By withdrawing the student less than one week prior to the start of school and not paying the tuition as agreed, the defendants are depriving the plaintiff of income against which a budget has already been projected, materials purchased and teachers hired").

[102] *Id.* at 864-865.

was under no duty to obtain a substitute student because of the tardiness of the required notice, if it did, it could receive a windfall profit by receiving double tuition.[103] The court held that the plaintiff could rely on the liquidated damages clause "merely" to establish its prima facie case and that the clause shifts the burden upon the defendant to go forward on the issue of whether or not the plaintiff was otherwise made whole.[104] Accordingly, the defendant was afforded reasonable discovery to establish his defense, indicating that the court would consider mitigation.[105]

The opposite result occurred in *Wassenaar v. Panos*.[106] This case concerned a three-year employment contract for a general manager of a hotel, which contained a liquidated damages clause providing that in the event of wrongful discharge, the employee was to be paid a sum equal to his salary for the unexpired term of the contract.[107] The employment was terminated twenty-one months prior to the contract expiration date and the employee was unemployed for ten weeks before he obtained another job.[108] The court, in reversing the lower court's finding that the clause was a penalty, held the clause to be valid and enforceable liquidated damages provision not to be reduced by the employee's earnings after the breach.[109] The court held that the doctrine of mitigation of damages is not applicable where there is a valid liquidated damages provision.[110] The court suggested by its analysis, that windfall and the issue of reasonableness of the liquidated damages were inextricably tied together and that when the liquidated damages are

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[103] *Hewitt*, 132 Misc. 2d. at 865.

[104] *Id.*

[105] *Id.*

[106] 331 N.W. 2d. 357 (Wis. 1983).

[107] *Id.* at 359, (stating "[It is further understood] that should this contract be terminated by the Towne Hotel prior to its expiration date, the Towne Hotel will be responsible for fulfilling the entire financial obligation as set forth within this agreement for the full period of three (3) years.").

[108] *Id.* at 359.

[109] *Id.* (holding that the burden of proof rested on the employer inasmuch as it sought to set aside the bargained for provision). *See also* Lake River Corp. v. Carborundum Co., 769 F. 2d 1284 (1985).

[110] *Wassenaar*, 331 N.W. 2d. at 359, 369.

found to be reasonable, there in essence can be no resulting windfall.[111] The court said, "[t]he overall single test of validity is whether the clause is reasonable under the *totality of circumstances* (emphasis added)."[112] Also, the court added to the usual ways of viewing actual damages by saying that the standard method of calculation may not reflect the *actual harm* (emphasis added).[113] The court explained as follows:

> In addition to the damages reflected in the black-letter formulation, an employee may suffer consequential damages, including permanent injury to professional reputation, loss of career development opportunities, and emotional stress. When calculating damages for wrongful discharge courts…rarely award consequential damages. Damages for injury to the employee's reputation, for example, are generally considered too remote and not in the parties' contemplation…nevertheless, in providing for stipulated damages, the parties to the contract could anticipate the types of damages not usually awarded by law.[114]

VI. MITIGATION OF DAMAGES CLAUSES

Given the complexities of competing issues dealing with mitigation of damages, particularly in entertainment service contracts, it is this author's opinion that carefully drafted mitigation of damages clauses should be used more often. In this manner, entertainment entities can better protect themselves from incurring the costs associated with termination of various entertainment projects, particularly relative to theatrical and motion picture productions. The desired outcome from this increase in the use would be that the terminated artist can find new employment soon and then, based on a well drafted mitigation clause the employer's cost is reduced by offsetting it with what is earned in the future.[115]

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[111] *Id.* at 362, 367-68.

[112] *Id.* at 361.

[113] *Id.*at 365.

[114] *Id.* at 365-366.

[115] A successful or well-known artist is likely to earn some income from other entertainment industry related activities. *See* Martin J. Greenberg & Djenane Paul, *Coaches Contracts: Terminating A Coach Without Cause and the Obligation To Mitigate Damages*, 23 MARQ. SPORTS L. REV. 339

This applies even if there is a liquidated damages provision in the contract. If post-breach, a liquidated damages provision is successfully challenged as being excessive and therefore a penalty, then the aggrieved party would be put in the position of having to prove damages with the concomitant duty to mitigate those damages.[116]

A mitigation of damages clause may include many negotiated provisions, but to have the effect of bringing clarity to potentially difficult and complex situations, it should minimally:

- Define exactly what, under the contractual circumstances, will constitute appropriate mitigation of damages measures. This may include such things as lists of particular job types, sources of employment to be examined, and references to particular employment indices.
- Define to the greatest degree possible, all terms of art such as "diligent efforts," "comparable activities," etc. and as part of the definitions, include actual examples where possible. For example, "diligent efforts" may be defined to involve, with documented proof, the responses to employment opportunities, attendance at employment conferences and industry meetings, etc.
- Provide for precise post-breach record keeping with respect to all mitigation of damages efforts. The contract could require the keeping of a complete ledger of activities to be certified as accurate by affidavit.

(2013). Although this piece deals with coaches' service contracts in college athletics, there are many similarities of issues to entertainment service contracts.

[116] *See* Charles J. Goetz & Robert E. Scott, *The Mitigation Principle: Toward A General Theory of Contractual Obligation*, 69 VA. L. REV. 967, 982 (1983) (stating "Contracting parties could reduce renegotiation costs by agreeing in advance to a detailed set of alternative rights and duties conditioned upon varying future circumstances. Attempts to provide built-in readjustment within the terms of the original obligation, however, confront a number of serious problems. Increasing the complexity of the obligation definition not only facilitates evasion, but also exposes a party to . . . the 'breacherstatus' problem of contract law. A party who contests the interpretation of his obligation by withholding any part of the disputed performance risks being characterized as a breacher. Obviously, the status of breacher is disadvantageous because the breacher is liable for compensatory damages.")

- Define the time frame for mitigation.
- If there is a liquidated damages clause, provide affirmatively whether this is to be the exclusive remedy; how damages caused by an event not contemplated by the parties in the liquidated damages clause will be dealt with and recite that the liquidated damages have been fairly negotiated by the parties and do not constitute a penalty.[117]
- Distinguish between contract termination for and without cause and how this might affect mitigation of damages.
- Recite guidelines for issues regarding payment format, notices, release of liability, waivers, disclaimers and any artistic element ownership.
- If there is a "pay or play" provision in the contract, include appropriate language as to whether the parties also intend it to be considered a formal liquidated damages provision and if not, then appropriate language either dismissing or not dismissing any mitigation of damages.
- Define and give explicit examples of any "formulas" to be used in computations.
- Clarify what effect, if any, death or disability of a party would have.

VII. CONCLUSION

Nowhere do issues regarding mitigation of damages arise more frequently and vividly than in breach of service contracts, particularly in the entertainment industry. Entertainment entities invest heavily in developing and marketing the various products they create and there is a constant battle to find a fair balance between the competing financial interests of the entertainment entities and the individuals who render talent services therein. However, as seen in case law, there are many discrepancies between the cost minimizing

[117] Inasmuch as doubts as to whether a provision should be considered a legally enforceable liquidated damages clause or an unenforceable penalty are usually resolved in favor of a construction which holds the provision to be a penalty, it is important to examine carefully and isolate distinguishing elements of liquidated clauses to help establish drafting guidelines. *See* Nat. Telecanvass Assoc. Ltd. v. Smith, 98 A.D.2d 796, (1983); *see also* MacNeil, *Power of Contract and Agreed Remedies*, 47 CORNELL L.Q. 495 (1962).

aspects of the mitigation principle and the many rules of contractual obligation which have evolved through the common law.[118] An examination of the judicial decisions demonstrates an awkwardness and in many instances inconsistent application and interpretation of the mitigation concept.[119]

In applying mitigation of damages principles, the courts have struggled with many related and tangential issues. These include defining what constitutes equivalent, substantially similar or comparable employment in areas where, by reason of the nature of the artistic services rendered, there is great subjectivity. The lost volume seller argues that there is no need for her to mitigate damages typically because of the non-exclusive nature of her services commitment. But important limitations have been placed on this idea including the notion that the seller may not have already adopted a strategy of not accepting additional service commitments.[120] Pay or Play, liquidated damages, and garden leave provisions are frequently utilized in entertainment and other service contracts, but raise a new set of issues when mitigation of damages comes into the equation.[121] Windfall cases are troublesome because the courts seek to balance freedom of contract notions with the inequity of windfall where mitigation principles may be applied.[122]

It is this author's strong opinion that greater use should be made of carefully negotiated and well-crafted mitigation of damages clauses. This is the most efficient way for entertainment entities to protect themselves from incurring many of the costs associated with termination of various entertainment projects. It also serves well the artist by giving clarity to her post-breach responsibilities and avoiding the risks of inconsistent application of mitigation principles by the courts.

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[118] *See supra* note 3.

[119] *See supra* notes 5-42.

[120] *See supra* notes 43-57.

[121] *See supra* notes 58-75.

[122] *See supra* notes 77-92.