McKINLEY ALLSOPP, INC., Plaintiff, v. JETBORNE INTERNATIONAL, INC., Defendant

No. 89 Civ. 1489(PNL)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

1990 U.S. Dist. LEXIS 12405

September 19, 1990, Filed

COUNSEL: [*1]

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JUDGES: Pierre N. Leval, United States District Judge.

OPINIONBY: LEVAL

OPINION: MEMORANDUM AND ORDER

Findings of Fact and Conclusions of Law

Defendant Jetborne International, Inc. is a public corporation organized and existing under the laws of Delaware having its principal place of business in Miami, Florida. Allen Blattner is the President and Chief Executive Officer. David Blattner is the Executive Vice-President. Jetborne, through its subsidiaries, is engaged in the purchase and sale of aviation spare parts and conducts other business in the aviation and aerospace industries.

Plaintiff McKinley-Allsopp, Inc. ("McKinley") is a Massachusetts corporation, with its principal place of business in New York City, New York. During the relevant time, McKinley was engaged in the business of investment banking and other financial and securities-related activities.

During the summer of 1988, Jetborne was introduced to McKinley by Henry Gayer, [*2] a financial consultant. (Tr. 69, 96, 236-37.) Jetborne and McKinley had various meetings and other communications to discuss the prospect of McKinley raising financing for Jetborne. (Tr. 95, 236-37.) Between mid-June, 1988 and July 27, 1988, McKinley and Jetborne also had discussions regarding Jetborne's then-contemplated purchase of Allmat International, Inc. from Pan-American World Airways ("Pan-Am"). (Tr. 61, 247, 339.) Allmat was a wholly owned subsidiary of Pan-Am.

In the course of those discussions, McKinley was represented by Jeffrey Gilbert, a Managing Director of McKinley and Amy Parker, a Senior Vice President. (Tr. 61, 94-95.) Both Gilbert and Parker worked in McKinley's corporate finance department. (Tr. 93.) Gilbert was the Director of that department and was considered to be senior management within McKinley. (Tr. 94-95, 177.) Gilbert was Parker's immediate supervisor. (Tr. 138.)

The discussions between Jetborne and McKinley resulted in the execution on July 27, 1988 of an Engagement Letter whereby Jetborne retained McKinley as its exclusive investment banker in connection with Jetborne's proposed purchase of Allmat from Pan-Am. The July 27, 1988 Engagement Letter required [*3] McKinley to "use all reasonable efforts" and to "utilize its best efforts" to secure financing for Jetborne's acquisition of Allmat. The Engagement Letter also required McKinley to "provide a team of Corporate Finance and Private Placement Professionals" in connection with McKinley's engagement. The Engagement Letter further stated that "based on the information which has been provided to McKinley, including preliminary evaluation of the inventory of Allmat and the economics of consolidation with Jetborne, we anticipate that we will issue to the Seller a 'highly confident' letter expressing our view that we will be able to secure the financing necessary for the buyer to consummate the [Allmat] Transaction."

Beginning in June of 1988 and continuing for several months, Jetborne provided McKinley with public and private financial information regarding Jetborne's business and reasonably complied with all of McKinley's requests for information about the company. (Tr. 61, 165, 196.)

As contemplated by the Engagement Letter, McKinley wrote to Jetborne on August 3, 1988, stating McKinley was "'highly confident' that . . . [it] will be able to secure for Jetborne the financing necessary to [*4] complete the proposed Acquisition [Jetborne's purchase of Allmat]." Jetborne submitted expert testimony of one Alan Miller that "highly confident" letters emerged in the mid-1980s in leveraged buyouts and other acquisition situations to bridge the gap between the seller and the financing party. "Highly confident" is a term of art in the investment banking industry. In negotiations between a proposed seller and proposed financier, the seller needs to know that the buyer is likely to obtain financing; at the same time, the party proposing to finance the transaction wants assurances that the purchaser is able to purchase the company from the seller. Investment bankers began issuing "highly confident" letters as a means of providing linked assurances to the three parties to a proposed acquisition. (Tr. 334.) Although not a guarantee of financing (Tr. 351), the term is meant and is commonly understood to mean that the investment banker is expressing a high level of confidence that financing can and will be secured for the subject transaction. (Tr. 222, 352.)

Prior to McKinley's engagement, McKinley had no prior experience regarding a transaction where the majority of the assets to be financed [*5] were aircraft spare part inventories, nor did McKinley know that there were complex and challenging issues relating to this type of financing. During the course of this undertaking, McKinley first learned of the difficulty of financing aircraft part inventories. (Tr. 100-103.) When McKinley issued its "highly confident" letter, it did not have a justified basis for the issuance of such a letter. (Tr. 222, 340.) Jetborne's expert witness opined that the "highly confident" letter was imprudently issued, and was not issued in accordance with the reasonable standards of the investment banking community. (Tr. 344.) In support of this opinion, Jetborne's expert testified that at the time the "highly confident" letter was issued (merely one week from the date of McKinley's engagement and only a few weeks after McKinley was first introduced to Jetborne in June of 1988), McKinley did not have available to it sufficient information of the type and quality necessary for a reasonable and prudent investment banker to issue a "highly confident" letter. In fact, when McKinley issued the letter on August 3, 1988, it had virtually no practical information as to whether Jetborne's purchase of Allmat [*6] was financeable. (Tr. 345-346.)

McKinley's "highly confident" letter was given to Pan-Am. On October 14, 1988, Jetborne executed a Letter of Intent with Pan-Am regarding Jetborne's proposed purchase of Allmat. The Pan-Am Letter of Intent required Jetborne to tender to Pan-Am a $250,000 deposit in connection with the acquisition. The Letter of Intent also provided that upon request of Jetborne delivered on or before twenty-one (21) business days after October 14, 1988 (the "Revocable Period"), Pan-Am would refund the $250,000 deposit to Jetborne.

At this time, Jetborne did not have $250,000 available to it nor could it raise that amount of money. (Tr. 249-250.) McKinley agreed to loan Jetborne $250,000 to finance the required Pan-Am deposit.

Thus, on the same day that Jetborne executed the Letter of Intent with Pan-Am, Jetborne executed a Note Agreement and Promissory Note (collectively referred to as the "Note") to McKinley in the principal amount of $250,000 and McKinley advanced the $250,000 deposit with Pan-Am on Jetborne's behalf. By its terms the Note became due and payable on the earliest to occur of (a) January 11, 1989, (b) the date Jetborne received financing for its [*7] purchase of Allmat, or (c) the date Pan-Am refunded some or all of the $250,000 deposit to Jetborne.

Jetborne's expert witness opined that it did not comport with the standards of reasonable skill and prudence in the investment banking industry for McKinley to structure this transaction to obligate Jetborne to repay McKinley $250,000 on January 11 if acquisition financing had not yet been obtained and the money had not been refunded by Pan-Am. In support of this opinion Jetborne's expert testified that when the Note was signed in October McKinley could not have reasonably anticipated that takeout financing could be obtained within three months (January 11, 1989) because the Descriptive Memoranda (discussed infra) had not yet been prepared and because McKinley had not yet begun to effectively market the transaction. (Tr. 520.) Jetborne's expert further explained that both McKinley and Jetborne knew and understood that Jetborne was relying on McKinley to obtain acquisition financing to fund repayment of the Note and, therefore, reasonable prudence dictated allowance of sufficient time that takeout financing could reasonably be sought and obtained before repayment of the Note was [*8] required. (Tr. 523.) Jetborne's expert concluded that the Note's three-month repayment period (October, 1988 to January, 1989) subjected Jetborne to an unreasonable risk that the due date of the Note would pass without McKinley having been able to obtain acquisition financing from which Jetbome was to repay McKinley. (Tr. 524.)

Towards the end of the twenty-one (21) day Revocable Period provided in the Pan-Am Letter of Intent, McKinley had not secured financing for Jetborne's acquisition of Allmat. At that time, only one company,

General Electric Capital Corporation(GECC) had expressed interest in providing financing for Jetborne's acquisition of Allmat. n1 On the day before the Revocable Period was to lapse, a meeting was held in Miami, Florida, between officers and representatives of Jetborne and Gilbert and Parker of McKinley. (Tr. 69, 152-153, 261.) During this meeting, the parties discussed whether Jetborne should exercise its right to demand a refund of the $250,000 deposit from Pan-Am and whether McKinley would agree to an extension of the January 11, 1989 due date set forth in the Note.

n1 McKinley did not bring GECC to the table. Lynn Butcher of Curtis and Company, who previously worked with Pan-Am, was responsible for introducing GECC to Jetborne. (Tr. 150-151, 270.)

[*9]

At this meeting, Gilbert and Parker told Jetborne that McKinley would succeed in providing Jetborne with the needed financing. (Tr. 71, 136, 154-156.) Mr. Gilbert said his contacts with the Bank of Boston were such that he felt secure he could obtain acquisition financing from that bank or another institution, in the event GECC decided not to participate. (Tr. 71, 227, 263.) Jetborne decided not to seek a refund of the $250,000 deposit from Pan-Am. (Tr. 73, 261-263.) After that meeting, McKinley never further pursued alternative sources of financing. (Tr. 228-229.)

Jetborne was concerned about its $250,000 liability to McKinley. In response to Allen Blattner's question whether McKinley would extend the Note, Gilbert called McKinley's headquarters in New York and stated that "it would not be a problem to extend the note." (Tr. 264-265, 269.(Blattner testimony)) Parker testified that Mr. Gilbert told Jetborne he believed that he could "convince the powers that be at McKinley" to extend the Note through April 30, 1989. (Tr. 157.)

According to the uncontradicted expert testimony of Miller, which the court accepts as accurate, in the investment banking world, an undertaking to use "best [*10] efforts" to obtain financing implies multifaceted obligations, which include learning the business to be financed, performing due diligence functions, authoring a descriptive memorandum, creating and generating financial models, identifying potential investors, contacting and screening potential investors, and working with the potential investors in an effort to convince them of the merits of the transaction. (Tr. 137-138.) McKinley failed to discharge its obligations in these respects.

Parker was the only McKinley employee assigned full-time to the Jetborne engagement. Parker was, at that time, relatively inexperienced in the investment banking business. (Tr. 145.) Parker testified to a host of inadequacies relating to McKinley's staffing and performance of its contract obligations and its lack of dedication to this transaction.

Parker told her superiors of this inadequate staffing, but was given only limited and untimely assistance in this regard. (Tr. 122-125.) Any additional assistance Parker received was not sufficient to provide the services reasonably required of McKinley to perform the engagement. (Tr. 126.)

Parker testified to McKinley's failure to provide adequate sales [*11] assistance (Tr. 139-141); to the lack of adequate backup and support necessary for the proper and timely research and generation of various documents and financing models (Tr. 141-142); and to McKinley's failure to timely provide her with an analyst to assist her with her work on and completion of the descriptive memorandum. (Tr. 142-143.) Parker further testified that she did not have sufficient research staff at her disposal to exercise reasonable efforts to attempt to finance this acquisition (Tr. 143) and that there was no senior staff working on the transaction nor support staff available to enable her to meet sufficiently with investors during the project. (Tr. 144.) Although Parker did receive some subordinate support from time to time, that support was available merely on a sporadic basis and came from persons who were not familiar with Jetborne or with the proposed transaction. (Tr. 145, 150, 172.)

By mid-December, 1988, GECC was conducting due diligence of Jetborne and Allmat and was actively investigating the transaction. (Tr. 221.) At that time, GECC told Parker that it expected McKinley to assist it in this project and in having GECC's internal reviews of the companies [*12] completed by December 19, 1988. (Tr. 128, 221.) McKinley did not furnish adequate staff to Parker to complete these projects. (Tr. 221.)

Being the only McKinley representative in Florida responding to GECC's questions and requests for information, Parker was unable to address all of GECC's concerns herself because she had inadequate backup and insufficient support staff. Parker testified that because she was required to do substantially by herself all the various tasks encompassed in McKinley's engagement, she was unable to be responsive to GECC's questions, discussions and demands. During the time GECC had its due diligence team in Miami, she alone on behalf of McKinley was dealing with GECC's three-person audit team, two senior members of GECC's Texas branch, three members of GECC's Stanford, Connecticut

headquarters, and an appraiser hired by GECC. (Tr. 149-150.) Parker testified that when GECC requested microeconomic models and projections of Jetborne and Allmat, inadequate staffing prevented her from responding professionally and promptly to GECC's requests. (Tr. 162, 166, 167.) Parker further stated that had McKinley provided, her with additional support staff, the microeconomic [*13] information requested by GECC could have been provided. (Tr. 173.)

Meanwhile, McKinley was giving consideration to Jetborne's obligation to repay the $250,000 obligation. In December, Gilbert related to Parker a recent conversation he had had with John Lakian, CEO of McKinley, wherein Lakian expressed a "discinclination" to extend the term of the Jetborne Note. (Tr. 175.) Later, Parker personally discussed the extension of Jetborne's Note with Lakian. Parker told Lakian that Jetborne understood and believed that its obligation was extended by virtue of Gilbert's statements in mid-November which had never been contradicted. In response, Lakian merely said that Gilbert had had no authority to make those statements to Jetborne. (Tr. 176.)

Shortly thereafter, about the time that GECC was deciding whether to issue a commitment to Jetborne, Lakian decided that GECC was unlikely to finance the Allmat acquisition and stated that he wanted the Note called because Allen and David Blattner were "crooks . . . looking to steal his money from him." (Tr. 179.) At this time, Lakian prematurely terminated McKinley's engagement. (Tr. 180.)

In a last effort, Parker presented a memorandum to Lakian [*14] in late January, 1989, to place before McKinley's managing directors the options that she thought Jetborne had at its disposal in an effort both to get McKinley repaid and to help Jetborne obtain financing. (Tr. 182-83.) Lakian stopped Parker's presentation, stating he was only interested in getting repaid and then foreclosed any further discussion. (Tr. 184.)

At the beginning of February, 1989, GECC informed Jetborne that it would not commit to a financing transaction for the purpose of acquiring Allmat. n2

n2 GECC pulled out of the transaction for a number of reasons, apparently including dissatisfaction with Jetborne's financial and management controls and historical performance. There is also some indication that GECC decided not to pursue the deal with Jetborne because it considered the used aircraft parts industry too risky.

McKinley subsequently brought this action against Jetborne to recover on Jetborne's Note for the $250,000 deposit which Pan-Am had retained. Jetborne counterclaimed for breach of contract. [*15]

* * * *

Jetborne has made out a clear and convincing case that McKinley breached its contracts by (1) failing to use its "best efforts" to secure financing for Jetborne's acquisition of Allmat under the July 27 Engagement Letter; (2) failing to satisfy its obligations arising from its "highly confident" letter; and (3) failing to comply with its implied promises of good faith and fair dealing.

First, the court finds that McKinley failed to discharge the contractual obligations it assumed in the July 27, 1988 Engagement Letter between McKinley and Jetborne. Jetborne's expert witness, Alan Miller, was both credible and convincing in his testimony to the effect that McKinley's efforts did not measure up to the obligations that arose from the commitments it undertook. Moreover, Miller's testimony was unrebutted. n3

n3 As the foregoing recitation of the facts suggests, the trial evidence would also support the conclusion that McKinley acted negligently in numerous respects. I have not rendered a verdict as to negligence because it was not pleaded and McKinley consequently lacked opportunity to rebut it. Jetborne is further fully protected by the court's finding of breach of contract. Should the court's findings of breach of contract be overturned on appeal for any reason, the record might be reopened to allow McKinley to dispute fully whether Jetborne has proved a case of negligence as well.

[*16]

1. McKinley was not free under its contract simply to abandon efforts on behalf of Jetborne upon the expiration of six months. If on the expiration of six months GECC was continuing to evaluate the potential deal, as was the case, McKinley's undertakings toward Jetborne required it to continue to work to bring the financing to fruition. Thus, all other points aside, McKinley's abrupt abandonment of Jetborne was a breach of contractual obligation.

2. McKinley's Engagement Letter required it to utilize its best efforts, consistent with its reasonable business judgment and subject to market conditions, to secure the amount of financing necessary for Jetborne's acquisition of Allmat. Miller's testimony established that the term "best efforts" has a customary usage and meaning in the

industry to the effect that the investment banker will use all reasonable efforts to accomplish what it is obligated to do by the terms of its engagement. (Tr. 370-72.) Miller then testified at length and in detail regarding an investment banker's obligations under a "best efforts" standard.

These included the necessity for direct client contact and for establishing a flow of information between the investment [*17] banker and the client in order to educate the investment banker about the specifics of the client's business (Tr. 373), as well as the gathering of information regarding its client's business and industry so that the investment banker can generate the information that will go into a descriptive memorandum. (Tr. 373-74.) The descriptive memorandum created by the investment banker should also include financial projections and assumptions which become a key facet in any merger or acquisition negotiations (Tr. 374). Miller also testified about the need to find prospective sources of financing, to contact those sources and screen them regarding their interest or potential interest in the transaction; the need for control of the information dissemination process (Tr. 375); negotiation with these sources and work on structuring the transaction to meet the objectives of all concerned. This process necessarily ties in with the prospective financing source's due diligence, a process wherein a party verifies through independent analysis what it has previously been told by others. (Tr. 376.) Also, in appropriate circumstances at least, an investment banker should line up likely substitute sources [*18] of financing in the event the primary financier loses interest in the transaction. (Tr. 377.)

All of the foregoing steps and processes involved in carrying out a best efforts obligation are, in Miller's opinion, industry standards that a reasonably prudent investment banker must meet to carry out his best efforts undertaking. (Tr. 379.)

The court finds that the efforts expended by McKinley were not in conformity with the understandings prevailing in the investment banking community regarding a "best efforts" undertaking. (Tr. 380.) McKinley failed to provide Jetborne with adequate support staff; adequate senior management assistance (Tr. 38); a descriptive memorandum that adequately described and explained Jetborne and its multi-faceted subsidiaries (Tr. 382-83); or an adequate marketing effort (Tr. 384). McKinley's staffing of this project was grossly inadequate and not in compliance with industry standards governing the use of an investment banker's best efforts because of (1) the minimal number of people assigned to the project, (2) their lack of seniority, (3) their lack of experience in the financing business and in particular with respect to the business of Jetborne, and (4) [*19] the lack of contacts necessary to adequately market and sell the transaction. (Tr. 386-87.) Moreover, having Parker shoulder the whole spectrum of tasks involved in this transaction essentially unassisted in and of itself constituted a breach of McKinley's best efforts undertaking. (Tr. 389.)

Miller also testified that McKinley's failures to use its best efforts adversely affected McKinley's ability to effectively market Jetborne and present it to the investment banking and financial communities. (Tr. 389-90.) In support of this opinion Miller testified that McKinley -- both prior to and upon GECC's arrival at Jetborne's premises -- failed to provide the necessary staffing to give GECC information reasonably necessary for GECC to analyze the transaction. Instead, McKinley had to generate these documents on the spot and was therefore unable to "sell" the transaction to GECC. (Tr. 390.)

3. McKinley also breached the contractual obligations it undertook in its "highly confident" letter. Although a highly confident letter is not a contractual commitment to secure financing, it does represent a commitment to devote efforts to secure financing (unless the entity issuing the "highly confident" [*20] undertaking expects to provide the financing itself, which was not the case here). The obligations (with respect to efforts) undertaken by a investment bank by issuance of a "highly confident" letter are at least as onerous as those undertaken by issuance of a "best efforts" undertaking (once again unless the issuer expects to provide the financing itself). For the same reasons set forth above that support the conclusion that McKinley failed to discharge its contractual obligations to render "best efforts," the court finds also that McKinley failed to discharge its contractual obligations incurred by issuance of the "highly confident" letter. I stress that the finding of breach of contract does not result from the failure to secure financing but from the failure to do those things which an investment banker undertakes to do by the issuance of a "highly confident" letter.

4. McKinley has alleged various affirmative defenses to Jetborne's counterclaims which are not supported by even a scintilla of evidence. McKinley alleged it was fraudulently induced by Jetborne to enter into the July 27, 1988 Engagement Letter, that it was fraudulently induced to issue the "highly confident" letter, [*21] that it was fraudulently induced into extending the $250,000 loan, and that Jetborne has waived or is estopped from pursuing its claims. McKinley has failed to prove these defenses.

5. Jetborne meanwhile contended that it was fraudulently induced by McKinley to incur the $250,000 debt based on McKinley's advance of the good faith deposit to Pan Am. Jetborne has failed to prove this contention.

DAMAGES

Jetborne contends that it is entitled to recover for loss of future profits, which, it argues, is equivalent to the present value of the profits that Allmat would have earned in the first five years following its acquisition by Jetborne, had McKinley not breached its contract. In addition, Jetborne claims that it is entitled to recover from McKinley the $250,000 deposit paid to Pan-Am as specific and identifiable costs incurred in reliance on McKinley's contractual promises.

In general terms, there are three different measures of damages that a court can award to an innocent party in a breach of contract case. First, "expectation damages" are those damages which seek to put the non-breaching party in the same position it would have been had the contract been fully performed. Such [*22] damages compensate the innocent party by giving to it an amount equivalent to the benefit of the bargain it entered into with the breaching party. Damages for loss of future profits are within this category of damages. Second, "restitution damages" enable the innocent party to recover any benefit conferred by it upon the breaching party as a result of the existence of the contract between them. Third, "reliance damages" enable the innocent party to recover identifiable costs incurred in reliance on the breaching party's promise, where the breaching party could reasonably foresee that they would be incurred. The purpose of both restitution and reliance damages is, unlike expectation damages, to return the innocent party to the economic position it occupied before the contract was entered into. See Fuller & Perdue, The Reliance Interest in Contract Damages, *46 Yale L.J. 52 (1936);* Goetz & Scott, Enforcing Promises: An Examination of the Basis of Contract, *89 Yale L.J. 1261, 1263 (1980);* 5 Corbin on Contracts, Sections 1031, 1035 (1964); Restatement of Contracts, Section 333; *In Re Yeager, 227 F.Supp. 92 (N.D. Ohio 1963).*

Under New York law, the normal measure of [*23] damages for breach of contract is expectation damages -- the amount necessary to put the aggrieved party in as good a position as it would have been had the contract been fully performed. *Kenford Co. v. County of Erie, 67 N.Y.2d 257, 493 N.Y.S.2d 131, 132, 493 N.E.2d 234, 235 (1986); Proteus Books Ltd. v. Cherry Lane Music Co., 873 F.2d 502, 513 (2d Cir. 1989); S&K Sales Co. v. Nike, Inc., 816 F.2d 843, 852 (2d Cir. 1989).* This applies equally to breaches of "best efforts" contracts. See, e.g., *Bloor v. Falstaff Brewing Corp., 601 F.2d 609, 614-615 (2d Cir. 1979); Perma Research v. Singer, 542 F.2d 111, 114-116 (2d Cir. 1976).* Although not the normal measure of damages, New York law does, however, recognize and award reliance damages in appropriate cases. See, e.g., *Kenford Co. v. County of Erie, 537 N.E.2d 176, 73 N.Y.2d 312, 540 N.Y.S.2d 1 (1989); Farash v. Sykes Datatronics, Inc., 452 N.E.2d 1245, 59 N.Y.2d 500, 465 N.Y.S.2d 917 (Ct. App. 1983); Paver & Wildfoerster v. Catholic H.S. Ass'n., 345 N.E.2d 565, 38 N.Y.2d 669, 382 N.Y.S.2d 22 (1976).*

I first consider Jetborne's claim for expectation damages. The Court of Appeals has most recently [*24] set out the criteria for entitlement to loss of profits in *Kenford Co. v. County of Erie, 502 N.Y.S.2d 131 (1986).* The three-pronged test that the non-breaching party must satisfy is as follows:

First, it must be demonstrated with certainty that such damages have been caused by the breach and, second, the alleged loss must be capable of proof with reasonable certainty. In other words, the damages may not be merely speculative, possible or imaginary, but must be reasonably certain and directly traceable to the breach, not remote or the result of other intervening causes. . . . In addition, there must be a showing that the particular damages were fairly within the contemplation of the parties to the contract at the time it was made.

Kenford at 67 N.Y.2d at 261, 502 N.Y.S.2d at 132, 493 N.E.2d at 235 (citations omitted).

Under the first branch of this test, the question is whether the loss of profits was demonstrated with certainty to have been caused by McKinley's breach of contract. On the evidence presented, Jetborne has not demonstrated with the required certainty that either GECC or anyone else would have provided financing if McKinley had properly performed its obligations. [*25] A "highly confident" letter does not represent a contractual commitment to secure financing and the evidence shows that, under any circumstances, aircraft part inventories are difficult to finance. I find that Jetborne's claim for loss of the anticipated profits of the Allmat acquisition fails under the first branch of the Kenford test and I need not reach the other two branches. It is not proven that Jetborne would have acquired Allmat absent McKinley's breach, let alone made profits from that acquisition.

Having found that expectation damages are not appropriate here because of the lack of required certainty regarding causation of loss, I now consider Jetborne's entitlement to recover reliance damages. Jetborne has proved by a preponderance of the evidence, first, that

Jetborne incurred a debt to McKinley of $250,000 and failed to redeem the debt when that was possible in reasonable reliance upon McKinley's "highly confident" letter and contractual obligation to use its best efforts to secure financing of the Allmat acquisition, which obligation McKinley breached. Second, Jet borne has proved that but for McKinley's breached promises it would not have incurred that debt, and [*26] third, that McKinley could reasonably have foreseen that Jetborne would incur this obligation in reliance. Jetborne is entitled to a judgment cancelling its debt of $250,000 owed to McKinley. n4

n4 In reaching this conclusion, I stress that the source of the deposit money is irrelevant to Jetborne's entitlement to recovery. The fact that McKinley loaned this sum to Jetborne (in the form of a Promissory Note) has no bearing on Jetborne's right to damages. Jetborne incurred the liability as a proximate result of McKinley's breached promises. Nor has McKinley shown that it should escape liability because of the opportunity Jetborne had to demand return of the deposit. Major portions of McKinley's breaching conduct occurred after the opportunity had passed.

CONCLUSION

Jetborne shall have judgment on its counterclaim holding McKinley liable for breach of contract. Jetborne's entitlement to damages is in the sum of $250,000 together with interest, representing the amount expended in reliance on McKinley's contractual [*27] obligations, and is to be set off against Jetborne's obligation to McKinley for the same amount.

Submit judgment within 10 days.

Dated: New York, N.Y.
September 14, 1990