No. 127903

IN THE
SUPREME COURT OF ILLINOIS

ROGER IVEY and HELIX STRATEGIES, LLC

Plaintiffs-Petitioners,

v.

TRANSUNION RENTAL SCREENING SOLUTIONS, INC.

Defendant-Respondent.

On Petition for Leave to Appeal from the
Appellate Court of Illinois, First District, No. 1-20-0894
Then heard on appeal from the Circuit Court of Cook County, Illinois
Law Division, No. 18 L 13423
Honorable Michael F. Otto, Judge Presiding

BRIEF OF PETITIONERS-APPELLANTS

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TABLE OF CONTENTS AND POINTS AND AUTHORITIES

NATURE OF THE ACTION

This appeal involves a breach of contract claim arising out of a contract between Petitioner Helix Strategies, LLC ("Helix"), a company formed by Roger Ivey ("Ivey"),[1] and Defendant Transunion Rental Screening Solutions ("TURSS"), a subsidiary of the large credit reporting company, Transunion, LLC ("Transunion"). TURSS is in the business of providing services to screen tenants for landlords, including through online and other software platforms. (C. 230-231) In March 2009, Helix and TURSS entered into a written agreement whereby Helix would create a nationwide database of residential rental lease forms and TURSS would build an electronic platform to market and sell the lease forms on TURSS's website and software platforms to TURSS's customers ("Marketing Agreement"). (C. 178-180) The Marketing Agreement specifically obligated TURSS to build the platform and make the Helix leases available to TURSS's customers. (C. 178)

Helix honored its obligations under the Marketing Agreement by preparing voluminous standard lease forms for nearly all of the United States and making them available to TURSS. (C. 258) However, TURSS intentionally failed to honor its obligations to build an electronic platform to market and sell the lease forms to TURSS's customers. (C. 223-24) TURSS also repeatedly misled Helix and Ivey for several years by stating that TURSS was working to build the electronic platform to sell the leases when in reality TURSS was not. (C322-334) Indeed, TURSS repeatedly misrepresented to Helix and Ivey that the electronic platform was nearly complete and ready to "go live"

[1] The dismissal of the fraud claim brought by Helix and Ivey is not being appealed. Given that only the breach of contract claim remains at issue and Ivey was not a party to the agreement, Helix is the only party of interest on this appeal.

in short order when in reality TURSS had never even formally approved the project or completed the initial steps necessary to build such a platform. (C. 223-24, 253-54, 282)

It cannot legitimately be disputed that TURSS breached the Marketing Agreement. As the Circuit Court found, TURSS was obligated to build the electronic platform and to make the Helix leases available for sale to TURSS's customers, and TURSS failed to do so despite having years to perform. (A-28-29) TURSS offered various excuses for its failure, which discovery in this case revealed to be false. TURSS's internal documents also revealed that TURSS understood it had the obligation to make the Helix leases available to TURSS's customers, and TURSS's corporate representative admitted that TURSS chose to focus on its own priorities instead of honoring its contractual obligation to build the platform necessary to sell the Helix products. (C. 143, 145, 223-224) In other words, TURSS intentionally breached the contract.

TURSS has not disputed that Helix honored its obligations under the Marketing Agreement. The Circuit Court also ruled that there was a triable issue of fact whether a limitations of liability provision in the Marketing Agreement precluded recovery for breach of contract given that Helix presented evidence of willful or intentional wrongdoing by TURSS. (C. 1807 V2) However, the Circuit Court granted TURSS's motion for summary judgment as to the breach of contract claim on the basis that the damages sought by Plaintiff were speculative and thus barred by the "New Business Rule." (C.2093 V2)

The only compensation Helix was to receive under the Marketing Agreement was a percentage of revenue from the leases sold. (C. 178-79) Therefore, the breach of

contract damages of Helix are the revenues lost due to TURSS's failure to make the leases available for sale. In opposition to TURSS's motion for summary judgment on the damages issue, Helix submitted detailed reports from qualified experts to estimate Helix's damages from TURSS's failure to make Helix's leases available. (C. 2172-2197 V2, C. 2147-2170 V2) Helix's expert testimony relied on market data from authoritative sources and profits from a substantially similar business in the marketplace. (*See id*.) Helix also put forth profit projections prepared by TURSS itself and testimony from Ivey regarding lost profits. (C. 2199-2212 V2; C2214-2218) Despite the overwhelming amount of reliable evidence establishing Helix's damages to a reasonable degree of certainty, the Circuit Court found that Helix's damages were speculative solely because, in the Circuit Court's reasoning, Helix did not provide evidence of profits for a substantially similar business. (R441-443) Helix respectfully submits that summary judgment was not warranted because Helix's damages were not speculative, and there was at least a triable issue of fact regarding Helix's damages.

On appeal, the Court of Appeal ruled that Helix could not prove its lost profit damages with reasonable certainty because Helix did not present evidence of actual demand for a similar business or product. (A-39) However, the dissenting opinion at the Court of Appeal agreed that the New Business Rule required a broader analysis, and that Helix's expert opinions based on authoritative data were sufficient to at least create a triable issue of fact regarding the claimed lost profit damages and avoid summary judgment. (A-61-66)

ISSUES PRESENTED FOR REVIEW

1. Whether the Court of Appeal erred in construing the exception to the New Business Rule too narrowly by ruling that as a new business Helix was required to present evidence of profits of a comparable business or product in order to find that its lost profits are not speculative and that sufficient evidence exists for Helix to prove its lost profits with reasonable certainty.

2. Whether the Court of Appeal should be reversed because Helix presented sufficient evidence to prove its lost profits as a new business with expert testimony based on authoritative market data and other evidence.

STATEMENT OF JURISDICTION

On February 5, 2020, the Circuit Court granted summary judgment on the breach of contract claim. (C. 2093 V2, A-33). The Circuit Court denied a motion for reconsideration of the issue and entered final judgment on July 23, 2020 (C. 2898 V2; A-35). An appeal was filed on August 21, 2020, 29 days after judgment was entered. (C. 2899-2901 V2; A-37)

On October 21, 2021, the Court of Appeal affirmed the order of the Circuit Court. (A-14, *Ivey v. Transunion Rental Screening Sols., Inc.*, 2021 IL App (1st) 200894) On November 22, 2021, Petitioners petitioned for leave to appeal to the Supreme Court of Illinois. (A-66) On January 26, 2022, the Supreme Court allowed leave to Appeal. (A-118)

STATEMENT OF FACTS

A. ORIGIN OF DISPUTE

Defendant Transunion Rental Screening Solutions, Inc. ("TURSS") is a subsidiary of the international credit reporting bureau, Transunion, LLC ("Transunion"). (C. 222, lines 7-8) TURSS provides consumer credit and criminal background screening services to landlords and property managers through its "CreditRetriever" and "MySmartMove.com" ("SmartMove") products. (C. 230-231) CreditRetriever is for professional managers with large portfolios and SmartMove is for smaller landlords. (C. 230-231; C. 248-249) Ivey is an attorney who in 2007 was the Assistant Vice President and Property Operations Counsel of UDR, Inc. ("UDR"), a publicly traded real estate investment trust and one of the nation's largest owners and managers of residential apartment communities. (C. 256, ¶ 2)

In 2007, Ivey and Michael Britti ("Britti"), the head of TURSS and a General Vice President of Transunion, began to discuss the possibility of Ivey creating residential leasing and property management forms (the "Helix Services") that TURSS would sell to its CreditRetriever and SmartMove customers on electronic platforms TURSS provided. (C. 256-257, ¶ 3) Britti proposed the idea to Ivey and made multiple representations to Ivey that TURSS was absolutely committed to selling lease products created by Ivey if Ivey created them. (C. 257, ¶ 5)

As part of Ivey and Britti's negotiations, on July 11, 2008, Britti provided Ivey a five-year business plan for TURSS's project funding and sale of the Helix Services, which was created by Transunion analysts and included income projections of profits to Helix of over $23,000,000 from sales to SmartMove customers alone. (C. 252-254, C. 264-270) The parties exchanged proposed terms over several months, but generally and

verbally agreed that Helix would create a database of forms and TURSS would build an electronic platform and market the Helix Services to both its SmartMove and CreditRetriever customers. (C. 257, ¶ 4) Based on the multiple representations and promises by Britti that TURSS was committed to selling Ivey's lease products, in September, 2008, Ivey voluntarily left his position at UDR to focus exclusively on creating the database of lease forms. (C. 257, ¶ 4) Britti, on behalf of TURSS, specifically represented to Ivey on numerous occasions – including by letter of intent in November 24, 2008 – that TURSS's goal was to have the platform completed by or during the first quarter of 2009. (C. 257-258, ¶ 7; C. 272-274)

In March 2009, Helix and TURSS formalized and executed their agreement (the "Marketing Agreement"). (C. 178-180) Notably, during the negotiation process the parties agreed to revise a draft agreement that stated "TURSS ***may*** build the platform" to state that "TURSS ***will*** build the platform," which is consistent with Britti and Ivey's discussions regarding TURSS's obligations. (C. 276-280) (emphasis added)

TURSS's responsibilities under the Marketing Agreement were outlined in paragraph 3 of the Marketing Agreement as follows:

> **Responsibilities of TURSS**. Following TURSS' reasonable approval of the scope and general attributes of the Helix Services, TURSS will make available on a non-exclusive basis, Helix Services to certain interested Subscribers. TURSS will provide the software platform, Helix will provide the document content.

(C. 178, ¶ 3)

Before Ivey left UDR, TURSS represented that it anticipated the platform would be completed by the first quarter of 2009, and at the outset of the Marketing Agreement TURSS made multiple representations that it expected the platform to be completed no

later than June or July, 2009. (C. 257-258, ¶¶ 7, 9) Following execution of the Marketing Agreement, Helix gave TURSS a formal product specifications manual that laid out all the primary information TURSS needed to plan the product, including a full set of sample lease forms and process instructions to guide the design. (C. 258, ¶ 8) TURSS approved the scope and format of the Helix forms. (C. 258 ¶ 8) Helix submitted electronic forms and supporting materials to TURSS in support of the platform, and ultimately created a unique lease document system for over 45 of the 50 states and Washington, D.C. that was designed specifically for integration into an electronic software operating platform. (C. 258, ¶ 10)

By July 2009, TURSS had not provided the platform but TURSS informed Ivey the lease product would be put in the market in August 2009. (C. 259, ¶ 13) In August, 2009, Britti left TURSS and was replaced by Mike Mauseth ("Mauseth"). (C. 253-254, 101:21-102:10) Mauseth and Ivey began to regularly discuss the progress of the electronic platform. (C. 259, ¶¶ 9-15)

On September 15, 2009, Joe Sullivan, a business analyst at TURSS, emailed Ivey and specifically stated that the "rollout of the Helix content will be around the end of the year [2009]." (C. 282) However, the end of 2009 came and went without the lease platform being completed. (C. 2509, ¶¶ 14-15)

In February of 2010, Ivey had a meeting with Mauseth and various employees of TURSS, who said that they were dealing with "other priorities," that Transunion corporate had not yet allocated the resources they needed, and that TURSS was committed to the lease product and that it was going to be rolled out within a couple of months. (C. 259, ¶ 16) After this meeting, TURSS agreed to amend the Marketing

Agreement to include the following term:

> The 5 year term of the Agreement is extended until the expiration of 5 years from the date TURSS first makes Helix Services generally available for purchase by TURSS' Subscribers.

(C. 202) The extension of the Marketing Agreement also specifically states that:

> The extension of the Agreement will not be construed as an approval by Helix of unreasonable delays, if any, by TURSS in performance of the Agreement.

(*Id.*) The Amendment also specifically states that the parties expected the platform to be completed by June, 2010. (*Id.*) The Amendment was approved and signed by TURSS on March 23, 2010. (*Id.*) Also, after the meeting, Ivey sent Mauseth the five year business plan Britti previously provided Ivey. (C. 284-294)

On June 21, 2010, Mauseth emailed Ivey and said that the rollout of the Helix services was "….looking more toward the end of August [2010]." (C. 296) However, the year 2010 ended and TURSS still had not completed the platform or advised Ivey that it had no intention to do so. (C. 262 ¶ 36)

During 2011, Ivey repeatedly contacted TURSS regarding the platform, and even tried to help TURSS by involving a third party with the expertise to build it. (C. 260-261, ¶ 24) However, 2011 ended and TURSS did not complete the platform or advise Ivey that it had no intention to do so. (C. 262 ¶ 36) In January, 2012, Ivey, Mauseth and Timothy Martin ("Martin"), the Group Vice President of U.S. Housing for TransUnion held a conference call. (C. 261, ¶25) On this call, Ivey again expressed his frustration with TURSS's delays. (C. 261, ¶25) Martin reiterated TURSS's commitment to build a platform and sell the Helix Services, and stated that TURSS hoped to begin work on the project by summer of 2012, but that it could be delayed until 2013. (C. 261, ¶25) Two

weeks after the conference call, Martin sent Ivey a letter stating that TURSS had acted in good faith; was complying with its obligations under the Agreement, that it had and would continue to perform under the Agreement; and that it believed in the potential of its relationship with Helix. (C. 304-306)

During 2013 and 2014 TURSS continued to communicate with the third party Ivey referred to TURSS about TURSS using a platform he was building. (C. 262, ¶ 33; C. 308-312) In October 2014, Ivey again contacted TURSS regarding the platform. (C. 308-312) At that time, TURSS was unable to provide any information about the platform or any assurance TURSS would build it. (C. 308-312) In fact, TURSS stated they were unaware of Helix and the project, and after a significant search could not locate the Marketing Agreement or anyone who was familiar with it. (C. 308-312) At this point, Ivey realized TURSS had no intention of building the platform to sell the Helix Services even though TURSS still had never informed Ivey that it had no intention of building the platform. (C. 262, ¶ 36) TURSS continues to refuse to perform under the Agreement. (*Id.*)

During the period TURSS failed to make the Helix services available, Helix diligently tried to sell the Helix services through two other companies. (C. 262, ¶34) Helix formally contracted with two other companies to build platforms and sell the Helix leases; however, these were small start-up companies without the name recognition or resources of Transunion necessary to sell a complex legal product like leases to landlords. (*Id.*)

B. DISCOVERY OF TURSS'S MISCONDUCT

Ivey first learned during discovery in this case that TURSS had been repeatedly misleading him about their efforts to build the platform. (C. 262, ¶ 26) While, as set

forth above, TURSS made multiple promises to build the platform and represented to Helix and Ivey on numerous occasions that TURSS was close to finishing the platform and making the services available, there is now substantial evidence that TURSS was never close to finishing the platform and in fact had not even legitimately approved or started the project.

For instance, Hillier, the TURSS employee in charge of the platform, testified that the process involved the following steps: (1) completing "requirements" (i.e. a blueprint for the platform), (2) designing/architecting the platform, (3) coding the platform, and (4) testing the platform. (C. 319) Hillier admitted that TURSS had not even completed the first step of drafting requirements, and that it would take at least a month to finish that step. (C. 315-318) Hillier also admitted that just the fourth step alone would take at least three to four months to complete. (C. 320) Therefore, by Hillier's own admission, TURSS's multiple representations to Helix and Ivey that TURSS was two or three months away from completing the platform were categorically false, given that TURSS was *at least* five to six months away (and likely much more) from completing the platform. Moreover, given Mauseth's, Hillier's and Sullivan's roles, they knew or clearly should have known that TURSS's statements to Ivey were false and that it was factually impossible to complete the project and put the product on the market in as little as one or two months as they represented to Ivey.

Richard Armitage (C. 322-334), an expert in project management of software implementations, submitted an affidavit regarding TURSS's failure to perform. (C. 322-323, ¶¶ 1-6) Armitage reviewed the entirety of the documents produced by TURSS in the litigation as well as all the Deposition Exhibits and the completed depositions. (C.

323, ¶ 8) Consistent with Hillier's testimony, Armitage testified that the project to build the electronic platform would require the following stages: Plan, Design, Build, Test, Deploy and Optimize. (C. 323, ¶ 9) Based on his review of the materials and testimony, Armitrage concluded that TURSS never completed the first stage of planning the project because several key components of that stage were not completed. (C. 324, ¶ 11) Armitrage also concluded that TURSS did not complete the design phase and that the "drafts of the website" and "some flowcharts" prepared by TURSS in February 2010 were insubstantial and appeared to be created by Hillier just to make Ivey feel like progress had been made (i.e. to placate Ivey and make him believe the platform was being built, not to actually move forward with the meaningful project implementation). (C. 324, ¶ 11) Armitrage further concluded that TURSS never started the build, test, deployment and optimization phases because TURSS never started the preliminary phases. (C. 324, ¶ 12-15)

Significantly, Armitrage concluded that in order for the project to be "real" with an intention of delivery, he would expect to see evidence of the following documents (none of which TURSS had): A Project Plan or Schedule, Timesheets, Ongoing Meeting Minutes and Status Reports, A Detailed Functional Design Document, Technical Specifications, Architectural Designs, a Budget (draft or approved - showing that the project was funded and approved), a dedicated Development Environment (can also include or be known as a Dev, Prod, Test/QA or Sandbox), Helpdesk Tickets (that are used to track Testing Defects, Code Transports etc.), a dedicated SharePoint site and document repository for the project, cutover/go-live planning or a Testing Plan (User Acceptance Testing) with Use-Case Scenarios. (C. 326, ¶ 20). Armitrage opined that the

failure of TURSS to have *any* of these documents leads to only one conclusion – that there was never any internal project established by TURSS to build the Helix platform and thus TURSS did not appear to have any intention of delivering the Helix product on their platform. (C. 326, ¶ 20)

TURSS claimed in its first motion for summary judgment (with almost no specifics and no documentary evidence) that "TURSS suffered multiple technical setbacks with its existing system and was unable to dedicate the time needed to create the platform for the sale." (C. 143) TURSS further claimed that one of the purported problems was that the version of CreditRetriever in use when the Marketing Agreement was executed (CreditRetriever 5.0) was antiquated. However, these claims were proven not to be true. The current head of TURSS, who took over in 2012, admitted that CreditRetriever 6.0 was launched in 2011 and the Helix platform could have been added to CreditRetriever 6.0 at that time. (C. 337) TURSS also made the unsupported assertion that there was a server interruption that and this caused delays. (C. 145) However, Sullivan testified that this outage occurred with CreditRetriever 5.0 in June of 2010, and that the main effect was to delay the rollout of CreditRetriever 6.0. (C. 340-341) Sullivan noted that only historical data was lost and restored, and that the problem was fixed going forward. (C. 341-343).

TURSS also claimed in its first motion for summary judgment that it did not actually have an obligation to build the platform. (C. 148-149) However, this claim was belied by not only the aforementioned document history and unambiguous contract language of the Marketing Agreement, but also by the statements of TURSS's own corporate representative that TURSS did not build the platform because TURSS didn't

prioritize it. (C. 223-224). TURSS's claim is also belied by TURSS's own internal communications in February, 2013 when Martin asked by a TURSS employee, Derek Frame, to look into the project. (C. 345-346) Frame reviewed the Marketing Agreement and other documents and emailed Martin stating:

> "I believe compliance should be straightforward. Helix is looking to provide documents (or document content) potentially along with document services (advisory, legal, etc.). Our ***obligation*** is to provide the platform in which to deliver the document content. Given our product/technical direction we should be able to support this."

(C. 345-346) (emphasis added) Martin's reply indicated he did not care whether Helix even existed anymore and told Frame to wait to see if they heard from Ivey again before TURSS figures it out. (C. 345-346)

C. PERTINENT LITIGATION DEVELOPMENT

The original complaint in this dispute was filed in the Circuit Court of Cook County, Illinois on July 20, 2015. (C. 7-36) In June 2016, TURSS brought its first Motion for Summary Judgment. (C. 141-202) On November 14, 2016, the Circuit Court granted summary judgment for TURSS on Counts for Breach of Contract, Negligent Misrepresentation, and Promissory Estoppel of Plaintiffs' four-count complaint, but allowed Plaintiffs leave to re-plead Plaintiffs' count for Fraud. (C. 373). On December 14, 2016, the Plaintiffs filed a motion to reconsider the order granting summary judgment on Count I (for breach of contract) and Count IV (promissory estoppel). (C. 360-70). On December 19, 2016, Plaintiffs filed a three-count amended complaint, sounding in breach of contract (Count I), fraud (Count II), and promissory estoppel (Count III). (C. 387-416). On May 22, 2017, the Circuit Court granted Helix's motion to reconsider the summary judgment on its original breach of contract claim, but ordered the amended breach of contract claim dismissed with prejudice for other reasons. (C. 586). The Circuit Court

also granted TURSS's motion to dismiss Plaintiffs' fraud claim and the remainder of the case with prejudice. (C. 586-87). The Plaintiffs filed their notice of appeal from that order on June 21, 2017. (C. 589-91).

On August 10, 2018, the Court of Appeal dismissed the appeal from the June 21, 2017 order for lack of jurisdiction. (C. 958-962**)** A mandate was issued on October 10, 2018 (C. 968-974) Thereafter, Helix brought a Motion for Reconsideration of the Circuit Court's previous motion for summary judgment ruling on the breach of contract claim, relying on a recently published case that warranted reversal of the Circuit Court's original ruling. (C. 1265; C.1269-1491) On May 23, 2019, the Circuit Court reversed its prior ruling granting summary judgment in favor of TURSS on the breach of contract claim. (C. 1807 V2)

D. THE MOTION FOR SUMMARY JUDGMENT AT ISSUE

TURSS brought a second Motion for Summary Judgment on September 6, 2019 ("MSJ"). (C. 1811-2031 V2**)** The MSJ attacked Helix's ability to prove its claim for lost profits, primarily on the basis of the so-called New Business Rule. (C. 1811-1820 V2**)**

Helix submitted a substantial amount of evidence to establish its lost profit damages to a reasonable degree of certainty. This evidence included the Expert Report of Stan Smith, Ph.D. (C. 2172-2197 V2) Dr. Smith holds a PhD in economics from the University of Chicago. (C. 2172 V2) Dr. Smith conducted a detailed market analysis looking at market data as well as the National Apartment Association's ("NAA's) annual revenue from its national lease program to calculate an estimate of Plaintiff's damages. (C. 2178-2179 V2) Dr. Smith estimated that Helix lost approximately $42,000,000 for the five year term of the Marketing Agreement. (C. 2172-2197 V2)

Helix also submitted the Expert Report of Paul Cohen, Esq. (C. 2147-2170 V2) Mr. Cohen is an attorney who represents businesses like Helix and who (like Mr. Ivey), spent years serving on the lease committee for the NAA lease product. (C. 2156 V2) Of great significance to Mr. Cohen's opinion is that he is intimately familiar with the market for electronic leases having represented companies that sell them and being on the NAA lease committee. (C. 2156-2158 V2)

Additionally, Helix submitted the previously mentioned TURSS five-year business plan and profit projections, as well as affidavits of Roger Ivey that detail many facts in support of Helix's damages. (C. 2199-2212 V2; C2214-2218) Ivey's testimony established that making leases available for sale were not a "new business" to either Helix or TURSS. (C. 2199-2212 V2) In fact, TURSS had been making the NAA leases available for sale for years at the time the Marking Agreement was executed. (C. 2200-2202 V2) Ivey also detailed how the Helix product was meant to serve the demand for this type of product. (C. 2199-2212 V2)

Ivey also explained that, because residential leasing is heavily governed by state and federal statutes and by common law, the basic purpose, function and effect of all leases, and particularly all reasonably well drafted leases, are the same. (C2215 V2) Because of this, Ivey further explained how virtually every lease provides for the following terms: a landlord, one or more tenants, the premises, length of tenancy, rent and other fees, payment terms, who pays for utilities, the various obligations and restrictions on the parties' rights and remedies. (*Id.*) Therefore, like the NAA lease, the Helix lease performed all of the same functions common to every residential lease as every NAA lease and every Helix lease provided for a landlord, one or more tenants, the

premises, length of tenacy, rent and other fees, payment provisions, utilities payments, the various obligations and restrictions on landlords and tenants, the parties' rights and remedies, etc. (C2216 V2)

The Marketing Agreement itself also provides evidence that the parties clearly contemplated that the revenues from the leases would be damages available in the event of a breach of the Agreement. (C. 1887 V2, ¶ 11) The Marketing Agreement limits the damages available to Helix under the Agreement to "TURSS's ***revenue share*** paid by Helix, under this agreement" …..except where "a party is harmed by the willful or intentional, wrongdoing of the other party." (C. 1887 V2, ¶ 11) (emphasis added) In other words, the parties intended that if there was willful or intentional wrongdoing, as Petitioners submit there was here, the damages available under the Marketing Agreement would be the revenue contemplated by the Marketing Agreement.

On February 5, 2020, the Circuit Court granted the MSJ under its interpretation of the New Business Rule. (C. 2093 V2)

Specifically, the Circuit Court stated and reasoned as follows:

> "…I'm going to grant the motion for summary judgment. The Milex case is clearly distinguishable to me. The leases here are -- the leases that Helix sought to market were designed from the outset to be different than the NAA – different from the NAA leases on which the experts sought to base their calculations of the profits Helix may have lost.
>
> I just believe that the expert projections were too speculative under the New Business Rule to allow to go to a jury. I'll note as well that Milex is somewhat sui generis.· It's perfectly understandable why the plaintiffs relied on it. It's the best case for them by far. But what was going on there, the generic drugs by my reading of the case, the Appellate Court allowed it because the products were identical, and they found that the sales from these other two companies were sufficient to establish a rational basis for calculations of the lost profit.

> But even there the cases they relied on, counsel alluded to it briefly, the cases Malatesta (phonetic), Fishman, and Rhodes, those were very different. Those were all cases -- that was about all that Milex relied on. Those were all cases where a sale of business fell through and the lost profits were based on what the owner actually recouped during the period that the plaintiffs who sought to buy the businesses or I guess it was farmland in the case of Rhodes, the profits that they would have sought to have earned during the identical period for the identical business, which is much further away still than we've got here.
>
> The plaintiff has -- plaintiffs have attempted to argue that it's really not -- that the New Business Rule should not apply at all because Mr. Ivey had previously designed leases and TransUnion had previously sold leases.
>
> Both of those may be true, but that doesn't mean that Helix Strategies and the leases they sought to market were not new. They were new. And I don't see a basis for establishing the lost profits that they might have recouped.
>
> I am not unsympathetic to counsel's argument that the -- that it seems unfair to allow TransUnion to escape liability because Helix's damages are speculative.
>
> But the Illinois Court reports are littered with cases where judgment went for defendant or judgment for plaintiff was reversed because whatever damages the plaintiff sought to prove were too speculative. And I believe that this is such a case.
>
> So motion for summary judgment is granted…"
>
> (R441-443).

On March 6, 2020, Plaintiff filed a Motion for Reconsideration of the MSJ ruling. (C. 2094-2225 V2) On March 18, 2020, TURSS filed a Motion for Final Judgment. (C. 2228-2349 V2). Plaintiff opposed the Motion for Final Judgment on the ground that Helix should be able to recover nominal damages and attorneys' fees. (C. 2448-2821 V2)

On July 23, 2020, this Court held a hearing on and denied Plaintiff's Motion for Reconsideration and granted TURSS's Motion for Final Judgement, entering judgment in favor of TURSS. (C. 2898 V2)

E. THE APPEAL

On August 21, 2020, Petitioners timely filed a Notice of Appeal of the Circuit Court judgment. (C. 2899-2901 V2)

On October 18, 2021, the Court of Appeal, in a two-to-one decision, affirmed the order of the Circuit Court granting summary judgment in favor of Defendant TURSS on Petitioners' breach of contract claim and on the order granting TURSS's motion to dismiss Petitioners' fraud claim. (A-39, *Ivey v. Transunion Rental Screening Sols., Inc.*, 2021 IL App (1st) 200894) Though the Court of Appeal noted there are Illinois decisions that did not apply the New Business Rule to claims of lost profits by new businesses (including *Milex Products, Inc. v. Alra Laboratories, Inc.*, 237 Ill. App. 3d 177 (1992) (*Id.* at ¶ 41), the Court of Appeal stated that "[t]he "New Business Rule" precludes expert witnesses from speculating about possible lost profits where no historical data demonstrates a likelihood of future profits." (*Id.* at ¶ 40) (citing *SK Hand Tool Corp. v. Dresser Industries, Inc.*, 284 Ill. App. 3d 417, 427, 219 Ill. Dec. 833, 672 N.E.2d 341 (1996).

In ruling that Helix's damages were too speculative, the Court of Appeal majority reasoned that "[i]n light of the undisputed facts regarding the differences between the NAA and Helix lease products, the lost profit analysis differs 'inherently' from that in *Milex*." (*Id.* at ¶ 48) Notably, the Appellate Court majority opinion did not contain a discussion of the manner in which Helix's experts came to the lost profit projections or Helix's other evidence of lost profits. (*Id.* at ¶ 38-57) Instead, the Appellate Court majority appeared to limit its inquiry to the isolated factor of whether or not the NAA lease was substantially similar to the Helix lease. (*See Id.*) In his dissent, Justice Walker characterized the majority's opinion as an unprecedented "restriction of the exception to

the new business rule to proof of actual profits for effectively identical products." (*Id.* at ¶ 84

Additionally, Justice Walker's dissent contained an analysis of the expert testimony offered by Helix and stated that he would "apply the exception to the New Business Rule in this case, as there is reliable market data to support plaintiff's claim of damages." (*Id.* at 87-90)

On November 22, 2021, Petitioners' filed a Petition for Leave to Appeal to the Supreme Court of Illinois. (A-66)

On January 26, 2022, the Supreme Court of Illinois granted review. (A-118)

STANDARD OF REVIEW

On appeal from the granting of a summary judgment, the reviewing court applies a *de novo* standard of review. *Gen. Cas. Ins. Co. v. Lacey*, 199 Ill. 2d 281, 284, 769 N.E.2d 18, 20 (2002). Therefore, the reviewing court must view the evidence in the light most favorable to the non-moving party on the motion for summary judgment and determine whether a genuine issue of material fact exists and whether judgment was appropriate as a matter of law. *Majca v. Beekil*, 183 Ill. 2d 407, 416, 701 N.E. 2d 1084, 1088 (1998). Moreover, the interpretation of a contract is a question of law subject to a *de novo* standard of review. *Illinois Fraternal Order of Policy Labor Council v. Town of Cicero*, 301 Ill. App. 3d 323, 335, 703 N.E. 2d 559, 567 (1998) Under this principle, the Circuit Court's entry of judgment is subject to *de novo* review.

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ARGUMENT

I. THE APPELLATE COURT ERRED BY HOLDING THAT EVIDENCE OF MARKET DEMAND OR PROFITS OF A COMPARABLE BUSINESS WAS NECESSARY FOR HELIX TO ESTABLISH LOST PROFIT DAMAGES.

A. Illinois Law On Lost Profit Damages

The basic theory of damages in a breach of contract action requires that a plaintiff "establish an actual loss or measurable damages resulting from the breach in order to recover." *In re Illinois Bell Telephone Link-Up II*, 2013 IL App (1st) 113349, ¶ 19, (quoting *Avery v. State Farm Mutual Automobile Insurance Co.*, 216 Ill. 2d 100, 149 (2005)).

Historically, Illinois courts have ruled that a "new business" must have some form of prior profits on which to substantiate its recovery of lost profits. *See*, *e.g.*, *Drs. Sellke & Conlon, Ltd. v. Twin Oaks Realty, Inc.*, 143 Ill. App. 3d 168, 174 (1986) (plaintiff's claim barred by new-business rule where plaintiff failed to offer any profit data before defendant allegedly interfered with its business).

More recently, Courts in Illinois have allowed new businesses to seek recovery of lost profits in a variety of circumstances and without evidence of prior profits. *See Tri-G, Inc. v. Burke, Bosselman & Weaver*, 222 Ill. 2d 218, 249 (2006) ("There is no inviolate rule that a new business can never prove lost profits."); *Milex Products, Inc. v. Alra Laboratories, Inc.*, 237 Ill. App. 3d 177 (1992); *Malatesta v. Leichter*, 186 Ill. App. 3d 602, 621 (1989); *see also Antrim Pharmaceuticals LLC v. Bio-Pharm, Inc.*, 310 F.Supp 934 (2018) (ruling that there was genuine issue of material fact as to whether a new

business was entitled to recover lost profits in exception to Illinois New Business Rule precluding summary judgment); *see also Parvati Corp. v. City of Oak Forest*, 709 F.3d 678, 685 (7th Cir. 2013).

Despite the holdings in these cases, some Illinois courts (including the Court of Appeal in this case) appear to enforce the New Business Rule either as a "per se" rule as if the exceptions are limited to a few isolated factors unique to the facts in *Tri-G, Inc.*, *Milex*, and *Malatasta*. *See e.g. Meriturn Partners, LLC v. Banner & Witcoff, Ltd.*, 2015 IL App (1st) 131883, ¶¶ 22-24 (outright rejecting a damage mode based on "a sales projection theory" because it involved "future suppositions")

However, the *Tri-G, Inc.*, *Milex*, and *Malatasta* opinions regarding the New Business Rule were based on these courts' analysis of a variety of evidentiary factors that were unique to each case. For example, in *Tri-G, Inc.*, 222 Ill. 2d 218 (Ill. 2006), this Court ruled that lost profits of a new business could be determined with reasonable certainty based primarily on the testimony of a third-party business owner, and dismissed the seemingly opposing cases relied on by the Appellee as those where the "lost profits (were) based *solely* on speculation," and acknowledged that the "determination of damages is a question reserved to the trier of fact…" *Id. at* 246, 250 (emphasis added).

Milex Products, Inc. v. Alra Laboratories, Inc., 237 Ill. App. 3d 177, 190 (1992) is the reported Illinois decision that is most analogous to the case at hand. In *Milex*, the Illinois Court of Appeal allowed plaintiff Milex to recover its lost profits from the defendant's breach of contract for a new business venture. Milex was a medical device provider that contracted with Alra Laboratories, a pharmaceutical manufacturer, to manufacture a new generic drug for sale by Milex that was based on an existing brand

name drug whose patent was about to expire. *Id.* at 177. Milex's expert, a pharmaceutical business consultant, used mathematical analysis of various data sets to determine Milex's lost profits from not selling its version of the specific generic drug at issue (clomiphene citrate). *Id.* at 184-85. Milex's expert relied on data that was itself "representative samples" and "averages," and based part of his opinion on *forecasts* of sales of *entirely different drugs. Id at 185.* Even so, the *Milex* court held that this testimony was based on "actual products in the marketplace" and "authoritative" sources of data, and therefore "was based upon fact, not speculation." *Id.* at 192.

The *Milex* court held that even though Milex was a new business, the expert testimony at trial showed damages that were "neither speculative nor the product of conjecture, but [were] based upon a reasonable degree of certainty." *Id.* at 193. Relying on this Court's refusal in *Schatz v. Abbot Laboratories, Inc.*, 51 Ill.2d 143, 147-148 (1972) to hold that "evidence of prior profits is the *sine qua non* of proof of damages suffered by a business enterprise" (emphasis in the original), the *Milex* court noted that there was precedent in Illinois law for not applying the New Business Rule where it "did not fit the circumstances" of the case, including in cases where the new business's product has an established market. *Milex* at 192 (referencing *Malatesta; Fishman v. Estate of Wirtz*, 807 F.2d 520 (7th Cir. 1986) (plaintiffs who had never owned a sports franchise awarded lost profits based upon the profits made by the team owners); and *Rhodes v. Sigler* (1976), 44 Ill. App.3d 375 (court found evidence of profits of a person other than the plaintiff in the same period of time plaintiff was seeking damages provided required degree of certainty). Ultimately, the *Milex* court affirmed the trial court's judgment for the Plaintiff in the amount of $3.27 million, which accounted for Milex's

lost profits and other damages.

The Court of Appeal in *Milex* further stated that damages resulting from lost profits from a new business are recoverable where: (1) the loss is "proved with a reasonable degree of certainty"; (2) the defendant's wrongful act caused the loss of profits; and (3) the "profits were reasonably within the contemplation of the defaulting party at the time the contract was entered into." *Milex Products, Inc. v. Alra Laboratories, Inc.*, 237 Ill. App. 3d 177, 190 (1992)

The manner in which the expert in *Milex* calculated damages is specifically described by the Court of Appeal on pages 184-185 of the opinion. Nowhere does the Court of Appeal in *Milex* state that actual sales data from the other generic drug makers was relied upon by the expert. Rather, the expert in *Milex* based his projections of Milex's sales on indirect sources of market data, including an "audit" that used a "representative sample" of data, and the expert estimated "such things as the prices at which the products were sold, the number of prescriptions in the marketplace, and the average size of a prescription in order to determine the basic economic structure of the clomiphene citrate market." *Milex*, at 184.

In addition, nothing in the *Milex* opinion or facts suggests that the data that Milex's experts relied on was from nearly "identical" products. To the contrary, Milex's experts based a large part of their estimate of the plaintiff's market share for its generic version of clomiphene citrate on 20 to 30 "other" (non-clomiphene citrate) drugs that were merely "similar" to the generic drug at issue. *Milex*, at 185. The Milex expert's opinion on Milex's market share "arrived at Milex's 10% of the market share as a result of looking at market share gains made by 20 to 30 other drugs with similar

characteristics." *Id.* In other words, Milex's damages evidence was derived from sales of *entirely different products*.

The *Milex* opinion and what is required to show lost profits of a new business is best encapsulated with this quote from Milex that explains why the Court of Appeal found the lost profits in that case were shown with a reasonable degree of certainty:

> Finally, we do not believe that the case of Drs. Sellke & Conlon, Ltd. stands for the inviolate rule that a new business can never prove lost profits. That case determined that where lost profits are based *solely* upon speculation, such proof is inadequate to establish lost profits within a reasonable degree of certainty. However, in the case before us, while the product is a new one, the evidence showed it to have an established market. Given that fact, together with Price's testimony, we conclude that the proof of lost profits was neither speculative nor the product of conjecture but was based upon a reasonable degree of certainty.

Milex, at 193 (emphasis added). Therefore, the key ingredients for the *Milex* Court to conclude that the lost profits of a new business were shown with a reasonable degree of certainty were both evidence of an "established market" and proper expert testimony. In *Milex*, the expert "testimony concerning lost profits was based upon actual products in the marketplace as well as authoritative sources for the data he used." *Id.* at 192. However, nothing in *Milex* suggests that these factors are exclusive, they simply happened to be the unique factors the Milex court considered to be not "solely" speculative and therefore, reasonably certain.

B. The Evolution of The New Business Rule In Other Jurisdictions

Other jurisdictions have also moved away from a strict application of the New Business Rule and consider a variety of factors in determining "reasonable certainty" exceptions to allow new businesses to recover their damages when they have been harmed. "Changing attitudes towards jurors, a consensus focused on the inherent

injustice to new businesses, and recognition of the economically nonoptimal allocation of resources that the New Business Rule encouraged may have all played a role in [a] shift in the interpretation of the rule away from a finding of law to a finding of fact, as pointed out by Bollas in the Ohio State Law Journal, and by Everett Gee Warner and Mark Adam Nelson in "Recovering Lost Profits," 39 Mercer L. Rev. (1988)." *See* Mark Gauthier, Recovering Lost Profits for Start-Up Companies, Bus. L. Today, December 2017, at 1, 2. The rationale behind this change is encapsulated in this quote from the Kansas Supreme Court:

> Strict application of the [reasonable] certainty doctrine would place a new business at a substantial disadvantage. To hold recovery is precluded as a matter of law merely because a business is newly established would encourage those contracting with such a business to breach their contracts. The law is not so deficient.

Vickers v. Wichita State University, Wichita, 213 Kan. 614, 518 P.2d 512, 517 (1974).

The Restatement Second of Contracts, Section 352, Comment b, provides that "[i]f the business is a new one or if it is a speculative one ..., damages may be established with reasonable certainty with the aid of expert testimony, economic and financial data, market surveys and analyses, business records of similar enterprises, *and the like*." (emphasis added)

Other courts have also not required evidence of profits from a similar business but instead allow new businesses to prove their damages solely with projections by expert testimony. For instance, in *Kaech v. Lewis County PUD*, 106 Wash. App. 260, 23 P.3d 529, 538–539 (2001), the Court of Appeals of Washington upheld a lost profits finding where a dairy farm had been in operation for only a short time, holding that "expert

testimony alone is a sufficient basis for an award of lost profits in the new business context when the expert opinion is supported by tangible evidence with a 'substantial and sufficient factual basis…'"

The Supreme Court in Arkansas recently overruled a strict application of the New Business Rule in *Tilley v. Malvern Nat'l Bank*, 2017 Ark. 343, 17, 532 S.W.3d 570, 579 (2017), where the Court there held that the Arkansas Court of Appeal decision in *Am. Fid. Fire Ins. Co. v. Kennedy Bros. Const.*, 282 Ark. 545, 547, 670 S.W.2d 798, 800 (1984) should be the rule regarding a new business proving lost profits. In *Am. Fid. Fire Ins. Co. v. Kennedy Bros. Const.*, 282 Ark. 545, the court affirmed an award of lost profits to a new business where the plaintiff proved lost profits with expert testimony showing its profits. *Id.* at 547.

The Supreme Court in New Mexico, recognizing advancements in data capture and analytics, overruled its own strict application of the New Business Rule in *Sunnyland Farms, Inc. v. Cent. New Mexico Elec. Co-op., Inc.*, 2013-NMSC-017, ¶ 27, 301 P.3d 387, 396. The reasoning behind its decision is applicable to the issues presented by this appeal:

> As economic forecasting models have become more sophisticated, courts have become more willing to accept predictions that a plaintiff's new business would have been successful. 1 Robert L. Dunn, Recovery of Damages for Lost Profits § 4.3, at 391 (6th ed. 2005). The majority of jurisdictions allow unestablished business plaintiffs to collect lost profit damages if they can prove with reasonable certainty the fact of lost profits. Id. at 378. The dollar amount of lost profit damages, however, does not require the same level of proof. Id. § 1.8 at 25 ("[T]he [reasonable certainty] rule applies only to the fact of damages, not to the amount of damages."); id. § 5.1 at 414 ("[L]ess certainty (or none at all) is required to prove the amount of damages."); *see also Deaton*, 99 N.M. at 258, 657 P.2d at 114 ("Lost profits need not be proved with mathematical certainty."). To remove any doubt as to whether the century-old *Kettering* rule is still good law, we expressly overrule our opinion in *Kettering*.

Id. at 396.

Delaware's highest court also recently affirmed an award of lost profits to a new business in *Siga Techs., Inc. v. PharmAthene, Inc.*, 132 A.3d 1108, 1131 (Del. 2015), as corrected (Dec. 28, 2015). The *Siga Techs.* Court stated that "where the injured party has proven the fact of damages—meaning that there would have been some profits from the contract—less certainty is required of the proof establishing the amount of damages. In other words, the injured party need not establish the amount of damages with precise certainty "where the wrong has been proven and injury established."

In sum, other jurisdictions consider a variety of factors in determining "reasonable certainty" and are more willing to award lost profit damages to a new business, where, like here, the lost profit projections are based on expert testimony and other evidence unique to each case.

C. A Change To The Rule of Law Articulated In Milex Is Not Necessary To Find For Petitioner In This Matter

Petitioner respectfully submits that a change to the rule of law articulated in *Milex* is not necessary to find for the Petitioner. Rather, this Court should clarify that the reasonable certainty analysis is not limited to a few isolated factors, but properly includes consideration of a variety of pertinent factors that may be unique to different cases. Stated differently, a finding of reasonable certainty is appropriate where damages estimates are not based "solely" on speculation. As set forth above, the Court of Appeal in *Milex* stated that damages resulting from lost profits from a new business are recoverable where: (1) the loss is "proved with a reasonable degree of certainty"; (2) the defendant's wrongful act caused the loss of profits; and (3) the "profits were reasonably

within the contemplation of the defaulting party at the time the contract was entered into." *Milex*, 237 Ill. App. 3d 177 at 190. Using *Milex* as an example, the court allowed lost profits to be proven with expert testimony that was based on "actual products in the marketplace" and other "authoritative" sources of data, and therefore "was based upon fact, not speculation." *Milex*, at 192. The *Milex* court also acknowledged that the New Business Rule should not apply where it "did not fit the circumstances" of the case. As discussed *infra*, the circumstances surrounding this case do not warrant exclusion of Helix's damages evidence based on an overly strict application of the New Business Rule.

A plaintiff with an arguably new business in Illinois should not be required to fit within the unique fact patterns found in *Milex* or *Malasta* or other cases to recover their damages. More specifically, a plaintiff should not be required to submit evidence of profits from a substantially similar business.

In this case, because the Petitioner's expert opinions relied, in part, on the performance of the NAA lease product, the Court of Appeal majority considered whether or not Petitioners' lease product was substantially similar to the NAA lease product. (A-39, ¶ 40) However, the Appellate Court majority did not analyze the lost profit calculations and other evidence proffered by Petitioners and its experts that were based on authoritative market data (as the dissenting opinion did). (A-39, ¶¶ 38-57, 87-90) Nor did the Appellate Court majority consider the projections prepared by TURSS itself or the opinion testimony of Petitioner Ivey. (A-39, ¶¶ 38-57) The Appellate Court also did not consider the other circumstances warranting finding for Petitioners, including TURSS's size and resources, the fact that TURSS's wrongdoing caused any existing

uncertainty in assessing damages, and the manifest conclusion that Petitioners were damaged in at least some degree, even if it cannot be proven with mathematical precision exactly how much they were damaged. (*See id*.)

Accordingly, the Circuit Court and the Appellate Court erred by ruling that Helix could not prove its lost profits with reasonable certainty because it did not present evidence of profits from a comparable business.

II. THE APPELLATE COURT SHOULD BE REVERSED BECAUSE HELIX SUBMITTED EVIDENCE OF LOST PROFITS USING AUTHORATIVE DATA TO CREATE A TRIABLE ISSUE OF FACT REGARDING THE REASONABLE CERTAINTY OF THE DAMAGES.

Regardless of whether or not evidence of profits from a comparable business is required to establish damages for a new business, Helix's evidence in this case is quantitatively and qualitatively superior to that in *Milex* and *Tri-G* in all respects, and is in no way speculative. As previously discussed, Helix *did provide* evidence (direct evidence, actually) of sales of a substantially similar product. (C. 2178-2179 V2) Petitioner's expert evidence was based on multiple authoritative sources of data by multiple experts, including TURSS's own personnel. (C. 2172-2197 V2, 2147-2170 V2) Ultimately, it is difficult to conceive of what other evidence Helix could have reasonably provided in this case.

In addition to the damages considerations discussed elsewhere in this brief, applying the three-prong test set forth in *Milex* to the instant case, Helix's claimed damages are recoverable. First, Helix's detailed expert testimony and TURSS's own business projections proved Helix's loss on a reasonable basis with a reasonable degree

of certainty (which is discussed more infra). Second, TURSS's conduct caused Helix's loss of profits. It is axiomatic that TURSS's failure to make the leases available to its customers is responsible for any lost profits that would have resulted from making the leases available to TURSS's customers. Third, the lease revenue was clearly contemplated by the parties as a basis for damages. Helix is not presenting some sort of speculative consequential damage claim; rather, the lease revenues are the only compensation Helix was to receive under the Marketing Agreement and are the direct damages contemplated by the parties. (C. 178) The Marketing Agreement limitation of liability provision expressly provides that the lease revenues were a foundation for damages and that there is no limitation on the amount of damages where there was willful or intentional wrongdoing by a party. (C. 178) The Circuit Court ruled that there was evidence that TURSS acted willfully or intentionally wrong in connection with its performance under the Marketing Agreement. (R. 403-05) Petitioners submitted substantial evidence of its lost profits using market data from authoritative sources, including TURSS's own analysis and admissions. (C. 2162, 2178-79 V2)

Petitioners' expert, Paul Cohen, offered a detailed analysis of Plaintiff's damages. Mr. Cohen is an attorney who has represented and counseled landlords in all aspects of property management for over thirty-five years. (C. 2150-2151 V2) Mr. Cohen also served on the NAA lease committee and worked with the NAA on their lease product almost from inception. (C. 2152 V2) Based on his knowledge of the marketplace, Mr. Cohen opined that when the parties' Marketing Agreement was executed in 2009 there was large market demand for electronic residential leases. (C. 2154 V2) Indeed, Cohen stated that while in 2009 the NAA lease was the only significant competitor in the

market, now there are many other companies in the market, including Yardi, RealPage, Legal Forms, Legal Templates, Rocket Lawyer, Legal Nature, Legal Contracts, Law Depot, Landlord, Landlord Lease Forms, EZ Landlord Forms, Tenant Tech, and Zillow. (C. 2163 V2) The entry of so many other businesses into the market since the time TURSS should have made the Helix products available to its customers is highly probative evidence of the large market demand that existed for an electronic lease available over the internet.

Mr. Cohen also estimates Helix's damages based on authoritative market data, including a survey by US marketing firm Marketing Sherpa and publications by JDR Group and other published sources. (C. 2159-60 V2) Mr. Cohen uses industry Conclusion standard conversion rates to estimate Plaintiff's damages. (C. 2159-60 V2) Significantly, Cohen's estimate uses conservative estimates in connection with his analysis. (C. 2159-2161 V2) Cohen also relies upon the direct income of the NAA lease, as reported on its IRS Form 990, which a substantially similar product from the only significant third-party competitor at the time. (C. 2159-2161 V2)

Mr. Cohen, based on his expertise in the area and knowledge of both the Helix product and the NAA product, opines that the Helix product is of the highest quality and is actually superior to the NAA product. (C. 2156-2158 V2) However, Mr. Cohen's report does not rely on the fact that the Helix leases were superior to the NAA lease to conclude that there was a large demand for the Helix product. (C. 2147-2171 V2)

Similarly, Petitioner's expert, Stan V. Smith, a Ph.D. in economics from the University of Chicago, offered a detailed analysis of Plaintiff's damages. (C. 2172 V2) Significantly, Dr. Smith analyzed data from the U.S. Census Bureau's American Housing

Survey to determine what the actual market was for a lease product. (C. 2178 V2) Dr. Smith also used a very conservative revenue figure for Helix from the leases at $5 per lease and used a conservative market penetration of only 1.5% for the first year. (C. 2178 V2) Smith also relies upon the NAA lease profits as set forth in IRS filings. (C. 2178-79 V2)

Additionally, Helix provided a five-year revenue projection prepared by TURSS's head and Transunion General Vice President, Michael Britti and by Transunion's analysts. This projection is substantial evidence of Plaintiff's damages. (C. 252-54, 267-270) The projection estimates profits to Helix in the first five years of sales of over $23,000,000 from sales to SmartMove customers alone. (C. 252-54, 267-270) These projections were created by TURSS itself using authoritative data. (C. 252-54, 267-270)

An Affidavit of Petitioner Ivey in support of its Opposition to its Motion for Summary Judgment also provides substantial support for the claimed damages. (C. 2199-2212 V2) This Affidavit provided substantial evidence regarding the demand for an electronic lease based on his experience serving on the NAA lease committee. (C. 2199-2212 V2)

The Circuit Court and Court of Appeal erred by not analyzing Helix's expert testimony based on market data from authoritative sources and other unique evidence of damages. The Circuit Court and Court of Appeal Appellate Court therefore erred by not finding that Helix's evidence *at least* created a triable issue of fact regarding whether the claimed lost profits could be proven with reasonable certainty. Indeed, the only analysis of the expert testimony was done by Justice Walker, in his dissent, in which it was held that there was a triable issue of fact regarding Helix's claimed lost profit damages. (A-

39, ¶¶ 87-90) The overly strict application of the New Business Rule by the Appellate Court should be reversed.

CONCLUSION

Wherefore, for the foregoing reasons, Petitioners request that this Court should reverse the appellate court's opinion and hold that there is a triable issue of fact as to Helix claim for breach of contract damages.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this *Brief* conforms to the requirements of Supreme Court Rules 341(a) and (b). The length of this *Brief*, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(H)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 9,990 words.

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NOTICE OF FILING AND PROOF OF SERVICE

I, Toni Gesin, a non-attorney on oath, hereby certify that on April 1, 2022, I electronically filed the attached **BRIEF OF PETITIONERS-APPELLANTS** with the Supreme Court of Illinois by using the Odyssey eFileIL system.

I further certify that on April 1, 2022, I sent the above-mentioned pleading to the attorneys of record by transmitting via email from Bendel Law Group and the Odyssey eFileIL service to the email address hereinafter indicated. Under penalties as provided by law pursuant to 735ILCS 5/1-109 of the Code of Civil Procedure, I certify the statements set forth in this Notice of Filing and Proof of Service are true and correct.

Christopher T. Sheean
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I further certify that once a file-stamped version of the foregoing **BRIEF OF PETITIONERS-APPELLANTS** is provided by the Illinois Supreme Court Clerk, pursuant to Illinois Supreme Court Rule 341 and 373, I will transmit 13 true and correct copies by Federal Express, postage prepaid and properly addressed to:

Clerk of the Illinois Supreme Court
Supreme Court Building
200 East Capitol Avenue
Springfield, Illinois 62701

Toni Gesin

APPENDIX

TABLE OF CONTENTS - APPENDIX

Supreme Court Case No. 127903

INDEX TO THE RECORD

Common Law Record ("C")

Briefing Schedule Order	12/14/2018	C 993-C 994
Request to Renumber	12/14/2018	C 995-C 997
ENotice	1/4/2019	C 998
Memorandum of Law	1/11/2019	C 999-C 1264
Motion for Reconsideration of Summary Judgment Ruling	1/11/2019	C 1265
Motion for Entry	1/11/2019	C 1266
Notice of Filing 1	1/11/2019	C 1267-C 1268
Memorandum of Points	1/11/2019	C 1269-C 1491
Notice of Filing 2	1/11/2019	C 1492-C 1494
Response Brief in Opposition to Post Appeal Motion	1/25/2019	C 1500 V2-C 1764 V2
Notice of Filing 1	1/25/2019	C 1764 V2-C 1766 V2
Opposition to Motion	1/25/2019	C 1767 V2-C 1775 V2
Notice of Filing 2	1/25/2019	C 1776 V2-C 1778 V2
Order	2/7/2019	C 1779
Reply Brief in Support of Motion	2/15/2019	C 1780 V2-C 1785 V2
Notice of Filing 1	2/15/2019	C 1786 V2-C 1787 V2
Reply in Support of Their Post Appeal Motion	2/15/2019	C 1788 V2-C 1801 V2
Notice of Filing 2	2/15/2019	C 1802 V2-C 1804 V2
Order	2/19/2019	C 1805 V2
Order	4/3/2019	C 1806 V2
Order	5/23/2019	C 1807 V2
Agreed Order	8/8/2019	C 1808 V2-C 1809 V2
Agreed Order	8/26/2019	C 1810 V2
Memorandum of Law in Support of Its Motion	9/6/2019	C 1811 V2-C 2030 V2
Motion for Summary Judgment	9/6/2019	C 2031 V2

Certificate of Service	9/6/2019	C 2032 V2
Order	9/10/2019	C 2033 V2
Motion to Extend Deadline to File Response	10/18/2019	C 2034 V2-C 2036 V2
Notice of Motion	10/18/2019	C 2037 V2-C 2039 V2
Revised Briefing Schedule Order	10/31/2019	C 2040 V2
Motion for Summary Judgment	11/1/2019	C 2041 V2-C 2056 V2
Notice of Filing	11/1/2019	C 2057 V2-C 2058 V2
Case Management Order	11/4/2019	C 2059 V2
Reply in Support of Its Motion	11/6/2019	C 2060 V2-C 2088 V2
Notice of Filing	11/6/2019	C 2088 V2-C 2090 V2
Order	11/12/2019	C 2091 V2
Order	1/15/2020	C 2092 V2
Order	2/5/2020	C 2093 V2
Motion for Reconsideration	3/6/2020	C 2094 V2
Memorandum of Points	3/6/2020	C 2095 V2-C 2225 V2
Notice of Motion	3/9/2020	C 2226 V2-C 2227 V2
Memorandum of Law	3/18/2020	C 2228 V2-C 2348 V2
Motion for Entry of Fina Judgment	3/18/2020	C 2349 V2
Notice of Motion	3/18/2020	C 2350 V2
Response Brief in Opposition	4/28/2020	C 2351 V2-C 2427 V2
Order	4/29/2020	C 2428 V2
Agreed Order	4/30/2020	C 2429 V2
Reply Brief in Support of Its Motion	5/13/2020	C 2430 V2-C 2446 V2
Certificate of Service	5/13/2020	C 2447 V2
Response to Motion for Entry of Final Judgment	5/20/2020	C 2448 V2-C 2821 V2
Certificate of Service	5/20/2020	C 2822 V2
ENotice	5/21/2020	C 2823 V2

Report of Proceedings ("R")

Supreme Court Case No. 127903

Plaintiff's First Amended Complaint

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

COUNTY DEPARTMENT, LAW DIVISION

ROGER IVEY, an individual; HELIX STRATEGIES, LLC., a Limited Liability Company, Plaintiffs, v. TRANSUNION RENTAL SCREENING SOLUTIONS, INC., a Corporation; TRANSUNION, LLC, a Limited Liability Company Defendants.	)	No. 2015 L 7382 Calender U Judge Brigid Mary McGrath

PLAINTIFFS' AMENDED COMPLAINT

Plaintiffs Roger Ivey ("Ivey") and Helix Strategies, LLC ("Helix") hereby file Plaintiffs' Amended Complaint at Law ("Complaint") against Defendant TransUnion Rental Screening Solutions, Inc. ("TURSS" or "Defendant") and TransUnion, LLC ("Transunion") and respectfully state as follows:

I.
Brief Summary

1. Helix is a document and information services company that provides residential property management lease contracts, forms and related information services for resale to the property management industry. TURSS is a consumer credit screening company that provides consumer credit and criminal background screening services to landlords and property management professionals. In March 2009, Helix and TURSS entered into a written contract whereby Helix agreed to provide customizable electronic residential leasing and property management forms (the "Helix Services") to TURSS and TURSS agreed to 1) provide the

software platforms necessary to market, sell and deliver the Helix Services to TURSS' customers, and 2) to actually market, sell and deliver the Helix Services to TURSS' customers. TURSS agreed to sell the Helix Services to small portfolio landlords through its MySmartMove.com web based product, and to its larger professional commercial customers through TURSS' CreditRetriever product. TURSS also agreed to sell the Helix Services to its customers through various third party re-sellers. The contract specified that Helix would be paid 65% of all revenue collected from sales of Helix Services on TURSS' websites, while the remaining 35% of collected revenue would be paid to TURSS. This was to be a lucrative arrangement for both parties. In fact, prior to entering the contract, TURSS provided Helix with a five-year business plan which estimated revenue to Helix of approximately $23 million for the sale of Helix Services through TURSS' direct MySmartMove.com sales alone (which estimate did not include sales through MySmartMove.com resellers). The five-year business plan was created by TransUnion. TURSS and TransUnion represented to Helix that the projected revenue to Helix of $23 million was a conservative estimate, which also did not include sales of Helix Services through TURSS' CreditRetriever service, or sales of any of the Helix product lines anticipated by the parties in addition to Helix's residential property management products, such as mobile-home leases, vacation rental leases, and storage unit rental leases.

2. TURSS induced Helix to enter the contract and create the Helix Services. Helix performed its obligations under the contract to provide the Helix Services to TURSS in the form requested by TURSS. Upon execution of the contract, TURSS represented to Helix that the development of the platform(s) would only take between three to six months. However, after more than five years of unnecessary delays and repeated assurances of future performance, TURSS ***still*** has not built the software platform(s) it is contractually obligated to provide Helix.

As a result, the Helix Services remain unused, unsold, and unavailable to TURSS customers. TURSS has breached the contract, cost Helix at least five years of lost revenue (estimated by TURSS to exceed $23 million dollars), and caused Helix extreme financial hardship.

II.
Parties

3. Helix is a Colorado limited liability company.

4. Ivey is an individual and resides in the state of Texas.

5. TURSS is a Delaware corporation with its principal place of business located in Greenwood Village, Colorado.

III.
Jurisdiction and Venue

6. This Court has jurisdiction because the amount in controversy exceeds the minimum jurisdictional limits of the Court.

7. Venue is proper in Cook County, Illinois because the subject contract between TURSS and Helix contains a mandatory venue provision requiring that any and all brought under the contract be filed in Cook County, Illinois.

IV.
Factual Background

8. Helix is a Colorado limited liability company engaged in the business of developing and providing customizable electronic residential leasing and property management forms to property owners and managers. TURSS provides credit reporting and applicant screening services to property owners and managers through two forums: MySmartMove.com for individual lessors and small property owners; and CreditRetriever for large property management companies.

9. In early 2008, principals of Helix and TURSS began to discuss the possibility of TURSS purchasing Helix's residential leasing and property management forms and marketing the forms to TURSS' customers electronically on MySmartMove.com and through CreditRetriever. Michael Britti ("Britti"), then a General Vice President at TransUnion and who performed duties on behalf of TURSS, proposed the idea to TURSS principals who approved the project and authorized Mr. Britti to negotiate the terms of a written agreement with Helix. Proposed terms were exchanged between the parties over several months, but the parties generally and verbally agreed that Helix would provide the database of forms and TURSS would build an electronic platform and market the Helix Services to TURSS customers through both MySmartMove.com and CreditRetriever. TURSS' verbal assurances became so strong and the business relationship between the parties became so imminent that in September 2008, Roger Ivey ("Ivey"), the President of Helix, voluntarily left his position as Assistant Vice President and Property Operations Counsel of UDR, Inc. ("UDR"), a publicly traded real estate investment trust and one of the nation's largest owners and managers of residential apartment communities, to focus exclusively on completion on the database of forms and finalizing the agreement with TURSS. TURSS was aware of and encouraged Mr. Ivey's decision to voluntarily leave his employment with UDR, a decision induced by TURSS' representations regarding their intent to imminently build electronic platforms and sell the Helix Services. A true and correct copy of the Letter of Intent from TURSS to Helix dated November 24, 2008 is attached hereto as Exhibit "A."

10. In March 2009, Helix and TURSS formalized and executed their Marketing Agreement ("the Agreement") whereby Helix agreed to provide customizable electronic residential leasing and property management forms to TURSS, and TURSS agreed to build an

electronic platform to host the forms and to sell the forms to its existing and future customers. The responsibilities of TURSS under the Agreement were outlined in paragraph 3 as follows:

> **Responsibilities of TURSS.** Following TURSS' reasonable approval of the scope and general attributes of the Helix Services, TURSS will make available on a non-exclusive basis, Helix Services to certain interested Subscribers. TURSS will provide the software platform, Helix will provide the document content.

A true and correct copy of the Agreement is attached hereto as Exhibit "B." Though the Agreement is silent as to the deadline for TURSS to provide the software platform, TURSS made multiple representations that it expected the platform would be completed no later than June or July 2009, which was a four month target. In fact, prior to the formal execution of the Agreement, TURSS had already assigned Kristin Hillier ("Hillier"), then the Senior Manager of TURSS Product Screening and Quality Control, to the task of managing the completion of the electronic platform. Mr. Britti, on behalf of TURSS, specifically informed Mr. Ivey on numerous occasions – including in TURSS' November 24, 2008 letter of intent– that the goal was to have the platform completed by or during the first quarter of 2009.

11. Also in March of 2009, and following execution of the Agreement, Helix submitted its forms and supporting informational materials to TURSS, which specifically approved the scope and format of the Helix Services. At that same time, TURSS also gave Helix written permission to begin marketing Helix as the exclusive provider of lease documents to TURSS' MySmartMove.com and CreditRetriever.com. A true and correct copy of the letter from Mr. Britti to Mr. Ivey dated March 18, 2009 is attached hereto as Exhibit "C."

12. Mr. Ivey began creation of the Helix Services prior to execution of the Agreement in March of 2009 and continued to aggressively build and complete the products. Mr. Ivey also

initiated frequent and consistent communications to TURSS before and after the Agreement was executed.

13. In August 2009, Mr. Britti left his position at TURSS. His position was filled by Mike Mauseth ("Mauseth"). Mr. Mauseth was already employed at TURSS and was aware of the Agreement with Helix. Mr. Mauseth and Mr. Ivey began to regularly discuss the progress of the electronic platform. These communications were nearly always initiated by Mr. Ivey, and often required several phone calls and/or emails before TURSS would respond. Each time Mr. Ivey inquired about the status of the platform, Mr. Mauseth confirmed that the platform was "on the agenda." In reality, TURSS put a hold on the project in order rebuild its entire legacy platform on a new operating system. Mr. Mauseth and Ms. Hillier later informed Mr. Ivey that "Chicago" – i.e., TransUnion, LLC, TURSS' corporate parent – had not yet allocated sufficient resources to complete the platform because of the decision to rebuild the legacy platform. Despite this, TURSS continued to promise Helix that TURSS was committed to its relationship with Helix, and that the electronic platform would be built and was in the development queue.

14. Following Mr. Britti's departure in September of 2009, TURSS also informed Mr. Ivey they would not build the platform to be compatible with the Helix forms TURSS had previously approved, and demanded that Mr. Ivey substantially reformat the Helix forms to fit TURSS' new, reduced scope platform plan. As a result, Mr. Ivey spent countless hours reformatting the Helix forms to accommodate TURSS demands, only to have TURSS never build a platform at all.

15. In January 2010, Mr. Ivey was advised by Joe Sullivan ("Sullivan"), a TURSS employee in Product Strategy and Management, that TURSS had written the specifications for the platform and was working on its design, but it would be June 2010 before the platform would

be available. Frustrated with the lack of progress and communication from TURSS, in February of 2010, Mr. Ivey had a face-to-face meeting with various employees of TURSS, including Mr. Mauseth, Ms. Hillier, and Mr. Sullivan. In the meeting, Mr. Mauseth and Ms. Hillier said, again, that TransUnion had not yet allocated sufficient resources to complete the platform. Mr. Mauseth and Ms. Hillier were clear that they did not have authority to make the decision to perform the Agreement, and expressed that the delay was not their fault, but that their hands were tied by the TransUnion decision makers in Chicago. Mr. Mauseth and Ms. Hillier again expressed that TURSS was committed to building the platform and selling the Helix Services, and agreed to provide better communication regarding TURSS' progress to Mr. Ivey, including by providing Mr. Ivey with bi-weekly progress updates. As a result of this meeting, Mr. Ivey proposed and TURSS agreed to amend the Agreement to include the following terms:

> The 5 year term of the Agreement is extended until the expiration of 5 years from the date TURSS first makes Helix Services generally available for purchase by TURSS' Subscribers.
>
> The extension of the Agreement will not be construed as an approval by Helix of unreasonable delays, if any, by TURSS in performance of the Agreement.

A true and correct copy of the Marketing Agreement Amendment ("Amendment") is attached hereto as Exhibit "D." The Amendment was approved by TURSS management and signed by TURSS on March 23, 2010.

16. TURSS' promises to provide better progress communication and bi-weekly progress reports were quickly broken, and TURSS consistently resumed its previous habit of failing to contact Mr. Ivey and reluctantly responding to his inquiries. By May 2010, Mr. Ivey was again instructed by email that the project team was making "steady progress on the requirements and design implementation for the lease functionality," and that by the end of May, TURSS "would provide expected delivery dates for release of the Helix document library into

the CreditRetriever production platform." Despite these additional assurances, TURSS continued to delay the completion of the electronic platform.

17. TURSS continued to delay work on the platform for the Helix Services throughout 2010 and 2011. In the fall of 2010, Mr. Ivey referred a third-party (the "Third Party") that was independently developing an electronic platform for the Helix lease forms to TURSS. The Third Party had completed substantial development of the electronic platform, and Mr. Ivey hoped that TURSS might contract for the use of the Third Party's platform and thus speed its delivery of the Helix Services to the market. TURSS expressed significant interest in this relationship to both Helix and the Third Party, and subsequently engaged in repeated communications with the Third Party in this regard through the end of 2014.

18. By January 2012, TURSS still had not made any visible progress on the electronic platform and was even less frequently communicating to Mr. Ivey. As such, in January 2012, Mr. Ivey requested and held a conference call with Mr. Mauseth and Timothy Martin ("Martin"), the Group Vice President of U.S. Housing for TransUnion. Mr. Martin was new to TransUnion and agreed to review the delays associated with the project. On this call, Mr. Ivey again expressed his frustration at TURSS' delays. Mr. Martin reiterated TURSS' commitment to build a platform and sell the Helix Services, and stated that TURSS "hoped" to begin work on the project by summer of 2012, but that it could be delayed until early 2013. Two weeks after the conference call, Mr. Martin sent Mr. Ivey a letter stating that TURSS had acted in good faith; had performed and would continue to perform under the Agreement; and believed in the potential of its relationship with Helix. A true and correct copy of the January 19, 2012 Letter from Mr. Martin to Mr. Ivey is attached hereto as Exhibit "E."

19. Throughout 2012, 2013, and 2014, Mr. Ivey continued to receive updates from the Third Party that TURSS was still periodically engaging in discussions and negotiations for TURSS' use of the Third Party's lease platform to sell the Helix Products. Finally, in the fall of 2014, the Third Party informed Mr. Ivey that it was no longer pursuing a business relationship with TURSS, due to TURSS' repeated broken promises, failures to follow up on agreed to communications, abuse of his time and efforts, and apparent unwillingness to commit to any kind of partnership.

20. Upon learning that TURSS was no longer engaged in meaningful dialogue with the Third Party, in October 2014, Mr. Ivey again contacted TURSS to determine the status of the platform. Through a series of communications, TURSS was unable to provide any information regarding the status of building the platform or any assurance that TURSS would be building the platform. In fact, after reportedly researching the matter, TURSS represented that they could not locate and were unaware of any contract with Helix, and that they in fact did not even know who Helix was.

21. To date, over six years after signing the Agreement, TURSS continues to refuse and/or fail to perform the Agreement.

Count One – Breach of Contract

(By Plaintiff Helix Only)

22. Plaintiff Helix repeats and realleges paragraphs 1 through 21 as if fully set forth herein.

23. Helix and TURSS entered into the Agreement. Helix performed under the Agreement by making the Helix Services available to TURSS for purchase by TURSS customers. TURSS willfully, intentionally, and in bad faith breached the Agreement by failing

to provide the software platform(s) necessary to make the Helix Services available for purchase on TURSS websites and commercial management screening platforms by TURSS customers. As a direct result of TURSS' willful and intentional breach of contract, Helix has suffered injury.

Count Two – Fraud

(By All Plaintiffs)

24. Plaintiffs repeat and reallege paragraphs 1 through 23 as if fully set forth herein.

25. TURSS and TransUnion repeatedly made false representations of material fact to Plaintiffs and the Third Party concerning TURSS' intention to complete the electronic software platform and market the Helix Services on TURSS' MySmartMove.com websites and with its CreditRetriever product. The specific false representations include TURSS' initial promise to build the platform made pursuant to the Agreement, which was made in 2009 by both Mike Britt, on behalf of TURSS, and by an employee of TransUnion in the Agreement itself. This representation to build the platform was false when made because when it was made TURSS and TransUnion did not intend to build the platform and make the Helix Services available. This is demonstrated by the fact that TURSS did not even take the first step in trying to build the platform and that TURSS employees would repeatedly tell Plaintiffs that TURSS was working on building the platform when TURSS had not even begun building the plaotform.

26. Before Ivey left his previous employer in September 2008, Britti represented that TURSS would begin working on the platform immediately and anticipated the platform to be completed by the first quarter of 2009. At the outset of the Agreement in or around February 2009, Britti represented that TURSS expected the platform to be completed no later than June or July, 2009. On September 15, 2009, Joe Sullivan, a business analyst at TURSS, emailed Ivey and specifically stated that the "rollout of the Helix content will be around the end of the year

[2009]." In February of 2010, Ivey had a face-to-face meeting with various employees of TURSS, including Mauseth, Sullivan, and Hillier, and they again expressed that TURSS was committed to building the platform, selling the Helix Services and that TURSS had already begun development of the platform. On June 21, 2010, Mauseth emailed Ivey and said that the rollout of the Helix services was "....looking more toward the end of August [2010]." In January, 2012, Martin, the Group Vice President of U.S. Housing for TransUnion, represented to Ivey that TURSS was committed to fulfilling its obligations under the Agreement, which included building the platform and making the Helix services available. These representations regarding the building of the platform, including the promise to build the platform, the statements that TURSS had made progress on building the platform, statements that the platform was nearly complete were all false. The reality is that TURSS never intended to build the platform and TURSS never even took the first steps necessary to build the platform. Defendant made multiple promises to build the platform and represented to Plaintiffs on numerous occasions that Defendant was close to finishing the platform and making the services available, Defendant was never close to finishing the platform and had not even legitimately started the project. TURSS had even created documents and provided them to Plaintiffs for the purpose of deceiving Plaintiffs into believing that TURSS had begun working on building the platform when in reality TURSS had not even completed the very first steps necessary to undertaking the project of building the platform. TURSS and TransUnion intended to deceive Plaintiffs into believing TURSS was close to completing building the platform so that TURSS and TransUnion could have Plaintiffs standing by ready and available to provide the Helix Services to TURSS if TURSS ever decided to sell the Helix Services. However, neither TransUnion or TURSS ever told Plaintiffs that this was their strategy; instead TransUnion and TURSS simply continued to

give Plaintiffs false excuses as to why TransUnion and TURSS had not built the platform and made the Helix Services available when TURSS and TransUnion were not even taking steps to build the platform and make the Helix Services available.

27. Plaintiffs reasonably relied on those inducements and representations, including by Mr. Ivey's leaving his then gainful employment to start, fund, and operate Helix Strategies; by creating and making the Helix Services available to TURSS; by making Mr. Ivey tell other potential sellers of Helix services in the industry that Helix would be working with TransUnion, which severely limited Helix Strategies' ability to sell its services elsewhere; and by redrafting a significant portion of the Helix Services upon TURSS' demand that the specifications be changed.

28. As a direct result of TURSS' pattern of knowing and deliberate material misrepresentations, Plaintiffs have suffered injury in that Plaintiffs have lost significant revenue as a result of the inability to sell the Helix Services and Ivey has lost significant income as a result of his justified reliance on the representations.

Count Three – Promissory Estoppel

(By All Plaintiffs)

29. Plaintiffs repeat and reallege paragraphs 1 through 28 as if fully set forth herein.

30. TURSS repeatedly promised and made representations to Plaintiffs that TURSS' would perform the Agreement and complete the electronic software platform and market the Helix Services on TURSS' MySmartMove.com websites and with its CreditRetriever product. Plaintiffs relied on TURSS' promises and representations by Mr. Ivey's leaving his then gainful employment to start, fund, and operate Helix Strategies; by creating and making the Helix Services available to TURSS; and by redrafting a significant portion of the Helix Services upon

TURSS' demand that the specifications be changed. Mr. Ivey's reliance on the promises and representations were reasonable, expected, and foreseeable, as TURSS was aware of, and encouraged, Mr. Ivey's decision to leave his employment. As a direct and proximate result of TURSS' acts as alleged above, Plaintiffs relied on TURSS' promises and representations to their detriment and have been damaged in an amount to be proven at trial.

Damages and Attorneys' Fees

31. Under all causes of action, Plaintiffs seek to recover a minimum of $23 million in actual damages for the loss of revenues associated with sales of the Helix Services through TURSS' MySmartMove.com product, plus actual damages for loss of revenues associated with sales of the Helix Services through TURSS' CreditRetriever product, plus actual damages for loss of revenues associated with sales of the Helix Services through TURSS' third party resellers, plus attorneys' fees. As a direct result of the conduct of TURSS, Plaintiffs have been compelled to retain the undersigned counsel to represent them in this action and have agreed to pay such counsel a reasonable fee for their services. Plaintiffs seek the recovery of their reasonable and necessary attorneys' fees through trial and all appeals under the Agreement and applicable Illinois law.

32. In addition to their actual damages and attorneys' fees, Plaintiffs seek an award of exemplary damages from TURSS based upon its bad faith breach of contract, fraudulent conduct, and intentional misrepresentations to Plaintiffs.

Conditions Precedent

33. All conditions precedent to Plaintiffs recovering the relief requested herein have been performed, occurred, or have been excused.

Prayer

WHEREFORE, PREMISES CONSIDERED, Plaintiffs request that this Court enter judgment against Defendant TransUnion Rental Screening Solutions, Inc. awarding Plaintiffs the following relief:

(i) Actual damages in excess of $23,000,000, but in no event less than the minimum jurisdictional limits of this Court;

(ii) For expenses of the suit incurred herewith;

(ii) Reasonable and necessary attorneys' fees;

(iii) Exemplary damages in an amount to be determined by the trier of fact;

(iv) Pre-and post-judgment interest to the maximum rate allowed by law; and

(v) Such other and further relief, at law and in equity, to which Plaintiffs may show themselves justly entitled.

Demand For Jury Trial

Plaintiffs hereby demand a trial by jury.

Respectfully submitted,
Plaintiffs Roger Ivey and Helix Strategies, Inc.

BY: _____
One of Their Attorneys

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Supreme Court Case No. 127903

Marketing Agreement

MARKETING AGREEMENT

This MARKETING AGREEMENT (the "Agreement") is made and entered into as of March 5 2009 ("Effective Date"), by and between TRANS UNION RENTAL SCREENING SOLUTIONS ("TURSS") with its principal place of business at 5889 S. Greenwood Plaza Blvd, Suite 201, Greenwood Village, CO 80111, and Helix Strategies, LLC ("Helix") with its principal place of business at 3247 Blue Grass Court, Castle Rock, CO 80109.

WHEREAS, Helix offers up to date customizable leasing and property management forms in an electronic format ("Forms"), and

WHEREAS, TURSS, from time to time, desires to offer these Forms to TURSS' current and potential customers ("Subscribers");

NOW, THEREFORE, in consideration of the foregoing and the promises and mutual covenants hereinafter set forth, the parties hereto agree as follows:

1. **Recitals.** The recitals set forth above are an integral part of this Agreement and are hereby incorporated into this Agreement.

2. **Definitions.**
"Helix Services" means the provision of Helix's customizable electronic residential leasing and property management Forms to Subscribers.

"Subscriber" means a landlord, credit grantor or other potential customers of TURSS who may be interested in Helix's Forms as end users, for use in their own or their principals' own transactions, but not for their resale.

"Service Area" means the United States, its territories and possessions.

3. **Responsibilities of TURSS.** Following TURSS' reasonable approval of the scope and general attributes of the Helix Services, TURSS will make available, on a non-exclusive basis, Helix Services to certain interested Subscribers. TURSS will provide the software platform, Helix will provide the document content.

4. **Responsibilities of Helix.** Helix shall provide Helix Services with content and delivery mechanisms that comply with all laws, regulations and judicial actions. Moreover, Helix shall comply with all consent decrees TURSS has entered into as well as those TURSS may enter into after the Effective Date. With respect to any question of interpretation of any of the foregoing, in the event TURSS provides to Helix TURSS's interpretation in writing, then Helix shall comply with such laws, regulations, judicial actions, consent decrees and/or principles in accordance with such TURSS interpretation. Notwithstanding the foregoing, in the event complying with any law, regulation, judicial action or consent decree would have a material negative affect on Helix's ability to provide the Helix Services hereunder, Helix may terminate this Agreement.

5. **Limited Authority and Marketing Material.** Nothing in this Agreement grants to Helix any right or authority to incur any expense in the name of TURSS nor to assume or create any obligation or responsibility, express or implied, for or on behalf of TURSS, nor to bind TURSS in any way or manner whatsoever. All rights in any Trademarks associated with the business of TURSS, including all goodwill pertaining thereto, shall be and remain the sole property of TURSS. "Trademarks" shall be defined as all trademarks, trade names, service marks, slogans, logos, designs, and other similar means of distinction, which are owned or controlled by TURSS. Helix may use and display such Trademarks only in the manner and for the purposes (including, without limitation, for purposes of promotional materials) authorized in writing in advance by TURSS, and only during the term of this Agreement. TURSS reserves the right to add to, change, or discontinue the use of any Trademark, on a selective or general basis, at any time. During the duration of this Agreement, Helix grants TURSS a non-exclusive license to Helix's trademarks so long as the use of Helix's trademarks are done in effort to promote Helix's Services to Customers. Helix shall not use any Trademark of TURSS in any corporate, partnership, or business name without TURSS's prior written consent. Should use of TURSS's Trademarks be authorized by TURSS as set forth in this Section, upon the termination of this Agreement, Helix shall cease all further use in its business of Trademarks identical or similar to TURSS's. Helix shall provide reasonable quantities of Helix Service and Product-related publications and marketing materials (including descriptive brochures, technical specification materials, and promotional materials suitable for marketing purposes) as TURSS deems appropriate for activities to be conducted by TURSS. A definitive number of initial copies, as determined by mutual agreement of the Parties of such materials shall be provided by Helix to TURSS at no cost. Upon TURSS's request, additional copies of such materials may be made available to TURSS at Helix's pro rata cost of production, or TURSS may create its own materials. Helix Forms may be sold to end users and their authorized agents only, and will not be sold to resellers. However, TURSS may market Helix Forms using third party marketers who abide by the terms of this Agreement.

6. **Payment.** During the term of this Agreement, TURSS shall receive thirty-five percent (35%) of all collected revenue (excluding any taxes) generated from Subscribers' purchases of Helix's Services through TURSS's MySmartMove.com and other "Small Owner" screening service websites, regardless if Subscribers utilize any of TURSS's services (e.g. if Subscribers cease to use TURSS services, but continue to use Helix's Services, TURSS will still receive 35% of the revenue). The party that receives customer payments shall be determined by mutual agreement of Helix and TURSS. The party receiving customer payments shall make payments of the other party's revenue share to the other party on a monthly basis.

Helix will have the authority to determine the sales pricing for the Helix Services, but will regularly consult with TURSS concerning the same. TURSS will have the right to sell the Helix Services either separately or "bundled" with TURSS' products. If sold "bundled," TURSS' payment will remain the same as if the Helix Products are sold separately, unless the parties otherwise agree to a different revenue share. Except for limited promotional offers agreed upon by the parties, TURSS will not advertise nor deliver the Helix Services for "free" or no cost.

TURSS may sell the Helix Services to "Large Owner" TURSS Subscribers at prices and a revenue share to be determined by TURSS and Helix. TURSS' rights to revenue share from such sales will exist for so long as such purchasers also remain TURSS Subscribers.

7. **Term, Termination & Survival.** The initial term of the Agreement shall commence upon the Effective Date and last for five (5) years after the Effective Date ("Initial Term") and will continue on a monthly basis after the Initial Term, unless this Agreement is otherwise renewed by written amendment or is otherwise terminated as provided for herein. Either party may terminate this Agreement for the other party's breach of any material provision of this Agreement; provided the non-breaching party has provided the party in breach with written notice specifying such breach and the party in breach has failed to cure such breach thirty (30) days of receipt of such notice, unless such cure period is extended by the written mutual agreement of the parties. The foregoing notwithstanding, without limiting any other remedies to which TURSS may be entitled, TURSS reserves the right to immediately terminate this Agreement if TURSS, in good faith, determines that (1) the requirements of any law, regulation, judicial action or this Agreement, have not been met by Helix; (2) Helix or any of its officers, members, or executives, commits, pleads guilty or nolo contendere to, or is convicted of, an act or offense involving moral turpitude; (3) Helix commits any willful or dishonest act that could injure TURSS in any material respect; and/or (4) Helix attempts to assign (without prior written TURSS approval, not to be unreasonably withheld), or subcontract or transfer this Agreement including, without limitation, any and/or all rights and obligations of Helix. TURSS shall promptly provide written notification to Helix of such action specifying therein in reasonable detail the reason or reasons for such termination. Moreover, notwithstanding anything in this Agreement to the contrary, TURSS reserves the right to immediately terminate this Agreement if TURSS, in good faith, determines that as a result of changes in laws, regulations or judicial action, TURSS, in good faith believes that the requirements of any law, regulation or judicial action will not be met. Either party may immediately terminate this Agreement, upon written notice to the other party, if (1) proceedings under bankruptcy or insolvency laws are commenced by, or against, the other party and such proceedings are not dismissed within sixty (60) days of such commencement; (2) if the other party is ordered or adjudged bankrupt, is placed in the hands of a receiver (or similar officer) and such receiver is not discharged within sixty (60) days; (3) the other party makes an assignment for the benefit of creditors, or otherwise enters into any scheme or composition with its creditors; (4) substantially all of the other party's assets are seized or attached in conjunction with any action against it by any third party; (5) the other party is dissolved or seeks to terminate or otherwise cease its business operations and affairs. Termination of the Agreement does not cease the Helix's payment requirements under Section 9 of this Agreement.

8. **Representations and Warranties.** Helix represents and warrants: (1) that it has the experience and ability to perform the Helix Services for TURSS Subscribers and services for TURSS set forth in this Agreement; (2) that it will perform the services in a professional and competent manner; (3) that it has the power to enter into and perform this Agreement; and (4) that Helix Services and its performance of this Agreement shall not violate any federal, state, and/or municipal laws or regulations. Helix represents and warrants that it is under no obligation or restriction, nor will it assume any such obligation or restriction that does or would present a conflict of interest, concerning the services to be provided by Helix under this Agreement. Helix agrees that if, after execution of this Agreement, it discovers a conflict of interest with respect to this Agreement, it shall make an immediate disclosure in writing to TURSS, which shall include a description of the action which Helix has taken or proposes to take to avoid or mitigate such conflict. During the term of this Agreement and for twelve (12) months after this Agreement is terminated, Helix shall not, either as part of, or otherwise in association with a third party, or otherwise directly or indirectly own, operate, be an company for or principal of, nor acquire or have any interest in, as an owner, partner, joint venturer, shareholder, member or otherwise, any third party including, without limitation, any third party entity or third party business enterprise which is or may be in competition with TURSS in the provision of services similar to TURSS' services in the Service Area. Helix represents and warrants that each principal and each employee it selects to perform services for TURSS pursuant to this Agreement is or will be bound (prior to rendering any such services) by an appropriate written agreement sufficient to ensure compliance with the provisions of this Agreement.

Nothing in this Agreement shall prevent Helix from independently marketing and selling its products to and through any and all third parties, including, without limitation, to TURSS' Subscribers and competitors, without obligation to TURSS, except that Helix shall not in any way: 1) denigrate, diminish or adversely comment on the reputation or desirability of TURSS' services; 2) adversely compare TURSS' services with those of its competitors; 3) knowingly and directly interfere with any Subscriber's or potential Subscriber's relationship or potential relationship with TURSS. Helix will not independently market to third parties to whom TURSS is actively marketing and of whom TURSS has given Helix prior written notice. Nothing in this Agreement shall prevent Helix from selling all or any part of its business to any party, except that, during the term of this Agreement, Helix will not make such a sale to a third party competitor of TURSS in the provision of services similar to TURSS' services in the Service Area. For purposes of this Section, "TURSS' services" shall not include services similar to the Helix Services).

9. **Confidentiality.** From time to time TURSS may provide business and technical information, which TURSS considers confidential or proprietary ("Confidential Information"), to Helix in connection with the services to be performed under this Agreement. Moreover, without limiting the foregoing, all nonpublic information regarding names and addresses of any Subscribers, account

EXHIBIT 1
Deponent
Date 4/1/16 Rptr
www.DEPOBOOK.com

Rd Ex. 1

invoices, training and educational manuals, and Subscriber leads developed by TURSS, memoranda, notes, records, drawings, manuals, disks, or other documents and media pertaining to TURSS's business or duties under this Agreement, in whatever form and including all copies, extracts, summaries, and analyses thereof, shall also be deemed Confidential Information. Helix shall hold in confidence and shall not publish, disseminate, disclose or otherwise use any Confidential Information it receives from TURSS, except solely for purposes of, and solely to the extent necessary to, perform under this Agreement. Subject to the Section below, the obligations of confidentiality set forth in this Section shall not apply to information: (a) which Helix can demonstrate, by its written records, was already in the possession of Helix prior to the first date of disclosure by TURSS or any such other source; (b) which Helix possesses or acquires independently of Helix's activities or duties under this Agreement; (c) which is now or becomes publicly known through no fault of Helix; (d) which Helix rightfully receives from third parties (including, without limitation, from purchasers of Helix Services who are also TURSS Subscribers that are not under similar obligation); (e) which by TURSS's written authorization is approved for use or release by Helix; or (f) which is required by law (e.g., an order of a court or data request from an administrative or governmental agency with competent jurisdiction) to be disclosed; provided however, that Helix shall use best commercial efforts to provide TURSS ten (10) days' prior written notice before the disclosure of such information pursuant to this subclause (f). Any portion of such Confidential Information that is specific (i.e., business practices, database management techniques, etc.) shall not be within the foregoing exceptions to such obligations of confidentiality merely because such information is embraced by general disclosures that are within such exceptions. Moreover, the foregoing exceptions to such obligations of confidentiality shall not apply to a combination of features found in such Confidential Information unless that combination and not just the individual features are within such exceptions. In the event that Helix shall have knowledge of any breach of the confidentiality of, or the misappropriation of, any Confidential Information, Helix shall promptly give notice thereof to TURSS. Notwithstanding that Customer may receive, from TURSS, Confidential Information via electronic technology now known or hereafter developed including, but not limited to, the Internet, in no event shall Helix, transmit any Confidential Information via electronic technology, (regardless of whether such transmission vehicle is secured, non-secured, encrypted, or non-encrypted) now known or hereafter developed including, but not limited to, the Internet, without the prior written consent of TURSS. In the event TURSS provides such consent, in addition to any other requirements mandated by TURSS, any electronic distribution of Confidential Information via a mode other than a secure private network (e.g., distribution via the Internet, satellite or other wireless technology, etc.), shall only be made using the strongest encryption technology generally available and widely used at the time of such transmission (at the time of this Agreement's execution, such technology is at least one hundred twenty-eight (128) bit encryption). This Agreement including, without limitation, all Exhibits attached hereto, shall be deemed Confidential Information and Helix shall not disclose the contents of this Agreement without the prior written consent of TURSS, provided, however, that Helix may disclose the fact of general existence of this Agreement. In the event of a breach of the aforestated obligations of confidentiality, TURSS shall be entitled to seek equitable relief to protect its interests, including but not limited to preliminary and permanent injunctive relief, as well as monetary damages. Nothing stated herein will be construed to limit any other remedies available to TURSS. Upon TURSS's written request or upon termination of this Agreement, whichever occurs first, in addition to the information required to be submitted to TURSS hereunder, Helix shall either return all other Confidential Information provided to Helix by TURSS under this Agreement, along with all copies thereof, to TURSS or, at TURSS's sole option, provide a written certification, signed by an officer of Helix, that all such other Confidential Information has been destroyed. All obligations of confidentiality set forth herein shall survive any such destruction of tangible Confidential Information as well as the return of tangible Confidential Information to TURSS.

10. **Indemnification.** Helix hereby indemnifies, saves and holds TURSS harmless for and against any and all claims, demands, and actions, of any kind, including any and all expenses, attorneys' fees (except as specifically provided for below in this Section), costs, settlements, judgments or awards incurred by TURSS, to the extent such claims, demands and/or actions arise from the Helix's (including, without limitation, Helix's employees') negligence or intentional wrongful conduct, and/or violation of any law, regulation or judicial action, under this Agreement; provided that TURSS provides written notice of such claim, demand and/or action to Helix within a reasonable time after TURSS acquires actual knowledge of such claim, demand or action. The defense against any such claim, demand and/or action shall be conducted and controlled by the Helix, at its own expense, but TURSS may have counsel present at the TURSS's expense and shall be permitted to participate in the defense of the claim, demand and/or action and all related settlement negotiations. No settlement of any such matter, other than a solely monetary settlement entered into within the scope and extent of Helix's indemnification obligations hereunder, where the TURSS is a party to the claim or a defendant, shall be made without the written approval of the TURSS. TURSS shall, to the extent practicable, provide Helix with all reasonably necessary assistance, information and authority to perform the above. The foregoing notwithstanding, Helix's obligations under this Section shall not apply solely to the extent such claims, demands, and/or actions result solely from Helix's strict compliance with TURSS's interpretation of laws, regulations, judicial actions and/or consent decrees as such interpretation has been specifically communicated to Helix by TURSS in writing, and neither party shall be obligated for the other party's in-house counsel costs in any event..

11. **Limitation of Liability.** **IN NO EVENT SHALL EITHER PARTY BE LIABLE FOR ANY CONSEQUENTIAL, INCIDENTAL, INDIRECT, SPECIAL, OR PUNITIVE DAMAGES INCURRED BY THE OTHER PARTY AND ARISING OUT OF THE PERFORMANCE OF THIS AGREEMENT INCLUDING, BUT NOT LIMITED TO, LOSS OF GOOD WILL AND LOST PROFITS OR REVENUE, WHETHER OR NOT SUCH LOSS OR DAMAGE IS BASED IN CONTRACT, WARRANTY, TORT, NEGLIGENCE, STRICT LIABILITY, INDEMNITY, OR OTHERWISE, EVEN IF A PARTY HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. THESE LIMITATIONS SHALL APPLY NOTWITHSTANDING ANY FAILURE OF ESSENTIAL PURPOSE OF ANY LIMITED REMEDY. THE FOREGOING NOTWITHSTANDING, WITH RESPECT TO HELIX, IN NO EVENT SHALL THE AFORESTATED LIMITATIONS OF LIABILITY, SET FORTH ABOVE, APPLY TO: (A) ANY PENALTIES, FINES, OR SIMILAR MONETARY DAMAGES INCURRED BY TURSS ITS PARENT AND/OR AFFILIATES AND RESULTING FROM GOVERNMENTAL, REGULATORY OR JUDICIAL ACTION(S) PERTAINING TO VIOLATIONS LAWS, REGULATIONS AND/OR JUDICIAL ACTIONS TO THE EXTENT SUCH DAMAGES RESULT FROM HELIX'S (INCLUDING, WITHOUT LIMITATION, HELIX'S EMPLOYEES') BREACH OF ITS OBLIGATIONS UNDER THIS AGREEMENT AND/OR FROM HELIX'S (INCLUDING, WITHOUT LIMITATION, HELIX'S EMPLOYEES') NEGLIGENCE OR INTENTIONAL CONDUCT. TURSS SHALL NOT BE LIABLE FOR ANY AND ALL CLAIMS ARISING OUT OF OR IN CONNECTION WITH THIS AGREEMENT BROUGHT MORE THAN TWELVE (12) MONTHS AFTER THE CAUSE OF ACTION HAS ACCRUED. EXCEPT AS OTHERWISE SET FORTH ABOVE, THE PARTIES' (TOGETHER WITH THEIR RESPECTIVE PARENTS' AND AFFILIATES') TOTAL LIABILITY UNDER THIS AGREEMENT SHALL NOT EXCEED THE AGGREGATE AMOUNT OF TURSS' REVENUE SHARE PAID BY HELIX, UNDER THIS AGREEMENT, DURING THE TWELVE MONTH (12) MONTH PERIOD IMMEDIATELY PRECEDING SUCH CLAIM. THE FOREGOING LIMITATIONS OF LIABILITY SHALL NOT APPLY IN THE EVENT AND TO THE EXTENT A PARTY IS HARMED BY THE WILLFUL OR INTENTIONAL, WRONGDOING OF THE OTHER PARTY.**

12. **Notice and Notice Addresses.** All required notices and other required communication, from one party to the other under this Agreement, shall be in writing and sent to the addresses set forth below. Any such notice or other communication shall be sufficiently given if: (1) delivered personally to the address, referred to below, of the party to whom notice is to be given; or (2) sent by pre-paid first class mail, certified mail, registered mail or by nationally-recognized private express courier, to the address, referred to below, of the party to whom notice is to be given.

TransUnion LLC 555 West Adams Chicago, IL 60661 Attn: GVP TURSS	With a copy to:	TransUnion LLC 555 West Adams Chicago IL 60661 Attn: VP & General Counsel, USIS	Helix:	Helix Strategies, LLC P.O. Box 925 Castle Rock, CO 80104 Attn: Roger Ivey, President and CEO

13. **Governing Law.** This Agreement shall be governed by and construed in accordance with the laws of the State of Illinois regardless of the laws that might otherwise govern under applicable Illinois principles of conflicts of law. Any and all actions brought under this Agreement will be brought in the state or federal courts in Cook County, Illinois. The prevailing party will be entitled to recover reasonable attorneys' fees and other actual and reasonable costs incurred in enforcing this Agreement.

14. **Construction and Severability.** The parties agree that in the interpretation, construction, and enforcement of the terms and conditions of this Agreement, there shall not be applied against either party the normal rule of construction that vague and ambiguous terms are to be construed against the drafting party. All references in this Agreement to the singular shall include the plural where applicable. Titles and headings to sections or paragraphs in this Agreement are inserted for convenience of reference only and are not intended to affect the interpretation or construction of this Agreement. If any term or provision of this Agreement is held by a court of competent jurisdiction to be invalid, void, or unenforceable, the remainder of the provisions shall remain in full force and effect and shall in no way be affected, impaired or invalidated.

15. **Force Majeure.** Any delay, omission or failure of performance by either party hereto under this Agreement shall not constitute default hereunder or give rise to any claim for breach of contract if, and to the extent, such delay, omission or failure is caused by or arises by reason of Force Majeure. Force Majeure shall mean occurrences beyond the reasonable control of the party affected, including acts of God; strikes, boycotts or other concerted acts of workmen; failure of utilities; laws, regulations or other orders of public authorities; military action, state of war or other national emergency; fire or flood which, by the exercise of reasonable diligence, the delayed party is unable to prevent or provide against. The party affected by any Force Majeure event or occurrence shall give the other party written notice of said event or occurrence within ten (10) days of such event or occurrence.

16. **Entire Agreement.** **THIS AGREEMENT CONSTITUTES THE ENTIRE AGREEMENT BETWEEN THE PARTIES HERETO AND SUPERSEDES ALL PREVIOUS AGREEMENTS AND UNDERSTANDINGS, WHETHER ORAL OR WRITTEN, EXPRESS OR IMPLIED, WITH RESPECT TO THE SUBJECT MATTER OF THIS AGREEMENT. EXCEPT AS SET FORTH ABOVE, THIS AGREEMENT MAY NOT BE ALTERED, AMENDED, OR MODIFIED EXCEPT BY WRITTEN INSTRUMENT, SIGNED BY THE DULY AUTHORIZED REPRESENTATIVES OF BOTH PARTIES.**

IN WITNESS WHEREOF, the parties, intending to be legally bound, have caused this Agreement to be executed by their duly authorized representatives as of the last date and year set forth below.

TRANSUNION RENTAL SCREENING SOLUTIONS (TURSS)
By: _____
Name: Fabio [illegible]
Title: G Comp Vice President
Date: March 4, 2009

By: _____
Name: Roger Ivey
Title: President and CEO
Date: 3/3/2009

Date: 3/5/09
By: _____
Law Department

M:\legal\contract\Helix\marketing Helix 10-30-06

Supreme Court Case No. 127903

Order Dated November 14, 2016

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

E.C.C.C.

ROGER IVEY and HELIX STRATEGIES, LLC,

Plaintiffs,

v.

TRANSUNION RENTAL SCREENING SOLUTIONS, INC.,

Defendant.

Case No. 15 L 7382

Calendar U

Judge Brigid Mary McGrath

ORDER

This matter coming to be heard for ruling on Defendants' Motion for Summary Judgment, the parties having appeared, due notice having been given, and the Court having been fully advised in the premises, IT IS HEREBY ORDERED:

1. DEFENDANT'S MOTION FOR SUMMARY JUDGMENT 4280 IS 4271 GRANTED AS TO COUNTS I, III AND IV, AND DENIED WITHOUT PREJUDICE AS TO COUNT II; 5280 5271
2. TIS' COUNT II FOR FRAUD IS STRICKEN, SUA SPONTE 4271 UNDER 735 ILCS 2-615, WITH LEAVE TO REPLEAD ON OR BEFORE DECEMBER 19, 2016;
3. DEFENDANTS' RESPONSE TO THE AMENDED COMPLAINT IS DUE 4231 JANUARY 17, 2018, AND THIS CASE IS SET FOR FURTHER STATUS ON JANUARY 20, 2017. 4217

IT IS SO ORDERED.

ENTER: _____
Honorable Brigid Mary McGrath

Order Prepared By:
Christopher T. Sheean
SWANSON, MARTIN & BELL LLP
330 N. Wabash Ave., Suite 3300
Chicago, IL 60611
(312) 321-9100
Fax: (312) 321-0990
Firm I.D. No. 29558

ENTERED
JUDGE BRIGID MARY McGRATH-1800
NOV 14 2016
DOROTHY BROWN
CLERK OF THE CIRCUIT COURT
OF COOK COUNTY, IL
DEPUTY CLERK

Appellate Court Case No.: 1-17-1592

Order Dated April 5, 2017

Order (2/24/05) CCG N002

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

AT

ROGER IVEY, et al. Plaintiffs,

v.

TRANSUNION RENTAL SCREENING SOLUTIONS, INC., Defendants.

No. 15L7382

ORDER

THIS MATTER COMING TO BE HEARD ON PLAINTIFFS' MOTION TO RECONSIDER AND DEFENDANT'S MOTION TO DISMISS, DUE NOTICE HAVING BEEN GIVEN AND THE COURT BEING FULLY ADVISED IN THE PREMISES, IT IS HEREBY ORDERED THAT: (1) PLAINTIFF'S MOTION TO RECONSIDER IS DENIED FOR THE REASONS STATED ON THE RECORD; AND (2) RULING ON DEFENDANT'S MOTION TO DISMISS IS CONTINUED FOR RULING TO MAY 22, 2017 AT 10:00 AM IN ROOM 1907 5285 W/R/HLE 6020

Atty. No.: 29558

Name: SWANSON, MARTIN (SHEFAN)

Atty. for: D

Address: 330 N. WABASH, STE 3300

City/State/Zip: CHICAGO, IL 60611

Telephone: 312/321-9100

ENTERED:

Dated:

Judge
Brigid M. McGrath

ENTERED
JUDGE BRIGID MARY McGRATH 1800 No. 1800
APR -5 2017
CLERK OF THE CIRCUIT COURT OF COOK COUNTY, IL

DOROTHY BROWN, CLERK OF THE CIRCUIT COURT OF COOK

Supreme Court Case No. 127903

Order Dated April 5, 2017

Order (2/24/05) CCG N002

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

AT

ROGER IVEY, et al.
Plaintiffs,
v.
TRANSUNION RENTAL SCREENING SOLUTIONS, INC.,
Defendants.

No. 15L7382

ORDER

THIS MATTER COMING TO BE HEARD ON PLAINTIFFS' MOTION TO RECONSIDER AND DEFENDANT'S MOTION TO DISMISS, DUE NOTICE HAVING BEEN GIVEN AND THE COURT BEING FULLY ADVISED IN THE PREMISES, IT IS HEREBY ORDERED THAT: (1) PLAINTIFF'S MOTION TO RECONSIDER IS DENIED FOR THE REASONS STATED ON THE RECORD; AND (2) RULING ON DEFENDANT'S MOTION TO DISMISS IS CONTINUED FOR RULING TO MAY 22, 2017 AT 10:00 AM IN ROOM 1907 5285 W/R/H/E 6020

Atty. No.: 29558
Name: SWANSON, MARTIN (SHEFAN)
Atty. for: D
Address: 330 N. WABASH, STE 3300
City/State/Zip: CHICAGO, IL 60611
Telephone: 312/321-9100

ENTERED:
Dated:

Judge
Brigid M. McGrath

ENTERED
JUDGE BRIGID MARY McGRATH 1800 No. 1800
APR -5 2017
CLERK OF THE CIRCUIT COURT OF COOK COUNTY, IL

DOROTHY BROWN, CLERK OF THE CIRCUIT COURT OF COOK COUNTY, IL

Supreme Court Case No. 127903

Order Dated May 22, 2017

Order (Rev. 02/24/05) CCG N002

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

AT

ROGER IVEY, et al., Plaintiffs,
v.
TRANS UNION RENTAL SCREENING SOLUTIONS, INC., DEFENDANT

No. 15 L 7382

ORDER

THIS CAUSE COMING TO BE HEARD FOR RULING ON DEFENDANT'S 2-619 MOTION TO DISMISS, DUE NOTICE BEING GIVEN AND THE COURT BEING FULLY ADVISED IN THE PREMISES, IT IS HEREBY ORDERED THAT:

1. DEFENDANT'S 2-619 MOTION TO DISMISS TI'S FRAUD CLAIM IS GRANTED FOR THE REASONS STATED ON THE RECORD; 4020

2. THE COURT'S RULING ON PLAINTIFFS' MOTION TO RECONSIDER IS MODIFIED SO THAT THE MOTION TO RECONSIDER IS GRANTED IN PART, DENIED IN PART, AS FOLLOWS: 5285

a. Plaintiffs' BREACH of CONTRACT CLAIM IS NOT BARRED BY THE ONE YEAR CONTRACTUAL LIMITATIONS PERIOD; BUT

b. PLAINTIFFS' BREACH of CONTRACT CLAIM REMAINS DISMISSED WITH PREJUDICE DUE TO THE DAMAGES LIMITATION IN THE MARKETING AGREEMENT;

3. THIS CASE IS DISMISSED WITH PREJUDICE FOR THE REASONS STATED IN THE RECORD.

Attorney No.: 29558
Name: SWANSON, MARTIN (SHEEAN)
Atty. for: △
Address: 330 N. WABASH, STE 3300
City/State/Zip: CHICAGO, IL 60611
Telephone: (312) 222-8559

ENTERED:

Dated: _____

Judge

ENTERED Judge's No.
JUDGE BRIGID MARY McGRATH-1800
MAY 22 2017
CLERK OF THE CIRCUIT COURT OF COOK COUNTY, IL
DEPUTY CLERK

AT

DOROTHY BROWN, CLERK OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

Supreme Court Case No. 127903

Order Dated February 5, 2020

Order (Rev. 02/24/05) CCG N002

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

CC A.J.E.

HELIX STRATEGIES, LLC

v.

TRANSUNION RENTAL SCREENING SOLUTIONS, INC.

No. 18L13423

ORDER

THIS MATTER COMING TO BE HEARD ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT, DUE NOTICE HAVING BEEN GIVEN, THE PARTIES APPEARING AND PRESENTING ARGUMENT, AND THE COURT BEING FULLY APPRISED IN THE PREMISES, IT IS HEREBY ORDERED THAT:

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT ~~ON THE REMAINING CLAIM~~ IS GRANTED. Y022

Attorney No.: 29558
Name: TRANSUNION (SHEEGAN)
Atty. for: D
Address: 330 N. WABASH, STE 3300
City/State/Zip: CHICAGO, IL 60611
Telephone: (312) 222-8559

Judge Michael F. Otto
FEB - 5 2020
ENTERED: Circuit Court – 2065

Dated: _____, _____

Judge Judge's No.

DOROTHY BROWN, CLERK OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

C 2093 V2

Supreme Court Case No. 127903

Order Dated July 25, 2020

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

ROGER IVEY and HELIX STRATEGIES, LLC, Plaintiffs, v. TRANSUNION RENTAL SCREENING SOLUTIONS, INC., Defendant.	Case No. 18 L 13423 (Previously Case No: 15 L 7382) Calendar U Judge Michael F. Otto

ORDER

This matter coming to be heard for argument and ruling on **Plaintiff's Motion for Reconsideration** and **Defendant's Motion for Entry of Final Judgment**, the parties having appeared and argued, due notice having been given, and the Court having been fully advised in the premises, IT IS HEREBY ORDERED:

For the reasons stated on the record in open court,

Plaintiff's Motion for Reconsideration of the Court's February 5, 2020 Order Granting Summary Judgment is DENIED. 5285-P

Defendant's Motion for Entry of Final Judgment is GRANTED.

This order disposes of all matters before the Court, and the case is closed. 8099

IT IS SO ORDERED.

ENTER: _____
Honorable Judge Michael F. Otto

Order Prepared By:
Christopher T. Sheean
SWANSON, MARTIN & BELL LLP
330 N. Wabash Ave., Suite 3300
Chicago, IL 60611
(312) 321-9100
Fax: (312) 321-0990
Firm I.D. No. 29558

Judge Michael F. Otto
JUL 23 2020
Circuit Court – 2065

Supreme Court Case No. 127903

Appellate Court's Opinion Dated October 18, 2021

2021 IL App (1st) 200894
No. 1-20-0894
Opinion filed October 18, 2021

First Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

ROGER IVEY and HELIX STRATEGIES, LLC, a Limited Liability Company, Plaintiffs-Appellants, v. TRANSUNION RENTAL SCREENING SOLUTIONS, INC., Defendant-Appellee.	)	Appeal from the Circuit Court of Cook County. No. 18 L 13423 Honorable Michael F. Otto, Judge, presiding.

PRESIDING JUSTICE HYMAN delivered the judgment of the court, with opinion.
Justice Coghlan concurred in the judgment and opinion.
Justice Walker dissented, with opinion.

OPINION

¶ 1 Roger Ivey formed Helix Strategies, LLC, (Helix) to create and sell customizable lease forms, a product, according to Ivey, unavailable in the rental market. Defendant Transunion Rental Screening Solutions (TURSS) entered into a nonexclusive marketing agreement with Ivey to build a platform to sell the leases on its website. After delays of nearly five years, TURSS decided not to build the platform or sell Helix's leases. Ivey and Helix sued TURSS, alleging breach of contract, fraud, and promissory estoppel and seeking over $23 million damages. The trial court

dismissed the fraud claim with prejudice, finding Helix could not establish (i) the elements of promissory fraud, including TURSS's intent to defraud; (ii) Helix's reasonable reliance; or (iii) proximate causation. The trial court also granted summary judgment for TURSS on the breach of contract claim, finding Helix's damages as too speculative.

¶ 2 After the trial court denied Helix's motion to reconsider and granted TURSS's motion for a final judgment, Helix appealed, arguing the trial court erred in (i) granting summary judgment on the breach of contract claim due to the speculative nature of the damages, (ii) denying nominal damages and attorney's fees, and (iii) dismissing the fraud claim.

¶ 3 We affirm. The trial court did not err in finding Helix's damages were too speculative as, under the new business rule, Helix could not present evidence estimating actual sales of its new, customizable leases. The trial court also did not err in declining to proceed to trial on nominal damages or in denying Helix's request for attorney's fees. Further, the trial court correctly dismissed the fraud claim where Helix failed to present facts showing TURSS acted with the intent to defraud.

¶ 4 Background

¶ 5 Helix is a Colorado limited liability company formed to provide residential property management lease forms and related services to landlords and other property management companies. Ivey serves as its president and chief executive officer. TURSS is a Delaware corporation with offices in Illinois and a subsidiary of the credit reporting agency Transunion, LLC. TURSS provides consumer credit and background screening services to property management companies and landlords. TURSS developed two Internet platforms to offer its screening services: MySmartMove.com, a website directed at small portfolio landlords, and CreditRetriever, directed to larger, professional commercial customers.

¶ 6 In 2007, Ivey worked as the assistant vice president and property operations counsel of UDR, Inc., a publicly-traded real estate investment trust. At the time, only one meaningful electronic lease product for landlords existed: a "one size fits all" lease the National Apartment Association (NAA) made available to its dues-paying members. Recognizing a need, Ivey met with Michael Britti, vice president of TURSS, to discuss the possibility of TURSS building an online platform to sell a customizable, electronic lease form that Ivey would create. In September 2008, Ivey left UDR to form Helix, purportedly based on assurances from Britti that TURSS would build the online platform no later than mid-2009.

¶ 7 The Marketing Agreement

¶ 8 In March 2009, Helix and TURSS entered into a five-year marketing agreement that required TURSS to build an online platform for Helix's lease documents. TURSS would receive 35% of "all collected revenue (excluding any taxes) generated" from the sale of Helix's leases, and Helix would receive 65%.

¶ 9 The marketing agreement created no obligations of exclusivity, stating: "Nothing in this Agreement shall prevent Helix from independently marketing and selling its products to and through any and all third parties, including, without limitation, to TURSS' Subscribers and competitors, without obligation to TURSS[.]" Also, TURSS could partner with other vendors to provide similar forms to TURSS customers. The marketing agreement included this specific limitation of liability:

> "In no event shall either party be liable for any consequential, incidental, indirect, special, or punitive damages incurred by the other party and arising out of the performance of this agreement including, but not limited to, loss of goodwill and lost profits or revenue, whether or not such loss or damage is based in contract, warranty, tort, negligence, strict

> liability, indemnity or otherwise, even if a party has been advised of the possibility of such damages. These limitations shall apply notwithstanding any failure of essential purpose of any limited remedy ***. TURSS shall not be liable for any and all claims arising out of or in connection with this agreement brought more than twelve (12) months after the cause of action has accrued. Except as otherwise set forth above, the parties' (together with their respective parents' and affiliates') total liability under this agreement shall not exceed the aggregate amount of TURSS' revenue share paid by Helix, under this agreement, during the twelve month (12) month [sic] period immediately preceding such claim. The foregoing limitations of liability shall not apply in the event and to the extent a party is harmed by the willful or intentional, wrongdoing of the other party." (Emphasis omitted).

¶ 10 Project Delays

¶ 11 Despite TURSS's repeated assurances that a platform for Helix's leases was in development, the project experienced extensive delays until shelved in 2014.

¶ 12 In August 2009, Britti left TURSS. His replacement, Mike Mauseth, regularly spoke with Ivey about TURSS's progress on the electronic platform. In September 2009, a TURSS business analyst told Ivey that TURSS would complete the platform by year's end. It did not.

¶ 13 In February 2010, Mauseth and other TURSS employees told Ivey that TURSS had not yet "allocated sufficient resources to complete the platform," but "was committed to building the platform and selling Helix services[.]" TURSS later asserted, falsely Ivey contends, that the delays occurred because TURSS had to devote considerable time and resources to rebuilding its CreditRetriever and MySmartMove platforms due to stability problems.

¶ 14 In March 2010, TURSS agreed to amend the marketing agreement, extending it another five years from the date TURSS would offer the Helix lease documents for sale. The amendment

added that TURSS anticipates that "the software platform(s) provided for in the Agreement and the Helix Services will be made available for purchase by TURSS' Subscribers approximately in June 2010 (without making any specific guarantee regarding this date)." It also stated, "The extension of the Agreement will not be construed as an approval by Helix of unreasonable delays, if any, by TURSS in performance of the Agreement."

¶ 15 Ivey made numerous inquiries with TURSS in 2010 and 2011. Delays continued. Helix, meanwhile, worked on developing its product and marketing it to other companies. Helix entered into agreements with two other companies but made no sales.

¶ 16 On January 5, 2012, Ivey spoke with Mauseth and Timothy Martin from TURSS. Both reiterated TURSS's commitment but advised of delays into 2013. A few weeks later, Martin sent Ivey a follow-up letter, explaining that he had reviewed the marketing agreement and discussed the project with the TURSS team. "Based on that review," Martin wrote, "I am confident that TURSS is complying with its contractual obligations and acting in good faith and, to date, has spent significant time" developing the software platform, which continued to "be in the TURSS development queue, though other priorities, including system stability, have taken precedence. This extended timeframe has been reasonable. A system that includes forms but is not stable is not in anyone's interest."

¶ 17 After more delays, Ivey contacted TURSS in October 2014. The employees he reached knew nothing about the marketing agreement and, in an email exchange, stated, "no one is left at TURSS who was involved in the Helix project."

¶ 18 C. Procedural History

¶ 19 On July 20, 2015, Helix and Ivey filed a four-count complaint against TURSS. Count I, brought by Helix, alleged "willful and intentional'' breach of contract. Counts II, III, and IV,

brought by Ivey and Helix, alleged, respectively, fraud, negligent misrepresentation, and promissory estoppel. TURSS filed a motion for summary judgment on all counts. After a hearing, the trial court granted summary judgment for TURSS as to counts I, III, and IV. The court found, relevant here, that the "exception to the limitations period for willful or intentional wrongdoing doesn't apply to breach-of-contract actions," adding that, "the one-year limitations contained in paragraph 11 of the contract dooms the action for breach of contract" because based "on the evidence before the court, there is no genuine issue of material fact that, according to plaintiff's allegations, this cause of action for breach of contract accrued well before the one year Helix filed its complaint."

¶ 20 The court found count II, alleging fraud, inadequate as a matter of law because it did not specifically identify the facts underlying the claims. But rather than granting TURSS's motion for summary judgment, the trial court *sua sponte* struck the fraud claim and allowed Helix leave to replead. As to negligent misrepresentation, the trial court barred the claim under the Moorman doctrine. Finally, on promissory estoppel, the court ruled the claim "firmly rooted in contract law and isn't willful or intentional as those terms are used under Illinois law."

¶ 21 Helix filed a motion to reconsider the entry of summary judgment on their claims for breach of contract and promissory estoppel. While the motion to reconsider was pending, Helix filed a three-count, first amended complaint alleging breach of contract (count I), fraud (count II), and promissory estoppel (count III). But Helix did not replead the claims for breach of contract and promissory estoppel to preserve those issues for review.

¶ 22 TURSS filed a combined motion to dismiss under section 2-619.1 of the Code of Civil Procedure. 735 ILCS 5/2-619.1 (West 2020). TURSS argued that the fraud claim remained legally

and factually deficient under section 2-615 (*id.* § 2-615) and asked the trial court to dismiss all of the counts under section 2-619(a)(9) (*id.* § 2-619(a)(9)) as time-barred and for lack of damages.

¶ 23 After briefing and argument on both motions, the trial court granted Helix's motion to reconsider, in part, but proceeded to dismiss all claims in the amended complaint with prejudice. Specifically, the trial court concluded that although a genuine issue of material fact existed regarding whether Helix filed the claims within one year of learning of the alleged breach of contract, Helix had failed to identify recoverable damages. The court explained, "this breach of contract action, I believe, still falls squarely within the ambit of the limitations of liability provision in the contract, damages limitations and all, so compensatory damages are barred, and any damages recoverable—or the only damages recoverable are the aggregate amount of TURSS' revenue share paid by Helix under the contract during the 12-month period immediately preceding such claim. In that case, that would be zero. So[,] the breach of contract action is still doomed[.]"

¶ 24 In dismissing the fraud count under section 2-619, the trial court stated the complaint and the exhibits refute the promissory fraud theory that the defendant had no intent to honor its contract from the onset and undermines other elements of fraud, including reasonable reliance and proximate cause.

¶ 25 Helix appealed. Another panel of this court dismissed the appeal without reaching the merits, finding that the order had not definitively disposed of all claims, and included no grounds for an appeal under Illinois Supreme Court Rule 304(a) (eff. Mar. 8, 2016). *Ivey v. Transunion Rental Screening Solutions, Inc.*, 2018 IL App (1st) 171592-U.

¶ 26 On remand, TURSS moved for final judgment. Simultaneously, Ivey filed a motion asking the trial court to reconsider its ruling on Helix's breach of contract claim and Ivey's promissory estoppel claim based on the holding in *Home Healthcare of Illinois, Inc. v. Jesk*, 2017 IL App (1st)

162482, issued during the appeal. The *Jesk* court found that parties were free to agree to exclude willful misconduct or gross negligence from the scope of a limitation of liability provision. *Id.* ¶ 45. Relying on *Jesk*, Helix argued they could avoid the limitation on liability provision by proving TURSS committed willful or intentional wrongdoing.

¶ 27 The trial court denied TURSS's motion for final judgment and granted Helix's motion to reconsider on Helix's breach of contract claim, leaving open the issue of whether Helix could state a claim for damages. But the trial court denied the motion to reconsider the promissory estoppel claim and dismissed it with prejudice.

¶ 28 The case then proceeded on Helix's sole remaining breach of contract claim with Ivey removed as a plaintiff. On September 6, 2019, TURSS moved for summary judgment on Helix's breach of contract claim, arguing Helix did not sufficiently prove actual damages. In addition, TURSS contended, in part, that Helix's alleged contract damages, consisting solely of purported lost profits, were too speculative under Illinois's "new business rule."

¶ 29 In support of its argument of lost profit damages, Helix submitted reports from two experts, Paul Jay Cohen and Dr. Stan V. Smith. Cohen concluded, "if TURSS had performed in accordance with the parties' Marketing Agreement," Helix would have made over $102,936,075 over five years. Smith looked at market data and the NAA's annual revenue from its National Lease Programs to issue a report concluding Helix's total lost revenue during the five-year contract was $42,949,247, and $120,530,266 to $145,586,153 during the 10 years immediately after the parties entered into the nonexclusive contract. Helix also cited *Milex Products, Inc. v. Alra Laboratories, Inc.*, 237 Ill. App. 3d 177 (1992), which permitted a plaintiff new to the generic drug business to recover lost profits based on expert testimony detailing actual sales of the generic drug in the marketplace, which "was based upon fact, not speculation." *Id.* at 192

¶ 30 After argument, the trial court granted summary judgment for TURSS, stating:

> "The *Milex* case is clearly distinguishable to me. The leases here are—the leases that Helix sought to market were designed from the outset to be different than the NAA—different from the NAA leases on which the experts sought to base their calculations of the profits Helix may have lost.
>
> I just believe that the expert projections were too speculative under the New Business Rule to allow to go to a jury. I'll note as well that *Milex* is somewhat *sui generis*. It's perfectly understandable why the plaintiffs relied on it. It's the best case for them by far. But what was going on there, the generic drugs by my reading of the case, the Appellate Court allowed it because the products were identical, and they found that the sales from these other two companies were sufficient to establish a rational basis for calculations of the lost profit."

¶ 31 Helix filed a motion to reconsider; TURSS filed a motion for entry of final judgment. Helix opposed the motion, asserting it should recover nominal and out-of-pocket damages as well as attorney's fees. TURSS argued that no Illinois court has allowed a case to proceed to trial on the possibility of recovering nominal damages.

¶ 32 After briefing and argument, the trial court denied Helix's motion to reconsider and granted TURSS's motion for a final judgment. The trial court entered a written order disposing of all matters, closing the case.

¶ 33 Analysis

¶ 34 Standards of Review

¶ 35 We review a trial court's grant of summary judgment *de novo*. *Argonaut Midwest Insurance Co. v. Morales*, 2014 IL App (1st) 130745, ¶ 14. For summary judgment, the movant must show (i) no triable issue of material fact exists and (ii) entitlement to judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2020). Genuine issues of material fact involve disputed material facts or, if undisputed, that reasonable persons might draw different inferences from those facts. *Id.* This court may affirm a trial court's grant of summary judgment on any basis appearing in the record regardless of the trial court's reasoning. *Harlin v. Sears Roebuck & Co.*, 369 Ill. App. 3d 27, 31-32 (2006).

¶ 36 A motion to dismiss a claim based on section 2-619 admits the legal sufficiency of the plaintiff's allegations but asserts affirmative matter that avoids or defeats the claim. *DeLuna v. Burciaga*, 223 Ill. 2d 49, 59 (2006). On review, we accept well-pled facts as true and construe the facts in the light most favorable to the nonmoving party. *Krozel v. Court of Claims*, 2017 IL App (1st) 162068, ¶ 13. We review a trial court's section 2-619 dismissal *de novo*. *Grady v. Illinois Department of Healthcare & Family Services*, 2016 IL App (1st) 152402, ¶ 9.

¶ 37 New Business Rule

¶ 38 Helix contends the trial court erred in precluding them from proving damages.

¶ 39 In a breach of contract case, a plaintiff must " 'establish an actual loss or measurable damages resulting from the breach in order to recover.' " *In re Illinois Bell Telephone Link-Up II & Late Charge Litigation*, 2013 IL App (1st) 113349, ¶ 19 (quoting *Avery v. State Farm Mutual Automobile Insurance Co.*, 216 Ill. 2d 100, 149 (2005)). A plaintiff's failure to prove damages entitles the defendant to judgment as a matter of law. *Westlake Financial Group, Inc. v. CDH-Delnor Health System*, 2015 IL App (2d) 140589, ¶ 39. The plaintiff must establish a reasonable basis for computing damages. *Kirkpatrick v. Strosberg*, 385 Ill. App. 3d 119, 130 (2008). The

proper measure of damages is the amount necessary to place the nonbreaching party into the position it would have been in had the defendant properly performed. *In re Illinois Bell*, 2013 IL App (1st) 113349, ¶ 19. While absolute certainty is not required, the plaintiff must prove damages with reasonable certainty without resort to conjecture or speculation. *Id.*

¶ 40 The "new business rule" precludes expert witnesses from speculating about possible lost profits where no historical data demonstrates a likelihood of future profits. *SK Hand Tool Corp. v. Dresser Industries, Inc.*, 284 Ill. App. 3d 417, 427 (1996). Courts applying this rule allow recovery for "profits lost due to a business interruption or tortious interference with a contract," but require the business be "established before the interruption so that the evidence of lost profits is not speculative." *Id.*; see also *Meriturn Partners, LLC v. Banner & Witcoff, Ltd.*, 2015 IL App (1st) 131883, ¶ 23. "The reason for the rule is that a new business has yet to show what its profits actually are." *SK Hand Tool Corp.*, 284 Ill. App. 3d at 427. Moreover, "[a]s lost profits are frequently the result of several intersecting causes, the plaintiff must show with reasonable certainty that the defendant's conduct caused a specific portion of the lost profits." *Id.*

¶ 41 Whether an entity is a "new business" for purposes of the new business rule depends on a track record of profits to assess estimates of alleged lost profits. See *Meriturn Partners, LLC*, 2015 IL App (1st) 131883, ¶ 23 (new business rule applies "where there is no historical data to demonstrate a likelihood of future profits."); *SK Hand Tool Corp.*, 284 Ill. App. 3d at 427 (new business rule turns on whether business has been profitable in past). "There is no inviolate rule that a new business can *never* prove lost profits." (Emphasis in original.) *Tri-G, Inc. v. Burke, Bosselman & Weaver*, 222 Ill. 2d 218, 249 (2006). Indeed, courts have opted not to apply the rule when damages were "neither speculative nor the product of conjecture, but [were] based upon a reasonable degree of certainty." See, *e.g.*, *Milex*, 237 Ill. App. 3d at 192.

¶ 42 Helix relies primarily on *Milex* to support its argument that its damages are not speculative or barred by the new business rule. Milex sought to market and sell a generic version of the fertility drug Clomid, which had an expiring patent. Milex's generic drug would have the identical active ingredient as Clomid. *Id.* at 179. Milex, a new pharmaceutical company, entered into an exclusive contract with Alra Laboratories to manufacture the generic drug for Milex. *Id.* at 180-81. When Alra reneged, Milex sued for lost profits. *Id.* at 181. Milex introduced expert testimony about the profits it contended it lost from the breach. Among other things, the expert considered the price of the pharmaceuticals, the total number of prescriptions in the market, and the average size of a prescription. *Id.* at 184-85. The trial court entered a $3.27 million judgment for Milex, which accounted for Milex's lost profits and other damages. The court found that although the generic drug was a new product, Milex's expert witnesses showed that the product had an established market. *Id.* at 187.

¶ 43 In affirming, the appellate court refused to apply the new business rule because Milex's expert provided credible testimony demonstrating an established market for the active ingredient through the performance of two competitors selling generic versions. This provided "a reasonable degree of certainty" of lost profits. *Id.* at 193. The court noted precedent for not applying the new business rule where it "did not fit the circumstances" and found the rule inapplicable when the new business' product has an established market.

¶ 44 The appellate court cited three cases where the new business rule did not fit the circumstances. *Id.* at 192. Each case involved lost profits awards based on actual profits made by another party operating the actual business at issue throughout the period of the alleged breach or business interruption. See *Malatesta v. Leichter*, 186 Ill. App. 3d 602, 621 (1989) (plaintiff was wrongfully prevented from acquiring an existing car dealership; the new business rule did not

apply, and the actual profits of a person who instead operated dealership during the time in question were not too speculative because the business was established throughout business interruption); *Fishman v. Estate of Wirtz*, 807 F.2d 520, 552 (7th Cir. 1986) (plaintiffs were wrongfully prevented from owning and operating the Chicago Bulls; plaintiffs' lost profits were not speculative, as the team continued to operate in hands of another whose profits during relevant period could guide assessing damages); *Rhodes v. Sigler*, 44 Ill. App. 3d 375, 380 (1976) (plaintiff was wrongfully prevented from using farmland to grow crops for year; actual crops grown by defendants on same farmland during year were valued to determine lost profits); see also *SK Hand Tool Corp.*, 284 Ill. App. 3d at 428 (recognizing that cases cited in *Milex* involved awards "based on actual profits made by established, profitable businesses" and distinguishing cases cited in *Milex* because facts before court involved alleged lost profits based on hypothetical profits).

¶ 45 Helix contends that, as in *Milex*, it presented expert testimony of lost profits with a reasonable degree of certainty to preclude the new business rule. Specifically, Helix maintains its expert, Cohen, presented evidence of the profits of a similar business, the NAA, and its lease product while Smith analyzed data from the U.S. Census Bureau's American Housing Survey to determine the actual market for the lease product. According to Helix, this evidence of lost profits established damages or, at minimum, created a question of fact regarding damages to preclude summary judgment. We disagree.

¶ 46 Unlike the actual demand for a generic drug in *Milex*, Helix does not base its alleged lost profits on actual sales of another entity operating a comparable business. Instead, Helix's only comparison is to the NAA lease, a product Helix acknowledges as vastly different. Indeed, from the outset, Helix intended to create a new lease product "with many unique qualities" as an alternative to NAA's lease. In an affidavit and at his deposition, Ivey identified shortcomings with

the NAA lease that Helix intended to resolve. These shortcomings included that the NAA lease (i) contained provisions "very unique" to Texas law; (ii) was expensive, only available to dues-paying members, and charged fees for each page and the lease software; (iii) averaged a length of over 20 pages; (iv) provided only a limited number of forms; (v) could not be customized; (vi) failed to update quickly; and (vii) contained provisions unfavorable to landlords. In addition, the NAA platform had become "unpredictable and cumbersome" and had not been integrated with other services. Helix's expert, Cohen, also identified ways Helix's lease differed from and improved on the NAA lease, which he described as a flawed and inferior product.

¶ 47 Moreover, Ivey testified that the Helix leases not only differed from NAA concerning the products' characteristics but also amounted to "a different animal in a lot of ways," including the TURSS platform on which the leases would be sold. As Helix's experts noted, as a not-for-profit organization, NAA was "not in the business of selling leases," and its lease product "is merely a product they offer to their members," not to the public. In contrast, Helix would sell its leases for profit on TURSS's rental screening website. TURSS had not sold electronic lease products on its platforms, whether from Helix, the NAA, or other entities. Though the NAA had marketing agreements with TURSS and other companies, it sold leases on its website only after customers became NAA members.

¶ 48 In light of the undisputed facts regarding the differences between the NAA and Helix lease products, the lost profit analysis differs "inherently" from that in *Milex*. See *TAS Distributing Co. v. Cummins Engine Co.*, 491 F.3d 625, 635 (7th Cir. 2007). So, we agree with the trial court's well-reasoned treatment of *Milex*.

¶ 49 Helix contends, however, that neither *Milex* nor its progeny requires comparison to an identical business or product to apply an exception to the new business rule. Instead, Helix asserts,

a plaintiff needs to present evidence of profits from "similar" or "comparable" products, and NAA's product meets that standard. Helix relies on *Antrim Pharmaceuticals LLC v. Bio-Pharm, Inc.*, 310 F. Supp. 3d 934 (N.D. Ill. 2018) as "persuasive authority."

¶ 50 Like *Milex*, *Antrim* involved alleged lost profits from sales of a generic pharmaceutical drug. The plaintiff's expert established damages by analyzing the generic drug's established market and actual sales. The defendant contended that the plaintiff's expert opinion regarding lost profits of its new business could not be relied on because the plaintiff was a "virtual business," unlike the other companies the expert analyzed. The trial court rejected that argument, stating, "[n]othing in *Milex* suggests that the sort of identity of structure or functioning that Bio-Pharm advocates is required. The relevant comparison in *Milex* is between the plaintiff's claimed lost profits and the profits of other similar businesses, using 'actual products in the marketplace as well as authoritative sources for the data [that the expert] used.' " *Id.* at 946 (quoting *Milex*, 237 Ill. App. 3d at 192). The court denied the defendant's motion for summary judgment, concluding that the defendant did not establish that plaintiff's supposed status as a "virtual company" undermined the validity of the expert's comparison between businesses.

¶ 51 Helix contends that, similarly, it need not present evidence of profits of an identical business or product to find that its lost profits are not speculative and that its experts established its lost profits with reasonable certainty. But the "virtual business" in *Antrim* did not refer to the plaintiff's marketing, sales platform, method of sale, or product. Instead, it referred to something irrelevant in assessing lost profit, the plaintiff's corporate structure. *Id.* Conversely, as noted, Helix's leases and the NAA lease and their selling platforms differ markedly.

¶ 52 Alternatively, Helix argues that because Ivey had been creating lease products for years and TURSS had been selling third-party leases, neither qualified as a "new business." But the new

business rule has nothing to do with the date of a company's launch; it applies unless a company can present evidence of past, actual profits from which to assess estimates of alleged lost profits. See *Kinesoft Development Corp. v. Softbank Holdings Inc.*, 139 F. Supp. 2d 869, 909 (N.D. Ill. 2001) (past successes related to other businesses or products provide insufficient basis to find plaintiff's claims fall outside scope of Illinois's new business rule).

¶ 53 Helix suggests the new business rule has been "discredited" and is no longer good law, citing *Parvati Corp. v. City of Oak Forest*, 709 F.3d 678 (7th Cir. 2013). But *Parvati* involved a misuse of the new business rule. Indeed, the court described the city's invocation of the rule as "perverse."

¶ 54 The plaintiff in *Parvati* alleged that the defendant city employed racially discriminatory zoning. In dicta, the court said, "[t]he rule is based on the correct observation that it is more difficult to establish loss objectively when a business is strangled in its cradle, for then there is no history of profit and loss from which to extrapolate lost future profit—the profit the business would have earned had it not been killed or wounded by the defendant. But it doesn't make sense to build on this insight a flat prohibition against awarding damages in such a case; the general standard governing proof of damages, which requires a plaintiff to make a reasonable estimate of its damages as distinct from relying on hope and a guess, is adequate for cases in which a new business is snuffed out by a wrongdoer." *Id.* at 685.

¶ 55 The trial court here said nothing about a "flat prohibition," but that Helix's evidence of alleged lost profits was too speculative to reach a jury. Further, Illinois courts have continued to recognize the new business rule, notwithstanding *Parvati*'s dicta. See, *e.g.*, *Meriturn Partners, LLC*, 2015 IL App (1st) 131883.

¶ 56 The dissent contends we misconstrue the new business rule by requiring "proof of actual profits for effectively identical products" and no cases impose similar exacting standards, relying on *Schatz v. Abbott Laboratories, Inc.*, 51 Ill. 2d 143, 147-48 (1972). *Infra*, ¶¶ 83-84. But *Schatz*, which did not involve the new business rule so has no applicability here, made the unremarkable observation that "absolute certainty" as to lost profits is not required. *Schatz*, 51 Ill. 2d at 147. We agree. Helix was required to present proof of its damages to "a reasonable degree of certainty," which, as we've noted, it failed to do.

¶ 57 Further, to contend Helix met its burden on damages, the dissent cites a 45-year-old federal district court case, *Perma Research & Development Co. v. Singer Co.,* 402 F. Supp. 881, 889 (S.D.N.Y. 1975), *aff'd,* 542 F.2d 111 (2d Cir.1976). Again, the dissent's case misses the mark. There, the inventor of a newly patented anti-skid device sued the patent assignee for breaching a contract to use best efforts to market the product. The trial court found the defendant's projected sales for the device provided a rational basis for calculating the lost profits because the defendant relied on those figures in deciding to enter the contract. Although one of Helix's experts cited TURSS's projected sales in his estimate, he relied on several other factors as well. More importantly, neither party presented evidence showing reliance on the estimate in deciding to enter into the contract. Further, in *Perma Research,* while newly patented, comparable devices were sold in the market. Conversely, as noted, Helix created a "different animal" from anything then available.

¶ 58 Out-of-Pocket and Nominal Damages

¶ 59 Nevertheless, Helix contends the trial court erred in granting summary judgment on its breach of contract claim because, at minimum, it should recover out-of-pocket and nominal damages.

¶ 60 As a preliminary matter, TURSS contends Helix waived the issue by not raising it in response to the motion for summary judgment. We deem issues not raised in the trial court waived. See *Cochran v. George Sollitt Construction Co.*, 358 Ill. App. 3d 865, 872-73 (2005). Helix, however, raised the issue at the hearing on the motion for summary judgment, so we reject TURSS's contention. *Boatmen's Bank of Benton v. Durham*, 203 Ill. App. 3d 921, 925 (1990) (an affirmative defense raised during summary judgment hearing was not waived).

¶ 61 But still, Helix failed to present sufficient evidence to support its request for "modest out-of-pocket expenses." The plaintiff has the burden to present evidence of each element of its claim, including damages. See *Ollivier v. Alden*, 262 Ill. App. 3d 190, 196 (1994) ("As the party seeking to recover, the plaintiff bears the burden of proving that he or she sustained damages resulting from the breach and establishing both the correct measurement of damages and the final computation of damages based on that measurement.") Helix failed to meet this burden.

¶ 62 At his deposition, Ivey said Helix's damages included "out-of-pocket costs," among other purported damages, but Helix provided no evidence detailing the amount. A conclusory statement like Ivey's does not provide a sufficient basis to establish (i) Helix sustained damages, (ii) the damages resulted from a breach of contract, or (iii) a proper measurement of those damages. While damages do not need to be calculated with mathematical precision, basic contract theory requires reasonable certainty and precludes damages based on conjecture or speculation. *Razor v. Hyundai Motor America*, 222 Ill. 2d 75, 106-07 (2006).

¶ 63 Absent evidence of damages, we will not reverse to permit the recovery of nominal damages. *Mayster v. Santacruz*, 2020 IL App (2d) 190840, ¶ 47. Thus, the trial court correctly entered summary judgment on Helix's breach of contract claim.

¶ 64 Attorney's Fees

¶ 65 Helix seeks attorney's fees under section 13 of the marketing agreement, which provides, "The prevailing party will be entitled to recover reasonable attorneys' fees and other actual and reasonable costs in enforcing this agreement."

¶ 66 To award fees, a party can be considered a "prevailing party" when it "is successful on any significant issue in the action and achieves some benefit in bringing suit [citation], receives a judgment in his favor [citation] or by obtaining an affirmative recovery." *Grossinger Motorcorp, Inc. v. American National Bank & Trust Co.*, 240 Ill. App. 3d 737, 753 (1992). A party does not have to succeed on all claims to be considered the prevailing party. *Peleton, Inc. v. McGivern's, Inc.*, 375 Ill. App. 3d 222, 227 (2007) (citing *Powers v. Rockford Stop-N-Go, Inc.*, 326 Ill. App. 3d 511, 515 (2001)). On the other hand, " 'when the dispute involves multiple claims and both parties have won and lost on different claims, it may be inappropriate to find that either party is the prevailing party.' " *Id.* at 227-28 (quoting *Powers*, 326 Ill. App. 3d at 515).

¶ 67 Helix asserts it qualifies as the "prevailing party" because the trial court rejected TURSS's arguments that (i) the marketing agreement did not impose a duty to perform, (ii) it could not have breached the contract because there was no deadline for performance, and (iii) the limitations of liability provision in the marketing agreement insulated TURSS from any breach of contract claim.

¶ 68 We disagree. Helix did not prevail on any significant issue, given that TURSS obtained summary judgment on the breach of contract claim and had the fraud claim dismissed with prejudice. Helix maintains it benefited from bringing the lawsuit due to the ruling that TURSS had a duty to perform, which may permit Helix to seek specific performance. But the trial court's ruling amounts to neither a finding TURSS must perform or Helix deserves specific performance. Moreover, Helix did not seek specific performance, so contending it may prevail on the claim in the future constitutes pure conjecture.

¶ 69 Moreover, even if Helix succeeded on one of its claims, given that each party won and lost on different claims, neither party is entitled to prevailing party fees. *Id.*

¶ 70 Dismissal of Fraud Claim

¶ 71 Helix argues the trial court erred in dismissing its fraud claim under section 2-619 because it properly pled all elements of a promissory fraud claim. Specifically, (i) TURSS repeatedly made false representations of material fact, asserting its intention to complete the electronic software platform and market the Helix leases on its website, (ii) Helix reasonably relied on those representations, including Ivey, who left gainful employment to start, fund, and operate Helix, and (iii) Helix suffered injury in the form of lost revenue and income.

¶ 72 A party asserting a claim for promissory fraud must allege a "false statement of material fact; *** knowledge or belief of the statement's falsity; *** intent to induce the plaintiff to act or refrain from action on the falsity of the statement; *** the plaintiff reasonably relied on the false statement; and *** damage from such reliance." *Bayview Loan Servicing, LLC v. Szpara*, 2015 IL App (2d) 140331, ¶ 34.

¶ 73 The trial court concluded that allegations of the first amended complaint refuted Helix's allegation of an intent to defraud when TURSS made the promises. The trial court concluded "defendant was, in fact, taking this contract seriously at the outset," noting that the complaint alleged (i) TURSS assigned a particular employee to be in charge of the project, (ii) an amendment extended the term of the contract, (iii) there were "other delays," and (iv) in a letter dated January 19, 2012, TURSS responded to a request to re-review the delays. Thus, the trial court held that these allegations contradicted Helix's allegations of fraudulent intent, and we agree.

¶ 74 Helix contends that the allegations further, rather than disprove, its fraud claim. Helix reasons that TURSS deceived it into thinking the project was moving forward by appearing to

work on the platform and pretending someone was in charge of overseeing it. But Helix presents no evidence of deception, such as TURSS not intending to build the platform or purposely causing the delays. Significantly, the marketing agreement included a nonexclusivity clause permitting either party to sell leases outside the agreement.

¶ 75 We agree with the trial court that Helix's allegations fail to allege that TURSS acted with the intent to defraud and support the opposite finding. TURSS showed that it intended to follow through, but a series of delays stymied its efforts.

¶ 76 Other Terms of the Marketing Agreement

¶ 77 Helix also asserts that the trial court erred in finding that other provisions of the marketing agreement supported dismissing the fraud claim. Helix points to the absence of a completion date, the inclusion of a merger clause, and a nonexclusively provision. Helix insists these provisions made it impossible to prove reasonable reliance, proximate causation, and damages.

¶ 78 According to Helix, a reasonable time is implied, despite the absence of a completion date. See *Werling v. Grosse*, 76 Ill. App. 3d 834, 842, (1979). What constitutes a reasonable time depends on several factors, including the facts, the nature of the circumstances, and the product. See *Yale Development Co. v. Aurora Pizza Hut, Inc.* 95 Ill. App. 3d 523, 525 (1981). Since the contract implies a reasonable amount of time to complete the platform, it could reasonably rely on TURSS's repeated promises. But, as the trial court noted, that rule applies to breach of contract, not fraud claims.

¶ 79 Further, the agreement prohibits oral modification and "may not be altered, amended, or modified except by written instrument signed by the duly authorized representatives of both parties." So the agreement prevents Helix from showing reasonable reliance on alleged oral misrepresentations after the execution of the marketing agreement.

¶ 80 Finally, the nonexclusivity provision permits Helix to sell the leases outside the agreement, preventing reasonable reliance. *McKown v. McDonnell*, 31 Ill. App. 2d 190 (1961) (broker with nonexclusive right to list property had no claim for conspiracy to defraud because vendor and purchaser owed no duty to deal exclusively with him).

¶ 81 Affirmed.

¶ 82 JUSTICE WALKER, dissenting:

¶ 83 I respectfully dissent because the standard set by the majority interprets the exceptions to the new business rule too narrowly, thereby shielding too much misconduct from liability. Our supreme court has explained that when a new business sues for lost profits,

> "absolute certainty as to the amount of loss or damage in such cases is unattainable, but that is not required to justify a recovery. All the law requires is that it be approximated by competent proof. That proof of the exact amount of loss is impossible will not justify refusing compensation. If that were the law, contracts of the kind here involved could be violated with impunity. All the law requires in cases of this character is that the evidence shall with a fair degree of probability tend to establish a basis for the assessment of damages." (Internal quotation marks omitted.) *Schatz v. Abbott Laboratories, Inc.*, 51 Ill. 2d 143, 147-48 (1972).

¶ 84 No case supports the majority's restriction of the exception to the new business rule to proof of actual profits for effectively identical products. The restriction, which permits parties to breach many contracts with impunity, conflicts with the reasoning of *Schatz* and with the rule in most jurisdictions. The majority's reasoning conflicts with the general rule.

> "[C]ourts in most *** jurisdictions[] have recognized that a new business should not be prevented from recovering lost profits caused by a breach of contract, merely because of the absence of a prior track record of profits. *** [M]any courts have recognized the unfairness in requiring a plaintiff to establish its lost profits with reasonable certainty, where it is the breaching defendant's wrongful conduct that has prevented the plaintiff from establishing with reasonable certainty what, if any, profits it would have realized." Michael D. Weisman & Ben T. Clements, *Protecting Reasonable Expectations: Proof of Lost Profits for New Businesses*, 76 Mass. L. Rev. 186, 197 (1991).

¶ 85 The problem of proving lost profits where the plaintiff sought to market a new product that improves on products available for sale parallels the problem of proving lost profits when a defendant breaches a contract to market the plaintiff's patented invention. Because the invention differs significantly from other products in the market, the market for other products will not match the market for the plaintiff's invention. Nonetheless, courts have in some cases awarded lost profits as damages when a defendant has breached a contract to market a patented invention. *Perma Research & Development Co. v. Singer Co.*, 402 F. Supp. 881, 898 (S.D.N.Y. 1975), *aff'd*, 542 F.2d 111 (2d Cir. 1976), states the general rule:

> "Although lost profits in a new venture are not ordinarily recoverable [citation], they may be awarded where: the lost of prospective profits are the direct and proximate result of the breach; profits were contemplated by the parties when they entered the contract; and there is a rational basis on which to calculate the lost profits."

See also *Rogerson Aircraft Corp. v. Fairchild Industries, Inc.*, 632 F. Supp. 1494 (C.D. Cal. 1986).

¶ 86 The court in *Perma Research* awarded damages based largely on sales projections made by the defendant's employees in the process of deciding whether to enter the contract. *Perma*

Research, 402 F. Supp. at 901. An expert's report on the market, supported by sufficient data concerning comparable products, may also support an award of damages for an unmarketed product. In *ASTech International, LLC v. Husick*, 676 F. Supp. 2d 389 (E.D. Pa. 2009), the defendant, an attorney, negligently failed to obtain a patent for the plaintiff's pharmaceutical invention. Because of the lack of a patent, the plaintiff could not market the invention. To prove damages, the plaintiff presented a report of an expert with "considerable experience *** in the pharmaceutical field [, who] provide[d] a list of potential buyers, a list of comparable transactions and projections of sale price and royalty income." *ASTech*, 676 F. Supp. 2d at 405-06. The court found the expert's report sufficient to present to a jury for assessment of damages.

¶ 87 Helix's expert, Cohen, is an attorney and real estate broker with 35 years of experience, who served on a Joint State Government Commission on Real Property Law and who worked with the NAA on its lease forms. He estimated Helix's loss by using (1) data from the United States Census on the number of residential leases in the country, (2) data from two Internet sources on the volume of traffic at Transunion's website, and (3) industry data on conversion rates, which show the percentage of site visits that turn into sales, differentiated for distinct industries. Cohen also used his knowledge of the sales of NAA's lease forms and the price NAA charged for the forms to estimate the amount Helix could earn from sales of its products, which Cohen considered superior to NAA's product. Cohen found data on the actual sales of another lease form marketed without Transunion's reputation and prominence. The other vendor sold approximately 35,000 forms per year for a product Cohen considered substantially inferior to Helix's product. Using all the historical information, Cohen estimated that Helix could soon sell 110,000 leases per year, with market penetration likely to increase steadily.

¶ 88 Helix's second expert, Smith, who specialized in economic analysis, used Cohen's research and Transunion's own projections to estimate the likely loss Helix suffered due to Transunion's failure to provide the promised platform for Helix's lease sales. The use of Transunion's projections echoes the use of Singer's projections in *Perma Research*.

¶ 89 Both of Helix's experts based their estimates on data concerning the size of the market, number of probable page views on a Transunion platform, likely rates of conversion from page views to sales, and the actual sales of inferior products serving similar needs. The expert testimony here meets the standards of *Milex Products, Inc. v. Alra Laboratories, Inc.,* 237 Ill. App. 3d 177 (1992), *Perma Research*, 402 F. Supp. at 898, *Rogerson Aircraft Corp.*, 632 F. Supp. 1494, *ASTech*, 676 F. Supp. 2d 389, *Antrim Pharmaceuticals LLC v. Bio-Pharm, Inc.*, 310 F. Supp. 3d 934 (N.D. Ill. (N.D. Ill. 2018), and cases cited in Michael D. Weisman & Ben T. Clements, *Protecting Reasonable Expectations: Proof of Lost Profits for New Businesses*, 76 Mass. L. Rev. 186. The opinions of Cohen and Smith give the trier of fact "a rational basis on which to calculate the lost profits." *Perma Research*, 402 F. Supp. at 898.

¶ 90 Based on the reasoning of *Schatz* and *Milex*, I would apply the exception to the new business rule in this case, as there is reliable market data to support plaintiff's claim of damages. I would find that there are genuine issues of material fact as to whether plaintiff is able to show lost profits damages to a reasonable degree of certainty as an exception to the Illinois new business rule. Hence, I would reverse the circuit court's grant of summary judgment and reman for trial. Accordingly, I respectfully dissent.

No. 1-20-0894

Cite as:	*Ivey v. Transunion Rental Screening Solutions, Inc.*, 2021 IL App (1st) 200894
Decision Under Review:	Appeal from the Circuit Court of Cook County, No. 18-L-13423; the Hon. Michael F. Otto, Judge, presiding.
Attorneys for Appellant:	Michael I. Zweig, of Ferris, Thompson & Zweig, Ltd., of Chicago, and Jason R. Bendel, of Bendel Law Group, of Los Angeles, California, for appellants.
Attorneys for Appellee:	Christopher T. Sheean, Erica Bury, and Edward J. Keating, of Swanson, Martin & Bell, LLP, of Chicago, for appellee.

Supreme Court Case No. 127903

Petition for Leave to Appeal

No.

IN THE
SUPREME COURT OF ILLINOIS

ROGER IVEY and HELIX STRATEGIES, LLC

Plaintiff-Petitioner,

v.

TRANSUNION RENTAL SCREENING SOLUTIONS, INC.

Defendant-Respondent.

On Petition for Leave to Appeal from the
Appellate Court of Illinois, First District, No. 1-20-0894
Then heard on appeal from the Circuit Court of Cook County, Illinois
Law Division, No. 18 L 13423
Honorable Michael F. Otto, Judge Presiding

PETITION FOR LEAVE TO APPEAL

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TABLE OF CONTENTS

PRAYER FOR LEAVE TO APPEAL

Plaintiffs-Petitioners, Roger Ivey and Helix Strategies LLC ("Helix"), pursuant to Illinois Supreme Court Rule 315(a), respectfully petition this Court for leave to appeal from the judgment of the Appellate Court of Illinois, First Judicial District, 2021 IL App (1st) 200894, No. 1-20-0894.

This Petition presents the important question of what evidence is necessary to establish the lost profits of a new business with reasonable certainty. The Appellate Court ruled that Petitioners could not prove lost profits of a new business with reasonable certainty because they did not present evidence of profits from a nearly identical business or product. However, Petitioners submitted detailed expert testimony relying on authoritative market data and other evidence to establish the claimed lost profits with reasonable certainty. The dissenting opinion agreed that the expert opinions based on authoritative data were sufficient to at least create a triable issue of fact regarding the claimed lost profit damages and avoid summary judgment.

Review of this issue by the Illinois Supreme Court is necessary to resolve the unsettled issue under Illinois law as to what evidence is necessary to establish lost profits of a new business with reasonable certainty and whether reasonable certainty can be established with expert testimony based on authoritative market data.

JUDGMENT BELOW

On October 18, 2021, the Appellate Court, in a two-to-one decision, affirmed the order of the Circuit Court of Cook County, Illinois granting summary judgment in favor of Defendant Transunion Rental Screening Solutions, Inc. ("TURSS") on Petitioners' breach of contract claim and the order granting TURSS's motion to dismiss Petitioners'

fraud claim.

No petition for rehearing was filed.

POINTS RELIED UPON FOR REVIEW

1. The Appellate Court erred in construing the exception to the new business rule too narrowly by essentially ruling that as a new business Petitioners were required to present evidence of profits of a comparable business or product to find that its lost profits are not speculative and sufficient evidence exists for Petitioners to prove its lost profits with reasonable certainty.

2. The Appellate Court should be reversed because Petitioners presented sufficient evidence to prove its lost profits as a new business with expert testimony based on authoritative market data and other evidence.

STATEMENT OF FACTS

Defendant Transunion Rental Screening Solutions, Inc. ("TURSS") is a subsidiary of the international credit reporting bureau, Transunion, LLC ("Transunion"). (C. 222, lines 7-8) TURSS provides consumer credit and criminal background screening services to landlords and property managers through its "CreditRetriever" and "MySmartMove.com" ("SmartMove") products. (C. 230-231) CreditRetriever is for professional managers with large portfolios and SmartMove is for small landlords. (C. 230-231; C. 248-249) Plaintiff Roger Ivey ("Ivey") is an attorney who in 2007 was the Assistant Vice President and Property Operations Counsel of UDR, Inc. ("UDR"), a publicly traded real estate investment trust and one of the nation's largest owners and managers of residential apartment communities. (C. 256, ¶ 2)

In 2007, Ivey and Michael Britti ("Britti"), the head of TURSS and a General

Vice President of Transunion, began to discuss the possibility of Ivey creating residential leasing and property management forms (the "Helix Services") that TURSS would sell to its CreditRetriever and SmartMove customers on electronic platforms TURSS provided. (C. 256-257, ¶ 3) Britti proposed the idea to Ivey and made multiple representations to Ivey that TURSS was absolutely committed to selling lease products created by Ivey if Ivey created them. (C. 257, ¶ 5)

As part of Ivey and Britti's negotiations, on July 11, 2008, Britti provided Ivey a five-year business plan for TURSS's project funding and sale of the Helix Services, which was created by Transunion analysts and included income projections of profits to Helix of over $23,000,000 from sales to SmartMove customers alone. (C. 252-254, C. 264-270) The parties exchanged proposed terms over several months, but generally and verbally agreed that Helix would create a database of forms and TURSS would build an electronic platform and market the Helix Services to both its SmartMove and CreditRetriever customers. (C. 257, ¶ 4) Based on the multiple representations and promises by Britti that TURSS was committed to selling Ivey's lease products, in September, 2008, Ivey voluntarily left his position at UDR to focus exclusively on creating the database of lease forms. (C. 257, ¶ 4) Britti, on behalf of TURSS, specifically represented to Ivey on numerous occasions – including by letter of intent in November 24, 2008 – that TURSS's goal was to have the platform completed by or during the first quarter of 2009. (C. 257-258, ¶ 7; C. 272-274)

In March 2009, Helix and TURSS formalized and executed their agreement (the "Marketing Agreement"). (C. 178-180) Notably, during the negotiation process the parties agreed to revise a draft agreement that stated "TURSS ***may*** build the platform" to

state that "TURSS ***will*** build the platform," which is consistent with Britti and Ivey's discussions regarding TURSS's obligations. (C. 276-280) (emphasis added)

TURSS's responsibilities under the Marketing Agreement were outlined in paragraph 3 of the Marketing Agreement as follows:

> **Responsibilities of TURSS**. Following TURSS' reasonable approval of the scope and general attributes of the Helix Services, TURSS will make available on a non-exclusive basis, Helix Services to certain interested Subscribers. TURSS will provide the software platform, Helix will provide the document content.

(C. 178, ¶ 3)

Before Ivey left UDR, TURSS represented that it anticipated the platform would be completed by the first quarter of 2009, and at the outset of the Marketing Agreement TURSS made multiple representations that it expected the platform to be completed no later than June or July, 2009. (C. 257-258, ¶¶ 7, 9) Following execution of the Marketing Agreement, Helix gave TURSS a formal product specifications manual that laid out all the primary information TURSS needed to plan the product, including a full set of sample lease forms and process instructions to instruct the design. (C. 258, ¶ 8) TURSS approved the scope and format of the Helix forms. (C. 258 ¶ 8) Helix submitted electronic forms and supporting materials to TURSS in support of the platform, and ultimately created a unique lease document system for over 45 of the 50 states and Washington, D.C. that was designed specifically for integration into an electronic software operating platform. (C. 258, ¶ 10)

By July 2009, TURSS had not provided the platform and TURSS informed Ivey it would be put in the market in August 2009. (C. 259, ¶ 13) In August, 2009, Britti left TURSS and was replaced by Mike Mauseth ("Mauseth"). (C. 253-254, 101:21-102:10) Mauseth and Ivey began to regularly discuss the progress of the electronic platform. (C.

259, ¶¶ 9-15)

On September 15, 2009, Joe Sullivan, a business analyst at TURSS, emailed Ivey and specifically stated that the "rollout of the Helix content will be around the end of the year [2009]." (C. 282) However, the end of 2009 came and went without the lease platform being completed. (C. 2509, ¶¶ 14-15)

In February of 2010, Ivey had a meeting with Mauseth and various employees of TURSS, who said that they were dealing with "other priorities", that Transunion corporate had not yet allocated the resources they needed and that TURSS was committed to the lease product and that it was going to be rolled out within a couple of months. (C. 259, ¶ 16) After this meeting, TURSS agreed to amend the Marketing Agreement to include the following term:

> The 5 year term of the Agreement is extended until the expiration of 5 years from the date TURSS first makes Helix Services generally available for purchase by TURSS' Subscribers.

(C. 202) The extension of the Agreement also specifically states that:

> The extension of the Agreement will not be construed as an approval by Helix of unreasonable delays, if any, by TURSS in performance of the Agreement.

(*Id.*) The Amendment also specifically states that the parties expected the platform to be completed by June, 2010. (*Id.*) The Amendment was approved and signed by TURSS on March 23, 2010. (*Id.*) Also, after the meeting, Ivey sent Mauseth the five year business plan Britti previously provided Ivey. (C. 284-294)

On June 21, 2010, Mauseth emailed Ivey and said that the rollout of the Helix services was "….looking more toward the end of August [2010]." (C. 296) However, the year 2010 ended and TURSS still had not completed the platform or advised Ivey that it had no intention to do so. (C. 262 ¶ 36)

During 2011, Ivey repeatedly contacted TURSS regarding the platform, and even tried to help TURSS by involving a third party with the expertise to build it. (C. 260-261, ¶ 24) However, 2011 ended and TURSS did not complete the platform or advise Ivey that it had no intention to do so. (C. 262 ¶ 36) In January, 2012, Ivey, Mauseth and Timothy Martin ("Martin"), the Group Vice President of U.S. Housing for TransUnion held a conference call. (C. 261, ¶25) On this call, Ivey again expressed his frustration with TURSS's delays. (C. 261, ¶25) Martin reiterated TURSS's commitment to build a platform and sell the Helix Services, and stated that TURSS hoped to begin work on the project by summer of 2012, but that it could be delayed until 2013. (C. 261, ¶25) Two weeks after the conference call, Martin sent Ivey a letter stating that TURSS had acted in good faith; was complying with its obligations under the Agreement, that it had and would continue to perform under the Agreement; and that it believed in the potential of its relationship with Helix. (C. 304-306)

During 2013 and 2014 TURSS continued to communicate with the third party Ivey referred to TURSS about TURSS using a platform he was building. (C. 262, ¶ 33; C. 308-312) In October 2014, Ivey again contacted TURSS regarding the platform. (C. 308-312) At that time, TURSS was unable to provide any information about the platform or any assurance TURSS would build it. (C. 308-312) In fact, TURSS stated they were unaware of Helix and the project, and after a significant search could not locate the Marketing Agreement or anyone who was familiar with it. (C. 308-312) At this point, Ivey realized TURSS had no intention of building the platform to sell the Helix Services even though TURSS still had never informed Ivey that it had no intention of building the platform. (C. 262, ¶ 36) TURSS continues to refuse to perform under the Agreement.

(*Id.*)

During the period TURSS failed to make the Helix services available, Helix diligently tried to sell the Helix services through two other companies. (C. 262, ¶34) Helix formally contracted with two other companies to build platforms and sell the Helix leases; however, these were small start-up companies without the name recognition or resources of Transunion necessary to sell a sophisticated legal product like leases to landlords. (*Id.*)

Ivey first learned during discovery in this case that TURSS had been lying to him repeatedly about their efforts to build the platform. (C. 262, ¶ 26) While, as set forth above, TURSS made multiple promises to build the platform and represented to Plaintiffs on numerous occasions that TURSS was close to finishing the platform and making the services available, there is now substantial evidence that TURSS was never close to finishing the platform and had not even legitimately approved or started the project.

For instance, Hillier, the TURSS employee in charge of the platform, testified that the process involved the following steps: (1) completing "requirements" (i.e. a blueprint for the platform), (2) designing/architecting the platform, (3) coding the platform, and (4) testing the platform. (C. 319) Hillier admitted that TURSS had not even completed the first step of drafting requirements, and that it would take at least a month to finish that step. (C. 315-318) Hillier also admitted that just the fourth step alone would take at least three to four months to complete. (C. 320) Therefore, by Hillier's own admission, TURSS's multiple representations to Plaintiffs that TURSS was two or three months away from completing the platform were always categorically false, given that TURSS was *at least* five to six months away (and likely much more) from completing the

platform. Moreover, given Mauseth's, Hillier's and Sullivan's roles, they knew or clearly should have known that TURSS's statements to Ivey were false and that it was factually impossible to complete the project and put the product on the market in as little as one or two months as they repeatedly represented to Ivey.

Plaintiff submitted expert testimony in the form of the Affidavit of Richard Armitage (C. 322-334), an expert in the project management of software implementations, regarding TURSS's failure to perform. (C. 322-323, ¶¶ 1-6) Armitage reviewed the entirety of the documents produced by TURSS in the litigation as well as all the Deposition Exhibits and the completed depositions. (C. 323, ¶ 8) Consistent with Hillier's testimony, Armitage testified that the project to build the electronic platform would require the following stages: Plan, Design, Build, Test, Deploy and Optimize. (C. 323, ¶ 9) Based on his review of the materials and testimony, Armitrage concluded that TURSS never completed the first stage of planning the project because several key components of that stage were not completed. (C. 324, ¶ 11) Armitrage also concluded that TURSS did not complete the design phase and that the "drafts of the website" and "some flowcharts" prepared by TURSS in February 2010 were insubstantial and appeared to be created by Hillier just to make Ivey feel like progress had been made (i.e. to placate Ivey and make him believe the platform was being built, not to actually move forward with the meaningful project implementation). (C. 324, ¶ 11) Armitrage further concluded that TURSS never started the build, test, deployment and optimization phases because TURSS never started the preliminary phases. (C. 324, ¶ 12-15)

Significantly, Armitrage concluded that in order for the project to be "real" and reflect an intention of delivery, he would expect to see evidence of the following

documents (none of which TURSS had): A Project Plan or Schedule, Timesheets, Ongoing Meeting Minutes and Status Reports, A Detailed Functional Design Document, Technical Specifications, Architectural Designs, a Budget (draft or approved - showing that the project was funded and approved), a dedicated Development Environment (can also include or be known as a Dev, Prod, Test/QA or Sandbox), Helpdesk Tickets (that are used to track Testing Defects, Code Transports etc.), a dedicated SharePoint site and document repository for the project, cutover/go-live planning or a Testing Plan (User Acceptance Testing) with Use-Case Scenarios. (C. 326, ¶ 20). Armitrage opined that the failure of TURSS to have *any* of these documents and structures leads to only one conclusion – that there was never any internal project established by TURSS to build the Helix platform and thus TURSS did not appear to have any intention of delivering the Helix product on their platform. (C. 326, ¶ 20)

TURSS claimed in its first motion for summary judgment (with almost no specifics and no documentary evidence) that "TURSS suffered multiple technical setbacks with its existing system and was unable to dedicate the time needed to create the platform for the sale." (C. 143) TURSS further claimed that one of the purported problems was that the version of CreditRetriever in use when the Marketing Agreement was executed (CreditRetriever 5.0) was antiquated. However, these claims were proven false. The current head of TURSS, who took over in 2012, admitted that CreditRetriever 6.0 was launched in 2011 and the Helix platform could have been added to CreditRetriever 6.0 at that time. (C. 337) TURSS also made the unsupported assertion that there was a server interruption that caused delays. (C. 145) However, Sullivan testified that this outage occurred with CreditRetriever 5.0 in June of 2010, and that the

main effect was to delay the rollout of CreditRetriever 6.0. (C. 340-341) Sullivan noted that only historical data was lost and restored, and that the problem was fixed going forward. (C. 341-343).

TURSS also claimed in its first motion for summary judgment that it did not actually have an obligation to build the platform. (C. 148-149) However, as the district court ruled, this claim is belied by not only the aforementioned document history and unambiguous contract language of the Marketing Agreement, but also by the statements of TURSS's employees, specifically Martin, that TURSS chose not to build the platform because TURSS didn't prioritize it. (C. 223-224). It is also belied by TURSS's own internal communications in February, 2013 when Martin asked a TURSS employee, Derek Frame, to look into the project. (C. 345-346) Frame reviewed the Marketing Agreement and other documents and emailed Martin stating:

> "I believe compliance should be straightforward. Helix is looking to provide documents (or document content) potentially along with document services (advisory, legal, etc.). Our ***obligation*** is to provide the platform in which to deliver the document content. Given our product/technical direction we should be able to support this."

(C. 345-346) (emphasis added) Martin's email response indicated he did not care whether Helix even existed and told Frame to wait to see if they heard from Ivey again before TURSS figures it out. (C. 345-346)

The original complaint in this dispute was filed on July 20, 2015. (C. 7-36) In June 2016, TURSS brought its first Motion for Summary Judgment. (C. 141-202) On November 14, 2016, the circuit court granted summary judgment for TURSS on Counts for Breach of Contract, Negligent Misrepresentation, and Promissory Estoppel of Plaintiffs' four-count complaint, but allowed Plaintiffs leave to re-plead Plaintiffs' count for Fraud. (C. 373). On December 14, 2016, the Plaintiffs filed a motion to reconsider

the order granting summary judgment on Count I (for breach of contract) and Count IV (promissory estoppel). (C. 360-70). On December 19, 2016, Plaintiffs filed a three-count amended complaint, sounding in breach of contract (Count I), fraud (Count II), and promissory estoppel (Count III). (C. 387-416). On May 22, 2017, the circuit court granted Helix's motion to reconsider the summary judgment on its original breach of contract claim, but ordered the amended breach of contract claim dismissed with prejudice for other reasons. (C. 586). The circuit court also granted TURSS's motion to dismiss Plaintiffs' fraud claim and the remainder of the case with prejudice. (C. 586-87). The Plaintiffs filed their notice of appeal from that order on June 21, 2017. (C. 589-91).

On August 10, 2018, this Court dismissed the appeal from the June 21, 2017 order for lack of jurisdiction. (C. 958-962**)** A mandate was issued on October 10, 2018 (C. 968-974) Thereafter, Helix brought a Motion for Reconsideration of the circuit court's previous motion for summary judgment ruling on the breach of contract claim, relying on a recently published case that warranted reversal of the circuit court's original ruling. (C. 1265; C.1269-1491) On May 23, 2019, the circuit court reversed its prior ruling granting summary judgment in favor of TURSS on the breach of contract claim. (C. 1807 V2)

On September 6, 2019, TURSS brought a second Motion for Summary Judgment ("MSJ"). (C. 1811-2031 V2**)** The MSJ attacked Helix's ability to prove its claim for lost profits, primarily on the basis of the so-called New Business Rule. (C. 1811-1820 V2**)**

Helix submitted a substantial amount of evidence to establish its lost profit damages to a reasonable degree of certainty. In addition to the TURSS business plan provided by Michael Britti, Plaintiff submitted the Expert Report of Stan Smith, Ph.D. (C. 2172-2197 V2) Dr. Smith holds a PhD in economics from the University of Chicago.

(C. 2172 V2) Dr. Smith conducted a detailed market analysis looking at market data as well as the National Apartment Association's ("NAA's") annual revenue from its National Lease Program to calculate an estimate of Plaintiff's damages. (C. 2178-2179 V2) Dr. Smith estimated that Helix lost approximately $42,000,000 for the five year term of the Marketing Agreement. (C. 2172-2197 V2)

Helix also submitted the Expert Report of Paul Cohen, Esq. (C. 2147-2170 V2) Mr. Cohen is an attorney who represents landlords and businesses like Helix who serve them, and who has been on the lease committee for the NAA for many years. (C. 2156 V2) Mr. Cohen's opinion is significant because he is intimately familiar with the market for electronic leases having represented companies that sell them and given his experience on the NAA lease committee. (C. 2156-2158 V2)

Lastly, Plaintiff submitted the Affidavit of Roger Ivey Dated October 15, 2019 that details many facts in support of Plaintiff's damages. (C. 2199-2212 V2) Ivey's testimony established that leases were not a "new business" to either Helix or TURSS, how all residential leases were essentially comparable, and how the differences between the NAA and the Helix / TURSS product made the latter a superior product. (C. 2199-2212 V2) In fact, TURSS had been selling the NAA leases for years at the time the Marking Agreement was executed. (C. 2200-2202 V2) Ivey also detailed how the Helix product was meant to serve the demand for this type of product. (C. 2199-2212 V2)

The Marketing Agreement itself provides evidence that the parties clearly contemplated that the revenues from the leases would be damages available in the event of a breach of the agreement. (C. 1887 V2, ¶ 11) The Marketing Agreement limits the damages available to Helix under the agreement to "TURSS's ***revenue share*** paid by

Helix, under this agreement" … except where "a party is harmed by the willful or intentional, wrongdoing of the other party." (C. 1887 V2, ¶ 11) (emphasis added) In other words, the parties contemplated that if there was willful or intentional wrongdoing, as there was here, that the damages available under the Marketing Agreement would be the revenue contemplated by the Marketing Agreement.

On February 5, 2020, the Circuit Court granted the MSJ on the basis of the New Business Rule. (C. 2093 V2)

Specifically, the Court stated and reasoned as follows:

"…I'm going to grant the motion for summary judgment. The Milex case is clearly distinguishable to me. The leases here are -- the leases that Helix sought to market were designed from the outset to be different than the NAA – different from the NAA leases on which the experts sought to base their calculations of the profits Helix may have lost.

I just believe that the expert projections were too speculative under the New Business Rule to allow to go to a jury. I'll note as well that Milex is somewhat sui generis.· It's perfectly understandable why the plaintiffs relied on it. It's the best case for them by far. But what was going on there, the generic drugs by my reading of the case, the Appellate Court allowed it because the products were identical, and they found that the sales from these other two companies were sufficient to establish a rational basis for calculations of the lost profit.

But even there the cases they relied on, counsel alluded to it briefly, the cases Malatesta (phonetic), Fishman, and Rhodes, those were very different. Those were all cases -- that was about all that Milex relied on.· Those were all cases where a sale of business fell through and the lost profits were based on what the owner actually recouped during the period that the plaintiffs who sought to buy the businesses or I guess it was farmland in the case of Rhodes, the profits that they would have sought to have earned during the identical period for the identical business, which is much further away still than we've got here.

The plaintiff has -- plaintiffs have attempted to argue that it's really not -- that the New Business Rule should not apply at all because Mr. Ivey had previously designed leases and TransUnion had previously sold leases.

Both of those may be true, but that doesn't mean that Helix Strategies and the leases they sought to market were not new. They were new. And I don't see a basis for establishing the lost profits that they might have recouped.

I am not unsympathetic to counsel's argument that the -- that it seems unfair to allow TransUnion to escape liability because Helix's damages are speculative.

But the Illinois Court reports are littered with cases where judgment went for defendant or judgment for plaintiff was reversed because whatever damages the plaintiff sought to prove were too speculative. And I believe that this is such a case.

So motion for summary judgment is granted…"

(R441-443).

On March 6, 2020, Plaintiff filed a Motion for Reconsideration of the MSJ ruling. (C. 2094-2225 V2) On March 18, 2020, TURSS filed a Motion for Final Judgment. (C. 2228-2349 V2). Plaintiff opposed the Motion for Final Judgment on the ground that Helix should be able to recover nominal damages and attorneys' fees. (C. 2448-2821 V2)

On July 23, 2020, this Court held a hearing on and denied Plaintiff's Motion for Reconsideration and granted TURSS's Motion for Final Judgment, entering judgment in favor of TURSS. (C. 2898 V2) On August 21, 2020, Plaintiffs timely filed a Notice of Appeal of the judgment. (C. 2899-2901 V2)

ARGUMENT

I. THE APPELLATE COURT ERRED BY EFFECTIVELY HOLDING THAT EVIDENCE OF PROFITS OF COMPARABLE ARE NECESSARY TO ESTABLISH LOST PROFITS OF A NEW BUSINESS WITH REASONABLE CERTAINTY.

The basic theory of damages in a breach of contract action requires that a plaintiff "establish an actual loss or measurable damages resulting from the breach in order to recover." *In re Illinois Bell Telephone Link-Up II*, 2013 IL App (1st) 113349, ¶ 19, (quoting *Avery v. State Farm Mutual Automobile Insurance Co.*, 216 Ill. 2d 100, 149

(2005)).

Historically, Illinois courts have ruled that a "new business" must have some form of prior profits to recover lost profits. *See, e.g., Drs. Sellke & Conlon, Ltd. v. Twin Oaks Realty, Inc.*, 143 Ill. App. 3d 168, 174 (1986) (plaintiff's claim barred by new-business rule where plaintiff failed to offer any profit data before defendant allegedly interfered with its business).

More recently, Courts in Illinois have allowed new businesses to recover lost profits even without any evidence of prior profits. *See Tri-G, Inc. v. Burke, Bosselman & Weaver,* 222 Ill. 2d 218, 249 (2006) ("There is no inviolate rule that a new business can never prove lost profits."); *Milex Products, Inc. v. Alra Laboratories, Inc.*, 237 Ill. App. 3d 177 (1992) *see also Antrim Pharmaceuticals LLC v. Bio-Pharm, Inc.*, 310 F.Supp 934 (2018) (ruling that there was genuine issue of material fact as to whether a new business was entitled to recover lost profits in exception to Illinois new business rule precluding summary judgment); *see also Parvati Corp. v. City of Oak Forest*, 709 F.3d 678, 685 (7th Cir. 2013). In *Tri-G, Inc.*, this Court ruled that lost profits of a new business could be determined with reasonable certainty based primarily based on the testimony of the plaintiff in that case. *Tri-G, Inc.*, at 250.

Illinois courts share this evolving approach with other states. "Changing attitudes towards jurors, a consensus focused on the inherent injustice to new businesses, and recognition of the economically nonoptimal allocation of resources that the New Business Rule encouraged may have all played a role in [a] shift in the interpretation of the rule away from a finding of law to a finding of fact, as pointed out by Bollas in the Ohio State Law Journal, and by Everett Gee Warner and Mark Adam Nelson in

"Recovering Lost Profits," 39 Mercer L. Rev. (1988)." *See* Mark Gauthier, Recovering Lost Profits for Start-Up Companies, Bus. L. Today, December 2017, at 1, 2. The rationale behind this change is encapsulated with this quote from the Kansas Supreme Court, which stated that "[s]trict application of the [reasonable] certainty doctrine would place a new business at a substantial disadvantage. To hold recovery is precluded as a matter of law merely because a business is newly established would encourage those contracting with such a business to breach their contracts. The law is not so deficient. *Vickers v. Wichita State University, Wichita*, 213 Kan. 614, 518 P.2d 512, 517 (1974).

The leading Illinois cases on point are *Tri G, Inc.*, *Milex Products, Inc. v. Alra Laboratories, Inc.*, 237 Ill. App. 3d 177 (1992) (where the claimed lost profits were of a generic drug comparable to other generic drugs on the market) and *Malatesta v. Leichter*, 186 Ill. App. 3d 602, 621 (1989) (where plaintiff was wrongfully prevented from acquiring an existing business). Despite the holdings in these cases, which are illustrative and not prescriptive in nature, some Illinois courts (including the Appellate Court in this case) appear to enforce the New Business Rule either as a per se rule or as if the exceptions are limited to the unique fact patterns found in *Tri-G, Inc.*, *Milex*, and *Malatasta*. *See e.g. Meriturn Partners, LLC v. Banner & Witcoff, Ltd.*, 2015 IL App (1st) 131883, ¶¶ 22-24 (outright rejecting a damage mode based on "a sales projection theory" because it involved "future suppositions")

There is no per se rule that, in order to be reasonably certain, evidence of the lost profits of a new business must consider sales of comparable (let alone identical) products or be the acquisition of an existing business. However, because the Petitioners' expert opinions relied, *in part*, on the performance of the NAA lease product, the Appellate

Court majority here made the inquiry whether or not Petitioners' lease product was substantially similar (or in the Appellate Court's overly strict application, nearly identical) to the NAA product but did not (as the dissenting opinion did) analyze the lost profit calculations and other evidence proffered by Petitioners and its experts that were based on authoritative market data. Nor did the Appellate Court consider the projections prepared by TURSS itself or the opinion testimony of Petitioner Ivey.

The Restatement Second of Contracts, section 352, comment b, provides that "[i]f the business is a new one or if it is a speculative one ..., damages may be established with reasonable certainty with the aid of expert testimony, economic and financial data, market surveys and analyses, business records of similar enterprises, and the like." Other courts have not required evidence of profits from a similar business. For instance, in *Kaech v. Lewis County PUD*, 106 Wash. App. 260, 23 P.3d 529, 538–539 (2001), the Court of Appeals of Washington upheld a lost profits finding where a dairy farm had been in operation for only a short time, holding that "expert testimony alone is a sufficient basis for an award of lost profits in the new business context when the expert opinion is supported by tangible evidence with a 'substantial and sufficient factual basis…'"

The Circuit Court and the Appellate Court erred by ruling that Petitioners could not prove its lost profits with reasonable certainty because it did not present evidence of profits from a comparable business.

II. THE APPELLATE COURT SHOULD BE REVERSED BECAUSE THE PETITIONERS HAD SUBMITTED EVIDENCE OF LOST PROFITS USING AUTHORATIVE DATA TO CREATE A TRIABLE ISSUE OF FACT REGARDING THE REASONABLE CERTAINTY OF THE DAMAGES.

Petitioners submitted substantial evidence of its lost profits using market data from authoritative sources, including TURSS's own analysis and admissions. (C. 2162, 2178-79 V2)

Petitioners' expert, Paul Cohen, offered a detailed analysis of Plaintiff's damages. Mr. Cohen is an attorney who has represented and counseled landlords in all aspects of property management for over thirty-five years. (C. 2150-2151 V2) Mr. Cohen also served on the NAA lease committee and worked with the NAA on their lease product almost from inception. (C. 2152 V2) Based on his knowledge of the marketplace, Mr. Cohen opined that when the parties' Marketing Agreement was executed in 2009 there was large market demand for electronic residential leases. (C. 2154 V2) Indeed, Cohen stated that while in 2009 the NAA lease was the only significant competitor in the market, now there are many other companies in the market, including Yardi, RealPage, Legal Forms, Legal Templates, Rocket Lawyer, Legal Nature, Legal Contracts, Law Depot, Landlord, Landlord Lease Forms, EZ Landlord Forms, Tenant Tech, and Zillow. (C. 2163 V2) The entry of so many other businesses into the market since the time TURSS should have made the Helix products available to its customers is highly probative evidence of the large market demand that existed for an electronic lease available over the internet.

Mr. Cohen also estimates Petitioners's damages based on authoritative market data, including a survey by US marketing firm Marketing Sherpa and publications by JDR Group and other published sources. (C. 2159-60 V2) Mr. Cohen uses industry

standard conversion rates to estimate Plaintiff's damages. (C. 2159-60 V2) Significantly, Cohen's estimate uses conservative estimates in connection with his analysis. (C. 2159-2161 V2) Cohen also relies upon the direct income of the NAA lease, as reported on its IRS Form 990, which a substantially similar product from the only significant third-party competitor at the time. (C. 2159-2161 V2)

Mr. Cohen, based on his expertise in the area and knowledge of both the Helix product and the NAA product, opines that the Helix product is of the highest quality and is actually superior to the NAA product. (C. 2156-2158 V2) However, Mr. Cohen's report does not rely on the fact that the Helix leases were superior to the NAA lease to conclude that there was a large demand for the Helix product. (C. 2147-2171 V2)

Similarly, Petitioner's expert, Stan V. Smith, a Ph.D. in economics from the University of Chicago, offered a detailed analysis of Plaintiff's damages. (C. 2172 V2) Significantly, Dr. Smith analyzed data from the U.S. Census Bureau's American Housing Survey to determine what the actual market was for a lease product. (C. 2178 V2) Dr. Smith also used a very conservative revenue figure for Helix from the leases at $5 per lease and used a conservative market penetration of only 1.5% for the first year. (C. 2178 V2) Smith also relies upon the NAA lease profits as set forth in IRS filings. (C. 2178-79 V2)

Additionally, Helix provided a five-year revenue projection done by TURSS's head, Michael Britti, and by Transunion's analysts. This projection is also substantial evidence of Plaintiff's damages. (C. 252-54, 267-270) The projections estimate profits to Helix in the first five years of sales of over $23,000,000 from sales to SmartMove customers alone. (C. 252-54, 267-270) These projections were created by TURSS itself using authoritative data. (C. 252-54, 267-270) TURSS's assertion that these projections cannot be used as a basis for calculating lost profits because of the integration clause in the Agreement are a basic misunderstanding of the law. Helix offered these projections as evidence of its lost profits, and not for the purpose of interpreting or adding obligations

to the Marketing Agreement.

An Affidavit of Petitioner Ivey in support of its Opposition to its Motion for Summary Judgment also provides substantial support for the claimed damages. (C. 2199-2212 V2) This Affidavit provided substantial evidence regarding the demand for an electronic lease based on his experience serving on the NAA lease committee. (C. 2199-2212 V2)

The Circuit Court and Appellate Court erred by not analyzing this expert testimony based on market data from authoritative sources and finding that it created a triable issue of fact regarding whether the claimed lost profits could be proven with reasonable certainty. Indeed, the only analysis of the expert testimony was done by Justice Walker, in his dissent, in which it was held that there was a triable issue of fact regarding Petitioners' claimed lost profit damages. The overly strict application of the new business rule by these and other Illinois courts conflicts with the courts' disposition towards the new business rule in *Tri-G, Inc.*, *Milex*, and other Illinois cases, and is deserving of resolution by the Illinois Supreme Court.

CONCLUSION

Wherefore, for the foregoing reasons, Petitioners request that this Court grant its petition for leave to appeal.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this *Brief* conforms to the requirements of Supreme Court Rules 341(a) and (b). The length of this *Brief*, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(H)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 5,593 words.

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APPENDIX

Table of Contents

2021 IL App (1st) 200894
No. 1-20-0894
Opinion filed October 18, 2021

First Division

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

ROGER IVEY and HELIX STRATEGIES, LLC, a Limited Liability Company, Plaintiffs-Appellants, v. TRANSUNION RENTAL SCREENING SOLUTIONS, INC., Defendant-Appellee.	)	Appeal from the Circuit Court of Cook County. No. 18 L 13423 Honorable Michael F. Otto, Judge, presiding.

PRESIDING JUSTICE HYMAN delivered the judgment of the court, with opinion.
Justice Coghlan concurred in the judgment and opinion.
Justice Walker dissented, with opinion.

OPINION

¶ 1 Roger Ivey formed Helix Strategies, LLC, (Helix) to create and sell customizable lease forms, a product, according to Ivey, unavailable in the rental market. Defendant Transunion Rental Screening Solutions (TURSS) entered into a nonexclusive marketing agreement with Ivey to build a platform to sell the leases on its website. After delays of nearly five years, TURSS decided not to build the platform or sell Helix's leases. Ivey and Helix sued TURSS, alleging breach of contract, fraud, and promissory estoppel and seeking over $23 million damages. The trial court

dismissed the fraud claim with prejudice, finding Helix could not establish (i) the elements of promissory fraud, including TURSS's intent to defraud; (ii) Helix's reasonable reliance; or (iii) proximate causation. The trial court also granted summary judgment for TURSS on the breach of contract claim, finding Helix's damages as too speculative.

¶ 2 After the trial court denied Helix's motion to reconsider and granted TURSS's motion for a final judgment, Helix appealed, arguing the trial court erred in (i) granting summary judgment on the breach of contract claim due to the speculative nature of the damages, (ii) denying nominal damages and attorney's fees, and (iii) dismissing the fraud claim.

¶ 3 We affirm. The trial court did not err in finding Helix's damages were too speculative as, under the new business rule, Helix could not present evidence estimating actual sales of its new, customizable leases. The trial court also did not err in declining to proceed to trial on nominal damages or in denying Helix's request for attorney's fees. Further, the trial court correctly dismissed the fraud claim where Helix failed to present facts showing TURSS acted with the intent to defraud.

¶ 4 Background

¶ 5 Helix is a Colorado limited liability company formed to provide residential property management lease forms and related services to landlords and other property management companies. Ivey serves as its president and chief executive officer. TURSS is a Delaware corporation with offices in Illinois and a subsidiary of the credit reporting agency Transunion, LLC. TURSS provides consumer credit and background screening services to property management companies and landlords. TURSS developed two Internet platforms to offer its screening services: MySmartMove.com, a website directed at small portfolio landlords, and CreditRetriever, directed to larger, professional commercial customers.

¶ 6 In 2007, Ivey worked as the assistant vice president and property operations counsel of UDR, Inc., a publicly-traded real estate investment trust. At the time, only one meaningful electronic lease product for landlords existed: a "one size fits all" lease the National Apartment Association (NAA) made available to its dues-paying members. Recognizing a need, Ivey met with Michael Britti, vice president of TURSS, to discuss the possibility of TURSS building an online platform to sell a customizable, electronic lease form that Ivey would create. In September 2008, Ivey left UDR to form Helix, purportedly based on assurances from Britti that TURSS would build the online platform no later than mid-2009.

¶ 7 The Marketing Agreement

¶ 8 In March 2009, Helix and TURSS entered into a five-year marketing agreement that required TURSS to build an online platform for Helix's lease documents. TURSS would receive 35% of "all collected revenue (excluding any taxes) generated" from the sale of Helix's leases, and Helix would receive 65%.

¶ 9 The marketing agreement created no obligations of exclusivity, stating: "Nothing in this Agreement shall prevent Helix from independently marketing and selling its products to and through any and all third parties, including, without limitation, to TURSS' Subscribers and competitors, without obligation to TURSS[.]" Also, TURSS could partner with other vendors to provide similar forms to TURSS customers. The marketing agreement included this specific limitation of liability:

> "In no event shall either party be liable for any consequential, incidental, indirect, special, or punitive damages incurred by the other party and arising out of the performance of this agreement including, but not limited to, loss of goodwill and lost profits or revenue, whether or not such loss or damage is based in contract, warranty, tort, negligence, strict

> liability, indemnity or otherwise, even if a party has been advised of the possibility of such damages. These limitations shall apply notwithstanding any failure of essential purpose of any limited remedy ***. TURSS shall not be liable for any and all claims arising out of or in connection with this agreement brought more than twelve (12) months after the cause of action has accrued. Except as otherwise set forth above, the parties' (together with their respective parents' and affiliates') total liability under this agreement shall not exceed the aggregate amount of TURSS' revenue share paid by Helix, under this agreement, during the twelve month (12) month [sic] period immediately preceding such claim. The foregoing limitations of liability shall not apply in the event and to the extent a party is harmed by the willful or intentional, wrongdoing of the other party." (Emphasis omitted).

¶ 10 Project Delays

¶ 11 Despite TURSS's repeated assurances that a platform for Helix's leases was in development, the project experienced extensive delays until shelved in 2014.

¶ 12 In August 2009, Britti left TURSS. His replacement, Mike Mauseth, regularly spoke with Ivey about TURSS's progress on the electronic platform. In September 2009, a TURSS business analyst told Ivey that TURSS would complete the platform by year's end. It did not.

¶ 13 In February 2010, Mauseth and other TURSS employees told Ivey that TURSS had not yet "allocated sufficient resources to complete the platform," but "was committed to building the platform and selling Helix services[.]" TURSS later asserted, falsely Ivey contends, that the delays occurred because TURSS had to devote considerable time and resources to rebuilding its CreditRetriever and MySmartMove platforms due to stability problems.

¶ 14 In March 2010, TURSS agreed to amend the marketing agreement, extending it another five years from the date TURSS would offer the Helix lease documents for sale. The amendment

added that TURSS anticipates that "the software platform(s) provided for in the Agreement and the Helix Services will be made available for purchase by TURSS' Subscribers approximately in June 2010 (without making any specific guarantee regarding this date)." It also stated, "The extension of the Agreement will not be construed as an approval by Helix of unreasonable delays, if any, by TURSS in performance of the Agreement."

¶ 15 Ivey made numerous inquiries with TURSS in 2010 and 2011. Delays continued. Helix, meanwhile, worked on developing its product and marketing it to other companies. Helix entered into agreements with two other companies but made no sales.

¶ 16 On January 5, 2012, Ivey spoke with Mauseth and Timothy Martin from TURSS. Both reiterated TURSS's commitment but advised of delays into 2013. A few weeks later, Martin sent Ivey a follow-up letter, explaining that he had reviewed the marketing agreement and discussed the project with the TURSS team. "Based on that review," Martin wrote, "I am confident that TURSS is complying with its contractual obligations and acting in good faith and, to date, has spent significant time" developing the software platform, which continued to "be in the TURSS development queue, though other priorities, including system stability, have taken precedence. This extended timeframe has been reasonable. A system that includes forms but is not stable is not in anyone's interest."

¶ 17 After more delays, Ivey contacted TURSS in October 2014. The employees he reached knew nothing about the marketing agreement and, in an email exchange, stated, "no one is left at TURSS who was involved in the Helix project."

¶ 18 C. Procedural History

¶ 19 On July 20, 2015, Helix and Ivey filed a four-count complaint against TURSS. Count I, brought by Helix, alleged "willful and intentional'' breach of contract. Counts II, III, and IV,

brought by Ivey and Helix, alleged, respectively, fraud, negligent misrepresentation, and promissory estoppel. TURSS filed a motion for summary judgment on all counts. After a hearing, the trial court granted summary judgment for TURSS as to counts I, III, and IV. The court found, relevant here, that the "exception to the limitations period for willful or intentional wrongdoing doesn't apply to breach-of-contract actions," adding that, "the one-year limitations contained in paragraph 11 of the contract dooms the action for breach of contract" because based "on the evidence before the court, there is no genuine issue of material fact that, according to plaintiff's allegations, this cause of action for breach of contract accrued well before the one year Helix filed its complaint."

¶ 20 The court found count II, alleging fraud, inadequate as a matter of law because it did not specifically identify the facts underlying the claims. But rather than granting TURSS's motion for summary judgment, the trial court *sua sponte* struck the fraud claim and allowed Helix leave to replead. As to negligent misrepresentation, the trial court barred the claim under the Moorman doctrine. Finally, on promissory estoppel, the court ruled the claim "firmly rooted in contract law and isn't willful or intentional as those terms are used under Illinois law."

¶ 21 Helix filed a motion to reconsider the entry of summary judgment on their claims for breach of contract and promissory estoppel. While the motion to reconsider was pending, Helix filed a three-count, first amended complaint alleging breach of contract (count I), fraud (count II), and promissory estoppel (count III). But Helix did not replead the claims for breach of contract and promissory estoppel to preserve those issues for review.

¶ 22 TURSS filed a combined motion to dismiss under section 2-619.1 of the Code of Civil Procedure. 735 ILCS 5/2-619.1 (West 2020). TURSS argued that the fraud claim remained legally

and factually deficient under section 2-615 (*id.* § 2-615) and asked the trial court to dismiss all of the counts under section 2-619(a)(9) (*id.* § 2-619(a)(9)) as time-barred and for lack of damages.

¶ 23 After briefing and argument on both motions, the trial court granted Helix's motion to reconsider, in part, but proceeded to dismiss all claims in the amended complaint with prejudice. Specifically, the trial court concluded that although a genuine issue of material fact existed regarding whether Helix filed the claims within one year of learning of the alleged breach of contract, Helix had failed to identify recoverable damages. The court explained, "this breach of contract action, I believe, still falls squarely within the ambit of the limitations of liability provision in the contract, damages limitations and all, so compensatory damages are barred, and any damages recoverable—or the only damages recoverable are the aggregate amount of TURSS' revenue share paid by Helix under the contract during the 12-month period immediately preceding such claim. In that case, that would be zero. So[,] the breach of contract action is still doomed[.]"

¶ 24 In dismissing the fraud count under section 2-619, the trial court stated the complaint and the exhibits refute the promissory fraud theory that the defendant had no intent to honor its contract from the onset and undermines other elements of fraud, including reasonable reliance and proximate cause.

¶ 25 Helix appealed. Another panel of this court dismissed the appeal without reaching the merits, finding that the order had not definitively disposed of all claims, and included no grounds for an appeal under Illinois Supreme Court Rule 304(a) (eff. Mar. 8, 2016). *Ivey v. Transunion Rental Screening Solutions, Inc.*, 2018 IL App (1st) 171592-U.

¶ 26 On remand, TURSS moved for final judgment. Simultaneously, Ivey filed a motion asking the trial court to reconsider its ruling on Helix's breach of contract claim and Ivey's promissory estoppel claim based on the holding in *Home Healthcare of Illinois, Inc. v. Jesk*, 2017 IL App (1st)

162482, issued during the appeal. The *Jesk* court found that parties were free to agree to exclude willful misconduct or gross negligence from the scope of a limitation of liability provision. *Id.* ¶ 45. Relying on *Jesk*, Helix argued they could avoid the limitation on liability provision by proving TURSS committed willful or intentional wrongdoing.

¶ 27 The trial court denied TURSS's motion for final judgment and granted Helix's motion to reconsider on Helix's breach of contract claim, leaving open the issue of whether Helix could state a claim for damages. But the trial court denied the motion to reconsider the promissory estoppel claim and dismissed it with prejudice.

¶ 28 The case then proceeded on Helix's sole remaining breach of contract claim with Ivey removed as a plaintiff. On September 6, 2019, TURSS moved for summary judgment on Helix's breach of contract claim, arguing Helix did not sufficiently prove actual damages. In addition, TURSS contended, in part, that Helix's alleged contract damages, consisting solely of purported lost profits, were too speculative under Illinois's "new business rule."

¶ 29 In support of its argument of lost profit damages, Helix submitted reports from two experts, Paul Jay Cohen and Dr. Stan V. Smith. Cohen concluded, "if TURSS had performed in accordance with the parties' Marketing Agreement," Helix would have made over $102,936,075 over five years. Smith looked at market data and the NAA's annual revenue from its National Lease Programs to issue a report concluding Helix's total lost revenue during the five-year contract was $42,949,247, and $120,530,266 to $145,586,153 during the 10 years immediately after the parties entered into the nonexclusive contract. Helix also cited *Milex Products, Inc. v. Alra Laboratories, Inc.*, 237 Ill. App. 3d 177 (1992), which permitted a plaintiff new to the generic drug business to recover lost profits based on expert testimony detailing actual sales of the generic drug in the marketplace, which "was based upon fact, not speculation." *Id.* at 192

¶ 30 After argument, the trial court granted summary judgment for TURSS, stating:

> "The *Milex* case is clearly distinguishable to me. The leases here are—the leases that Helix sought to market were designed from the outset to be different than the NAA—different from the NAA leases on which the experts sought to base their calculations of the profits Helix may have lost.
>
> I just believe that the expert projections were too speculative under the New Business Rule to allow to go to a jury. I'll note as well that *Milex* is somewhat *sui generis*. It's perfectly understandable why the plaintiffs relied on it. It's the best case for them by far. But what was going on there, the generic drugs by my reading of the case, the Appellate Court allowed it because the products were identical, and they found that the sales from these other two companies were sufficient to establish a rational basis for calculations of the lost profit."

¶ 31 Helix filed a motion to reconsider; TURSS filed a motion for entry of final judgment. Helix opposed the motion, asserting it should recover nominal and out-of-pocket damages as well as attorney's fees. TURSS argued that no Illinois court has allowed a case to proceed to trial on the possibility of recovering nominal damages.

¶ 32 After briefing and argument, the trial court denied Helix's motion to reconsider and granted TURSS's motion for a final judgment. The trial court entered a written order disposing of all matters, closing the case.

¶ 33 Analysis

¶ 34 Standards of Review

¶ 35 We review a trial court's grant of summary judgment *de novo*. *Argonaut Midwest Insurance Co. v. Morales*, 2014 IL App (1st) 130745, ¶ 14. For summary judgment, the movant must show (i) no triable issue of material fact exists and (ii) entitlement to judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2020). Genuine issues of material fact involve disputed material facts or, if undisputed, that reasonable persons might draw different inferences from those facts. *Id.* This court may affirm a trial court's grant of summary judgment on any basis appearing in the record regardless of the trial court's reasoning. *Harlin v. Sears Roebuck & Co.*, 369 Ill. App. 3d 27, 31-32 (2006).

¶ 36 A motion to dismiss a claim based on section 2-619 admits the legal sufficiency of the plaintiff's allegations but asserts affirmative matter that avoids or defeats the claim. *DeLuna v. Burciaga*, 223 Ill. 2d 49, 59 (2006). On review, we accept well-pled facts as true and construe the facts in the light most favorable to the nonmoving party. *Krozel v. Court of Claims*, 2017 IL App (1st) 162068, ¶ 13. We review a trial court's section 2-619 dismissal *de novo*. *Grady v. Illinois Department of Healthcare & Family Services*, 2016 IL App (1st) 152402, ¶ 9.

¶ 37 New Business Rule

¶ 38 Helix contends the trial court erred in precluding them from proving damages.

¶ 39 In a breach of contract case, a plaintiff must " 'establish an actual loss or measurable damages resulting from the breach in order to recover.' " *In re Illinois Bell Telephone Link-Up II & Late Charge Litigation*, 2013 IL App (1st) 113349, ¶ 19 (quoting *Avery v. State Farm Mutual Automobile Insurance Co.*, 216 Ill. 2d 100, 149 (2005)). A plaintiff's failure to prove damages entitles the defendant to judgment as a matter of law. *Westlake Financial Group, Inc. v. CDH-Delnor Health System*, 2015 IL App (2d) 140589, ¶ 39. The plaintiff must establish a reasonable basis for computing damages. *Kirkpatrick v. Strosberg*, 385 Ill. App. 3d 119, 130 (2008). The

proper measure of damages is the amount necessary to place the nonbreaching party into the position it would have been in had the defendant properly performed. *In re Illinois Bell*, 2013 IL App (1st) 113349, ¶ 19. While absolute certainty is not required, the plaintiff must prove damages with reasonable certainty without resort to conjecture or speculation. *Id.*

¶ 40 The "new business rule" precludes expert witnesses from speculating about possible lost profits where no historical data demonstrates a likelihood of future profits. *SK Hand Tool Corp. v. Dresser Industries, Inc.*, 284 Ill. App. 3d 417, 427 (1996). Courts applying this rule allow recovery for "profits lost due to a business interruption or tortious interference with a contract," but require the business be "established before the interruption so that the evidence of lost profits is not speculative." *Id.*; see also *Meriturn Partners, LLC v. Banner & Witcoff, Ltd.*, 2015 IL App (1st) 131883, ¶ 23. "The reason for the rule is that a new business has yet to show what its profits actually are." *SK Hand Tool Corp.*, 284 Ill. App. 3d at 427. Moreover, "[a]s lost profits are frequently the result of several intersecting causes, the plaintiff must show with reasonable certainty that the defendant's conduct caused a specific portion of the lost profits." *Id.*

¶ 41 Whether an entity is a "new business" for purposes of the new business rule depends on a track record of profits to assess estimates of alleged lost profits. See *Meriturn Partners, LLC*, 2015 IL App (1st) 131883, ¶ 23 (new business rule applies "where there is no historical data to demonstrate a likelihood of future profits."); *SK Hand Tool Corp.*, 284 Ill. App. 3d at 427 (new business rule turns on whether business has been profitable in past). "There is no inviolate rule that a new business can *never* prove lost profits." (Emphasis in original.) *Tri-G, Inc. v. Burke, Bosselman & Weaver*, 222 Ill. 2d 218, 249 (2006). Indeed, courts have opted not to apply the rule when damages were "neither speculative nor the product of conjecture, but [were] based upon a reasonable degree of certainty." See, *e.g.*, *Milex*, 237 Ill. App. 3d at 192.

¶ 42 Helix relies primarily on *Milex* to support its argument that its damages are not speculative or barred by the new business rule. Milex sought to market and sell a generic version of the fertility drug Clomid, which had an expiring patent. Milex's generic drug would have the identical active ingredient as Clomid. *Id.* at 179. Milex, a new pharmaceutical company, entered into an exclusive contract with Alra Laboratories to manufacture the generic drug for Milex. *Id.* at 180-81. When Alra reneged, Milex sued for lost profits. *Id.* at 181. Milex introduced expert testimony about the profits it contended it lost from the breach. Among other things, the expert considered the price of the pharmaceuticals, the total number of prescriptions in the market, and the average size of a prescription. *Id.* at 184-85. The trial court entered a $3.27 million judgment for Milex, which accounted for Milex's lost profits and other damages. The court found that although the generic drug was a new product, Milex's expert witnesses showed that the product had an established market. *Id.* at 187.

¶ 43 In affirming, the appellate court refused to apply the new business rule because Milex's expert provided credible testimony demonstrating an established market for the active ingredient through the performance of two competitors selling generic versions. This provided "a reasonable degree of certainty" of lost profits. *Id.* at 193. The court noted precedent for not applying the new business rule where it "did not fit the circumstances" and found the rule inapplicable when the new business' product has an established market.

¶ 44 The appellate court cited three cases where the new business rule did not fit the circumstances. *Id.* at 192. Each case involved lost profits awards based on actual profits made by another party operating the actual business at issue throughout the period of the alleged breach or business interruption. See *Malatesta v. Leichter*, 186 Ill. App. 3d 602, 621 (1989) (plaintiff was wrongfully prevented from acquiring an existing car dealership; the new business rule did not

apply, and the actual profits of a person who instead operated dealership during the time in question were not too speculative because the business was established throughout business interruption); *Fishman v. Estate of Wirtz*, 807 F.2d 520, 552 (7th Cir. 1986) (plaintiffs were wrongfully prevented from owning and operating the Chicago Bulls; plaintiffs' lost profits were not speculative, as the team continued to operate in hands of another whose profits during relevant period could guide assessing damages); *Rhodes v. Sigler*, 44 Ill. App. 3d 375, 380 (1976) (plaintiff was wrongfully prevented from using farmland to grow crops for year; actual crops grown by defendants on same farmland during year were valued to determine lost profits); see also *SK Hand Tool Corp.*, 284 Ill. App. 3d at 428 (recognizing that cases cited in *Milex* involved awards "based on actual profits made by established, profitable businesses" and distinguishing cases cited in *Milex* because facts before court involved alleged lost profits based on hypothetical profits).

¶ 45 Helix contends that, as in *Milex*, it presented expert testimony of lost profits with a reasonable degree of certainty to preclude the new business rule. Specifically, Helix maintains its expert, Cohen, presented evidence of the profits of a similar business, the NAA, and its lease product while Smith analyzed data from the U.S. Census Bureau's American Housing Survey to determine the actual market for the lease product. According to Helix, this evidence of lost profits established damages or, at minimum, created a question of fact regarding damages to preclude summary judgment. We disagree.

¶ 46 Unlike the actual demand for a generic drug in *Milex*, Helix does not base its alleged lost profits on actual sales of another entity operating a comparable business. Instead, Helix's only comparison is to the NAA lease, a product Helix acknowledges as vastly different. Indeed, from the outset, Helix intended to create a new lease product "with many unique qualities" as an alternative to NAA's lease. In an affidavit and at his deposition, Ivey identified shortcomings with

the NAA lease that Helix intended to resolve. These shortcomings included that the NAA lease (i) contained provisions "very unique" to Texas law; (ii) was expensive, only available to dues-paying members, and charged fees for each page and the lease software; (iii) averaged a length of over 20 pages; (iv) provided only a limited number of forms; (v) could not be customized; (vi) failed to update quickly; and (vii) contained provisions unfavorable to landlords. In addition, the NAA platform had become "unpredictable and cumbersome" and had not been integrated with other services. Helix's expert, Cohen, also identified ways Helix's lease differed from and improved on the NAA lease, which he described as a flawed and inferior product.

¶ 47 Moreover, Ivey testified that the Helix leases not only differed from NAA concerning the products' characteristics but also amounted to "a different animal in a lot of ways," including the TURSS platform on which the leases would be sold. As Helix's experts noted, as a not-for-profit organization, NAA was "not in the business of selling leases," and its lease product "is merely a product they offer to their members," not to the public. In contrast, Helix would sell its leases for profit on TURSS's rental screening website. TURSS had not sold electronic lease products on its platforms, whether from Helix, the NAA, or other entities. Though the NAA had marketing agreements with TURSS and other companies, it sold leases on its website only after customers became NAA members.

¶ 48 In light of the undisputed facts regarding the differences between the NAA and Helix lease products, the lost profit analysis differs "inherently" from that in *Milex*. See *TAS Distributing Co. v. Cummins Engine Co.*, 491 F.3d 625, 635 (7th Cir. 2007). So, we agree with the trial court's well-reasoned treatment of *Milex*.

¶ 49 Helix contends, however, that neither *Milex* nor its progeny requires comparison to an identical business or product to apply an exception to the new business rule. Instead, Helix asserts,

a plaintiff needs to present evidence of profits from "similar" or "comparable" products, and NAA's product meets that standard. Helix relies on *Antrim Pharmaceuticals LLC v. Bio-Pharm, Inc.*, 310 F. Supp. 3d 934 (N.D. Ill. 2018) as "persuasive authority."

¶ 50 Like *Milex*, *Antrim* involved alleged lost profits from sales of a generic pharmaceutical drug. The plaintiff's expert established damages by analyzing the generic drug's established market and actual sales. The defendant contended that the plaintiff's expert opinion regarding lost profits of its new business could not be relied on because the plaintiff was a "virtual business," unlike the other companies the expert analyzed. The trial court rejected that argument, stating, "[n]othing in *Milex* suggests that the sort of identity of structure or functioning that Bio-Pharm advocates is required. The relevant comparison in *Milex* is between the plaintiff's claimed lost profits and the profits of other similar businesses, using 'actual products in the marketplace as well as authoritative sources for the data [that the expert] used.' " *Id.* at 946 (quoting *Milex*, 237 Ill. App. 3d at 192). The court denied the defendant's motion for summary judgment, concluding that the defendant did not establish that plaintiff's supposed status as a "virtual company" undermined the validity of the expert's comparison between businesses.

¶ 51 Helix contends that, similarly, it need not present evidence of profits of an identical business or product to find that its lost profits are not speculative and that its experts established its lost profits with reasonable certainty. But the "virtual business" in *Antrim* did not refer to the plaintiff's marketing, sales platform, method of sale, or product. Instead, it referred to something irrelevant in assessing lost profit, the plaintiff's corporate structure. *Id.* Conversely, as noted, Helix's leases and the NAA lease and their selling platforms differ markedly.

¶ 52 Alternatively, Helix argues that because Ivey had been creating lease products for years and TURSS had been selling third-party leases, neither qualified as a "new business." But the new

business rule has nothing to do with the date of a company's launch; it applies unless a company can present evidence of past, actual profits from which to assess estimates of alleged lost profits. See *Kinesoft Development Corp. v. Softbank Holdings Inc.*, 139 F. Supp. 2d 869, 909 (N.D. Ill. 2001) (past successes related to other businesses or products provide insufficient basis to find plaintiff's claims fall outside scope of Illinois's new business rule).

¶ 53 Helix suggests the new business rule has been "discredited" and is no longer good law, citing *Parvati Corp. v. City of Oak Forest*, 709 F.3d 678 (7th Cir. 2013). But *Parvati* involved a misuse of the new business rule. Indeed, the court described the city's invocation of the rule as "perverse."

¶ 54 The plaintiff in *Parvati* alleged that the defendant city employed racially discriminatory zoning. In dicta, the court said, "[t]he rule is based on the correct observation that it is more difficult to establish loss objectively when a business is strangled in its cradle, for then there is no history of profit and loss from which to extrapolate lost future profit—the profit the business would have earned had it not been killed or wounded by the defendant. But it doesn't make sense to build on this insight a flat prohibition against awarding damages in such a case; the general standard governing proof of damages, which requires a plaintiff to make a reasonable estimate of its damages as distinct from relying on hope and a guess, is adequate for cases in which a new business is snuffed out by a wrongdoer." *Id.* at 685.

¶ 55 The trial court here said nothing about a "flat prohibition," but that Helix's evidence of alleged lost profits was too speculative to reach a jury. Further, Illinois courts have continued to recognize the new business rule, notwithstanding *Parvati*'s dicta. See, *e.g.*, *Meriturn Partners, LLC*, 2015 IL App (1st) 131883.

¶ 56 The dissent contends we misconstrue the new business rule by requiring "proof of actual profits for effectively identical products" and no cases impose similar exacting standards, relying on *Schatz v. Abbott Laboratories, Inc.*, 51 Ill. 2d 143, 147-48 (1972). *Infra*, ¶¶ 83-84. But *Schatz*, which did not involve the new business rule so has no applicability here, made the unremarkable observation that "absolute certainty" as to lost profits is not required. *Schatz*, 51 Ill. 2d at 147. We agree. Helix was required to present proof of its damages to "a reasonable degree of certainty," which, as we've noted, it failed to do.

¶ 57 Further, to contend Helix met its burden on damages, the dissent cites a 45-year-old federal district court case, *Perma Research & Development Co. v. Singer Co.,* 402 F. Supp. 881, 889 (S.D.N.Y. 1975), *aff'd,* 542 F.2d 111 (2d Cir.1976). Again, the dissent's case misses the mark. There, the inventor of a newly patented anti-skid device sued the patent assignee for breaching a contract to use best efforts to market the product. The trial court found the defendant's projected sales for the device provided a rational basis for calculating the lost profits because the defendant relied on those figures in deciding to enter the contract. Although one of Helix's experts cited TURSS's projected sales in his estimate, he relied on several other factors as well. More importantly, neither party presented evidence showing reliance on the estimate in deciding to enter into the contract. Further, in *Perma Research,* while newly patented, comparable devices were sold in the market. Conversely, as noted, Helix created a "different animal" from anything then available.

¶ 58 Out-of-Pocket and Nominal Damages

¶ 59 Nevertheless, Helix contends the trial court erred in granting summary judgment on its breach of contract claim because, at minimum, it should recover out-of-pocket and nominal damages.

¶ 60 As a preliminary matter, TURSS contends Helix waived the issue by not raising it in response to the motion for summary judgment. We deem issues not raised in the trial court waived. See *Cochran v. George Sollitt Construction Co.*, 358 Ill. App. 3d 865, 872-73 (2005). Helix, however, raised the issue at the hearing on the motion for summary judgment, so we reject TURSS's contention. *Boatmen's Bank of Benton v. Durham*, 203 Ill. App. 3d 921, 925 (1990) (an affirmative defense raised during summary judgment hearing was not waived).

¶ 61 But still, Helix failed to present sufficient evidence to support its request for "modest out-of-pocket expenses." The plaintiff has the burden to present evidence of each element of its claim, including damages. See *Ollivier v. Alden*, 262 Ill. App. 3d 190, 196 (1994) ("As the party seeking to recover, the plaintiff bears the burden of proving that he or she sustained damages resulting from the breach and establishing both the correct measurement of damages and the final computation of damages based on that measurement.") Helix failed to meet this burden.

¶ 62 At his deposition, Ivey said Helix's damages included "out-of-pocket costs," among other purported damages, but Helix provided no evidence detailing the amount. A conclusory statement like Ivey's does not provide a sufficient basis to establish (i) Helix sustained damages, (ii) the damages resulted from a breach of contract, or (iii) a proper measurement of those damages. While damages do not need to be calculated with mathematical precision, basic contract theory requires reasonable certainty and precludes damages based on conjecture or speculation. *Razor v. Hyundai Motor America*, 222 Ill. 2d 75, 106-07 (2006).

¶ 63 Absent evidence of damages, we will not reverse to permit the recovery of nominal damages. *Mayster v. Santacruz*, 2020 IL App (2d) 190840, ¶ 47. Thus, the trial court correctly entered summary judgment on Helix's breach of contract claim.

¶ 64 Attorney's Fees

¶ 65 Helix seeks attorney's fees under section 13 of the marketing agreement, which provides, "The prevailing party will be entitled to recover reasonable attorneys' fees and other actual and reasonable costs in enforcing this agreement."

¶ 66 To award fees, a party can be considered a "prevailing party" when it "is successful on any significant issue in the action and achieves some benefit in bringing suit [citation], receives a judgment in his favor [citation] or by obtaining an affirmative recovery." *Grossinger Motorcorp, Inc. v. American National Bank & Trust Co.*, 240 Ill. App. 3d 737, 753 (1992). A party does not have to succeed on all claims to be considered the prevailing party. *Peleton, Inc. v. McGivern's, Inc.*, 375 Ill. App. 3d 222, 227 (2007) (citing *Powers v. Rockford Stop-N-Go, Inc.*, 326 Ill. App. 3d 511, 515 (2001)). On the other hand, " 'when the dispute involves multiple claims and both parties have won and lost on different claims, it may be inappropriate to find that either party is the prevailing party.' " *Id.* at 227-28 (quoting *Powers*, 326 Ill. App. 3d at 515).

¶ 67 Helix asserts it qualifies as the "prevailing party" because the trial court rejected TURSS's arguments that (i) the marketing agreement did not impose a duty to perform, (ii) it could not have breached the contract because there was no deadline for performance, and (iii) the limitations of liability provision in the marketing agreement insulated TURSS from any breach of contract claim.

¶ 68 We disagree. Helix did not prevail on any significant issue, given that TURSS obtained summary judgment on the breach of contract claim and had the fraud claim dismissed with prejudice. Helix maintains it benefited from bringing the lawsuit due to the ruling that TURSS had a duty to perform, which may permit Helix to seek specific performance. But the trial court's ruling amounts to neither a finding TURSS must perform or Helix deserves specific performance. Moreover, Helix did not seek specific performance, so contending it may prevail on the claim in the future constitutes pure conjecture.

¶ 69 Moreover, even if Helix succeeded on one of its claims, given that each party won and lost on different claims, neither party is entitled to prevailing party fees. *Id.*

¶ 70 Dismissal of Fraud Claim

¶ 71 Helix argues the trial court erred in dismissing its fraud claim under section 2-619 because it properly pled all elements of a promissory fraud claim. Specifically, (i) TURSS repeatedly made false representations of material fact, asserting its intention to complete the electronic software platform and market the Helix leases on its website, (ii) Helix reasonably relied on those representations, including Ivey, who left gainful employment to start, fund, and operate Helix, and (iii) Helix suffered injury in the form of lost revenue and income.

¶ 72 A party asserting a claim for promissory fraud must allege a "false statement of material fact; *** knowledge or belief of the statement's falsity; *** intent to induce the plaintiff to act or refrain from action on the falsity of the statement; *** the plaintiff reasonably relied on the false statement; and *** damage from such reliance." *Bayview Loan Servicing, LLC v. Szpara*, 2015 IL App (2d) 140331, ¶ 34.

¶ 73 The trial court concluded that allegations of the first amended complaint refuted Helix's allegation of an intent to defraud when TURSS made the promises. The trial court concluded "defendant was, in fact, taking this contract seriously at the outset," noting that the complaint alleged (i) TURSS assigned a particular employee to be in charge of the project, (ii) an amendment extended the term of the contract, (iii) there were "other delays," and (iv) in a letter dated January 19, 2012, TURSS responded to a request to re-review the delays. Thus, the trial court held that these allegations contradicted Helix's allegations of fraudulent intent, and we agree.

¶ 74 Helix contends that the allegations further, rather than disprove, its fraud claim. Helix reasons that TURSS deceived it into thinking the project was moving forward by appearing to

work on the platform and pretending someone was in charge of overseeing it. But Helix presents no evidence of deception, such as TURSS not intending to build the platform or purposely causing the delays. Significantly, the marketing agreement included a nonexclusivity clause permitting either party to sell leases outside the agreement.

¶ 75 We agree with the trial court that Helix's allegations fail to allege that TURSS acted with the intent to defraud and support the opposite finding. TURSS showed that it intended to follow through, but a series of delays stymied its efforts.

¶ 76 Other Terms of the Marketing Agreement

¶ 77 Helix also asserts that the trial court erred in finding that other provisions of the marketing agreement supported dismissing the fraud claim. Helix points to the absence of a completion date, the inclusion of a merger clause, and a nonexclusively provision. Helix insists these provisions made it impossible to prove reasonable reliance, proximate causation, and damages.

¶ 78 According to Helix, a reasonable time is implied, despite the absence of a completion date. See *Werling v. Grosse*, 76 Ill. App. 3d 834, 842, (1979). What constitutes a reasonable time depends on several factors, including the facts, the nature of the circumstances, and the product. See *Yale Development Co. v. Aurora Pizza Hut, Inc.* 95 Ill. App. 3d 523, 525 (1981). Since the contract implies a reasonable amount of time to complete the platform, it could reasonably rely on TURSS's repeated promises. But, as the trial court noted, that rule applies to breach of contract, not fraud claims.

¶ 79 Further, the agreement prohibits oral modification and "may not be altered, amended, or modified except by written instrument signed by the duly authorized representatives of both parties." So the agreement prevents Helix from showing reasonable reliance on alleged oral misrepresentations after the execution of the marketing agreement.

¶ 80 Finally, the nonexclusivity provision permits Helix to sell the leases outside the agreement, preventing reasonable reliance. *McKown v. McDonnell*, 31 Ill. App. 2d 190 (1961) (broker with nonexclusive right to list property had no claim for conspiracy to defraud because vendor and purchaser owed no duty to deal exclusively with him).

¶ 81 Affirmed.

¶ 82 JUSTICE WALKER, dissenting:

¶ 83 I respectfully dissent because the standard set by the majority interprets the exceptions to the new business rule too narrowly, thereby shielding too much misconduct from liability. Our supreme court has explained that when a new business sues for lost profits,

> "absolute certainty as to the amount of loss or damage in such cases is unattainable, but that is not required to justify a recovery. All the law requires is that it be approximated by competent proof. That proof of the exact amount of loss is impossible will not justify refusing compensation. If that were the law, contracts of the kind here involved could be violated with impunity. All the law requires in cases of this character is that the evidence shall with a fair degree of probability tend to establish a basis for the assessment of damages." (Internal quotation marks omitted.) *Schatz v. Abbott Laboratories, Inc.*, 51 Ill. 2d 143, 147-48 (1972).

¶ 84 No case supports the majority's restriction of the exception to the new business rule to proof of actual profits for effectively identical products. The restriction, which permits parties to breach many contracts with impunity, conflicts with the reasoning of *Schatz* and with the rule in most jurisdictions. The majority's reasoning conflicts with the general rule.

> "[C]ourts in most *** jurisdictions[] have recognized that a new business should not be prevented from recovering lost profits caused by a breach of contract, merely because of the absence of a prior track record of profits. *** [M]any courts have recognized the unfairness in requiring a plaintiff to establish its lost profits with reasonable certainty, where it is the breaching defendant's wrongful conduct that has prevented the plaintiff from establishing with reasonable certainty what, if any, profits it would have realized." Michael D. Weisman & Ben T. Clements, *Protecting Reasonable Expectations: Proof of Lost Profits for New Businesses*, 76 Mass. L. Rev. 186, 197 (1991).

¶ 85 The problem of proving lost profits where the plaintiff sought to market a new product that improves on products available for sale parallels the problem of proving lost profits when a defendant breaches a contract to market the plaintiff's patented invention. Because the invention differs significantly from other products in the market, the market for other products will not match the market for the plaintiff's invention. Nonetheless, courts have in some cases awarded lost profits as damages when a defendant has breached a contract to market a patented invention. *Perma Research & Development Co. v. Singer Co.*, 402 F. Supp. 881, 898 (S.D.N.Y. 1975), *aff'd*, 542 F.2d 111 (2d Cir. 1976), states the general rule:

> "Although lost profits in a new venture are not ordinarily recoverable [citation], they may be awarded where: the lost of prospective profits are the direct and proximate result of the breach; profits were contemplated by the parties when they entered the contract; and there is a rational basis on which to calculate the lost profits."

See also *Rogerson Aircraft Corp. v. Fairchild Industries, Inc.*, 632 F. Supp. 1494 (C.D. Cal. 1986).

¶ 86 The court in *Perma Research* awarded damages based largely on sales projections made by the defendant's employees in the process of deciding whether to enter the contract. *Perma*

Research, 402 F. Supp. at 901. An expert's report on the market, supported by sufficient data concerning comparable products, may also support an award of damages for an unmarketed product. In *ASTech International, LLC v. Husick*, 676 F. Supp. 2d 389 (E.D. Pa. 2009), the defendant, an attorney, negligently failed to obtain a patent for the plaintiff's pharmaceutical invention. Because of the lack of a patent, the plaintiff could not market the invention. To prove damages, the plaintiff presented a report of an expert with "considerable experience *** in the pharmaceutical field [, who] provide[d] a list of potential buyers, a list of comparable transactions and projections of sale price and royalty income." *ASTech*, 676 F. Supp. 2d at 405-06. The court found the expert's report sufficient to present to a jury for assessment of damages.

¶ 87 Helix's expert, Cohen, is an attorney and real estate broker with 35 years of experience, who served on a Joint State Government Commission on Real Property Law and who worked with the NAA on its lease forms. He estimated Helix's loss by using (1) data from the United States Census on the number of residential leases in the country, (2) data from two Internet sources on the volume of traffic at Transunion's website, and (3) industry data on conversion rates, which show the percentage of site visits that turn into sales, differentiated for distinct industries. Cohen also used his knowledge of the sales of NAA's lease forms and the price NAA charged for the forms to estimate the amount Helix could earn from sales of its products, which Cohen considered superior to NAA's product. Cohen found data on the actual sales of another lease form marketed without Transunion's reputation and prominence. The other vendor sold approximately 35,000 forms per year for a product Cohen considered substantially inferior to Helix's product. Using all the historical information, Cohen estimated that Helix could soon sell 110,000 leases per year, with market penetration likely to increase steadily.

¶ 88 Helix's second expert, Smith, who specialized in economic analysis, used Cohen's research and Transunion's own projections to estimate the likely loss Helix suffered due to Transunion's failure to provide the promised platform for Helix's lease sales. The use of Transunion's projections echoes the use of Singer's projections in *Perma Research*.

¶ 89 Both of Helix's experts based their estimates on data concerning the size of the market, number of probable page views on a Transunion platform, likely rates of conversion from page views to sales, and the actual sales of inferior products serving similar needs. The expert testimony here meets the standards of *Milex Products, Inc. v. Alra Laboratories, Inc.,* 237 Ill. App. 3d 177 (1992), *Perma Research*, 402 F. Supp. at 898, *Rogerson Aircraft Corp.*, 632 F. Supp. 1494, *ASTech*, 676 F. Supp. 2d 389, *Antrim Pharmaceuticals LLC v. Bio-Pharm, Inc.*, 310 F. Supp. 3d 934 (N.D. Ill. (N.D. Ill. 2018), and cases cited in Michael D. Weisman & Ben T. Clements, *Protecting Reasonable Expectations: Proof of Lost Profits for New Businesses*, 76 Mass. L. Rev. 186. The opinions of Cohen and Smith give the trier of fact "a rational basis on which to calculate the lost profits." *Perma Research*, 402 F. Supp. at 898.

¶ 90 Based on the reasoning of *Schatz* and *Milex*, I would apply the exception to the new business rule in this case, as there is reliable market data to support plaintiff's claim of damages. I would find that there are genuine issues of material fact as to whether plaintiff is able to show lost profits damages to a reasonable degree of certainty as an exception to the Illinois new business rule. Hence, I would reverse the circuit court's grant of summary judgment and reman for trial. Accordingly, I respectfully dissent.

No. 1-20-0894

Cite as:	*Ivey v. Transunion Rental Screening Solutions, Inc.*, 2021 IL App (1st) 200894
Decision Under Review:	Appeal from the Circuit Court of Cook County, No. 18-L-13423; the Hon. Michael F. Otto, Judge, presiding.
Attorneys for Appellant:	Michael I. Zweig, of Ferris, Thompson & Zweig, Ltd., of Chicago, and Jason R. Bendel, of Bendel Law Group, of Los Angeles, California, for appellants.
Attorneys for Appellee:	Christopher T. Sheean, Erica Bury, and Edward J. Keating, of Swanson, Martin & Bell, LLP, of Chicago, for appellee.

Supreme Court Case No. 127903

Order Granting Petition for Leave to Appeal

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January 26, 2022

In re: Roger Ivey et al., etc., Appellants, v. Transunion Rental Screening Solutions, Inc., Appellee. Appeal, Appellate Court, First District. 127903

The Supreme Court today ALLOWED the Petition for Leave to Appeal in the above entitled cause.

We call your attention to Supreme Court Rule 315(h) concerning certain notices which must be filed.

Very truly yours,

Cynthia A. Grant

Clerk of the Supreme Court