No. 127903

IN THE
SUPREME COURT OF ILLINOIS

HELIX STRATEGIES, LLC,	)	On petition for leave to appeal
	)	from the Appellate Court of
Plaintiff-Appellant,	)	Illinois, First Judicial District,
	)	No. 1-20-0894.
and ROGER IVEY,	)	
	)	
Plaintiff,	)	There heard on appeal from the
	)	Circuit Court of Cook County,
v.	)	Illinois, County Department,
	)	Law Division, No. 18 L 13423
TRANSUNION RENTAL SCREENING	)	
SOLUTIONS, INC.,	)	The Honorable
	)	MICHAEL F. OTTO,
Defendant-Appellee.	)	Judge Presiding.

RESPONSE BRIEF OF DEFENDANT-APPELLEE TRANSUNION RENTAL SCREENING SOLUTIONS, INC.

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E-FILED
6/28/2022 8:47 AM
CYNTHIA A. GRANT
SUPREME COURT CLERK

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NATURE OF THE CASE

This commercial litigation matter involves a breach of contract claim brought by a newly-formed company, Helix Strategies, LLC, against Transunion Rental Screening Solutions (TURSS). TURSS is a consumer credit screening company that provides consumer credit and background screening services to potential landlords and property management companies. Helix formed to develop and sell customizable leases and other related documents it intended to market to landlords and property managers. TURSS and Helix entered into a non-exclusive marketing agreement under which TURSS agreed to develop an online platform through which it could offer Helix's lease documents to TURSS customers. However, for a variety of reasons, TURSS was unable to develop the platform, and no Helix documents were sold. Helix also failed to sell any lease documents through other, unrelated partnerships.

Helix and its president and chief executive officer, Roger Ivey, sued TURSS. In the only claim at issue here, Helix sought breach of contract damages for purported lost profits. TURSS moved for summary judgment, reasoning that because Helix could not present proof of damages to a reasonable degree of certainty, its damages claim was barred under the new business rule. The circuit court granted TURSS's motion and Illinois Appellate Court, First Judicial District, over a dissent, affirmed. *Ivey v. Transunion Rental Screening Solutions, Inc.,* 2021 IL App (1st) 200894.

Helix petitioned for, and this Court allowed, leave to appeal.

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ISSUE PRESENTED

Did the circuit court properly grant, and the First District properly affirm, TURSS's motion for summary judgment, where Helix failed to satisfy the requirements of Illinois' new business rule or any exception to the rule, because Helix failed to offer evidence of its alleged lost profits with reasonable certainty and without resorting to conjecture or speculation?

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JURISDICTIONAL STATEMENT

On November 14, 2016, the circuit court (McGrath, J.) granted summary judgment for TURSS on Helix and Mr. Ivey's promissory estoppel claim. (C. 373 V1; *see also* C. 1841 V2). On May 22, 2017, the circuit court (McGrath, J.) dismissed Helix and Mr. Ivey's fraud claim under 735 ILCS 5/2-619. (C. 587 V1). On May 23, 2019, the circuit court (McGrath, J.) ordered that all of Mr. Ivey's claims were dismissed with prejudice, and that any claims against TransUnion, LLC were also dismissed with prejudice. (C. 1807 V2).[1]

On February 5, 2020, the circuit court (Otto, J.)[2] granted TURSS's motion for summary judgment on Helix's breach of contract claim. (C. 2093 V2). On March 6, 2020, Helix timely filed a motion to reconsider that summary judgment order. (C. 2094-2348 V2). On March 18, 2020, TURSS filed a motion for entry of final judgment on all of Helix's claims. (C. 2349 V2). On July 23, 2020, the circuit court denied Helix's motion to reconsider, granted TURSS's motion for entry of a final judgment, and noted that the order formally disposed of all remaining

---

[1] Although Helix and Mr. Ivey added Transunion LLC to the caption of the first amended complaint and referred to Transunion in the fraud count, the parties later stipulated that Transunion was never properly added as a proper party defendant. (C. 2905 V2).

[2] None of the orders entered by Judge McGrath are at issue in this appeal. This Court is only asked to consider Judge Otto's orders granting summary judgment for TURSS and his order denying TURSS's motion to reconsider; and, the First District's opinion regarding the application of the new business rule to Helix's breach of contract claim. (*See* Helix's Opening Brief at 4).

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before the circuit court and the case was closed. (C. 2898 V2). Helix timely appealed on August 21, 2020. (C. 2900-01 V2).

The First District entered its opinion in this matter, *Ivey v. Transunion Rental Screening Solutions, Inc.*, 2021 IL App (1st) 200894, on October 18, 2021. (A.[3] 39-65). Helix attempted to file its petition for leave to appeal on November 22, 2021, but the petition was rejected by this Court for technical filing reasons. Helix then moved for leave to file its petition for leave to appeal *instanter*, which this Court allowed on November 29, 2021. On January 26, 2022, this Court granted the petition for leave to appeal. (A. 119). Therefore, this Court has jurisdiction to consider this appeal.

[3] The Appendix was filed along with Helix's opening brief in this matter.

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STATEMENT OF FACTS

I. Background.

A. The Parties and the Marketing Agreement.

Helix is a Colorado limited liability company that provides residential property management lease forms and related services to landlords and other property management companies. (C. 378-80 V1). Mr. Ivey, Helix's president and chief executive officer, is a former assistant vice president and property operations counsel of UDR, Inc., a publicly-traded real estate investment trust. (C. 381, 394 V1).

TURSS is a consumer credit screening company that provides screening services, including credit and criminal background check services, to landlords and property management professionals. (C. 378 V1; 1812 V2). To that end, TURSS developed and operated two internet services platforms: MySmartMove.com, a website directed at small portfolio landlords in need of tenant screening services; and CreditRetriever, TURSS's product directed to larger professional commercial customers. (C. 379 V1; 1812 V2).

During 2007, Mr. Ivey and Michael Britti, a principal at TURSS, began discussing a possible project involving the two. (C. 381 V1; *see* C. 2041 V2). Mr. Ivey intended to develop customizable lease forms available for purchase. (C. 1855 V2). At the time, there was only one meaningful electronic lease product available to landlords: a "one size fits all" lease that the National Apartment Association (NAA), a not-for-profit national trade organization, made available

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only to its dues-paying members. (C. 2014, 2163, 2179, 2205 V2). NAA was not in the business of selling leases; it offered them as a member resource. (C. 2014 V2). According to Mr. Ivey, the NAA leases were based on leasing documents developed by the Texas Apartment Association, and could not be changed without the permission of the Texas Apartment Association. (C. 1856 V2). Mr. Ivey also believed that the NAA forms included provisions mandating that landlords using the forms be members of related local, state, or national apartment associations; and, if they were not, that lack of membership would render the lease agreements unenforceable. (C. 1856 V2). The NAA leases were long and cumbersome; limited in number; expensive; and available on a lease platform with limited functionality and a lack of integration with other services. (C. 2205-06 V2).

Mr. Ivey sought to develop "unique" lease products with the specific intent to offer a product that differed from the NAA's lease in "a lot of ways." (C. 2204-07, 2378 V2). Mr. Ivey and Mr. Britti discussed the possibility of TURSS creating an electronic platform through which it could offer a database of Mr. Ivey's lease forms available, for a fee, to interested TURSS customers. (C. 381, 403 V1; *see also* C. 394; Opinion at ¶6). Mr. Ivey left his position with UDR in September 2008, purportedly to form Helix as the corporate entity for his lease documents business. (C. 398 V1; C. 1855 V2).

On November 24, 2008, TURSS sent Helix a letter of intent regarding a possible contract between the two entities. (C. 394-95 V1). According to the

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letter of intent – a non-binding agreement "pending completion of our definitive contract" – TURSS "anticipate[d] rolling out the initial phase of Helix' Products during the first quarter of 2009 (depending on development schedules and Helix's product availability)[.]" (C. 394 V1).

On March 5, 2009, Helix and TURSS entered into a written contract, identified as a "marketing agreement." The non-exclusive marketing agreement assigned a handful of obligations to 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. 1812 V2). During the five-year term of the marketing agreement, TURSS was entitled to receive 35 percent of "all collected revenue (excluding any taxes) generated from Subscribers' purchases of Helix's Services[.]" (C. 397 V1). Helix and TURSS would separately and jointly determine prices and revenue sharing for purchases by large owner TURSS customers. (C. 397 V1).

The marketing agreement emphasized that it created no obligations of exclusivity:

> 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[.]

(C. 397 V1). Similarly, TURSS was free to partner with other vendors to provide similar forms to TURSS customers. (C. 397 V1). The parties agreed that the

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written contract constituted their entire agreement, and "supersedes all previous agreements and understandings, whether oral or written, express or implied, with respect to the subject matter of this agreement," and that it could only be modified by a written agreement signed by the parties. (C. 407 V1) (emphasis omitted). The Marketing Agreement did not create any minimum sales guarantee, did not identify a date by which TURSS was required to begin offering Helix's forms on TURSS's platform, and did not include any penalty if TURSS did not offer the lease documents for sale. (C. 406-407 V1). The marketing agreement also included a specific limitation of liability, stating that "[i]n 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 . . . lost profits or revenue[.]" (C. 407 V1).

B. Project Delays.

Mr. Britti left TURSS during August, 2009. (C. 392 V1). His replacement, Mike Mauseth, remained in contact with Mr. Ivey about the project, and TURSS indicated that it would complete the platform by the end of the year. (C. 392 V1). However, the project experienced delays – a domino-effect of issues with TURSS's CreditRetriever and MySmartMove platforms, both of which were experiencing significant stability issues. (C. 1941, 1963 V2). TURSS agreed to amend the marketing agreement during March, 2010, extending the term of the

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contract another five years from the date TURSS offered the Helix documents for sale. (C. 393, 412 V1).

Despite TURSS's efforts, the delays continued over the course of the next several years. (C. 1813 V2). Meanwhile, Helix worked to develop its product and market it to other companies. (*See* C. 394). It signed contracts with SyndicIT (in November, 2010) and Sibylus, Inc., d/b/a Rentobo (in November, 2014). (C. 150 V1). Helix failed to sell any lease documents under either agreement. (C. 150 V1).

Meanwhile, TURSS's issues with its existing platforms continued, requiring the investment of extensive time and resources to make the necessary repairs. (C. 1960). Mr. Ivey contacted TURSS during October, 2014, and was told no TURSS employees who had worked on the project remained. (A 44).

II. This Litigation.

A. The Complaint, Motions to Dismiss, and Motions to Reconsider.

Helix filed its initial, four-count complaint against TURSS on July 20, 2015, alleging breach of contract, fraud, negligent misrepresentation, and promissory estoppel. (A. 45).[4] TURSS moved to dismiss, and the circuit court granted its motion as to the promissory estoppel and negligent misrepresentation claims. The circuit court also granted TURSS's motion to dismiss the breach of contract claim, finding that the claim was barred by a one-year limitations period

[4] As noted above, Mr. Ivey also alleged several claims against TURSS. However, because those claims are not at issue, they are not discussed.

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included in the marketing agreement. (A. 45). Helix filed a motion to reconsider the dismissal of the breach of contract and promissory estoppel claims, and – before the circuit court ruled on that motion – also filed its instant first amended complaint alleging breach of contract, fraud, and promissory estoppel. (A. 45). Notably, Helix did not replead those two counts for purposes of appeal. (A. 45). TURSS moved to dismiss the amended complaint; after briefing and argument, the circuit court denied Helix's motion and granted TURSS's motion to dismiss. (A. 46). Helix attempted to appeal, but the appeal was later dismissed for lack of jurisdiction. (A. 46).

On remand, Helix moved to reconsider the dismissal of the breach of contract claim and the promissory estoppel claim. (A. 46). The circuit court denied the motion to reconsider as to the promissory estoppel claim, but granted the motion to reconsider the dismissal of the breach of contract claim, allowing Helix to proceed with discovery and determine whether Helix could identify any damages. (A. 46-47).

B. Relevant Discovery and TURSS's Motion For Summary Judgment.

Pursuant to the circuit court's scheduling order, Helix disclosed two experts pursuant to Illinois Supreme Court Rule 213(f)(3): Paul Jay Cohen, an attorney with experience counseling landlords about property management and with developing standard leases and forms, including the NAA's members-only lease form (C. 1998-2015 V2); and Stan Smith, an economist (C. 2017-31 V2). Helix also identified Mr. Ivey as an expert who would testify about, among other

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things, the Helix leases and "how the Helix services were far superior than the HAA lease product." (C. 1996 V2).

Mr. Cohen opined that Helix's leases and forms were "far superior" to any "similar product on the market" and that there existed significant flaws in the other lease products on the market at the time TURSS and Helix signed the marketing agreement. (C. 2005, 2008 V2). According to Mr. Cohen, issues with the NAA leases were many, including the inability to customize, its reliance on Texas law, the lack of availability to anyone other than NAA members, the expenses of the leases, the length of the leases, the irrelevance of many of the lease provisions, and the difficult and cumbersome process required to change those leases. (C. 2008-09 V2). Mr. Cohen did not analyze or evaluate any specific information about actual lease sales made by Helix or any other company. Rather, Mr. Cohen opined that because Helix produced a superior product, and because of his estimate about the size of the available market for Helix's product, Helix's leases would have earned revenue of $102,936,075.00 over a five-year period. (C. 2015 V2).

Mr. Smith relied primarily on three things, gleaned from interviewing Mr. Ivey and reviewing Mr. Cohen's report: TURSS's projected revenue, something it provided Helix before the parties' entered into the marketing agreement; general market data about the number of available rental units annually; and data about NAA's lease sales and revenue over a nine-year period. (C. 2021-24 V2). Based on those assumptions, Mr. Smith opined that Helix lost revenue

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during the five-year contract term of $42,949,247.00; and lost revenue of between $120,530,266.00 and $145,586,154.00 over ten years. (C. 2030 V2). None of Mr. Smith's projections discuss any Helix sales or lease sales of any other businesses. Neither Mr. Smith nor Mr. Cohen acknowledged that the marketing agreement was non-exclusive and included no promise about minimum sales or pricing.

TURSS moved for summary judgment. It explained that because the anticipated profits of a new business are too uncertain, Illinois law typically precludes new businesses from claiming them. (C. 1817 V2). Helix responded in opposition, arguing that under an exception to the new business rule, Illinois courts allow new businesses to seek lost profits damages as long as the new business offers competent evidence providing a reasonable basis for the calculation. (C. 2049 V2). In reply (C. 2060-69 V2), TURSS acknowledged the reasonable basis exception, but added that it did not apply here, where neither Mr. Cohen nor Mr. Smith pointed to evidence of lost profits based on an analogous product, an analogous platform, or even an analogous consumer market. (C. 6064 V2). Moreover, TURSS reasoned, Helix failed to establish *any* profits: Helix attempted to sell the same lease product through different suppliers without any success. (C. 2063-64 V2).

After argument (R. 414-45), the circuit court agreed with TURSS (R. 441). It noted that Mr. Cohen and Mr. Smith attempted to compare Helix's product to the NAA leases – the leases Helix, Mr. Ivey, Mr. Cohen, and Mr. Smith all described as being significantly different from Helix's product and offered in a

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very different platform. (R. 442-43). Because Helix's leases were so different from the NAA leases, and because the NAA, itself – a not-for-profit offering sample leases to its members – was so different from Helix, the circuit court found the projections about lost profits were too speculative and, therefore, could not establish a rational basis for calculations of lost profits. (R. 441-45).

C. The First District's Opinion.[5]

Helix appealed. The First District affirmed, *Ivey*, 2021 IL App (1st) 200894, ¶ 3, over a dissent. The majority explained that to prevail in a breach of contract case, a plaintiff must identify actual or measurable damages – the amount necessary to put a non-breaching party into the position it would have been in, but for the breach. *Ivey*, 2021 IL App (1st) 200894, ¶ 39. Although those damages need not be established with *absolute* certainty, the majority reasoned, they must be proven with *reasonable* certainty and without resorting to speculation. *Ivey*, 2021 IL App (1st) 200894, ¶ 39.

That, the majority explained, can be difficult when the plaintiff is a new business. *Ivey*, 2021 IL App (1st) 200894, ¶ 40. If a business has no track record of its profits, it is difficult to demonstrate a likelihood of *future* profits. *Ivey*, 2021 IL App (1st) 200894, ¶ 40. The new business rule addresses that problem,

[5] The First District addressed three issues: the new business rule; whether Helix could proceed to trial on a nominal damages claim; and whether the circuit court properly dismissed Helix's fraud claim. Because Helix's petition for leave to appeal and opening brief discuss only the new business rule, the remaining two issues in the opinion are not discussed here.

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precluding a new business from speculating about its lost profits unless credible testimony, such as testimony about an established product in a comparable market, can be used to make a reasonable calculation of lost profits. *Ivey*, 2021 IL App (1st) 200894, ¶ 41; *see also* ¶¶ 42-44.

The majority determined that Helix failed to offer evidence that met the reasonable certainty standard. *Ivey*, 2021 IL App (1st) 200894, ¶ 46. The dissent (Walker, J.) interpreted the majority's opinion as creating a "restriction of the exception to the new business rule to proof of actual profits for effectively identical products." *Ivey*, 2021 IL App (1st) 200894, ¶ 84. The majority disagreed, emphasizing that the new business rule does not require a party to provide proof of actual profits for identical products. *Ivey*, 2021 IL App (1st) 200894, ¶ 49-56. But, the products need to be similar or comparable – a standard not met here. *Ivey*, 2021 IL App (1st) 200894, ¶ 49.

The dissent also pointed to *Perma Research & Development Co. v. Singer Co.*, 402 F. Supp. 881, 898 (S.D.N.Y. 1975), suggesting that it could properly rely on sales projections contemplated by the parties when they entered the contract as evidence of lost profits. *Ivey*, 2021 IL App (1st) 200894, ¶¶ 85, 86. The dissent added that, under *ASTech International, LLC v. Husick*, 676 F. Supp. 2d 389 (E.D. Pa. 2009), 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." *Ivey*, 2021 IL App (1st) 200894, ¶ 86.

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The majority reiterated that under Illinois precedent, there is no "flat prohibition" against allowing a new business to seek lost profits, but added that neither Helix nor TURSS relied on projected sales before agreeing to the marketing agreement. *Ivey*, 2021 IL App (1st) 200894, ¶¶ 55, 57. Moreover, the majority reiterated, Helix's experts relied on a comparison between Helix's new product and the NAA leases – products, the majority concluded, that even Helix's experts conceded were inherently not similar or comparable, sold through platforms that also "differ markedly." *Ivey*, 2021 IL App (1st) 200894, ¶¶ 46, 52. As a result, the majority found, Helix's experts' opinions were too speculative to satisfy the reasonable certainty exception to the new business rule. *Ivey*, 2021 IL App (1st) 200894, ¶¶ 45, 56. And, without evidence of lost profits, the majority determined, TURSS was entitled to summary judgment. *Ivey*, 2021 IL App (1st) 200894, ¶¶ 3, 40, 45.

Helix appeals.

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ARGUMENT

I. Introduction.

For decades, Illinois courts and federal courts interpreting Illinois law have consistently considered and applied the new business rule: the rule that expected profits of a new commercial business are usually too speculative and remote to be recoverable. Those same courts have also consistently applied an exception to the new business rule, allowing a claim to proceed where a plaintiff provides competent, convincing, and non-speculative proof of lost profits to a reasonable degree of certainty, from which a reasonable basis of computation is possible. In this case, both the circuit court and the appellate court majority applied that framework to Helix's evidence of lost profits. Both the circuit court and the appellate court majority found Helix failed to meet that reasonable degree of certainty standard, because Helix's experts relied on a comparison to an inherently different existing product, sold through an inherently different business, on an inherently different platform.

This appeal, then, is not premised on the majority's misunderstanding of the new business rule or the exception to the rule, or the way in which Illinois courts (including this Court) have consistently applied them. This is not a situation in which – as the dissent claimed – the First District improperly precluded a new business's lost profits claim because it could not offer proof of *actual* profits based on *identical* products. The First District did not refuse to

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consider Helix's expert testimony. The First District did not disregard the evidence Helix offered in support of its claims in favor of an inflexible doctrine.

This is also not a case in which Helix seeks resolution of a split of authorities among the appellate districts of this State in the application of the new business rule. Indeed, Helix acknowledges in its opening brief that no change in the law is necessary for this Court to rule in his favor. (Opening Brief at 27-33). Rather, Helix argues that both the circuit court and First District should have used a more lax evidentiary standard *in this specific case*, considering factors such as TURSS's size and resources, and allegations of wrongdoing, in evaluating Helix's lost profits calculation.

Fundamentally, Helix is advocating for a newly-expanded exception to the new business rule, one not consistent with the rule, its purpose, or the evidentiary standards on which it is based. As this Court has observed, lost profits are always difficult to recover. Expected profits of a new business are typically too uncertain and remote to be recoverable. An exception to that rule is made in cases in which a plaintiff provides convincing, *non-speculative* evidence sufficient to meet its burden of proving lost profits, such as apples-to-apples comparisons of a new product to existing products in an established market. But, even under that exception, a plaintiff still has the burden of proving its damages and, absent a reasonable degree of certainty based on competent proof, no exception to the new business rule is implicated. Any different result, or expansion of that decades-old standard, would impermissibly shift the burden of

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proof to a defendant, requiring that a defendant *disprove* a plaintiff's subjective belief about its product's anticipated value. The exception to the new business rule cannot be interpreted so broadly.

As both the circuit court and the First District majority correctly concluded, Helix failed to satisfy its burden. Helix failed to offer competent, non-speculative evidence establishing, to a reasonable degree of certainty, its anticipated lost profits. This Court should affirm the First District majority's application of the new business rule and its exception, and the circuit court's order granting TURSS summary judgment.

II. Standard Of Review.

This Court reviews cases involving summary judgment *de novo*. *In re Illinois Bell Telephone Link-Up II*, 2013 IL App (1st) 113349, ¶ 25; *Horwitz v. Holabird & Root*, 212 Ill. 2d 1, 8 (2004). Under 735 ILCS 5/2-1005, a defendant is entitled to summary judgment where "the pleadings, depositions, admissions and affidavits show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." 735 ILCS 5/2-1005; *see Martens v. MCL Const. Corp.*, 347 Ill. App. 3d 303, 312 (1st Dist. 2004). Importantly, summary judgment "should be encouraged as an aid in the expeditious disposition of a lawsuit[.]" 735 ILCS 5/2-1005; *see Brown & Brown v. Mudron*, 379 Ill. App. 3d 724, 727 (3d Dist. 2008). Here, the circuit court properly awarded summary judgment for TURSS, and the First District's majority correctly affirmed that ruling.

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III. Although Illinois Courts Recognize the New Business Rule, They Also Recognize Exceptions Under Which New Businesses May Recover Lost Profits Damages.

Helix's claim sounds, at its core, in contract: it alleges that TURSS breached the marketing agreement. In order to plead and prove that alleged breach of contract, Helix must show: (1) the existence of a valid and enforceable agreement; (2) that Helix fully performed; (3) that TURSS breached the contract; and (4) that Helix suffered damages as a result of that alleged breach. *See Babbitt Municipalities, Inc. v. Health Care Serv. Corp.*, 2016 IL App (1st) 152662, ¶ 27; *see also TAS Dist. Co., Inc. v. Cummins Engine Co., Inc.*, 491 F.3d 625, 631 (7th Cir. 2007). The fourth element – the question whether Helix can identify any recoverable damages – is the nub of the dispute in this case.

Any business's claimed lost profits are difficult, but not impossible, to calculate. For a new business, it is even harder to calculate lost profits because of the level of speculation involved. If a business has no past history of earnings, it is necessarily speculative to try to calculate prospective earnings or profits. But, as this Court, the Appellate Court, federal courts applying Illinois law, and the majority below have all concluded, it is entirely possible to make those calculations – as long as there exists a reasonable basis for the computation. Thus, where a new business without a history of profits seeks damages, the claim is barred by the "new business rule" – unless the new business can provide competent, non-speculative proof establishing its claimed damages with reasonable certainty.

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A. In Any Breach of Contract Case, a Plaintiff Must Identify Alleged Damages With Reasonable Certainty, With Evidence Not Based On Speculation Or Conjecture.

Damages, the Appellate Court has explained, "are an essential element of a breach of contract action and a claimant's failure to prove damages entitles the defendant to judgment as a matter of law." *In re Illinois Bell*, 2013 IL App (1st) 113349, ¶19. They are measured as "the amount of money necessary to place the plaintiff in a position as if the contract had been performed." *In re Illinois Bell*, 2013 IL App (1st) 113349, ¶ 19. However, a plaintiff is not entitled to damages which are not the natural and proximate result of a breach, and a plaintiff is not entitled to damages which would place it "in a better position, providing a windfall recovery." *In re Illinois Bell*, 2013 IL App (1st) 113349, ¶ 19. It is the plaintiff's burden to both prove damages and establish a reasonable basis for computing those damages. *See Kirkpatrick v. Strosberg*, 385 Ill. App. 3d 119, 130 (2d Dist. 2008). Although absolute certainty is not required, damages must "be proved with *reasonable certainty* and *cannot* be based on *conjecture* or *speculation*." *Id*. (emphasis added).

That rule has evolved from a more restrictive interpretation of the common law. In the distant past, businesses were only allowed to recover lost profits damages they could prove with "absolute certainty." *TAS Distributing Co.*, 491 F.3d at 631. No more. For decades, businesses have been allowed to recover lost profits they can prove with "reasonable" certainty. *Id*. at 632; *see Midland Hotel Corp. v. Reuben H. Donnelly Corp.*, 118 Ill. 2d 306, 315-16 (1987). As

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this Court reasoned, "[b]eing merely prospective, [lost] profits will, to some extent, be uncertain and incapable of calculation with mathematical precision." *Midland Hotel Corp.*, 118 Ill. 2d at 315-16; *see also TAS Distributing Co.*, 491 F.3d at 632 (observing that the "absolute certainty requirement was reformed some time ago to the less demanding requirement of reasonable certainty"). All jurisdictions in the United States have adopted that reasonable certainty standard. *TAS Distributing Co.*, 491 F.3d at 632.

However, this Court has emphasized, "recovery of lost profits cannot be based upon conjecture or sheer speculation. It is necessary that the evidence afford a reasonable basis for the computation of damages; the defendant's breach must be plainly traceable to specific damages," and "unless plaintiff can prove that the breach was the cause of lost profits, he is entitled to nominal damages only." *Midland Hotel Corp.*, 118 Ill. 2d at 316; *SK Hand Tool Corp. v. Dresser Indus.*, 284 Ill. App. 3d 417, 426 (1st Dist. 1996) (observing that "Illinois courts have long rejected the use of speculative, inaccurate or false projections of income in the valuation of a business"). This Court added: "[S]ince lost profits are frequently the result of several intersecting causes, it must be shown with a reasonable degree of certainty that defendant's breach caused a specific portion of the lost profits." *Midland Hotel Corp.*, 118 Ill. 2d at 316.

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B. The Evolution of the New Business Rule and Allowable Exceptions Under Illinois Law.

A corollary to that general lost profits rule – that an existing business cannot recover lost profits unless those lost profits can be proven with reasonable certainty – applies to new businesses. Traditionally, because a new business lacks the same record of profitable operations as an existing business, the law treated it as impossible to identify data on which to base a lost profits calculation. Thus, that corollary rule, known as the "new business rule," acted as a *per se* rule of exclusion, barring new businesses from recovering damages for lost profits. Recovery of anticipated lost profits of new business: post-1965 cases, 55 A.L.R. 4th 507, § 2.

Illinois courts have long applied the new business rule. *Milex Prods., Inc. v. Alra Labs., Inc.*, 237 Ill. App. 3d 177, 191 (2d Dist. 1992). "The long-standing rule in Illinois is that lost profits may be a measure of damages where a business is interrupted, but the business must *have been established prior to the interruption* so that the evidence of lost profits is not speculative." *Drs. Sellke & Conlon, Ltd. v. Twin Oaks Realty, Inc.*, 143 Ill. App. 3d 168, 174 (2d Dist. 1986) (citing *Rhodes v. Sigler*, 44 Ill. App. 3d 375, 379 (3d Dist. 1976)) (emphasis added). The First District has explained the rule similarly:

> Although the amount of an award of lost profits need not be proven with absolute certainty, the plaintiff bears the burden of proving such damages with reasonable certainty. Illinois courts have not hesitated to reverse damage awards based on false assumptions or data as speculative. As lost profits are frequently the result of several intersecting causes, the plaintiff must show

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> with reasonable certainty that the defendant's conduct caused a specific portion of the lost profits. Illinois courts will hold that an expert's opinion is based on speculation or conjecture when the expert fails to account for their party's actions or other significant factors.
>
> * * *
>
> Evidence of prior profits is not the *sine qua non* of proof of damages suffered by a business in all cases. Nevertheless, Illinois courts have long held as a general rule that while profits lost due to business interruption or tortious interference with a contract may be recovered, the business must have been established before the interruption so that the evidence of lost profits is not speculative. The reasons 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 (internal citations omitted); *see also TAS Distributing Co.*, 491 F.3d at 634 (noting that the "general rule under Illinois law is that a new business has no right to recover lost profits").

However, as the *SK Hand Tool Corp.* court succinctly observed, "there are exceptions to the general rule." 284 Ill. App. 3d at 427; *see also TAS Distributing Co.*, 491 F.3d at 633 (stating same). The key is finding a non-speculative means of comparison, such as to an existing product, existing market, existing business, or existing platform.

1. A Plaintiff May Be Able to Show Lost Profits By Pointing to Profits Earned By an Existing Business.

In *Rhodes v. Sigler*, 44 Ill. App. 3d 375 (3d Dist. 1976), the Third District recognized that a plaintiff could offer reasonable, not-unduly-speculative evidence of his anticipated farming profits by pointing to the profits earned by the individuals who farmed the same piece of land over the same growing

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season. Plaintiff sued for possession of farmland he intended to work during the 1974 growing season. Although the dispute continued longer than the season, eventually, the plaintiff prevailed. *Id*. at 376. After a bench trial, the circuit court awarded plaintiff damages, including lost profits. *Id*. at 376, 379. The Third District affirmed. *Id*. at 379. The court acknowledged that farming-related losses could be speculative, as they depended on the skill of the farmer, his experience, and his income from the previous year. *Id*. at 380. However, "mathematical certainty is not required to fix the amount of damages," and the crops grown by the defendants on the disputed land during the time of the unjust possession were valued by the circuit court." *Id*. Those profits were a sufficiently non-speculative way for the trial court to value plaintiff's lost profits: the evidence established that plaintiff was no worse a farmer than the defendants, and defendants' profits represented those which plaintiff likely would have earned during the period of wrongful possession. *Id*.

In *Fishman v. Estate of Wirtz*, 807 F.2d 520 (1986), the Seventh Circuit applied the same logic (using Illinois law) to a dispute brought by an unsuccessful bidder who attempted to purchase the Chicago Bulls basketball team. A consortium of investors led by plaintiff Fishman and identified as IBI initially secured an agreement to purchase the team. However, another consortium of investors led by Arthur Wirtz, the part owner of Chicago Stadium (the stadium in which the Bulls played), intervened, and agreed the lease Chicago Stadium to the Bulls only if the team sold to Wirtz's consortium, rather

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than IBI. 807 F.2d at 525-530. Eventually, the contract of sale to IBI was terminated, and the Wirtz consortium successfully purchased the team. *Id*. at 529. After years of litigation, IBI successfully sued for violations of state and federal antitrust law. *Id*. at 530. In evaluating the damages awarded by the district court, the Seventh Circuit emphasized the difficulties in calculating damages for lost profits involving a business IBI never owned. *Id*. at 550-52. However, the Seventh Circuit observed, the Chicago Bulls were a continuing business – albeit in a different owner's hands – and, therefore, the existence of that business gave the district court a sufficiently non-speculative way to calculate the profits IBI *would* have earned. *Id*.

In *Malatesta v. Leichter*, 186 Ill. App. 3d 602 (1st Dist. 1989), the First District applied the same logic in evaluating lost profit damages in another case involving tortious interference in an attempted purchase of an existing business. Plaintiff entered into an agreement for the purchase of Thompson Chevrolet, an automobile dealership in Villa Park, Illinois. *Id*. at 604. The contract fell apart and plaintiff sued for tortious interference. *Id*. at 604-13. Plaintiff offered, as evidence of damages, testimony from the owner of the Thompson dealership about his salary and the value of the business. *Id*. at 612-13. The jury sided with plaintiff and awarded him lost profits damages based on the evidence of the value of the dealership.

On appeal, defendant argued that because the dealership would have been a new business for plaintiff, the new business rule precluded any award of

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lost profits damages. *Id*. at 620-21. The First District acknowledged that "Illinois courts have generally found "the lost profits of a new business would be too speculative[.]" *Id*. at 621. But, the court observed, "the guiding rule that a new business' profits are too speculative to prove a plaintiff's damages to a reasonable certainty . . . does not fit our circumstances because the business here does not have the same uncertainties that are akin to a business which is not in existence at the time of, and does not continue after, the wrongful conduct." *Id*. Therefore, the First District concluded, evidence of profits of "a person other than plaintiff, who operated the same established business at the identical location for the period of time which plaintiff seeks damages, is not of such a speculative nature to require a finding that plaintiff's lost profits may not be proved to a reasonable certainty. " *Id.* at 622.

Each of those businesses – the farm, the basketball team, the automobile dealership – existed separately and independently of the new business each plaintiff sought to establish. Each of those businesses had quantifiable profits for the period of time at issue in the litigation. Therefore, although there would undoubtedly have been differences in the ways the new businesses would have operated, in the skill and successes of their owners, and the profits they would have earned, evidence of those earned profits constituted reasonable, non-speculative evidence establishing the new businesses' anticipated *lost* profits.

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2. A Plaintiff May Be Able to Prove Lost Profits By Pointing to Profits Earned By a Business Selling Comparable Goods Or Services.

The same controlling principles and logic used in cases involving the existing business exception has also been used repeatedly by this Court and the Appellate Court in cases involving evidence of comparable goods or services. "A recovery may be had for prospective profits when there are any criteria by which the probable profits can be estimated *with reasonable certainty*." *Tri-G, Inc. v. Burke, Bosselman & Weaver*, 222 Ill. 2d 218, 248 (2006) (emphasis added). No question, there cannot be mathematical precision when calculating something *prospectively*; but, a proponent of damages must still "approximate the claimed lost profits by competent evidence," evidence which "must with a fair degree of probability tend to establish a basis for the assessment of damages for lost profits." *Id*. Crucially, "recovery of lost profits *cannot be based upon conjecture or sheer speculation*. It is necessary that the evidence afford a reasonable basis for the computation of damages." *Id*. (internal citations and quotations omitted, emphasis added).

Tri-G is yet another useful example of this Court's instructions about the way in which those principles should be applied. *Tri-G* involved a trial of an underlying claim as part of a legal malpractice suit. 222 Ill. 2d 218, 227-28. Tri-G was a residential developer building homes in a development called Huntington Point, and obtained several construction loans from Elgin Federal. *Id.* at 226. Tri-G also contracted with a different construction company, CLG, to complete

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construction on several lots in Huntington Point. *Id*. at 228. Over the course of the project, Tri-G built and sold homes on eight lots, and CLG constructed and sold similar houses on similar lots in the same subdivision. *Id*. at 232, 249. Tri-G alleged that because of Elgin Federal's wrongful conduct, Tri-G lost profits on several other properties it expected to develop in Huntington Point. At trial, *CLG's* principal testified about *CLG's* profits on the homes it constructed and sold at Huntington Point. *Id*. at 249. That testimony, this Court concluded, could be used to calculate *Tri-G's* alleged lost profits, because the businesses, the lots, and the homes constructed were all comparable. *Id*. at 249-50. In other words, plaintiff offered an apples-to-apples comparison to establish its alleged lost profits: evidence of profits earned by an existing business that performed similar work, in the same location, selling to a similar pool of buyers, during roughly the same period of time.

That same logic prevailed in *Milex*, the case on which Helix relies heavily in its opening brief. There, plaintiff – an existing business that manufactured obstetrical and gynecological products – became interested in entering a new market, pharmaceuticals, marketing a generic version of the fertility drug Clomid. *Millex*, 237 Ill. App. 3d at 179. It entered into an exclusive contract with defendant Alra, a prescription drug manufacturer, to manufacture the generic drug. *Id*. at 180, 182. Alra developed the generic version and secured FDA approval for the product. *Id*. at 181. Alra reneged on the contract, though, when Milex refused to agree to Alra's demands to re-negotiate. *Id*. at 183-84.

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Milex sued for breach of contract, seeking lost profits as its damages. *Id*. at 179. A pharmaceutical consultant testified at trial for Milex. *Id*. at 184-85. He explained that two other generic versions of Clomid were introduced into the market at around the same time Milex sought to market *its* generic version; and used that as context for his discussion of the generic Clomid market, the total number of generic Clomid prescriptions written over the relevant period of time, the average size of a prescription, pricing, and several different ways in which the introduction of generics impact a market. *Id*. at 185. Milex's expert then used those concrete numbers from the existing market to calculate Milex's estimated lost profits. *Id*. at 184-85.

On appeal, the Second District explained that typically, new businesses cannot recover lost profits because they have no way of showing, without resorting to speculation, what those profits would have been. *Id*. at 191. However, the Second District observed, Milex's evidence was not speculative. *Id*. at 192. Rather, the Second District agreed with the circuit court's finding that the expert was credible and his opinions were based on specific facts and numbers involving identical, existing products in the marketplace. *Id*. at 192. Fundamentaly, "while the product [Milex's generic Clomid] is a new one, the evidence showed it to have an established market. Given the fact, together with [the expert'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." *Id*. at 193.

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In short, in both *Tri-G* and *Milex*, the new business plaintiff could point to an actual, comparable product in the marketplace, and specific evidence related to that comparable product – e.g., demand, market share, pricing, or profits earned – in order to prove the new business's lost profits. Neither court required that the new business plaintiff prove with absolute certainty the new business's lost profits. Rather, as the *Milex* court reasoned, the key is simply that a plaintiff must offer evidence of lost profits with a reasonable degree of certainty.

C. The Exception to the New Business Rule Does Not Apply to Unestablished Ventures Seeking to Sell Unestablished Products In an Unestablished Market.

Those exceptions are distinct from the usual application of the new business rule. It is one thing for a new business to introduce evidence of lost profits based on information about actual, existing products in established markets; or on profits earned by existing businesses. It is another issue entirely where a plaintiff seeks lost profits for a new company, without a track record of profit, attempting to sell a new and untested product to a new market. That is the type of speculative evidence the new business rule prohibits using as a basis for a lost profits calculation. If there is nothing tangible on which to base a calculation of lost profits – i.e., no similar product, or marketplace, or sales data offering concrete, real-world support for a plaintiff's calculations – a lost profits award would be impermissibly speculative.

The First District addressed that problem in *Meriturn Partners, LLC v. Banner and Witcoff, Ltd.*, 2015 IL App (1st) 131883. There, Meriturn, a private

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equity company, explored a possible investment in a company called Sustainable Solutions, Inc., which repurposed industrial waste into usable products. *Meriturn Partners*, 2015 IL App (1st) 131883, ¶ 4. Meriturn hired counsel to perform due diligence into the company and its existing patents, in advance of the investment and creation of new business entities using that technology. *Meriturn Partners*, 2015 IL App (1st) 131883, ¶ 5. The investigation indicated Sustainable Solutions owned the patents; the investment proceeded; and a new business entity was formed to take over Sustainable Solutions. *Meriturn Partners*, 2015 IL App (1st) 131883, ¶ 6. However, after the transaction was completed, the new company discovered that, in fact, Sustainable Solutions had *not* owned the patent, and Sustainable Solutions' owner had been engaged in double dealing and other misdeeds. *Meriturn Partners*, 2015 IL App (1st) 131883, ¶ 7. The new business faltered and lost a potential venture which, based on internal projections, would have resulted in multi-million dollars in royalties earned annually. *Meriturn Partners*, 2015 IL App (1st) 131883, ¶ 7. Plaintiffs sued for legal malpractice.

At trial, plaintiffs sought to argue two lost-profit theories. *Meriturn Partners*, 2015 IL App (1st) 131883, ¶ 17. One, the sales projection theory, was predicated on the idea that if Sustainable Solutions had owned the patent, plaintiffs would have profited from their investment. *Meriturn Partners*, 2015 IL App (1st) 131883, ¶¶ 17, 22. The circuit court barred Meriturn from proceeding on that theory *in limine*, and the appellate court affirmed, finding it barred by the

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new business rule. *Meriturn Partners*, 2015 IL App (1st) 131883, ¶ 23. After reiterating the general principles underlying the new business rule (i.e., that it "precludes expert speculation about possible lost profits where there is no historical data to demonstrate a likelihood of future profits"), the Second District explained that this case satisfied none of the exceptions to the rule:

> Plaintiffs contend that neither Meriturn nor Sustainable Solutions was a new business. That is true, but the venture for which they seek profits was a new business. The result plaintiff seek requires a number of assumptions to be made in their favor. In fact, the projections that plaintiffs claim support their right to lost profits are all future suppositions. They were possible. Not probable or reasonably certain. This case deals with an unestablished venture that sought to go to market with an unestablished product using an unestablished process.

Meriturn Partners, 2015 IL App (1st) 131883, ¶¶ 23-24.

TAS Distributing Co. speaks to the same issue: the difficulty of proving lost profits where the issue concerns a new venture, a new product, and a new process. "[A]s a general rule, expected profits of a new commercial business are considered too uncertain, specific and remote to permit recovery." *Id*. at 633. The same rule applies to established businesses seeking to add new product lines. *Id*.

In *TAS Distributing Co.*, plaintiff TAS designed, marketed, and licensed patented technology allowing a user to automatically start or stop an engine in certain circumstances. 491 F.3d at 627. Defendant Cummins manufactured two new products for use in trucks using TAS's technology, pursuant to a non-exclusive licensing agreement between the two companies. *Id*. at 627-28, 635.

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The products did not sell as well as TAS expected. *Id*. at 635. According to TAS, Cummins' primary competitor, DDC (with whom TAS also had a licensing agreement, and which sold a similar – but not identical - product), sold many more engines using various versions of TAS's technology. *Id*. at 636. It sued Cummins for failure to satisfy its contractual obligation to "make all reasonable efforts to market and sell" the products. *Id*. at 627.

The Seventh Circuit affirmed the district court's order granting summary judgment for Cummins. *Id*. at 636-38. The court explained:

> There is no evidence in the record, aside from TAS' assertions, suggesting that DDC's product sales provide a reasonable basis upon which to calculate damages. TAS submits that DDC is a chief competitor of Cummins, and, therefore, that DDC's sales numbers likewise should have been attained by Cummins. Merely stating that Cummins *should have* sold as many engines incorporating TAS technology as did DDC, without more, does not warrant reversal of the district court's judgment. There is nothing in the record tending to suggest that Cummins could have sold as many products as DDC; the record is devoid of information relating to DDC's precise role in the engine market. The record also does not contain facts, beyond unsupported contentions, tending to establish that DDC and Cummins are sufficiently comparable companies to warrant imputing DDC's engine sales to Cummins.

TAS Distributing Co., 491 F.3d at 636 (emphasis in original).

The Second District addressed the same situation in *Drs. Sellke & Conlon, Ltd.*, 143 Ill. App. 3d at 174. There, plaintiff – a professional corporation – sought damages for (among other things) lost profits arising out of a breach of a lease, all related to a landlord's allegedly improper conduct. *Id*. at 170-72. Plaintiff was attempting to open a new orthodontic office, but the landlord caused a variety of

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construction delays and refused to complete certain repairs to the space, delaying the opening of the office by several months. *Id*. at 171. Plaintiff sought to prove that it lost approximately 20 patients per month as a result of the delayed opening. *Id*. In support of that theory, plaintiff pointed to the average number of patients it acquired each month after the opening, and also offered testimony that the two months during which the delay occurred are peak months for acquiring new patients. *Id*. at 174. The circuit court found that evidence to be unreasonably speculative; the appellate court affirmed. *Id*. at 175. Although plaintiff offered evidence of profits realized *after* the tortious interference, that evidence was insufficient to establish alleged lost profits with a reasonable degree of certainty. *Id*. at 175. Plaintiff could only speculate about what its profits might have been, without any evidence to support that theory.

IV. Helix's Claim Is Barred By the New Business Rule.

All of those cases – cases decided by this Court, the Illinois Appellate Court, and federal courts interpreting Illinois law – use the same principles and general framework that has existed for decades. A party seeking lost profits damages has the burden of proving them with reasonable certainty, based on evidence that is neither speculative nor conjecture. A new business typically cannot recover lost profits, because it has no way to prove them beyond speculation. An exception exists where a new business can point to non-speculative evidence related to an actual, existing business; or a comparable product or market – something tangible on which to base lost profit calculations.

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That framework is logical and reasonable. It harmonizes otherwise competing policy goals, allowing a plaintiff the opportunity to plead and prove damages which cannot be proven with absolute certainty, while at the same time precluding a plaintiff from claiming damages based on conjecture or sheer speculation. It avoids shielding a defendant's misconduct from liability, without impermissibly shifting to a defendant the plaintiff's burden of proof about the value of its product or the likelihood it would succeed as a business. And, it is consistent with general principles of Illinois law outside of the context of the new business rule – that lost profits are only recoverable if a plaintiff proves the loss with reasonable certainty, and that a plaintiff must establish actual damages with competent proof in order to recover them.

With that in mind, the First District majority's well-reasoned decision should be affirmed. It correctly applied that established framework in this case, agreeing with the circuit court that Helix failed to offer any non-speculative evidence of lost profits. Rather, Helix argued its lost profits calculations based on an apples-to-oranges comparison of its new-to-the market, unique lease documents with only one other existing product: NAA's generic leases, which Helix repeatedly described as entirely different from, and inferior to, Helix's customizable product. Unlike Helix, the NAA was a not-for-profit company and offered access to sample leases as a benefit to its membership of large landlords. Helix, in contrast, was a new business attempting to sell its new product on a newly-created platform, directed at different, theoretically untapped market of

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smaller landlords – something Helix unsuccessfully attempted separately from its agreement with TURSS. Fundamentally, Helix failed to offer non-speculative evidence sufficient to prove lost profits with reasonable certainty. Helix's claim for lost profits was correctly barred. The First District's opinion, correctly interpreting the new business rule and the manner in which to apply it, should be affirmed.

A. The First District Correctly Interpreted the New Business Rule and the Exception to That Rule.

The new business rule is just that: a general rule. This case concerns an exception to that general rule. In order for a plaintiff to avoid the new business rule's general prohibition of a lost profits claim for a newly-formed business or product, the plaintiff must offer non-speculative proof of damages to a reasonable degree of certainty. Helix, and the dissent, seek to significantly broaden that exception – so much so that the exception truly would, as the cliché says, swallow the rule. Both suggest that it should be enough for a new business to offer an expert's suppositions about lost profits, premised on the expert's theories about a new product's potential in a newly-created market using a newly-created sales platform. Damages cannot be proven so casually.

The dissent turns on a single contention: the claim that "[n]o case supports the majority's restriction of the exception to the new business rule to proof of actual profits for effectively identical profits." *Ivey*, 2021 IL App (1st) 200894, ¶ 84. The majority identified no such limitation. To be sure, the majority

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discussed the same fundamentals discussed at length above: that the new business rule generally precludes lost profits claims; that there is an exception to that rule; and that the exception only applies where a plaintiff provides convincing, non-speculative evidence of lost profits. The majority did *not* conclude that a plaintiff *must* offer proof of actual profits for identical products. Rather, the majority emphasized that there must be some sort of concrete, non-speculative evidence on which to base a calculation of profits, such as a comparable business, or a comparable product, or even an existing market.

That makes sense, both in the context of this case and in terms of the broader precedent the majority set. There must be *tangible* evidence on which Helix's lost profits calculation was based, not speculation about what *might* happen if Helix's new product, created by a new business, successfully sold via a newly-created platform to a new market of consumers. It is not enough for an expert to suggest that Helix's leases would have been enormously successful because many people need leases and because many people viewed TURSS's website. There needs to be some sort of *comparable* product and *comparable* business on which to base a lost profits calculation, not just possibility and hope.

Although the dissent baldly dismisses the majority's well-reasoned view as unsupported by any case, it is actually the dissent that cites to no authority in support of its expansive view of what is actually a narrow exception to the new business rule. The dissent maintains that the majority's reasoning conflicts with both this Court's decision in *Schatz v. Abbott Labs., Inc.*, 51 Ill. 2d 143, 147-48

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(1972) and "the rule in most jurisdictions." *Ivey*, 2021 IL App (1st) 200894, ¶ 84. Not so. As the majority correctly observed, *id.* at ¶ 56, *Schatz* stands for the unremarkable and uncontested proposition that lost profits damages need not be proven with "absolute certainty," and it is enough that lost profits be "approximated by competent proof." 51 Ill. 2d at 148.

Schatz involved a previously-existing business with an established earnings history. It did not implicate the new business rule and, therefore, there was no need for this Court to evaluate the exception to the new business rule, either. Regardless, the logic of this Court's decision in *Schatz* belies the point the dissent attempted to make. In *Schatz*, the plaintiff movie theatre owners were not required to prove, with absolute certainty, lost profits resulting from decreased attendance caused by noxious odors and unpleasant conditions attributable to the defendant's nearby manufacturing facility. *Id*. at 144, 147-48. Rather, this Court concluded, plaintiff presented ample evidence – through gross receipts – of a decline in attendance and decreased admissions price resulting from defendant's conduct. *Id*. at 148. The gross receipts constituted tangible, non-speculative proof from which lost profits could extrapolated. Thus, this Court found, there existed a sufficient – concrete, non-speculative – basis on which to make an assessment of damages with a fair degree of probability. *Id*. at 148-49.

The point of *Schatz*, the dissent argued, was that a plaintiff can prove lost profits so long as there exists a rational basis on which to calculate those lost profits. *Ivey*, 2021 IL App (1st) 200894, ¶ 85. No one disputes that principle. But,

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as *Tri-G, Inc.*, *TAS Distributing*, *Milex*, *Drs. Sellke & Conlon*, *Midland Hotel*, *Meriturn Partners*, *Malatesta*, *Fishman*, *Rhodes*, and *SK Hand Tool* all observed, a plaintiff still must prove its alleged lost profits with evidence that is not speculative, based on a reasonable degree of certainty. That standard cannot be satisfied by an expert's assumptions about the potential of an untested product in a new market.

Helix maintains to this Court that the First District improperly found the only relevant inquiry involved whether "the NAA lease was substantially similar to the Helix lease" – proof of actual profits for identical products. (Opening Brief at 18-19). Like the dissent below, Helix maintains that the First District improperly treated the exceptions to the new business rule too narrowly, and points to cases from other jurisdictions purporting to support that theory (Opening Brief at 24-27) – but, like the dissent, the authorities cited by Helix stand for the unremarkable proposition that lost profits damages must be proven with reasonable certainty and tangible evidence. *See, e.g.*, *Vickers v. Wichita State University, Wichita*, 213 Kan. 614 (1974) (involving a breach of contract claim brought by a producer of televised Missouri Valley Conference college basketball games; the Supreme Court of Kansas found that the producer could use evidence of lost profits in connection with other televised conference basketball games to satisfy a reasonable certainty standard of proof); *Kaech v. Lewis County Pub. Utility Dist. No. 1*, 106 Wash.App. 260 (2001) (finding that an expert's testimony about a new dairy farm's lost profits, including evidence of actual milk

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production from the farm's heard, the value of that production on the market, and the way that production declined during the relevant time period, sufficient to prove lost profits, because it "was based on tangible evidence having a sufficient and substantial factual basis"); *Tilley v. Malvern Nat'l Bank*, 2017 Ark. 343 (2017) (formally overruling a nearly century-old, generally-not-followed precedent barring a new business from recovering lost profits in favor of a standard requiring a plaintiff to present a "reasonably complete set of figures to the jury and . . . not leav[ing] the jury to speculate as to whether there could have been any lost profits").

Helix advocates for an expansion of the exception to the new business rule that goes beyond one identified by any of those cases, or even that suggested by the dissent below. (Opening Brief at 28). According to Helix, this Court should accept nearly *any* claim of lost profits as sufficient, even one premised simply on the defendant's size and resources, allegations of wrongdoing, and the claim that the plaintiff was damaged "in at least some degree." (Opening brief at 28-29). Helix offers no authority in support of that view. That stands to reason. Lost profits damages are intended to compensate a plaintiff's proven lost profits. Lost profits damages are *not* available for the alleged misconduct of a defendant, or because a plaintiff is a smaller business than a defendant, or because the plaintiff has alleged wrongdoing. A plaintiff must *prove* those lost profits, just as a plaintiff must *prove* wrongdoing and causation.

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That was the majority's point below: a plaintiff must prove its damages, and Helix failed to do so here. That has consistently been the point of the Illinois courts and their federal counterparts considering the application of the new business rule and claims for lost profits. There must be some sort of concrete, tangible evidence on which to base a lost profits calculation – evidence related to a comparable, existing product; or a comparable, existing business; or an existing market into which a new product was introduced. That standard is appropriate and workable. It should remain the law of this State.

B. Helix Failed to Offer Non-Speculative Evidence of Lost Profits.

Not only did the First District correctly interpret the new business rule and the exception to the rule, the First District properly applied it in this case. Helix presented no non-speculative evidence in support of its lost profits claim. On the contrary, Helix offered evidence showing that it had created a new product, that it sought to introduce that new product to a new market, and that it expected TURSS to create a new platform for Helix's new product. Helix offered *no* evidence of a comparable product and an existing market, from which the circuit court could calculate Helix's lost profits. Therefore, both the circuit court and the First District correctly ruled that Helix was not entitled to seek lost profits damages.

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1. Helix Failed to Offer Evidence Of a Comparable Product.

To reach that conclusion, the best starting point is with Helix's claims. It argues that it is entitled to tens of millions of dollars of damages because TURSS failed to build a new platform through which Helix's newly-created lease documents could be offered to customers. Helix argues repeatedly that those lease documents were new and unique in the industry. Helix also repeatedly argues that the integration system it sought from TURSS was also going to be new and unique. And, Helix insists that the quality of its lease documents was so high, and the materials so useful, they could naught but sell in enormous numbers.

Helix was free to attempt to prove those claims, but it has the burden of doing so, with reasonable certainty, based on evidence that is not speculative. If it had evidence satisfying that standard, it might have avoided the application of the new business rule. Instead, Helix offered evidence from Mr. Ivey and two experts, most of which was premised on the idea that the Helix lease documents were simultaneously completely different and better than NAA's lease documents; but also so similar to make them an apples-to-apples comparison of products. (C. 2005-30 V2).

Helix cannot simultaneously claim that its product was "a different animal in a lot of ways" from NAA's leases; but simultaneously claim that the NAA product, and NAA, itself – a not-for-profit business that made its leases available only to its membership – were sufficiently comparable to prove Helix's

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lost profits in this case. That, ultimately, is the problem with Helix's case: it does not have non-speculative evidence proving its alleged profits with reasonable certainty, such that its case falls into an exception to the new business rule. That is why the First District emphasized those distinctions: "Helix's only comparison is to the NAA lease, a product Helix acknowledges is vastly different." (A. 52).

Apparently recognizing that the lease documents *are* fundamentally different and not compatible in a way recognized by any court interpreting Illinois law, Helix instead argues that it should not be required to submit evidence of profits from a substantially similar business. (Opening Brief at 28). Instead, Helix maintains, it was enough that it presented "authoritative market data" (Opening Brief at 28) – apparently, the analysis its experts provided speculating about the number of lease documents TURSS might have sold based on website traffic and estimated need. None of that speaks to the fundamental problem that Helix has *no data supporting its claim that its lease documents would sell*. On the contrary, the evidence of record established that Helix attempted to sell its lease documents through two other partnerships *without making a single sale*. This is not a situation in which there exist questions about whether Helix would have sold as many lease documents as it claims; rather, this is a situation where the evidence showed Helix sold none at all.

This case is analogous to *TAS Distributing* and *Meriturn Partners*. Helix is a new business with no history of profits, attempting to sell a new product using a new platform. It makes no difference that there might exist a similar product

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(as in *TAS Distributing*), or that a different company may have sold a similar product in the past (as in *Meriturn Partners*). Nothing about that sales data speaks to the specific profits this *particular* product might have earned, because Helix believes there existed a market for some sort of customizable lease documents.

2. Helix Failed to Offer Evidence Of an Existing Market.

Helix also argues that it evidence of the parties' projections about possible sales should be deemed sufficient. Helix and the dissent incorrectly suggested it would be appropriate to use TURSS's "own projections to estimate the likely loss Helix suffered due to [TURSS's][6] failure to provide the promised platform for Helix's lease sales" – are incorrect. *TAS Distributing* addressed the problem with that view. There, as here, the contract at issue included an integration clause in the contract, barring the introduction of pre-contractual projections. 491 F.3d at 636. Therefore, pre-contractual sales projections during negotiations "cannot be considered proof of damages," because it is excluded under the four corners rule. *Id*. Further, those pre-contractual sales projections cannot, as Helix argues, create a material issue of fact regarding whether it can establish its lost profits damages with reasonable certainty.

[6] The dissent repeatedly identifies TURSS as Transunion. 2021 IL App (1st) 200894, ¶¶87, 88, 89. As noted above, Transunion was not a party to the appeal and was never properly made a party to this litigation.

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In short, nothing in the expert reports or the evidence submitted below is sufficient to avoid the new business rule's prohibitions. This is not a case that falls into a recognized exception to the rule: Helix's leases are not comparable to the NAA's lease documents, and there is nothing about Helix's alleged damages that could be established through evidence of profits of another existing business. Rather, this is exactly the type of claim the new business rule exists to preclude. Helix has no historical data demonstrating a likelihood of future profits, and Helix cannot offer a reasonable basis for computing its alleged damages without resorting to speculation or conjecture. To allow Helix lost profits based on such speculative data would reward it – and any business making a similar claim in the future – with a windfall, despite having no reasonable evidence in support of its claim. The First District correctly described, and then applied, the new business rule. This Court should affirm that decision.

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CONCLUSION

For all these reasons, Defendant-Appellee TRANSUNION RENTAL SCREENING SOLUTIONS, INC. asks that this Court affirm the rulings of the circuit court and the Illinois Appellate Court First Judicial District in favor of TURSS and against Plaintiff-Appellant Helix Strategies, LLC.

Respectfully Submitted,

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Dated : June 10, 2022.

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CERTIFICATE OF COMPLIANCE WITH RULE 341

I, Catherine Basque Weiler, certify that this Response Brief conforms to the set forth in Illinois Supreme Court Rule 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) table of contents and 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 is 12,533 words.

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