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

# PETITIONERS-APPELLANTS' REPLY BRIEF

**ORAL ARGUMENT REQUESTED**

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## INTRODUCTION

Appellant Helix Strategies, LLC ("Helix"") appealed the granting of summary judgment by the Circuit Court (affirmed by the Court of Appeal, First District) dismissing Helix's claim for breach of contract on the basis of the New Business Rule. Helix's Opening Brief argued that the lower courts erred when they applied the New Business Rule to Helix's claim for lost profit damages because Helix submitted evidence that established its lost profits with a reasonable degree of certainty, including expert testimony relying on market data from authoritative sources and evidence of profits from a comparable product. Helix also argued that the application of the New Business Rule did not fit the circumstances of the case for a variety of reasons. Helix reasoned that the Circuit Court and Court of Appeal erred in applying the New Business Rule by failing to consider the testimony of Helix's experts and the manner in which its lost profits were calculated. In furtherance of its arguments, Helix pointed to authority from Illinois and other jurisdictions that has allowed evidence of lost profits damages, including where lost profits were based solely on expert testimony calculations using market data.

The Response Brief by Appellee Transunion Rental Screening Solutions, Inc. ("TURSS") essentially argues that exceptions to the New Business Rule should be limited to situations where: (1) a plaintiff points to profits earned by an existing business; or (2) a plaintiff points to profits earned by a business selling comparable goods or services. However, there is no limitation in Illinois law that Helix's evidence of lost profits must fit within the narrow confines of these two fact patterns.

Furthermore, even if there was a requirement that a plaintiff present evidence of profits from a comparable business, Helix has done that in this case by presenting

evidence of the profits of the National Apartment Association ("NAA") lease product. TURSS's Response Brief focuses on the differences between the Helix lease product and the NAA lease product and ignores the evidence submitted by Helix that the NAA lease and the Helix lease functioned essentially the same way, particularly given that residential leases are heavily regulated legal instruments. At the very least, Helix's argument underscores that there are triable issues of fact regarding its damages that are sufficient to overcome summary judgment, including the dispute regarding the comparability of the Helix lease and the NAA lease.

TURSS's claim that there was no market for the Helix leases is also without merit. Multiple factors support a finding that the Helix lease had a market, and, that if TURSS had not intentionally breached the contract and had made the Helix lease product available to its large number of landlord customers, the product would have sold and been successful. These factors include Helix's evidence regarding the large number of companies who ultimately entered the market of selling electronic leases, the NAA's substantial profits from selling the only known comparable lease product at the time the Marketing Agreement was executed, TURSS's name recognition, and the fact that TURSS had a built-in customer base because it had a substantial number of landlord customers buying its credit screening product. These same TURSS landlord customers would have only needed to add the lease product to their purchase while they were ordering TURSS' tenant screening.

In sum, Helix has at least submitted enough reliable evidence of its lost profit damages to create a triable issue of fact regarding whether it can prove its lost profit damages with a reasonable degree of certainty. This evidence should have been

sufficient to overcome TURSS's motion for summary judgment brought as to Helix's claim for breach of contract damages. Accordingly, the ruling of the Circuit Court and the Court of Appeal with respect to Helix's breach of contract claim should be reversed and this Court should find that there is at least a triable issue of fact whether Helix has established its lost profits damages with a reasonable degree of certainty.

## ARGUMENT

### I. HELIX IS NOT REQUIRED TO POINT TO PROFITS EARNED BY A COMPARABLE BUSINESS TO PROVE ITS LOST PROFITS

The crux of TURSS's Response is that lost profit damages of a new business should be limited to where: (1) a plaintiff points to profits earned by an existing business; or (2) a plaintiff points to profits earned by a business selling comparable goods or services. (*See* Response, p. 34) As set forth below, existing Illinois law does not warrant such a limitation and should not mandate such a limitation going forward.

Helix does not dispute that the majority of the reported Illinois decisions applying the exception to the New Business Rule involve the two fact patterns TURSS identified. However, one reported decision that does not fit within these fact patterns or TURSS' analysis is *Milex Products, Inc. v. Alra Laboratories*, Inc., 237 Ill. App. 3d 177 (1992). In TURSS's attempt to fit the *Milex* decision into the only two exceptions TURSS argues exist to the New Business Rule, TURSS claims that in *Milex* "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." (Response, p. 29) However, a plain reading of *Milex* demonstrates that TURSS's assertion regarding *Milex* is not accurate and the Milex court made a broader assessment

of the relevant evidence. There was no actual sales data from "identical, existing products" in *Milex*. The data regarding other products in *Milex* were from audits using representative samples and market research. *Id.* at 185. Nor was there any statement by the Court in *Milex* that the products from which the data was derived were or needed to be "identical." Indeed, the opposite is true – the *Milex* court made a more wholistic assessment of the factors involved, and Milex's expert even relied on data from *entirely different drugs* than the one at issue in Milex to calculate the actual lost profits. *Id.*

There is simply nothing in Illinois law that limits the exceptions to the New Business Rule to the two types of situations argued by TURSS. As Helix established in its Opening Brief, whether or not a new business plaintiff can prove its lost profit damages to a reasonable degree of certainty is and should be determined by the circumstances of the case.

The core precepts of several of the cases TURSS relies on support looking at all the circumstances of the case to determine whether lost profits of a new business can be shown with reasonable certainty, not establishing de-facto "per se" rules. For instance, in *Malatesta v. Leichter*, 186 Ill. App. 3d 602 (1989), where the plaintiff was prevented from acquiring an existing business, the Court, in reaching its conclusion that lost profits could be proven with reasonably certainty, stated it did not apply the New Business Rule because it "[did] not fit our circumstances…." *See id.* at 621. In *Rhodes v. Sigler*, 44 Ill. App. 3d 375 (1976), the plaintiff-tenant sought lost-profit damages for the period of time that defendant unjustly withheld possession of farmland from him. In ruling that the plaintiff had established his lost profits with reasonable certainty, the Court considered the factors of the "advances in modern farming and the fact that the crops there were in

fact grown by the defendants during the period damages were sought." *See id.* at 380. These factors or circumstances are similar to circumstances that are present here, as discussed *infra*.

The Illinois decisions involving the New Business Rule illustrate that every case is different, and it is necessary to analyze the particular facts and circumstances of the case to determine whether or not there is sufficient evidence to establish the lost profits of a new business venture with reasonable certainty. This analysis should include analyzing expert calculations based on market data, as proffered here by Helix. This is consistent with The Restatement Second of Contracts, section 352, comment b, which 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." In its Response, TURSS appears to acknowledge this fact, where it states that "[i]f 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***." (Response, p. 19) (emphasis added)

TURSS claims in its Response that its interpretation of how the New Business Rule should function (only allowing two scenarios to overcome the New Business Rule) "avoids shielding a defendant's misconduct from liability." (Response, p. 35) Helix disagrees. Under TURSS's interpretation and narrow fact pattern exceptions, a defendant would be shielded from liability where a plaintiff was not purchasing an existing business

or was not entering an established market and thus was not able to point to available income data from a similar business. The result would be that every business contracting with a new business or for a new product would be able to intentionally breach (as TURSS did here [C. 143, 145, 223-24]) and escape any liability for lost profit damages. Illinois law on lost profit damages and the reasonable certainty standard is not and should not be so restrictive.

Notably, Helix isn't asking this Court to adopt a blanket rule that expert calculations based on market data are always reliable. Rather, Helix is merely asking this Court to uphold prior decisions stating that a new business venture may be awarded its lost profits where the circumstances warrant, and that admissible projections offered by qualified experts *may* be based on reliable market data. Given the substantial amount of factual evidence presented by Helix in support of its claim to lost profit damages, the summary judgment in TURSS's favor should be reversed.

## II. HELIX OFFERED EVIDENCE OF AN EXISTING MARKET FOR ITS PRODUCT.

TURSS claims that Helix can't prove its lost profits because the electronic lease product market is a "new market" and that there is no "marketplace" for the Helix leases. (Response, p. 30, 44) This claim has no merit for several reasons. First and foremost, the market for leases in general is not new. Every landlord needs a lease. (C2155 V2) TURSS tries to turn the inquiry of whether there was evidence of a "market" for the Helix leases into whether or not there is evidence of a market for Helix's specific lease. (Response, p. 30, 44) This argument is essentially arguing that Helix needs evidence of a demand for an identical product, placing a limitation on the exception to the New

Business Rule that, as argued *supra*, does not exist. When looking at the market or demand for the Helix product, Helix's experts properly analyzed the market for residential leases in general and electronic leases. (C2163 V2) Again, every landlord needs lease. (C2155 V2)

Second, the electronic lease market wasn't "new" when the Marketing Agreement was executed. The NAA had been selling an electronic lease product for years. (C2156 V2) TURSS claims in its response that "[u]nlike Helix, the NAA was a not-for-profit company and offered access to sample leases as a benefit to its membership of large landlords." (Response, p. 35) This statement is not accurate. While the NAA was a not-for-profit company, the NAA made its leases available for a substantial profit. (C2162 V2) Indeed, the NAA made over $10,000,000 from selling its leases in 2017. (C2162 V2)

Even if the electronic lease market was relatively new when the Marketing Agreement was signed in 2009, it was not a "new" market during the 5-year term the lease product would have been sold. As Helix's expert, Mr. Cohen's opinion states, which was authored in 2020, there are now seventeen companies selling electronic leases, including well-known names in the real estate industry like Zillow. (C2163 V2) Rather than go to the local lawyer to draft up a lease, landlords now buy electronic leases online. Even if the electronic lease market was small (or non-existing as TURSS claims) at the time TURSS executed the Marketing Agreement with Helix, this market quickly grew during the five-year timeframe of the Marketing Agreement. (*See id.*) Therefore, history shows that there was a market for electronic lease products such as Helix's.

Furthermore, the fact that only one major entity, the NAA, was selling electronic

leases at the time the Marketing Agreement was executed is evidence that supports Helix's claimed lost profits, rather than preventing Helix from recovering. Being the second to market an electronic lease product, when there is a strong demand for such a product and with the backing of a well-known name like Transunion, is certainly better than being 18th to market. This is consistent with Paul Cohen's detailed opinion that there was a strong market for Helix's lease product. (C2154-2156 V2)

Accordingly, Helix has submitted substantial evidence of a market for its lease product.

## III. HELIX OFFERED EVIDENCE OF LOST PROFITS FOR COMPARABLE PRODUCT

As set forth above, Helix maintains that it is not necessary to show evidence of profits of a comparable business or product to prove its lost profit damages with reasonable certainty. Nonetheless, Helix has submitted evidence of income from a comparable product by submitting actual income information for the NAA lease. (C2162 V2) TURSS claims that Helix cannot look to the large amount of income the NAA was making with its electronic lease product because the Helix lease and the NAA lease are an "apples to oranges" comparison rather than an "apples to apples" comparison. This simply isn't supported by the evidence. Helix's founder, Roger Ivey, based on his experience on the NAA lease committee, testified that his product was designed to eliminate the complaints he heard about the NAA lease, and that the differences in the Helix lease were all *improvements* over the NAA lease while Ivey was on the NAA lease committee. (C1078-79) Therefore, Ivey and Helix's expert, Paul Cohen, opined that the Helix product was a better product than the NAA lease. (*See id.*;

C2157-58 V2)

TURSS does focus on the evidence of how Helix tried to improve upon the NAA lease with its lease product. (Response, p. 35) However, TURSS ignores that the evidence also shows that the Helix lease and NAA lease functioned substantially similar. This is because residential leasing is heavily governed by state and federal statutes and by common law. Thus, the basic purpose, function and effect of all leases, and particularly all reasonably well drafted leases, are the same. (C2215 V2) Because of the requirements that apply to all leases, Helix's founder, Ivey, also testified how virtually every lease provides for similar terms, such as: 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 these same functions common to every residential lease. (C2216 V2)

Therefore, comparing the Helix lease to the NAA lease is far from an "apples to oranges" comparison, as TURSS claims. Significantly, TURSS does not challenge Helix's evidence that the Helix lease is a superior product to the NAA lease. In fact, TURSS fails to offer any evidence to contradict Helix's evidence that its lease product was superior to the NAA lease. TURSS also does not claim that the changes Helix made to its lease product would make it any less marketable to landlords than the NAA lease. Rather, TURSS simply states that because the Helix lease product isn't identical to the NAA lease product that Helix shouldn't be able to recover any lost profit damages. The reasonable certainty standard does not support such a rigid application of the New Business Rule.

## IV. HELIX'S OFFERED SUFFICIENT EVIDENCE OF LOST PROFITS TO WITHSTAND SUMMARY JUDGMENT.

As laid out in detail in the Opening Brief, Helix offered substantial evidence of its lost profits. (Opening Brief, pp. 29-32) TURSS's Response offers little to challenge Helix's evidence of lost profits.

With respect to Paul Cohen's report, TURSS offers no reason Mr. Cohen is not qualified to make estimations based on the market data he used for his opinion. The Response claims that "Mr. Cohen did not analyze or evaluate any specific information about actual lease sales made by Helix or any other company." (Response, p. 11) However, Mr. Cohen did evaluate income data from the NAA lease. (C2162 V2). Mr. Cohen's opinion also offered statements regarding the profitability of another company selling electronic residential leases, specifically that another company without the name recognition or web traffic of TURSS was generating $2,000,000 a year in revenue selling electronic leases. (C2161 V2)

TURSS also indirectly challenges Mr. Cohen's report (which calculates lost profits, in part, by looking at the vast traffic to TURSS's website for its screening product) by claiming that calculating lost profits based on web traffic is "speculating." (Response, p. 43) However, TURSS offers no explanation why Mr. Cohen's analysis is speculative. Again, TURSS claims that without data from a comparable product that the report must be based on speculation. As set forth above, lost profit damages may be established with reasonable certainty with the aid of expert testimony, economic and financial data, and market surveys and analyses, and the exceptions to the New Business Rule are not and should not be limited to two unique situations.

As in *Milex*, a damages estimate requires some estimation and projections. *Milex*, at 184-5, 193. Mr. Cohen relied upon 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 also used industry standard conversion rates to estimate Helix's damages. (C. 2159-60 V2) TURSS doesn't challenge the authoritativeness of this market data. Cohen also supports his opinion regarding the market for electronic leases by identifying the large increase in providers of electronic leases since the Helix services should have been made available by TURSS. (C. 2163 V2)

TURSS's brief challenge to the opinion of Helix's second expert, Dr. Stan Smith, also does not warrant a finding that Dr. Smith's calculation of lost profit damages can't be used to establish Helix's lost profit damages with reasonable certainty. TURSS claims that Dr. Smith's report is not reliable because it relies, in part, on the sales projections prepared by TURSS. The five-year profit projection at issue was done by TURSS head, Michael Britti, and Transunion analysts. (C252-254, 264-270) It estimates profits to Helix of over $23,000,000 from sales to SmartMove customers alone. (*See id.*) These projections were created by TURSS itself using market data. (*See id.*)

Relying on the Seventh's Circuit's opinion in *TAS Distrib. Co. v. Cummins Engine Co.*, 491 F.3d 625, 633 (7th Cir. 2007), TURSS claims that its own 5-year profit projection cannot be used as evidence of Helix's lost profit damages. However, the decision in *Cummins Engine Co.* is distinguishable. Unlike here, the defendant in *Cummins* made the plaintiff's product available, but the plaintiff claimed that it wasn't selling as much as it should because the defendant wasn't using "reasonable efforts."

The plaintiff in *Cummins* argued that the forecasts in that case created the expectation of what the business would have done with "best efforts," and "urge[d] that Cummins should be bound by the sales projections it forwarded during negotiations," implying an obligation beyond the express terms of the contract. Given that it was a "best efforts," the plaintiff's theory of the case in Cummins was essentially that if the defendant tried a "little harder" the product would have sold "more."

Here, unlike in *Cummins*, Helix does not argue that TURSS is "bound" by the five-year income projection done by TURSS, that the five-year projection created any obligation under the Marketing Agreement, or that the five-year projection is part of the Agreement. Helix merely offers the 5-year projection as another piece of evidence of Helix's lost profits damages, and therefore its introduction does not violate the merger clause.

Significantly, TURSS does not challenge the manner in which Dr. Smith calculates the lost profit damages. 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. (C2178 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. (C2178 V2) TURSS never claims that these numbers are speculative or that they are unreliable. (C2178 V2)

As set forth in Helix's Opening Brief, neither the District Court nor the Court of Appeal majority did any analysis of the manner in which Helix's lost profits damages are calculated. This is likely because other than a blanket accusation of "speculation," TURSS's arguments do not actually challenge the methods used to calculate Helix's lost

profits. As set forth above, there is sufficient evidence of Helix's lost profit damages to warrant reversal of the lower court ruling on Helix's breach of contract claim.

## V. THE TOTALITY OF THE CIRCUMSTANCES WARRANTS REVERSAL OF THE SUMMARY JUDGMENT AS TO THE BREACH OF CONTRACT CLAIM.

As set forth above, there is substantial evidence to calculate Helix's lost profits. In addition to the calculations based on market data, additional facts and circumstances warrant a finding that there is a triable issue of fact regarding whether or not Helix's lost profits can be proven with reasonable certainty. TURSS argues other factors as well. TURSS implies that Helix's damages are undermined by the fact that the Marketing Agreement was non-exclusive. (Response, p. 12) However, just because the Marketing Agreement was not exclusive does not mean that Helix has no damages as a result of TURSS's breach. TURSS cannot escape liability for its breach by claiming that Helix could have contracted with someone else to do it. If so, every defendant that breached a contract could escape liability unless a contract was exclusive. There is no law to support this argument. Nor can TURSS escape liability because Helix couldn't sell its leases through another entity. There is no evidence Helix contracted with anyone else to sell the Helix leases with the name recognition and built-in customer base of TURSS.

A significant circumstance that supports a finding that Helix and TURSS's venture would have been successful is that TURSS already had a large number of landlords using its tenant screening product. (C2158 V2) Therefore, had TURSS made the Helix leases available to its customers, it would have been as an "add on" product. It also would have had the backing and name recognition of Transunion, the large credit

reporting company.

Helix, citing to authority from outside the jurisdiction, also argued in its Opening Brief that TURSS's wrongdoing should be a factor in determining whether or not Helix can proceed with its lost profit claim. TURSS responds that a plaintiff must prove its lost profits. (Response, p. 40) Helix acknowledges it must prove its lost profits and is not claiming that Helix should obtain its claimed damages just because of TURSS's wrongdoing. However, it cannot be ignored that the reason we don't know exactly how much Helix would have made under the Marketing Agreement if TURSS had made the Helix leases available is because TURSS chose to focus on its own priorities and to not make the Helix leases available. (C153, 145, 223-224) In other words, TURSS's breach put Helix in the untenable position of having to calculate what would have occurred if had TURSS honored its contractual obligation and performed. To the extent that a plaintiff may otherwise fall just short of what is necessary to prove its damages with reasonable certainty, there is no reason a court should not consider the wrongdoing of the defendant and how the breach of the agreement is the reason we don't know exactly what Helix would have made in connection with the Marketing Agreement.

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## CONCLUSION

Wherefore, for the foregoing reasons, Appellant requests that this Court 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 and that they are not barred by the New Business Rule.

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 4,078 words.

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**NOTICE OF FILING AND PROOF OF SERVICE**

I, Toni Gesin, a non-attorney on oath, hereby certify that on July 26, 2022, I electronically filed the attached **PETITIONERS-APPELLANTS' REPLY BRIEF** with the Supreme Court of Illinois by using the Odyssey eFileIL system.

I further certify that on July 26, 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.

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I further certify that once a file-stamped version of the foregoing **PETITIONERS-APPELLANTS' REPLY BRIEF** 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:

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