CIVIL ACTION NO. [redacted] **JEFFERSON CIRCUIT COURT**
DIVISION TWO (2)
JUDGE [redacted]

FILED ELECTRONICALLY

[redacted] INC. D/B/A [redacted] INC. OF KENTUCKY PLAINTIFF

v.

[redacted] et al. DEFENDANTS

DEFENDANTS' MEMORANDUM IN SUPPORT OF THEIR MOTION TO EXCLUDE THE TESTIMONY OF PLAINTIFF'S DAMAGES EXPERT, [redacted]

The Defendants, [redacted] ("[redacted] [redacted] ("[redacted]"), [redacted] ("Mr. [redacted] and [redacted] ("Mr. [redacted] by and through counsel, for their memorandum in support of their motion to exclude the testimony of Plaintiff's damages expert, [redacted], state as follows:

INTRODUCTION

The opinions of Mr. [redacted] about the value of [redacted] have so little connection to reliable, relevant facts and are otherwise so thoroughly flawed as to render Mr. [redacted] opinions inadmissible. Defendants do not challenge Mr. [redacted] competence to do business valuations. However, here he just rubber-stamped [redacted] own projections. His work in this case involved no expertise; Mr. [redacted] merely plugged unreliable [redacted] supplied numbers into a preset formula. Proper exercise of the Court's gatekeeping function requires exclusion of this expert's testimony under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) and its progeny.[1]

[1] Copies of the non-Kentucky authorities cited in this brief will be filed simultaneously with this brief or shortly thereafter.

MR [redacted] METHODOLOGY AND TESTIMONY

The [redacted] Expert Witness disclosures, which purported to comply with the Court's Order entered October 7, 2015,[2] contain two undated and unsigned spreadsheets[3] (attached hereto as Exhibit 1) prepared by [redacted] expert witness [redacted] Even though there is no evidence that [redacted] made a profit in any one year of its existence and even though [redacted] history shows total losses in excess of $20 Million, these spreadsheets (hereafter the "[redacted] Valuations") purport to use a discounted cash flow analysis to arrive at an "enterprise value" of [redacted] of between $34,893,251 (Bates No. [redacted] D-00277) and $44,876,364 (Bates No. [redacted] D-00279).[41] The [redacted] 5-year cash flow was determined from the "Operating Profit" shown on a 5-year projection obtained (by the Defendants) from the records produced by Mr. [redacted] in his litigation with [redacted][5] These projections (hereafter the "Anonymous Projections") are attached hereto as Exhibit 2. Taking each year's "Operating Profit" from the Anonymous Projections, Mr. [redacted] subtracted hypothetical income taxes of 40% per year and added back the depreciation for each year (as shown in the Anonymous Projections) to arrive at the projected [redacted] annual cash flow.

Mr. [redacted] has testified that he did not prepare the Anonymous Projections, that he does not know who did, but that they were probably prepared before the [redacted] factory closed (in 2006). Excerpts from Mr. [redacted] deposition testimony in this regard are attached hereto as

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[2] Which required [redacted] to: "(i) Provide complete and meaningful answers to all the defendants' discovery requests regarding damages within twenty (20) days; and (ii) Identify any expert witness on the issue of damages within twenty (20) days and state the substance and facts of the opinions to which any expert is expected to testify and provide summary grounds for each such opinion."

[3] Bates No. [redacted] D-00277 through [redacted] D-00280.

[4] Depending on what assumptions are made about the "specific company risk premium" component of the overall discount rate used by Mr. [redacted]

[5] Bates No. [redacted]-00127-128.

Exhibit 3. (Vol. 1, pp. 136-140.) Mr. [redacted] has also sworn, in the [redacted] Associates case in this very Court, in answer to that plaintiff's discovery that:

> The company [Acme] is unable to determine costs of manufacture because the [redacted] factory has been closed for- approximately three (3) years and no production has taken place since 2006 at that facility.

Acme answer to Request for Production No. 24 in Acme Supplemental Responses to the [redacted] Associates Requests for Production of Documents (attached as Exhibit A-13 to the Defendants' Memorandum in Support of Motion for Default and for Sanctions). Although Mr. [redacted] stated under oath in the [redacted] Associates case that the Acme costs of manufacturing could not be determined because the factory had been closed for approximately three years, in this case he is nevertheless making a damage claim based in large part on projected sales and costs when the factory has now been closed for nine years.

In connection with the preparation of the [redacted] Valuations, Mr. [redacted] also reviewed miscellaneous Acme invoices, a Acme 12-month sales forecast prepared by Mr. [redacted] (attached hereto as Exhibit 4),[6] Acme tax returns for the years 2006 to 2011, and an undated and unsigned document apparently prepared by a Mr. [redacted] (the "[redacted] Document") not previously produced in discovery (attached hereto as Exhibit 5), which reports conversations Mr. [redacted] had with unnamed people about the characteristics of the Acme product.[7] Mr. [redacted] did not know Mr. [redacted] and did not do anything to check on his background.[8]

Mr. [redacted] claims that at the end of 2012 Acme had a fair market value of at least $34,000,000 (based upon a discounted cash flow analysis) even though:

- Acme never had a year in its history in which it made a profit. Exhibit 6, [redacted] Depo. at 37.

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[6] Bates No. [redacted]-00129.

[7] Mr. [redacted] letter states that he is retired, but owned a "mid-sized marketing and advertising firm in Chicago."

[8] See, Deposition of Mr. [redacted] attached hereto as Exhibit 6 at p. 19

- [redacted] manufacturing facilities had not operated since 2006. [redacted] Depo. at 89.

- [redacted] lost in excess of $20,000,000 in the period of time examined by Mr. [redacted] Depo. at 69.

- [redacted] had only one contract (the [redacted] contract) and less than $300,000 in sales were left on that contract. [redacted] Depo. at 68.

- Mr. [redacted] valuation relied on projections from an unknown source that projected that [redacted] would have gross sales of $7,000,000 in the first year (which Mr. [redacted] assumed was 2013) when [redacted] had never had sales approaching that amount. [redacted] Depo. at pp. 39 and 69.

- Mr. [redacted] assumed that it was reasonable for [redacted] sales to double every year thereafter; and would level off at $132,000,000 **per year** and would continue at that level for perpetuity. [redacted] Valuation, Exhibit 1 hereto.

- Mr. [redacted] valuation assumed that the [redacted] factory was up and running in 2013 and that all its debts were paid (because the projections upon which Mr. [redacted] relied have no allowance for any debt service), yet Mr. [redacted] has no idea how much would be required to ready the factory for production or how much would be necessary to payoff [redacted] debt.[9] Moreover, Mr. [redacted] has no idea where [redacted] was going to obtain the necessary funding. [redacted] Depo. at p.73 and 87.

- Mr. [redacted] knows that [redacted] would need funding to finance sales growth at those levels, but he never tried to calculate how much and he has no idea where [redacted] would obtain that capital. He nonetheless assumed that [redacted] would have obtained the funding. [redacted] Depo. at p. 72-73.

- He assumed that the [redacted] tax returns showed that the [redacted] sales and income trends were positive. [redacted] Depo. at p. 27. The [redacted] tax returns do not show positive trends in the three most recent years covered by the returns (2009, 2010, 2011). See, summary at Exhibit 8.

- The total undepreciated value of [redacted] tangible assets was, at most, in the neighborhood of $2,000,000. [redacted] Depo. at p. 57. Yet, Mr. [redacted] had no good answer about why anyone would pay $34,000,000 for [redacted] when he could replace its assets with new equipment for $2,000,000 *Id.*

- The one-year projected sales prepared by Mr. [redacted] included projected sales to customers in Kuwait, Afghanistan, and Libya; **almost half of the projected sales**

[9] Mr. [redacted] did not review the [redacted] Report, in which an expert (hired by [redacted] long before the litigation began) reported that it would take $3,500,000 to repair the equipment and restart the factory. [redacted] Depo. at p. 84-87. Exhibit 7 ([redacted] Report) at p.1.

are to Libya. [redacted] did not have a contract for any of these projected sales; Mr. [redacted] never even saw any written proof whatsoever that anyone in any of these countries had any need or desire for the [redacted] products or even that anyone in any of these countries had ever been contacted by Mr. [redacted] or any other representative of [redacted] Depo. at pp. 72 and 73.

- Mr. [redacted] knows nothing about the patents, if any, [redacted] still has on the panels or anything about how difficult they may be to manufacture. [redacted] Depo. at pp. 66-67.

- Mr. [redacted] assumed that the [redacted] Anonymous Projections were projections for the years 2013 to 2017 without any idea about what the unknown author of the Anonymous Projections intended to be the period covered by the projections. [redacted] Depo. at p.54-55.

ARGUMENT

Introduction:

It has long been the rule in Kentucky that uncertain, contingent, and speculative damages cannot be recovered. *Spencer v. Woods*, 282 S.W.2d 851 (Ky. 1955); *Ford Contr., Inc. v. Ky. Transp. Cabinet*, 429 S.W.3d 397 (Ky. Ct. App. 2014). Loss of anticipated profits as an element of recoverable damages is recognized in Kentucky. *Graves v. Winer*, 351 S.W.2d 193 (Ky. 1961):[10]

> There must be presented, however, sufficient evidence on which a reasonable inference as to the amount of damage can be based. McCormick, *Handbook on the Law of Damages*, Sec. 28, 104-06 (1935). In proving a claim of loss of profits of an established business, the record of past profits is usually the best available evidence. Mere "estimates" of witnesses will not serve, if books were kept. McCormick states: "Opinions of witnesses as to the amount of profits that would have been gained are not admissible, except where the opinion is that of an expert based upon relevant facts." Id., at 107-10 (emphasis supplied).

Ill. Valley Asphalt, Inc. v. Harry Berry, Inc., 578 S.W.2d 244, 246 (Ky. 1979). Lost profits can be recovered for a new business, without a history of profits, if the damages can be established

[10] Mr. [redacted] analysis is not technically about "lost profits," but is instead a valuation of the business using a discounted cash-flow method. For all practical purposes, however, the lost profit and lost cash flow depend upon analysis of expected future revenues and should be examined in the same way and subject to the same requirements for reasonable certainty.

with reasonable certainty. *Pauline's Chicken Villa, Inc. v. KFC Corp*., 701 S. W.2d 399 (Ky. 1985):

> Thus, the test is not whether the business is a new or unestablished one, without a history of past profits, but whether damages in the nature of lost profits may be established with *reasonable certainty*. Comment b in the Restatement, *supra*, sums it up as follows:
>
> > However, if the business is a new one . . . proof will be more difficult. Nevertheless, 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.
>
> No court, including this one, can elucidate a single definition of "reasonable certainty" which may be used as a yardstick in all cases. However, this is a case containing factors and elements which eliminate virtually all the uncertain variables. This is a national franchisor, with uniformity of national advertising, uniform quality control, earnings and expense figures on nearby and comparable locations, and an available history concerning success and failure ratios. The franchisee, likewise, is experienced in the field and with the specific product, with a proven record of operation and management, a history of profit and loss, with two current operations in the general area, etc.

701 S.W.2d at 401-402. (Emphasis supplied). Acme has none of the history and none of the records necessary to establish damages with reasonable certainty.

When expert testimony is offered, the Kentucky Supreme Court has adopted the holding of the United States Supreme Court in *Daubert.*[11] See, *Mitchell v. Commonwealth*, 908 S.W.2d 100, 101 (Ky. 1995). *Daubert* is firmly and deeply embedded in Kentucky law and governs the admissibility of all types of expert testimony. The trial court should function as a "gate keeper" charged with keeping out unreliable, pseudoscientific evidence. *Brown-Forman Corp. v. Upchurch*, 127 S.W.3d 615, 620 (Ky. 2004).

> Expert opinion evidence is admissible so long as (1) the witness is qualified to render an opinion on the subject matter, (2) the subject matter satisfies the requirements of Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), (3) the subject matter satisfies the test of relevancy set forth in KRE 401, subject to the balancing of probativeness against

[11] *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

> prejudice required by KRE 403, and (4) the opinion will assist the trier of fact per KRE 702.

Stringer v. Commonwealth, 956 S.W.2d 883, 891, 44 13 Ky. L. Summary 21 (Ky. 1997):

Long before *Daubert*, the Kentucky Supreme Court recognized a need for careful scrutiny of the factual support underpinning opinion testimony from experts. In *Alexander v. Swearer*, 642 S.W.2d 896, 896 (Ky. 1982) an expert witness was permitted at trial to testify to the "point of impact of colliding vehicles" on the basis of "assumptions" and statements made by participants and bystanders and not on the basis of facts known to the expert; in finding error, the Supreme Court said that expert opinion must be scrutinized by trial courts and admitted only upon a determination that it is grounded in facts and not assumptions.[12] Post-*Daubert* rulings are consistent with this decision, leaving no doubt that expert opinion based on assumptions not supported by evidence cannot pass the reliability test of *Daubert*.

These factors have been applied in multiple cases to exclude the testimony of expert witnesses or to support the grant of summary judgment or JNOV where the plaintiff's expert damage proof did not meet the *Daubert* standards. See, Robert M. Lloyd, *Proving Lost Profits After Daubert: Five Questions Every Court Should Ask Before Admitting Expert Testimony*, 41 U. Rich. L. Rev. 379 (January, 2007).[13] The short-comings of the Carter Valuations can be divided into four categories: (i) the Carter Valuations are based on unreliable data; (ii) the Carter Valuations incorporate assumptions which are not supported by any facts; (iii) the Carter

[12] *Alexander v. Swearer*, 642 S.W.2d 896, 897 (Ky. 1982) ("his testimony must be supported by physical evidence observed by him"). See also *Sanborn v. Commonwealth*, 892 S.W.2d 542, 551 (Ky. 1995) (sustaining an exclusion of expert testimony that had no support in fact other than a statement by the defendant that was not believed by the expert).

[13] The 5 questions are: (i) Is the expert qualified for this analysis? (ii) How reliable is the underlying data? (iii) Are the expert's assumptions supported by the record? (iv) Does the expert deal adequately with facts inconsistent with the expert's theory? (v) Has the expert considered alternative scenarios?

Valuations ignore contrary facts – like [redacted] staggering historical losses; and (iv) Mr. [redacted] methodology is flawed, because [redacted] is a public company with a readily determined market value.

The underlying data used in the [redacted] Valuations is unreliable.

Mr. [redacted] has relied almost exclusively on the Anonymous Projections -- with no independent testing of those projections whatsoever. Mr. [redacted] believes those projections are reliable because they were prepared "in the ordinary course of business." But, Mr. [redacted] does not know when or how they were prepared and they did not even come out of [redacted] files, so Mr. [redacted] certainly cannot know that the projections were prepared in the ordinary course of business. Mr. [redacted] did review a one-year sales "forecast" done by Mr. [redacted] but here again did no independent testing of those projections (for example, by asking simple questions like: "Who in Libya is going to buy 800,000 sq. ft. annually of the [redacted] product?").

Courts have been particularly concerned when the expert relies on projections and other soft data supplied by a party with a financial interest in the outcome of the litigation[14] and by and large exclude the testimony where the expert failed to take reasonable steps to verify the data provided by the client. Where an expert relied on sales projections made by his client's president, a U.S. district court held that the testimony should have been excluded under *Daubert*, saying that "Rule 703 "implicitly requires that the information be viewed as reliable by some independent, objective standard beyond the opinion of the individual witness."' [15]

In *United Phosphorus, Ltd. v. Midland Fumigant, Inc.*, an economist relied on deposition testimony of his client's president to determine that the product in question was "homogeneous"

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[14] See, e.g., *Fraud-Tech, Inc. v. Choicepoint, Inc.* 102 S.W.3d 366, 384-85 (Tex. App. 2003); cf. *Loeffel Steel Prods., Inc. v. Delta Brands, Inc.* 387 F. Supp. 2d 794, 807 (N.D. Ill. 2005) (holding that it was improper for an expert to rely on the client's statements as to productivity losses).
[15] *TK-7 Corp. v. Estate of Barbouti*, 993 F.2d 722, 733 (10th Cir. 1993).

(i.e., that it was of such uniform quality that consumers did not distinguish among brands).[16] The court excluded the economist's conclusion, accepting the opposing expert's contention that "it is not acceptable methodology for an economist to rely on deposition testimony of an interested party where objective evidence and analysis exists [sic]." [17]

It is clear that the court must exercise some oversight on the data that goes into the expert's opinion. Otherwise the advocate who is willing to push the envelope will be able to get before the jury the sort of testimony that one court excluded with this description:

> What [the expert] has done is to present his own speculative numbers without having tempered them in any way to account for their "iffy" nature. Those deficiencies involve a fundamental flaw that causes the overall [expert] opinion to be the Rule 702 equivalent of what in early computer vocabulary bore the label "GIGO" ("garbage in, garbage out"). [18]

It should also be noted that in order to prove lost profits with "reasonable certainty," as the law requires, courts have required that any calculations be based on ""definite, certain and reasonable data.'" [19] Thus, when experts have relied on bad data, courts have held that plaintiffs have failed to prove their damages and have granted summary judgments,[20] directed verdicts,[21] and new trials.[22]

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[16] *United Phosphorus, Ltd. v. Midland Fumigant, Inc.*, 173 F.R.D. 675, 685 (D. Kan. 1997).
[17] Id.; cf. *TK-7 Corp. v. Estate of Barbouti,* 993 F.2d 722, 732-34 (10th Cir. 1993) (granting directed verdict where the only damage-evidence was the testimony of an expert who relied on a marketing study which contained unexplained and unsupported assertions).
[18] *Kay v. First Cont'l Trading, Inc.*, 976 F. Supp. 772, 776 (N.D. Ill. 1997).
[19] *Roboserve, Ltd. v. Tom's Foods, Inc.*, 940 F.2d 1441, 1452 (11th Cir. 1991*)* (quoting *Grossberg v. Judson Gilmore Assoc.*, 395 S.E.2d 592, 594 (Ga. Ct. App. 1990)).
[20] See *Lanphere Enter., Inc. v. Jiffy Lube Int'l, Inc*., No. CV 01-1168-BR, 2003 U.S. Dist. LEXIS 16205 at 45-47, 64 (D. Or. Jul. 9, 2003) (granting summary judgment for the defendant where plaintiff's only evidence of damages was an expert's testimony that was excluded for reliance on faulty data).
[21] See *TK-7 Corp.*, 993 F.2d at 732-34.
[22] See *Great Pines Water Co. v. Liqui-Box Corp.,* 203 F.3d 920, 925-26 (5th Cir. 2000); cf. *Children's Broad. Corp. v. Walt Disney Co.,* 245 F.3d 1008, 1018-19 (8th Cir. 2001) (upholding grant of new trial where the expert failed to consider the potential competition).

An expert opinion can and should be excluded where the expert has simply accepted his client's data as an assumption for his opinion:

> [F]ederal courts that have opined on this particular evidentiary issue have made certain important points about complete reliance on secondary sources. First, the expert must conduct some sort of independent investigation or verification to ensure that the data he or she plans to use is both accurate and helpful to the court in light of the disputed issues. Second, that investigation should be sufficiently thorough such that the expert has gained a working familiarity with the borrowed data so that the expert can demonstrate the data's reliability. Blind adherence to data of unknown origin does not suffice in federal court. Therefore, in the context of commercial projections, the expert's investigation should reveal certain objective characteristics of trustworthiness, such as reliance on a market study, examination of relevant industry comparisons, and consistency with observed data, to enumerate a few examples.

Bruno v. Bozzuto's, Inc., 311 F.R.D. 124, 144 (M.D. Pa. 2015) (Emphasis Supplied).

Put another way, "[A]n expert must vouchsafe the reliability of the data on which he relies and explain how the cumulation of that data was consistent with standards of the expert's profession." *SMS Sys. Maint. Servs. v. Dig. Equip. Corp.*, 188 F.3d 11, 25 (1st Cir. 1999).

The Court in *Rand v. Parametric Tech. Corp.*, No. 03-CV-11046-MEL, 2005 U.S. Dist. LEXIS 47964 (D. Mass. Oct. 19, 2005), excluded the report of a company's damages expert for failing to conduct any verification of the data.

> [Expert's] damages estimate is wholly dependant on Rand's 2003 budget prediction, which [expert] accepted without any independent evaluation to confirm its reliability. An expert must do more than simply rely on a client's representations about the validity of its forecasts… In order to verify the reliability of Rand's forecasts. [expert] did not create a performance model, examine industry-wide forecasts, assess local market conditions, review customer-specific data, or evaluate Rand's historic revenue trends and predicted trajectory… [Expert] failed to make any independent inquiry into the reliability of Rand's budgets, but nevertheless used Rand's predictions about its expected future revenue as the basis of his damages calculation. As a result, both [Expert's] methods and the resulting conclusion as to damages lack basic indicia of reliability.

Rand v. Parametric Tech. Corp., No. 03-CV-11046-MEL, 2005 U.S. Dist. LEXIS 47964, at *4-6 (D. Mass. Oct. 19, 2005).

Mr. [redacted] also testified during his deposition that his impression of the [redacted] product potential was based on the representations of a Mr. [redacted] in "a kind of a letter" which is addressed to no one, is undated and unsigned, but says it was prepared by Mr. [redacted] (the "[redacted] Document") (Exhibit 5.)

> I also obtained, I believe from a Mr. [redacted] kind of a letter that indicated the viability of the product and outlined the product from [redacted] perspective for what it was and what it would do and its potential.

[redacted] deposition (Exhibit 6) at p. 19 Lines 2-9.

The [redacted] Document says that Mr. [redacted] although retired, was the owner of a "mid-size marketing and advertising firm in Chicago." There is no indication in the Document that Mr. [redacted] has any expertise in the [redacted] product, in the components of the [redacted] product, or in construction materials. However, the [redacted] Document then goes on to report on the many favorable characteristics of the [redacted] product almost entirely without any indication of where Mr. [redacted] obtained his information. For example, the Document reports that "A [redacted] building is stable even in a Category 5 hurricane. . ." and "I've been told that the product is also resistant to tornados and tsunamis but I can find no proof of this." The Mr. [redacted] reliance on on this "kind of a letter," like his reliance on the Anonymous Projections was a blind reliance. When asked about his investigation of Mr. [redacted] qualifications, Mr. [redacted] replied as follows:

> Q. Did you know Mr. [redacted] before you received this letter?
>
> A. No.
>
> Q. Did you do anything to check on his background?
>
> A. I did not, no.

Deposition of [redacted] pg 19 Line 21- pg 20 Line 1.

Had Mr. [redacted] done any investigation of Mr. [redacted] he would have found that Mr. [redacted] companies are both creditors and shareholders of [redacted] See, Complaint filed in [redacted]

County Pennsylvania, attached at Exhibit 9. The opinions of a non-expert, with a stake in the litigation, are not the type of information an expert like Mr. [redacted] may rely upon:

> We emphasize that the type of information which can be utilized by the expert in forming his opinion should be only that produced by qualified personnel and on which the expert would customarily rely in the day-to-day decisions attendant to his profession. Such a limitation, we feel, guarantees a relatively high degree of reliability and frees the expert to use for his testimony the tools on which he normally relies in making a diagnosis.

Buckler v. Commonwealth, 541 S.W.2d 935, 940 (Ky. 1976).

In short, Mr. [redacted] reliance on any information from Mr. [redacted] is reliance upon unreliable hearsay which the Court has an obligation to prevent being introduced. Moreover, the reliance on this information is just one more example of Mr. [redacted] reliance on the unreliable in forming his projections.

Mr. [redacted] assumptions are not supported by any facts:

Mr. [redacted] valuation of [redacted] rests upon a number of unsupported assumptions. As the Fourth Circuit put it, "When the assumptions made by an expert are not based on fact, the expert's testimony is likely to mislead a jury, and should be excluded by the district court."[23] Other courts have agreed, and litigants have often been able to exclude expert testimony by arguing that the expert's opinion was based on unfounded assumptions.[24]

Assumptions that courts have been unwilling to accept because the record failed to support them include an assumption that a trend of increasing sales or profits would continue,[25] assumptions as to the costs of buildings and equipment,[26] data as to comparable sales of real

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[23] *Tyger Constr. Co v. Pensacola Constr. Co.*, 29 F.3d 137, 144 (4th Cir. 1994), quoted in *Three Crowns Ltd P'ship v. Salomon Bros., Inc.*, 906 F. Supp. 876, 894 (S.D.N.Y. 1995).
[24] See, e.g., *Chemipal v. Slim-Fast Nutritional Foods Int'l, Inc.*, 350 F. Supp. 2d 582, 590, 597 (D. Del. 2004) (excluding expert testimony where economist took data from a report by client's advertising agency without verifying it).
[25] See *In re Elder-Beerman Stores Corp.*, 206 B.R. 142, 165-66 (S.D. Ohio 1997).
[26] See *KW Plastics v. United States Can Co.*, 131 F. Supp. 2d 1289, 1293 (M.D. Ala. 2001).

estate,[27] assumptions that subcontractors would be found and that they would be as successful as the existing subcontractor,[28] assumptions that a terminable contract would not be terminated,[29] an assumption that a supplier would reduce its price,[30] and assumptions that competitors would not enter the market.[31]

Even before Daubert, courts held that unfounded assumptions could be grounds for excluding expert testimony,[32] for reversal on appeal,[33] or for granting a summary judgment,[34] directed verdict[35] or judgment n.o.v.,[36] for reducing a jury verdict,[37] or for holding that the plaintiff

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[27] See *Cayuga Indian Nation of N.Y. v. Pataki*, 83 F. Supp. 2d 318, 323, 327 (N.D.N.Y. 2000).
[28] See *De Jager Constr., Inc. v. Schleininger,* 938 F. Supp. 446, 454 (W.D. Mich. 1996).
[29] See *Hiller v. Mfrs. Prod. Research Group of N. Am., Inc.,* 59 F.3d 1514, 1529 (5th Cir. 1995).
[30] See id. at 1528.
[31] See *Children's Broad. Corp. v. Walt Disney Co.,* 245 F.3d 1008, 1018 (8th Cir. 2001) (upholding grant of new trial where expert failed to consider potential competition); *Cent. Office Tel., Inc. v. AT&T*, 108 F.3d 981, 992 (9th Cir. 1997); *Heary Bros. Lightning Prot. Co. v. Lightning Prot. Inst.*, 287 F. Supp. 2d 1038, 1066 (D. Ariz. 2003) (excluding expert testimony based on the assumption that there were no potential competitors).
[32] *Shannon v. Crowley*, 538 F. Supp. 476, 483-84 (N.D. Cal. 1981) (granting motion in limine where the damages calculation was based on unsupported assumptions).
[33] See *Am. Road Equip. Co. v. Extrusions, Inc.*, 29 F.3d 341, 344-45 (8th Cir. 1994) (reversing trial court decision based in part on the testimony of an expert who based a profits forecast on unsupported assumptions and failed to account for adverse facts).
[34] See *Ways & Means, Inc. v. IVAC Corp.*, 506 F. Supp. 697, 703, 707 (N.D. Cal. 1979) (granting summary judgment where plaintiff's damage model was excluded because of defects in a survey).
[35] See, e.g., *Herman Schwabe, Inc. v. United Shoe Mach. Corp.*, 297 F.2d 906, 911-13 (2d Cir. 1962) (affirming directed verdict where plaintiff failed to establish reasonableness of assumptions underlying damage calculations).
[36] See *Grantham & Mann, Inc. v. Am. Safety Prods., Inc.*, 831 F.2d 596, 601 (6th Cir. 1987) (upholding a grant of judgment n.o.v. where an expert assumed without basis that plaintiffs could meet sales targets); *E. Auto Distribs., Inc. v. Peugeot Motors of Am., Inc.*, 795 F.2d 329, 338-39 (4th Cir. 1986) (affirming judgment n.o.v. on one part of plaintiff's case where expert testimony was excluded because of, inter alia, unsupported assumptions); *R.S.E., Inc., v. Pennsy Supply, Inc.*, 523 F. Supp. 954, 965-71 (M.D. Pa. 1981) (granting judgment n.o.v. where plaintiff's damages model contained incorrect assumptions); *Beverly Hills Concepts, Inc. v. Schatz & Schatz,* 717 A.2d 724, 740 (Conn. 1998) (remanding case with instructions to enter judgment for defendants because damages testimony was based on unsupported assumptions).
[37] See *Hiller v. Mfrs. Prod. Research Group of N. Am., Inc.,* 59 F.3d 1514, 1524-25 (5th Cir. 1995) (modifying jury verdict resulting from expert testimony based on unsupported assumption as to plaintiff's future sales); *William Inglis & Sons Baking Co. v. Cont'l Baking Co.,* 942 F.2d 1332, 1341 (9th Cir. 1991) (reducing verdict on appeal to the extent it was based on a national accounting

failed to prove damages with reasonable certainty.[38] The classic case in this regard is *Southern Pacific Communications Co. v. American Telephone & Telegraph Co.*[39] In spite of an elaborate computer model,[40] which the plaintiffs' experts developed to compute damages, the court held that they had not proven their lost profits with reasonable certainty.[41] Taking language from the Supreme Court of the United States' opinion in *Bigelow v. RKO Radio Pictures, Inc.*,[42] the court noted that: "Although a plaintiff may make a just and reasonable' approximation of the amount of damages based on 'relevant data,' a damage claim cannot be based upon mere 'speculation or guesswork.'"[43] After considering at length the assumptions the plaintiffs' experts had used to construct their damages model,[44] the court held that the plaintiffs had failed to prove that they had suffered any damages at all, let alone that they had proven with sufficient certainty the amount of damages.[45]

The Carter [redacted] Valuations ignore contrary facts:

Where the expert simply ignores the data and, without a reasonable basis, simply chooses other data more favorable to the party who hired him or her, the testimony should be excluded.[46]

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firm's unsupported assumption as to profit margin), amended, in part, on reh'g, 981 F.2d 1023 (1992); *Larsen v. Walton Plywood Co.*, 390 P.2d 677, 689 (Wash. 1964) (granting remittitur where the verdict was based on expert testimony using unsupported assumptions as to potential sales).

[38] See *Beverage Canners, Inc. v. Cott Corp.*, 372 So. 2d 954, 956 (Fla. Dist. Ct. App. 1979) (awarding nominal damages where damages-expert made multiple unsupported assumptions); *Bell Atl. Network Servs., Inc. v. P.M. Video Corp.*, 730 A.2d 406, 420-21 (N.J. Super. Ct. App. Div. 1999) (holding that damages were not proved with reasonable certainty where experts relied on projections but ignored "caveats, contingencies, and assumptions" contained in the reports).

[39] 556 F. Supp. 825 (D.D.C. 1982).

[40] See id. at 1074-76.

[41] Id. at 1098.

[42] 327 U.S. 251 (1946).

[43] 556 F. Supp. at 1075 (quoting *Bigelow*, 327 U.S. at 264).

[44] Id. at 1079-95.

[45] See id. at 1098.

[46] See, e.g., *Children's Broad. Corp. v. Walt Disney Co.*, 245 F.3d 1008, 1018, 1022 (8th Cir. 2001) (granting a new trial where damages expert, among other things, ignored the effect of a powerful competitor); *De Jager Constr., Inc. v. Schleininger*, 938 F. Supp. 446, 455 (W.D. Mich. 1996)

The fact that the expert was ignorant of the data does not excuse the failure to consider it if the expert should have discovered the data in the course of his or her investigation. [47]

Mr. [redacted] methodology is fundamentally flawed:

[redacted] has repeatedly claimed that Defendants "destroyed" its business. If a business has not been just injured, but has been destroyed, the measure of damages is the market value of the business on the date of loss. Dunn, Robert L., Recovery of Damages for Lost Profits, Volume 2. Fourth Edition, Copyright 1992, LawPress Corporation Westport, CT. In one case, the Florida Court of Appeals reduced the trial court's compensatory award because where complete destruction has occurred, lost profits cannot be recovered:

> Lost profits and loss of use may be a proper item of damages if the property or business is not completely destroyed. (citations omitted) However, where the property or business is totally destroyed we hold the proper total measure of damages to be the market value on the date of the loss."

Aetna Life & Casualty Co. v. Little, 384 So.2d 213, 216 (Fla.App.1980).

> The Texas Courts have said the following:
>
> The rule is stated as follows in 25 C.J.S. Damages, sec. 44 (1966):"Where loss of anticipated profits results from injury to personal property, recovery is limited to the period of time reasonably necessary to restore the property to its condition

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(excluding the testimony of an expert with the "modus operandi of making unsupported assertions and projections, of deliberately ignoring documents and figures which would strike a certified public accountant in the face, and of picking and choosing among purported facts to maximize plaintiff's damages"); see also *Am. Road Equip. Co. v. Extrusions, Inc.*, 29 F.3d 341, 344-45 (8th Cir. 1994) (reversing in part a judgment based on the testimony of an expert who failed to account for a decline in orders for reasons unrelated to the breach of contract); *Thomas J. Kline, Inc. v. Lorillard, Inc*., 878 F.2d 791, 799-800 (4th Cir. 1989) (excluding, in a pre-Daubert case, expert's testimony in part because of expert's failure to consider certain facts); *Metrix Warehouse, Inc. v. Daimler-Benz Aktiengesellschaft*, 828 F.2d 1033, 1044-45 (4th Cir. 1987) (upholding the setting aside of a jury verdict, in a pre-Daubert antitrust case, where expert failed to consider effects of lawful competition).

[47] See, e.g., *Cell, Inc. v. Ranson Investors*, 427 S.E.2d 447, 450 (W. Va. 1992) (holding that expert testimony could not prove damages with sufficient certainty where expert failed to account for the fact that the store operator had no experience and for a market analysis that said that the proposed store was too small to be profitable).

> immediately prior to the injury. Where there has been an entire loss of the property involved in the action, the full value of the property is the measure of damages, and there can be no recovery for anticipated profits. "We hold that, under the facts in the present case, the proper measure of damages for destruction of a business is measured by the difference between the value of the business before and after the injury or destruction.

Sawyer v. Fitts, 630 S.W.2d 872 (Tex. App. Fort Worth 1982).

Trying to value [redacted] by reference to hypothetical profits does not change the fact that [redacted] is a public company with publicly traded stock (as it has been quick to point out to the court when that suited its purposes). [redacted] in other words, has an ascertainable market value. As of December 20, 2012 (the date of the [redacted] notice to [redacted] of its repossession of [redacted] assets), [redacted] market value was $313,200.00.[48] That should be the limit of [redacted] recovery under any circumstance. Any greater recovery would be a windfall to [redacted] shareholders.

CONCLUSION

There appear to be no reported cases anywhere in which an expert witness has even attempted to testify, as Mr. [redacted] has here, that a business which has no evidence of prior profits and with a history of staggering losses would, but for the tortious conduct of the defendants, have earned more than $26 Million per year[49] and be worth at least $34 Million. Certainly, there are no reported cases in which such "expert" testimony" has survived a *Daubert* challenge.

For the foregoing reasons, Mr. [redacted] opinions given in this action lack the basic reliability necessary to provide any guidance to a jury, and therefore the Court must exclude his testimony.

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[48] [redacted] per share price of $0.0018 per share [Nasdaq.com/symbol/lppi/historical] multiplied by the number of [redacted] shares outstanding (175,000,000) [[redacted] Report 2005-2007 at p. 8].

[49] [redacted] operating profit in year 5 of the Anonymous Projections.

Respectfully submitted:

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ATTORNEYS FOR DEFENDANTS

and

[redacted]

ATTORNEYS FOR Our client [redacted]

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Motion was served by e-mail and U.S. Mail, postage prepaid, on this the 12th day of July, 2016, on the following:

[redacted]

[redacted]

/s/ *John M. Sosbe*
Counsel for Defendants

EXHIBITS TO DAUBERT MOTION

Exhibit 1 – [redacted] Valuations

Exhibit 2 – Anonymous Projections

Exhibit 3 – Excerpts from Mr. [redacted] Deposition Testimony

Exhibit 4 – [redacted] 12-Month Sales Forecast

Exhibit 5 – [redacted] Document

Exhibit 6 – Complete Transcript of Mr. [redacted] Deposition

Exhibit 7 – [redacted] Report

Exhibit 8 – Summary of [redacted] Economic Trends as shown in Tax Returns

Exhibit 9 – [redacted] Lawsuit Against [redacted]

[redacted]