ARTICLES

LOST PROFITS FOR BREACH OF CONTRACT: WOULD THE COURT OF APPEALS APPLY THE SECOND CIRCUIT'S ANALYSIS?

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“I coulda been a contender.”
– Marlon Brando

A party that establishes a breach of contract claim may recover benefit of the bargain damages to put it in the position it would have enjoyed had the contract not been breached. Such damages may include the profits the party would have made had the contract been fully performed.

The party seeking lost profits usually presents the testimony of an expert who has constructed a damage model that the expert claims shows the profits the non-breaching party would have made had the breach not occurred. The claimed lost profits can be general damages (the profits the party would have made in the performance of the breached contract), consequential damages (the profits the

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1 Marlin Brando, ON THE WATERFRONT (Columbia Pictures 1954).

2 E.g., Brushton-Moria Sch. Dist. v. Fred H. Thomas Assocs., P.C., 91 N.Y.2d 256, 261, 669 N.Y.S.2d 520, 522 (1998); Adams v. Lindblad Travel, Inc., 730 F.2d 89, 92 (2d Cir. 1984) (“The general rule for measuring damages for breach of contract has long been settled. It is the amount necessary to put the plaintiff in the same economic position he would have been in had the defendant fulfilled his contract.”).

3 E.g., Sager v. Friedman, 270 N.Y. 472, 481, 1 N.E.2d 971, 974 (1936) (“The injured party is entitled to the benefit of his bargain as written and is entitled to damages for the loss caused by [the] failure to perform the stipulated bargain. That loss may include the profits which he would have derived from [the] performance of the contract.”).


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party would have made on other collateral agreements had the breached contract been fully performed), or a combination of both. The damage model is a projection of what purportedly would occur in the future in a "world" that can never exist—the "world" where the contract has been fully performed. The model presents a view of what "coulda been" had the contract not been breached.

The New York Court of Appeals has repeatedly ruled that lost profits must be proved with "reasonable certainty." In adhering to this standard, it specifically rejected a Second Circuit decision that a plaintiff need only provide a "reasonable basis" for its claimed damages.

In 2007, the Second Circuit in Tractebel Energy Marketing, Inc. v. AEP Power Marketing, Inc., applied New York law in a breach of contract case and ruled that the "reasonable certainty" standard applied only when lost profits are sought as consequential damages. The Tractebel court ruled that when a plaintiff seeks to recover lost profits as general damages, the plaintiff only has to present "a stable foundation for a reasonable estimate" of its claimed damages. The Second Circuit’s decision raises interesting questions. Would the Court of Appeals also rule that a different standard governs when the claimed lost profits are general, as opposed to consequential, damages? Would it also apply a "stable foundation for a reasonable estimate," as opposed to "reasonable certainty," standard with respect to establishing the amount of lost profits claimed as general damages?

Since the amount of damages sought on a lost profits claim can be substantial, any uncertainty in the standard to be applied in proving lost profit damages would complicate litigation of the claim.

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5 Am. List Corp., 75 N.Y.2d at 42–43, 549 N.E.2d at 1164, 550 N.Y.S.2d at 593 ("[Consequential damages] are extraordinary in that they do not so directly flow from the breach."). Schonfeld, 218 F.3d at 176 ("[C]onsequential damages’... seek to compensate a plaintiff for additional losses (other than the value of the promised performance) that are incurred as a result of the defendant’s breach.") (quoting 3 DAN B. DOBBS, DOBBS LAW OF REMEDIES § 12.2(3) (1993)).


8 The term “plaintiff” as used herein refers to the party asserting the claim for breach of contract, and “defendant” refers to the breaching party against whom the claim is asserted.


10 Tractebel Energy Mktg., Inc. v. AEP Power Mktg., Inc., 487 F.3d 89 (2d Cir. 2007).


12 Id.

13 Id. at 108. The plaintiff in Tractebel sought damages of $520 million.
By injecting uncertainty in New York law concerning lost profit damages, the Tractebel case impacts the litigation of a lost profits claim in various ways. If there is a basis for federal court jurisdiction, a plaintiff should consider whether a federal court would be more hospitable to its claim for lost profits.\textsuperscript{14} A plaintiff may be more aggressive in claiming lost profit damages if it believes it does not have to prove its damages with “reasonable certainty” but only needs to present a “stable foundation for a reasonable estimate” of its damages. If the “stable foundation” requirement of the Second Circuit is a lesser burden than the “reasonable certainty” standard of the Court of Appeals, the damage exposure to defendant would be increased and a plaintiff might gain significant leverage in settlement negotiations.\textsuperscript{15}

This article will first review what the Court of Appeals and the Second Circuit have said on the issue of proving the amount of lost profits in a breach of contract case. It will then discuss whether the Court of Appeals also would draw a distinction when lost profits are claimed as general, as opposed to consequential, damages. Finally, it will discuss the burdens of production and proof when the plaintiff seeks lost profits and conjecture whether the Court of Appeals would apply the standard articulated in Tractebel.

The discussion set forth below concludes that the Court of Appeals likely would not recognize different levels of proof of lost profits depending on whether they were sought as general or consequential damages and that the Court likely would continue to require a plaintiff to prove lost profit damages with reasonable certainty. The “reasonable estimate?”“reasonable certainty” issue can be explained by viewing a “stable foundation for a reasonable estimate” of lost profit damages as plaintiff’s burden of production. When plaintiff puts forward such a stable foundation, it has presented sufficient evidence to allow the trier of fact to award lost profit damages. Where no such stable foundation is presented, plaintiff’s lost profits claim fails and should be dismissed.\textsuperscript{16} If plaintiff advances a reasonable estimate of lost profits, the trier of

\textsuperscript{14} Similarly, in determining whether to exercise a right to remove a case filed in state court to federal court, a defendant should consider whether a federal court would be more hospitable to plaintiff’s claim for damages.

\textsuperscript{15} A rule of thumb applied to assess exposure on a claim is to multiply plaintiff’s claimed damages by the probability that plaintiff would prevail in recovering that amount. If a more lenient standard is applied in determining lost profit damages, plaintiff may seek a larger award and may have a greater possibility of recovery. As a result, there would be an increase in plaintiff’s perception of the settlement value of the case as well as how defendant might view its exposure to damages.

\textsuperscript{16} Freund, 34 N.Y.2d at 379, 314 N.E.2d at 419, 357 N.Y.S.2d at 857.
fact must determine whether plaintiff has proved its claimed damages with reasonable certainty.\textsuperscript{17} A properly instructed jury can award lost profit damages based upon a reasonable estimate of such damages. The jury also may award plaintiff zero damages for lost profits.\textsuperscript{18} If the jury awards lost profit damages to plaintiff and its verdict is not supported by the evidence, the court could grant judgment as a matter of law to defendant.\textsuperscript{19}

I. LOST PROFITS

A. Older Court of Appeals Authority

New York courts have long recognized that lost profits are an appropriate measure of damages in a breach of contract case.\textsuperscript{20} The most cited older authority on the subject is the decision of the Court of Appeals in \textit{Wakeman v. Wheeler & Wilson Manufacturing Co.},\textsuperscript{21} a case in which plaintiff claimed defendant sewing machine manufacturer breached an agreement whereby plaintiff would be the exclusive sales agent for defendant’s machines in Mexico.\textsuperscript{22} Plaintiff sought as damages the profits he would have made over the term of the agreement selling defendant’s machines in Mexico.

The Court ruled that a measure of damages could be the profit plaintiff would have made under the agreement had it not been

\textsuperscript{17} Id. at 382, 314 N.E.2d at 420–21, 357 N.Y.S.2d at 860.
\textsuperscript{19} See Porter v. Saar, 260 A.D.2d 165, 166, 688 N.Y.S.2d 137, 138 (App. Div. 1st Dep’t 1999), lv. denied, 93 N.Y.2d 819, 697 N.Y.S.2d 566 (1999) (ruling that the trial court erred in failing to set aside a verdict for lost profits that was not supported by the evidence); see also Cambridge Assoc’s v. Town of N. Salem, 282 A.D.2d 702, 724 N.Y.S.2d 319, 320 (App. Div. 2d Dep’t 2001) (affirming action of the Supreme Court setting aside a verdict and directing judgment as a matter of law in favor of defendant). The court also may grant remittur or a new trial.
\textsuperscript{20} Bagley v. Smith, 10 N.Y. 489, 497 (1853) ("The loss of profits is one of the common grounds, and the amount of profits lost, one of the common measures of the damages to be given upon a breach of contract."). See also Griffin v. Colver, 16 N.Y. 489, 491 (1858) ("Profits which would certainly have been realized but for the defendant’s default are recoverable; those which are speculative or contingent are not"); Messmore v. N.Y. Shot and Lead Co., 40 N.Y. 422, 427 (1869) (the non-breaching party “is entitled to recover all his damages, including gains prevented... provided they are certain, and such as might naturally be expected to follow the breach").
\textsuperscript{22} Id. at 208–09, 4 N.E. at 265–66 (1886).
In order to be recovered, however, these claimed profits could not be “merely speculative, possible and imaginary” but “must be reasonably certain.”

The Court recognized that because a claim for lost profits is prospective, it would, to some extent, involve uncertainty and contingency. Because such profits are contingent upon future events, they could “be determined only approximately upon reasonable conjectures and probable estimates.” In some instances, however, lost profits would not be recoverable because they would be so uncertain and contingent they would be incapable of adequate proof.

The *Wakeman* Court stated that when it is clear that the breach caused damage and the only uncertainty concerns the amount of the damage, there rarely can be a good reason for refusing, on account of such uncertainty, any damages whatever for the breach. In such circumstances, the breaching party should not be permitted entirely to escape liability because the amount of damage which he has caused is uncertain. The Court believed that if the plaintiff showed “the consequences naturally and plainly traceable [to the breach] then it is for the jury, under proper instruction as to the rules of damages, to determine the compensation to be awarded for the breach.” The jury’s verdict, as long as it is “not based upon mere speculation and possibilities but, upon the facts and circumstances proved, would” be the appropriate determination of damages.

As the Court of Appeals later noted, a jury is permitted

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23 *Id.* at 209–10, 4 N.E. at 266. The Court rejected defendant’s contention that lost profits should be limited to the profits plaintiff would have made on sales orders that plaintiff obtained but defendant did not fill. Instead, plaintiff could seek recovery on sales he allegedly would have made over the life of the agreement. *Id.* at 216–17, 4 N.E. at 270–71.

24 *Id.* at 209, 4 N.E. at 266. The Court of Appeals had previously noted that a court may reject a claim for lost profits when it is subject to too many contingencies, and too dependent on fluctuating markets and the chances of business, to constitute a safe criterion for an estimate of damages. *Griffin*, 16 N.Y. at 492–93.

25 *Wakeman*, 101 N.Y at 209, 4 N.E. at 266.


27 *Wakeman*, 101 N.Y at 209, 4 N.E. at 266.


29 *Wakeman*, 101 N.Y. at 210, 4 N.E. at 266.

30 *Id.* at 216–17, 4 N.E. at 271. The Court noted that there were facts upon which a jury could base a judgment. Plaintiff had presented evidence concerning the capabilities of its agents in Mexico, the plans and actions of the agents to penetrate the Mexican market, the actual sales that had been made, and the size of the Mexican market and of particular cities therein and the profit plaintiff would have made on the sale of a sewing machine in Mexico. From this evidence the jury could have determined the sales plaintiff could have made and multiplied that number by the profit per sale to arrive at an amount of lost profits. Although
to determine the amount of plaintiff’s damages even though the elements of such damages presented by plaintiff were “more or less uncertain and problematical.”

Wakeman makes clear that when a breach of contract occurs, a court, despite uncertainty as to the amount of damages, should endeavor to award damages to redress the injury caused by the breach. An “equally fundamental” principle, however, is that the plaintiff should not recover more than he would have gained had the contract been fully performed.

Subsequent to Wakeman, the Court of Appeals has noted that the fact that lost profits are not susceptible to precise determination does not insulate a breaching party from liability. Where the amount of damages is “unavoidably uncertain, beset by complexity or difficult to ascertain,” the “law is realistic enough to bend to necessity in such cases.” Damages caused by the breach are recoverable “to the extent that the evidence affords a sufficient basis for estimating their amount in money with reasonable certainty.”

Lost profits can be awarded as damages “where plaintiff has supplied some adequate basis for computing the amount, even where that amount cannot be precisely determined with absolute certainty.”

It is plaintiff’s burden to produce evidence that affords a sufficient basis to estimate the amount of lost profit damages with reasonable certainty. The plaintiff has the burden to present evidence with a tendency to show the probable amount of damages to allow the trier

the amount of such profits were not certain nor strictly accurate, the Court believed plaintiff’s proof sufficient for the administration of justice.

32 Wakeman, 101 N.Y. at 216, 4 N.E. at 270.
36 Haughey v. Belmont Quadrangle Drilling Corp., 284 N.Y. 136, 142, 29 N.E.2d 649, 652 (1940) (citing RESTATEMENT (FIRST) OF CONTRACTS § 331 (1932)).
37 Plant Planners, Inc. v. Pollock, 60 N.Y.2d 779, 780–81, 475 N.E.2d 781, 781–82, 469 N.Y.S.2d 675, 675 (1983); see also Broadway Photoplay Co. v. World Film Corp., 225 N.Y. 104, 109, 121 N.E. 756, 758 (1919) (Although a plaintiff is not required “to prove its damages to the dollar,” it must “supply some basis of computation” of its claimed damages.). Such basis may be provided by an expert’s affidavit projecting, based on underlying data, the profit that would have been earned from performance of the contract. E.g., C.K.S. Ice Cream Co. v. Frusen Gladje Franchise, Inc., 172 A.D.2d 206, 208, 67 N.Y.S.2d 716, 718 (App. Div. 1st Dep’t 1991).
38 Haughey, 284 N.Y. at 142, 29 N.E.2d at 652.
The failure to present a stable foundation for computation of lost profits is fatal to plaintiff’s claim. In *Broadway Photoplay Co. v. World Film Corporation*, Judge Cardozo addressed lost profits as damages for a breach of a contract whereby defendant promised to provide a first run feature film to plaintiff one day each week. The Court reversed the award of lost profits because it had “no stable foundation” given the assumptions upon which plaintiff’s proof of lost profits rested. The Court noted that the popularity of a movie was subject to “endless variety of human tastes and fashions” such that there was no basis on which to project the profits that would have been made by people choosing in the future to see movies that were not yet known.

In *Freund v. Washington Square Press, Inc.*, the Court of Appeals ruled that because a plaintiff had presented no basis for an award of royalties he would have received had defendant performed its agreement to publish plaintiff’s book, plaintiff could recover only nominal damages on his breach of contract claim. The Court ruled plaintiff’s lost profits claim failed for uncertainty because plaintiff had “provided no stable foundation for a reasonable estimate of royalties he would have earned had defendant not breached its promise to publish.” The *Freund* Court also noted “damages claimed must be measurable with a reasonable degree of certainty.”

**B. The Kenford and Ashland Management Decisions**

The decisions of the Court of Appeals in *Kenford Co. v. County of Erie* and *Ashland Management, Inc. v. Janien* are its more recent

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40 Broadway Photoplay Co. v. World Film Corp., 225 N.Y. 104, 109, 121 N.E. 756, 758 (1919)
41 Id. at 104, 121 N.E. at 756.
42 Id. at 109, 121 N.E. at 758.
43 Id.
45 Id. at 384–85, 314 N.E. at 422, 357 N.Y.S.2d at 862.
46 Id. at 383, 314 N.E.2d at 421, 357 N.Y.S.2d at 861.
47 Id. at 382, 314 N.E.2d at 421, 357 N.Y.S.2d at 860.
rulings on lost profits damages.

The Kenford case involved a planned domed stadium to be built in Erie County.\textsuperscript{50} Kenford Company, Inc. ("Kenford"), Dome Stadium, Inc. ("DSI") and the County of Erie entered into an agreement pursuant to which Kenford would donate land to the County on which a stadium would be built and the County would enter into an agreement with DSI, in the form of a document attached to the contract, to manage the stadium facility for a twenty year term.\textsuperscript{51} Construction of the stadium did not occur.\textsuperscript{52} Kenford Company and DSI sued Erie County for breach of contract. DSI claimed that the County breached the agreement pursuant to which DSI would operate the planned stadium. \textsuperscript{53} Ten years of litigation culminated in a ruling that the County had breached that contract. \textsuperscript{54} The Court set the matter for a trial on the issue of determining damages.\textsuperscript{55}

DSI claimed damages for the profits it would have made over the life of the twenty year agreement to manage the stadium.\textsuperscript{56} The jury returned a multi-million dollar verdict in DSI’s favor.\textsuperscript{57} The Appellate Division reversed the portion of the judgment that awarded lost profits.\textsuperscript{58} The Court of Appeals addressed whether DSI had proved its lost profits claim.\textsuperscript{59}

The Court first noted that lost profit damages for a breach of contract had been permitted in New York under “long-established and precise rules of law.”\textsuperscript{60} First, the plaintiff must demonstrate with certainty that the claimed damage has been caused by the breach in that the damage was directly traceable to the breach and not the result of other intervening causes.\textsuperscript{61} Second, the amount of the alleged loss “must be capable of proof with reasonable certainty.”\textsuperscript{62} It could not be speculative, possible or imaginary, “but must be reasonably certain.”\textsuperscript{63}

Applying these criteria, the Court noted that DSI’s computation of

\textsuperscript{50} Kenford, 67 N.Y.2d at 259–60, 493 N.E.2d at 234, 502 N.Y.S.2d at 131.
\textsuperscript{51} Id.
\textsuperscript{52} Id. at 260, 493 N.E.2d at 235, 502 N.Y.S.2d at 132.
\textsuperscript{53} Id.
\textsuperscript{54} Id.
\textsuperscript{55} Id.
\textsuperscript{56} Id.
\textsuperscript{57} Id. at 260–61, 493 N.E.2d at 235, 502 N.Y.S.2d at 132
\textsuperscript{58} Id.
\textsuperscript{59} Id.
\textsuperscript{60} Id. at 261, 493 N.E.2d at 235, 502 N.Y.S.2d at 132.
\textsuperscript{61} Id. The issue of whether a breach of contract directly and proximately caused damage is often referred to as the fact of damage.
\textsuperscript{62} Id.
\textsuperscript{63} Id.
damages “was in accord with contemporary economic theory and was presented though the testimony of recognized experts.” The Court acknowledged this type of evidence had been accepted by courts in New York and other jurisdictions. DSI’s economic analysis took historical data from the operations of other domed stadiums and related facilities and applied it to the results of a comprehensive study of the marketing prospects for the proposed facility. The Court observed that DSI’s “massive” economic analysis “unquestionably” represented “business and industry’s most advanced and sophisticated method for predicting the probable results of contemplated projects.” The Court found it “difficult” to conclude what additional proof DSI could have advanced in an attempt to establish lost profits with reasonable certainty. Nonetheless, the Court held DSI’s proof was “insufficient to meet the required standard.”

The claimed damages were based upon projections. Although the Court recognized that projections could not be “absolute,” it found DSI’s proof of damages insufficient because the “foundations” of the “economic model” for the profits presented by DSI’s expert undermined the certainty of the projections. The projections assumed the stadium would be completed and successfully operated. The assumption of successful operation depended upon

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64 Id.
65 Id.
66 Id.
67 Id.
68 Id.
69 Id.
70 Id.
71 Id.

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Id. In discussing the reasonable certainty standard, the RESTATEMENT (SECOND) CONTRACTS noted the “increasing receptiveness on the part of courts to proof by sophisticated economic and financial data and by expert opinion has made it easier to meet the requirement of certainty.” The RESTATEMENT (SECOND) OF CONTRACTS § 352 cmt. a (1981).

Id. at 261–62, 493 N.E.2d at 236, 502 N.Y.S.2d at 133.
Id.

An expert’s opinion concerning lost profits will be viewed as too speculative for a jury to consider if it is based on significant unfounded assumptions. See, e.g., Point Prod. A.G. v. Sony Music Entm’t, Inc., 215 F. Supp. 2d 336, 346, opinion amended on reconsideration, No. 93 Cir. 400 (NRB), 2002 WL 31856951 (S.D.N.Y. Dec. 19, 2002). A lost profits claim may be dismissed if there is no foundation for the assumptions in plaintiff’s expert’s damages calculations. See, e.g., Media Logic, Inc. v. Xerox Corp., 261 A.D.2d 727, 731, 689 N.Y.S.2d 762, 766 (App. Div. 3d Dep’t 1999).

Kenford, 67 N.Y.2d at 262, 493 N.E.2d at 336, 502 N.Y.S.2d at 133. Plaintiff’s proof of lost profits is inadequate when it rests “upon a host of assumptions concerning uncertain contingencies.” Kidder, Peabody & Co. v. IAG Int’l Acceptance Grp. N.V., 28 F. Supp. 2d 126, 134 (S.D.N.Y. 1998), aff’d, 205 F.3d 1323 (2d Cir. 1999). For example, proof is speculative when it depends on assumptions concerning abrupt market expansion, reversal of market trends, or failure to take account of what would be the response of competitors. Trademark Research Corp. v. Maxwell Online, Inc., 995 F.2d 326, 333 (2d Cir. 1993).

Kenford, 67 N.Y.2d at 262, 493 N.E.2d at 336, 502 N.Y.S.2d at 133. There is no simple answer as to when a claim for lost profits will be considered speculative. Damages often are viewed as speculative when numerous questionable assumptions are used to make a long term projection of lost profits. See Atias v. Sedrish, 133 Fed. Appx. 759, 759–60 (2d Cir. 1993).
the stadium hosting sporting events and other forms of entertainment as well as meetings, conventions and other commercial gatherings. At the time of the breach, there was only one other domed stadium (the Houston Astrodome) that could have been used as a basis of comparison. Plaintiff’s state of the art economic model projected what a stadium that was never built would have been used for based on what had occurred at a different facility in a different section of the country. The Court believed such evidence could not prove lost profits with reasonable certainty.\(^{72}\) The Court concluded “the multitude of assumptions required to establish projections of profitability over the life of this contract require speculation and conjecture, making it beyond the capability of even the most sophisticated procedures to satisfy the legal requirements of proof with reasonably certainty.”\(^{73}\)

The Court noted that New York courts had “long recognized the inherent uncertainties of predicting profits in the entertainment field” and had given “great weight” to how the “whim of the general public” and “the fickle nature of popular support for professional athletic endeavors” could impact projections that looked twenty years into the future.\(^{74}\) The Court stated that the record in the case demonstrated the efficacy of the principles articulated in Cramer v. Grand Rapids Show Case Co.\(^ {75}\) and it would continue to adhere to those principles.\(^ {76}\)

The Cramer Court considered whether plaintiffs could recover the

\(^{72}\) Kenford, 67 N.Y.2d at 262, 493 N.E.2d at 236, 502 N.Y.S.2d at 133.  The Court of Appeals later stated that Kenford addressed the fact of damage, in addition to the quantum of damage, and found that DSI had failed to prove its claimed lost profits were caused by the breach. Am. List Corp. v. U.S. News & World Report, Inc., 75 N.Y.2d 38, 43, 549 N.E.2d 1161, 1164, 550 N.Y.S.2d 590, 593 (1989) (“We concluded [in Kenford] that the claimed lost future profits could not be recovered because it could not be demonstrated that such damages were caused by the breach, the alleged loss was not capable of proof with reasonable certainty, and it had not been proven that those damages were within the contemplation of the parties at the time the contract was made.”).


profits they would have made from a new business in which they had no experience and which was situated in a locale where they had not previously done business. The Court ruled that the claimed lost profits were too speculative to be recovered. The Kenford Court appeared to believe that DSI’s proof was insufficient because, like the plaintiff in Cramer, DSI did not base its proof upon any historical data but upon conjecture of what it would have made in a new business that was unlike anything that had been done in the relevant market.

In Ashland Management, Inc. v. Janien, Janien, a person who developed a model for stock selection, asserted a claim alleging that Ashland Management, an investment advisory company that had employed him, breached a contract concerning use of that model. Janien succeeded in his attempt to recover a judgment for what Ashland Management would have paid to him had the contract been performed. In attacking the judgment in the Court of Appeals, Ashland Management contended that Janien was not entitled to “recover lost profits” even if Ashland had breached the contract.

The Ashland Management Court noted that although lost profit damages must be reasonably certain, absolute certainty is not required and the law did not require mathematical precision. The Court noted that the lost profits claim in Kenford failed to meet the reasonable certainty requirement because the claim “rested on a host of speculative assumptions and few known factors.”

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77 The First Department has stated that “damages were denied” in Cramer because “plaintiffs were inexperienced retailers” who were incapable of proving their venture “would have been successful.” Hirschfeld v. IC Sec., Inc., 132 A.D.2d 332, 336, 521 N.Y.S.2d 436, 439 (App. Div. 1st Dep’t 1987), appeal dismissed, 72 N.Y.2d 841, 530 N.Y.S.2d 556 (1998).
78 The Cramer Court also noted that plaintiffs “had no assurance that the venture would not prove to be a failure.” Cramer, 223 N.Y. at 67, 119 N.E. at 228. The Court relied upon its decision in Witherbee v. Meyer, 155 N.Y. 446, 50 N.E. 58 (1898), believing the facts before it were distinguishable from Wakeman v. Wheeler & Wilson Manufacturing, Co., 101 N.Y. 205, 4 N.E. 264 (1886). Cramer, 223 N.Y. at 68, 119 N.E. at 228. The Witherbee Court expressed hostility to lost profit damages believing that the claim often is “too dependent upon numerous and changing contingencies to constitute a definite and trustworthy measure of damages.” Witherbee, 155 N.Y. at 453, 50 N.E. at 60.
81 Id. at 399, 624 N.E.2d at 1008, 604 N.Y.S.2d at 913.
82 Id. at 403, 624 N.E.2d at 1010, 604 N.Y.S.2d at 915.
83 Id.
84 Id. at 405, 624 N.E.2d at 1012, 604 N.Y.S.2d at 917. The Court of Appeals also has noted that the reason for its rejection of the damage claim in Kenford was that “there were too many undetermined variables” and that “competent proof” addressing these variables could have removed the “lost profit claim from the realm of impermissible speculation.”
Court stated that the claimed damages must be “capable of measurement based upon known reliable factors without undue speculation.” This statement contains three points:

1. The court must first decide whether the claimed damages are “capable of measurement.” This question looks to whether there is an accepted methodology that can be applied to the evidence to project the profit that plaintiff would have earned had the contract been performed.

2. If so, the court must determine whether plaintiff has presented a reasonable basis upon which lost profits can be estimated. Court decisions indicate that a reasonable basis is established by applying the accepted methodology to historical data to make a projection of the profits that would have been earned in the future.

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Ashland, 82 N.Y.2d at 403, 624 N.E.2d at 1010, 604 N.Y.S.2d at 915. Plaintiff’s proof is not speculative merely because defendant disagrees with the methodology utilized or particular assumptions. Care Travel Co. v. Pan Am. World Airways, Inc., 944 F.2d 983, 994–95 (2d Cir. 1991).


Since “Daubert factors” may be applied to determine the admissibility of an expert’s opinion concerning lost profit damages, consideration should be given to whether (i) the methodology underlying the testimony is valid and (ii) the method is a reliable basis to draw a conclusion from the particular facts of the case. See Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 589–92, 113 S. Ct. 2786, 2794–96 (1993); Kumho Tire Co. v. Carmichael, 526 U.S. 137, 153–58, 119 S. Ct. 1167, 1176–79 (1999).


See Lee v. Park, 16 A.D.3d 986, 988, 793 N.Y.S.2d 214, 217 (App. Div. 3d Dep’t 2005) (plaintiff’s past profits, established by presentation of its tax returns and testimony of its accountant, could provide a basis for discerning future profits without speculation); AMCO
3. Plaintiff’s proof cannot be speculative; it may not be rife with assumptions and conjectures that would render it speculative.90

The Ashland Management Court upheld the award of damages believing Janien’s proof of damages did not rest on inappropriate assumptions. The investment model at issue did not involve a “new business” but an extension of the business in which Ashland had engaged for years. The “product” that would generate the “profits” Janien sought to recover was an enhancement of a “product” that had been highly successful for Ashland. The “product” had a ready reservoir of potential customers since Ashland intended to market the model to its existing clients. Finally, Ashland, after having tested the “product,” had enough confidence in it to include projections of revenue in the contract at issue. In light of these factors, the Court concluded that Janien “had met his burden of proving his lost profits with reasonable certainty.”91

C. Second Circuit Authority

Citing Wakeman v. Wheeler & Wilson Manufacturing Co., the Second Circuit has stated that where the fact of damage is certain, uncertainty concerning the amount of damage should not prevent an award of damages.92 It continues to apply this principle.93 The Second Circuit has also stated the Supreme Court had restated the

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92 Matarese v. Moore-McCormack Lines, 158 F.2d 631, 637 (2d Cir. 1946); see also Compania Pelineon De Navegacion, S.A. v. Tex. Petroleum Co., 540 F.2d 53, 56 (2d Cir. 1976), cert. denied, 429 U.S. 1041 (1977) (“The rule which precludes the recovery of uncertain damages applies to such as are not the certain result of the wrong, not to those damages which are definitely attributable to the wrong and only uncertain in respect of their amount.”).

principle of Wakeman as “where a wrong has been done, the courts will endeavor to make a reasonable estimate of damages.”

The Second Circuit follows what can be characterized as the wrongdoer rule—where the breach of contract caused damage but there is uncertainty concerning the amount of damage, the burden of that uncertainty will rest upon the defendant. The rule requires the plaintiff to demonstrate its damages with some level of certainty. Once that burden is met, the breaching party whose acts caused plaintiff’s damage will bear the uncertainty of plaintiff’s proof. In discussing the wrongdoer rule, the Second Circuit has stated “[o]ur case law is clear that a plaintiff need only demonstrate a ‘stable foundation for a reasonable estimate’ as to damages.”

When plaintiff presents a reasonable estimate of its lost profits, a jury award of such profits could stand even though the defendant presented contrary evidence. An award of damages based upon a reasonable estimate of lost profits will be upheld on appeal if the amount awarded is a plausible inference that the trier of fact could draw from the evidence presented. While acknowledging New York law requires “reasonable certainty,” the Second Circuit has upheld a jury’s award of lost profit damages where plaintiff provided “a reasonable basis upon which the jury could . . . conclude the amount of plaintiffs’ lost profits caused by defendants’ breach.”


95 Contemporary Mission, Inc. v. Famous Music Corp., 557 F.2d 918, 926 (2d Cir. 1977); see also Lee v. Joseph E. Seagram & Sons, Inc., 552 F.2d 447, 455 (2d Cir. 1977) (“[S]ince defendant[s]’ breach has made difficult a more precise proof of damages, [defendant] must bear the risk of uncertainty created by its conduct.”).

96 Schonfeld v. Hilliard, 218 F.3d at 164, 172 (2d Cir. 2000).

97 Boyce v. Soundview Tech. Grp., Inc., 464 F.3d 376, 392 (2d Cir. 2006). The “stable foundation” language came from the Court’s pre-Kenford decision in Contemporary Mission, 557 F.2d at 926, where the Second Circuit cited Freund v. Wash. Square Press, Inc., for the proposition that plaintiff’s burden is only to provide a “stable foundation for a reasonable estimate” of damages.

98 See Lee, 552 F.2d at 456 (“Mere dispute on the validity of some of the figures cannot wipe out the evidence but merely emphasizes that the jury was presented with a factual question whose determination we should not change.”).

99 See Am. Fed’l Grp., Ltd. v. Rothenberg, 136 F.3d 897, 913 (2d Cir. 1998) (“We are satisfied, however, that the retention and earnings rate figures accepted by the magistrate judge are ‘plausible’—though surely not inarguable—inferences from the evidence. We cannot, therefore, reject them and the computations based upon them as clearly erroneous.”).

In *Perma Research and Development v. Singer Co.*, a case decided prior to *Kenford Co. v. County of Erie*, the Second Circuit articulated a “reasonable basis” standard for awarding lost profit damages stating that “the reasonable basis for damages that the law requires is a precise one, barring only those damages which ‘are not the certain result of the wrong, not . . . those damages which are definitely attributable to the wrong and only uncertain in respect of their amount.’” The court ruled that the plaintiff could recover those damages which were a certain result of the breach for which it had presented a “reasonable basis” for an award.

In *Kenford*, the Court of Appeals specifically rejected the “reasonable basis” standard of *Perma Research*. The Second Circuit thereafter followed *Kenford* in ruling that under New York law, a plaintiff had to establish the amount of the claimed lost profits with “reasonable certainty.” It ruled that New York law requires that lost profit damages be capable of measurement based on known and reliable factors without undue speculation and projections of future profits based upon a multitude of assumptions that require speculation and conjecture do not provide the requisite certainty.

101 *Perma Research and Dev. v. Singer Co.*, 542 F.2d 111 (2d. Cir. 1976). The first assignee of a patent brought suit against the second assignee claiming the second assignee breached its contractual obligation to use best efforts to perfect and market the patented device. Plaintiff sought as damages the money it would have made had the product been perfected and marketed. Plaintiff presented proof that the patented device could have been perfected, that a market for it existed, and that projected sales that could have been made in that market—sales which would have been the basis of payments to plaintiff. The Second Circuit rejected the contention that plaintiff’s lost profit damages were too speculative to assess.

102 *Id.* at 116.

103 *Id.*

104 *Kenford*, 67 N.Y.2d at 263, 493 N.E.2d at 236, 502 N.Y.S.2d at 133. One federal court noted that “[a]lthough the *Perma Research* test reflects the basic principle that speculative future profits may not be awarded, the Court in *Kenford* found it inconsistent with New York law to the extent that it emphasized the rationality of the calculation of lost profits over all other considerations.” *Perico, Ltd. v. Ice Cream Indus., Inc.*, No. 87 Civ. 4211 (MBM), 1990 WL 11539, at*5 (S.D.N.Y. Feb. 9, 1990).

105 *Int’l Telecom, Inc. v. Generadora Electrica Del Oriente, S.A.*, 128 F. App’x. 809, 810 (2d Cir. 2005); *Merlite Indus., Inc. v. Valassis Inserts, Inc.*, 12 F.3d 373, 376 (2d Cir. 1993); but see *S&K Sales Co. v. Nike Inc.*, 816 F.2d 843, 852 (2d Cir. 1987) (“[Plaintiff] need only provide the jury with a sound basis for approximating with reasonable certainty the profits lost . . ..”).


107 *Schonfeld*, 218 F.2d at 172 citing *Kenford*, 67 N.Y.2d at 262, 493 N.E.2d at 236, 502 N.Y.S.2d at 133. The Second Circuit has ruled that it is not clear error for a court to deny lost profits based on a fifteen year projection that relied upon numerous assumptions concerning future events. *Atias v. Sedrish*, 133 F. App’x. 759, 760 (2d Cir. 2005); see also *Trademark Research Corp. v. Maxwell Online, Inc.*, 995 F.2d 326, 333 (2d Cir. 1993) (“[Plaintiff’s] lost profits presentation depended entirely on speculation of a particularly dubious kind.
D. Tractebel

In *Tractebel Energy Marketing, Inc. v. AEP Power Marketing, Inc.*, the Second Circuit addressed the standard to be applied in a breach of contract case to determine whether the non-breaching party could recover as damages the profits it would have earned over the life of a long term contract had it been performed.

In *Tractebel*, AEP Power Marketing, Inc. (“AEP”) and Dow Chemical Company (“Dow”) agreed to develop a co-generation facility (the “Facility”). AEP would operate the Facility and purchase the electricity it produced. Because AEP would be committed to purchase a huge amount of energy, AEP wanted to have in place, prior to its entering into the agreement with Dow, an agreement binding another company to purchase from AEP some of the energy produced by the Facility.

AEP entered into a Power Purchase and Sale Agreement (the “PPSA”) with Tractebel Energy Marketing, Inc. (“TEMI”) pursuant to which, for a period of 20 years, AEP promised to supply energy from the Facility to TEMI and TEMI agreed to take a minimum level of energy at the prices stipulated in the PPSA. The PPSA called for a “Termination Payment” which required the terminating party to make a payment to the party that did not cause the termination.

After the execution of the PPSA, the energy market collapsed. TEMI repudiated the agreement. Litigation ensued. AEP asserted a breach of contract claim against TEMI seeking to recover as damages the amount of the Termination Payment as calculated over the remaining term of the PPSA. At trial, AEP claimed damages of $520 million. The claimed damages were viewed as the profits AEP would have earned over the remaining life of the

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[Plaintiff's accounting expert] assumed an abrupt expansion of the market for trademark search services, assumed that [Plaintiff] would reverse the long decline in its market share, assumed that [Plaintiff's] historically aggressive competitors would take no measures to counter [Plaintiff's] ascendancy, and predicted which choices customers would make among a variety of new and old search technologies—all of these assumptions reduced to speciously exact dollar amounts and spun out to the year 1998.”).


The agreement provided that in the event of a default, the non-defaulting party would be entitled to any net loss resulting from the termination of the agreement and provided a formula for determining what that net loss would be. *Id.* at 108. AEP claimed that TEMI’s repudiation would cause it to suffer a net loss. *Id.*

As a result of the state of the energy market after the collapse, TEMI did not need or want the “immense” amount of energy it had agreed to purchase from AEP. *Id.* at 93.
agreement had it been performed.\textsuperscript{111}

The district court, after a bench trial, ruled\textsuperscript{112} that AEP could not recover those lost profit damages because AEP failed to prove its damages with the requisite degree of certainty.\textsuperscript{113} It stated that under New York law, AEP had the burden of proving the amount it claimed with “reasonable certainty.”\textsuperscript{114} It “not[ed] that reasonable certainty did not mean absolute certainty” but “require[d] that damages be capable of measurement based upon known and reliable factors without undue speculation.”\textsuperscript{115}

The district court concluded that the testimony of AEP’s expert failed to meet the reasonable certainty test.\textsuperscript{116} The expert essentially calculated the present value of the amount of payments AEP would have received from TEMI had the contract been performed and deducted the present value of what AEP would have received from selling to other buyers the power that would have been purchased by TEMI.\textsuperscript{117} The calculation was based upon assumptions of what the price of electricity would be over the remaining term of the contract.

The district court viewed AEP’s expert as relying upon a large number of assumptions concerning future events to estimate damages caused by the breach. The court stated that in order to determine the amount of the Termination Payment, “one would have to be able to presage a vast and varied body of facts” and, in

\begin{enumerate}
  \item \textsuperscript{111} “The district court [had] characterized [AEP’s claimed] damages pursuant to the Termination Payment provision as ‘essentially a request for lost profits projected over the 20 year length of the contract.’” \textit{Id.} at 108.
  \item \textsuperscript{112} \textit{Tractebel}, No. 03 Civ. 6731(HB), 03 Civ. 6770 (HB), 2005 WL 1863853 (S.D.N.Y. Aug. 8, 2005), \textit{amended on reconsideration}, No. 03 Civ.6731 (HB), 03 Civ.6770 (HB), 2006 WL 147586 (S.D.N.Y. Jan. 20, 2006), \textit{aff’d in part, vacated in part}, 487 F.3d 89 (2d Cir. 2007).
  \item \textsuperscript{113} \textit{Id}. at *13.
  \item \textsuperscript{114} \textit{Id}. at *13 (citing \textit{Kenford}, 67 N.Y.2d at 261, 493 N.E.2d at 235, 502 N.Y.S.2d at 132).
  \item \textsuperscript{115} \textit{Id}. at *13 (quoting Ashland Mgmt., Inc. v. Janien, 82 N.Y.2d 395, 403, 624 N.E.2d 1007, 1010, 604 N.Y.S.2d 912, 915 (1993)).
  \item \textsuperscript{116} \textit{Id}. at *14. In so ruling, the court acknowledged that AEP had presented evidence from an expert who appeared well qualified to give an opinion in the power field.
  \item \textsuperscript{117} The District Court stated:

    \begin{quote}
    [AEP’s expert’s] methodology for calculating the Termination Payment was as follows: First, [he] totaled the payments AEP was to receive from TEMI under the PPSA ($646 million), and then subtracted the revenues that AEP may be expected to earn from [the facility] in the absence of payments from TEMI. To calculate these revenues, [he] estimated a range of potential values, incorporating a variety of alternative scenarios that allowed for the testing of extreme assumptions. Based on this approach, [he] estimated revenues between $40 and $229 million to AEP without the PPSA, with a most likely case of $126 million. Subtracting these figures from the amounts TEMI owed under the PPSA, [he] estimated that AEP’s damages [were] between $417 million and $604 million, with the most likely case being $520 million.
    \end{quote}
\end{enumerate}

\textit{Id}. at *14.
light of “so many unknown variables, the [] expert [] might have done as well had [he] consulted tealeaves or a crystal ball.”

The district court believed it was “inherently speculative” to calculate lost profits over a twenty year period since AEP’s damage model relied on a large number of assumptions and there was no forward price curve for electricity. After hearing the evidence at trial, the district court concluded that, leaving aside “credibility gaps,” the proof presented by plaintiff’s expert “failed to meet the ‘reasonable degree of certainty’ test.”

The district court noted that AEP’s expert, who was armed with the tools and experience to make a damage calculation, provided a damage estimate of between $417 and $604 million with the most likely case being $520 million. The “gap” of $187 million between the high-end and low-end of the damage estimate troubled the district court, which believed that “[a]lthough . . . ‘reasonable certainty’ brings with it a measure of flexibility, it does not allow a margin of error of hundreds of millions of dollars.”

The district court also considered the damage projection to be speculative because the projection pertained to a new business which the parties had not previously conducted. Although there is no *per se* rule precluding an award of lost profits for a “new business,” a higher level of proof is needed to achieve reasonable certainty as to the amount of the damages. The district court noted that when a new business seeks recovery of lost profits, greater scrutiny is given to the claim because there is no track record on which to base an estimate of lost profits.

The Second Circuit reviewed *de novo* the denial of damages to AEP for breach of contract. The court faced an interesting fact

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118 Id. at *16.
119 Id.
120 Id. at *14.
121 The Second Circuit had previously noted that “[w]hen damages are at some unascertainable amount below an upper limit and when the uncertainty arises from defendant’s wrong, the upper limit will be taken as the proper amount.” Raishevich v. Foster, 247 F.3d 337, 343 (2d Cir. 2001).
122 Tractebel, 2005 WL 1863853, at *16.
123 Id.
124 Id.
126 Tractebel, 2005 WL 1868533, at *13 (citing Ashland, 82 N.Y.2d at 404, 624 N.E.2d at 1011, 604 N.Y.S.2d at 916; Schoenfeld v. Hilliard, 218 F.3d 164 (2d Cir. 2000)).
127 Tractebel Energy Mktg., Inc. v. AEP Power Mktg., Inc., 487 F.3d 89, 109 (2d. Cir. 2007) (citing Lauder v. First Union Life Ins., 284 F.3d 375, 379 (2d Cir. 2002)). Had the Second Circuit viewed as a finding of fact after trial the lower court’s conclusion that plaintiff had
TEMI intentionally breached the contract in order to avoid a substantial loss and the breach deprived AEP of the substantial benefit it would have gained from the sale of electricity at the price that it had locked in under the contract. The parties had agreed that in the circumstances presented TEMI would be obligated to make a Termination Payment. The Second Circuit considered whether uncertainty concerning the amount of payment would allow TEMI to avoid its responsibility to make the payment and thereby leave AEP without compensation to redress TEMI’s repudiation of the contract. In essence, would the Second Circuit leave standing a district court decision that allowed a party that intentionally breached a contract to avoid liability for the injury caused by its breach and to garner the windfall of saving the hundreds of millions of dollars it would have lost in the performance of the contract? The Second Circuit vacated the district court’s judgment denying the Termination Payment and remanded the case for reconsideration of AEP’s damages.

The Second Circuit believed that because the district court had viewed AEP as seeking lost profits as consequential damages, it had applied a “reasonable certainty” test. The court believed that, failed to prove its claimed lost profit damages with reasonable certainty, it likely would have had to affirm that ruling because such finding would have been a plausible inference from the evidence presented and could not be characterized as clearly erroneous. See supra note 79; note 86. The Second Circuit characterized the issue before it as whether the district court had applied the appropriate standard in determining damages, an issue of law that would be reviewed de novo. See Juliano v. Health Maint. Org. of N.J., Inc., 221 F.3d 279, 286 (2d Cir. 2000) (“Whether the court chose the correct method of calculating damages is a question of law . . . which we review reviewed de novo.”); Lauder, 284 F.3d at 379 (“Finally, whether the court correctly calculated damages is a question of law that we review de novo.”).

When the parties entered into their long term contract, they negotiated and stated that a breaching party would be liable to make a Termination Payment and they specified the formula to calculate the Termination Payment. Tractebel, 2005 WL 1863853, at *1, *4. TEMI intentionally breached the contract because it determined it would lose a substantial amount of money if it performed. Id. at *1. As the district court noted, when TEMI approved the contract at issue, it forecasted that it would earn a profit of $80 million and that less than a year later, “the PPSA projected that TEMI was approximately $360 million ‘out of the money’”. Id. at *2. AEP lost an expectancy interest as a result of the breach. Id. at *13. The amount of the injury to AEP was substantial. Id. at *17. AEP presented a damage assessment from a qualified expert. Id. at *14, *16. TEMI did not establish any gaping holes in that expert’s damage model. It did not show that the methodology employed by AEP’s expert, or the assumptions used by that expert, were unreasonable in light of assumptions commonly used by parties in the industry to negotiate and value contracts. Id. Nor did TEMI advance a better analysis. Id.

“A court may take into account willfulness “in deciding whether to require a lesser degree of certainty.” Restatement (Second) of Contracts § 352 cmt. a (1981).

Tractebel, 2005 WL 1863853, at *1.

Id. at *4.

The Second Circuit stated that “[i]n characterizing AEP’s claim as one for consequential damages, the district court confused the benefit of the bargain with speculative profits on
although under Kenford Co. v. County of Erie lost profit damages must be proven with “reasonable certainty,” that standard applies only when lost profits are sought as consequential damages. The Second Circuit ruled that the district court had erred in applying the reasonable certainty standard because AEP's lost profits claim sought general, as opposed to consequential, damages. The court ruled that although a plaintiff must prove the amount of damages with reasonable certainty when it seeks lost profits as consequential damages, a plaintiff may recover lost profits as general damages by “show[ing] a ‘stable foundation for a reasonable estimate’ of damage incurred as a result of the breach.” The court concluded: “[t]he law of New York is clear that once the fact of damage is established, the non-breaching party need only provide a ‘stable foundation for a reasonable estimate’ [of damages]’ before an award of general damages can be made.” The court did not cite any authority to support this assertion.

collateral transactions.” Tractebel, 487 F.3d at 110. The district court, however, noted that since “AEP was unable to prove anything close to a reasonable estimate of damages,” even if the case were viewed “as a claim for general damages, AEP has failed to meet its burden.” Tractebel Energy Mktg., Inc. v. AEP Power Mktg., Inc., No. 03 Civ.6731 (HB), 03 Civ.6770 (HB), 2006 WL 147586, at *3 (S.D.N.Y. Jan. 20, 2006).

133 Tractebel, 487 F.3d at 109 (citing Kenford Co. v. Cnty. of Erie, 67 N.Y.2d 257, 261, 493 N.E.2d 234, 235, 502 N.Y.S.2d 131, 132 (1986). Subsequent to its ruling in Tractebel, the Second Circuit noted that when a plaintiff seeks general, as opposed to consequential damages, it “is required to show with reasonable certainty the fact of damage, not its amount.” Merrill Lynch & Co. v. Allegheny Energy, Inc., 500 F.3d 171, 185 (2d Cir. 2007).

134 Since “AEP [sought] only what it bargained for,” the Second Circuit viewed AEP’s claim as “most certainly a claim for general damages.” Tractebel, 487 F.3d at 110. The Second Circuit did not address the fact that on a motion for reconsideration AEP had argued that a “reasonable estimate” standard should be applied since it presented a claim for general damages (“AEP argues that a plaintiff seeking general damages need only present a ‘reasonable estimate’ of the ‘approximate’ present value of the breaching party’s performance under the contract.”) and the district court concluded that AEP had been “unable to prove anything close to a reasonable estimate of [its] damages,” such that even if the standard advanced by AEP were applied, “AEP has failed to meet its burden.” Tractebel, 2006 WL 14758, at *3.

135 Tractebel, 487 F.3d at 110 (quoting Contemporary Mission, Inc. v. Famous Music Corp., 557 F.2d 918, 926 (2d Cir. 1977)). The Second Circuit cited Wakeman as support for the proposition that when the fact of damage is certain, there rarely can be a good reason for refusing a damage award because of uncertainty concerning the amount of damages. Id. (citing Wakeman v. Wheeler & Wilson Mfg. Co., 101 N.Y. 205, 209, 4 N.E. 264, 266 (1886)). The court cited Contemporary Mission’s interpretation of Freund v. Wash. Square Press, Inc., for the proposition that the non-breaching party need only show a “stable foundation for a reasonable estimate” of damages. Id. at 110–11 (citing Contemporary Mission, 557 F.2d at 926 (2d Cir. 1977)).


137 Commentators had noted that in jurisdictions where a plaintiff is required to prove its damages with certainty, courts have applied that standard more stringently where the plaintiff seeks consequential damages—lost profits on transactions other than the transaction
The Second Circuit also rejected the district court’s conclusion that AEP’s damage projections were inherently speculative because they relied upon a large number of assumptions (price fluctuations, regulatory changes, competitor’s actions, fluctuating supply and demand). The court viewed assumptions on such variables as inherent in setting damages in any long-term contract. It stated that long-term agreements like the contract at issue could not be breached with impunity simply because it would be difficult to accurately calculate damages.

The court noted that “New York courts have significant flexibility in estimating general damages” once liability for breach of contract has been established. It ruled that “[t]o the extent certain variables must be assumed in order to arrive at a reasonable estimate” of damages, such assumptions may be made unless the defendant produces evidence that “undermines the basis for the assumptions.” “The risk that the future might reveal the... assumptions to be false” was to be borne by the breaching party.

After the Second Circuit ruling, the parties in Tractebel resolved their dispute without a further ruling by the district court. Courts in the Second Circuit have applied Second Circuit’s analysis in Tractebel to claims for lost profits. No New York State court has applied that analysis.

II. THE COURT OF APPEALS WOULD LIKELY NOT APPLY THE TRACTEBEL ANALYSIS

A. The Consequential/General Distinction

In Tractebel, the Second Circuit stated that a plaintiff seeking

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138 Tractebel, 487 F.3d at 111.
139 Id.
140 Id. at 112.
141 Id.
142 Id.
143 Id.
144 See Compana Embotella dora Del Pacifico, S.A. v. Pepsi Cola Co., 650 F. Supp. 2d 314, 322 (S.D.N.Y. 2009) (quoting Tractebel, 487 F.3d at 109–110) (“[T]he Court is faced with the question of whether the damages sought by [plaintiff] are general, thus merely requiring a ‘reasonable estimate’ of damages before an award can be made, or instead consequential thus requiring [plaintiff] to prove such damages ‘with reasonable certainty.’”); Smart v. N. State Dept of Corr., No. 02-CV-836F, 2008 WL 4186332, at *6 (W.D.N.Y. Sep. 10, 2008) (quoting Tractebel, 487 F.3d at 110) (“While ‘certainty’ as to the amount of damages is not an essential element of general damages in New York, it is an element of consequential damages.”).
lost profits has “a higher burden for proving consequential damages than for general damages.” The court believed that although the “reasonable certainty” standard would apply to a claim for consequential damages, a lesser standard (“stable foundation for a reasonable estimate”) would apply when general damages were sought. The Tractebel court stated that it is “clear” under New York law that the standard for establishing lost profits differs depending upon what type of damages were claimed. Contrary to the language of Tractebel, this point is not “clear” under New York law. New York State court decisions have not drawn such a distinction. The Court of Appeals likely would rule that different standards should not apply.

In Ashland Management, Inc. v. Janien, the Court of Appeals cited Restatement (Second) of Contracts section 352 as support for its “reasonable certainty” standard for proof of lost profit damages. That section, captioned “Uncertainty as a Limitation on Damages,” states: that damages are not recoverable “for loss beyond an amount that the evidence permits to be established with reasonable certainty.” The section does not draw a distinction between general and consequential damages. A comment to section 352 notes that the “main impact of the requirement of certainty comes in connection with recovery for lost profits.” There is nothing in the Restatement or in its commentary that suggests a different standard of proof would apply depending upon whether the claimed damages are general or consequential.

The language in Tractebel seems at odds with the Ashland Management decision. The contract in that case provided that the Ashland Management would pay to Janien “a royalty of the higher of $50,000 or 15% of gross revenues per annum” that Ashland received from accounts that used the stock selection model developed by Janien. Janien claimed “that he was entitled to

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145 Tractebel, 487 F.3d at 111.
146 Id.
149 Restatement (Second) Contracts § 352 cmt a (1979).
150 The Restatement Contracts § 331(1) provided that lost profits were recoverable “only to the extent that the evidence affords a sufficient basis for estimating their amount in money with reasonable certainty.” The Restatement did not suggest that this provision applied only to consequential, and not to general, damages.
151 Ashland, 82 N.Y.2d at 400–01, 624 N.E.2d at 1009, 604 N.Y.S.2d at 914.
recover lost profits\textsuperscript{152} for breach of the contract arising from Ashland Management’s failure to make the payment that the contract required. Janien sought as damages the amount of money Ashland Management would have paid to him pursuant to the contract had it not been breached.\textsuperscript{153} Payments that would be due from the other contract party during the course of performance of the contract are general, not consequential, damages.\textsuperscript{154}

The Ashland Management Court stated “[l]ost profits must also be established with reasonable certainty” and believed Janien had established his claimed damages by basing them on projections contained in the parties’ agreement.\textsuperscript{155} The Court applied the reasonable certainty standard even though Janien was seeking the performance owed under the breached contract.\textsuperscript{156} The Ashland Management decision cites and discusses the Kenford Co. v. County of Erie decision and in no way limits that decision as applying only to a claim for consequential damages. The Court of Appeals adhered to the reasonable certainty standard and did not rule that a lesser standard applied because Janien’s lost profits claim did not seek consequential damages.

The Second Circuit in Tractebel believed an 1845 New York trial court decision, Masterton & Smith v. Mayor of Brooklyn,\textsuperscript{157} showed that New York courts had long ago clarified the distinction between profits which are general, as opposed to consequential, damages.\textsuperscript{158} This may not be the case. The Court of Appeals has cited Masterson for the proposition that “[l]oss of profits upon the very contract sued

\textsuperscript{152} Id. at 401, 624 N.E.2d at 1009, 604 N.Y.S.2d at 914.
\textsuperscript{153} Id. at 401, 624 N.E.2d at 1011, 604 N.Y.S.2d at 916.
\textsuperscript{154} See cases cited supra notes 3–4. As the Tractebel court noted, “when the non-breaching party seeks only to recover money that the breaching party agreed to pay under the contract, the damages sought are general damages.” Tractebel Energy Mktg., Inc. v. AEP Power Mktg., Inc., 487 F.3d 89, 109 (2d. Cir. 2007).
\textsuperscript{155} Ashland, 82 N.Y.2d at 401, 624 N.E.2d at 1012, 604 N.Y.S.2d at 914. The contract at issue contained projections concerning the minimum funds anticipated to be managed by Ashland Management using the model developed by Janien. Id. at 405, 624 N.E.2d at 1011, 604 N.Y.S.2d at 916. The Court viewed the projections as the minimum reasonable levels of investment that the parties determined the model would earn “after studying and discussing the products extensively.” Id. The Court believed Janien’s damage claim rested upon “the parties’ carefully studied professional judgments of what they believed were realistic estimates of future assets to be managed” using Janien’s model. Id. at 406, 624 N.E.2d at 1012, 604 N.Y.S.2d at 917. The Court believed Janien’s damages could be easily computed by applying Ashland’s 1% management fee to the amount of funds projected to be invested using Janien’s model and then allotting Janien 15% of such revenues. Id.
\textsuperscript{156} Janien was not seeking the profits he would have made on other business dealings had the contract not been breached. See supra note 4.
\textsuperscript{157} Masterton & Smith v. Mayor of Brooklyn, 7 Hill 61 (Sup. Ct. N.Y. Co. 1845)
\textsuperscript{158} Tractebel, 487 F.3d at 110.
upon, if definite and certain, may be recovered.”

The differing standards of proof for lost profit damages articulated in Tractebel also seem inconsistent with earlier Second Circuit decisions. In at least two earlier cases, the Second Circuit applied the “reasonable certainty” standard in awarding damages to compensate a party for the loss of the benefit it would have received under the contract at issue had it been performed.

In Care Travel Co. v. Pan American World Airways, Inc., plaintiff travel agency sued to redress defendant airline’s breach of an agreement governed by New York law pursuant to which plaintiff received an exclusive right to sell tickets on defendant’s flights from England to Karachi, Pakistan and Bombay, India. At trial, the plaintiff won an award of damages for the additional profits it would have made under that contract had the exclusivity provision not been breached. In affirming the judgment, the Second Circuit held that plaintiff had satisfied the burden of proving its damages with reasonable certainty. Even though plaintiff was seeking the profit it would have made in the performance of the breached contract, as opposed to profits on other business arrangements, the Second Circuit, citing Kenford, noted that the claimed damages “must be capable of proof with reasonable certainty.”

In Travellers International, A.G. v. Transworld Airlines, Inc., a tour operator sued to redress an airline’s wrongful termination of a joint venture agreement for the mass marketing of tours. The plaintiff sought to recover the profits it would have made under the contract at issue but for the breach. In affirming judgment for plaintiff, the Second Circuit noted that plaintiff had to prove “with a reasonable degree of certainty the amount of lost profits traceable to the breach.” The court stated that the determination of damages for lost profits was of sufficient certainty to “satisfy the rigorous standard set forth in Kenford and its progeny.”

161 Id. at 983, 987, 994.
163 Id. at 1579.
164 Id. It is possible to view the claimed damages in Ashland Management, Care Travel, and Travellers as general damages because even though the payment would come from the other party to the contract, the obligation to pay would only arise from there being a contractual agreement between defendant and a third party. For example, in Ashland Management, Janien’s right to payment would arise from an investor placing with Ashland Management funds that would be invested using Janien’s stock selection model.
The consequential/general distinction also appears inconsistent with a prior Second Circuit decision that indicated the “reasonable certainty” standard applies in all cases but is more stringently applied when consequential damages are sought. In Bausch & Lomb Inc. v. Bressler, the court stated:

A plaintiff seeking damages for breach of contract may not recover “for loss beyond an amount that the evidence permits be established with reasonable certainty.” The rule of certainty is enforced most strongly where, as here, the plaintiff seeks to recover for a loss on a transaction separate from the transaction that gave rise to the breach.

B. The Court of Appeals Would Likely Continue to Adhere to the Reasonable Certainty Standard

The plaintiff has the burden of presenting evidence that would allow the jury to determine with some specificity the financial repercussions of defendant’s breach. To satisfy this burden, a plaintiff must present a stable foundation for a reasonable estimate of its claimed lost profit damages. A failure to do so will result in dismissal of the claim.

The case law yields the parameters of what constitutes such a stable foundation:

The claimed damages must be capable of being proved. If defendant contends that the amount of damages is incapable of being proved, it has the burden of establishing such incapability.

Plaintiff must present competent evidence to establish its damages. A court should accept any evidence that has a tendency to show the probable amount of the claimed damages. A plaintiff

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166 Id. (quoting RESTATEMENT (SECOND) OF CONTRACTS § 352).
169 See Brauner v. Columbia Broad. Sys. Inc., 221 A.D. 2d 306, 633 N.Y.S.2d 530 (App. Div. 2d Dep’t 1995) (awarding summary judgment to defendant when plaintiff did nothing to rebut defendant’s “prima facie showing that . . . damages were incapable of proof with reasonable certainty”).
can prove lost profits by basing such claim upon “historical data and actual operating statistics of a kind type relied by the parties in the conduct of their business.”

Plaintiff's business records of profits prior to the breach can be the basis for a projection of lost profits. An award also can be based upon a plaintiff's performance in similar situations. Projections prepared by defendant can be used to establish lost profits.

There must be a definite and logical connection between plaintiff's proof and its claimed damages. Plaintiff can recover only its lost net profits. It must introduce evidence that would allow differentiation between its gross profit and its net profit. The plaintiff must take into account overhead and expenses that would have been incurred in the performance of the agreement.

Plaintiff's presentation of a “stable foundation” satisfies its burden of production. The burden then shifts to defendant to come forward with evidence to challenge plaintiff's damage model. If defendant does not present such evidence, plaintiff's estimate can be the basis for an award of lost profit damages.

A defendant would have the burden to present evidence to undermine, and argument to question, whether plaintiff presented the required stable foundation. For example, defendant could challenge the methodology used to calculate damages, dispute the

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181 Id.
182 See Le Roi & Assoc., Inc. v. Bryant, 309 A.D.2d 1144, 1145, 764 N.Y.S.2d 889, 890 (App. Div. 4th Dep't 2003) (“Inasmuch as defendants failed to controvert the evidence presented by plaintiff's expert with respect to the total amount of lost profits, we conclude that plaintiff established its entitlement to damages.”).
183 See McClelland v. Climax Hosiery Mills, 252 N.Y. 347, 357, 169 N.E. 605, 606 (1930) (discussing how the defendant has the burden of producing evidence that plaintiff's damages are less than the amount claimed).
184 In Tractebel, the district court noted that TEMI had disputed the methodology used by AEP's expert contending that the expert relied upon “a great number of 'subjective judgments' about events over the last 20 years.” Tractebel Energy Mktg., Inc. v. AEP Power Mktg., Inc.,
purported factual data to which the methodology is applied, point out factors not considered by plaintiff that would negatively impact plaintiff’s damage model,\(^{185}\) show plaintiff’s claimed damages were due to other causes,\(^{186}\) contest the validity of assumptions used in plaintiff’s damage model,\(^{187}\) and claim that plaintiff failed to mitigate its damages.\(^{188}\) Although the burden is on defendant to come forward with evidence to challenge plaintiff’s damage model, the burden of proof to establish damages always remains upon the plaintiff.\(^{189}\)

If the defendant claims lost profits are too speculative to be awarded, it has the burden of establishing that contention.\(^{190}\) A claim is speculative when it is not based on known and reliable factors,\(^{191}\) rests on too many assumptions concerning future events,\(^{192}\) or the claimed profits are dependent on the fickle nature of popular support, such as profits in an entertainment venture.\(^{193}\)

At the trial of a lost profits claim, the evidence will likely include both plaintiff’s damage model, which satisfies plaintiff’s burden of presenting a stable foundation for a reasonable estimate of damages, and defendant’s evidence attacking that model. The jury should be instructed that plaintiff must prove “with certainty” the

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\(^{188}\) Id. at 263, 493 N.E.2d at 236, 502 N.Y.S.2d at 133; Broadway Photoplay Co. v. World Film Corp., 225 N.Y. 104, 109, 121 N.E. 756, 758 (1919).
fact of damage—that profits were lost as a result of the breach of contract. A New York State court would instruct the jury that the amount of such damages must be proved with “reasonable certainty.” The jury is likely to be instructed that in considering the evidence, doubts are to be resolved against the breaching party.

If the Tractebel standard were applied, the jury would likely be instructed that it could award lost profit damages to a plaintiff seeking general damages if the jury, after consideration of all the evidence, found plaintiff had presented a “stable foundation” for a reasonable estimate of its loss. In a New York State court, the determination that plaintiff presented such a stable foundation can, but does not necessarily, entitle plaintiff to a damage award. Although such presentation shifts to defendant the burden of coming forward with evidence as to why the claimed lost profits should not be awarded, plaintiff still bears the burden of convincing the trier of fact that it is reasonably certain that plaintiff would have earned the claimed lost profits had the contract not been breached.

The open question is whether the Court of Appeals also would rule that a plaintiff seeking general damages is entitled to lost profits if it presents a stable foundation for a reasonable estimate of its claimed damages or whether, as it did in Kenford Co. v. County of Erie, the Court of Appeals would reject a standard that had been articulated by the Second Circuit.

The Tractebel decision sets forth no reason why the Court of Appeals should depart from its long-established rule that the non-


196 See, e.g., Wakeman v. Wheeler & Wilson Manufacturing. Co., 101 N.Y. 205, 4 N.E. 264 (1886); Contemporary Mission, Inc. v. Famous Music Corp., 557 F.2d 918, 926 (2d Cir. 1977); see also RESTATEMENT (SECOND) OF CONTRACTS § 352 cmt. a (“Doubts are generally resolved against the party in breach.”).


198 The trial judge in Tractebel concluded, after a bench trial, that plaintiff AEP had failed to meet this burden. Tractebel Energy Mkts., Inc. v. AEP Power Mkts., Inc., No. 03 Civ.6731 (HB), 03 Civ.6770 (HB), 2006 WL 147588, at *3 (S.D.N.Y. Jan. 20, 2006).

199 See, e.g., Stern v. Premier Shirt Corp., 260 N.Y.S.2d 201, 205, 183 N.E. 363, 364 (1932) (“[T]he damages should be measured by the profits plaintiff may be able to show with reasonable certainty were lost to him by the breach”). Nearly twenty-five years ago in Kenford, the Court of Appeals regarded the reasonable certainty standard as a “long-established and precise” rule of law. Kenford, 67 N.Y.2d at 261, 502 N.Y.S.2d at 132.
breaching party must prove its claimed lost profit damages with reasonable certainty, a standard articulated in the Restatement (Second) of Contracts. A comment to the Restatement (Second) notes that damage standards for breach of contract are generally more stringent than in tort cases.\textsuperscript{200} New York law requires that a plaintiff in a tort case establish its damages with reasonable certainty.\textsuperscript{201} It would be anomalous for a New York court to require a lesser standard of proof in a contract case.

It is difficult to see the Court of Appeals adopting the \textit{Tractebel} standard given its earlier decision in \textit{Ashland Management, Inc. v. Janien}. In that case, Janien demanded general damages in that his counterclaim sought to recover what Ashland Management would have paid to him under the contract at issue.\textsuperscript{202} The Court of Appeals addressed whether Janien had established his claimed damages with reasonable certainty.\textsuperscript{203} It did not apply a different standard because Janien sought general, as opposed to consequential, damages.\textsuperscript{204}

Although it is easy to see why the Second Circuit in \textit{Tractebel} did not want to let the district court’s denial of damages stand, the Second Circuit took a step beyond existing New York law when it ruled that a plaintiff seeking lost profits as general damages does not have to prove such damages with reasonable certainty.\textsuperscript{205} As it did in \textit{Kenford}, where the Court specifically rejected the Second Circuit’s “rational basis” standard,\textsuperscript{206} the Court of Appeals is likely to reject the standard articulated in \textit{Tractebel} and continue to require lost profit damages be proved with reasonable certainty.

\textsuperscript{200} \textit{RESTATEMENT (SECOND) OF CONTRACTS} § 352 cmt. b (1981).

\textsuperscript{201} Steitz v. Gifford, 280 N.Y. 15, 20, 19 N.E.2d 661, 664 (1939); Behrens v. Metro. Opera Ass’n, 18 A.D.3d 47, 50, 794 N.Y.S. 2d 301, 303 (App. Div. 1st Dep't 2005) (“In tort actions, an injured plaintiff may recover from the defendant all damages directly flowing from and as a natural consequence of the wrongful act, so long as the damages may be ascertained with reasonable certainty.”); see also \textit{N.Y. JUR. DAMAGES} § 104 (citing Steitz for the proposition that profits prevented or lost as the result of a tortious act are recoverable “provided the plaintiff can establish that the profits claimed to have been lost would reasonably have been realized except for the defendant’s wrong”).

\textsuperscript{202} \textit{Id.} at 398, 624 N.E.2d at 1008, 604 N.Y.S.2d at 913.

\textsuperscript{203} \textit{Id.} at 403, 624 N.E.2d at 1010, 604 N.Y.S.2d at 915.

\textsuperscript{204} \textit{Id.} at 405, 624 N.E.2d at 1011, 604 N.Y.S.2d at 916.


\textsuperscript{206} \textit{Kenford} Co. v. Cnty. of Erie, 67 N.Y.2d 257, 263, 493 N.E.2d 234, 236, 502 N.Y.S.2d 131, 133 (1986) (rejecting the “rational basis” test the Second Circuit had enunciated in \textit{Perma Research}).