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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

DEEPMONEY LLC, Plaintiff and Appellant, v. PERSHING LLC, Defendant and Respondent.	A136887 (San Francisco County Super. Ct. No. CGC 11-511171)

This is an appeal from judgment following the trial court's grant of summary judgment in favor of defendant Pershing LLC (Pershing) and against plaintiff DEEPmoney LLC (DEEPmoney). In so ruling, the trial court reasoned that DEEPmoney had failed to raise triable issues of fact with respect to two essential elements of its case – to wit, the formation of a contractual relationship between the parties and the right to recover lost profits as damages. On appeal, DEEPmoney challenges both findings by the trial court. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

DEEPmoney sued Pershing to recover lost profits for breach of contract, breach of the duty of good faith and fair dealing and promissory estoppel.[1] DEEPmoney theorized that the parties had entered into a binding, enforceable contract on August 5, 2009,

[1] DEEPmoney's original complaint also included causes of action for breach of partnership and joint venture fiduciary duties. However, the trial court sustained Pershing's demurrer with leave to amend, and an amended complaint was subsequently filed with only the three causes of action identified above.

pursuant to which Pershing agreed to perform certain services in connection with DEEPmoney's business plan to deploy a new type of investment vehicle called "STARpools."

DEEPmoney was incorporated in September 2005 by Dale Sundby, who had previously launched other technology-related ventures with varying degrees of success.[2] The basic concept of DEEPmoney was to create "co-trading" platforms. These platforms would allow average investors to participate in investment funds that, in essence, performed by mirroring or mimicking the trades of the most successful managed investment portfolios. Sundby personally invested over $1 million in DEEPmoney to help launch this business, which was originally in the form of a program called EinStock before ultimately transforming into the STARpool program.[3] Sundby also began promoting DEEPmoney's business plan to potential investors and executive candidates.

In May 2008, Sundby began talking to certain individuals at Pershing about collaborating on the STARpool concept. Pershing is one of the largest "clearing firms" in the United States. Headquartered in New Jersey, Pershing, among other things, acts as custodian for individual investor accounts held by financial intermediaries, like securities broker-dealers and registered investment advisors, which make up Pershing's client base. Pershing does not provide services directly to the individual investors. Rather, Pershing serves as the "back office" for those investors by, among other things, generating and maintaining historical and real-time transactional data for their accounts on behalf of the financial intermediaries. Sundby wanted DEEPmoney to engage with Pershing to gain access to these trading histories maintained in Pershing's databases. While Pershing had no independent right to provide any person or entity access to its clients' confidential

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[2] In 2008, Sundby formed a related entity, DEEPmoney Advisors LLC, to serve as an operating company for the purpose of managing STARpools. DEEPmoney Advisors LLC is not a party to this lawsuit and, in fact, never employed anyone or had any capital. According to Sundby, DEEPmoney Advisors LLC, which had "nothing in it," was simply "a placeholder waiting for all these other things to pour into it."

[3] EinStock was intended to provide a comprehensive trading platform for self-directed investors.

individual investor trading data, it nonetheless could hypothetically provide such access if Pershing's clients (and, in turn, the individual investors) were willing to authorize the disclosure.

Sundby's plan was to utilize this data from Pershing, if authorized, to identify the most successful professionally-managed investment portfolios by asset class and investing style. DEEPmoney would offer sub-advising agreements to the money managers responsible for the most successful portfolios. Average investors could then use DEEPmoney's co-trading platform to automatically "mirror" the money manager's trades in near real time, using both mutual-fund style investment vehicles and non-mutual-fund style vehicles. As DEEPmoney summarizes: "[DEEPmoney] would provide platforms to facilitate th[e] *co-trading*, and the 'Star' money managers would simply continue doing what they do best, manage their client portfolios, receiving a percentage of any fees generated by the new trading activity. Pershing would gain by charging clearing fees for the new trading activity."

Thus, in May or June 2008, when DEEPmoney was still focused on the EinStock concept, Sundby began discussing with Richard Brueckner, Pershing's Chairman and CEO, and Brian Nygaard, a senior executive in Pershing's San Francisco office, the possibility of a collaboration to give DEEPmoney access to Pershing's portfolio and trading data. These negotiations ended amidst the 2008 financial meltdown, with Pershing's senior management declining Sundby's invitation to work together. However, in early 2009, after DEEPmoney had replaced EinStock with the STARpool concept, Sundby reestablished contact with Pershing.

Around this same time, Sundby began talking to Marc Bryant as a possible candidate for CEO of DEEPmoney. Bryant, who had significant executive-level experience in the financial services industry, worked with Sundby to create a draft pro forma financial spreadsheet to anticipate STARpool's revenue potential. In May 2009, Nygaard participated in one or more meetings with Sundby and Bryant on behalf of Pershing. Near the conclusion of these meetings, Nygaard requested a copy of Bryant's draft pro forma spreadsheet. Sundby complied with this request and sought Nygaard's

commentary on the spreadsheet. This time, Nygaard complied, emailing Sundby on May 8, 2009, his observations with respect to the draft, followed a few days later with proposals for modifying it. Nygaard saved his proposed spreadsheet modifications in a new document entitled "DEEPmoney Pro Forma 5-09.xls."[4] In this document, Nygaard projected $65 million in profits for DEEPmoney by year 2014. As Nygaard explained to Sundby, he reached this profit number by applying a multiplier of 20 to DEEPmoney's projected cash flow, "a good number for [investment advising firms] with a good growth trajectory."

In the Summer of 2009, Sundby and Nygaard continued to negotiate a business deal that would provide DEEPmoney access to trading data maintained by Pershing on behalf of its clients. At this time, Nygaard knew Sundby was engaged in talks with potential investors for the STARpool concept. Sundby told Nygaard that he hoped Pershing and DEEPmoney could quickly finalize an agreement, so he could then use the agreement to his benefit in negotiations with potential investors.

On August 5, 2009, Nygaard sent a letter to Sundby on Pershing letterhead, which letter now provides the basis for DEEPmoney's legal claims. In this one-page letter, Nygaard laid out the following framework for a Pershing/DEEPmoney business collaboration:

"Dear Dale:

"Thanks for your interest in partnering with Pershing. Rich Brueckner and I appreciate our many discussions and you considering Pershing LLC to service DEEPmoney's STARpool funds.

"As we have discussed with you and with your counsel, Pershing provides custody service for assets introduced to Pershing by registered broker dealers and investment advisors. The clients that we serve have, by contract, primary ownership and rights to the data we maintain on their behalf. While Pershing cannot unilaterally disclose

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[4] Sundby had previously incorporated Nygaard's commentary into a new document entitled "DEEPmoney Pro Formo (Brian 1).xls," which Nygaard then further modified and saved as "DEEPmoney Pro Forma 5-09.xls."

information to outside parties regarding those accounts without the authorization of those parties, we can and will grant access to that data at the appropriate time with their expressed authorization.

"We will contact a select group of Pershing clients to inquire if they would be willing to meet with you. We will agree on the appropriate approach and level of disclosure prior to making those contacts. We will base expansion of those contacting efforts on the reactions we receive from the initial group of clients.

"In the meantime, we will collaborate on the technology requirements and costs of transferring authorized transaction and account data to service STARpool sub-advising. In the normal course of business, and consistent with our normal pricing protocols, we will work to forge a mutually beneficial contract for any services we ultimately provide to DEEPmoney.

"Please note that this letter should not be construed as Pershing's (or its affiliates') agreement to financially participate in your new venture or to make any specific investment in systems development to assist you in initiating your venture. The details of any future agreements will be determined as we jointly agree to terms of any such development in contracts to be created going forward.

"We look forward to continuing our work together and wish you the best of luck in this new venture."

Ultimately, however, DEEPmoney and Pershing were not able to successfully collaborate on the STARpool concept. Sundby never found an outside investor for DEEPmoney and, while Pershing introduced Sundby to some of its clients, none apparently agreed to provide DEEPmoney access to their individual investor clients' investment data. In November 2010, after Nygaard had left the company, Pershing decided not to expend additional effort on DEEPmoney and STARpool, thereby triggering this lawsuit. The operative complaint (the amended complaint) was then filed by DEEPmoney on September 1, 2011.

Following an unsuccessful demurrer, Pershing moved for summary judgment or, alternatively, summary adjudication. Pershing argued, among other things, that the

August 5, 2009 letter was not a binding, enforceable contract and that, even if it were, any claim for damages in the form of lost profits would be entirely speculative.

On August 1, 2012, following a hearing, the trial court sustained Pershing's objections to certain evidence offered in opposition by DEEPmoney, and granted the motion for summary judgment on two alternative grounds. First, the court found the August 5, 2009 letter was merely "an agreement to agree," and thus did not constitute a contract as a matter of law. Second, the court found DEEPmoney's damage claim for lost profits was based upon pure speculation and, thus, not sustainable as a matter of law. Judgment was thus entered in favor of Pershing and against DEEPmoney, prompting this appeal.

DISCUSSION

DEEPmoney challenges the trial court's grant of summary judgment in Pershing's favor on three grounds. First, DEEPmoney contends the trial court erred in finding the August 5, 2009 letter too indefinite as a matter of law to constitute a legally binding contract. Second, DEEPmoney contends that, if this court were to conclude triable issues of fact exist with respect to the enforceability of the August 5, 2009 letter, the company also has a right to proceed to trial on its claims regarding "non-fund" methods of deploying its STARpool financial product, an issue it contends was never decided. And, lastly, DEEPmoney contends the trial court erred in finding its lost profits claim too speculative as a matter of law to support a damages award because Pershing never met its initial burden on summary judgment to present evidence that would require the trier of fact to find against it. We address each contention in turn below after setting forth the relevant legal standards.

A defendant moving for summary judgment has met its burden to show a cause of action lacks merit if the defendant can show the plaintiff cannot establish one or more elements of the cause of action. (Code of Civ. Proc., §437c, subd. (o)(1).) "In such a case, the defendant bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850 [107 Cal.Rptr.2d 841, 24 P.3d 493] (*Aguilar*).) If the

defendant carries the burden of production, the burden shifts to the plaintiff to make his or her own prima facie showing of the existence of a triable issue of fact. (*Ibid*.) 'There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof. [Fn. omitted.]' (Ibid.)" (*McGonnell v. Kaiser Gypsum Co.* (2002) 98 Cal.App.4th 1098, 1103.) Further, in making his or her prima facie showing, the plaintiff "may not rely upon the mere allegations or denials of its pleadings to show that a triable issue of material fact exists but, instead, shall set forth the specific facts showing that a triable issue of material fact exists as to that cause of action or a defense thereto." (Code Civ. Proc., § 437c, subd. (p)(2); see also *Teselle v. McLoughlin* (2009) 173 Cal.App.4th 156, 168-169.)

In reviewing an order granting summary judgment in favor of the defendant, we independently examine the record to determine whether there exists any triable issue of material fact. (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 767.) Thus, like the trial court, we consider all admissible evidence set forth in the papers in the light most favorable to the plaintiff as the losing party. This review requires us to resolve any evidentiary doubts or ambiguities in the plaintiff's favor. (*Id.* at p. 768; see also § 437c, subd. (c).)

With these standards in mind, we return to the factual record.

I. DEEPmoney's Lost Profits Claim.

The trial court first found Pershing was entitled to summary judgment on the ground that DEEPmoney had failed to raise any triable issues of fact with respect to its lost profits claim, the only damages identified in the operative complaint. DEEPmoney contends this finding was erroneous because Pershing never met its initial burden on summary judgment to make a prima facie showing of the *nonexistence* of any triable issue as to lost profits. According to DEEPmoney, the burden therefore never shifted its way to make a prima facie showing.

The substantive law is not in dispute. " 'The basic object of damages is compensation, and in the law of contracts the theory is that the party injured by a breach

should receive as nearly as possible the equivalent of the benefits of performance. [Citations.] The aim is to put the injured party in as good a position as he would have been had performance been rendered as promised.' [Citations.]" (*Auerbach v. Great Western Bank* (1999) 74 Cal.App.4th 1172, 1191.)

"Lost profits" are one variety of damages recoverable by a successful plaintiff in a breach of contract case. In fact, in this case, lost profit damages are the only damages sought. Lost profits are generally defined as a plaintiff's loss of net pecuniary gain, which gain is derived by deducting the plaintiff's expenses (such as the value of labor, materials, rent and other expenses) from its net profits. (*Kids' Universe v. In2Labs* (2002) 95 Cal.App.4th 870, 883-884 [*Kids' Universe*]; *Gerwin v. Southeastern Cal. Assn. of Seventh Day Adventists* (1971) 14 Cal.App.3d 209, 222-223; *Resort Video, Ltd. v. Laser Video, Inc*. (1995) 35 Cal.App.4th 1679, 1700.) To be recoverable, however, this net gain must be "reasonably certain." (E.g., *Kids' Universe, supra,* 95 Cal.App.4th at pp. 883-884; see also *Natural Soda Prod. Co. v. City of L.A.* (1943) 23 Cal.2d 193, 199 ["The award of damages for loss of profits depends upon whether there is a satisfactory basis for estimating what the probable earnings would have been had there been no [breach]. If no such basis exists, as in cases where the establishment of a business is prevented, it may be necessary to deny such recovery"].) Thus, where, as here, the plaintiff's business that allegedly sustained the loss of net pecuniary gain is not an established business, courts have, understandably, been hesitant to award such damages.

Controlling case law holds that, "[w]here the operation of an *established business* is prevented or interrupted, as by a . . . breach of contract . . . , damages for the loss of prospective profits that otherwise might have been made from its operation are generally recoverable for the reason that their occurrence and extent may be ascertained with reasonable certainty from the past volume of business and other provable data relevant to the probable future sales. [Citations.] On the other hand, where the operation of an *unestablished business* is prevented or interrupted, damages for prospective profits that might otherwise have been made from its operation are not recoverable for the reason that their occurrence is uncertain, contingent and speculative. [Citations.] . . . But although

generally objectionable for the reason that their estimation is conjectural and speculative, anticipated profits dependent upon future events are allowed where their nature and occurrence can be shown by evidence of reasonable reliability. [Citations.]" (*Kids' Universe, supra,* 95 Cal.App.4th at pp. 883-884, quoting *Grupe v. Glick* (1945) 26 Cal.2d 680, 692-693.) In other words, "loss of prospective profits may nevertheless be recovered if the evidence shows with reasonable certainty *both* their *occurrence* and the *extent* thereof. [Citations]; 5 Corbin, Contracts (1964), *supra,* § 1023, pp. 150-151; Rest., Contracts, § 331.)" (*Gerwin v. Southeastern Cal. Assn. of Seventh Day Adventists, supra,* 14 Cal.App.3d at p. 221.)

Generally, lost profits are established by one or more of the following types of evidence: " '[I]f the business is a new one or if it is a speculative one . . . , damages may be established with reasonable certainty with the aid of expert testimony, economic and financial data, market surveys and analyses, business records of similar enterprises, and the like." (*Kids' Universe, supra,* 95 Cal.App.4th at pp. 883-884, quoting Rest. 2d, Contracts, § 352, cmt. b, p. 146.) Thus, as the Restatement Second reflects, " 'A plaintiff's [or a third party's] prior experience in the same [or similar] business has been held to be probative [citations]; as has a plaintiff's [or a third party's] experience in the same [or similar] enterprise subsequent to the interference. [Citations.]' " (*Kids' Universe, supra,* 95 Cal.App.4th at p. 886; see also *Resort Video, Ltd. v. Laser Video, Inc., supra,* 35 Cal.App.4th at p. 1698 ["Unestablished businesses have been permitted to claim lost profit damages in situations where owners have experience in the business they are seeking to establish, and where the business is in an established market"].)

In this case, undisputedly, DEEPmoney was never established as a business. As Pershing demonstrated in moving for summary judgment, DEEPmoney never "employed" anyone (aside from founder, Dale Sundby); never had a marketable product or service; never generated operational income; and never received any seed money from

an outside investor.[5] Further, despite the investment nature of its STARpool product/service, DEEPmoney never registered as an investment advisor with the SEC; never registered any investment fund with the SEC; and never obtained any patent protection.

However, DEEPmoney's lack of operational business experience is not the only factor suggestive of the uncertainty underlying its lost profits claim. There is also the fact that DEEPmoney's proposed financial product – to wit, the STARpools concept – has, to date, never been put to market by *any* business entity. Indeed, Sundby and Nygaard themselves described this product as "novel" and "unique." And, while Sundby nonetheless insists in sworn testimony the STARpools concept is, in essence, too well-constructed to fail because STARpools "simply track the performance of the most proven professionally managed portfolios," his testimony is his own (inherently biased) opinion, not evidence.[6] As such, Sundby's testimony does not undermine Pershing's showing that DEEPmoney has not raised and cannot reasonably be expected to raise a triable issue of fact as to lost profits.[7]

Thus, we are left in the case of DEEPmoney with two layers of market uncertainty. First, DEEPmoney lacks any sort of established business and, second, DEEPmoney's STARpools concept lacks any established market. These circumstances

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[5] Sundby was actively seeking an executive management team and potential investors for DEEPmoney, but these searches were ultimately unsuccessful. Sundby did not intend to, himself, play a significant role in the company.

[6] Sundby, who does not purport to be an expert in the investment advising field, based his optimism on the fact that, "while past performance [of a managed portfolio] is not a guarantee of future success, it is the most widely accepted indicator."

[7] DEEPmoney contends Pershing committed "fatal error" on summary judgment by failing to depose "CEO candidate" Marc Bryant, who worked with Sundby to draft the pro forma spreadsheet identifying DEEPmoney's potential profits. We disagree. To shift the burden of proof to its opponent, the party moving for summary judgment need not depose all potentially relevant witnesses. The moving party need only present affirmative evidence that "would require a reasonable trier of fact to find it more likely there were no lost profits than to conclude that there were such losses." (*Kids' Universe, supra,* 95 Cal.App.4th at p. 882.) Nothing more is required.

render DEEPmoney's legal authority, *S. Jon Kreedman & Co. v. Meyers Bros. Parking-Western Corp*. (1976) 58 Cal.App.3d 173 [*S. Jon Kreedman & Co*], inapposite. There, the Court of Appeals affirmed a trial court decision to award lost profits in a breach of contract case involving a parking garage operator that sued a developer for failing to construct an agreed-upon parking garage. In doing so, the court noted that, "most obviously, although this particular parking garage was new, the parking business is . . . not a new business and [plaintiff] 'was a highly experienced garage operator . . . .' Moreover, as the trial court also pointed out, the operation of a parking garage is a relatively simple operation with sufficiently few decision points to make a prediction of profits reasonably possible." (*S. Jon Kreedman & Co., supra*, 58 Cal.App.3d at pp. 184-185.) The plaintiff there also offered expert testimony from a land economist who "concluded based on feasibility studies and the evidence developed at the trial that the parking garage, had it been constructed, would have been a very profitable operation for [plaintiff]." (*Id*. at p. 185.) In this case, to the contrary, DEEPmoney was a new business, lacked both a client base and an experienced operator, and involved a far from "relatively simple" business concept. Thus, DEEPmoney's authority likewise fails to undermine our conclusion that Pershing met its summary judgment burden.

In attempting to make its own prima facie showing of damages, DEEPmoney relies first on certain prelitigation profit projections prepared by Nygaard and based upon information provided by Sundby. DEEPmoney notes that Nygaard, in particular, has significant business experience in the financial services industry. "[P]relitigation projections, particularly when prepared by the defendant, have . . . been approved [as evidence sufficient to prove a new business's lost profits]. [Citation.] The underlying requirement for each of these types of evidence is a substantial similarity between the facts forming the basis of the profit projections and the business opportunity that was destroyed.' [Citation.]" (*Kids' Universe, supra*, 95 Cal.App.4th at p. 886; see also *Parlour Enterprises, Inc. v. Kirin Group, Inc*. (2007) 152 Cal.App.4th 281, 288.) Thus, like other forms of opinion evidence, prelitigation profit projections must be based on an adequate factual basis rather than mere speculation. (*Parlour Enterprises, Inc. v. Kirin*

Group, supra, 152 Cal.App.4th at pp. 289-290. See also *Kids' Universe, supra,* 95 Cal.App.4th at p. 885 [expert testimony regarding lost profits in the new business context must be "supported by tangible evidence with a 'substantial and sufficient factual basis' rather than by mere 'speculation and hypothetical situations' "].)

Here, the prelitigation projections relied upon by DEEPmoney were derived from, in Sundby's own words, a "pro-forma financial plan that reflected [Marc Bryant's] the candidate CEO's most current assumptions." Sundby forwarded this draft pro forma spreadsheet, which was prepared with Bryant's input, to Nygaard seeking his "commentary." Nygaard then made certain suggestions for altering the analysis in the document, which he emailed back to Sundby. As Nygaard explained during his subsequent email exchange with Sundby, he proposed applying a multiplier of twenty to determine the business growth trajectory of DEEPmoney by the company's 60th month, with the result that the company would achieve projected profits by year 2014 of approximately $65 million. Nygaard, who does not purport to be an expert, explained his use of this multiplier as follows: "[T]wenty is a good number for IAs [investment advisors] with a good growth trajectory . . . this one is beyond what I would consider 'good' . . . so the multiplie[r] (just based on the economics) would be north of twenty." Nygaard also surmised in the email that "the five year number should be between 20 and 25 billion . . . [¶] . . . The Star net number should be about 5.5 million per month."

DEEPmoney relies on this analysis by Nygaard in attempting to make a prima facie showing of its entitlement to substantial lost profit damages. We, however, conclude such evidence is insufficient to create any triable issue. DEEPmoney does not dispute the trial court's finding that the pro forma spreadsheet contained "assumptions and [was] intended as a marketing tool to present to future investors . . . ." Nor could it. Sundby himself acknowledges this spreadsheet was intended to be "presented to others who could assist [DEEPmoney]." And, as we have already discussed at length, the projections are not tied to the actual market performance of any comparable business enterprise, product or service, much less to the performance of any DEEPmoney product or service. Rather, they are based on mere assumptions that certain essential conditions

will be met – for example, that DEEPmoney will receive the necessary capital to launch the STARpool product, that Pershing clients will authorize the transfer of confidential investment information to DEEPmoney, and that a client base for the new and untested STARpool product will develop. Yet, no evidence suggests any of those things will actually happen.

Indeed, Nygaard stated in a declaration offered in support of summary judgment that his commentary on the pro forma financial spreadsheet was no more than a "back-of-the-envelope estimate," and that he understood Sundby's growth trajectory assumption, upon which he relied to reach his own estimates, was "purely a speculative guess on Mr. Sundby's part." He further stated his understanding that the spreadsheet was based on "future, hoped-for potential results and not any actual data or any operating history." Nothing in the record undermines these statements. Sundby's repeated insistence otherwise – i.e., his insistence that the DEEPmoney venture would have been profitable because STARpools simply track the "proven performance" of the most successful professionally managed portfolios – is not evidence; it is an aspiration. Assumptions and aspirations relied upon to promote a new product do not provide the sort of adequate factual basis required to support a claim for lost profits.[8] (See *Parlour Enterprises, Inc. v. Kirin Group, supra*, 152 Cal.App.4th at pp. 289-290.)

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[8] DEEPmoney nonetheless insists that "Pershing offers no evidence, including from Nygaard, to dispute . . . Pershing's $65 million profit projection attached to Sundby's declaration," and that "Pershing and Nygaard were exceptionally qualified to project advisory profits, and to know what multipliers were common." These arguments miss the point. While Pershing met its initial burden of demonstrating DEEPmoney's lost profits claim is based on pure speculation, DEEPmoney thereafter failed its burden of demonstrating a triable issue of fact with respect to this claim. There is simply no actual evidence in the record, including in the Nygaard and Sundby declarations, demonstrating that Nygaard's proposed use of a "twenty" multiplier to derive $65 million in lost profits by year 2014 was reasonable based on a reliable profit indicator such as the financial performance of a comparable enterprise or business plan. (See *Parlour Enterprises, Inc. v. Kirin Group, supra*, 152 Cal.App.4th at p. 291 ["Before evidence of similar businesses may be used to prove loss of prospective profits, there must be ' " 'a substantial similarity between the facts forming the basis of the profit projections and the business opportunity that was destroyed' " ' "].)

Finally, in a last ditch effort to prove otherwise, DEEPmoney points to the report and declaration of its expert, Jeffrey P. Graham. However, in doing so, DEEPmoney wholly disregards the trial court's decision to exclude this evidence as likewise unduly speculative and unsupported by a reasonable factual basis. As Pershing noted in the Respondent's Brief, DEEPmoney did not appeal from this evidentiary ruling. Rather, DEEPmoney voiced objection to the trial court's ruling for the first time in its Reply Brief in response to Pershing's arguments.[9] Under these circumstances, we need not consider the expert report and declaration in reviewing the trial court's summary judgment decision, as an appellate record generally does not include evidence excluded at trial and not properly challenged on appeal. (E.g., *Guz v. Bechtel National, Inc*. (2000) 24 Cal.4th 317, 334 ["[o]n appeal after a motion for summary judgment has been granted, we review the record de novo, considering all the evidence set forth in the moving and opposition papers except that to which objections have been made and sustained"]; *Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 526-527 ["the trial court must consider *all* evidence unless an objection to it has been raised *and sustained*. (§ 437c, subd. (c).) [Fn.

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[9] Among other arguments, DEEPmoney contends that, by challenging the trial court's summary judgment decision on appeal, it thereby challenges all rulings encompassed within that decision, including evidentiary rulings and the award of costs. DEEPmoney also contends that the trial court failed to rule on Pershing's evidentiary objections until issuing the "post-hearing order," thereby permitting challenge for the first time on appeal. Finally, DEEPmoney contends it is "perfectly acceptable" to challenge a trial court's evidentiary rulings for the first time in a reply brief. California law, however, does not accord with these arguments: "[F]or purposes of reviewing a motion for summary judgment, we do not consider evidence 'to which objections have been made and sustained.' (*Guz v. Bechtel National, Inc*. (2000) 24 Cal.4th 317, 334 . . . .) Where a plaintiff does not challenge the superior court's ruling sustaining a moving defendant's objections to evidence offered in opposition to the summary judgment motion, 'any issues concerning the correctness of the trial court's evidentiary rulings have been waived. [Citations.] We therefore consider all such evidence to have been "properly excluded." [Citation.]' (*Lopez v. Baca* (2002) 98 Cal.App.4th 1008, 1014-1015 . . . .)" (*Alexander v. Codemasters Group Limited* (2002) 104 Cal.App.4th 129, 139-140 [fn. omitted]; see also *Reed v. Mutual Service Corp*. (2003) 106 Cal.App.4th 1359, 1372, fn. 11 [reviewing court need not consider issues raised for the first time in an appellant's reply brief].)

omitted.] It follows that the reviewing court must conclude the trial court considered any evidence to which it did not expressly sustain an objection"]; see also *Alexander v. Codemasters Group Limited* (2002) 104 Cal.App.4th 129, 139-140.)

In any event, we need not belabor this admissibility issue, because, whether we do or don't consider the expert report and declaration for purposes of this appeal, the result is the same – to wit, affirming the trial court's lost profits ruling. More specifically, the expert report and declaration fail to provide a legal basis for awarding lost profits to DEEPmoney for the same reason that Nygaard's projections failed to do so. The "facts" underlying those expert projections have no basis in reality. (See pp. 11-13, *ante*.) Thus, as the trial court correctly found, DEEPmoney's expert report and declaration provide no basis for recovery of lost profits. (See *Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747, 753, 776 [concluding an expert's lost profit estimates were "unduly speculative" where they were not based on a market share the plaintiff had ever actually achieved, but rather on the expectation that "[plaintiff's] market share would have increased spectacularly over time to levels far above anything it had ever reached"]; *Greenwich S.F., LLC v. Wong* (2010) 190 Cal.App.4th 739, 766 [reversing lost profits award where "[t]he proposed real estate development project here involved numerous variables that made any calculation of lost profits inherently uncertain"]; *Resort Video, Ltd. v. Laser Video, Inc., supra*, 35 Cal.App.4th at p. 1699 [evidence was too speculative to support a lost profits award where plaintiff's business was new, plaintiff lacked relevant prior business experience, and plaintiff failed to offer any evidence of "operating histories of comparable businesses"].) Summary judgment in favor of Pershing on this ground was thus proper.

II. Enforceability of the Parties' August 5, 2009 Letter.

The trial court alternatively ruled Pershing was entitled to summary judgment based upon DEEPmoney's failure to raise a triable issue of fact with respect to the enforceability of the parties' August 5, 2009 letter. According to the trial court, this letter, signed by Nygaard on Pershing's behalf and sent to Sundby, was merely "an agreement to agree" rather than an actual contract. " 'Whether a writing constitutes a

final agreement or merely an agreement to make an agreement depends primarily upon the intention of the parties. In the absence of ambiguity this must be determined by a construction of the instrument taken as a whole.' [Citation.]" (*Beck v. American Health Group Internat., Inc*. (1989) 211 Cal.App.3d 1555, 1562.) "The objective intent as evidenced by the words of the instrument, not the parties' subjective intent, governs our interpretation." (*Ibid*.) If the written instrument's language is clear and explicit, it governs. (*La Jolla Beach & Tennis Club, Inc. v. Industrial Indemnity Co*. (1994) 9 Cal.4th 27, 37.)

Further, "[i]n order for acceptance of a proposal to result in the formation of a contract, the proposal 'must be sufficiently definite, or must call for such definite terms in the acceptance, that the performance promised is reasonably certain.' (1 Witkin, Summary of Cal. Law, *supra*, Contracts, § 145, p. 169.) A proposal ' "cannot be accepted so as to form a contract unless the terms of the contract are reasonably certain. [¶] . . . The terms of a contract are reasonably certain if they provide a basis for determining the existence of a breach and for giving an appropriate remedy." ' (*Ibid*., quoting from Rest.2d Contracts, § 33.) If, by contrast, a supposed 'contract' does not provide a basis for determining what obligations the parties have agreed to, and hence does not make possible a determination of whether those agreed obligations have been breached, there is no contract. (See, e.g., 1 Williston on Contracts (4th ed. 1990) § 4:18, p. 414 ['It is a necessary requirement that an agreement, in order to be binding, must be sufficiently definite to enable the courts to give it an exact meaning.']; see also Civ. Code, § 3390, subd. 5 [a contract is not specifically enforceable unless the terms are 'sufficiently certain to make the precise act which is to be done clearly ascertainable'].) 'In particular . . . a provision that some matter shall be settled by future agreement, has often caused a promise to be too indefinite for enforcement.' (1 Williston, *supra*, § 4:18, pp. 418-420.)" (*Weddington Productions, Inc. v. Flick* (1998) 60 Cal.App.4th 793, 811-812.)

"[T]he specificity required for an enforceable contract depends upon the circumstances." (*S. Jon Kreedman & Co., supra*, 58 Cal.App.3d at p. 182.)

Here, Pershing agreed in the August 5, 2009 letter to several things. However, for reasons set forth below, we conclude none of these things amounts to an enforceable promise to perform any particular service for DEEPmoney.

First, paragraph two of the letter states that Pershing "can and will grant access to that data at the appropriate time with [the clients'] expressed authorization." (P. 5, *ante*.) This language, given its common meaning, fails to create a binding contractual obligation for at least two reasons. First, the clause requiring Pershing to grant access to the data "at the appropriate time" is simply too vague to be enforced. Indeed, it begs the question: When would be the appropriate time for Pershing to grant access to the data? Nothing in the letter indicates what the parties intended by way of a response. "While courts have been increasingly liberal in supplying missing terms in order to find an enforceable contract they do so only where the ' "reasonable intentions of the parties" ' can be ascertained." (*Copeland v. Baskin Robbins U.S.A.* (2002) 96 Cal.App.4th 1251, 1255-1256 [footnotes omitted].) Further, while the second clause, "with their expressed authorization," is no doubt one factor in determining the "appropriate time" given that Pershing would not be permitted to give access to the data in the absence of client authorization, in this case, the necessary authorization never occurred. Under such circumstances, we agree with Pershing that no contractual obligation arose from this language. (See *Ladas v. California State Auto. Assn.* (1993) 19 Cal.App.4th 761, 770 ["To be enforceable, a promise must be definite enough that a court can determine the scope of the duty and the limits of performance must be sufficiently defined to provide a rational basis for the assessment of damages"].)

Next, Pershing agreed to "contact a select group of Pershing clients to inquire if they would be willing to meet with you." (P. 5, *ante*.) With respect to this particular promise, the letter further states that Pershing and DEEPmoney will "agree on the appropriate approach and level of disclosure prior to making those contacts," and will "base expansion of those contacting efforts on the reactions we receive from the initial group of clients." First, there does not appear to be any dispute that Pershing did in fact contact at least some of its clients regarding the proposed data transfer to DEEPmoney.

Moreover, while the letter appears to require further actions by Pershing, such as "agree[ing] on the appropriate approach and level of disclosure" and "expan[ding] . . . those contacting efforts" based on "the reactions we receive from the initial group of clients," the precise nature of any further action required of Pershing is simply too unclear to constitute a binding contractual obligation. As stated above, a contract term is not specifically enforceable "unless the terms are 'sufficiently certain to make the precise act which is to be done clearly ascertainable.' " (*Weddington Productions, Inc. v. Flick, supra,* 60 Cal.App.4th at pp. 811-812, quoting Civ. Code, § 3390, subd. 5; see also *Robinson & Wilson, Inc. v. Stone* (1973) 35 Cal.App.3d 396, 407 ["Absent plans and specifications, an agreement to provide labor and materials for the completion of 'standard' or 'minimal' medical suites is too indefinite and uncertain to evidence a meeting of the minds respecting the scope of the work or to provide an objective basis for assessment of damages"].)

In the following paragraph, Pershing agreed to "collaborate on the technology requirements and costs of transferring authorized transaction and account data to service STARpool sub-advising. In the normal course of business and consistent with our price protocols, *we will work to forge a mutually beneficial contract for any services we ultimately provide to DEEPmoney*." (Italics added.) (P. 5, *ante*.) As the trial court recognized, however, a willingness to "work to forge" a "mutually beneficial contract" is not an enforceable contract. It is an agreement to agree, which cannot serve as the basis for recovery under California contract law: "A manifestation of willingness to enter into a bargain is not an offer if the person to whom it is addressed knows or has reason to know that the person making it does not intend to conclude a bargain until he has made a further manifestation of assent." [Citation.]' [Citation.] Thus, where it is part of the understanding between the parties that the terms of their contract are to be reduced to writing and signed by the parties, the assent to its terms must be evidenced in the manner agreed upon or it does not become a binding or completed contract." (*Beck v. American Health Group Internat., supra,* 211 Cal.App.3d at p. 1562.)

And, finally, the letter concludes with what can only be identified as a qualification: "Please note that this letter should not be construed as Pershing's (or its affiliates') agreement to financially participate in your new venture or to make any specific investment in systems development to assist you in initiating your venture. The details of any future agreements will be determined as we jointly agree to terms of any such development in contracts to be created going forward." (P. 5, *ante*.) As this language makes quite clear, it should "not be construed as [a contract]," and "any future agreements" must await another day. As we just finished explaining, " '[p]reliminary negotiations or an agreement for future negotiations are not the functional equivalent of a valid, subsisting agreement.' " (*Beck v. American Health Group Internat., supra,* 211 Cal.App.3d at p. 1562. See also *Weddington Productions, Inc. v. Flick, supra,* 60 Cal.App.4th at p. 812 [" 'if an essential element is reserved for the future agreement of both parties, as a general rule the promise can give rise to no legal obligation until such future agreement' "].)

Thus, giving the language of the August 5, 2009 letter its ordinary meaning in light of all relevant circumstances, including the grave uncertainty underlying several aspects of DEEPmoney's business plan (*S. Jon Kreedman & Co., supra,* 58 Cal.App.3d at p. 182), we agree with the trial court that no binding contract was formed between DEEPmoney and Pershing. Rather, the parties simply agreed to agree, or at least to strive to agree, at a later date, upon further negotiation, and only if certain conditions could be realized. Such an agreement is not actionable. (E.g., *Beck v. American Health Group Internat., supra,* 211 Cal.App.3d at pp. 1562-1563.)

Accordingly, summary judgment in favor of Pershing with respect to the causes of action for breach of contract, breach of the implied covenant of good faith and fair dealing, and promissory estoppel, all of which depend on the existence of contractual relationship between the parties under the August 5, 2009 letter, was proper.[10] (*Racine &*

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[10] Finally, because we conclude no triable issues of fact exist on this record as to either DEEPmoney's right to damages or to enforce the August 5, 2009 letter, we need not address DEEPmoney's argument that, if this letter were found to be enforceable, the

Laramie, Ltd. v. Department of Parks & Recreation (1992) 11 Cal.App.4th 1026, 1032 ["There is no obligation to deal fairly or in good faith absent an existing contract"].)

DISPOSITION

The judgment is affirmed.

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Jenkins, J.

We concur:

_____
McGuiness, P. J.

_____
Siggins, J.

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company would be entitled to pursue claims based on "non-fund" STARpool investment products.