

IN THE CIRCUIT COURT OF THE  
15TH JUDICIAL CIRCUIT IN AND FOR  
PALM BEACH COUNTY, FLORIDA

CASE NO.: 502012CA023358XXXXMBAG

JAMES TODD WAGNER, SUPERCAR  
ENGINEERING, INC., A FLORIDA  
CORPORATION,

Plaintiffs,

v.

WARREN MOSLER, MOSLER AUTO  
CARE CENTER, INC.,  
("MACC"), A FLORIDA  
CORPORATION, D/B/A MOSLER  
AUTOMOTIVE AND ALAN  
RICHARD SIMON,

Defendants.

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Proceedings had and taken place before the Honorable  
Judge Luis Delgado, one of the Judges of said Court, at the Palm  
Beach County Courthouse, 205 N. Dixie Highway, Courtroom 10D,  
West Palm Beach, Florida 33401, on March 30, 2023, commencing at  
the hour of 10:12 a.m., and being a Hearing.

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1 (Thereupon, the following proceedings were had:)

2 THE COURT: Oh, you can have a seat. I'm  
3 sorry. All right. So when we're in here, you  
4 know, if you need to approach for something, just  
5 do it. If you need to have a drink of water,  
6 please have a drink of water. You know, I'm going  
7 to come in usually, you know, I'll say at ease, or  
8 please sit down. You know, it's pretty laid back.

9 The only time I get really, really fussy about  
10 procedure in the courtroom is when we have a jury  
11 in here, you know, because I try to preserve that  
12 so that we don't have an issue with that, but I  
13 want you to be able to present your case the way  
14 you want to. So it's okay to relax a little bit.

15 All right. Let's announce our presence.

16 MR. ZAPPOLO: Good morning, Your Honor, Scott  
17 Zappolo on behalf of Plaintiffs James Todd Wagner  
18 and Supercar Engineering, and with me is Mr. James  
19 Todd Wagner.

20 MR. WEBER: Steven Weber and Tevon Etienne for  
21 the Defendants.

22 THE COURT: I'm looking at both -- we're not  
23 doing any evidence today, are we?

24 MR. WEBER: I don't think so, Your Honor,  
25 except -- I don't think we need -- I think we

1 can --

2 THE COURT: Okay. Without a clerk.

3 MR. WEBER: -- go -- a lot of it has to do  
4 with representations, probably, of Mr. Zappolo. I  
5 don't think be we have to swear him under oath, so.

6 THE COURT: Well, the reason I'm asking is  
7 because if was going to collect exhibits I'd need a  
8 clerk, but we're good with that, right?

9 MR. WEBER: Yeah, I don't think we need to.

10 MR. ZAPPOLO: I'm someone at a loss. I  
11 was -- I actually have someone here to testify  
12 about something, and I would tell the Court I think  
13 it's overkill, but I have to be careful, you know,  
14 given the gravity of the motions that are pending  
15 against us. I don't want to suffer my lack -- for  
16 lack of that.

17 Mr. Weber's made assertions in his motion that  
18 we had no grounds for certain things. I have a  
19 private investigator who's going to come in and  
20 tell me where I -- where he -- that he produced the  
21 documentation to --

22 THE COURT: Well, the reason I'm asking, if  
23 we're having an evidentiary hearing, I need to get  
24 a clerk, okay?

25 MR. WEBER: Yeah.

1 THE COURT: Can I please have a clerk? So it  
2 might delay us a little bit, but either way, if I  
3 take you for an hour now, we'll get a clerk after  
4 lunch, and I can give you more time then.

5 MR. WEBER: We can do the non-evidentiary  
6 motions first, Your Honor.

7 THE COURT: Let's do that.

8 MR. WEBER: Yeah.

9 THE COURT: Okay.

10 MR. WEBER: We'll start with the easiest stuff  
11 first. So one motion is our motion  
12 to -- Defendant's motion to bifurcate trials, issue  
13 the of liability, from the determination of  
14 punitive damages. I don't think any evidentiary  
15 hearing or witness is required here.

16 There's currently a claim for punitive damages  
17 against one of the Defendants as to one statement  
18 in a defamation claim. I reviewed mister -- the  
19 Plaintiff's response to our motion. It seems like  
20 they don't oppose the bifurcated procedure, their  
21 only concern is with respect to their jury  
22 instructions, not our jury instruction. So I think  
23 that concern is alleviated, but then it sounds like  
24 the Plaintiffs want the same jury to hear punitive  
25 damages that heard the issues of liability, and we

1 don't -- I think that's fine. And in fact, my jury  
2 instruction on this issue assumes that, so I think  
3 we might have an agreement as to a bifurcated  
4 procedure for liability and punitive damages.

5 MR. ZAPPOLO: As I said in my motion, I  
6 recognize the status of the law with respect to  
7 bifurcation. I respect that.

8 I do want to apprise the Court of one thing on  
9 the record. Yesterday during questioning of our  
10 expert, Ms. O'Shell, Counsel asked her questions  
11 about whether or not MACC, one of the Defendants,  
12 was appropriately funded, or could have funds, et  
13 cetera, and I'm paraphrasing, of course, and she  
14 answered, yeah, Mr. Mosler, according to his  
15 disclosures, got, you know, a net worth of 95  
16 to -- and for the record, Your Honor,  
17 I -- presuming this is all covered under our  
18 confidentiality agreement, I don't -- or order, I  
19 don't want to --

20 THE COURT: Well, you don't need to put that  
21 amount on the record right now.

22 MR. WEBER: Yeah.

23 MR. ZAPPOLO: I'm sorry?

24 THE COURT: You don't need to put the amount  
25 on the record.

1 MR. ZAPPOLO: Okay. So --

2 THE COURT: Just a significant amount.

3 MR. ZAPPOLO: Could we strike  
4 whatever -- because I started to say it, so please  
5 strike that.

6 THE COURT: Yeah, let's strike that.

7 MR. ZAPPOLO: And so I -- I kind of chuckled  
8 to him during the deposition, I said, you know, you  
9 just opened the door to that. He went back and  
10 tried to market as -- and instructed, like, oh,  
11 move to strike, and designate that portion of the  
12 deposition as confidential, and I said, you just  
13 opened the door to it.

14 So I'm concerned that there are going to be  
15 some of those issues at trial. I certainly don't  
16 think that the jury needs to hear, you know, dollar  
17 figures and things like that, but it is going to  
18 become apparent through various aspects of  
19 testimony at the trial that mister -- Mr. Mosler is  
20 a man of means. It's just part of --

21 THE COURT: I mean, it's going to -- you guys  
22 are talking about Supercars.

23 MR. WEBER: Yeah, this --

24 MR. ZAPPOLO: Right.

25 THE COURT: You know? You're presenting



1 evidence of Supercars to a jury. Even if you don't  
2 bring up numbers, be you know, you're not  
3 necessarily going to, you know, Wayne Akers Ford to  
4 buy a supercar, right?

5 MR. WEBER: This is a non-issue, Your Honor.

6 THE COURT: Um-hmm.

7 MR. WEBER: Because, number one, this isn't  
8 even in Cinnamin O'Shell's report, this is  
9 something that she just threw out there so that Mr.  
10 Zappolo could say this to Your Honor today.

11 I think it's the limited issue on the motion  
12 right now, it should be on a bifurcated procedure,  
13 and we should --

14 THE COURT: Yeah, and the parties are in  
15 agreement.

16 MR. WEBER: Yeah.

17 THE COURT: Right?

18 MR. ZAPPOLO: Yes.

19 MR. WEBER: Let's just limit it before we get  
20 into a whole other topic.

21 THE COURT: All right. All right. Parties  
22 are in agreement, and I'll accept that agreement.  
23 All right.

24 What's the next one?

25 MR. WEBER: So that's the first of four

1 motions, Your Honor. We're making good progress.

2 I think the next probably easiest motion to deal

3 with is probably our Daubert motion as to

4 Dr. Durre.

5 THE COURT: How do you spell it?

6 MR. WEBER: D-U-R-R-E, and it's got an accent

7 on it.

8 So this is Defendant's Motion to Exclude the

9 Testimony Report of Plaintiff's Expert Witness

10 Linda Durre. Dr. Durre submitted a report, which

11 I've included in the material sent to Your Honor.

12 It's approximately a two-page affidavit, and I can

13 provide a copy to Your Honor.

14 THE COURT: No, I have it.

15 MR. WEBER: Your Honor will see that in this

16 affidavit of Linda Durre, PhD, which is dated

17 November 4th, 2022, that her essentially entire

18 opinion is set forth in paragraph 6, which is on

19 Page 2 of the affidavit.

20 Now, I set forth in our motion there is

21 literally no details in this affidavit of any

22 method, facts, data, any methodology, any

23 application of the facts of this case to her

24 alleged opinion, and it should be excluded, because

25 it doesn't even come close to meeting any of the

1 standards of Daubert, or the relevant Florida  
2 statute.

3 THE COURT: So, specifically, your argument is  
4 as to prongs two and three of 90.702, right?  
5 Reliably and helpfulness to the finder of fact?

6 MR. WEBER: Well --

7 THE COURT: Because clearly this person is an  
8 expert.

9 MR. WEBER: Well, I would say she's not,  
10 because our expert, Dr. Silverman, relied on three  
11 tests. I don't know if Your Honor recalls, but we  
12 did a Motion to Compel mental examination, where  
13 our mental health expert examined Mr. Wagner. He  
14 used three tests.

15 Dr. Durre in her deposition admitted she does  
16 not have experience with those tests, and her only  
17 basis to conclude those tests could not show  
18 Mr. Wagner's mental health 10 to 12 years ago is  
19 reading the questions of the tests.

20 So I don't think she's qualified to even opine  
21 with respect to these tests, because --

22 THE COURT: Okay.

23 MR. WEBER: -- any average layman can read the  
24 tests and doesn't require specialized knowledge.

25 So I have the testimony from her deposition if Your

1 Honor needs to see that.

2 So I would say, yes, she should be excluded  
3 under Daubert, and Section 90.702, because the  
4 testimony is not based on sufficient facts or data,  
5 the testimony is not the product of reliable  
6 principles and methods, and number three, the  
7 witness does not apply the principles and methods  
8 reliably to the facts of this case.

9 THE COURT: All right. So all three  
10 prongs --

11 MR. WEBER: All three prongs, Your Honor.

12 THE COURT: Okay. Response?

13 MR. ZAPPOLO: Your Honor, this comes down to a  
14 very simple question. We objected to the actual  
15 kind of ex post facto try to have Dr. Silverman  
16 analyze Mr. Wagner in 2022 or '23, and then opine  
17 about his mental status back in 2010 and 2011.

18 Dr. Durre, being a practitioner in the field  
19 for 44 years. She's been a licensed psychologist,  
20 she's been an expert witness for 47 years in nine  
21 different states as set forth in her affidavit.

22 She said, based upon my education, training, and  
23 experience, this isn't appropriate to do. The  
24 tests are all -- all the questions are asking you  
25 how do you feel right now.

1       She did say in her affidavit it's difficult,  
2       if not impossible, and in her testimony she said  
3       it's difficult because had someone gone in and  
4       asked him all of the questions, how did you feel  
5       ten years ago? Maybe there might be some validity  
6       to it. But the reality of it is, when you're  
7       asking about right now there's not much validity to  
8       that.

9       Now, I understand that somebody can argue back  
10      and forth, but the reality --

11      THE COURT: The testimony is, I can't give you  
12      an opinion?

13      MR. ZAPPOLO: The testimony -- her testimony,  
14      she's a rebuttal witness.

15      THE COURT: Right.

16      MR. ZAPPOLO: They're trying to strike our  
17      rebuttal witness to their --

18      THE COURT: But that's the sum and substance  
19      of her testimony. Her testimony is that as far as  
20      reliable facts or data, that I've reviewed and  
21      examined the person, I've reviewed the notice of  
22      objection and the Motion in Limine, and the Motion  
23      to Compel mental examination, and that it's  
24      difficult or not impossible to ascertain, to  
25      measure, do psychological testing, in the present

1 time on an individual for the past psychological,  
2 and/or mental, and/or emotional state that happened  
3 ten to twelve years prior.

4 MR. ZAPPOLO: Right. So she's challenging  
5 their expert's findings.

6 THE COURT: Okay.

7 MR. ZAPPOLO: She says you can't do what he  
8 says he's doing.

9 THE COURT: All right.

10 MR. ZAPPOLO: They're going to put on  
11 Dr. Silverman, and he's going to say, oh, based  
12 upon my opinion Mr. Wagner had some mental defect  
13 12 years ago.

14 THE COURT: All right. Thank you.

15 MR. ZAPPOLO: And she says that's not --

16 THE COURT: So my role as the gate keeper of  
17 the evidence is just to essentially keep out junk  
18 science, but I have to use these three prongs.

19 Whether it's, you know, there are sufficient  
20 facts and data. Here the affidavit is brief and  
21 short, but she addresses that she spoke to the  
22 person.

23 Whether it's, you know, uses reliable  
24 principles, and she's saying that the evidence is  
25 impossible to gather.

1           Now, that in and of itself I don't think  
2           is -- is -- I think we're looking at it the wrong  
3           way. I think she's saying that based on her 47  
4           something years that this is not something they can  
5           do. Obviously, this testimony is helpful to the  
6           finder of fact because it would be rebuttal  
7           evidence. I'm going to deny the motion to exclude  
8           this witness.

9           MR. ZAPPOLO: Thank you, Your Honor.

10          THE COURT: All right. What's the next one?

11          MR. WEBER: The next motion is -- may I just  
12          add one thing about Dr. Durre, Your Honor, please?

13          THE COURT: No. I've already ruled.

14          MR. WEBER: Okay. All right. Next will be  
15          our motion to exclude Cinnamin O'Shell, Plaintiff's  
16          damages witness.

17          Now, our first grounds for that motion is that  
18          they are presenting Ms. O'Shell as a witness to  
19          testify as to lost profits in Count III of their  
20          Sixth Amended Complaint. Count III is a breach of  
21          contract claim, and nowhere in that claim did they  
22          mention the word lost profits, and so after years  
23          of litigation, and after we actually got their  
24          first lost profits expert excluded when they sought  
25          loss profits under their defamation claim, now they

1 have come back and are asserting lost profits for  
2 Count III, breach of contract.

3 Well, first, that Count III breach of contract  
4 doesn't mention lost profits for consequential  
5 damages anywhere in the Sixth Amended Complaint.  
6 This is something that they're manufacturing almost  
7 ten years later because Judge Hafele excluded their  
8 last lost profits expert.

9 So our first argument in our motion is that in  
10 order to obtain lost profits or move forward, you  
11 need to plead it, and that is set forth in the rule  
12 which is Florida Rule of Civil Procedure 1.120, and  
13 I can provide a copy to Your Honor if you'd like.

14 THE COURT: You know what I would like is a  
15 copy of the complaint.

16 MR. WEBER: Yes.

17 MR. ZAPPOLO: If it helps the Court, Your  
18 Honor, and expedites things, I will stipulate that  
19 we did not make the allegation specifically. When  
20 we sought damages we just pled it as general  
21 damages, and that's our position that it's general  
22 damages and need not be pled under the  
23 circumstances.

24 MR. WEBER: Your Honor, I might not have a  
25 copy printed out. I apologize, Your Honor. It's



1 actually -- I actually copy and pasted the  
2 (inaudible) in our motion, Your Honor.

3 THE COURT: Oh, I'm sorry. Thank you.

4 UNIDENTIFIED FEMALE: You're welcome.

5 MR. WEBER: Would this help, Your Honor? I  
6 copied and pasted the wherefore section from  
7 their --

8 THE COURT: I mean, they stipulated they  
9 didn't plead it.

10 MR. WEBER: Yeah, okay. So they did not plead  
11 it. The law is, I would say, clear, that although  
12 in some cases lost profits can be a general damage,  
13 that is only when the damages directly flow from  
14 the breach of the -- it's only when the  
15 non-breaching party seeks only to recover the money  
16 that the breaching party agreed to pay under the  
17 contract, and that's set forth in the case law.

18 By contrast, consequential damages do not  
19 arise within the scope of the immediate  
20 transaction, but stem -- when they stem from losses  
21 incurred by the non-breaching party in its dealings  
22 with third-parties.

23 So in this case, Count III is alleging that  
24 MACC, the company, breached a distribution  
25 agreement with Plaintiff, SEI, because MACC

1 allegedly didn't provide SEI with vehicles.

2 From that allegation, SEI is claiming lost  
3 profits of millions of dollars based on the profits  
4 it allegedly would have obtained from selling those  
5 vehicles to its customers based on its alleged  
6 profits, cost, be expenses, et cetera.

7 None of that is pled in the complaint, and  
8 that's exactly what the case law does not allow you  
9 to do.

10 In response, Mr. Zappolo has cited what looks  
11 like a Florida Bar CLE case, which is citing cases  
12 from the 1950s to the 1970s, but none of those  
13 cases are applicable, Your Honor, because Your  
14 Honor doesn't have to look that far back.

15 There is case law in our motion. I can  
16 provide additional case law that I've researched in  
17 response to Mr. Zappolo's response. The -- what  
18 he's seeking is not general damages. He was  
19 required to plead it. Ms. O'Shell's testimony  
20 regarding lost profits is irrelevant, because they  
21 did not plead lost profits for this claim.

22 If Your Honor needs to (inaudible) the  
23 complaint I can find that for you.

24 THE COURT: No, they stipulated they didn't  
25 plead it. Go ahead.

1 MR. ZAPPOLO: Thank you, Your Honor. Counsel  
2 hasn't cited any cases directly on point that  
3 support his position, because there are none. I've  
4 looked for them. Sure he's looked for them. There  
5 aren't any that say that you have to do that. What  
6 he did is he did kind of a non-sequitur logical  
7 argument stretching from one thing to another.

8 If you read the case law that I've come across  
9 and that I've presented to the Court in my  
10 response, it actually addresses all of his  
11 concerns, everything that he said is within, and I  
12 cited the -- the CLE materials because it goes  
13 through and really explains to the Court.

14 But here's what really is interesting.  
15 Special damages are those that -- and by the way,  
16 he relies on the Colletti (phonetic) case, and I  
17 actually talked about what the Colletti court  
18 found, and I cited it. Special damages, those that  
19 do not necessarily result from the broader breach  
20 of contract complained of. Special damages are  
21 damages that do not flow by implication of law  
22 merely upon the breach.

23 General damages, on the other hand, are  
24 damages that law presumes, okay? So the question  
25 for this Court is, based upon their own case law,

1       whether or not Ms. O'Shell Turk's damage analysis  
2       involving lost profits involves a claim for special  
3       damages, as they say, or general damages, as we  
4       say.

5       So Florida juris prudence article, in a breach  
6       of contract action, general damages, those damages  
7       are those damages that naturally necessarily flow  
8       or result from the injuries alleged.

9       That's kind of common law case law. Everyone  
10      knows that, okay?

11      Special damages are items of loss that  
12      peculiar to the party against whom the breach was  
13      committed, and would not be expected to occur  
14      regularly to others in similar circumstances.

15      Okay?

16      Lost profits may be pled as either general or  
17      special damages, and I cite the Florida 3rd DCA  
18      case of Bird Lakes Development Corp. v. Meruelo,  
19      and I've attached that, and if we look you can find  
20      it in my materials at Bates stamp on the bottom  
21      right hand corner Page 121, within footnote  
22      two, "While case law often refers to lost profits  
23      as consequential damages, lost profits do not  
24      always constitute consequential damages."

25      Now, Mr. Weber just told the Court, oh,

1      they're consequential damages. The Court in this  
2      opinion said they don't always amount to  
3      consequential damages. Lost profits are  
4      recoverable as general damages where they flow  
5      directly and immediately from the breach of a  
6      contract.

7      Now, Ms. O'Shell's testimony is that.  
8      Mr. Wagner's testimony is that. And I believe  
9      everyone in this case has been talking about that  
10     since the inception of the case. And let's think  
11     about what's the contract, Your Honor. The  
12     contract is I'm going to sell you cars, SEI, says  
13     MACC. You're required, and I laid it out, how  
14     many, you know, how many elements here. It's all  
15     about the calculation of profits. Their contract  
16     contemplated the sales price, the price that he was  
17     going to get.

18     They're trying to -- they've argued in Court  
19     in other hearings that the MSRP was what his sale  
20     price to others had to be. So obviously  
21     they're -- they're pigeon holing his profits.  
22     That's the way this whole thing has gone. So  
23     there's a number of cases that are cited here, and  
24     even in -- and then they say, well, you can -- and  
25     their secondary argument for Ms. O'Shell is, oh,

1     it's too speculative because it's a start up  
2     business.

3         Well, I covered that in this memorandum as  
4     well, where the case law says clearly, just because  
5     it's a start up business doesn't mean that it can't  
6     have a lost profits projection, and I cite the  
7     Florida Bar approved jury instructions for this  
8     concept as well.

9         So what we do is, if we look at what you have  
10    to do, the court must determine the damages  
11    naturally and necessarily flow or result from  
12    injuries, okay?

13        Here the court -- before the court is the  
14    issue of breach of an exclusive distributor for  
15    automobiles contract as opposed to an article IX  
16    sale of goods contract which Counsel's cases cite  
17    to. My cases talk about contracts where -- and one  
18    of my cases talks about where a land developer was  
19    going to buy land, and then sell it to others and  
20    make a profit. He didn't even have a written  
21    contract, Your Honor.

22        And the Court said, that's okay. Those are  
23    general damages. Because that's what the parties  
24    expected. They knew that they were going  
25    to -- that the land developer was going to sell

1     these things and try to make a profit. That's the  
2     whole purpose of the contract at issue here, so  
3     that Mr. Wagner's company, SEI, could sell the cars  
4     and make a profit, and the copy of the contract is  
5     actually attached to our complaint. So it is  
6     included within the pleading.

7         So the evidence in this case and the contract  
8     at issue sets forth a discounted purchase price for  
9     SEI to purchase the vehicles in question. The  
10    minimum automobile purchase requirements and  
11    commensurate MACC production requirements supply  
12    vehicles. The MSRP, which argued by them to be a  
13    mandatory sales price, and the 25-year term, which  
14    is to be binding upon future buyers of the company.

15        Thus, the parties clearly contemplate the time  
16    contracting the lost profits aspect of damages for  
17    any breach, and they were built into the contract,  
18    and they're general damages, which need not be  
19    specifically pled.

20        Again, I go on and I cite the Bird Lakes case.  
21    It's -- in that case they said it was not fatal to  
22    a claim for lost profits that damages -- lost  
23    profit damages were not pled specifically. That  
24    case was cited by the 4th DCA recently. I cite  
25    that in my memorandum. I cite the HCA Health

1 Services of Florida, Inc. v. Cyberknife case, it's  
2 a Florida 4th DCA 2016-case.

3 And then I do what every prudent attorney  
4 would do. I say, in an abundance of caution, if  
5 you're inclined to find that these were specific  
6 damages that needed to be pled, Counsel has argued  
7 that the case is not at issue in the last hearing  
8 that we had because of his Motion to Dismiss, and  
9 so we move to amend by interlineation, but the  
10 reality of it is, Judge, is all the case law says  
11 is, and in all the cases where they say that it had  
12 to be specifically pled is post-trial, and they  
13 say, oh, there was a surprise at trial. Here  
14 there's no surprise at trial. It's, you know,  
15 they've had the opportunity to depose all of our  
16 people. Mr. Wagner testified about anticipated  
17 lost profits and how much he was going to make when  
18 he was deposed any number of times, and they've had  
19 the opportunity to depose our expert.

20 So there's no surprise, and -- so it's not,  
21 like, even unfair to find this -- these to be  
22 general damages under the circumstances of this  
23 case.

24 MR. WEBER: May I have a brief rebuttal, Your  
25 Honor? As I said, in some cases lost profits can



1 be general damages. In other cases, they're  
2 consequential damages.

3 The HCA case, which is a 2016-case, which I  
4 provided to Your Honor, clearly explains the  
5 difference, and when a lost profits claim is as  
6 general damages versus special damages and must be  
7 pled. There is no dispute that special damages  
8 must be pled, according to the rule.

9 Now, they again had their initial damages  
10 expert excluded. It's only ten years later that  
11 they're seeking now to bring forward this new  
12 expert based on this new methodology, which is  
13 going to be the second part of our argument, to  
14 explain this lost profits method, and why they're  
15 entitled to lost profits for breach of claim three.

16 And so that's -- that's the first part of this  
17 argument, and I've provided Your Honor with the  
18 case law if you want.

19 THE COURT: I'll take that right now.

20 MR. WEBER: Here's a copy for you.

21 THE COURT: Give me a minute. I'm also  
22 looking at their case, but.

23 MR. WEBER: I highlighted the relevant  
24 footnote for Your Honor that explains --

25 THE COURT: Thank you.

1 MR. WEBER: -- the difference between them.

2 THE COURT: Yeah. And let's say I agree with  
3 you, and he said you were not -- you said you were  
4 not at issue, and then he wanted to amend. What's  
5 your position on that?

6 MR. WEBER: I mean, I think you would have to  
7 allow him to amend, because we are not at issue.  
8 We have a Motion to Strike the pleadings right now,  
9 so the case is not at issue, which is separate from  
10 this motion, Your Honor. This is not this motion.  
11 Yes, there is a motion directed at the pleadings  
12 right now.

13 But there is prejudice. I mean, this case has  
14 been going on for ten years. We got a new expert,  
15 their second damages expert, in fact, because Judge  
16 Hafele excluded their first damages expert. So on  
17 the eve of trial, literally a day before this case  
18 is set -- this ten-year-old case is set for  
19 calendar call, he's going to amend to include a  
20 claim for lost profits. It's a 2013-case, Your  
21 Honor.

22 MR. ZAPPOLO: May I respond?

23 THE COURT: Um-hmm.

24 MR. ZAPPOLO: Their motion is what makes this  
25 not at issue, and if their motion is, you know, is

1     what they're relying on. So we're going to be back  
2     on some Motion to Strike any way at some point,  
3     they're going to take the position that it's not at  
4     issue. So if Your Honor is in any way concerned  
5     about it, the simple remedy, and to make sure  
6     everything is cleanly tried, is to allow the  
7     interlineation, but I don't think that you need to  
8     do that. I think that if you walk up to ten people  
9     on the street and you say, "That guy had a contract  
10    to distribute and sell cars. They didn't provide  
11    him with the cars. Is it reasonable to expect that  
12    he's going to sue for lost profits?" Everyone  
13    would say, yeah, of course.

14       And that's what the testimony in this case has  
15    been about, that's what the -- I mean, it's  
16    just -- it kind of boggles my mind that they're  
17    raising this. This is, what it is, Your Honor, is  
18    that Mr. Weber is kind of new to the case  
19    relatively, and --

20       THE COURT: I'm thinking about what I've heard  
21    in this case so far, and what I think I know about  
22    the case, and try to figure out --

23       MR. ZAPPOLO: And I --

24       MR. WEBER: May I just say --

25       THE COURT: There are so many e-mails that are

1 going through my mind right now that I reviewed for  
2 you guys last time we were present to give me some  
3 context on this. All right. Please finish your  
4 argument.

5 MR. ZAPPOLO: I just -- I'm not sure what  
6 Counsel is talking about with his argument that  
7 somebody was already excluded or something. We  
8 have had an expert excluded, a different one that I  
9 recall. I'm not saying he's not correct, I'm just  
10 not sure who he's speaking of. Mr. Weber, can you  
11 enlighten me who you're talking about so I can  
12 address that?

13 MR. WEBER: 2019. In July of 2019, the last  
14 time this case was set for trial, Your Honor, Judge  
15 Hafele excluded Plaintiff's damages expert, and now  
16 five years later, this is a new damages expert on a  
17 new count because Judge Hafele excluded their last  
18 lost profits expert. So they're manufacturing this  
19 lost profits claim. It's a new claim after ten  
20 years, and there's prejudice here, Your Honor.  
21 They shouldn't be allowed to amend.

22 MR. ZAPPOLO: There's no manufacturing of  
23 anything. This is --

24 THE COURT: Hold on. So, you know, there's a  
25 contract to provide a car.

1 MR. ZAPPOLO: Cars. Plural.

2 THE COURT: Cars. Multiple cars. We'll just  
3 say, you know, the contract to provide a car, and  
4 that car is going to be sold for a profit, correct?

5 MR. ZAPPOLO: Yes, sir.

6 THE COURT: And that's what you're seeking to  
7 recover?

8 MR. ZAPPOLO: Yes.

9 THE COURT: Now, that car being sold for a  
10 profit is going to be sold to an individual?

11 MR. ZAPPOLO: Yes.

12 THE COURT: Or another individual?

13 MR. ZAPPOLO: Yes.

14 THE COURT: Or another individual?

15 MR. ZAPPOLO: Sold to anyone. It's a supply  
16 chain issue. It's --

17 THE COURT: And they're going to be sold based  
18 on whatever the market thinks that car is worth,  
19 right?

20 MR. ZAPPOLO: Presumably.

21 THE COURT: And so the car is worth a lot at a  
22 certain time. It's going to be sold for a lot of  
23 money. If the car is worth less at some point in  
24 the future it's going to be sold for a little bit  
25 less money, correct?

1 MR. ZAPPOLO: But the MSRP is referenced even  
2 in the contract by the manufacturer.

3 THE COURT: Okay. And that sale price minus,  
4 you know, his costs, would be the profit.

5 MR. ZAPPOLO: Yes.

6 THE COURT: And so that profit would be  
7 different at certain points depending on the demand  
8 for that vehicle?

9 MR. ZAPPOLO: Potentially, just like the real  
10 estate would be in the case that I cited in my  
11 memo.

12 THE COURT: Um-hmm.

13 MR. ZAPPOLO: It's right on parallel with the  
14 case that I cited where the real -- a person  
15 bought -- was to buy land from a developer. The  
16 developer balked and didn't allow him to buy the  
17 land, and he was able to without even having a  
18 contract sue for lost profits for what -- because  
19 the developer knew, it was contemplated that he was  
20 going to sell the land off in parcels.

21 Here mister -- SEI was going to exactly the  
22 same thing. If you substitute vehicles for plots  
23 of land it's exactly on point.

24 THE COURT: Give me that case one more time.

25 MR. ZAPPOLO: Yes, sir. Let me grab that.

1 MR. WEBER: Your Honor, I would say it's

2 completely different --

3 THE COURT: Well, let me get this case number

4 real quick.

5 MR. WEBER: Yeah.

6 MR. ZAPPOLO: I apologize, Your Honor.

7 THE COURT: Because I don't know that it's

8 that different. Because, I mean, again, I go back

9 to how I started is, you're not going to Al Baker

10 Ford to get a supercar, right? You're going to go

11 buy a Ford, and it's going to be something that

12 they mass produce. But from my understanding of my

13 conversations with all of you guys is that

14 Supercars are pretty unique. They have to get

15 special licensing or testing in order to be legal

16 in one state or another state. There's -- they're

17 very unique, right?

18 MR. WEBER: Yeah.

19 THE COURT: Okay. Like real estate.

20 MR. WEBER: Well, except that their lost

21 profits claim, and you'll see it in the report, is

22 based on all sorts of assumptions, Your Honor.

23 Over a 35-year period of time based on what SEI's

24 alleged costs were, based on the present value

25 discount rate, and the riskiness of the sale, based

1 on what the advertising and marketing budget were.

2 Based on the alleged price for these cars. Based  
3 on how many cars could be sold. Based on how many  
4 cars could be sold --

5 THE COURT: Well, now you're arguing Daubert  
6 standards to me, you know, and a moment ago you  
7 were arguing about how this was pled.

8 MR. WEBER: Well, right, this is just -- I'm  
9 just showing you how it's -- there's so many  
10 factors involved, and this doesn't all flow  
11 directly from the contract. I'm going to get into  
12 the Daubert standard in a bit because, I mean, she  
13 admits in her deposition she's going to amend it.

14 THE COURT: Thank you.

15 MR. WEBER: No recognized generally accepted  
16 method. This is just the have they pled it part of  
17 the motion.

18 MR. ZAPPOLO: And for the record, Your Honor,  
19 that was the Bird Lakes case that I cited in my  
20 memo.

21 THE COURT: Yeah, but I'm having a hard time  
22 flipping through it.

23 MR. WEBER: Scott, do you have a copy for me?

24 MR. ZAPPOLO: I provided --

25 THE COURT: I suppose I should have just asked



1       you for the Bates stamp.

2           MR. ZAPPOLO: Yeah, that would have been  
3       probably easier. It's in my package, it's Bates  
4       stamp --

5           THE COURT: 103. 103. Let me give you back  
6       your stack. Here. Thank you.

7           MR. ZAPPOLO: Thank you. Your Honor, to the  
8       extent that you find any argument about prior  
9       expert being stricken persuasive, I have to ask  
10      Counsel who he's talking about, because I'm just  
11      drawing a blank. My client's sitting here --

12          THE COURT: Well, you guys can talk about  
13      that. Let me --

14          MR. ZAPPOLO: Trying to yell at me, who is he  
15      talking be about?

16          THE COURT: Let me get through this real  
17      quick, because there's something I want to look at.

18          MR. ZAPPOLO: And for a point of  
19      clarification, Your Honor, Mr. Weber has just  
20      clarified to me who he was referring to.

21          THE COURT: Give me one minute.

22          MR. ZAPPOLO: Sure.

23          THE COURT: Okay. All right. Anything else?

24          MR. WEBER: I would just say, Your Honor, that  
25      there are repercussions to allowing this. There's

1 no -- if this case had gone to trial in 2019 this  
2 would never have been -- this expert would not have  
3 been submitted. I mean, they're only doing this  
4 ten years later. I mean, this should not be  
5 allowed, and there's no pleading that would apprise  
6 us of this. There's -- all sorts of issued have  
7 been risen by this expert's report at the last  
8 minute.

9 THE COURT: Well, then let's address the  
10 report. I can tell you on the argument regarding  
11 the pleading is going to fail with me. So let's  
12 move onto the next one. And I do find the Bird  
13 Lakes case very persuasive. All right. And again,  
14 we're talking about real estate, and we're talking  
15 about something that's unique and specific, and in  
16 that case it didn't need to be specifically pled.

17 Here, this is a supercar, which again, the  
18 Court ruled -- is there any objection for me  
19 judicially noticing that Supercars are unique?

20 MR. WEBER: I don't know if  
21 I -- maybe -- maybe they -- I would object, Your  
22 Honor.

23 THE COURT: Okay. All right.

24 MR. WEBER: In fact, I would say --

25 THE COURT: So they're commonplace?

1 MR. WEBER: Well, they're not common place,  
2 but I don't know if every one is unique in the way  
3 that Your Honor is thinking about it.

4 THE COURT: Well --

5 MR. WEBER: Because our expert is going to  
6 say, they're claiming this price of \$700,000 for  
7 their car.

8 THE COURT: Um-hmm.

9 MR. WEBER: But --

10 THE COURT: What makes a car a supercar?

11 MR. WEBER: Well, there's a number of factors,  
12 Your Honor. A supercar in what context? Like --

13 THE COURT: Well, I guess how many are  
14 produced in a year?

15 MR. WEBER: It depends on the car. I mean,  
16 you're --

17 THE COURT: Well, how many of these cars are  
18 produced in a year?

19 MR. WEBER: Well, that's the great question,  
20 Your Honor, because there's only one of these cars  
21 at issue in this case.

22 THE COURT: So one is unique, isn't it?

23 MR. WEBER: Well, that's just because of what  
24 happened.

25 THE COURT: I mean, when I think about the

1 definition of unique, isn't --

2 MR. WEBER: But they were try --

3 THE COURT: -- it one of a kind?

4 MR. WEBER: But they were trying to produce

5 25. Their expert says that allegedly 25 could be

6 manufactured per year. There's literally no

7 evidence. You don't see in it transcript, he just

8 made that up.

9 THE COURT: But you just told me there was

10 only one.

11 MR. WEBER: Well, right, in -- there's only

12 one --

13 THE COURT: And so it's by definition unique.

14 MR. WEBER: Well, only because of the

15 circumstances in this case, but there's many Mosler

16 cars.

17 THE COURT: Okay.

18 MR. WEBER: Mosler is manufacturing other

19 cars. This is just one specific car.

20 THE COURT: Okay.

21 MR. WEBER: And from that one specific car,

22 they're alleging this claim of lost profits.

23 THE COURT: So then at best they're unique,

24 and at worst they're very special?

25 MR. WEBER: Well, they're expensive. I mean,

1       they're not a --

2           THE COURT: Rare?

3           MR. WEBER: They can be rare. Yeah.

4           THE COURT: Okay. All right. All right.

5       Yeah, no, I think, you know, with that rational,

6       Bird Lakes is controlling.

7           All right. Let's move on to the next issue

8       regarding the -- I guess another sub part of this

9       issue.

10          MR. WEBER: A sub-part of this issue is --

11          THE COURT: Your expert. The quality of the

12       expert.

13          MR. WEBER: The quality of the expert. And,

14       well, I would say I want to focus on the

15       methodology used by the expert specifically,

16       because if she's married to her report, Your Honor.

17          THE COURT: Correct.

18          MR. WEBER: She does not set forth any

19       methodology, and in her deposition she identifies

20       this alleged but-for method for evaluating lost

21       profits.

22          And so during her deposition, we asked her,

23       well, what is this but-for method? And she

24       actually identified a treatise that supposedly

25       supported the existence of this but-for method, and

1     you'll see in our motion we attack that she hasn't  
2     identified in her report any methodology. And so  
3     may I approach, Your Honor?

4           THE COURT: Yes.

5           MR. WEBER: And what happens is we ask her  
6     about two generally accepted methods, the before  
7     and after method and the yard stick method,  
8     specifically, before we get into the other methods,  
9     and she differentiates her but-for method from the  
10    two generally accepted methods, the before and  
11    after method and yard stick method.

12          And so then I asked her, well,  
13    where -- because her own treatise doesn't identify  
14    the but-for method, where is the before -- I mean  
15    the but-for method identified? May I approach,  
16    Your Honor?

17          THE COURT: Yes.

18          MR. WEBER: So she -- the expert, supposedly,  
19    directs me to this treatise and this specific page,  
20    and what she does is she points to a sentence in  
21    the treatise, which is addressing the before and  
22    after method, even though she just testified that  
23    she's not using the before and after method, and  
24    you'll see where this alleged but-for method is  
25    mentioned, Your Honor, is in paragraph 64, that

1 second sentence where it says, "The underlying  
2 theory is that but-for the Defendant's action the  
3 Plaintiff would experience the same level of  
4 revenues and profits after the event or action, as  
5 the Plaintiff did before that event or action.

6 So from the before and after method, Your  
7 Honor, she's literally pulling out one sentence to  
8 create a new method called the but-for method, but  
9 there is no treatise or authority that she  
10 identified that sets forth what this but-for method  
11 is, and we don't think there is such a method. So  
12 this goes directly to the reliability of the  
13 methodology that she allegedly used in her report.

14 So that's the first attack on her. What is  
15 this but-for method? Is it a competent and valid  
16 method of calculating lost profits? That's the  
17 first point I want it raise, Your Honor. And I can  
18 show you her transcript where she identifies it, if  
19 you want to see it.

20 THE COURT: Yeah. I would love to see the  
21 transcript.

22 MR. ZAPPOLO: Your Honor, mister -- I just  
23 need to point out to the Court and set a clear  
24 record. Yesterday at the conclusion of  
25 Ms. O'Shell's deposition, which I have to tell you,

1 I've been doing this a long time, I've never seen  
2 an expert testify as sharply, and as crisply, and  
3 as on point as she did. That's just my opinion.

4 What Mr. Weber's characterizing to you is  
5 characterization. I wanted to get her the  
6 transcript. The court reporter -- I asked the  
7 court reporter on the record, can you give me your  
8 information so I can be sure and get this  
9 transcript for tomorrow's hearing, because I knew  
10 it was going to work so well in our favor? And she  
11 wouldn't give it to me on the record. She then  
12 said I'll reach out to you afterwards.

13 There was a mix up, because Counsel put my  
14 wrong e-mail address on the notice for the  
15 deposition. It's true. It says S zap low at zap  
16 low law, that's not my e-mail address, and it's a  
17 non-existing e-mail address. It never has. It's a  
18 mixing of my two e-mail addresses.

19 So she wasn't able to get in touch with me.  
20 At 11:00 last night -- actually, at 9:00 I asked  
21 Mr. Weber to tell the court reporter that I wanted  
22 the transcript delivered to me at the same time as  
23 he got it, and he said I don't have her contact  
24 information, and then he e-mailed me and said I've  
25 got her information, here, and he gave me a



1 website. There's -- I couldn't find out where to  
2 contact her. Apparently at, like, 11:00 I saw that  
3 she had tracked me down on the Florida Bar, and I  
4 wrote her immediately and said please get me a  
5 transcript ASAP. This is what my concern was on  
6 the record yesterday, or earlier in the day, and  
7 when I came into my office at 4:00 this morning I  
8 still didn't have the transcript. When I didn't  
9 have it by 7:00 I said cancel my expedited order  
10 because it's going to be useless to me. So I'm a  
11 little bit at a disadvantage.

12 But Counsel has just put, from what I can  
13 see -- okay. I've got a transcript in front of me.  
14 If you go through this, Your Honor, I would  
15 venture -- I would say Your Honor can read this  
16 over lunch and make a ruling about whether or not  
17 this witness is competent to testify.

18 There -- the representations by Mr. Weber  
19 about her testimony and everything, I think you'll  
20 find very interesting if you just read this  
21 transcript.

22 MR. WEBER: Your Honor, do you want me to  
23 respond about all of this?

24 THE COURT: No. I just want you to address  
25 the witness.

1 MR. WEBER: Okay. Let's do this. So I gave  
2 Your Honor the transcript. I'm going to walk you  
3 through the transcript now. So first, what I  
4 wanted to show Your Honor is on Page 8, and on  
5 Page 8 of her transcript, beginning on line 9,  
6 you're going to see that Ms. O'Shell is discussing  
7 this but-for method that she allegedly used in a  
8 prior case in Orlando, and she described what she  
9 did under this alleged but-for method, and what she  
10 says is that the but-for method on lines 9  
11 through 19 is this analysis where you do an  
12 analysis of what would have been the profits.

13 And she goes onto explain between lines  
14 eight -- on Page 8, line 9 through Page 9 line 5  
15 what she did in that prior case.

16 In this case, she testifies that on Page 13  
17 she was engaged to calculate the damages --

18 THE COURT: Hold on. I'm still on Page 8 and  
19 9.

20 MR. WEBER: Yep.

21 THE COURT: All right. Go ahead. What's the  
22 next one?

23 MR. WEBER: So now I want you to go to  
24 Page 14 -- I'm sorry, 13.

25 THE COURT: Okay.

1 MR. WEBER: So on 13, on line 25, that bottom  
2 line. You'll see the question is, "What method did  
3 you use to estimate lost profits in this matter?"

4 And she then answers, "I used the but-for method."

5 Your Honor sees that?

6 THE COURT: I do.

7 MR. WEBER: Next, you'll see that same  
8 Page 14, line 16, I say, "Aside from the but-for  
9 method, did you use any other method to calculate  
10 lost profits in this case?" Answer, "No."

11 Now, we're going to go to Page 31.

12 THE COURT: Okay.

13 MR. WEBER: 31 on line 12, I ask Ms. O'Shell  
14 if she's familiar with the yard stick method, and  
15 she says she is. She can't describe it, Your  
16 Honor, but she identifies that she applied the  
17 but-for method. You'll see that on lines 12  
18 through 19.

19 Then on Page 32, line 9 --

20 THE COURT: Hold on. Page 32, line 9?

21 MR. WEBER: Yep.

22 THE COURT: Okay.

23 MR. WEBER: I asked Ms. O'Shell if she's  
24 familiar with the before and after method, and she  
25 says yes, and you'll see that she explains the

1 before and after method.

2 And then on line 19 of Page 32, you'll see  
3 that I ask Ms. O'Shell if there is a treatise or  
4 authority that describes the but-for method for  
5 determining lost profits, the one that she's  
6 allegedly used in this case, and you'll see on  
7 lines 22 through 24 she says yes, there's many of  
8 them. It's a widely accepted method for  
9 determining lost profits.

10 Page 33, Your Honor.

11 THE COURT: Okay.

12 MR. WEBER: And I ask Ms. O'Shell to identify  
13 any authority sitting here today that describes the  
14 but-for method, and you'll see from line 8  
15 through 16, she refers to this AICPA publication,  
16 and I'm going to show you in a second.

17 And then on line 20, on that same page, 33, I  
18 ask her the difference between the but-for method  
19 and the yard stick method.

20 THE COURT: On page what?

21 MR. WEBER: On 33 at line 20. She can't  
22 recall her application of the yard stick method.

23 On Page 34, line 18, I ask her the difference  
24 between the but-for method and the before and after  
25 method.

1 And from 34, 18 to 35, 10, she says the before  
2 and after method is not applicable.

3 Mr. Zappolo, I'm going to have you, when it's  
4 your turn, and I'm going to give you time to review  
5 the transcript before it's your turn, I think  
6 that's only fair.

7 MR. ZAPPOLO: Thank you, Your Honor.

8 THE COURT: But when it is your turn, as I'm  
9 going through this, I'm going to have -- you're  
10 going to have to address for me Page 35 line 4.

11 MR. ZAPPOLO: 35, line 4.

12 THE COURT: Page 35 --

13 MR. ZAPPOLO: But-for the action this would  
14 have happened.

15 THE COURT: The but-for method assumes,  
16 calculates lost profits based on an assumption.

17 MR. ZAPPOLO: I'm sorry, Your Honor -- okay.

18 THE COURT: And so, you know, when I'm looking  
19 at expert testimony I'm going to need more than  
20 assumptions. Maybe there's more context in this  
21 deposition as you go forward, but right now I'm  
22 going to highlight that for you, because if there  
23 isn't I want you to address that for me.

24 MR. ZAPPOLO: Yes, Your Honor.

25 THE COURT: All right. Please continue.

1 MR. WEBER: So line -- I mean, Page 92, Your  
2 Honor.

3 THE COURT: Page 92.

4 MR. WEBER: Page 92. So now I'm going to show  
5 her the AICPA guide that she just mentioned, that  
6 Your Honor just read, which allegedly identifies  
7 the but-for method. Okay, Your Honor?

8 THE COURT: Okay.

9 MR. WEBER: So this is line 92 -- Page 92,  
10 line 19. And Exhibit 6 referred to there is this  
11 document, Your Honor, the Chapter 10 calculation of  
12 lost profits. This is --

13 THE COURT: What you handed me as Page 25 at  
14 the bottom?

15 MR. WEBER: Correct.

16 THE COURT: Okay.

17 MR. WEBER: This is the page that's referenced  
18 in what you're about to read. This is an excerpt  
19 from that 60-page exhibit, the only relevant page.  
20 Let me know when Your Honor's ready, I'll point you  
21 to the -- Page 49, line 9 is really where I have  
22 her identify in this Exhibit 6 where this alleged  
23 but-for method that exists.

24 THE COURT: All right.

25 MR. WEBER: So you'll see on line -- on

1 Page 94, lines 9 through 22, she admits that the  
2 reference to the but-for method is solely within  
3 this paragraph 64, and the before and after method  
4 doesn't -- it's not just a portion of the sentence  
5 in line 64.

6 Put another way, Your Honor, from the before  
7 and after method, an accepted method, Ms. O'Shell  
8 has extracted the second sentence of paragraph 64  
9 as allegedly the entirely other method for  
10 calculating lost profits. Are you following me  
11 there?

12 THE COURT: I am. I mean, I wasn't there, I'm  
13 just reading the word on paper. Is she -- and I'll  
14 go back and read the first portion, because I think  
15 you address it. She's not interchangeably using  
16 before and after and but-for.

17 MR. WEBER: She's not.

18 THE COURT: She's saying but-for is a  
19 different test, and I think it said it was based on  
20 an assumption?

21 MR. WEBER: Correct. This is a totally  
22 different test. She actually said she's not using  
23 the before and after method, and that's why this is  
24 so problematic. There's the yard stick method.  
25 There's the before and after method. She's

1 creating this but-for method.

2 THE COURT: All right. Anything else you want  
3 me to read in this?

4 MR. WEBER: I mean, there's other portions of  
5 the deposition where we attack this, and --

6 THE COURT: I mean, I want you to go through  
7 it now, because --

8 MR. WEBER: Yeah.

9 THE COURT: -- you know, at that point we're  
10 going to recess, and then I'll let you read the  
11 transcript in its entirety since I know you were  
12 just handed it a moment ago, but it was a  
13 deposition that occurred yesterday, and so it  
14 should be fresh, and so you should know roughly  
15 where to go.

16 MR. ZAPPOLO: Yes. Yes.

17 THE COURT: So, you know, I'm going to give  
18 you the time because we're all gentlemen, but I'm  
19 not going to give you forever because, you know,  
20 you lived it yesterday.

21 MR. ZAPPOLO: I'll be ready after lunch, Your  
22 Honor.

23 THE COURT: Okay.

24 MR. WEBER: And so later -- so that's the  
25 before and after but-for yard stick method portion,



1 Your Honor. I would say she's identified the yard  
2 stick method. She's identified the before and  
3 after. Now she's using this but-for method. Okay?  
4 She admits that it's different than these two other  
5 methods, and so later on I have her look again for  
6 authority to describe this but-for method, because  
7 if she's got something I want to see it, Your  
8 Honor. I don't want to be surprised by it.

9 And so then she comes back with another  
10 treatise, and that's the table of contents that I  
11 gave to Your Honor. You'll see that. It looks  
12 like this.

13 THE COURT: Yes.

14 MR. WEBER: So she came back with this  
15 authority, allegedly, and Your Honor will note on  
16 5.0, I don't know if Your Honor can see that in the  
17 middle?

18 THE COURT: I can.

19 MR. WEBER: Methods for determining lost  
20 revenue. Before and after method, yard stick  
21 method, sales protection method, lost market share  
22 method. There's no reference there on the table of  
23 contents about any but-for method, right? I mean,  
24 that's pretty apparent on the face of this  
25 document.

1       So then I asked her, well, can you send me  
2       these pages? Because page -- Page 249, because  
3       we've already established you're not using the  
4       before and after method. We've already established  
5       you're not using the yard stick method.

6       So then I say, well, show me the sales  
7       projection method, and the lost market share  
8       method. So she sends me Page 249.

9       THE COURT: I don't have 249. I have -- I  
10      have --

11      MR. WEBER: Oh, I didn't give it to you. I  
12      apologize, Your Honor.

13      THE COURT: I have page -- yeah, 25, 241.  
14      Thank you.

15      MR. WEBER: So I have her send me Page 249,  
16      and we look at these two other methods.  
17      Ms. O'Shell seems to -- Mr. Zappolo tried to get  
18      Ms. O'Shell to say she's actually using the sales  
19      protection method, but then when I cross-examined  
20      her, you will see on Page 124, Your Honor. 124,  
21      line 17.

22      And so now I'm asking Ms. O'Shell whether she  
23      applied the sales protection method.

24      THE COURT: Okay.

25      MR. WEBER: From line 124 through line 17,

1 through Page 125, line 14, I question Ms. O'Shell  
2 whether she used any independent analysis, or  
3 company prepared documents to ensure they are  
4 consistent with the industry. Any comparable or  
5 guideline companies, or any benchmarks as required  
6 by the sales projection method? She did not, Your  
7 Honor.

8 You'll see on Page 125, line 25,  
9 question, "Did you compare your forecasts or  
10 budgets to any industry or comparable guidelines  
11 distributors?"

12 Answer, "No."

13 Question, "Did you compare your forecast or  
14 budgets for your report to any distributors at  
15 all?"

16 "No. Only the company's business plan."

17 "Which company business plan?"

18 "SEI, or -- I'm sorry, it was Wagner Exotics  
19 executive summary and Lee Motors business plan."

20 "And was Lee Motors ever a functioning  
21 company?"

22 "I don't know."

23 And one of the things is, you'll see, on 249,  
24 is the Court there concluded that the experts  
25 proposed testimony regarding lost profits amounts

1 to speculation and conjecture because he failed to  
2 perform any analysis on a viable market for the  
3 product expected to receive from the entity there,  
4 and he lacked relevant and recent activity in that  
5 industry.

6 All of Ms. O'Shell's testimony is based on  
7 assumptions, Your Honor. From Mr. Wagner and from  
8 this Mr. Franks, their other  
9 evaluation/manufacturing expert, which we're going  
10 to attack also. It's all based on assumptions,  
11 Your Honor, because it's undisputed that SEI never  
12 sold a car except for this car at issue for  
13 substantially less than Mr. Wagner had hoped.  
14 That's also in Ms. O'Shell's testimony. In fact,  
15 she didn't even use that one car that she sold,  
16 that SEI sold, because she excluded it.

17 So it's -- there's no but-for method. Then  
18 they point to the sale protection method, but she's  
19 not even relying on what the sales projection  
20 method requires. She's not using the yard stick  
21 method. She's not using the before and after  
22 method. What generally accepted method is she  
23 using? She's not using any, Your Honor.

24 THE COURT: You guys didn't address lost  
25 market share?

1 MR. WEBER: Lost market share? I -- well --

2 THE COURT: The only reason I ask is because  
3 that's the only other place I see but-for  
4 referenced.

5 MR. WEBER: Where do you see that, Your Honor?

6 THE COURT: On Page 249, where it says, "Lost  
7 market share method," and the heading, it's that  
8 first sentence, last three or four words. That's  
9 the only other place I see it referenced.

10 MR. WEBER: They didn't even bring that up,  
11 Your Honor, and I would say it's not even  
12 applicable because they never had a market share.

13 THE COURT: Yeah, it says, "Lost market share  
14 models based on the premise that the Plaintiff  
15 would have maintained the same market share but-for  
16 the event."

17 MR. WEBER: And they never had a market share.

18 THE COURT: Okay.

19 MR. WEBER: That's that portion of the  
20 argument.

21 THE COURT: All right. Then we'll break now  
22 because I want you to review your transcript.

23 MR. ZAPPOLO: Thank you, Your Honor. I have  
24 one point to ask Your Honor's indulgence. We have  
25 the person who I said was called to testify. I

1 don't know if Mr. Weber will stipulate if -- that  
2 he's a private investigator, he's the person that  
3 produced this document. I can swear him in in two  
4 seconds, we can introduce the document.

5 THE COURT: Any --

6 MR. WEBER: I mean, I would need to see the  
7 document. Can I have a copy of the document?

8 MR. ZAPPOLO: Yes.

9 MR. WEBER: Is this mine?

10 MR. ZAPPOLO: Yes. It's relevant to the other  
11 hearing, but I thought we were going to go with the  
12 first hearing first.

13 MR. WEBER: He's complaining about the  
14 transcript, but he's just handing me this document.  
15 I mean, I don't know what's even in this. I mean,  
16 is it just to authenticate that this  
17 document -- did he create it?

18 MR. ZAPPOLO: It's -- no, he didn't create it.  
19 He found it in the public records and it contains  
20 the information that you accused me of disclosing  
21 inappropriately.

22 MR. WEBER: Well, hold on. This is only one  
23 part of that motion.

24 MR. ZAPPOLO: I understand. But that's the  
25 important part, as far as I'm concerned.

1 THE COURT: I guess you're asking because you  
2 want me to just take that testimony briefly and let  
3 him go?

4 MR. ZAPPOLO: Yes, sir.

5 THE COURT: And the substance of that  
6 testimony is that he found that in the public  
7 records?

8 MR. ZAPPOLO: Yes, sir.

9 THE COURT: Okay. Can I take this out of  
10 order so I can let him go?

11 MR. WEBER: Yeah.

12 THE COURT: Okay. Sir, come on up. So the  
13 way it will work, there will be a very brief  
14 direct, a very brief cross, and a very brief  
15 redirect, and then we'll go, okay?

16 MR. WEBER: Yeah.

17 THE COURT: Raise your right hand.

18 ALEX BRENER,  
19 having been first duly sworn and responding,  
20 "Yes," was examined and testified as follows:

21 THE COURT: Sir, have a seat. Go ahead.

22 DIRECT EXAMINATION

23 BY MR. ZAPPOLO:

24 Q. Hi. I don't think we've ever met before.

25 Would you introduce yourself to the Court?

1 A. My name is Alex Brener.

2 Q. Okay. And Mr. Brener, what do you do for a  
3 living?

4 A. I'm a private investigator.

5 Q. Okay. And you're licensed in the state of  
6 Florida?

7 A. Correct.

8 Q. Okay. And were you ever contacted by anyone  
9 about this case?

10 A. Mr. Wagner contacted me about this case.

11 Q. Okay. What did he ask you to do?

12 A. He asked me to find the office where he could  
13 serve a subpoena on this company.

14 Q. Okay. And do you remember the names of the  
15 companies?

16 A. Something with III.

17 Q. Okay.

18 A. I believe that's the beginning of it.

19 Q. All right. And did you, in fact, do any  
20 research for that Mr. Weber?

21 A. Yeah --

22 Q. Or Mr. Wagner.

23 A. Yeah, I proceeded to look into the company,  
24 and I located the documents, all the public filings that  
25 would allow him to serve process on him.



1 Q. I'm just going to ask you to take a look at  
2 this document, which I -- the lower section of it. It's  
3 got my e-mail address at the top, but in the lower  
4 section there there's something that begins with the  
5 words, "James." Do you see that on the first page?

6 There is --

7 A. I don't see James here in the --

8 Q. Sorry, I'm just trying to explain --

9 A. -- heading --

10 Q. Right here in the middle of the page.

11 A. Okay.

12 Q. You see it says James?

13 A. Okay. Yeah, got you. Yeah.

14 Q. Who wrote that portion of the document?

15 A. That would be from me.

16 Q. Okay. And so, is it -- was it -- and what is  
17 that document dated?

18 A. It is dated March 8th, 2023.

19 Q. Do you recall doing the research on or about  
20 March 8th, 2023?

21 A. Probably a day or two before then, yeah.

22 Q. Okay.

23 A. Is when I would have done it.

24 Q. Okay. And as a part of that, did you respond  
25 to Mr. Wagner and provide him with anything?

1 A. Yeah, I provided him with the enclosed with  
2 this e-mail, it would have been the 91-page filing from  
3 the SEC.

4 Q. Okay. I'm going to mark the e-mail as  
5 Exhibit 1 for today's purposes, and then I'm going to  
6 show you what's been marked for identification purposes  
7 as Exhibit 2.

8 Do you recognize that document?

9 A. Yeah.

10 Q. And what is that?

11 A. This is the 91-page, I believe, public filing  
12 from the SEC website.

13 Q. Okay. And you obtained that, and you provided  
14 it to Mr. Wagner, correct?

15 A. Correct.

16 Q. All right.

17 MR. ZAPPOLO: Your Honor, at this point I  
18 would move exhibits number 1 and 2 into evidence.

19 THE COURT: All right. Any objection?

20 MR. WEBER: You know, Your Honor, I haven't  
21 even had a chance to look through this document  
22 yet, but I will not object.

23 THE COURT: All right. Admitted as 1.

24 (Thereupon, Plaintiff's Exhibits 1 and 2 were  
25 admitted into the record.)

1 MR. ZAPPOLO: Thank you. No, Your Honor. I

2 mean, the documents will speak for itself at a

3 later point in the hearing on -- I'll testify --

4 THE COURT: Any cross-examine?

5 MR. WEBER: I just have a brief

6 cross-examination.

7 THE COURT: Go ahead.

8 THE CLERK: So just for clarification, Your

9 Honor, it was Exhibit 1 and 2, right?

10 THE COURT: One and two.

11 MR. ZAPPOLO: Yes, sir.

12 THE COURT: Yes.

13 MR. ZAPPOLO: One was the e-mail, two was the

14 attachment to it.

15 THE COURT: All right. Thank you, madam

16 clerk.

17 THE CLERK: Thank you, Your Honor.

18 CROSS-EXAMINATION

19 BY MR. WEBER:

20 Q. Prior to March 8th, 2023, had you heard the

21 name III Capital Management?

22 A. Prior to what date, I'm sorry?

23 Q. March 8th, 2023.

24 A. Well, Mr. Wagner contacted me before that

25 date. The March 8th date was my reply to him with the

1 information already.

2 Q. When did Mr. Wagner contact you --

3 A. I don't have it on --

4 Q. -- with the info for III Capital Management?

5 A. It was probably just a few days before then.

6 Q. Okay. So in March 2023, right?

7 A. Yeah.

8 Q. You did not have the name prior to March 2023,  
9 right?

10 A. Correct.

11 Q. Did you look through this document, this  
12 91-page document, allegedly?

13 A. Did I look through it?

14 Q. Yeah.

15 A. Yeah.

16 Q. And what was the purpose of you looking  
17 through this document?

18 A. To try to locate any address that would lead  
19 to use for service of process, to make sure it was on  
20 that document.

21 Q. Is Mr. Mosler's name mentioned anywhere in  
22 this document?

23 A. Whose name?

24 Q. Warren Mosler.

25 A. I don't recall.

1 Q. Sorry, I'm multi-tasking, but just in case I  
2 didn't say it already, prior to Mr. Wagner giving you  
3 the name III capital management, you had not heard of  
4 that company before, right?

5 A. That's correct.

6 MR. WEBER: Okay, Your Honor, I have no  
7 further questions.

8 THE COURT: All right. Redirect?

9 REDIRECT EXAMINATION

10 BY MR. ZAPPOLO:

11 Q. Does the company name AVM ring a bell to you  
12 at all?

13 A. I -- not one hundred percent sure, but I think  
14 it was somewhere in this 19-page document I did see an  
15 AVM, but I'm not certain. I would have to go through  
16 this document again.

17 Q. Fair enough.

18 MR. ZAPPOLO: No further questions.

19 THE COURT: All right, sir. Please have a  
20 great day.

21 THE WITNESS: You too. Thank you.

22 MR. ZAPPOLO: Thank you for your time, sir.

23 THE COURT: All right. It's 11:20, we're  
24 going to break. We'll come back around  
25 1:00 -- we'll say 1:ten. Read your transcript, eat

1 a sandwich, and then after that I don't think  
2 there's much more work on this matter, right?

3 MR. WEBER: Correct, Your Honor, we just have  
4 to finish up the O'Shell motion, which is, I think  
5 we can get it done in probably like 30 minutes and  
6 then finish this. We should be done in 30 minutes.

7 THE COURT: Wonderful. All right. So we'll  
8 reconvene after lunch.

9 MR. WEBER: Great.

10 MR. ZAPPOLO: Thank you.

11 MR. WEBER: So what time do we come back, Your  
12 Honor?

13 THE COURT: Let's say, like, 1:10.

14 MR. WEBER: Okay. Thank you, Your Honor.

15 (Lunch recess.)

16 THE COURT: Did you get a chance to review the  
17 transcript?

18 MR. ZAPPOLO: I did, Your Honor. A little bit  
19 abbreviated, but I'm well enough versed to be able  
20 to speak with you.

21 THE COURT: Wonderful. All right. So what  
22 portions of the transcript are you going to  
23 highlight for me?

24 MR. ZAPPOLO: Well, Your Honor, first thing  
25 you asked me to address was the issue at Page 35, I

1 guess.

2 THE COURT: Right, at Page 35, lines --

3 MR. ZAPPOLO: Line -- you said --

4 THE COURT: -- one through 4.

5 MR. ZAPPOLO: Yes, basically you were -- and I

6 think I interpreted Your Honor's concern about the

7 use of the expert's word "assumption." And I

8 actually called the expert during the break and

9 said, what's up with the order assumption? She

10 said, "That's what experts do. You're making a

11 lost profits calculation. You don't know what's

12 going to happen ten years from now." So she

13 said, "Look at my report itself." If Your Honor

14 would turn to Bates Page Number 58 in my binder,

15 that is the portion of Ms. O'Shell's report

16 entitled basic facts and assumptions.

17 If we look at it, our report date is

18 12-31-2022. Mr. Weber asked her about why 12-31?

19 She said that's the nearest date in time, it's an

20 end of the year date, and it's a logical place to

21 put your, you know, to do your report. You

22 wouldn't do a report for something ten years ago.

23 You're trying to project lost profits as best you

24 can, because for Your Honor's aware, the case law

25 says she doesn't have to be perfect in her

1 analysis. She just has to have a reasonable basis  
2 for her findings, et cetera, and I think that  
3 reading the deposition in whole shows that she  
4 absolutely does.

5 Next one, Item 2, Mosler Auto Care Center, DBA  
6 MACC, and Supercar Engineering entered into a valid  
7 contract entitled.

8 Now, of course if she's going to say that  
9 there were damages she has to base it upon  
10 something. She based it upon the assumption that  
11 there's a valid contract. Of course, if the jury  
12 finds that there's not a valid contract, or if the  
13 Court finds or something, then the damages go out  
14 the window, but she has to base her calculations on  
15 something, and so she assumed that the contract  
16 itself is valid. And she talked about dated, et  
17 cetera, et cetera.

18 She talked into -- about at item three, this  
19 second SA, Saudi Arabia/UAE contract. Mr. Weber  
20 questioned her about that in his -- when he deposed  
21 her, and she said, "I didn't consider that as part  
22 of my lost profits calculation." "Why?" She  
23 said, "Because there wasn't enough market data and  
24 research to substantiate the number of cars that  
25 would be sold in there." And this is in her



1 transcript.

2 So her lost profits analysis does not include  
3 the second contract that was entered into between  
4 these parties.

5 Her third fact and assumption, no damage  
6 calculation prepared for the SA/UAE contract,  
7 therefore all assumption calculations are based  
8 upon the China/Thailand contract. That's just what  
9 I said, and she was asked about that, she told why.

10 What the Court also needs to understand is  
11 that she turned over her entire file with all of  
12 her back up for the market data research that she  
13 did, and it's referenced in her transcript. Her  
14 actual calculations, and the math, and all of that  
15 kind of stuff that she did in order to prepare the  
16 ultimate finding that we have here, the ultimate  
17 damage report.

18 The contract had a term beginning on the date  
19 of 11-16-2010 through 11-15-2035. He was  
20 asked -- Counsel asked her, where did you come up  
21 with those dates? She said I found them in the  
22 contract.

23 Now, it's listed here as a basic fact or  
24 assumption, but, you know, it's something that  
25 we're going to prove. Here's the contract. I can

1 show Your Honor the contract. It's a 25-year  
2 contract from 2010, and it goes through the year  
3 2035.

4 So when you see the word assumption in her  
5 report and in her testimony, the Court shouldn't be  
6 dissuaded and think that she did anything other  
7 than a serious calculation based upon her based  
8 upon her experience as a 25-year CPA who's  
9 testified in bunches and bunches of trials, serves  
10 on advisory boards, I don't remember the exact  
11 terminology, but she's on things for the family law  
12 committee here in Palm Beach County and things like  
13 that. I don't want to misspeak so I'm just  
14 generalizing with that, but she's got a quite  
15 impressive resume.

16 Now, the contract performance, she omitted the  
17 chassis 32, that was the first car that Mr. Weber  
18 was referring to, and she gave her reasoning for  
19 why she omitted the damage or the lost profit  
20 calculation for that car.

21 She had the assumption that MACC and SEI had  
22 the ability to meet the performance and delivery  
23 terms required by the contract. Of course. That's  
24 what a CPA has to do when doing these things.

25 Now, if someone comes in and says there was a

1 market shortage of car tires, so there was no way  
2 that one party could perform or whatever, that's  
3 not her -- that's not her bailiwick, Your Honor.  
4 That's not what she's supposed to do. She's  
5 supposed to look at this dispassionately and do her  
6 calculations, which is what she did. She  
7 researched it, and she did that.

8 She also testified about how the first car  
9 was -- she saw that as the value had been deflated  
10 because of -- potentially because of the  
11 defamation, and since that was a separate count in  
12 the complaint, which it is, we've got the  
13 defamation, then we've got the tried libel count,  
14 she said it's not appropriate to double up on those  
15 calculations.

16 THE COURT: So what you're telling me is, the  
17 word assumption is essentially synonymous with  
18 opinion? You know, my opinion on this is, my  
19 assumption on this is?

20 MR. ZAPPOLO: Yes, it's kind of what everyone  
21 who does a damage calculation has to use. That's  
22 what they do.

23 THE COURT: All right. So then when I come  
24 back to you, I'm going to ask you to show me  
25 specifically what is being assumed.

1 MR. WEBER: Yes.

2 THE COURT: And if those, you know, right now  
3 I'm being told that assumption and opinion are  
4 synonymous, right? And so when I come back to you  
5 I want you to tell me what data is being assumed,  
6 and when I say the word I mean speculated or part  
7 conjecture, okay?

8 MR. WEBER: Totally, Your Honor.

9 MR. ZAPPOLO: And --

10 THE COURT: And that will be what I address  
11 with you. You can address that too, but also --

12 MR. ZAPPOLO: I just want to be clear to the  
13 Court. You said assumption is -- what is the  
14 phrase you used?

15 THE COURT: Synonymous with opinion. Like --

16 MR. ZAPPOLO: Synonymous with opinion? I'm  
17 not sure that that's accurate, because --

18 THE COURT: Okay.

19 MR. ZAPPOLO: -- for example, she said, like,  
20 one of her assumptions, she said it's facts and  
21 assumptions, right? She assumed the fact that the  
22 contract was for ten years. That's like, I don't  
23 know how to -- I'm kind of at a loss to explain the  
24 difference here, Your Honor, but these are the  
25 guidelines --

1 THE COURT: You're going to have to do it to  
2 me. You're going to have to do it to the finder of  
3 facts. You have to --

4 MR. ZAPPOLO: I understand that, but  
5 she -- but the expert will take the stand and say,  
6 look, this is why I did the calculations the way I  
7 did them. That's --

8 THE COURT: Yeah, essentially what I'm trying  
9 to make sure is that none of the data that was used  
10 was pure conjecture, you know?

11 MR. ZAPPOLO: Absolutely.

12 THE COURT: That's what I'm trying to arrive  
13 at, because at that point we're not maybe talking  
14 about reliable facts or data.

15 MR. ZAPPOLO: Absolutely, Your Honor.

16 THE COURT: That's what I'm driving at.

17 MR. ZAPPOLO: And that's why she put it here,  
18 and she was questioned about all of this  
19 repeatedly. Mr. Weber went down the line. Line,  
20 by line, by line. Where did you get -- why did you  
21 come up with a report date? She explained. That's  
22 the way experts do it. I wouldn't do a report date  
23 from three years ago, I do the date closest in time  
24 to when I'm going to give my opinion in case there  
25 are deviations that can happen.

1       She assumes that it's a valid contract.

2       Otherwise, why are you calculating damages, right?

3       That's for the Court -- so she says, I took the  
4       contract at face value when I did it.

5       The next one, she says -- she's letting us  
6       know that she omitted damage calculations for the  
7       UAE contract, and she was asked, why did you do  
8       that? And she said, "Because I couldn't find  
9       enough reliable data to back up calculations for  
10      that contract."

11      And that's entirely reasonable. And if you  
12      look at the back section of her deposition, Your  
13      Honor, look at how many times she used the word  
14      conservative in her report. She said the  
15      information that I got from another expert,  
16      Mr. Jonathan Frank, who the other side tried to  
17      exclude, and Judge Hafele said no, his opinion  
18      stays, it's a valid opinion. She relied on his  
19      testimony. She read his transcript, and he's the  
20      person that told her that up to 25 cars a year  
21      could be manufactured.

22      So she then took that and did the market  
23      analysis and research, and she talks about the  
24      reports and other things, and she gave them to  
25      counsel with her package, her entire file, and she

1       said I find this report and that report to be  
2       reliable by, you know, reputable sources and et  
3       cetera, and I relied upon them to find that the  
4       China market is approximately 28% of all global  
5       supercar sales. So she then did the math, and she  
6       said 25% of the cars being manufactured could have  
7       gone there. I find that to be a reasonable  
8       analysis, or point of analysis assumption, and so  
9       those are the types of things that went into her  
10      calculations. Very comprehensive, if you read her  
11      entire deposition, Your Honor.

12           So she went through, and Mr. Weber asked her  
13      about everything, and she had answers for all of  
14      these things. Why did you do it this way? Why did  
15      you do it that way? Et cetera, et cetera. Okay?  
16      So I just want the Court to be aware of that.

17           So if we -- if, you know, if a layperson looks  
18      at the word assumption they might take it out of  
19      context, but that's kind of a term of art here that  
20      experts use. She says I use that in my reports all  
21      the time. That's just to give the ground work of  
22      why I did the things the way that I did, and that's  
23      the explanation and the backup for why she did her  
24      calculations.

25           So I think I've covered that, Your Honor. I

1 would like to point out some things. And  
2 Mr. Wagner wants me to point out to the Court that  
3 he gave her the opinion that he could sell more  
4 cars than that. She said no, I'm taking it down  
5 because of my market research and the other  
6 expert's testimony. So, she again being  
7 conservative.

8 If you look, just by way of example, at  
9 Page 70 of the deposition, line 22, the  
10 question, "What are these assumptions --

11 THE COURT: Page 7?

12 MR. ZAPPOLO: Yes, sir. 7-0.

13 THE COURT: 70. Thank you. Okay.

14 MR. ZAPPOLO: And this is just an example. I  
15 want Your Honor to get a feel for what's going on  
16 here.

17 Mr. Weber asks, "What are these assumptions  
18 based on?"

19 Answer, "So the assumptions in 10-A," and if  
20 you look at her report, 10-A, at Page 3 of her  
21 report, which is on Bates 58, 10-A, minimum per  
22 agreement, 10-A, "The assumption is that SEI would  
23 have purchased and sold three supercars per year,  
24 which was the minimum per the contract, except for  
25 in 2011, which I assume that MACC would not have



1      been able to meet the manufacturing requirement."

2            And that's because she testified in another  
3      portion, I'm just going by memory here, and I know  
4      the facts of the case well enough that her  
5      testimony rang true to me, is that SEI didn't get  
6      its approvals until late in the year, so SEI wasn't  
7      going to -- excuse me, I'm sorry. MACC didn't get  
8      its approvals until late in the year to sell the  
9      car, so she assumed that they wouldn't meet the  
10     purchase and sale requirements of that year.

11           So everything she did has a factual basis for  
12     it, and it's backed up by either her conversations  
13     with Mr. Wagner, and/or her reading of the  
14     deposition of Mr. Frank, or the documentation that  
15     was provided her to Mr. Wagner.

16           I should point out one thing, Your Honor.  
17     There was something in the -- in the transcript  
18     where she actually did make a mistake, or she was  
19     mistaken, but she said that she used some  
20     calculations at one point, and I'll read it to you  
21     later, from a market analysis, or a business plan  
22     for a company by the name of Lee, and she said, "I  
23     didn't think that that was associated with  
24     Mr. Wagner." In fact, that was Mr. Wagner's  
25     business plan, he had just with put a different

1 person's name on it, and he'll testify to that  
2 today if he needs to, but he'll certainly testify  
3 to it at trial.

4 But in any case. So she goes through, and for  
5 10-B, most probable calculation, the assumption  
6 again in 2011 there will be no supercars sold  
7 because MACC would not have been able to meet the  
8 manufacturing requirements, but then beginning in  
9 2012 and 2013, the minimal part of the contract  
10 would be sold of three, and that's what the  
11 contract itself requires. It's a base of three,  
12 and then that would ramp up to seven supercars per  
13 year in 2020 based upon Mr. Frank's deposition, an  
14 expert -- another expert, and that MACC would have  
15 been able to manufacture 25 automobiles per year,  
16 and I use the market research regarding the  
17 China/Thailand market compared to the global market  
18 in order to determine that seven of those supercars  
19 could have been sold in China/Thailand.

20 Did you rely on anything other than market  
21 research to reach conclusions in 2000 to assume  
22 that in 2012, 2013 three supercars per year would  
23 have been sold to SEI?

24 Yes, in 2012, were based on the minimum per  
25 the contract.

1       She goes through and she's using, and she's  
2       comparing, and she's constantly taking the  
3       conservative approach to all of these calculations.

4       So what I need to get to with Your Honor is  
5       this whole but-for, and there's no such analysis,  
6       et cetera, okay? And I will go ahead and --

7       THE COURT: Let me stop you, because what you  
8       just explained about the different markets and  
9       using other markets to perhaps justify additional  
10      sales as part of the lost profits, am I  
11      understanding that correctly?

12      MR. ZAPPOLO: It was that -- the  
13      China/Thailand market was the market for the  
14      contract.

15      THE COURT: Okay.

16      MR. ZAPPOLO: This was a -- this was an  
17      exclusive distribution agreement to sell cars in  
18      China and Thailand. It should be noted by the  
19      Court, Mr. Wagner's company was also a  
20      non-exclusive distributor for other parts of the  
21      world.

22      THE COURT: I guess my question, then, to both  
23      of you, is how come you guys never addressed the  
24      lost market share method as part of this  
25      deposition? Because --

1 MR. ZAPPOLO: I can --

2 THE COURT: -- what I'm hearing is --

3 MR. ZAPPOLO: I can answer that.

4 THE COURT: -- it sounds like, you know,  
5 again, the lost market share model is based on the  
6 premise that the Plaintiff would have maintained  
7 the same market share but-for the event.

8 MR. ZAPPOLO: Yes, she covered that in her  
9 deposition. I don't know the exact page, Your  
10 Honor, but she did state, this was a startup  
11 company, and so the startup company didn't have a  
12 market share yet. So it's all projections, and  
13 Counsel would -- is probably going to argue to the  
14 Court, oh, since they never sold a car, they have  
15 no track record, so nothing is reliable, and the  
16 case law is crystal clear on this, Your Honor.  
17 Even in the standard jury instructions, if  
18 you -- just because you have a startup company, it  
19 doesn't mean that you can't have a lost profits  
20 analysis, okay?

21 So the -- that's just one method of  
22 calculating lost profits, and I may be misspeaking,  
23 because she wanted me to emphasize to the Court  
24 something that I -- maybe I'm not really good at,  
25 but she said Counsel was focusing on a lost revenue

1 calculation; I was conducting a lost profit

2 calculation.

3 She said, and if you read through my

4 deposition as a whole, what I'm doing is doing a

5 lost profit calculation. Don't let them try and

6 pigeonhole us into this lost revenue calculation,

7 and the lost profit calculation starts with lost

8 revenue, but then you have to take into effect

9 the -- what they're called avoided costs, which are

10 like your expenses and other things, and then if

11 you do that math, that's what gets you to a proper

12 lost profits calculation.

13 This person knows their stuff, Your Honor.

14 She's got, and she tells me she'll produce more

15 other things. What happened was this, Your Honor.

16 Mr. Weber came out of the box and started asking

17 her about these things, and she was answering them,

18 and he was saying, "What about this? Do you know

19 this? Do you know that?" And I was writing

20 down -- I wrote down, "Red herring. He asked her

21 about other methods that she didn't find

22 appropriate for this situation."

23 And if you look at the beginning of her

24 transcript, she says, well, you can use this

25 method, but it's kind of fact and case specific, or

1     you can use that method, it's kind of fact and case  
2     specific. Just like Your Honor just asked. A  
3     reasonable question. Why not market share? Why  
4     not use the difference in market share approach.

5         And she said because he didn't have a market  
6     share, so that one doesn't apply.

7         So what she used is this but-for methodology.  
8     But-for the Defendant having breached that  
9     contract, what is the likelihood -- likely result  
10    of the profits that would have been made, and then  
11    when we take out the avoidance costs and the  
12    expenses and everything, we get to an appropriate  
13    and legal lost profits finding and analysis, and I  
14    would dare say to Your Honor, once you get this far  
15    down into the weeds on all of this stuff, this is  
16    something that the two experts can duke out on the  
17    stand in front of the jury, but it's not junk  
18    science here by any sense of the word.

19         She was talking about, you know, tying things  
20    into discounting, to the treasury rate, and  
21    Mr. Weber asked her questions about, you know,  
22    didn't you apply risk factors, and she said, "Yes,  
23    by virtue of this or that so you don't apply the  
24    risk factor in two different places." And they  
25    were going back and forth on all of this stuff. I

1 mean, it was -- like I said, it's --

2 MR. WEBER: May I present, Your Honor?

3 THE COURT: We're going to let him finish.

4 MR. ZAPPOLO: If we just go ahead and look at  
5 a very simple analysis. Page 127. I asked, "Are  
6 your calculations, your methodologies in compliance  
7 with the generally accepted methods in your  
8 industry for the calculations you've done?"

9 "Unequivocally yes."

10 "You also testified earlier about doing market  
11 research regarding worldwide supercars; do you  
12 remember that?"

13 "Yes."

14 "That type of research would naturally include  
15 causes for losses like anticipated dips in the  
16 market. There aren't going to be a lot of  
17 supercars sold during this time period, that type  
18 of thing, correct?"

19 Mr. Weber objected, but her answer was, "Yes,  
20 I believe the market reports from MIEYA  
21 (phonetic)," which is one of the things that she  
22 relied upon, it's all in her report, "actually  
23 includes historical and future projections. It  
24 included for the time period of 2017 through 2027,  
25 and then the analysis from industry growth insights

1 includes the period timeframe from 2015 to 2030.

2 So it definitely takes into consideration

3 long-terms ebbs and flows."

4 This is not something she was just winging it,

5 Your Honor. This is a professional who did her job

6 and did the work, and did it well.

7 Now, Exhibit 6, calculation of lost profits

8 practice aid 06-04 out of the American Institute of

9 Certified Public Accounts. If you scroll down to,

10 and I said let me see if you can find it, now we

11 jump forward to Page 130.

12 I'm going to scroll back up on Page 51 of

13 Exhibit 6. It says Chapter 18. Specialized

14 damages. Newly established businesses. That's

15 what we're dealing with here, correct, newly

16 established businesses?

17 She says yes, and that's what the facts of the

18 case will bear out.

19 So she actually during a lunch break grabbed

20 one of the treatises, and we were able to pull out

21 the methodologies, and Mr. Weber was asking her and

22 grilling her on all of this stuff. What about this

23 method? How is this different from that, and

24 everything? And she talked to him about it, but

25 the interesting thing is, I asked her -- at one



1 point I asked her, did you have access to all of  
2 these treatises and everything so that you could be  
3 sure that you were strictly following? And she  
4 said, yes, of course I did, and that's what I did.

5 So, and she says, it talks about the Plaintiff  
6 has to show, did you consider these factors when  
7 you were consulting with Mr. Wagner? Yes, I did.

8 So we went through a lot of this stuff, but I  
9 want to back up because there is something here.

10 Mr. Weber asked her, "Where is the method by which  
11 you calculated the numbers on Page 8 of your  
12 report?"

13 And Page 8 is her final damage --

14 THE COURT: Show me where -- where are you  
15 looking?

16 MR. ZAPPOLO: -- conclusion -- Bates stamp 63.

17 So Mr. Weber asked her, where's the method? She  
18 said, answer, "The facts and assumptions are  
19 contained in pages 2 and 3 of her report," which we  
20 were just at, "and my detailed calculations were  
21 provided to you, and it's contained in my  
22 Plaintiff's damage calculation binder in sections  
23 4-A and 4-B are the annual calculations."

24 So he went through -- she went through and she  
25 did all of the calculations. We provided it to

1 opposing Counsel, and these are the -- this is the  
2 summary that's found at Bates stamp 63.

3 THE COURT: There's two black bars at the  
4 bottom. Is that blacked out on purpose?

5 MR. ZAPPOLO: I didn't black anything out,  
6 Your Honor, did I? Oh, it's just a bad copy, Your  
7 Honor. And -- I don't know whether I have a better  
8 copy of her report. It's --

9 MR. WEBER: It's attached to the response,  
10 Your Honor.

11 THE COURT: That's fine. That's fine.

12 MR. ZAPPOLO: Might be attached to Mr. Weber's  
13 motion? Yes, I believe it is. Within Mr. Weber's  
14 motion.

15 MR. WEBER: If Your Honor wants --

16 MR. ZAPPOLO: -- blacked outside --

17 THE COURT: I have it here.

18 MR. ZAPPOLO: I apologize, Your Honor, for the  
19 bad copy.

20 THE COURT: It's okay. It's the one drawback  
21 to requiring hard copies of everything, you know?  
22 Because it happens all the time.

23 MR. WEBER: Please do away with it, Your  
24 Honor. Go full electronic.

25 THE COURT: What page of the transcript are we

1 reading from?

2 MR. ZAPPOLO: The page of the transcript was  
3 Page 111.

4 THE COURT: Thank you.

5 MR. ZAPPOLO: So on Page 111, line 17, the  
6 question was, "Where is the method by which you  
7 calculated these numbers on Page 8 of the report?"  
8 Which I believe Your Honor has now a legible copy  
9 in front of him.

10 Answer, "The facts and assumptions are  
11 contained on pages 2 and 3, and my detailed  
12 calculations were provided to you, and it's  
13 contained in my Plaintiff's damage calculations  
14 binder in sections 4-A and 4-B." She said, are the  
15 annual calculations, but that's because this is  
16 over a 25-year period, she had to do it all and  
17 then she just summarized it in the conclusion  
18 section of her report at Page 8.

19 So this is the way this deposition went.  
20 Everything -- he walked through this line by line,  
21 and she answered, and answered every single  
22 question. The only thing that appears now to be  
23 the dispute is he's trying to tell the Court, or  
24 suggest to the Court that this is not a proper  
25 methodology, and he went through the different

1 methodologies that they say she should have used,  
2 and she said no, I dismissed that. For one reason  
3 or another I didn't use that methodology.

4 And for example, Your Honor just asked, "Why  
5 not use the market share?" Well, there was no  
6 market share before.

7 Why not use the before and after, Your Honor?  
8 That's a good rhetorical question. Why not just  
9 use the whole total of a before and after? And she  
10 could have said, "Oh, before and after, there was  
11 no before, it was a startup business."

12 And we know that the case law says that  
13 that's -- you can still go forward with a damage  
14 calculation under lost profits even though you have  
15 a startup business.

16 So from -- you know, with all of those things,  
17 this deposition transcript in total -- Page 116.

18 "Do you see the but-for method referenced in  
19 Paragraph 13?" I'm not sure what Mr. Weber was  
20 referencing to.

21 But she said, answer, "No, because we just  
22 looked at it in the AI CPA production. It is  
23 classified under the before and after method. I  
24 personally believe that it is a separate and  
25 distinct method in this particular context, because

1       there were no revenues, because there's a breach of  
2       contract from the very beginning. So there's no  
3       comparison for the before and after."

4       So Mr. Weber's presentation, oh, she didn't  
5       follow the before and after. She didn't follow the  
6       before and after. There's the simple explanation.

7       She followed a, kind of a subparagraph of the  
8       before and after, according to his presentation,  
9       and that's perfectly logical because there was no  
10      before sales because this was a breach from the  
11      beginning.

12      So unless Your Honor has any questions, I  
13      think I pretty well covered it, and I don't want to  
14      abuse my time with the Court. Thank you.

15      MR. WEBER: May I approach? I'm going to use  
16      the lectern, Your Honor, if I may, just to drill  
17      down here. Because this is not an argument about  
18      how many times someone uses the word conservative.  
19      Like, that just fundamentally --

20      THE COURT: No, I'm not persuaded by that.

21      MR. WEBER: Yeah.

22      THE COURT: I do like what he just mentioned  
23      about Page 116. For me that's important.

24      MR. WEBER: 116, which -- which -- about the  
25      but-for method?

1 THE COURT: Um-hmm.

2 MR. WEBER: Well, that's the reason why I was  
3 questioning her about these other methods. Did you  
4 use the yard stick method? No. Well, why not?  
5 Why didn't she use the yard stick method if there's  
6 no previous sales, right?

7 Why didn't you use the before and after  
8 method? Why didn't you use some other method?  
9 She's supposedly the expert. She supposedly  
10 decides what methodology she wants to use.

11 I had my rebuttal report from my MIT professor  
12 over here who goes into the detail, but what I'm  
13 going to do, Your Honor, is just guide you through  
14 this testimony, and it requires me to take a step  
15 back.

16 THE COURT: Okay.

17 MR. WEBER: Just to lay the foundation of  
18 what's going on here.

19 THE COURT: Am I still looking at this  
20 transcript?

21 MR. WEBER: I'm about to walk you through it.  
22 MACC manufactures the automobiles, racecars and  
23 supercars for sale. Wagner tried to buy MACC. He  
24 failed, which kind of led to this lawsuit.

25 Now, in his claim, which is the subject of

1      this report, he's alleging that as a distributor of  
2      MACC's automobiles, like, let's say his sale never  
3      existed, he was a distributor, he was selling  
4      MACC's automobiles to China and Thailand.

5              So he's trying to establish his lost profits  
6      as a distributor of the automobiles for MACC. You  
7      following me? So that's where we are. He's trying  
8      to establish his lost profits that he would have  
9      got as a distributor of the cars for MACC. Are you  
10     following me?

11            THE COURT: I am.

12            MR. WEBER: Okay, good. So now, here's where  
13     we're going to go. Remember, she chose the but-for  
14     method, and that is what she identifies -- oh, I  
15     should mention, she's only testified to lost  
16     profits four or five times by her own testimony, so  
17     Mr. Zappolo's testimony about 20 cases or more,  
18     she's actually not testified that many times to  
19     lost profits, but she chose the but-for method,  
20     that's on Page 14 of the transcript, line 16  
21     through 19.

22            THE COURT: Right. We covered that.

23            MR. WEBER: Yep. So now on Page 31, I asked  
24     her about the yard stick method, which is another  
25     method that she may have used. This is 31.

1 Page 31, line 12 through 19. She doesn't even know  
2 the definition of the yard stick method. Pressed  
3 her about it. She couldn't comment whether that  
4 would have been appropriate given that there was a  
5 total lack of sales. Interesting answer.

6 Next on Page 32, I asked her about the before  
7 and after method. This is Page 32, lines 9  
8 through 24. This is another method for determining  
9 lost profits. On Page 33, once she said she used  
10 the but-for method for establishing lost profits,  
11 on Page 33, line 8 through 16, I asked her to  
12 identify any authority that identified the but-for  
13 method. I gave Your Honor the document that she  
14 herself identified. Remember this document, Your  
15 Honor?

16 THE COURT: Um-hmm.

17 MR. WEBER: As supposedly setting forth the  
18 but-for method. There is none, Your Honor. It's a  
19 single sentence within the before and after method  
20 that is established.

21 Next, I asked her about the differences  
22 between the but-for and the yard stick and before  
23 and after method. That's on Page 34. She couldn't  
24 even tell me the difference between the yard stick  
25 and the but-for. She knows nothing about the yard



1 stick, apparently, and you'll see Dr. May  
2 (phonetic), MIT professor, explaining about the  
3 yard stick method.

4 Next, on Page 92, I showed her that document,  
5 the practice aid, and she pointed out where the  
6 but-for method was right, that one sentence on  
7 Page 94, lines --

8 THE COURT: Give me a minute, because I'm  
9 thinking about something.

10 MR. WEBER: What?

11 THE COURT: Give me one moment.

12 So, she uses this method. Perhaps she  
13 explains it successfully on Page 116, perhaps she  
14 doesn't, but this is the method she uses, and it's  
15 used -- and it's premised on the assumption that  
16 the contract indicates three cars are going to be  
17 sold, minimum, per year, and based on that number,  
18 these are what the profits would be if they were  
19 sold overseas, correct?

20 MR. WEBER: Yes, using the but-for method.

21 THE COURT: Okay. What's to prevent you from  
22 using that method and telling the jury, what if  
23 zero cars were sold overseas that year, even though  
24 they had three in their possession? And then there  
25 would be no lost profits, wouldn't there?

1 MR. WEBER: Correct. But the point of  
2 Daubert, that's me cross-examining her on the  
3 merits, though, but she's not even there. Daubert  
4 is to prevent the junk science and experts duking  
5 it out, one person using a legitimate model, and  
6 one person using a model that nobody's ever heard  
7 of called the but-for model. That's the whole  
8 point here.

9 And what I'm about to get to is the  
10 assumptions that she relied on, which is -- she  
11 never talked to another distributor. She never got  
12 information about what the gross profit of another  
13 distributor would be, right, because SEI supposedly  
14 is operating as a distributor.

15 So let me show, Your Honor, about --

16 THE COURT: Hold on. Hold on.

17 MR. WEBER: -- the gross profits --

18 THE COURT: A few more questions.

19 MR. WEBER: Yeah.

20 THE COURT: And so when I look at Page 116,  
21 and again, perhaps she answers successfully,  
22 perhaps she doesn't, but, "Do you see the but-for  
23 method referenced there in Paragraph 13?" That's  
24 the question.

25 The answer, "No. But as we look at the AI CPA

1 production, it is classified under the but before  
2 and after method. I personally believe that it is  
3 a separate and distinct method in this particular  
4 context, because there were no revenues, because  
5 there is a breach of contract from the very  
6 beginning, so there is no comparison to the before  
7 and after."

8 And so I guess my question to you would be  
9 this. If this expert is saying that it's not  
10 classified under one of these recognized methods,  
11 but that her personal belief is that it's a  
12 separate and distinct method, is that separate and  
13 distinct method that she believes is applicable  
14 something that survives your Daubert challenge?

15 MR. WEBER: That's exactly the question, Your  
16 Honor.

17 THE COURT: Well, I'm asking.

18 MR. WEBER: If she's --

19 THE COURT: It's rhetorical.

20 MR. WEBER: And that's the -- that's the  
21 whole -- Your Honor, you just nailed it. You just  
22 nailed it with that question, because she's saying  
23 the but-for is this carve out, and so then the  
24 question -- the natural question is, is this carve  
25 out recognized by anybody else as a legitimate

1 method? Because what she just did is she took the  
2 before and after method and cherry picked a portion  
3 of it, and then the question is, well, does cherry  
4 picking that sentence out of the before and after  
5 method survive Daubert?

6 THE COURT: All right, now I just spoon fed  
7 you, so let me hear the response, because I want to  
8 hear this answer.

9 MR. ZAPPOLO: I have two words, Your Honor.  
10 Kumho Tire. The Kumho Tire case says you don't  
11 have to have the Daubert expert. It's -- you don't  
12 get -- the Court is not pigeonholed by the Daubert  
13 analysis. Those are factors that the Court should  
14 consider, but you have lots of people that are not  
15 giving scientific, or very particularized data.  
16 You have to have some, and Kumho and Daubert talk  
17 about how we're trying to relax the standards, et  
18 cetera, to allow people while still acting as a  
19 gatekeeper to not allow, you know, ridiculous junk  
20 science in.

21 This is far from junk. This is a person who  
22 says, I've got a bunch of treatises, I have them  
23 all at my access, I looked through the different  
24 ones, and this is the methodology that I came up  
25 with. She believes it's a totally separate, but at

1 the very least it falls within what they say she  
2 should have done, so they can say, fine, you should  
3 have done X -- you say you did X, Y, and Z, but you  
4 should have done A, B, and C first. If they want  
5 to try and impeach her on that, that's fine, but to  
6 say this is junk or doesn't survive a gatekeeping  
7 threshold is improper under --

8 THE COURT: All right, give me a minute.  
9 Kumho Tire standard.

10 MR. ZAPPOLO: There's a little more help for  
11 Your Honor in the transcript.

12 THE COURT: I'm sorry?

13 MR. ZAPPOLO: There is a little more help for  
14 Your Honor in the transcript.

15 THE COURT: Where am I looking?

16 MR. ZAPPOLO: Page 117. Page 12 -- I'm sorry,  
17 line 12, Page 117. "Have you identified any  
18 treatises or other authority that explains the  
19 but-for method that you relied upon for your  
20 report?"

21 Answer, "Yes."

22 Question, "Which treatise or authority is it?"

23 "It's the comprehensive guide to economic  
24 damages published in Business Valuation Resources,  
25 authors are Nancy Fannon and Jonathan Dunitz. I

1 have the fifth edition. I don't know if I have  
2 another one, but it's in Chapter 11, projecting  
3 but-for profits."

4 So she's talking about the very things that  
5 we're talking about here today, and her opinion as  
6 to that. That's her -- that covers what she did.

7 MR. WEBER: The document (inaudible), Your  
8 Honor. This but-for method is not some separate  
9 carve out. It's not -- that's the whole --

10 THE COURT: Hold on, hold on, hold on, hold  
11 on. This is -- this is the document referenced in  
12 Page 117?

13 MR. ZAPPOLO: Yes.

14 THE COURT: All right. And the corresponding  
15 page --

16 MR. WEBER: 249, which you have.

17 MR. ZAPPOLO: She goes on at Page 118. Well,  
18 let me finish what I was reading.

19 MR. WEBER: And I -- I analyzed this in depth  
20 for Your Honor.

21 THE COURT: Hold on.

22 MR. ZAPPOLO: This chapter.

23 THE COURT: Let me hear this real quick, you  
24 know.

25 MR. WEBER: Yeah.

1 MR. ZAPPOLO: This chapter goes onto describe  
2 exactly what my analysis described, and what my  
3 report described. "We're in a business setting,  
4 lost profits represent an amount necessary to place  
5 the harmed party in a position it would have been  
6 but-for the alleged acts."

7 It then discusses lost revenue, less avoided  
8 costs, equals net lost profits, and that's what I  
9 tried to explain to you when I first started my  
10 conversation with you after lunch, Your Honor.

11 It goes on. It's an entire paragraph titled  
12 projecting but-for profits. It does also talk  
13 about the methods for determining lost revenue.  
14 You see? She's distinguishing there the lost  
15 profits versus the lost revenue, and she is saying,  
16 this is a methodology --

17 MR. WEBER: Let me -- let me --

18 MR. ZAPPOLO: And there are more -- and she  
19 goes on. And there are more than just the before  
20 and after method and the yard stick method.  
21 According to this treatise, there is the before and  
22 after, there is the yard stick method, sales  
23 projection method, lost market share method, and  
24 those are the methods that are included in this  
25 treatise.

1        Now, at another point I'm going to try to flip  
2        through and find it, but I ask her, do you have  
3        other treatises that support the but-for? And she  
4        said yes.

5        THE COURT: Give me one second. Give me one  
6        second.

7        MR. ZAPPOLO: Page 120. Line 7. Counsel, as  
8        he was just saying, he asked her about, "And so you  
9        see how in 5.0 on Exhibit 8 it doesn't list any  
10       but-for method, right?"

11       Answer, "That's correct. But if you read the  
12       chapter -- do you want me to read the entire  
13       chapter to you, because the entire thing is  
14       calculating but-for profits. That is a method for  
15       determining the lost revenue. The lost revenue is  
16       identified and defined on Page 243 of the book.  
17       It's the first page of Chapter 11.

18       But so this is the but-for profits  
19       calculation, and lost revenue is defined as  
20       revenues that would have been earned but-for the  
21       alleged acts, and then there are four methods to  
22       calculate lost revenue. That's only one portion of  
23       the calculation that you then have to  
24       conduct -- I'm sorry -- that you then have to  
25       deduct avoided costs in order to get to your net



1 lost profits.

2 So the method for determining lost revenue,  
3 that's only one component of the entire lost profit  
4 calculation, and that's what this is describing.  
5 It's listing out the four methods for determining  
6 that one component."

7 That's what she emphasized to me. Her  
8 methodology was dealing with the entire lost profit  
9 calculation, not just the -- I'm sorry, the lost  
10 revenue calculation, not just the one component of  
11 lost profit.

12 THE COURT: Give me a moment. I know you read  
13 it to me, but I like to read it over.

14 MR. WEBER: Can I just show Your Honor  
15 something?

16 THE COURT: One more minute.

17 MR. WEBER: May I -- real quick, Your Honor?

18 THE COURT: Well, are you done, or do you have  
19 more?

20 MR. ZAPPOLO: No, I thought you were -- I  
21 thought you were reading so I stopped.

22 THE COURT: Yeah. Do you have any more?

23 MR. ZAPPOLO: No, sir. I think -- as before,  
24 I don't know what Mr. Weber will say, but we're  
25 kind of going back and forth.

1 THE COURT: We are.

2 MR. WEBER: Let me just explain --

3 MR. ZAPPOLO: Which to me leads it to --

4 THE COURT: I'm really torn on this one, and I

5 want to get it right because I think this is going

6 to be really bad for one -- your case if I grant

7 it, and, I mean, it's prejudicial to both of you.

8 I think, you know, and again, I know you said in

9 Kumho to me, and in Kumho it's discretionary,

10 subject to abuse of discretion.

11 And so I'll give you my rational, and then,

12 and then, you know, whatever my rational is, it's

13 going to hurt one of you, and so I want to get it

14 right. And so I am giving you a little more time

15 than normal, but that's why I'm doing it.

16 MR. ZAPPOLO: I appreciate that, Your Honor.

17 I would just state, my expert says she can produce

18 more treatises if that helps, you know.

19 THE COURT: What do you want to say to me?

20 MR. WEBER: So it's not like when she

21 originally identified this but-for method it was as

22 lost profits. Look at Chapter 10 --

23 THE COURT: No, I see it first off as lost

24 revenue.

25 MR. WEBER: Calculating lost revenue. In her

1 testimony she literally said it's in the but-for  
2 method. When -- and remember, she chose this  
3 authority. When pressed further, then she, again,  
4 looking at all of these same methods of lost  
5 revenue, which he realizes there's no but-for  
6 exception from before and after, then she says, oh,  
7 it's in the sales projection method.

8 THE COURT: Do they need an expert to say that  
9 they had contracted for three cars, they couldn't  
10 sell three cars, and so they didn't get profits  
11 from selling three cars?

12 MR. WEBER: Well, I would say yes, because  
13 there's -- this is lost profits. I mean, she's  
14 making all sorts of assumptions as to the gross  
15 profit of the distributor. One of the things she  
16 does in her report is she's got a minimum per  
17 contract, and most probable contract.

18 So what she did, based on the assumes profits  
19 from selling an assumed amount, she determined that  
20 the profits would be this amount. So you need an  
21 expert to determine what the profits would be,  
22 right? Because there's no -- you don't know what  
23 the costs would be, you don't know what the sales  
24 would be, you don't know what the profits would be  
25 so you need an expert to tell you that.

1 THE COURT: Well --

2 MR. WEBER: And that's why you use the yard  
3 stick approach, to determine what it would be based  
4 on the sales of other competitors, but she didn't  
5 do that. She carved out her own method.

6 THE COURT: What are the assumptions she's  
7 using?

8 MR. WEBER: Well, that's -- so one I pressed  
9 her --

10 THE COURT: When I use the word assumption  
11 with you, I'm --

12 MR. WEBER: True assumption.

13 THE COURT: -- talking about conjecture.

14 MR. WEBER: Yeah. Conjecture. So let's look  
15 at that. Page 121.

16 THE COURT: All right.

17 MR. WEBER: So now I'm pressing her, and  
18 she's -- so now Page 121. Question, "Which of  
19 these four methods on Exhibit 8 did you utilize in  
20 your report, the before and after method, the yard  
21 stick method, the sales projection method, or the  
22 lost market share method?"

23 Answer -- this is after, like, four hours of  
24 testimony, "For the determination of the lost  
25 revenues, I used the sales projection method based

1 on a projected sales per Mr. Frank's deposition,  
2 per Mr. Wagner, and the market research that we've  
3 already discussed. So I projected those sales  
4 based upon the assumption from our report."

5 Question, "Did you apply the sales projection  
6 method as set forth on Page 249 of this Exhibit 8?"

7 Answer, "No response."

8 Question, "You can answer the question without  
9 looking at the authority."

10 Answer, "Well, no, I can't, because I don't  
11 have it memorized."

12 Question, "What is your understanding of the  
13 sales projection method? Don't look at the  
14 authority."

15 Mr. Zappolo, "Objection to form."

16 By Mr. Weber, question, "Tell me, what is your  
17 understanding of the sales projection method?"

18 Answer, "It is when you are projecting the  
19 sales but-for the action of the -- but-for the  
20 contract. You are figuring out what the potential  
21 sales would be, similar to what I did by year for  
22 SEI. I assumed they were going to sell between  
23 three and seven automobiles per year at \$700,000,  
24 increased by an annual increase factor."

25 That's the first assumption right there.

1 "You could also do it based upon sales  
2 projections provided by the client. I did not do  
3 that because there were no sales projections  
4 provided by the client. I created my own sales  
5 projections.

6 Now, again, that's only one component of the  
7 lost profits calculation, that's to figure out the  
8 lost revenue. We then had the avoided cost,"  
9 right, because profits are costs and revenue.

10 "We then have the avoided costs, which you  
11 already talked about, that I estimated to be a  
12 total of 20% of the gross sales."

13 Question, this is line 16, "Other than  
14 assuming how many sales per year, did you do  
15 anything else as part of a sales projection method  
16 you allegedly applied for your report?"

17 Answer -- Mr. Zappolo, "Object to form."

18 Answer, "Yes. I assumed a certain number of  
19 sales of the automobiles based upon the information  
20 I provided. I also multiplied that times the  
21 projected sales price per automobile, and deducted  
22 the cost of goods which she's assumed, and avoided  
23 costs to get the net profits."

24 Next page, question, "Anything else?"

25 Answer, "Not that's specific to the

1 projections, no."

2 "Where in your report do you mention the sales  
3 projection method as the method you employed?"

4 Answer, "Nowhere."

5 That's only part of it, Your Honor. There's a  
6 ton of assumptions here, and I didn't even mention,  
7 Your Honor, that this report, her -- her range here  
8 of profits -- I trust Your Honor is familiar with  
9 the present discount value where you apply a  
10 riskiness factor to how much money you could get  
11 over time, okay, because there's risk involved in  
12 getting money be over time. She gives two numbers.  
13 Most probable is this number, this 20 roughly  
14 million-dollar number, and then the minimum number,  
15 which is based on the three cars per year number.

16 THE COURT: Okay.

17 MR. WEBER: She applied the same risk  
18 factors --

19 THE COURT: Mr. Zappolo, I'll give you the  
20 last word. And again, I'm going back and forth. I  
21 can tell you the last several arguments have been  
22 more persuasive by Mr. Weber, and so I want to give  
23 you one last opportunity to dissuade me here.

24 MR. ZAPPOLO: That which Mr. Weber just --

25 MR. WEBER: The 30-year treasury bond. That's

1       how she thinks -- that's how she equated it.

2       That's the riskiness value she --

3           MR. ZAPPOLO: That's totally misstating, Your  
4       Honor, because here's what happened. She gave  
5       testimony and said that the risk factors are  
6       enumerated within my calculations because you don't  
7       double hit somebody with double risk. She said the  
8       risk factor was incorporated because when I use the  
9       market research, those -- and I read it to Your  
10      Honor earlier, you may recall, the projections  
11      based, you know, she -- two different sources on  
12      projected sales volumes for supercars that take  
13      into account the risk factors, market economy,  
14      things like that.

15       So, Mr. Weber, it's a total red herring  
16      argument, just like these other things. Again,  
17      what he glossed over, the middle of what he was  
18      reading on Page 122, her -- her words, "Now, again,  
19      that's only one component of the lost profits  
20      calculation."

21       Remember, her but-for is lost profits. What  
22      he's trying to hang his hat on is lost revenue  
23      calculation. These are the four things how you  
24      count the lost revenues, and she says, "But I'm not  
25      calculating," she's not calculating lost revenues.



1 She's calculating lost profits.

2 THE COURT: But she references these materials  
3 as the basis for her opinion.

4 MR. ZAPPOLO: She -- for one of the aspects of  
5 her calculation. That's the whole thing, Your  
6 Honor. For one of the aspects of her calculation  
7 she used these, and it's -- and like I said, it's  
8 totally encompassed within, and she said that one  
9 chapter that is referenced there is about lost  
10 revenue, which is one of the components of the lost  
11 profit but-for methodology.

12 THE COURT: Okay. All right. Your motion is  
13 granted. And -- I am convinced. You know, as far  
14 as the methodology used by this person, I think  
15 it's personal to her. It's not been accepted by  
16 the community. I didn't see any of that testimony.  
17 As far as the journals that were provided to me,  
18 again, they covered lost revenue and lost profits,  
19 and again, on Page 122 of the transcript I see at  
20 least three assumptions that were made, and so I  
21 think it would also fail the reliable factor, and  
22 reliable -- reliability prong, as well as the  
23 helpfulness prong to the finder of fact.  
24 All right. Let's move onto the next one,  
25 please.

1 MR. WEBER: Last motion is --

2 THE COURT: So I know you want to raise your  
3 hand and talk to me. I want to tell you your  
4 attorney did an incredible job on this. He worked  
5 really, really hard, but ultimately it, you know,  
6 it's a decision I have to make. I've made it for  
7 the reasons I just stated. It was tough, but I  
8 made it, but if you don't think he -- your attorney  
9 covered this at incredible length then you can ask  
10 that later when they're typing it up, but I'm going  
11 to move on, okay?

12 MR. WEBER: Last motion, Your Honor, I  
13 don't -- I don't have any witnesses to put on, but  
14 maybe Mr. Zappolo does, and I'll be very short and  
15 brief.

16 As Your Honor knows, there is currently  
17 a -- there's a claim for punitive damages with  
18 respect to one of the four defamatory statements at  
19 issue in this case.

20 Pursuant to Judge Hafele's order granting  
21 punitive damage discovery, we produced close to  
22 1000 pages of Mr. Mosler's very confidential tax  
23 returns, okay? The case law is clear that a person  
24 has a privacy interest in their tax returns and  
25 personal financial information.

1        So we produced close to 1000 pages of tax  
2        returns, and approximately a month ago we received  
3        a public filing of information which came from  
4        Mr. Mosler's tax returns, disclosing that  
5        information publicly.

6        We immediately reached out to Mr. Zappolo and  
7        said, you can't do this. This information is not  
8        to be public. It was designated as confidential.  
9        Your Honor knows that we fought about disclosing  
10       this information.

11       When Judge Hafele initially granted the  
12       punitive damages discovery, in the order allowing  
13       punitive damage discovery, Judge Hafele wrote that  
14       the improper dissemination of Mr. Mosler's  
15       financial information shall subject a party to  
16       appropriate sanctions, including but not limited to  
17       striking of Plaintiff's punitive damages claims  
18       should Mr. Wagner violate the protective order.

19       Now, this Court has endured a witness  
20       tampering hearing where Mr. Wagner was found that  
21       he tampered with a material witness in this case.  
22       During the hearing where Judge Hafele allowed  
23       punitive damages, there was a whole argument about  
24       whether to allow Mr. Wagner access to the  
25       information, given Judge Hafele's firsthand

1 accounts of Mr. Wagner.

2 During the witness tampering hearing Judge  
3 Hafele literally cautioned James Todd Wagner, and  
4 asked if he wanted Counsel, and wanted to speak to  
5 a criminal attorney. Despite all of that, they  
6 disclosed Mr. Mosler's personal information.

7 And then, approximately a week later, it was  
8 disclosed again, after we had filed something to  
9 seal the initial disclosure, Your Honor.

10 Now, we just had this witness who appeared  
11 before lunch who testified that he provided  
12 Mr. Wagner with some sort of document. Well,  
13 that's the second violation. The first violation  
14 was the disclosure of the information from the tax  
15 return that showed up in the request for  
16 production. The second disclosure was a notice of  
17 deposition as to two entities that appear on  
18 Mr. Mosler's tax return. And now I suspect that  
19 they're going to try and show that they didn't get  
20 it from the tax return, but they did, Your Honor.

21 And the burden is on them to show that not  
22 only did they violate the protective order once,  
23 which I don't think they can dispute, but they  
24 violated it twice even after knowing the first  
25 violation. So what we saw here, Your Honor, is

1       pursuant to Judge Hafele's order, a Motion to  
2       Strike their claim for punitive damages. There is  
3       a long line of history which we go through in our  
4       motion that would justify this.

5       And even if Your Honor doesn't strike the  
6       motion for punitive damages, there's got to be some  
7       sort of plan in place how they protect this  
8       information going forward, because Mr. Mosler, as  
9       Your Honor might gather from the news articles and  
10      other things, he's a public person, and he can't  
11      have his financial personal information being  
12      disclosed publicly in this case, and so there's got  
13      to be a plan in place to prevent further  
14      disclosure.

15      But also, as part of our motion --

16      THE COURT: Is that something that's already  
17      been adjudicated, that he's a public person?

18      MR. WEBER: Not, like, under the defamation  
19      law, Your Honor. I mean, he's -- I don't know if  
20      Mr. Zappolo would argue that, but Mr. Mosler has  
21      run for public office, and I think if you Google  
22      him, I think you would see more about him.

23      THE COURT: I mean, I don't know.

24      MR. ZAPPOLO: I think the other side tried to  
25      assert that Mr. Wagner was a public person at one

1 time and we had a hearing on that, Your Honor,  
2 but --

3 MR. WEBER: Different issue.

4 MR. ZAPPOLO: Different issues.

5 MR. WEBER: Yeah.

6 MR. ZAPPOLO: I don't think there's been  
7 any --

8 THE COURT: Okay.

9 MR. ZAPPOLO: -- issues with that.

10 MR. WEBER: But the other part of the motion  
11 is a protective order, because through this  
12 discovery they are seeking literally every aspect  
13 of Mr. Mosler's financial life.

14 For example, in the -- here is one example of  
15 one of the requests for production they just  
16 recently served, Your Honor.

17 THE COURT: Thank you.

18 MR. WEBER: You'll see in this document, which  
19 is their Request for Production dated February  
20 17th, 2013, it is a lengthy document that seeks  
21 information about tax returns, 2022, income, loan  
22 application and financial statements, deeds, notes,  
23 and leases, automobiles, boats, watercraft,  
24 airplanes, and other vehicles, collectibles and  
25 precious metals, financial accounts, stock

1 certificates, stock options, or issues and  
2 warrants, bonds, appraisals, retirement accounts,  
3 health savings, health reimbursement and other  
4 similar accounts, life insurance, other insurance,  
5 annuities, receivables, credit cards and other  
6 liabilities, dues, memberships and associations,  
7 other assets and liabilities, trusts, crypto  
8 currency, electronic accounting, patents,  
9 trademarks, copyrights, or other similar intangible  
10 assets, domain names, websites, business  
11 information, all with lengthy paragraphs, Your  
12 Honor, which I have not read into the record.

13 The law doesn't allow a party to do a  
14 financial lobotomy, and I cited the case law in our  
15 motion, Your Honor.

16 There has to be some sort of limit on this  
17 punitive damage discovery, and so Mr. Mosler --

18 THE COURT: As far as your Motion for  
19 Protective Order, I guess let me address that  
20 second. I want to address the first issue first.

21 As far as your Motion for Protective Order, one, I  
22 guess, I don't know that, you know, a shotgun  
23 approach is something that I'm crazy about. I'd  
24 like to go number by number.

25 But let's start with the first part, the

1 disclosure, please.

2 MR. WEBER: Yes, so, I think it is undisputed  
3 that there was a disclosure in violation of the  
4 protective order the first time, and so I think we  
5 should just stop there and just make sure that's  
6 undisputed, but I think that is undisputed at this  
7 point based on Plaintiff's response. If I can get  
8 a simple yes or no before we get in --

9 MR. ZAPPOLO: I'd like to address it.

10 MR. WEBER: -- address --

11 MR. ZAPPOLO: I -- the --

12 MR. WEBER: If he's going to address I'll keep  
13 going.

14 THE COURT: All right, then we'll -- then keep  
15 going, and I'll let you if, you know --

16 MR. ZAPPOLO: I don't want to make a mountain  
17 out of a mole hill, but I think under the  
18 circumstances since, and I would say for the  
19 record, it was my doing and my doing alone, it  
20 deserves me to look you in the eye and explain what  
21 happened. That's what my position is with respect  
22 to the --

23 THE COURT: Okay. So then we agree that there  
24 was a disclosure.

25 MR. WEBER: Yeah.



1 MR. ZAPPOLO: Yes.

2 THE COURT: Okay. All right. Well, tell me  
3 about it.

4 MR. ZAPPOLO: So, Your Honor, here's the long  
5 and short of it, and I just -- if you want to swear  
6 me in I'm happy to be sworn in.

7 THE COURT: Go ahead.

8 MR. ZAPPOLO: I'll speak the truth, it is what  
9 it is, it was a mistake. Here's the situation.

10 The 17th was the, arguably, the last day for  
11 discovery. On February 14th, my -- without going  
12 into too much detail, my soon to be mother-in-law  
13 of 81 years old suffered a fall, fractured her  
14 spine, was admitted to Gardens Hospital.  
15 The -- without defending anyone, they administered  
16 some wrong drugs to her, which they gave her  
17 schizophrenic drugs, which caused her to have some  
18 severe paranoia and other things.

19 I was spending time in the hospital with her.  
20 I have actually at home, I have my sticker from  
21 sleeping at the hospital on the 16th. That was a  
22 Thursday night.

23 On the 17th, if you look at the documents in  
24 question, they're filed in the evening hours,  
25 because as my recollection I did it from home

1 remotely accessing my office computers. We were  
2 also in the process of moving our offices, and I've  
3 got the e-mails and everything to back all of this  
4 up.

5 But I had asked Ms. O'Shell for what  
6 information she needed to finalize her assessment,  
7 because she is disclosed as an expert witness to  
8 also opine as to the net worth of Mr. Mosler should  
9 that eventuality come to pass.

10 So she sent me an e-mail, and I have a copy of  
11 her e-mail.

12 THE COURT: So the disclosure is to this  
13 person?

14 MR. ZAPPOLO: This -- no. No, sir. This is  
15 our expert, Ms. O'Shell, who you just said cannot  
16 testify about the one aspect, but she's also  
17 retained to give an opinion as to punitive damages,  
18 should it be appropriate.

19 And so she sent me this document, this e-mail,  
20 on February 12th, and if you look there, there  
21 are -- per our discussion, see attached.

22 If you look two pages back, schedule A,  
23 request for documents. That schedule A is exactly  
24 what Mr. Weber just read to Your Honor.

25 THE COURT: Um-hmm.

1 MR. ZAPPOLO: So my expert on punitive damages  
2 asked me to request these of the other side. I  
3 understand the case law, et cetera, but I thought  
4 that was an appropriate thing to do. My expert  
5 says she needs it, because if you don't do what  
6 your expert says, then your expert is asked on the  
7 stand, well, how come you didn't get this, or you  
8 didn't get that, you didn't ask for this, you  
9 didn't know about this or that?

10 So you're -- it's kind of a catch 22  
11 situation, so I did that, and I cut and pasted that  
12 document into the request for production number  
13 one, and that -- I have a copy, Your Honor, the  
14 actual one that was filed, and you'll see it was  
15 filed at 7:54 p.m.

16 THE COURT: This one?

17 MR. ZAPPOLO: I believe that is correct, yes,  
18 Your Honor. That's the one that Mr. Weber just  
19 gave you.

20 MR. WEBER: No, a different one. For the  
21 record --

22 MR. ZAPPOLO: It was a different one?

23 MR. WEBER: Yeah, you're confusing --

24 MR. ZAPPOLO: Say first?

25 MR. WEBER: Yeah, but they also say request.

1 MR. ZAPPOLO: No, first.

2 MR. WEBER: For the record, what I gave the  
3 Judge is different than what -- you're giving him  
4 the third -- first --

5 MR. ZAPPOLO: No --

6 MR. WEBER: The one that has the disclosure is  
7 the third, Scott.

8 MR. ZAPPOLO: No, I --

9 MR. WEBER: You --

10 MR. ZAPPOLO: You just -- you just handed them  
11 right to the Court, the first request for  
12 production saying it was a lobotomy.

13 THE COURT: What I have is filing number  
14 167082187.

15 MR. WEBER: If I may? The disclosure of the  
16 information is not that one, it's this one.

17 MR. ZAPPOLO: I am -- right. Right.

18 MR. WEBER: This is the one that was publicly  
19 disclosed.

20 MR. ZAPPOLO: Right.

21 THE COURT: Okay --

22 MR. ZAPPOLO: But I'm explaining to the Judge  
23 what happened.

24 THE COURT: Okay.

25 MR. ZAPPOLO: Okay? So this is -- this is the

1 first one, and I'll just give you -- that -- that  
2 says Plaintiff's request for production, and then  
3 underneath it, it says first, dated February 17th,  
4 2023.

5 THE COURT: Okay.

6 MR. ZAPPOLO: Okay. I understand from the  
7 Court that that's -- and Mr. Weber's argument that  
8 that's a lot of information to ask for, but I just  
9 explained why I would forward on, my expert  
10 requested.

11 If you look at the e-mail dated February 12th,  
12 in the body of the e-mail that I gave to the Court  
13 there are things that have references. Page 685,  
14 687, 689, et cetera, and those were incorporated  
15 within what was filed and was the actual  
16 disclosure, and is the arguable document at issue,  
17 at the same time.

18 THE COURT: Okay. Thank you.

19 MR. ZAPPOLO: And if you look at the title,  
20 Your Honor, it says third underneath.

21 THE COURT: Okay.

22 MR. ZAPPOLO: Okay. And I did the same -- it  
23 was the same technique. Cut and paste right out of  
24 the e-mail that she sent, and paste it right into  
25 the document.

1        Now, as I pasted that into the document, you  
2        can see that there are, although substantially the  
3        same from the e-mail to the document that was  
4        filed, there are some changes to it.

5        I was in the process of making changes to  
6        this, and I had this -- this up on my computer  
7        screen, and I was -- I had it up with her, you  
8        know, with the information that is arguably -- and  
9        quite probably, and the Court will probably find,  
10       violative of the Court order. It doesn't say the  
11       specific, you know, it's not a disclosure of the  
12       document, it's a disclosure of some of the  
13       information from the 800 pages that Mr. Weber  
14       referred to, but it's what my expert is saying she  
15       needed in the e-mail to me. She needed that back  
16       up information.

17       So the -- I want to remind Your Honor, about a  
18       week before this I was before Your Honor arguing  
19       that Mr. Mosler needed to respond to an  
20       interrogatory about disclosing his net worth, and  
21       the interrogatory was very specific. It talked  
22       about the years and things like that, and Mr. Weber  
23       objected to that saying that my interrogatory  
24       didn't explain what years, et cetera.

25       So if I give too little information, I get an

1 objection that I haven't given enough information,  
2 even though I might have actually given the  
3 information. Your Honor saw what that was and  
4 ordered him to produce -- to answer that  
5 interrogatory, but I've still got that situation  
6 with virtually everything that we file. There's  
7 nothing that, you know, there's very little that  
8 doesn't get objected to by Mr. Mosler's side.

9 In any case, I have this up on my computer,  
10 I'm dog tired, I'm doing multiple things, I know  
11 it's the last day for discovery, it's already  
12 almost 8:00 p.m. at night. I have this up on my  
13 computer, and I was working to modify this. I had  
14 modified this to the best of my ability not to  
15 include that information, but in the multiple  
16 things, the remote working from home on the small  
17 screens and all that kind of stuff, I was also  
18 working on my second request for production,  
19 because, and here's the second request, all of  
20 these were filed together, Your Honor.

21 The second request for production is up on my  
22 computer. Got multiple documents. As Your Honor  
23 knows, you may recall from when you were in  
24 practice, you do everything in kind of Word or  
25 WordPerfect, and then you convert it to PDF.

1       The document that has the language I labeled  
2       as from Ms. O'Shell, it was, like, the stuff that  
3       Ms. O'Shell requested pursuant to the e-mail, and  
4       so I ended up having two things named the same  
5       thing, and when I converted it and saved it again,  
6       I converted the wrong file to the PDF, and that's  
7       how it got uploaded.

8       I also at the same time did a fourth request  
9       for production, which was a request for copies of  
10      Counsel's exhibits that he was -- intended to use  
11      at trial, which has still not been responded to,  
12      much like the others.

13      So I didn't know. I filed this stuff, nobody  
14      said anything to me. I didn't know, ignorance is  
15      bliss, I'm going along, and on -- so those were  
16      filed on the 17th. On Thursday, February 23rd, at  
17      9:34 p.m., I receive an e-mail from Mr. Weber  
18      notifying me of this fact.

19      It's at the bottom of that page, Your Honor,  
20      if you read from the bottom up. Mr. Weber, you can  
21      see, wrote -- whoever wrote, "Scott, we reviewed  
22      your Plaintiff's Request for Production, Third,"  
23      which is the one at issue here right now, "dated  
24      February 17th. You filed a request for production  
25      that discloses confidential information for



1 Mosler's tax return in violation of the Court's  
2 protective order. We will be filing a Motion for  
3 Sanctions. I will call you tomorrow."

4 Tomorrow would have been Friday. As you can  
5 see in my response, Your Honor. "Steve, I  
6 responded on Sunday, February 26th," because that  
7 Friday my internet was done and all of that good  
8 kind of stuff because I was physically moving my  
9 office, in a state of exhaustion, et cetera, but  
10 nevertheless. "I was moving my office on Friday  
11 and Saturday, no phones or e-mail, mostly  
12 everything is back up now." There was another  
13 glitch after that, but I see that you filed a  
14 Notice of Confidential Filing," and that's because  
15 when Mr. Weber saw what was filed he filed a notice  
16 of confidential filing designating what was in the  
17 Court file as confidential.

18 The Clerk initially, I understand, issued  
19 a -- immediately rendered it -- took it off and you  
20 couldn't click on it on the website, but then after  
21 the Clerk's review, they said this isn't  
22 confidential under the Administrative Orders, and  
23 instructed Mr. Weber to have someone file a motion,  
24 give him ten days to file a motion.

25 So I said, "I'll give you a call Monday to

1 discuss your concerns. We also need to meet and  
2 confer regarding the pretrial stipulation," another  
3 thing that was going on at the time.

4 I talked about depositions, et cetera, was  
5 there a good time to call.

6 Now, I don't recall specifically, Your Honor,  
7 as I stand here today, whether we had that  
8 conversation or not, but in any event, the next  
9 thing I was able to find was on Wednesday, March  
10 1st, I sent Mr. Weber, as is in my response to this  
11 e-mail -- I think we did have a conversation,  
12 because the Clerk had told him -- somehow I know  
13 this, I don't know how I know it, but the Clerk  
14 said that the person who filed it needs to file a  
15 motion to maintain something as confidential.

16 So they were keeping it confidential. There  
17 was a little glitch and hick up for a couple of  
18 days or something. They said the people that need  
19 to file -- that file the document needs to  
20 designate it as confidential. That would have been  
21 me.

22 So I wrote him on Wednesday, March 1st, at  
23 8:57 a.m. -- oh, here it is. There it is. 2-28, I  
24 don't know what day of the week that was, "Scott,  
25 please see attached from the Clerk in your response

1 to notice of confidential filing, let's discuss it  
2 tomorrow. I believe a joint motion to keep the  
3 information confidential is appropriate."

4 I said, "I will draft a joint motion." My  
5 fault. "I will draft a joint motion."

6 At this point, the -- it's not available for  
7 public view on the docket.

8 I got the -- by Thursday, March 2nd, I had  
9 drafted and sent to Mr. Weber the e-mail here  
10 that's attached, and I told Mr. Weber, "I was a  
11 little bit concerned that the Judge or the Clerk  
12 would want designations as to which parts of the  
13 filing are confidential," because that's what a lot  
14 of times the Clerk says, you just do only the  
15 numbers or only something else, "But I'm willing to  
16 seek the whole document be deemed confidential, as  
17 you request." That was what Mr. Weber wanted.

18 "To that end, I've attached a motion for  
19 review as requested. Due to my move I cannot  
20 quickly locate a copy of the confidentiality order,  
21 which I usually attach to such motions and things,  
22 I'd think you want that attached to the attached  
23 motion that I'm trying to finalized. While I  
24 continue to look for it, if you can tell me the  
25 date or e-mail me a copy it would expedite the

1 process. Please note, in light of the Clerk's  
2 directed that the motion of confidential filing  
3 come from the filer of the notice of confidential  
4 filing, Defendants, I have also made sure to lead  
5 the title with Defendant's and Plaintiff's joint  
6 motion."

7 And so the Clerk gave us ten days to get that  
8 motion filed in order to get an order from you. I  
9 totally agree that an order is appropriate. I  
10 don't know why we didn't submit an agreed order on  
11 this. Instead, I got the motion -- the motion for  
12 this.

13 Now, what did happen during that time period  
14 is I did serve the request, and we're going to get  
15 into that, but that's the second aspect of it. The  
16 first aspect of this motion is me standing before  
17 the Court saying I screwed up and it got filed.  
18 That is totally on me. I'm going to have  
19 Mr. Wagner --

20 THE COURT: I have a question.

21 MR. ZAPPOLO: Yes?

22 THE COURT: I'm looking at the third --  
23 Plaintiff's Request for Production, Third.

24 MR. ZAPPOLO: Yes.

25 THE COURT: And I'm looking at the e-mail that

1     you sent on February 12th, right? It's just the  
2     first part of the e-mail to your expert.

3         MR. ZAPPOLO: To my expert --

4         THE COURT: It's this one right here.

5         MR. ZAPPOLO: Okay. Yes, sir.

6         THE COURT: All right. And the letter -- or  
7     the e-mail from you to Ms. O'Shell, for example,  
8     has bullet points and page numbers.

9         MR. ZAPPOLO: No, that's from Ms. O'Shell to  
10    me, Your Honor. I apologize if it's -- if it's  
11    unclear.

12        THE COURT: Okay.

13        MR. ZAPPOLO: This top header.

14        THE COURT: Yeah, I'm sorry, that's -- I  
15    misspoke.

16        MR. ZAPPOLO: That's Ms. O'Shell writing to me  
17    what she wants me to obtain for her.

18        THE COURT: And then I'm looking at your  
19    third, and it's the same bullet points but with  
20    additional writing after the page numbers.

21        MR. ZAPPOLO: Yes. I was in the middle of  
22    that process.

23        THE COURT: All right.

24        MR. ZAPPOLO: And -- and --

25        THE COURT: And so which of these is the

1 disclosure?

2 MR. ZAPPOLO: The -- the filing. The third  
3 filing.

4 THE COURT: The actual -- okay.

5 MR. ZAPPOLO: The actual filing in the Court  
6 file. I filed a request for production in the  
7 Court record that has the information that is in  
8 that third -- now, that information did,  
9 concededly, come from Mr. Mosler's --

10 THE COURT: But this is the disclosure? All  
11 of this?

12 MR. ZAPPOLO: Yes, sir.

13 THE COURT: Okay.

14 MR. ZAPPOLO: The question becomes what  
15 portions of did need to be redacted, or do we just  
16 keep the whole thing confidential?

17 And I would say this. I can stand here and  
18 argue, well, Judge, he's talking about mortgages in  
19 there. Mortgages are typically filed in public  
20 record. You know, I could go through all of that,  
21 but it's not my style.

22 It was not an intended thing for me to do. I  
23 did not intend -- I have no interest in -- contrary  
24 to the filings that call me everything but the  
25 devil, and tried to motivate Mr. Mosler to settle

1 or something, I don't see this case -- I don't see  
2 anything is going to get this case settled. I  
3 don't think there's any benefit to me to disclosing  
4 anything of Mr. Mosler's. I wouldn't have done it  
5 intentionally. My apologies to the Court and  
6 Mr. Mosler, but that's on -- that's me, okay?

7 I'm going to put Mr. Wagner on the stand,  
8 because Mr. Wagner had absolutely nothing to do  
9 with this. I'm going to explain -- I'm going to  
10 have him testify about the safeguards that we had  
11 in place given Judge Hafele's prior order that  
12 Mr. Wagner doesn't have access to it. The only  
13 time he's had access to Mr. Mosler's tax returns  
14 are in my office, under my supervision, on my  
15 computer system. He doesn't even get a copy of it.  
16 He doesn't have any hard copies; he doesn't have  
17 any electronic copies or anything. It's password  
18 protected. I wouldn't even let him drive the thumb  
19 drive with the information to our expert's office,  
20 but we'll -- I'll swear to that right now, or we  
21 can put Mr. Wagner on the stand about that.

22 So the first aspect of this motion is valid.  
23 There was a disclosure. It was inadvertent, and  
24 that is my -- just -- that's the explanation. I  
25 just screwed up. I was extremely tired under the

1 circumstances, and didn't get the right thing saved  
2 and uploaded as a PDF to the Court file.

3 THE COURT: All right. Confidential order on  
4 this particular filing has not been filed yet?

5 MR. ZAPPOLO: It's not been entered. They  
6 won't -- you need to issue an order on it, and I  
7 have no objection to it, and -- but then we get to  
8 the bigger issue, which is, you know, does my screw  
9 up warrant, you know, striking pleadings or  
10 anything that they're seeking, and the answer to  
11 that is no, and we go into that second aspect of  
12 the hearing.

13 Just because something happened -- I don't  
14 even know, as a matter of fact, I wrote Mr. Weber,  
15 so, I think that that was -- I have to look for the  
16 second phase stuff here --

17 MR. WEBER: I just want to make sure we're all  
18 on the same page about what actually happened, Your  
19 Honor, if I may just jump in here?

20 MR. ZAPPOLO: Sure.

21 THE COURT: Okay.

22 MR. WEBER: Okay. This is getting into the  
23 weeds a little bit, but I'm the one who actually  
24 filed the motion. Their motion didn't comply with  
25 the rule, which is why I did it, to make sure



1     their -- you have the right documents, docket entry  
2     753, which is the request for production which  
3     discloses the information, and you should -- and  
4     there's a motion to determine confidentiality of  
5     Court records which I filed, which Mr. Zappolo  
6     approved, to get that docket entry marked  
7     confidential.

8           THE COURT: You're talking about this entry?

9           MR. WEBER: That --

10          MR. ZAPPOLO: That is true. Yes, sir.

11          MR. WEBER: The 753, which is --

12          MR. ZAPPOLO: 753 is the Third Request for  
13     Production. It says February 17th Request for  
14     Production, Third.

15          MR. WEBER: There is a Motion to Determine  
16     Confidentiality, and an order, and we agree that  
17     one should be --

18          THE COURT: When was that order uploaded?

19          MR. WEBER: I don't -- I'd have to look --

20          MR. ZAPPOLO: The motion?

21          THE COURT: No, the agreed order.

22          MR. WEBER: I would have to look back. I  
23     don't know if I can do it. I think our motion had  
24     an order attached to it, right?

25          MR. ZAPPOLO: I thought yours had an order

1 attached to it.

2 MR. WEBER: Yeah. I can look back on it.

3 THE COURT: Give me a moment.

4 MR. ZAPPOLO: Whether it was uploaded or not,  
5 Your Honor, it's appropriate to enter an order for  
6 that confidentiality so that the Clerk's office  
7 will --

8 MR. WEBER: But it is marked confidential now,  
9 Your Honor. It is not accessible publicly. That  
10 was the -- the point of doing the notice of  
11 confidential information, and then doing the  
12 motion. That's the -- the Clerk sees the notice of  
13 confidential it's automatically marked  
14 confidential, that's why I did the notice  
15 initially.

16 MR. ZAPPOLO: And I will say to the Court, I  
17 don't know how long -- and for Mr. Weber's benefit,  
18 I don't know how long the Clerk holds that as  
19 confidential. I think she told us we had ten days  
20 to get a motion filed, but --

21 MR. WEBER: No, it's indefinite now.

22 MR. ZAPPOLO: Indefinite, okay.

23 MR. WEBER: I'm not worried about it now.

24 It's -- we're fine now.

25 MR. ZAPPOLO: All right. Mr. Weber made some

1 changes to the motion, and I thought he uploaded  
2 it.

3 MR. WEBER: I got to look, Your Honor. I  
4 apologize. It would have been the same day as the  
5 motion. Sorry, Your Honor.

6 THE COURT: That would have been March 20th?

7 MR. WEBER: Yeah. It would have been around  
8 then -- well, no, it was earlier than that, Your  
9 Honor, actually.

10 THE COURT: March 10th? No.

11 MR. WEBER: I apologize, Your Honor.

12 THE COURT: Defendant's Motion for Contempt  
13 and Sanctions, blah blah blah, protective order,  
14 filed March 10th?

15 MR. WEBER: No, there's a separate order, Your  
16 Honor. That's -- that's the contempt order.  
17 There's a Motion to Determine Confidentiality of  
18 Court Records, it was an entirely separate motion.

19 THE COURT: Did you file that a couple of days  
20 ago, or?

21 MR. WEBER: No, this was pretty close to the  
22 actual disclosure. Around the 25th, I would say,  
23 of February.

24 THE COURT: March 3rd?

25 MR. ZAPPOLO: Could have been.

1 MR. WEBER: Yeah, that sounds more --

2 THE COURT: I don't see an order. I can tell  
3 you that the orders that I have for you guys that  
4 I'm sitting on, bad me, is Plaintiff's Motion for  
5 Sanctions for Withholding Evidence, and the order  
6 approving stipulation for deposition of Linda Durre  
7 and Cinnamin O'Turk. There's no other pending  
8 motions in this case -- no other uploaded orders in  
9 this case, so.

10 MR. WEBER: I don't know why, Your Honor,  
11 we'll get it uploaded today. But it's confidential  
12 at this point, no one can access it.

13 THE COURT: Okay.

14 MR. ZAPPOLO: So that's in -- mea culpa, I  
15 fall on my sword, and that's all I have to say  
16 about that, Your Honor, other than I don't believe  
17 there's much by way of damage. It's not like I  
18 was, you know, talking about how much money he made  
19 or any of that. I mean, I understand that it is  
20 confidential, I recognize that, and it was just a  
21 mistake.

22 With regard to the second part of the motion  
23 that Counsel relies upon and suggests that we've  
24 got some type of nefarious we're trying to get  
25 Mr. Mosler, and put pressure on him, or something

1     like that, I would definitely like to -- that  
2     portion we do have a -- we have a dispute over it,  
3     and I don't know whether Mr. Weber wants to address  
4     that portion, or how Your Honor wants to handle  
5     that aspect of it.

6           MR. WEBER: Well, if I may, Your Honor? We go  
7     into it in our motion all of the factors, the long  
8     history of this case, Judge Hafele's rulings in  
9     this case. Now, Mr. Zappolo has represented during  
10    this hearing that he's keeping the punitive damage  
11    information, I guess, segregated from Mr. Wagner,  
12    which is good, which is what we initially wanted  
13    back in August of 2020th, so I'm glad to hear that,  
14    because we specifically argued that to Judge  
15    Hafele, and Judge Hafele specifically ruled that he  
16    was not going to foreclose Mr. Wagner from viewing  
17    this information, because Mr. Zappolo is correct,  
18    he has been intimately involved in day-to-day  
19    operation of this case. That's from the transcript  
20    on August 6th, 2020.

21           So I do want Mr. Wagner to not have access to  
22    that information. And so if --

23           MR. ZAPPOLO: That's the problem, Your Honor.

24           MR. WEBER: -- he had access to it --

25           MR. ZAPPOLO: He should be able to access it,

1 Your Honor.

2 MR. WEBER: -- you know, I don't want that,  
3 because I don't want any disclosures. There's a  
4 huge conflict between Mr. Wagner and Mr. Mosler in  
5 this case, Your Honor can see it, and we were  
6 worried about exactly this situation, and that's  
7 why Judge Hafele entered his order with the  
8 language he did about striking pleadings.

9 THE COURT: Can I see the order again?

10 MR. WEBER: This is the -- you can read Judge  
11 Hafele's remarks on the record, Your Honor.

12 THE COURT: Okay.

13 MR. ZAPPOLO: So --

14 THE COURT: I mean, what I've heard so far is  
15 not inconsistent with this order.

16 MR. WEBER: Well, there was a disclosure,  
17 violation of the protective order, Your Honor. I  
18 mean, to the extent that it was done, or intent,  
19 we -- I don't know if Your Honor wants me to take  
20 examination of Mr. Zappolo and Mr. Wagner. I don't  
21 know if that's necessary. I would say that we  
22 don't want any disclosure in violation of the  
23 protective order. That has to be, like, absolute,  
24 and that's what Judge Hafele made his order,  
25 because there cannot be any disclosures.

1 THE COURT: Well, even if I order that, it  
2 seems like this was inadvertent, and so, you know,  
3 if I order that it's just going to be the same. I  
4 don't think this is going to happen again.

5 MR. WEBER: And so -- yeah, and so we don't  
6 want that. I mean, if Your Honor's not going to  
7 strike the punitive damages claim, this is the  
8 first violation, but there should be a warning. If  
9 it happens again --

10 THE COURT: Well, I mean, I think he knows.

11 MR. ZAPPOLO: I'm nauseous about it.

12 THE COURT: I think he knows.

13 MR. ZAPPOLO: I will say for the record, I'm  
14 nauseous enough about the whole thing, Your Honor.

15 THE COURT: Yeah. Look, I'm not going to do  
16 it today. And gentlemen, you've seen how I run the  
17 docket. You know, one time I can buy it as an  
18 accident. If it happened again I'd like into it  
19 deeper.

20 And then, you know, if I have to make  
21 decisions they can be heavy, and so this time it  
22 seems inadvertent, it seems like there's no harm no  
23 foul, it seems like the spirit of what Judge Hafele  
24 ordered is correct. This information is in his  
25 possession and control. It's not outside of his

1 possession and control.

2 MR. ZAPPOLO: With -- for clarity, Your Honor,  
3 my expert does have it password protected.

4 THE COURT: So no, it wasn't a good thing. It  
5 was an inadvertent thing. I'm not going to strike  
6 the punitives at this time.

7 MR. WEBER: So one question, though, that  
8 was -- he's admitted to the first disclosure, but  
9 there's the second disclosure issue, which I think  
10 is why he brought this expert in -- not expert, his  
11 investigator who handed me this 91 page document.

12 THE COURT: Um-hmm.

13 MR. WEBER: Because what happened was, after  
14 this issue arose, then Mr. Zappolo filed a notice  
15 of deposition listing these two entities, and our  
16 contention is, well, you're only listing those  
17 entities because you have access to Mr. Mosler's  
18 tax returns. Like, you got that information from  
19 his tax returns, and then here you are filing these  
20 Notice of Depositions publicly disclosing their  
21 relationship to Mr. Mosler. You can't do that.  
22 You can't file this stuff --

23 THE COURT: Well, then how does he get the  
24 discovery?

25 MR. WEBER: Well, you can file things under



1 seal. You can file things notice of confidential  
2 filing, and attach the document that you want filed  
3 under seal. I mean, there's ways -- the protective  
4 order envisions that anytime you file something  
5 that has information that is confidential, you're  
6 supposed to file it under seal.

7 There's a whole procedure in the protective  
8 order, Your Honor. But in addition, even if you  
9 didn't file a protective order, there's something  
10 called a notice of confidential filing where you  
11 designate under the rule where it's confidential,  
12 and you attach the document, but, you know, he's  
13 not doing any of that. He doesn't need to disclose  
14 any of this information when you're seeking  
15 discovery. That's the whole point of having this  
16 protective order. Here's a copy.

17 I don't understand why he's disclosing this  
18 information, and I think that he's saying, oh,  
19 well, Mr. Wagner told -- you know, Mr. Wagner  
20 somehow allegedly knows this information that was  
21 disclosed a second time, but I don't buy it.

22 MR. ZAPPOLO: He works for AVM, Your Honor.  
23 Let's put the testimony in --

24 THE COURT: So, but here's my question, okay?  
25 Let's say this was something that was in the public

1 record absolutely without question, okay?

2 MR. ZAPPOLO: That's our position.

3 THE COURT: Let's assume that.

4 MR. ZAPPOLO: Internet print outs.

5 THE COURT: Let's assume that this was in the  
6 public record, all right.

7 MR. ZAPPOLO: Yes.

8 THE COURT: These parties still want to have  
9 this confidentiality, right, and this order was  
10 entered, I guess, you know, in three years ago?

11 MR. WEBER: Right.

12 THE COURT: So, you know, even if it existed  
13 in the public record, and even if it was available  
14 for everyone to see, in order to comply with the  
15 order, shouldn't we make these confidential  
16 filings?

17 MR. ZAPPOLO: No, sir. Here's why. They took  
18 Mr. Mosler's deposition that I've got transcripts  
19 of, and I'm going to -- I'll read to the Court, be  
20 that -- where he talks about being the AVM, and  
21 Triple I, and how he owns 10% of those, and he gets  
22 10% of their profits and everything, and they file  
23 those things in support of motions for summary  
24 judgment and other things, and that stuff has been  
25 in the public record for years.

1       This is the Triple I Capital Management  
2       website that references its founder, Warren Mosler.

3       THE COURT: Are we looking to protect this  
4       information to keep it from the public, or to keep  
5       it from Mr. Wagner?

6       MR. WEBER: Well, the public. For publicly  
7       disclosing Mr. Mosler's ownership in certain  
8       entities, which could only be available through his  
9       tax returns.

10      MR. ZAPPOLO: Somebody better go back --

11      MR. WEBER: There's -- his -- his tax return  
12      discloses his ownership in certain entities, and  
13      that's not public information, and while, you know,  
14      Mr. Mosler may have some historical connection to  
15      AVM, his interest now is not public information.  
16      And so I guess Mr. Zappolo is going to try and find  
17      some, you know, who knows what to demonstrate that  
18      Mr. Mosler's interest is public somehow.

19      THE COURT: Okay. So going forward, let's  
20      make sure that we do these confidential, okay?

21      MR. ZAPPOLO: Your Honor --

22      THE COURT: Because the order is three years  
23      old, and whether it's in the public sector or not,  
24      let's make sure that it's done this way so at least  
25      in this case we're in compliance with the order,

1     okay?

2           MR. ZAPPOLO: Your Honor, may I approach?

3     Here's the e-mail that I wrote to Mr. Weber when  
4     Mr. Weber accused me of you did it again, in  
5     essence, and at the bottom of the first page he  
6     wrote, "Scott, you again publicly filed a document,  
7     the below document," that's the notice of taking  
8     depositions of AVM and III, "that contains  
9     information derived from Mosler's tax information."

10    That's simply not true. "Take immediate steps to  
11    make the confidential documents below  
12    confidential."

13           My response, "Truth. I barely even looked at  
14    Mr. Mosler's tax filings." That's not what I do,  
15    Your Honor. I barely look at them. And I  
16    certainly didn't get the information in the  
17    subpoenas, or notice of taking depositions from  
18    them. The corporate names came from Mr. Mosler's  
19    conversations with James Wagner. Mr. Wagner is  
20    prepared to testify to that. He worked for one of  
21    the companies, and others, over the years, and more  
22    particular, public filings by those entities,"  
23    which are now in evidence, Your Honor.

24           "Further, no figures are disclosed, and the  
25    response to any of the areas of inquiry might be a

1 billion dollars, which might upset Mr. Mosler, or  
2 it might be none." But that's not --

3 THE COURT: I mean, can't you pick up the  
4 phone and talk to each other before we send out  
5 notices?

6 MR. WEBER: Yeah.

7 MR. ZAPPOLO: Notices of -- yes, I asked him  
8 if he -- and I asked him if he would produce him,  
9 he said I don't represent him, do what you got to  
10 do. So I did.

11 MR. WEBER: Well, I agree with Your Honor, we  
12 should just mark this confidential going forward.  
13 I mean, that solves this.

14 THE COURT: I'm going to put this behind me.  
15 I'm going to tell you guys just to mark these  
16 things confidential and talk to each other on the  
17 phone. If something is out there in the public  
18 record, just in order to be in compliance with the  
19 2020 ruling from Judge Hafele, let's make sure that  
20 we do this in a confidential nature, okay? So  
21 that's the extent of the relief you're going to get  
22 today, and that's the guidance you're going to get  
23 going forward, okay?

24 MR. ZAPPOLO: Your Honor, there's one -- one  
25 other thing that's kind of housekeeping with

1       respect to these things.

2           I understand Counsel's position on the  
3       financial lobotomy argument. In response to Your  
4       Honor's order that Mr. Mosler answer the  
5       interrogatory, "What's your net worth?"

6           In Mr. Weber's filing, he said Mr. Mosler has  
7       already told his net worth in the answer to  
8       interrogatories.

9           I beg to differ on that, number one. He  
10       said, "I estimate it's between this and this."  
11       Okay? And that's soft. He can give -- take the  
12       stand and say, oh, I was wrong, it's different, or  
13       whatever.

14          If they expect us to stop all discovery  
15       related to that, they can't leave that, and I  
16       don't -- and in fairness, I don't have to take his  
17       word for it, especially when I have documentation  
18       that suggests his net worth is more than twice what  
19       he disclosed.

20          So as part of his interrogatory response,  
21       Mr. Mosler advised that he had given financial  
22       affidavits to two separate entities over -- during  
23       a certain time period. I followed up and asked him  
24       to produce those things.

25          That those -- that discovery has never been

1       responded to. I presume Mr. Weber's position is  
2       that it's covered by his Motion for Protective  
3       Order today; that has all of this delay and  
4       everything has kept my expert from preparing her  
5       position with respect to the punitive damages, and  
6       it's harmed my opportunity to get prepared.

7           So what I would ask Your Honor to do, it's one  
8       of the requests for production that's up in front  
9       of Your Honor, it might be the second or it might  
10      be the fourth -- hold on, I'll tell you, Your  
11      Honor.

12       MR. WEBER: And can I respond, Your Honor?

13       THE COURT: Hold on. I want to get the right  
14      document first. I'm looking at first dated  
15      January 17th -- or February 17th.

16       MR. ZAPPOLO: It's not the -- it's not the  
17      first.

18       THE COURT: All right. I'm looking at --

19       MR. ZAPPOLO: The second was for their  
20      exhibits. The third is the one that we dealt with.  
21      So it is probably the fourth.

22       THE COURT: There's second. There's third. I  
23      don't think I have fourth.

24       MR. ZAPPOLO: Okay. I need to track down the  
25      fourth, because it just asks him to produce, very

1 simply, the financial statements that he  
2 testify -- that he put in his interrogatory  
3 response that he had given to some banks, and I  
4 think in a very -- the very starting point --

5 MR. WEBER: Here, I have a copy, let's  
6 expedite this.

7 THE COURT: Okay. Thank you.

8 MR. WEBER: Of course, Your Honor. Here you  
9 go, Scott.

10 MR. ZAPPOLO: Thank you. Yes. I ask for,  
11 very simply, a copy of any financial statement of  
12 net worth that you provide anyone, cross reference  
13 your interrogatory number three where he responded  
14 as to whom he had given financial statements to  
15 over the years.

16 THE COURT: And there's a Motion for  
17 Protective Order pending on this?

18 MR. WEBER: This Motion for Protective Order.

19 MR. ZAPPOLO: This motion that we're here  
20 today --

21 MR. WEBER: -- based on what's going on. So,  
22 you know, we just want a limit on what he's going  
23 to be seeing. Maybe at this point it's not overly  
24 burdensome, but the first, the third, and the other  
25 ones definitely are, and, you know, there's got to



1 be some limitation on what he's going to be seeking  
2 through this discovery, since Your Honor's not  
3 striking the claim, so, as part of this motion.

4 THE COURT: Well, what's your recommendation?

5 MR. WEBER: Well, my recommendation is to  
6 grant the protective order as to the first and the  
7 third, because they are way overbroad. We'll  
8 respond to the fourth one, and so then he's got the  
9 interrogatory, and he's got the financial  
10 statements.

11 MR. ZAPPOLO: And, Your Honor, the AVM, III  
12 depositions, and the information we saw from them,  
13 needs to go forward, because that's something that  
14 at face value contradicts Mr. Mosler's  
15 representation of net worth.

16 MR. WEBER: That's not at issue even today, I  
17 don't represent them, so I would say that's not for  
18 today. They have a separate hearing, they have  
19 separate attorneys, they have separately responded  
20 to the deposition. Mr. Zappolo is trying to sneak  
21 this in. This is not set for hearing, Your Honor.

22 MR. ZAPPOLO: No, I'm just saying it's --

23 THE COURT: Hold on. Hold on. Hold on.  
24 You're not looking to agree to something that you  
25 don't have the --

1 MR. WEBER: I can't, Your Honor.

2 MR. ZAPPOLO: I concede that, I'm just trying  
3 to make the Court aware that I -- from my  
4 perspective, what I need is the response for the  
5 fourth request for production, and then to take the  
6 AVM and III depositions. They have obtained  
7 separate counsel who have objected, and we're  
8 trying to work that and get that scheduled.

9 THE COURT: All right. So first and third are  
10 for Mr. Mosler. We're not touching the second one  
11 because MACC is not present, correct?

12 MR. WEBER: No, Your Honor, the second one is  
13 not applicable, I believe. It's the third and the  
14 first we are granting the protective order on.  
15 We'll answer the fourth. The answer is not  
16 applicable.

17 MR. ZAPPOLO: So, well, the second is I just  
18 want to get your copies of your exhibits. I don't  
19 think that's --

20 MR. WEBER: Yeah, that's not an issue.

21 MR. ZAPPOLO: That should be agreed to.

22 MR. WEBER: Yeah. I already sent them.

23 THE COURT: Okay. Okay. Well, we don't have  
24 specific objections to these, do we?

25 MR. WEBER: No, Your Honor. Well, they're in

1 our motion, and we have a list of argument in our  
2 Motion for Protective Order.

3 THE COURT: And it applies to all of them?

4 MR. WEBER: All of them, yes. So I have the  
5 case laws --

6 MR. ZAPPOLO: He -- he wrote down the dates of  
7 the requests for -- I think he wrote 2-17.

8 MR. WEBER: That motion applies to all of the  
9 outstanding punitive damages discovery. So from  
10 everything that's listed, we would carve out our  
11 objection to this fourth. So we would answer the  
12 fourth, 2-17-23.

13 MR. ZAPPOLO: And I'm saying I can use that in  
14 the depositions that I'm trying to get scheduled,  
15 and that --

16 THE COURT: The fourth.

17 MR. ZAPPOLO: -- can satisfy my requirements.

18 THE COURT: The fourth? Or 1-3 --

19 MR. ZAPPOLO: I can use the response to the  
20 fourth, that would give me the financial statements  
21 given to the banks that Mr. Mosler referenced.

22 And then I can go forward with AVM and III,  
23 which is a cash flow analysis.

24 THE COURT: Okay.

25 MR. WEBER: And we object --

1 MR. ZAPPOLO: And then -- so I'll take  
2 that --

3 THE COURT: And you object?

4 MR. WEBER: We -- well, we object to the -- we  
5 are objecting to the depositions, and I know  
6 Counsel for them -- the entities have objected, so  
7 that's not here today before us, but with respect  
8 to this fourth one we'll respond to it.

9 THE COURT: Right. So I won't address the  
10 depositions today. Let's get, you know, other  
11 lawyers involved. As for your fourth, you're fine,  
12 your agreement's fine.

13 MR. ZAPPOLO: Yes.

14 THE COURT: Okay?

15 MR. ZAPPOLO: Thank you, Your Honor.

16 THE COURT: All right. Anything else?

17 MR. WEBER: That's it, Your Honor.

18 THE COURT: You should talk to your client.  
19 He wants to raise his hand.

20 MR. ZAPPOLO: Yes, I'm sorry. And of course,  
21 with my client's wishes, Your Honor, Mr. Wagner  
22 just wants the Court to know that his -- the prior  
23 expert that was excluded was someone who is not a  
24 damages expert, per se. From his perspective it  
25 was a vocational person who was going to talk about

1 his lost income from what he would have made as a  
2 (inaudible), et cetera.

3 THE COURT: Okay.

4 MR. ZAPPOLO: So it's a different issue from  
5 his perspective than Mr. Weber was presenting to  
6 the Court, but it's on the record now, and  
7 everyone's happy and had their day in Court, so to  
8 speak.

9 THE COURT: All right. All right, gentlemen.

10 MR. ZAPPOLO: Thank you, Your Honor, for the  
11 time, we appreciate it.

12 THE COURT: It's been a really long day.

13 MR. WEBER: Yes, Your Honor.

14 THE COURT: You know, but sometimes cases need  
15 more time, especially when we're close to trial,  
16 and what I don't want you, or anyone to say, is  
17 that you didn't get enough time before trial to  
18 have your issues heard. And so have a wonderful  
19 day.

20 (Thereupon, the hearing was concluded at 2:53  
21 a.m.)

22

23

24

25

## 1 CERTIFICATE OF REPORTER

2 STATE OF FLORIDA

3 COUNTY OF PALM BEACH

4

5 I, Sierra Lafferty, Court Reporter, certify that

6 I was authorized to and did report the hearing in the

7 matter of James Todd Wagner, Supercar Engineering, Inc., a

8 Florida Corporation vs. Warren Mosler, Mosler Auto Care

9 Center, Inc ("MACC"), a Florida Corporation, d/b/a Mosler

10 Automotive, and Alan Richard Simon; and that the

11 transcript is a true and correct record of my notes.

12 I further certify that I am not a relative,

13 employee, attorney, or counsel of any of the parties, nor

14 am I a relative or employee of any of the parties'

15 attorneys or counsel connected with the action, nor am I

16 financially interested in the action.

17 Dated this 5th day of April 2023.

18

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21



22

Sierra Lafferty, Court Reporter

23

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