# EXHIBIT 21

LEXSEE 2005 US DIST LEXIS 4566

**LAVA TRADING, INC., Plaintiff, -against- HARTFORD FIRE INSURANCE COMPANY, Defendant.**

**03 Civ. 7037 (PKC) (MHD)**

**UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK**

***2005 U.S. Dist. LEXIS 4566***

**February 14, 2005, Decided**

**SUBSEQUENT HISTORY:** Sanctions allowed by, in part, Magistrate's recommendation at *Lava Trading, Inc. v. Hartford Fire Ins. Co., 2005 U.S. Dist. LEXIS 2866 (S.D.N.Y., Feb. 24, 2005)*
Adopted by, Motion denied by, Summary judgment denied by *Lava Trading v. Hartford Fire Ins. Co., 2005 U.S. Dist. LEXIS 44802 (S.D.N.Y., Apr. 8, 2005)*

**PRIOR HISTORY:** *Lava Trading, Inc. v. Hartford Fire Ins. Co., 2005 U.S. Dist. LEXIS 466 (S.D.N.Y., Jan. 10, 2005)*

**DISPOSITION:** [*1] Magistrate recommended that defendant's motions for sanctions and for preclusion be granted.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Plaintiff insured sued defendant insurer, seeking to collect additional amounts under property loss and business interruption policies. The insurer moved to strike the *Fed. R. Civ. P. 26(a)(2)(B)* report of the insured's principal damages expert and to preclude the insured from calling the expert as a witness. The matter was referred to a magistrate judge for a report and recommendation.

**OVERVIEW:** The insured maintained business premises in the World Trade Center; it claimed that the amounts the insurer had paid in the wake of the Trade Center's destruction were insufficient. The expert's role was to estimate the amount of revenue that the insured would have realized if the events of September 11, 2001, had not occurred. The expert also estimated a loss in revenues allegedly caused by the insurer's failure to timely advance the proceeds it did pay. The magistrate found that the expert witness report did not satisfy *Rule 26(a)(2)(B)*, as it did not identify the specific facts or methodology on which the expert relied. The expert's proffered opinions failed to meet the standards of *Fed. R. Evid. 702* and Daubert, as the expert relied on estimates or guesses by an employee of the insured as to essential numbers, including potential market size, and disregarded nearly contemporaneous projections by the insured of its expected performance. The expert's revenue estimate was nearly three times larger than the insured's projections. Also, the expert's method was not generally accepted, and a number of his factual premises were unfounded.

**OUTCOME:** The magistrate recommended that the insurer's motion to strike the expert's report and to preclude his testimony be granted; it was recommended that a second witness's testimony, which was derivative of the expert's opinion, be precluded as well.

**LexisNexis(R) Headnotes**

***Civil Procedure > Discovery > Disclosures > Mandatory Disclosures***
***Evidence > Testimony > Experts > General Overview***
[HN1] As amended in 1993, *Fed. R. Civ. P. 26(a)(2)(B)* requires that a party who has designated an expert witness for trial provide a report prepared and signed by that witness. The report must, among other things, contain a complete statement of all opinions to be expressed and the basis and reasons therefor; and the data or other information considered by the witness in forming the opinions. The expert must also provide any exhibits to be used as a summary or support for the opinion and a variety of other information about the witness's prior experience, including publications and prior testimony. *Fed. R. Civ. P. 26(a)(2)(B).*

***Civil Procedure > Discovery > Disclosures > Mandatory Disclosures***
***Civil Procedure > Discovery > Methods > Expert Witness Discovery***
[HN2] As the language of *Fed. R. Civ. P. 26(a)(2)(B)* suggests, the report pertaining to the proposed opinions of an expert and their factual basis must be "detailed and complete." *Fed. R. Civ. P. 26(a)(2)(B)* 1993 advisory committee notes. This requirement is intended to ensure adequate trial preparation, including the opportunity for efficient follow-up discovery through deposition, if necessary. *Fed. R. Civ. P. 26(b)(4)(A).*

***Civil Procedure > Discovery > Disclosures > Mandatory Disclosures***
***Civil Procedure > Discovery > Methods > Expert Witness Discovery***
[HN3] Under *Fed. R. Civ. P. 26(b)(4)(A)*, the discovering party is afforded the opportunity, as a matter of right, to depose the other side's expert. This provision deviates from its predecessor, which allowed such inquiry only upon court authorization. The rule further specifies, however, that the deposition is to be conducted only after the expert provides the required report. In this fashion the drafters anticipated that depositions would be significantly shortened and narrowed, and in some cases the need for the deposition might be entirely obviated. *Fed. R. Civ. P. 26(a)(2)(B)* 1993 advisory committee notes. The report must be complete such that opposing counsel is not forced to depose an expert in order to avoid ambush at trial; and moreover the report must be sufficiently complete so as to shorten or decrease the need for expert depositions and thus to conserve resources.

***Civil Procedure > Discovery > Disclosures > Mandatory Disclosures***
[HN4] Expert reports must include "how" and "why" the expert reached a particular result, not merely the expert's conclusory opinions.

***Civil Procedure > Discovery > Misconduct***
[HN5] Under the terms of *Fed. R. Civ. P. 37(c)(1)*, untimely submissions are not admissible unless the proponent of the evidence can demonstrate that his delay in complying with the required deadlines was "substantially justified" or that it was harmless, that is, that it did not prejudice the other side. Indeed, untimely produced evidentiary materials, including expert submissions, are subject to "near automatic exclusion" under *Rule 37(c)(1).*

***Evidence > Scientific Evidence > Daubert Standard***
***Evidence > Testimony > Experts > Admissibility***
***Evidence > Testimony > Experts > Daubert Standard***
[HN6] *Fed. R. Evid. 702* specifies that expert witness testimony is admissible only if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case. The gate-keeping role of the court under this rule is to be exercised in accordance with the criteria outlined by the United States Supreme Court in Daubert and later applied not only to scientific testimony or evidence, but to all expert opinions and evidence.

***Evidence > Testimony > Experts > Daubert Standard***
[HN7] Under Daubert, a trial court must determine that expert testimony is not only relevant, but reliable. In doing so, the court must undertake a two-step analysis in assessing the proposed testimony of a qualified expert. Thus, the judge must determine, at least on a preliminary basis, whether the reasoning or methodology underlying the testimony is scientifically valid, and he must further decide whether that reasoning or methodology properly can be applied to the facts in issue. In short, the trial court must decide not only whether the methodology is reliable for some purposes, but whether it is reliable in light of the particular facts and circumstances of the particular case, that is, whether the method or technique is a reliable way

to draw a conclusion regarding the particular matter to which the expert testimony was directly relevant.

***Evidence > Testimony > Experts > General Overview***
[HN8] For scientific methods, the Daubert Court suggests that, in considering general reliability, a trial judge assess whether the method or theory can be and has been tested. The court should also look to whether it has been subjected to peer review and publication, the degree to which it has been accepted in the relevant profession or discipline, and the known or potential error rate of the methodology. For methods or theories that are not purely scientific, the court should follow the same general approach, adapting the Daubert criteria as needed for the purpose of assessing reliability.

***Evidence > Testimony > Experts > Admissibility***
***Evidence > Testimony > Experts > Daubert Standard***
[HN9] As for the second step of the analysis for admissibility of expert testimony, a court must consider whether the methodology or theory is appropriate for the particular issue or task for which it is being used, and must also assess whether the witness is applying it in a manner that ensures a reliable linkage between the facts that he is examining and the conclusions that he is announcing. Conclusion and methodology are not entirely distinct from one another. Trained experts commonly extrapolate from existing data. But nothing in either Daubert or the Federal Rules of Evidence requires a district court to admit opinion evidence which is connected to existing data only by the ipse dixit of the expert. A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered.

***Evidence > Procedural Considerations > Burdens of Proof > General Overview***
***Evidence > Testimony > Experts > General Overview***
[HN10] In assessing the adequacy of an expert's proposed testimony, it is the proponent's burden to demonstrate that it satisfies the relevant criteria.

***Evidence > Testimony > Experts > General Overview***
[HN11] That a required exercise is unavoidably hypothetical does not permit a purported expert witness to use his credentials to legitimize what amounts to a client's wishes.

***Evidence > Testimony > Experts > General Overview***
[HN12] A putative expert who seeks to estimate "but for" sales cannot rely on his "industry expertise" or its equivalent as a substitute for a methodology that looks to specific data and proceeds to make statistically or scientifically valid inferences from the data. Intuition will not do. The witness must look to comparable markets, and if they differ from the market for which he is offering predictions, he must utilize professionally accepted methods of making comparisons--even of "unique" markets--that will take into account the uniqueness of the comparators. If there are reasons why such a comparison is impossible, the party proffering the expert must prove such impossibility, and the ipse dixit assertion of the expert that the market in question is "unique" does not constitute such proof.

***Evidence > Testimony > Experts > General Overview***
[HN13] An expert must offer good reason to think that his approach produces an accurate estimate using professional methods, and this estimate must be testable. Someone else using the same data and methods must be able to replicate the result.

***Evidence > Testimony > Experts > General Overview***
[HN14] Reliance on--and indeed the rubber-stamping of--a client's vague, self-interested and untested beliefs does not constitute a reliable method of estimation, does not reflect any meaningful expertise on the part of the estimator, and most assuredly does not assist the trier of fact.

***Civil Procedure > Discovery > Disclosures > Mandatory Disclosures***
***Civil Procedure > Discovery > Methods > Expert Witness Discovery***
[HN15] A "dance of the seven veils" approach to expert discovery is the precise target of *Fed. R. Civ. P. 26(a)(2)(B)*.

**COUNSEL:** For Lava Trading, Inc., Plaintiff: Finley Harkham, Jeremy J. Flanagan, Anderson, Kill, Olick & Oshinsky P.C., New York, NY; Jonathan O. Bauer, Anderson Kill et ano., Newark, NJ.

For Hartford Fire Insurance Company, Defendant: Elizabeth R Leong, Melissa Faith Savage, Wystan M. Ackerman, Robinson & Cole LLP, New York, NY;

Rebecca Levy-Sachs, Robinson & Cole, L.L.P., Sarasota, FL; Rhonda J. Tobin, Stephen E. Goldman, ROBINSON & COLE, LLP, Hartford, CT.

**JUDGES:** MICHAEL H. DOLINGER, UNITED STATES MAGISTRATE JUDGE.

**OPINION BY:** MICHAEL H. DOLINGER

**OPINION**

*REPORT & RECOMMENDATION*

TO THE HONORABLE P. KEVIN CASTEL, U.S.D.J.:

On October 6, 2004, defendant Hartford Fire Insurance Company applied for an order (1) striking the *Rule 26(a)(2)(B)* report of plaintiff's principal damages expert, Dr. Eric Clemons, and (2) precluding plaintiff from calling Dr. Clemons as a witness at the forthcoming trial. Alternatively, defendant urged that at least a portion of Dr. Clemons's testimony be precluded and that defendant be awarded the expense of its [*2] follow-up deposition of the witness. The basis for Hartford's application was its contention that Dr. Clemons's report -- or, more precisely, both the original and the supplemental reports prepared by Dr. Clemons -- were manifestly inadequate to meet the requirements of *Fed. R. Civ. P. 26(a)(2)(B)*, and that materials created by the witness after the second report had been provided did not cure the deficiencies and furthermore necessitated a second deposition session. (*See* Oct. 6, 2004 letter to the Court from Stephen E. Goldman, Esq.; Nov. 1, 2004 letter to the Court from Rebecca Levy-Sachs, Esq.).

While that motion was being briefed, defendant conducted a two-day deposition of Dr. Clemons. [1] Following the completion of that deposition, defendant has separately moved to preclude any testimony by Dr. Clemons and by a second damages witness, Mr. Denis O'Connor, based on its contention that Dr. Clemons's proposed testimony does not meet minimum standards for admissibility under *Fed. R. Evid. 702*. (*See* Deft's Nov. 15, 2004 Supplemental Memorandum in Support of its Motion to Preclude).

1 Defendant took that deposition rather than await a ruling on its challenge to the reports, because it was required to provide its own experts' reports by November 1, 2004, and it was facing an expedited schedule to complete all remaining discovery and file both dispositive and *in limine* motions. (*See* Nov. 1, 2004 Levy-Sachs letter to the Court at 8).

[*3] Both motions have now been fully briefed. For the reasons that follow, we conclude that defendant's complaints are substantially justified and therefore recommend that both motions be granted. [2]

2 Defendant has separately moved to impose dispositive sanctions on Lava for other discovery derelictions, most notably its asserted failure to provide timely and complete production of key documents, especially large quantities of e-mails. (*See* Hartford's Memorandum for Issuance of Sanctions Based Upon Egregious Discovery Misconduct). Lava has very belatedly produced documents that add further grounds for rejecting the admission of Dr. Clemons's testimony (*see id.* at 17-24), since those documents -- which were not available to defendant when it was deposing Dr. Clemons -- appear to refute a number of key factual assumptions on which his opinions are grounded. (*See* pp. 47-49, *infra*).

*Background*

Plaintiff Lava Trading Inc. is self-described as "a technical service bureau for connectivity to all [*4] major U.S. equity market liquidity services." (Compl. at P2). In substance, it is a provider of software and communication links for a portion of the securities industry that utilizes so-called order-management systems.

Lava maintained business premises in the World Trade Center prior to September 11, 2001. Its premises were covered by policies issued by Hartford that insured against property loss and business interruption. In the wake of the destruction of the Trade Center, Hartford paid Lava for its lost property and later paid plaintiff another sum for estimated business-income losses and related expenses resulting from the destruction of its premises. [3] Lava demanded additional amounts, which Hartford declined to pay, and in 2003 Lava sued, contending that it was owed substantially more money under its policies.

3 Hartford's business-interruption payments

totaled nearly two million dollars. (*See* Supplemental Affidavit of Stephen E. Goldman, Esq., sworn to Dec. 21, 2004, at P7 (filed in support of Hartford's Motion for Sanctions)).

[*5] In preparing its case for trial, Lava designated Dr. Clemons as a damages expert. His role was to estimate the amount of revenue that Lava would have realized from its business in the period between September 2001 and October 31, 2002 if the events of September 11, 2001 had not occurred. [4] According to plaintiff, another designated expert witness, Denis O'Connor, was to utilize the lost-revenue figures provided by Dr. Clemons to opine as to plaintiff's recoverable damages.

4 Under the terms of the policy, the so-called period of restoration, during which Lava might be entitled to coverage for losses, was capped at twelve months. (*See* Compl., Ex. A at LAV0000000028 -- Pk).

Clemons prepared a report dated August 16, 2004 (Goldman Oct. 6, 2004 letter to the Court at Ex. 1), in which he concluded that, from September 11, 2001 until the end of October 2002, Lava had lost a total of $ 56,539,621.00 in sales revenues as a result of the interruption to its business caused by the September 11 attack. (*Id.*, [*6] Ex. 1, Report at p. 13, Table 1). [5] He further estimated a loss in revenues to Lava assertedly caused by Hartford's alleged failure to advance in a timely fashion the moneys that it did pay Lava, concluding that this consequential loss over the same time period totaled $ 4,810,303.00. (*Id.*, Ex. 1, Report at p. 13, Table 2).

5 According to the chart annexed to Clemons's report, Lava's actual revenue for that period was $ 30,042,951. (*Id.*).

The August 16 report alluded in very broad terms to some of the factors that Dr. Clemons was evaluating, including a very general statement to the effect that he believed that the September 11 attack had delayed Lava's development and launch of new products because its personnel were largely focused on recovery efforts. The report, however, did not describe (1) the specific facts -- including, for example, prior and subsequent performance data, and market size -- that Dr. Clemons may have relied upon, (2) the specific computational model (if any) that he had used, [*7] or (3) the details of what use he was making of pre-existing data, as well as his mathematical calculations, to arrive at the very specific projected monthly lost-revenue totals that he was estimating. Rather, he stated only that he was using unspecified "estimates" provided to him by George Hessler, Lava's Director of Broker Dealer Sales, to develop an unspecified "total growth potential of the industry," and that he was then using an unspecified growth or "traction" curve to project the amount of new business that Lava would have attracted over the following twelve and one-half months but for the September 11 attacks. (*Id.*, Ex. 1, Report at pp. 11-12). Although this description implied that he was doing specific calculations utilizing data reflecting past revenues and expenses, as well as specific estimates of market size and potential for expansion by Lava, Dr. Clemons never departed from this grossly impressionistic level of generality to describe what in fact he was doing to reach his dollar figures. Indeed, his only disclosure of any data or calculations was a chart at the end of the report that simply listed, on a month-by-month basis, Lava's actual revenues and the amount [*8] of revenues that Dr. Clemons thought that Lava would have earned if not for the events of September 11. (*Id.*, Ex. 1, Report at p. 13, Table 1). In short, how Dr. Clemons had derived the revenue-loss numbers was left a complete mystery.

As for the figures that Dr. Clemons arrived at to represent the loss caused by purported delay on the part of Hartford in advancing funds to Lava on its business-loss claim, he described in very general terms the derivation of a "good faith curve", which appears to have been premised on the notion that if Hartford had made "a promise" of more money to Lava in December 2001 or had actually paid it then (*id.*, Ex. 1, Report at p. 11, P5.3.3), the company could have hired more personnel, who could have more quickly developed new products and attracted more business from December 2001 through October 2002. (*Id.*, Ex. 1, Report at pp. 11-12). Based on the further premise that Lava could not obtain alternative funding until April 2002, Clemons apparently did a hypothetical calculation that, in effect, advanced by two months Lava's actual revenues and measured the difference between the resulting amount of revenue from December 2001 through October [*9] 2002 and the so-called "actual revenue" curve (that is, the revenue Lava in fact realized in the post-September 11 period). (*Id.*). This difference he then manipulated in an unspecified manner to ensure that price cuts made by Lava in the Spring of 2002 because of competition not

also be advanced by two months in his analysis. (*Id.* at p. 12). He then arrived at a final figure for the loss caused by Hartford's alleged delay in payment.

Upon receipt of this report, defendant objected that it was patently inadequate under the governing rules. Plaintiff subsequently agreed that it would have Dr. Clemons supplement his initial report. [6] Dr. Clemons supplied a second report, this one dated September 20, 2004. (Goldman Oct. 6 letter to the Court, Ex. 2).

6 Plaintiff insists that in agreeing to a supplementation, it was not conceding that the original report was deficient. (Oct. 14, 2004 letter to the Court from Finley Harkham, Esq., at 1). Whether it so conceded is inconsequential for present purposes.

The [*10] new report was in large measure the same as the first, both in substance and in format. It did not include any further description of the data on which Dr. Clemons relied or the method by which he derived his estimates of loss, nor did it disclose any of his mathematical computations. The principal change was that Dr. Clemons increased his estimate of the revenue loss sustained by Lava from the September 11 attacks by approximately $ 11 million, and his estimate of the loss occasioned by Hartford's assertedly delayed payment by more than $ 2 million. Thus he now listed, in his month-by-month revenue chart, a total loss of $ 67,418,566.00 attributable to the September 11 attack. (*Id.*, Ex. 2, Report at p. 14). As for Hartford's asserted delay in payment, he listed a total loss of $ 7,001,045.00. (*Id.*). [7] The report did not explain these alterations, any more than it explained how the original figures had been derived in the first place. [8]

7 Since the premise for the consequential loss was the asserted delay in Hartford paying $ 2 million to Lava, the posited loss reflects an assumption that such a payment would have yielded a gross gain of 250 percent. The report does not explain how Lava could have achieved such a remarkable result.

[*11]

8 A careful reading of the second report discloses that, in estimating revenue loss attributable to delayed payment by Hartford, Dr. Clemons shifted Lava's actual revenue figures by three months instead of two, as in the prior report -- thus increasing the loss figure -- and he eliminated any claimed loss for December 2001, presumably because, under his scenario, a timely payment by Hartford would have had no impact until January 2002. (*See* Clemons Dep. Tr. ("Dep. Tr.") at 392-93, 403).

Following receipt of the second report, defendant's counsel again objected, noting that the report failed to provide the basis for Dr. Clemons's opinions. As articulated by counsel, "While [Dr. Clemons] includes a Pro Forma Income projection, there is no explanation as to how the numbers were derived, and they do not comport with the Projected Revenues contained in the Lava claim submitted to the Hartford, in or about late 2002 in the amount of $ 59,000,000.00. The work sheets or spreadsheet calculations used to create the Pro Forma Projections, which are the sole basis for his conclusions, are required [*12] to be produced under *Rule 26(b)*." (Oct. 1, 2004 letter from Rebecca Levy-Sachs, Esq. to Jonathan Bauer, Esq. & Jeremy Flanagan, Esq.).

This complaint triggered a responding letter in which plaintiff's counsel did not purport to proffer the necessary explanations on behalf of the witness. All that she did was to attach a series of spreadsheets listing numerous columns of dollar and percentage figures that appear to relate to certain listed clients or prospective clients of Lava. No explanation of the derivation or meaning of these numbers was offered, and counsel simply advised that "the explanations Hartford is seeking can be explained at [Clemons's] deposition." (Oct. 5, 2004 letter from Lauren C. Bisordi, Esq. to Rebecca Levy-Sachs, Esq.). At that deposition, Dr. Clemons identified the spreadsheets as reflecting a sensitivity analysis that he had performed after the completion of his revised report. (Dep. Tr. at 81-90).

The deposition of Dr. Clemons began on October 15, 2004. It could not be completed that day, in part because it turned out that plaintiff had not produced, and the witness and his attorney did not then have, the written materials that might have revealed (1) Dr. [*13] Clemons's mathematical calculations that yielded the revenue loss figures that he had adopted, (2) the specific assumptions upon which the analysis was based, and (3) the specific S curve that had been utilized to derive the numbers. (*See* Dep. Tr. 101-04, 142-44, 160-61).

In the wake of the first deposition session, Dr. Clemons created some additional materials to reflect his up-dated calculations, including a revision of the

sensitivity analysis of his prior estimates. Some of these materials were not provided to defendant prior to the next session of the deposition, which was conducted on October 27, 2004, but rather were handed over midway through the second session. (Dep. Tr. at 316-18. *See* Nov. 1, 2004 Levy-Sachs letter to the Court at Ex. B). These sheets showed estimated revenue figures, premised on varying -- if very general -- assumptions, and reflected what Dr. Clemons described as "lost revenues" of between $ 90 million and $ 110 million. (*Id.*).

Following the conclusion of Dr. Clemons's deposition, defendant moved to preclude plaintiff from calling him as a witness, arguing that, apart from the inadequacies of his various reports and supplementations, his analysis [*14] does not meet minimum standards of reliability and utility under *Rule 702* and under *Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 125 L. Ed. 2d 469, 113 S. Ct. 2786 (1993)*, and its progeny. The parties have proffered multiple and voluminous rounds of papers on this matter, the briefing of which was completed with the submission of last-minute letters to the court on January 12, 2005.

*ANALYSIS*

I. *The Expert Witness Reports*

[HN1] As amended in 1993, *Rule 26(a)(2)(B)* requires that a party who has designated an expert witness for trial provide a report prepared and signed by that witness. The report must, among other things, "contain a complete statement of all opinions to be expressed and the basis and reasons therefor; [and] the data or other information considered by the witness in forming the opinions; . . . ." The expert must also provide "any exhibits to be used as a summary or support for the opinion" and a variety of other information about the witness's prior experience, including publications and prior testimony. *Fed. R. Civ. P. 26(a)(2)(B)*.

[HN2] As this language suggests, the report pertaining to the proposed opinions of an expert and their [*15] factual basis must be "detailed and complete". (*Fed. R. Civ. P. 26(a)(2)(B)*, 1993 Advisory Committee Notes, at 160 (West 2004 Rev. Ed.)). This requirement is intended to ensure adequate trial preparation, including the opportunity for efficient follow-up discovery through deposition, if necessary. (*See Fed. R. Civ. P. 26(b)(4)(A)*).

[HN3] Under *Rule 26(b)(4)(A)*, the discovering party is afforded the opportunity, as a matter of right, to depose the other side's expert. This provision deviates from its predecessor, which allowed such inquiry only upon court authorization. The rule further specifies, however, that the deposition is to be conducted only after the expert provides the required report. In this fashion the drafters anticipated that depositions would be significantly shortened and narrowed, and in some cases the need for the deposition might be entirely obviated. (*See Fed. R. Civ. Proc. 26(a)(2)(B)*, 1993 Advisory Committee Notes, *supra*, at 161). *Accord, e.g., Salgado v. General Motors Corp., 150 F.3d 735, 741 n.6 (7th Cir. 1998)* [*16] ("The report must be complete such that opposing counsel is not forced to depose an expert in order to avoid ambush at trial; and moreover the report must be sufficiently complete so as to shorten or decrease the need for expert depositions and thus to conserve resources.") (citing cases).

Judged by these standards, Dr. Clemons's report in both its versions, and as supplemented by the October 5 letter from plaintiff's counsel, was manifestly inadequate. As we have noted, it offered a very specific set of ultimate opinions, that is, a precise set of figures for estimated monthly revenue losses assertedly caused -- over a twelve-and-one-half-month period -- both by the effects of the September 11 events and by the purported delay in payment by Hartford. It failed, however, to identify either (1) the specific facts or factual assumptions on which Dr. Clemons relied to generate his opinions or (2) the methodology that he used (other than in the most general and unhelpful terms) or (3) his actual calculation of the losses or (4) the basis for the dramatic alteration of his loss numbers from the first to the second report. In short, the report -- in all its manifestations and supplementations [*17] -- did not disclose any of the essential details needed to understand and assess Dr. Clemons's conclusions. *See, e.g., Salgado, 150 F.3d at 741-42 n.6* [HN4] ("Expert reports must include 'how' and 'why' the expert reached a particular result, not merely the expert's conclusory opinions.") (citing cases). It follows as well that the report failed to offer any prospect for narrowing or focusing the deposition of the witness, much less obviating the necessity for such a deposition.

The failure of the plaintiff and its expert to meet the requirements of *Rule 26(a)(2)(B)* is further underscored by what occurred at the deposition. As noted, the first

session had to be adjourned because plaintiff had still concededly not provided even the calculations that the witness had undertaken to arrive at his ultimate figures. (Dep. Tr. at 160-61). Moreover, the witness generated additional calculation materials between deposition sessions, but plaintiff did not share some of them with defendant until midway through the second session of the deposition. (Dep. Tr. at 316-18).

Finally, we note that on the current *Daubert* motion, plaintiff has proffered extensive new affidavits by both [*18] Dr. Clemons and Dr. Glenn D. Meyers, a consulting economist who assisted him, in which they offer new explanations, new analyses and a set of demonstrative exhibits (including charts and graphs) never before produced. This new effort only underscores the failure of the original and revised reports of Dr. Clemons to describe the essential details of his analysis. Moreover, these affidavits, if viewed as an effort to supplement Dr. Clemons's original reports, do not salvage plaintiff's position on the current *Rule 26(a)(2)(B)* motion.

The court's scheduling order required plaintiff to provide its expert-witness reports by August 16, 2004. Despite -- or perhaps because of -- the manifestly inadequate content of the first report, plaintiff was afforded the opportunity to supplement, more than one month later, and yet it failed to take advantage of the opportunity, choosing instead to provide a recycled version of the first report, with the same blatant deficiencies and higher dollar figures. Plaintiff remained in substantial default up to and through the two-session deposition of Dr. Clemons and through the briefing of defendant's *Rule 26(a)(2)(B)* motion in October and November 2004. A [*19] more complete disclosure -- albeit without any additional backup documentation -- did not finally occur until plaintiff's response to defendant's current *Daubert* motion, in December 2004, long after the end of expert discovery.

In short, the affidavits, if deemed to be new expert submissions, are plainly and substantially untimely. [HN5] Under the terms of *Fed. R. Civ. P. 37(c)(1)*, such untmely submissions are not admissible unless the proponent of the evidence can demonstrate that his delay in complying with the required deadlines was "substantially justified" or that it was harmless, that is, that it did not prejudice the other side. *See, e.g., Wilson v. Bradlees of New Eng., Inc., 250 F.3d 10, 21 (1st Cir. 2001)*; *AMEX, LLC v. Mopex, Inc., 215 F.R.D. 87, 93 (S.D.N.Y. 2002)*. Indeed, as one court has recently noted, untimely produced evidentiary materials, including expert submissions, are subject to "near automatic exclusion" under *Rule 37(c)(1)*. *Wilson, 250 F.3d at 20-21*. Plaintiff in this case fails to make the required showing.

Lava had ample time to provide the required [*20] expert-witness submissions, and was afforded additional time to correct the initial report. Nonetheless, plaintiff failed to do so. Indeed, full disclosure did not occur until Lava was faced with the current *Daubert* motion to preclude. Moreover, there is no mystery as to the requirements of *Rule 26(a)(2)(B)*. In short, plaintiff shows no justification, substantial or otherwise, for its course of conduct.

Plaintiff also fails to demonstrate harmlessness. Indeed, the extraordinary delay in the presumably definitive presentation of the basis for Dr. Clemons's opinions has unquestionably prejudiced defendant, since Hartford has been forced to pursue a full explanation through an extended set of depositions and then motion practice, only to receive an altered presentation long after the close of discovery and long after defendant had already obtained an analysis by its own expert of the plaintiff's preceding submissions.

In sum, defendant is fully justified in challenging the adequacy of plaintiff's disclosure of Dr. Clemons's analysis and opinions. We describe the appropriate remedy after we have addressed defendant's challenge to the substance of Clemons's proposed testimony.

II. [*21] *The Daubert Challenge*

A. *General Standards*

At the conclusion of the deposition of Dr. Clemons, defendant filed a separate motion to preclude his testimony on the ground of its asserted unreliability. Plaintiff has opposed this application. We conclude, however, that Dr. Clemons' proffered opinions of revenue loss fall well short of the essential requirements for usable expert testimony, and that under *Daubert* and its progeny that testimony should be precluded.

[HN6] *Rule 702* specifies that expert witness testimony is admissible only "if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the

witness has applied the principles and methods reliably to the facts of the case." The gate-keeping role of the court under this rule is to be exercised in accordance with the criteria outlined by the Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 125 L. Ed. 2d 469, 113 S. Ct. 2786 (1993)*, and later applied not only to scientific testimony or evidence, but to all expert opinions and evidence. *See Kumho Tire Co. v. Carmichael, 526 U.S. 137, 147, 143 L. Ed. 2d 238, 119 S. Ct. 1167 (1999)*.

[HN7] Under *Daubert*, the trial [*22] court must determine that the "testimony is not only relevant, but reliable." *509 U.S. at 589*. In doing so, the court must undertake a two-step analysis in assessing the proposed testimony of a qualified expert. Thus, the judge must determine, at least on a preliminary basis, "whether the reasoning or methodology underlying the testimony is scientifically valid," and he must further decide "whether that reasoning or methodology properly can be applied to the facts in issue." *Id. at 592*. In short, the trial court must decide not only whether the methodology is reliable for some purposes, but whether it is reliable "in light of the particular facts and circumstances of the particular case," that is, whether the method or technique is a reliable way "to draw a conclusion regarding the particular matter to which the expert testimony was directly relevant." *Kumho, 526 U.S. at 153-58*.

[HN8] For scientific methods, the *Daubert* Court suggested that, in considering general reliability, the trial judge assess whether the method or theory "can be and has been tested." *Daubert, 509 U.S. at 593*. The court should also look to whether [*23] it has been subjected to peer review and publication, the degree to which it has been accepted in the relevant profession or discipline, and the known or potential error rate of the methodology. *Id. at 593-95*. For methods or theories that are not purely scientific, the court should follow the same general approach, adapting the *Daubert* criteria as needed for the purpose of assessing reliability. *See Kumho, 526 U.S. at 150*.

[HN9] As for the second step of the analysis, the court must consider whether the methodology or theory is appropriate for the particular issue or task for which it is being used, and must also assess whether the witness is applying it in a manner that ensures a reliable linkage between the facts that he is examining and the conclusions that he is announcing. As the Supreme Court has noted in this context:

> Conclusion and methodology are not entirely distinct from one another. Trained experts commonly extrapolate from existing data. But nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence which is connected to existing data only by the *ipse dixit* of the expert. [*24] A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered.

*General Elect. Co. v. Joiner, 522 U.S. 136, 146, 139 L. Ed. 2d 508, 118 S. Ct. 512 (1997)*.

Bearing these criteria in mind, we turn to the record before us. [HN10] In assessing the adequacy of Dr. Clemons's proposed testimony, we note that it is plaintiff's burden to demonstrate that it satisfies the relevant criteria. *See, e.g., Zaremba v. GMC, 360 F.3d 355, 358 (2d Cir. 2004)*; *Moore v. Ashland Chem., Inc., 151 F.3d 269, 276 (5th Cir. 1998)*. Plaintiff fails to do so in this case.

B. *What Dr. Clemons Did*

Dr. Clemons was charged by Lava with the task of arriving at an estimate of the revenues that plaintiff would have earned through October 31, 2002 had the September 11 attack not occurred. As explained in general terms in his deposition, he started by positing an estimate of the total volume of business potentially available to Lava if it had been able to capture the entire available market for its products and services. To do so, he adopted an estimate orally conveyed to him by Lava employee George Hessler in the summer of 2004. (Dep. Tr. at 74, [*25] 90, 108-10, 266-67, 269).

Clemons then adopted an estimated rate of client "capture" on a month-by-month basis during the relevant period, that is, an estimate of how rapidly and broadly plaintiff would have signed up potential customers if the September 11 attack had not occurred. (Dep. Tr. at 113-14). [9] Again, he relied on Mr. Hessler to provide such a set of estimates, and he viewed Hessler's estimates as "plausible" because he considered Lava's most successful product -- the so-called Color Book -- to be a "must have" item for at least the over-the-counter ("OTC") portion of the securities industry. (Dep. Tr. at

63-64, 66-67, 113-18). [10] He also adopted Hessler's estimate that, in the period between September 2001 and October 2002, Lava would have captured approximately 75 percent of the potential market. (Dep. Tr. at 13-14, 147-49). [11]

9 The breadth of such progress may be viewed as equivalent to the extent of the business -- that is share volume -- that Lava would have acquired at any given firm. Although a particular desk at a trading firm might sign up with Lava, that does not mean that all desks within the firm that could use a particular product or service would do so (Dep. Tr. at 77), and the extent of such sign-ups and utilization would presumably impact revenues to Lava.

[*26]

10 When quizzed at his deposition about the basis for his assertion that the Color Book was a "must have" item, Clemons referred vaguely to people at Lehman and "Citi", to whom Lava had referred him, and he cited a friend who worked at a New Jersey office of Merrill Lynch, and whose identity Clemons declined to disclose. (Dep. Tr. at 123-24, 125-26).

11 According to Dr. Clemons, Hessler reported -- and he assumed -- that as of mid-September 2001 Lava had acquired 7.9 percent of the relevant potential OTC market. (Dep. Tr. at 108-10, 145).

According to Dr. Clemons, Hessler's revenue estimates for the relevant period, if graphed, would yield an S-shaped curve. (Dep. Tr. at 253-55). He suggested that such a curve lends plausibility to Hessler's projections, because new products, when successfully placed in the market, typically generate sales volume and revenue over time in an S-shaped curve; that is, initially sales are slow, then they accelerate as the product is accepted more widely, and then they slow down as the market approaches saturation or sales are constrained by the entry of competitive [*27] products. (Dep. Tr. at 114-20; *see also id.* at 146-48, 261). [12]

12 In fact, as defendant properly notes, Hessler's projections, which Clemons adopted, reflect virtually a straight line, at least through early 2002. (*See* Deft's Dec. 28, 2004 Reply Memorandum at Ex. C; Goldman Oct. 6, 2004 letter to the Court, Ex. 2, Report at p. 14, Table 1).

In adjusting Hessler's estimates, Dr. Clemons reported adding a few refinements. These included a modest reduction for a portion of the revenue estimates to account for the impact of decimalization by the Exchange, a further minor decrease to account for some competition by at least one other company that he viewed as a late-arriving competitor for a portion of Lava's business and to account for the possibility that some trading houses would develop their own products in-house, and a small adjustment to reflect a revenue cap that limited payments to Lava from Merrill Lynch. (Dep. Tr. at 74-75, 93-94, 98, 130-31, 144, 245-48, 334-36, 368-70).

Finally, Dr. Clemons [*28] reported doing a sensitivity study during the period after preparation of his two reports. (Dep. Tr. at 233). As he described the study, he retained his assumptions that Lava had begun the relevant period with approximately 7.9 percent of the potential market and would have ended it with 73 percent of the market for the "must have" product. (Dep. Tr. at 256-58, 282-83). He then varied the rates of acquisition of new business during the relevant period in different directions -- that is, both up and down -- to see how such changes would affect the total of projected revenues. (Dep. Tr. at 297-98, 326, 329-30, 342-43). He concluded that, under a range of varying assumptions, revenues would very likely have totaled somewhere between 90 and 110 million dollars (presumably reflecting an actual revenue loss to Lava of between approximately 60 and 80 million dollars). (Dep. Tr. at 289-90).

Dr. Clemons also undertook to determine the effect on Lava's revenues, in the actual post-September 11 scenario, of Hartford's failure to pay two million dollars to Lava in December 2001. In doing so, he simply shifted, by three months, Lava's actual revenues during the period from January through October [*29] 2002. (Dep. Tr. at 390).

C. *The Witness's Qualifications*

In attacking Dr. Clemons's proposed testimony, defendant initially argues that, entirely apart from the serious problems with his methods and their application in this case, he is simply unqualified to perform the form of analysis that he is proposing to do for the trier of fact. (*See* Deft's Nov. 15, 2004 Supplemental Memorandum in Support of Its Motion to Preclude at 17-19). Although

defendant's challenge in this respect has some force, we find it unnecessary to rely on that ground in determining that the testimony should be precluded.

Judged by Dr. Clemons's extensive curriculum vitae -- which is as long as, and far more detailed than, his expert's report (*compare* Oct. 6, 2004 Goldman Letter to the Court at Ex. B (Expert Witness Statement) *with id.* at Ex. B (Vita of Eric K. Clemons)) -- he has considerable experience in the areas of information technology for the financial markets, corporate strategic decision-making, pricing strategies and aspects of marketing. He has focused on the impact of evolving information technology on the securities industry and has been called upon on occasion to undertake predictive [*30] exercises concerning the anticipated success of new products and services. (Dep. Tr. at 10-24, 45-49; Oct. 6, 2004 Goldman letter to the Court, Ex. B (Vita at 1-3)).

Defendant points out that Clemons is neither an economist nor an accountant and does not profess any expertise in either area. (Dep. Tr. at 14, 31). Indeed, by his own testimony, Clemons assiduously avoids accounting data. (Dep. Tr. at 31). Moreover, he has not previously undertaken the type of exercise that he was requested to do here, that is, to conduct a systematic and reasonably precise assessment of how a business would have performed over a specified period of time but for the occurrence of an intervening event. (Dep. Tr. at 27, 34, 45). [13]

> 13 In fairness, we note that Dr. Clemons was assisted by an economist and an accountant. On the current record, however, their actual role is not described in any detail, and what specific analyses they performed is left largely to the imagination and certainly not documented. (*See* unsworn Affidavit of Eric K. Clemons, dated Dec. 8, 2004, at PP4.5.1-4.5.3, 7.1.1.-7.9; Affidavit of Dr. Glenn D. Meyers, sworn to Dec. 8, 2004, at PP4, 5).

[*31] Defendant also points out that although Clemons has testified in a number of fora on a diverse range of topics, none involved anything remotely approaching the nature of the task that he was requested to perform in this case. Thus, for example, he has prepared reports or testified about the quality of softwear provided by a vendor to a bank (Dep. Tr. at 10), about the role of smart cards in banking in Europe and the United States, as well as the degree of competition between various card issuers (Dep. Tr. at 11-13), about technical and financial constraints in code development for softwear design and its relationship to the Y2K issue (Dep. Tr. at 16-18), about the design and utility of a patented program owned by Lava (Dep. Tr. at 19-20), about the uniqueness of a patented invention owned by Priceline (Dep. Tr. at 21), and about the technology of trading support systems. (Dep. Tr. at 22-24).

It is at least questionable whether Clemons has the training and experience to offer a reliable estimate of lost or future revenues for a product, even one within the area of his technical expertise. Indeed, to the extent that he has apparently previously applied the type of analysis he utilized [*32] here, it was to assess future strategies by businesses (Clemons Aff. at P3.5.3; Dep. Tr. at 352 (models used to make "policy recommendations"), [14] an exercise that does not meet the requirement for a lost-profit assessment, which demands a far greater degree of precision in analysis. *See, e.g., Kenford Co. v. County of Erie, 67 N.Y.2d 257, 261, 493 N.E.2d 234, 502 N.Y.S.2d 131, 132 (1986)* (requiring "reasonable certainty"). This pattern suggests a serious question as to whether he is even minimally qualified to be certified as an expert for the purpose of doing a lost-revenue estimate.

> 14 He reports that he is "qualified to express expert opinion on matters of dynamic competitive strategy in the area of high technology competition in a financial services company." (Clemons Aff. at P3.4.6).

In any event, we need not rest our recommended resolution of defendant's application on the relatively narrow ground of qualifications, that is, the precise contours of the witness's training and experience, which are plainly [*33] extensive in the particular areas of his expertise. Rather, the methods that he has chosen to use and his application of them to the facts of this case provide ample bases for recommending against allowing him to testify to his revenue-loss opinions.

D. *General Reliability of the Method*

We start by noting that, despite the use of terminology that might imply a degree of rigor in analysis -- for example, capture rates, S curves, good-faith curves and *pro forma* revenue measurements -- the actual process undertaken by Dr. Clemons to determine losses caused by the September 11 events bears none of the

hallmarks of a reliable method for measuring lost income. The same conclusion applies to his calculation of Lava's delayed-payment loss.

To calculate the September 11 lost revenue, in substance he accepted the orally communicated estimates of Lava's employee, Mr. Hessler, as to the essential numbers that would drive his ultimate conclusions -- that is, the potential size of the market for Lava's products during the pertinent period, Lava's actual and potential customers, the rapidity and extent of client "capture" that would have taken place absent the September 11 attack, and [*34] the extent of market penetration (about three-quarters of the potential OTC market: that would have occurred by October 31, 2002 in such conditions. He also did not contemporaneously document any of the conversations that he had with Mr. Hessler concerning these matters, [15] and he did not require Hessler to substantiate with any specificity the basis for his estimates. He also chose not to take into account any hard data as to Lava's pre-September 11 performance and its own nearly contemporaneous (that is, July and August 2001) projections of expected performance for the pertinent period.

15 Indeed, it was only just before the first deposition session that Clemons asked Hessler to prepare a written reconstruction ("crib notes") of comments that Hessler had made to him months before about the size of the available market. (Dep. Tr. at 271; Transmittal Affidavit of Wystan M. Ackerman, Esq., sworn to Nov. 15, 2004, at Ex. 11).

The impressionistic nature of this aspect of the process is best captured by Clemons's [*35] own descriptions of some of what occurred. Thus, in his deposition he admitted giving no weight to Lava's far lower July 2001 sales projections for the relevant time frame -- even though these had been done before Lava had an incentive to overstate its prospects -- because he had spoken to Lava representatives in July or August 2004, and "their sense was" that the old projections (dating from only one or two months before the loss) were "too conservative". (Dep. Tr. at 120-22). [16] The choice to disregard these projections enabled Clemons to arrive at an estimate of revenue that was approximately three times as large as the company's own July 2001 projections [17], and that assumed that in October 2001 Lava would have doubled its assumed September revenues, that the next month it would have tripled the September assumed revenues, and that in December it would have quadrupled those figures. (*See* Goldman Oct. 6, 2004 letter to the Court, Ex. 2, Report at p. 14). [18]

16 Clemons has never explained why these projections were unduly cautious.

17 *Compare* Goldman Oct. 6, 2004 letter to the Court, Ex. 2, Report at p. 14 (projecting $ 97.4 million in revenue for September 2001 through October 2002), *with* Ackerman Trans. Aff. at Ex. 8 (Lava's Business Plan & Investment Offering dated July 26, 2001 (projecting revenue of $ 32.6 million for 2002)).

[*36]

18 Clemons's projected revenue numbers for September through December 2001 are: $ 1,124,450.00 (September); $ 2,274,000.00 (October); $ 3,391,637.00 (November); and $ 4,814,123.00 (December). By comparison, according to belatedly produced Lava documents, Lava's own August 2001 gross-revenue projections for those months were only: $ 488,000.00 (September); $ 703,000.00 (October); $ 827,000.00 (November); and $ 924,000.00 (December). *See* Affidavit of Rhonda J. Tobin, Esq., sworn to Jan. 3, 2005, Ex. 19 -- LKR011164, LKR011170) (filed in support of Hartford's Motion for Sanctions).

As for the potential size of the market, Hessler provided these numbers to Clemons on a desk-by-desk basis. Clemons just "eyeballed" them and had a conversation with Hessler about them during which Hessler assured him that the estimates were reliable. Clemons did not seek any form of specific verification or documentation for them from Hessler. (Dep. Tr. at 134-38). Moreover, although Hessler reportedly used so-called comparables for many of the potential customers [19] -- that is, data from other, purportedly similar, [*37] firms to estimate potential business for Lava from the targeted firm -- Clemons never inquired as to the specifics of the firms that Hessler had used as comparators. (Dep. Tr. at 270-72). [20]

19 As of September 2001, Lava had signed up only seven of the sixteen firms that Clemons posited as the plaintiff's largest customers for the pertinent period. (*See* Ackerman Trans. Aff. at Ex. 10).

20 As explained by Clemons:

> Q: Okay. Did you verify when -- the numbers, meaning the potential revenues you used came from Mr. Hessler, is that correct?
>
> A: Let me try that. The numbers that are keyed in for the size of the available desks are, in fact, from Mr. Hessler. But as we discussed the last time, I would take a look at a number and I would say why is that low and he would say it was a cap. And I would say why is that cap high and he would say because they bought a firm that specializes in that area. And I would say, well, how do we know and he'd say because we have invoices that represent full trading. How do you know. Well, they are the same size as Bear and we have invoices for Bear. So the over-the-counter desk at Bank of America ["B of A"] would be roughly the same at saturation as Bear. And I would say B of A, why are they that big and he'd say well, B of A purchased. And I'd say, right, I forgot that.
>
> So in other words, there was a lot of debate that went on firm by firm and even desk by desk before I accepted the numbers.
>
> Q: And none of that discussion or that debate was memorialized?
>
> A. That's correct. And my sense was the best source for that would be George [Hessler] . . . . But the data here after debate actually seems pretty comfortable to me. (Dep. Tr. at 262-64). As noted, the only documentation even of these discussions took the form of "crib notes" created by Hessler at Clemons's request several months later, in October 2004, to use at Clemons's forthcoming deposition. *See* p. 28, n.15, *supra.*

[*38] With regard to the proffered opinion of Clemons that Lava would have won control of 73 percent of the potentially available OTC market by the end of October 2002, in contrast to its actual 16 percent at that time (*see* Ackerman Trans. Aff. at Ex. 12), Clemons again relied on Hessler and offered the following explanation for adopting Hessler's number:

> I asked [Hessler], you know, why not 70, why not 50, why not 90. And his sense was that he captured about 70 to 75 to 80 percent of the market, in a time period that was delayed by six months. And if -- in other words, we shift the adoption 75, 73, 78 percent saturation, it seems about the saturation he got.

(Dep. Tr. at 257-58). When asked about his assertion that Lava had gotten three-quarters of the potential OTC market by the Spring of 2003, Clemons responded:

> You know this is a conversation which is, therefore, you're not memorialized in notes. It was a conversation where he said within roughly six months of the end of my analysis, which was we went through what, October of '02, and said by, you know, early '03 he had captured 12 of the top 16 firms, which is what, 75 percent. He had another -- by other [*39] calculations he'd captured 14 of 16 because two of them were trading with him a little bit. So now he thinks he's got 80 percent. I figure something between -- just below 75 percent would have been correct.

(Dep. Tr. at 259-60). Clemons later confirmed that he had not verified Lava's claim that it had attained 73 percent of the OTC market in the Spring of 2003. (Dep. Tr. at 322-23) ("I think the most accurate way to respond is that as I sit here, Lava assured me that their total revenues for a period roughly six to eight months out were equivalent to my pro forma revenues for 2002, for October 2002.").

When asked for his basis for assuming that whatever

sales level Lava purportedly achieved in the Spring of 2003 would have occurred in October 2002 but for the September 11 events, Clemons stated:

> Well, you know, it's -- the question is if we hadn't lost two months, really, when the markets were crippled, if we hadn't lost four months when Lava was financially crippled, we'd have been six months ahead of ourselves. Now, I can -- if -- there are ways to fit actuals before and actuals after and do the kind of revenue shifting that we did for the good faith curve. But it seemed [*40] reasonable to peg the far end. I don't want him giving himself a hundred percent. And it seemed reasonable to peg the far end as where he would have been but for a six month delay.

(Dep. Tr. at 260-61). [21]

> 21 Clemons did not suggest the facts upon which he based his contention that the markets were "crippled" for two months or that Lava was "financially crippled" for four more months, precluding product development and hiring of sales staff. As we will see, the record reflects quite the opposite. *See* pp. 47-49, *infra.*

Faced with the fact that by October 31, 2002 Lava had acquired less than twenty percent of the potential OTC market, Clemons recited his belief that the difference between this figure and Hessler's projected 73 percent control resulted from the events of September 11. In support of that belief he offered the following:

> Again, the sense I have is that they were delayed approximately six months, and the reason for that is clearly October, November they were crushed. Just [*41] as clearly, December, January, February and March they were financially starved. Clearly through January February they were less than fully connected.

(Dep. Tr. at 308). Ultimately, however, when asked for his explanation for the 67-million-dollar difference between the revenues Lava actually earned and his estimate of *pro forma* revenues for the same period, Clemons said simply that he had asked Lava's representatives

> could they have achieved the 97 in that time period but for. In other words, I wasn't looking for an explanation of the discrepancy [of 67 million dollars]. The explanation of the discrepancy is contained in thousands of pages of deposition transcripts and it's contained in the rubble [of the World Trade Center].

(Dep. Tr. at 451-52).

As Clemons explained his method, he was specifying "the total size of the pool" and finding "an adoption rate," "a pricing rate," and "a competitive impact rate," and putting them together to "see what a revenue stream looked like." Admitting that this approach did not involve an accounting analysis, he conceded the need for "a reality check," and he said that his "reality check is the discussion I had with [*42] George [Hessler]," that is, "Did you ever hit those volumes. The answer is yes, we did in '03. Did you hit those revenues. No, we didn't because by '03, we were giving price rebates back." (Dep. Tr. at 452-53).

As for the speed of the hypothetical growth projected by Hessler and adopted by Clemons, the witness was asked to state the basis for projecting the growth in Lava's revenues -- by way of example -- in October 2001 and in November 2001, representing roughly a 200 percent growth in revenues in two months:

> Q: Did you do anything independently other than speaking to [Lava representatives] to verify through analogous products or markets whether they could have ramped up from 7.9 percent in September to 24 percent in November given their financial situation, excluding 9/11?
>
> . . . .
>
> A: The answer is only sort of. And here's the sort of. The sort of is if they signed a large firm like Cantor. They had two or three firms, I remember, with very high probability of signing up. And if the firm had already ordered the lines, which Cantor had, could they have lit up a

> comparable volume in October. I believe they could have. Could they have lit up a comparable volume in [*43] November. Well maybe it should be another eight percent and that would give me 24. Could they have done even more in December. If they had -- if they signed up two large clients, not two large clients, if they had continued two months of spectacular growth, they would have acquired the staff.
>
> I don't find the numbers implausible, given the rate of growth in September. I don't want the numbers implausible, given my what's the word I want -- anecdotal experience with other really attractive corporate products launched at the right time.

(Dep. Tr. at 302-03).

Having pegged the start of the *pro forma* revenue curve at 7.9 percent of the presumed total OTC market for September 2001 and at 73 percent of the market as of October 31, 2002, Dr. Clemons relied on Hessler's guesses about monthly revenue rises. Although Dr. Clemons adjusted these numbers modestly to account for the effects of (1) competition, (2) decimalization and (3) a revenue cap on payments by Merrill Lynch, he provided no systematic basis for the nature or degree of the discounting.

With regard to Clemons's estimate of revenue loss attributable to delayed payment by Hartford, his explanation for his three-month [*44] shift of revenue was equally diffuse. [22] If

> that money would have been forthcoming in December, Lava could have on the basis of that, hired additional personnel, they could have taken action sooner than they did. People could have been hired to light up, which is relatively straightforward work, do the installation while their developers continued to do the more sophisticated work required to light more customers. . . . The sense I had from Lava, and this is based on numerous depositions and interviews, is that if they had had money in December, by January they could have been operating at the level that they did not eventually achieve until April.

(Dep. Tr. at 392-93). When asked about the specific basis for this assertion, Clemons retreated to saying that it was based on a conversation with one Lava official, Kamran Rafieyan, and that

> his sense was -- and again he convinced me of this -- his sense was that with money in hand in December, people being hired in December, he could be -- his new people could be reinstalling and his existing people could be installing, and it would have shifted his revenue curve by three months.

(Dep. Tr. at 394-95). [23] [*45]

> 22 Clemons was quite specific as to his methodology: "The calculations were really appallingly simple. We know what the actual revenue was in January '02, which is shown here as $ 1,681,762, we know what the actual revenue was for April which was $ 2,284,301. I took the April revenue and put it in January. I took the May revenue and put it in February. And I took the June revenue -- I just moved each of the revenues three months over in time." (Dep. Tr. at 390).
>
> 23 Clemons also conceded that, in the course of this discussion, he did not ask Rafieyan "whether he had anybody he wanted to hire." (Dep. Tr. at 395).

Clemons's approach fails to offer a reliable basis for his revenue-loss estimates. As observed, he appears to have done the following: (1) taken as his starting point Lava's hypotheses about market potential and "but for" performance at a time when the company had every incentive to maximize its guesses as to how it would have done "but for" September 11, (2) ignored the client's far lower estimates [*46] made shortly before the event in question but at a time when Lava did not have the same incentive to exaggerate its prospects, (3) adopted Lava's proffered numbers after having "eyeballed" them and having had unrecorded and undocumented general discussions with the company's representative about his "sense" of their accuracy, (4) assumed *a priori* that if

Lava achieved a certain higher volume six to eight months after the pertinent period, that increment would have been achieved during the earlier period but for the loss of the World Trade Center premises, [24] (5) declined to look at available data that would have shed a glaring light on the absence of a factual basis for key representations by Lava on which he was relying, (6) and inferred the accuracy of Lava's own revenue-loss guesses based on the fact that, if charted, they would reflect an S-shaped curve.

> 24 "So my job was not to explain the discrepancy between 97 and 33. That's in the catastrophic events of 9/11. My job is to come up with a number and find out if the number is, in fact, achieved within a reasonable period of time later. In other words, but for the delay, could they have achieved those volumes. And they could have." (Dep. Tr. at 453).

[*47] If we look to the pertinent *Daubert* factors, this approach is indefensible. First, on its face, Clemons's method is designed to avoid confronting self-interested theory with measurable facts. [HN11] That the required exercise is unavoidably hypothetical does not permit a purported expert witness to use his credentials to legitimize what amounts to a client's wishes. Clemons began with the client's guesses and ultimately relied on them because his "sense" was that they were plausible, while he avoided meaningful inquiry into whether they had a basis in fact. Such an approach is plainly inconsistent with the requirement that the expert use "scientific" or "professional methods." *Zenith Elecs. Corp. v. WH-TV Broad. Corp., 395 F.3d 416, 419, 2005 WL 107184, *2 (7th Cir. 2005). See 395 F.3d 416, [WL] at *3* (rejecting use of plaintiff's internal projections to judge likely future revenues "but for" defendant's misconduct).

As the Seventh Circuit has recently noted, [HN12] a putative expert who seeks to estimate "but for" sales cannot rely on his "industry expertise" or its equivalent as a substitute for a methodology that looks to specific data and proceeds to [*48] make statistically or scientifically valid inferences from the data. *See 395 F.3d 416, [WL] at *2-3*. "Intuition won't do." *395 F.3d 416, 418, [WL] at *2*. The witness must look to comparable markets, and if they differ from the market for which he is offering predictions, he must utilize professionally accepted methods of making comparisons -- even of "unique" markets -- that will take into account the uniqueness of the comparators. *See, e.g., 395 F.3d 416, [WL] at *2* (noting availability of multi-variate regression analysis as one tool for permitting such comparisons). (*See also* Levy-Sachs Trans. Aff. at Ex. X). [25]

> 25 As Judge Easterbrook noted in *Zenith*, if there are reasons why such a comparison is impossible, the party proffering the expert must prove such impossibility, and the *ipse dixit* assertion of the expert that the market in question is "unique" does not constitute such proof. *See 395 F.3d 416, [WL] at *2*.

Clemons failed to undertake any such analysis. He simply based his opinions on estimates or guesses supplied by the client. That [*49] is not adequate. *See, e.g., 395 F.3d 416, 420, [WL] at *3* (rejecting, as "doubly" unacceptable, reliance on party's "internal projections," "which rest on its say-so rather than a statistical analysis"). Moreover, although he might have undertaken some form of reality check on his projections -- for example, by comparing the S curve derived from Hessler's data to ones for comparable products or even, less satisfactorily, by systematically comparing Hessler's estimates with Lava's prior performance and prior projections for the same period, together with documented vetting of the underlying data on which Hessler had purportedly relied -- he did none of these things. (*E.g.,* Dep. Tr. 63-64, 68-69, 71-72, 108-09, 321-22, 448-49). [26]

> 26 Even Clemons acknowledged the need for a "reality check", but described his check as consisting of conversations with Hessler. (Dep. Tr. at 453). A party's "say-so rather than a statistical analysis" is not a reality check and is not useful science. *See Zenith, 395 F.3d at 420, 2005 WL 107184 at *3*.

[*50] Second, plaintiff offers no suggestion that Dr. Clemons's approach has been or can be tested for reliability as a measure of lost revenue. [HN13] "An expert must offer good reason to think that his approach produces an accurate estimate using professional methods, and this estimate must be testable. Someone else using the same data and methods must be able to replicate the result." *Zenith Elecs. Corp., 395 F.3d at 419, 2005 WL 107184, at *2*. Clemons's general impression about both Lava's business prospects and the plausibility of the numbers his client offered him does not permit

such replication. *See, e.g., 395 F.3d 416, [WL] at *2* ("Shapiro's method, 'expert intuition,' is neither normal among social scientists nor testable -- and conclusions that are not falsifiable aren't worth much to science or the judiciary.").

Third, the particular methodology identified by Clemons as central to his analysis is not generally accepted as an appropriate means of ascertaining lost revenues. Indeed, Clemons himself conceded that the so-called S-curve analysis is normally done for the far more impressionistic purpose of estimating the likelihood of future success or failure for a proposed business venture, [*51] and that he had never used one -- or apparently known of such use -- for forensic purposes. (Dep. Tr. at 349-52).

The inappropriateness of such an approach to the current lost-income analysis was underscored by a recent ruling of the Tenth Circuit adopting a trial court's rejection of the use of an S-curve to determine lost profits. That ruling was based in part on the conclusion that "S curves are not appropriate for a young company . . . that claims to have a vast untapped market in need of its unique product." *Lifewise Master Funding v. Telebank, 374 F.3d 917, 929 (10th Cir. 2004), aff'g Lifewise v. Telebank, 2003 U.S. Dist. LEXIS 26340, Case No. 2:00CV0495B, slip op. (D. Utah March 5, 2003)* (Deft's Supp. Memorandum at Ex. B).

The accuracy of this observation is supported by plaintiff's own effort to demonstrate that S-curve analysis has been the subject of peer review and publication, or its equivalent. Although plaintiff proffers a weighty compendium of publications that refer to the use of an S curve (*see* Meyers Aff. at Exs. 1-12), none reflects its use for income-loss measurement for a recently-created product or service that is likely to be tapped by a narrow [*52] market, as distinguished from mass-market consumer products the prospective use of which over a period of years is being assessed. (*See, e.g., id.* at PP17, 35, 40-41, 43, 46, 48 & Exs. 1-2). Furthermore, these estimates appear to concern only types of products -- whether cell phones or faxes or VCRs -- and not specific competing brands. (*See, e.g., id.* at Ex. 1; Dep. Tr. at 125, 291-94). [27]

> 27 The difficulty with Clemons's approach is highlighted by his explanation for paying no attention, for example, to the details of whether Lava's sixteen principal actual or potential customers as of September 2001 were in a position, or likely, to give Lava significantly more business in the coming months. While conceding that he had ignored these considerations, he excused that failing by asserting that he was using an "actuarial" approach, which does not require knowledge -- for example -- of an individual's health and other circumstances in order to measure life expectancy. (Dep. Tr. at 280-81, 358-59, 430-31). Such actuarial tables rest, however, on the experience of millions of people over many years. That is far different from predicting, with any reliability, the amount of revenue likely to be generated over a period of months from a relative handful of firms, some much larger than others, and some with far more vibrant prospects as a customer of Lava than others.

[*53] Other than for such uses, plaintiff offers no evidence that Clemons's general approach has been accepted in the relevant profession. As noted, the record is bare of any indication that S-curve analysis has been used to estimate actual revenue losses, a point that Clemons himself has virtually conceded. (Dep. Tr. at 350-51). In fact, the pertinent literature recognizes that S-curve analysis is utilized to assist decision-making regarding product development and marketing strategies, and rests on the evaluation of product performance over many years. (*See, e.g.,* Meyers Aff. at Exs. 1-2; *see also* Levy-Sachs Trans. Aff. at Ex. O). The commentators have also repeatedly noted the ease with which such analysis can be manipulated to yield almost any result sought by the analyst and its strong tendency to produce wildly unrealistic projections of extraordinary sales growth. (*See, e.g., id.* at Ex. W. *Accord, Lifewise, 2003 U.S. Dist. LEXIS 26340, Case No. 2:00CV0495B, slip op. at 41-42*).

Finally, Clemons conceded that he has not attempted to measure or estimate any error rate for this method. (Dep. Tr. at 303-04). Although he noted that he had done a sensitivity analysis after the preparation [*54] of his two reports, he conceded that if the data he used in deriving his loss estimates were systematically biased, the sensitivity analysis would not detect such error. (Dep. Tr. at 361). Moreover, he conceded the obvious point that if the factual representations by Lava on which he had relied were incorrect, so too would be his estimates. (Dep. Tr. at 381-82). Furthermore, as we have noted,

Clemons chose not to attempt any comparisons with the real-world experience of other technology-based products -- either in the securities industry or elsewhere -- in assessing the plausibility of the S-shaped curve designed by Hessler that he has blessed in his deposition testimony.

With regard to Dr. Clemons's estimate of the loss caused by a delayed payment by Hartford, as we noted, he simply relied on Mr. Rafieyan's "sense" that, with more money in December 2001, he could have speeded up the process of expanding his client base and that this would have "shifted his revenue curve by three months." (Dep. Tr. at 294-95). This approach by Clemons betrays the same deficiencies as his method for estimating the lost revenues attributable to September 11. [HN14] Reliance on -- and indeed the rubber-stamping [*55] of -- the client's vague, self-interested and untested beliefs does not constitute a reliable method of estimation, does not reflect any meaningful expertise on the part of the estimator, and most assuredly does not assist the trier of fact.

In sum, as a generic matter, plaintiff has failed to show that Clemons's approach to loss estimation meets the basic reliability criteria of *Rule 702*, as elaborated by *Daubert* and its progeny. [28] For reasons that we will further note, his analysis in this case would not pass muster in any event because it does not square with the facts of record.

> 28 In moving for relief, defendant also argues that Dr. Clemons's assessment does not square with the terms of the governing insurance policy. (*See* Deft's Supplemental Memorandum at 28-30; Deft's Reply Memorandum at 35-42). We do not rely on this argument since (1) Dr. Clemons is simply proffering an opinion as to total lost revenues, (2) another witness, apparently Mr. O'Connor, may be able to adjust those numbers to fit the criteria of the policy, and (3) the proper interpretation of the policy is apparently in dispute and will presumably be resolved either by the court on motion or by the trier of fact.

[*56] E. *Failure of Key Factual Premises*

As we have noted, Dr. Clemons constructed a model that was premised on a variety of assumed facts, and failed to verify the validity of those assumptions. Upon examination, a number of crucial factual premises for his model are plainly unfounded.

The measurement of lost revenues that Clemons offered rested on the belief that Lava had obtained approximately 73 percent of the OTC market for its Color Book product by about March 2003. According to Clemons, that actual performance legitimized the estimate of George Hessler that, but for the September 11 attack, Lava would have attained 73 percent of the potential market by October 31, 2002. In fact, however, it appears that by the Spring of 2003 Lava had managed to acquire only a 24-percent share of the OTC market. (*See* Levy-Sachs Trans. Aff. at Ex. S).

On a related point, Clemons projected an extraordinarily steep one-year revenue growth, and he based that projection on the assumptions that the Lava product was a "must have" item and that Lava faced no real competition in the early part of the relevant period. In fact, however, Lava itself recognized before that time that there were potential [*57] competitors in the market, and a recent report on the industry has noted that as of 2004 only 40 percent of the industry was using order-management systems. (*Id.* at Exs. N, P, Q (Rafieyan Dep. at 12-23), R).

In the same vein, the analysis proffered by Clemons assumed that Lava would enroll 160 trading desks in the 16 firms that were the subject of his assessment. (Ackerman Trans. Aff., Ex. 7). By contrast, as of March 2003 (the time at which Clemons hypothesized that Lava had achieved the growth that it would otherwise have attained by October 31, 2002), Lava was connected to only 40 desks. (Levy-Sachs Trans. Aff., Ex. T. *See also* Affidavit of Stephen E. Goldman, Esq., sworn to Dec. 16, 2004, Ex. 17 (filed in support of Hartford's Motion for Sanctions)).

In plaintiff's extensive opposition to the current motion, it discloses that Clemons's model was premised on the assumption that Lava would have new product offerings during the relevant period. (Meyers Aff. at P33). Clemons, however, conceded that delays in product release did not adversely affect Lava's revenues during the pertinent period. (Dep. Tr. at 447-48; *see also id.* at 63, 57, 182).

Still another factual error [*58] is conceded by Clemons, this time with regard to the effect of the revenue caps that Lava granted to a number of clients. Clemons now admits that he understated the effect of

these caps, which he now describes as totaling 8.75 million dollars. (Clemons Aff. at P6.4.7; Meyers Aff. at P25). Moreover, although Clemons describes the caps as limited to specific firm employees at specific desks (Clemons Aff. at P6.4.3), that assertion is contradicted by Lava's own spreadsheets, which describe several of the caps as firm-wide and refer to another as applicable to all firm employees. (Ackerman Trans. Aff. at Ex. 7; Levy-Sachs Trans. Aff. at Ex. V). These errors, although limited to one adjustment in Clemons's analysis, are emblematic of the divorce between what Clemons did and the factual basis for any such analysis.

As for Clemons's estimate of delay damages, he assumed that Hartford should have paid Lava two million dollars in December 2001. Apart from the other problems with Clemons's three-month revenue shift -- which also does not embody any accepted methodology or factual basis -- his central assumption is plainly false. Lava did not file even a preliminary business interruption claim [*59] until January 2002, and it was in the amount of only $ 933,000.00. (Levy-Sachs Trans. Aff. at P21 & Ex. EE).

Finally, a very recent -- and untimely -- production of documents by plaintiff [29] has yielded additional information undercutting several key factual premises of Clemons's analysis. As noted, Clemons adopted the estimates of Hessler about revenue generation based on the assumption that, absent September 11, Lava would have achieved by October 31, 2002 the competitive position he believed that it had accomplished six months later. As he put it, Lava's growth was delayed by six to eight months because -- post-September 11 -- its development people were not working on new products for four to six months since they were tied up with reinstallations, its sales people were also occupied with recovery efforts, Lava was not fully connected for an extended period of time, and the company was "starved" for cash or financially "crushed", which prevented it from hiring more people to restore current customers, thus freeing more experienced staffers to go after new business. (*E.g.*, Dep. Tr. at 200, 308-10, 339, 395).

29 Plaintiff produced thousands of pages of e-mails on December 10 and 13, 2004. (*See* Deft's Dec. 17, 2004 Memorandum for Issuance of Sanctions at pp. 1, 13 & n.3; Goldman Dec. 16, 2004 Aff. at PP16-23 & Exs. 12, 14-21).

[*60] In striking contrast, the new batch of e-mails reflects that Lava was not "financially crippled" or operationally devastated during the six months following September 11, as Clemons suggested. The e-mails show that within a few days after September 11, Lava had located available alternative premises; that it had moved into office and data center space by early to mid-October; that by the week of October 9, 2001 it had resumed trading; that by mid-October it was rapidly reconnecting its clients; that in November 2001 it traded more than one billion shares and -- according to its Chief Executive Officer, Richard Korhammer -- was trading by mid-November at a level twenty-five percent higher than before September 11 [30]; that it was undertaking renewed product development and marketing by October 2001; and that it was hiring new people, including sales personnel, by mid-October. (*See* Goldman Dec. 16, 2004 Aff. at Exs. 13-21; Tobin Aff. at Exs. 2, 4, 5, 6, 7, 8, 11, 12, 13, 14, 16, 22, 23). [31] The same set of belatedly produced documents reflect that by January 2002 Lava had more than doubled its share volume from the record level of November 2001, and that its revenues were climbing [*61] in tandem with the volume of trading. (*See* Tobin Aff., Ex. 22 -- LBM0000000098; *id.*, Ex. 7 -- LKR106050). In short, these documents (1) reflect that plaintiff was neither technologically nor financially "crippled" for six or eight months and (2) demonstrate still further a profound lack of fit between Clemons's proffered opinions and the facts of this case. [32]

30 "Our volume is about 25% higher than it was before the disaster now. We're back up and running." (Tobin Aff., Ex. 5 at LKR107748).

31 Among the more pertinent of the recently produced documents, all drawn from the Tobin Affidavit, are the following: Ex. 2 -- LKR103890, 103765, 103760, 107978, 107986; Ex. 4 -- LSM000000001-4; Ex. 5 -- LKR103454, LKR107748; Ex. 6 -- LKR107883; Ex. 7 -- LKR107050; Ex. 8 -- LKR108305-6; Ex. 11 -- LKR0000000501; Ex. 12 -- LKR0000001115; Ex. 14 -- LKR107450, 103293; Ex. 16 -- LKR107326; Ex. 22 -- LBM0000000021, LBM0000000087, LBM0000000098, LBM0000000139; Ex. 23 -- LKR101920-2).

32 We note as well that as late as July 2002 Lava reported to its Board of Directors that its then-current expectation was that its insurance claim for lost income and related expenses -- which was apparently still being revised -- would end up in the range of three to five million dollars.

(*See id.*, Ex. 22 -- LBM0000000139).

[*62] In sum, apart from the inherent lack of reliability in Clemons's methodology for estimating "but for" revenues, his analysis is premised on a number of crucial factual assumptions that are dramatically belied by the record before us. Necessarily, then, his ultimate opinions plainly lack even arguable reliability and would not meaningfully assist the trier of fact. Indeed, quite to the contrary, they seem geared to promote jury confusion by tying an impressive set of academic and business credentials to a series of very large loss numbers that have not been shown to have any meaningful, much less rigorously analyzed, basis.

F. *Proposed Relief*

As we have noted, Dr. Clemons's report in both its versions and as supplemented by counsel's October 5 letter and accompanying spreadsheets, were plainly not compliant with the requirements of *Rule 26(a)(2)(B)*. Their patent inadequacy deprived defendant of the ability, guaranteed by the pertinent rule, to prepare for trial without engaging in a prolonged and searching follow-up series of deposition sessions. Moreover, the failings of plaintiff's disclosures in this respect are only accentuated by its submissions on the current motion, which [*63] include lengthy affidavits by Clemons and by Dr. Meyers. Those affidavits seek to introduce substantial additional materials and to proffer new analyses and explanations in support of Clemons's numbers. In short, all of the prior inadequate submissions were in the nature of preliminary drafts, with Clemons's theories subject to repeated alteration as they were sequentially called into question. *See, e.g., Salgado, 150 F.3d at 741-42*.

[HN15] This "dance of the seven veils" approach to expert discovery is the precise target of *Rule 26(a)(2)(B)*. Under all of the circumstances, even if Clemons had ultimately arrived at a defensible theory for estimating lost revenues, the appropriate sanction in this case would be preclusion. *See, e.g., Salgado, 150 F.3d at 740-43* & n.6.

In any event, as we have noted, the methodology utilized by Clemons does not meet minimum standards for the admissibility of his opinions about lost revenues under the*Daubert* precedent. His approach is untested, unproven, not generally accepted as appropriate for the type of use to which he puts it, premised on false assumptions, and demonstrably unreliable. Accordingly, he should be precluded [*64] from testifying to those opinions.

From this conclusion, it follows as well that Mr. O'Connor should be precluded from testifying to damage figures. Plaintiff concedes, as it must, that O'Connor's testimony is derivative of Clemons's, in that he relies on Clemons's revenue-loss opinions to determine recoverable damages. (*See* Ackerman Trans. Aff. at Ex. 6 (O'Connor's expert report). If Clemons's opinions are deemed not to be admissible, it follows that O'Connor's conclusions lack an evidentiary predicate and hence also cannot be received in evidence.

*CONCLUSION*

For the reasons noted, we recommend that defendant's motions for sanctions under *Rule 37* and for preclusion under *Fed. R. Evid. 702* be granted.

Pursuant to *Rule 72 of the Federal Rules of Civil Procedure*, the parties shall have ten (10) days from this date to file written objections to this Report and Recommendation. Such objections shall be filed with the Clerk of the Court and served on all adversaries, with extra copies to be delivered to the chambers of the Honorable P. Kevin Castel, Room 2260, 500 Pearl Street, New York, New York, and [*65] to the chambers of the undersigned, Room 1670, 500 Peal Street, New York, New York. Failure to file timely objections may constitute a waiver of those objections both in the District Court and on later appeal to the United States Court of Appeals. *See Thomas v. Arn, 474 U.S. 140, 150, 88 L. Ed. 2d 435, 106 S. Ct. 466 (1985)*; *Small v. Sec'y of HHS, 892 F.2d 15, 16 (2d Cir. 1989)*; *28 U.S.C. § 636(b)(1)*; *Fed. R. Civ. P. 72, 6(a), 6(e)*.

**DATED: New York, New York**

**February 14, 2005**

**RESPECTFULLY SUBMITTED,**

**MICHAEL H. DOLINGER**

**UNITED STATES MAGISTRATE JUDGE**