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IN THE SUPREME COURT OF THE STATE OF ALASKA

RECREATIONAL DATA SERVICES, INC., Appellant, v. TRIMBLE NAVIGATION LIMITED, A CALIFORNIA CORPORATION, Appellee.	Supreme Court No. S–15893 Superior Court Case No. 3AN-11-10519CI

APPEAL FROM THE SUPERIOR COURT
THIRD JUDICIAL DISTRICT AT ANCHORAGE
THE HONORABLE CATHERINE M. EASTER, JUDGE

BRIEF OF APPELLANT RECREATIONAL DATA SERVICES, INC.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Statutes

Other authorities

AUTHORITIES PRINCIPALLY RELIED UPON

Alaska Rule of Civil Procedure 50. Motion for a Directed Verdict and for Judgment.

(a) **Motion for Directed Verdict – When Made – Effect.** A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific grounds therefor. The order of the court granting a motion for a directed verdict is effective without any assent of the jury.

(b) **Motion for Judgment Notwithstanding the Verdict.** Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Not later than 10 days after the date shown in the clerk's certificate of distribution on the judgment, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with the party's motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with the party's motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may set aside the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.

(c) **Same – Conditional Rulings on Grant of Motion.**

(1) If the motion for judgment notwithstanding the verdict, provided for in subdivision (b) of this rule, is granted, the court shall also rule on the motion for a new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed, and shall specify the grounds for granting or denying the motion for the new trial. If the motion for a new trial is thus conditionally granted, the order thereon does not affect the finality of the judgment. In case the motion for a new trial has been conditionally granted and the judgment is reversed on appeal, the new trial shall proceed unless the appellate court has otherwise ordered. In case the motion for a new trial has been conditionally denied, the appellee on appeal may assert error in that denial; and if the judgment is reversed on appeal, subsequent proceedings shall be in accordance with the order of the appellate court.

(2) The party whose verdict has been set aside on motion for judgment notwithstanding the verdict may serve a motion for a new trial pursuant to Rule 59 not later than 10 days after entry of the judgment notwithstanding the verdict.

(d) **Same – Denial of Motion.** If the motion for judgment notwithstanding the verdict is denied, the party who prevailed on that motion may, as appellee, assert grounds entitling the party to a new trial in the event the appellate court concludes that the trial court erred in denying the motion for judgment notwithstanding the verdict. If the appellate court reverses the judgment, nothing in this rule precludes it from determining that the appellee is entitled to a new trial, or from directing the trial court to determine whether a new trial shall be granted.

STATEMENT OF JURISDICTION

Recreational Data Services, Inc., appeals to the Alaska Supreme Court from the final judgment entered on March 18, 2015, and amended on March 22, 2015. [R. 43-47; Exc. 234-36] Notice of appeal was timely filed on April 17, 2015.

This Court has jurisdiction over this appeal pursuant to AS 22.05.010.

ISSUE PRESENTED

Did the superior court err in granting JNOV to defendant, setting aside the jury's verdict on all claims?

STATEMENT OF FACTS

This appeal concerns the superior court's decision to grant JNOV in favor of defendant Trimble Navigation, setting aside the jury's verdict in its entirety. Therefore, this brief sets forth the facts in the record in the light most favorable to plaintiff Recreational Data Services ("RDS"). The Court must adopt this perspective in reviewing the JNOV ruling.[1]

RDS's idea

In January 2008, Alaska resident Brian Feucht imagined a new product that he believed would be valuable for hunters and fishermen. [Tr. 16, 20-22] He was riding his snowmachine when he saw wolves that he wished to hunt, but he did not do so because he was not certain he was at a place where wolf hunting was legal. [Tr. 20] He realized

[1] *See Borgen v. A & M Motors, Inc.*, 273 P.3d 575, 584 (Alaska 2012).

how useful it would be to obtain hunting regulations on a GPS-enabled device, so a hunter could ascertain in the field what regulations applied at his location. [Tr. 21-22]

Feucht had a history of extremely successful business development, focused especially on building and marketing new software. [Tr. 6-19] He brainstormed the commercial possibilities for designing and selling a package of software developed specifically for hunters or fishermen, and for using the data sent back by consumers to drive additional sales. [Tr. 22-25] The iPhone was new at this time. [Tr. 77] It had only a few applications ("apps") specifically for hunters and fishermen, and there was no suite of relevant programs that could be purchased as a package. [Tr. 23]

Feucht consulted a patent agent to discuss whether his idea was patentable. [Tr. 25-26] Coincidentally, the agent had another client who had patented a related product: a program that would display hunting and fishing boundaries on a GPS and alert the user when a boundary is crossed. [Tr. 26-27, 113, 247] Feucht contacted that man, fellow Alaskan Jim Belz,[2] and together the two formed RDS for the purpose of commercializing their ideas. [Tr. 27-28] They envisioned marketing a mobile device loaded with a suite of software tailored to the hunting and fishing communities. [Tr. 28] Their plan was realistic. Belz had the patent, to which he gave RDS an exclusive license for use in the outdoor recreation industry. [Tr. 28, 280, 322] Feucht knew how to build software; he also had established relationships with the outdoor recreation industry, and he had the business knowledge to see how their product idea could be realized. [Tr. 8-10, 28-30]

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2 Mr. Belz's name is misspelled in the transcript as "Bells." [Tr. 27, 247, 248]

The first contract with Trimble: the Nondisclosure Agreement

Feucht contacted Trimble Navigation, an established company that sold GPS-based products. [Tr. 32, 532-33] Feucht had a personal relationship with Ken Wineberg [Tr. 36], the director of federal sales for a Trimble division then called Tripod Data Services (later renamed Trimble Mobile Communication Solutions, or "MCS"[3]). On February 26, 2009, Feucht sent Wineberg a six-page executive summary, introducing RDS and its idea to market three specialized suites of mobile software that Feucht named HuntZone, FishZone, and RecZone. [Tr. 39-40; Exh. 1; Exc. 151-56]

Wineberg promptly forwarded the executive summary to MCS's Director of Strategic Business Development, a man named Chaur-Fong Chen. [Exh. 1] Wineberg's cover note commented: "the idea may have some merit for GPS based information." [*Id.*]

Chen was excited by the proposal and quickly became Feucht's point of contact with Trimble. [Tr. 145, 908] Within a few weeks, Chen sent Feucht a standard Trimble form, a mutual nondisclosure agreement ("NDA"), in which RDS and MCS committed not to disclose confidential information that the other shared in the course of discussing a possible joint product. [Tr. 41-44; Exc. 149-50 (NDA signed on March 12, 2009)]

Both Feucht and Chen understood that Trimble was bound by the signed NDA and that the NDA precluded Chen from sharing RDS's confidential information with Trimble divisions outside of MCS, except on a need-to-know basis. [Tr. 42, 559, 560-61, 1010, 1012, 1025-26; Exc. 150 ¶ 5.2.1]

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[3] The name change is legally immaterial in this appeal. [Tr. 1325-26; *see also* Tr. 536, 558-59, 821, 1010]

Soon after the NDA was signed, Chen discussed RDS's ideas with the president and two directors of Trimble Navigation, and he told Feucht that he would move forward to create a business plan. [Tr. 46; Exh. 3] Chen shared RDS's executive summary with colleagues within a different division, Trimble Outdoors. [Tr. 831; Exh. 12]

Notwithstanding the constraints of the NDA, Chen conferred regularly with representatives of Trimble Outdoors.[4] Chen later acknowledged that Trimble Outdoors was not a party to the NDA, and he never asserted that this division had a need to know the information he provided. [Tr. 1011-12, 1014]

Although the NDA was non-exclusive and allowed each party to continue to discuss its *own* ideas with others, Feucht orally promised Chen that RDS would not shop its ideas to other companies until Trimble "got a fair shake to look at" it. [Tr. 53; *see also* Tr. 55; Exh. 32 (Feucht reconfirmed RDS's commitment to Trimble even after RDS was approached by "another large player in the GPS industry who has expressed strong interest" in RDS's ideas)]

Remington joins the team

To move the project toward market, Feucht sought to involve another established company that could handle marketing while RDS addressed software and Trimble provided the hardware. [Tr. 70] Feucht reached out to his contacts at Remington Arms

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[4] *See* Tr. 153-56, 1012 (describing conversation with Rich Rudow of Trimble Outdoors in October 2009), 1016-20 (conversation with Rudow in September 2010), 1015-16 and 1029-30 (conversations with Rudow in November 2010); Exh. 14 (on October 19, 2009, Chen described planned presentations to Rudow and requested help); Exh. 13 at pp.2-3 (Chen asked to speak with Rudow in September 2010); Exh. 72 (setting up meeting in October 2010); *see also* Exh. 51 (Chen advised Trimble CEO Steve Berglund of need for further conversations with Trimble Outdoors).

and was directed to work with Pat Boehnen, marketing director and project manager. [Tr. 70-71, 349-51] Remington was very positive about RDS's ideas. [Tr. 350, 354, 608-10] By May 2009, Remington was ready to move forward with RDS. [Exh. 33] Boehnen began to work closely with Feucht and Chen. [Tr. 71, 354, 358-60; Exh. 35]

The three partner companies launch the Copper Center Project

In September 2009, the principals of RDS, Trimble, and Remington met together in person for the first time. [Tr. 71-73] At a three-day meeting at a lodge in Copper Center, they hammered out the roles and responsibilities of each of the companies. [Tr. 73-74] They planned to launch a ruggedized phone, built by Trimble, preloaded with a suite of specialized software that RDS would design. [Tr. 74-75, 318, 360-61] Remington would handle marketing. [*Id.*] The men negotiated profit-sharing, job duties, future meetings, and everything else that they required to work together to bring their product to market. [Tr. 318-19]

At the end of the meeting, the men shook hands and agreed they would be partners in a product they code-named the Copper Center Project, and they committed that jointly they would push their product to fruition. [Tr. 72, 262, 362, 478] Though there was no written partnership agreement, both Feucht and Boehnen understood that a partnership had been formed. [Tr. 473-74, 511-13][5] Chen subsequently referred regularly to RDS and Remington as Trimble's "partners," though he denied at trial that he ever meant the

[5] Boehnen later explained that, in his experience, it was common for a written partnership agreement to be signed only when the partners had to commit capital, and that the absence of a written agreement did not mean no partnership was formed. [Tr. 364-66; *see also* Tr. 768 (Paul Miller, an experienced businessman, testified that it is fairly common for a business partnership to exist even without a written agreement)]

word to have a legal meaning. [Tr. 825, 922, 929; Exh. 12; Exh. 15 (Chen's email of September 2010 referred to RDS as a "key partner"); Exh. 58]

Remington would not have committed itself to the Copper Center Project if its executives had not believed that Trimble was a partner with RDS. [Tr. 606, 630; *see also* Tr. 603, 606 (Boehnen's superior, Marc Hill, was convinced by Chen and Feucht's joint presentations to him that Trimble and RDS were partners), 637]

Following the September 2009 meeting in Copper Center, representatives of the three partner companies conferred frequently to keep each other updated on their progress. [Tr. 95] Chen remained the principal point of contact for Trimble, but he reported repeatedly that he was talking with Trimble's CEO. [Tr. 145-46, 178, 406; Exh. 37; Exh. 41] Chen always represented that he and the Trimble executive team were committed to the Project. [Tr. 369-70, 398]

RDS acceded to Trimble's request that RDS not launch its software separately as downloadable apps while it waited for Trimble to develop the hardware, because separate app sales would take away from future hardware sales. [Tr. 76] Trimble's schedule forced RDS to delay building software, because RDS could not design software specific for Trimble's device until Trimble had settled on the hardware design. [Tr. 76-79]

Market research

On behalf of the partnership, Remington took responsibility for two large-scale market research surveys designed to help the partners refine their product to meet consumer demand and to evaluate how many units they could expect to sell. [Tr. 100-01, 370] RDS and Trimble had the opportunity to contribute to developing the surveys so

that each party could learn what it needed to know in order to make good business decisions. [Tr. 179-80, 944-48; Exh. 43; Exh. 66; Exh. 67; *see also* Exh. 44 (survey)]

To finalize and conduct the surveys, Remington retained the same independent company that regularly worked on Remington's product development. [Tr. 180, 376] This use of an independent expert helped ensure that the data were statistically valid and not skewed by the bias of an interested party. [Tr. 180, 376-77, 435-36; *see also* Tr. 422-36 (Boehnen voir dire)] Both large-scale surveys queried a sample from Remington's database of gun owners. The first assessed general interest in the type of product the team was contemplating, and the second posed more specific questions about features that consumers desired. [Tr. 370-71, 381-82, 389-90] The second survey received an atypically large response rate, giving the results even greater validity. [Tr. 389-90, 611-14 (survey was statistically valid research)]

Following the second round of market research, Chen, Feucht, and Boehnen worked together to generate a consolidated profit-and-loss statement that each then would share with his company's executives. [Tr. 180, 412-13, 415-19, 422-36, 447; Exc. 180-86] They used government data on the numbers of hunters and fishermen as a starting point, then used the market research data to estimate the numbers of each who would be interested in a specialized phone. [Tr. 384-85, 417-18, 453-59] They applied a standard adoption-rate curve, widely used in marketing. [Tr. 460-61, 514-15, 675-76] At every step, they made conservative assumptions, so that they would not over-promise results to their executives. [Tr. 89-90, 184-85, 433, 615, 617-19] After much discussion, the three men agreed they had developed a conservative, realistic picture of sales, supported by the

market research data. [Tr. 181, 260] Boehnen's supervisor, Marc Hill,[6] reviewed and approved the numbers. [Tr. 612-27][7] Chen, on behalf of Trimble, represented to Boehnen and Feucht that he agreed the data were good and that the responses indicating consumer demand were valid. [Tr. 391] Chen in fact pressed for using larger numbers for expected demand for both phones and downloads. [Tr. 628-30]

Having agreed on the revenue side of the profit-and-loss analysis, each company representative then developed an estimate of the costs the company would incur in developing and marketing the product. [Tr. 181, 415-17] The resulting analyses of sales and costs were combined into a consolidated profit-and-loss statement. [Exc. 180-86]

Corporate buy-in

Boehnen and Chen made clear to each other and to Feucht that they were acting with approval and support from their supervisors. Chen and Feucht joined Boehnen in making a presentation to Boehnen's superiors, where Chen represented that he had support from his superiors, and he assured the Remington executives that they could rely on the market research. [Tr. 395-96, 628-30] Boehnen's supervisor, Hill, believed in the Copper Center Project based on the market research; Hill's reputation and job were on

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[6] Hill's resume was impressive: The jury learned that he was vice president of a billion-dollar company by his mid-thirties, and was later chief marketing officer for Freedom Group, a large firearms manufacturer holding company. [Tr. 597-601]

[7] Both Boehnen and Hill explained that Remington routinely relies on this type of market research to make business decisions, and that other companies do as well. [Tr. 388-89, 413 (market research is the "best way" to develop the numbers), 607, 611)] Trimble's witness Larry Fox testified that, when Trimble later launched a product that competed with the Copper Center Project, it relied on the same type of market research surveys. [Tr. 1060, 1132-58]

the line when he accepted the data and recommended the product to his company's board of directors. [Tr. 611] He directed Boehnen to move forward as quickly as he could. [Tr. 614] Remington was prepared to rely on the market research and to invest in the Project. [Tr. 398; Exh. 68 ("everyone" at Remington "loves it")]

Chen advised that Trimble too was "ready to go." [Tr. 398, 412] The sheer amount of time Chen devoted indicated that Trimble believed the Copper Center Project was a viable and highly profitable idea; no company permits its personnel to devote great efforts to pursue a project with only a small projected yield. [Tr. 410-11; *see also* Tr. 657 (Hill observed that someone had to approve Chen's expense accounts)]

Feucht presented the market research to a business acquaintance, Paul Miller, a man with substantial experience who, at that stage of his career, would only work with companies with expected profits over $100 million. [Tr. 776] Miller agreed to join the RDS team, initially as an unpaid consultant, with the expectation that he would become Chief Operating Officer. [Tr. 665-66, 707] Miller understood from multiple meetings, and from observing Chen and the way he interacted with Feucht, that Trimble was RDS's partner in the Copper Center Project. [Tr. 666-68, 679-81, 685-86, 688; *cf.* Tr. 698-702]

Presentations to third parties

During 2009 and 2010, Chen, Feucht, and Boehnen traveled together around the country to a series of meetings with other companies, where they presented Trimble,

RDS, and Remington as partners who were jointly asking the new company to work with them on the Project. [Tr. 88, 92-93, 145, 392-94][8]

At these meetings, they generally shared a PowerPoint presentation (the "deck") that described the Copper Center Project. [Tr. 413-14; Exh. 24 (excerpted at Exc. 157-79)] Chen approved the deck [Tr. 692], which explicitly labeled Remington, Trimble, and RDS as "partners." [Exc. 160] At the presentations, as well as in related emails, Chen regularly characterized RDS as Trimble's partner. [Tr. 336, 368, 481, 915-23, 929, 939-42; Exh. 9 at p.3; Exh. 15; Exh. 58]

The deck included key data on expected sales that Chen, Boehnen, and Feucht had developed through their market research, and it showed the adoption rate that they had agreed to use. [Tr. 414-18; Exh. 24 at pp.22-46] Trimble, along with Remington and RDS, asked the companies they met with to rely on their data. [Tr. 394, 412-13]

Those hearing the presentation understood that Trimble was holding itself out as a partner with RDS. [*E.g.*, Tr. 335-38] A company such as AT&T would never have met with them had they not presented themselves as partners. [Tr. 369, 929]

The Corvallis meeting at which Trimble valued RDS and offered to acquire it

In December 2010, RDS and Trimble met at Trimble MCS's headquarters in Corvallis, Oregon. [Tr. 127-28] Steve Wolff (financial controller of Trimble MCS) and Mark Harrington (vice president of Trimble Navigation) attended for Trimble, along with

[8] Companies they met with included Symbian, AT&T, Eklutna Corporation (to which they hoped to market a product related to the Copper Center Project, but with medical rather than sportsmen's applications), and Janney Montgomery Scott. [Tr. 80-81, 85-89, 92, 174-75, 290, 331-36, 392-94, 941-43]

Chen. [Tr. 128, 214, 531, 999] A key agenda item was to discuss whether Trimble would acquire RDS and its patent. [Tr. 128] The idea of acquiring RDS had been discussed before. [Tr. 129-30, 409] Chen had drawn a timeline that showed the acquisition occurring in late 2010 because tax rates would change thereafter, making the acquisition less profitable for Trimble. [Tr. 130, 400-04, 408-09; Exh. 27] Before the meeting, Chen wrote to Harrington, "I do believe we want to own the software." [Exh. 6]

At the meeting, Wolff drew a matrix on a whiteboard [Exc. 188], showing how he valued RDS based on whether he assumed the Project would achieve 75%, 47%, or less of its goals. [Tr. 131] His starting point was a spreadsheet Feucht had prepared, describing the Project's goals. [Tr. 134-36] As part of the conversation, Trimble offered to acquire RDS for $18.4 million, the figure Wolff assigned at the 47% level. [Tr. 997][9] Chen memorialized the valuations with a photo of the whiteboard, which he sent to Feucht and Wolff. [Tr. 131-32; Exc. 187-88]

Feucht was not interested in the offer; he disagreed with Wolff's valuation method. [Tr. 137-38; Exh. J] Given his contacts with venture capitalists, Feucht reasonably expected to be able to raise the money that RDS needed for software development, but he had not pursued these opportunities before the December 2010 meeting because he had been expecting Trimble to acquire RDS. [Tr. 316] Paul Miller also was confident that RDS could raise the necessary funds through private investment. [Tr. 706-

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9 Whether an offer was made was disputed, but Chen acknowledged the offer in response to a question: "Q: [November 2010 was] roughly a month before you met with RDS and made the valuation offer of $18.4 million, right? A: Yes." [Tr. 997] On redirect, Chen denied that Trimble made an offer [Tr. 1047], but the jury was free to believe the cross-examination testimony.

08] Wolff told Feucht that he would re-engage with the Project in early 2011. [Exh. X]

Remington withdraws, and RDS targets Cabela's as a new marketing partner

Toward the end of 2010, following a change in corporate management, Remington began to signal that it might withdraw from the Copper Center Project. [Exh. QQ] Remington did not formally withdraw until early 2011 [Tr. 103, 679-80], but Feucht wasted no time in trying to bring in a new marketing partner so that the Project would not stall. [Tr. 105-06] He suggested the outdoor retailer Cabela's, in part because his RDS colleague Paul Miller had personal ties to Tommy Millner, CEO of Cabela's. [Tr. 106-08, 683-84] Chen encouraged Feucht to "get it done" and to bring Cabela's aboard as the new marketing partner. [Tr. 106] After a preliminary meeting between Miller and Millner,[10] a more formal meeting was scheduled for March 25, 2011, at Cabela's headquarters in Sidney, Nebraska, where executives from Trimble, RDS, and Cabela's would confer. [Tr. 108-09; Exh. 16] Expected attendees included Steve Wolff and Paul Harmon for Trimble, Feucht and Miller for RDS, and the Cabela's executive team. [Tr. 109, 686; Exh. 9 at p.3] RDS and Trimble planned to pitch together for Cabela's to become the Project's new marketing partner. [Tr. 109]

Before the March meeting, RDS began to hear about a different project that Trimble was discussing with Cabela's – but RDS still hoped and reasonably expected that

[10] Millner told Miller that he believed there was a market for a specialized phone designed for outdoor recreation. [Tr. 684; Exh. Y (Millner believed a general purpose device (like a phone) with value for hunters and fishermen "will be a big hit"); Exh. RR (Millner "was bullish on the project description")] Millner said that Cabela's was considering selling an outdoor-oriented cell phone, but was not yet excited about getting into the cell phone business. [Tr. 312-13; Exh. RR]

Trimble would honor its commitment to come to the meeting with Cabela's and support the Project. [Tr. 118-23, 686-88; Exh. 16 (as of March 9, 2011, Trimble confirmed it would attend)]

The first hints of a competing project being developed by Trimble

In late November 2010, Chen first mentioned to Feucht that Trimble Outdoors (another Trimble business unit) was working on a project with Cabela's that also was geared to hunters and fishermen. [Tr. 118-19; Exh. 54] Chen described it as a "cataloging app," and reassured Feucht that it did not compete with the Project. [Tr. 118, 324, 325, 907-08] Chen's statement was not honest. On September 29, Chen had been told by Rich Rudow of Trimble Outdoors that the Trimble–Cabela's project "might be similar" to what Chen was working on with RDS [Exh. 13], and on November 18 Chen was told specifically that "there appears to be a fair amount of overlap" between the two projects. [Exh. 6 at p.1; *see* Tr. 987-89 (Chen, after an initial denial, admitted having been told that there was a fair amount of overlap)][11] Notwithstanding the NDA, Chen sent the Copper Center Project's consolidated profit-and-loss statement (a document labeled "confidential") to Trimble Outdoors in November 2010. [Tr. 1029-30; Exc. 180]

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[11] Chen's credibility on important points was impeached multiple times during trial. *See, e.g.*, Tr. 912-14 (Chen denied he referred to RDS initially as a "potential partner" then admitted this, when confronted with the email in which he used that term), 919-22 (Chen testified that he had colleagues who call each other "partner" absent a legal partnership arrangement, then admitted he knew of no such instance), 944-51 (Chen denied that Trimble had any input into the market research surveys, then admitted this), 975-78 (at trial Chen disavowed the reliability of the data generated through the market research, but at his deposition he testified that, based on the market research, he knew how many units they could sell), 1001-03 (Chen lied at his deposition about whether he was in the country at the time of a key meeting).

Chen suggested to Feucht the possibility of merging the two Trimble projects. [Tr. 125] Feucht was very concerned that the Trimble–Cabela's project (alone or as hypothetically merged with the Trimble–RDS project) would result in squeezing out RDS, and he sought reassurance from Chen that there was still an ongoing "deal" between Trimble and RDS. [Tr. 125; Exh. 17; Exh. 18; Exh. 54] Feucht asked Chen to put in writing what a proposed merger of the two projects might look like. [Tr. 125; Exh. 54] Feucht never got a response to that request. [Tr. 127] To all appearances, Chen kept working with him in support of the Project [Tr. 127], though by the end of 2010 RDS and Remington both perceived that Trimble seemed to be dragging its feet, and they became concerned about Trimble's continued commitment to the Project. [Tr. 94, 399-400, 636-37] Chen reassured Feucht that Trimble remained fully committed. [Tr. 94-95]

At the Corvallis meeting in December 2010, Feucht brought up the Trimble–Cabela's project, and both Wolff and Chen reassured him that it was not a competing product. [Tr. 139-40]

RDS did not learn more about the Trimble–Cabela's project until early 2011. Then, Paul Miller received a public mailing from Cabela's, advertising a product called ReconHunt, a suite of downloadable apps, which had many characteristics similar to the Copper Center Project. [Tr. 698] Miller was disturbed by the apparent competition. [Tr. 698, 737-38]

Trimble skips the March 2011 meeting with Cabela's

Feucht and Miller prepared for the big meeting with Cabela's and Trimble, scheduled for March 25. They arranged with Trimble that they would fly to Denver; the RDS and Trimble teams would confer on the day before the meeting, then go together to Nebraska. [Tr. 685] A few days before the scheduled meeting, Miller reached out to his contacts at MCS, advising that Millner, the Cabela's CEO, had expressed a desire that representatives of Trimble Outdoors also attend the meeting. [Exh. 19]

After landing in Denver, Feucht and Miller learned via email that *no one* from Trimble would attend the Cabela's meeting, nor would Trimble representatives meet with Miller and Feucht as they had planned. [Tr. 109-10, 687-88; Exh. 9; *see also* Exh. 21 at pp.3-5] In emails, Trimble representatives referred to their company's other project with Cabela's and stated that they needed additional time to consider the two projects and to figure out how to move forward. [Tr. 696-700; Exh. 9 at p.3; Exh. 21 at pp.3, 5-7]

Feucht and Miller were stunned, but they went on to Sidney as planned, hoping to make the best possible presentation they could without Trimble's participation. [Tr. 110-11, 689-90] Before the meeting with the Cabela's executives, they ate lunch at the restaurant within the Cabela's store. [Tr. 111] There they found, on every table, a placard advertising Trimble and Cabela's new product: ReconHunt and ReconFish, each a suite of software applications packaged specifically for the hunter or fisherman, which would be available for download soon. [Tr. 111, 701] Essentially all of the software that the Copper Center Project team had planned to include on its phone was now being presented in the Trimble–Cabela's software package, save only the alert that would sound

if a regulatory boundary were crossed, since that feature was protected by RDS's patent.[12]

For all practical purposes, the Copper Center Project was dead at that moment, and RDS realistically could not move forward on its own because it had lost first-mover advantage. [Tr. 112, 708-09] In hindsight, it was apparent that Trimble had strung RDS along for at least several months, if not longer, stalling RDS from taking independent action to move its own ideas toward the market and enabling ReconHunt to reach the market first. [Tr. 238-39] Feucht felt "absolute devastation." [Tr. 111-12]

Nonetheless, putting aside their anger and disappointment, Feucht and Miller shared Project details at the meeting with the Cabela's executives, then provided follow-up information that Cabela's requested. [Tr. 690-91, 733-36; Exh. HH] RDS tried to continue to work with Trimble as well, but Trimble promised only delay and denied any ongoing definite commitment. [Tr. 222; Exh. 23]

About three weeks after the meeting, Cabela's formally declined RDS's invitation to participate in the Project. [Tr. 703; Exh. 8] Internal emails, disclosed during discovery, revealed that the Cabela's employees who had become aware of both the Trimble–Cabela's project and the Trimble–RDS project determined, weeks before the meeting, that the Trimble–RDS project "appears to be in direct competition and conflict with [Cabela's] licensing plans with Verizon, Trimble, and Xentris." [Exh. 7] Tom

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12 *See* Tr. 112-14, 701; *compare* Exh. 24 at pp.27-28, 32-47 (Copper Center Project's PowerPoint describing planned software) *with* Tr. 1106-15, Exh. 52 at pp.23-25 (Trimble–Cabela's PowerPoint describing "unique" software features of ReconHunt), Exh. 69 at pp.8-11 (listing features of Trimble–Cabela's product similar to the Copper Center Project's design).

Rosdail, Cabela's point man for the Trimble–Cabela's project, "kill[ed] the RDS deal." [Exh. 9 at p.1; *see* Tr. 793 (Rosdail determined that the projects competed)]

Course of Litigation

RDS filed a lawsuit in September 2011, alleging a series of causes of action, including intentional and negligent misrepresentation and breach of contract. [R. 225-38 (initial complaint), Exc. 1-25 (amended complaint)]

Trial was set for September 2014. [R. 4312] Tragically, RDS's lead counsel, Christopher Cyphers, was killed in an airplane accident less than a month before the scheduled trial date. [R. 3154] Having waited for its day in court, RDS declined to seek a continuance. [*Id.*] RDS obtained other counsel, who devoted themselves full-time to preparing the case for trial on short notice. [R. 3155-57]

RDS's claims

At trial, RDS presented three main claims:[13]

First, RDS alleged that Trimble (acting mostly through Chen) made both negligent and intentional misrepresentations. Among the significant misrepresentations discussed at trial was the assertion that the Trimble–Cabela's project did not compete with the Copper Center Project. [Tr. 1434-40; Exc. 19-21]

Second, RDS alleged that Trimble (again acting through Chen) breached the Nondisclosure Agreement by disclosing to Trimble Outdoors confidential information that RDS had provided to Trimble MCS. [Tr. 1446-60; Exc. 19-21]

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[13] Before trial, RDS formally dropped other claims asserted against Trimble in the complaint. [R. 66-67, 2234] RDS also dismissed the claims it had brought against defendants other than Trimble. [R. 63-64, 342]

Third, RDS alleged that Trimble breached the duty of loyalty it owed to RDS after entering into a partnership with it to promote the Copper Center Project, by failing to devote itself to advancing the interests of the partnership and instead furthering its own interests at the expense of RDS. [Tr. 1461-63; Exc. 9-11]

RDS did not claim that any contract obligated Trimble to build a product with RDS, or prohibited Trimble from advancing even a competitive product on its own, so long as it did not use RDS's confidential information. [Tr. 240, 242] The problem, RDS alleged, was that Trimble deliberately strung RDS along through deceptive statements, thereby protecting Trimble's ability to get to market first with its products and denying RDS the opportunity to gain first-mover advantage in marketing either standalone apps or a phone preloaded with a specialized suite of apps. [Tr. 243]

For each of these claims, RDS sought compensatory damages measured by the lost profits it reasonably would have earned but for Trimble's tortious misconduct and breaches of contract. [Tr. 1472-75; Exc. 11, 17, 21, 22] RDS also sought punitive damages for intentional misrepresentation. [Tr. 1365, 1475-76; Exc. 22]

Pretrial motion to preclude RDS's damages evidence

Trimble moved to exclude RDS's damages evidence, relying heavily on *Guard v. P & R Enterprises, Inc.*,[14] which Trimble contended limits the ways in which a new business may prove lost profits. [R. 2112-26; *see also* R. 2105-11 (RDS's opposition)] The superior court granted Trimble's motion to the extent of prohibiting RDS's expert from testifying, and ruled that RDS would be required to establish with reasonable

[14] 631 P.2d 1068 (Alaska 1981).

certainty "any evidence regarding lost profits." [Exc. 47-48]

Trial testimony: liability

At trial, witnesses supported RDS's liability claims through the testimony summarized above. [*See generally* Tr. 4-159, 172-89, 214-340, 349-419, 451-522, 596-710, 718-779, 793-98, 909-52, 960-1033, 1325-32]

Trial testimony: damages

To provide bases from which the jury could measure lost profits with reasonable certainty, RDS presented two main pieces of evidence: (1) the picture of the whiteboard, Exhibit 30, reflecting the way Trimble valued RDS for possible acquisition in December 2010 [Exc. 188]; and (2) the consolidated profit-and-loss statement, Exhibit 28, that Trimble, Remington, and RDS jointly developed and relied on in their own operations and their presentations to third parties. [Exc. 180-86] The whiteboard showed valuations of the Project between zero and $38.5 million, depending on the underlying assumptions about the extent to which the Project met its sales goals, with the highest valuation reflecting an assumption that the Project would meet 75% of its revenue goal. [Exc. 188] The profit-and-loss statement estimated profits for RDS of $111,666,973 over a five-year period. [Exc. 186]

Trial witnesses supported RDS's damages claims in other ways as well. Remington witnesses Boehnen and Hill – neutral parties who had no stake in the outcome of the trial – testified that the profit-and-loss statement offered a reasonably certain, very conservative estimate of RDS's lost profits. [Tr. 467-72, 616-18]

Larry Fox, director of business development for Trimble Outdoors, testified that he had estimated that Trimble could sell 500,000 phones a year with a specialized package of apps for hunters and fishermen. [Tr. 1171-75] He based that number on information he received from Verizon, who termed that total "the typical adoption rate of a cell phone device of this particular nature." [Tr. 1171-72] Trimble's estimate of 500,000 phone sales per year was on the same order of magnitude as the estimate that the Copper Center Project participants devised through their market research: their profit-and-loss statement assumed approximately 2.8 million phones purchased in five years, or an average of 560,000 per year. [Exc. 184-86][15] Trimble's numbers were derived from market research based on very similar assumptions to those used for the Copper Center Project. [Tr. 1134-48, 1151-76]

Boehnen testified that, when the iPhone 6 went on sale during trial, over three million were sold on the first day, leading to millions of dollars in profit. [Tr. 471-72]

When Trimble opted to sell downloadable apps only, without marketing a phone, it anticipated profits from those sales of $2 to $2.5 million per year. [Tr. 1159-60]

Trimble offered no damages calculation as an alternative to RDS's calculations. Instead, it presented an expert who opined that RDS was unlikely to have succeeded with marketing any product akin to the Copper Center Project once Remington and Trimble withdrew, and therefore RDS had no viable claim for any lost profits. [Tr. 1251-75]

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15 *See also* Exh. 29 at pp.2-3 (summarizing data collected by Boehnen on how quickly other cell phones reached one million sales, and noting that the Copper Center Project anticipated only 158,000 sales in the first year, with more in following years).

Mid-trial motions related to damages

During trial, Trimble continued to challenge RDS's proof of damages. It objected to admission of Exhibit 28, the profit-and-loss statement. [Tr. 166-70] The court admitted the exhibit over objection [Tr. 170, 182], then reconsidered and rescinded admission [Tr. 213], then reconsidered again and admitted it, after hearing foundation testimony from Boehnen, who finalized the consolidated statement. [Tr. 422-36, 446-47]

After RDS rested, Trimble moved for directed verdict on all damages claims. [Tr. 799-818] As with the pretrial motion and with the objections to Exhibit 28, Trimble relied heavily on *Guard*; it also based arguments on *Reeves v. Alyeska Pipeline Service Co.*,[16] contending that this case disallows lost profits as the measure of damages in a case involving wrongful appropriation of an idea. Trimble also argued that RDS had failed to prove that Trimble caused it any damage. [Tr. 799-807; *see also* Tr. 807-18 (RDS's opposition and Trimble's reply)] The court denied Trimble's oral motion, stating in pertinent part that, although she considered the issue "very close," if she viewed the evidence in the light most favorable to RDS, she could not say that fair-minded jurors in the exercise of reasonable judgment could reach only one conclusion. [Tr. 818]

At the end of trial, Trimble again moved for directed verdict on all claims, both liability and damages. [Tr. 1334-49] After hearing argument from both sides [Tr. 1334-70], the court denied the motion, stating only that she relied on "the reasons previously stated." [Tr. 1370] The court also denied Trimble's motion to strike the punitive damages claim, stating that she recognized that, viewing the evidence in the light most

16 56 P.3d 660 (Alaska 2002).

favorable to RDS, she had to conclude that a reasonable juror could find that the evidence supported the punitive damages claim. [Tr. 1370-71]

Verdict

The jury found for RDS on each of its substantive claims. Specifically, the jury determined:

(1) Trimble made an intentional misrepresentation that was a substantial factor in causing harm to RDS. [Exc. 49]

(2) Trimble made a negligent misrepresentation that was a substantial factor in causing harm to RDS. [Exc. 49-50]

(3) Trimble breached its mutual nondisclosure agreement with RDS. [Exc. 50]

(4) Trimble entered into a partnership with RDS, and then breached its fiduciary duty of loyalty to its partner. [Exc. 51][17]

For the amount of damages, the jury accepted neither RDS's analysis nor Trimble's. The jury awarded $38.5 million for the tort claims and $12.8 million for the breach of contract claims, for a total of $51.3 million. [Exc. 50-51] The jury rejected RDS's claim for punitive damages. [Exc. 50]

Post-trial motion and appeal

Trimble moved for JNOV on all claims, contending that the evidence at trial supported none of the jury's verdict. [Exc. 52-97] After briefing and argument [Exc. 98-148, 189-214; Tr. 1674-99], the court granted Trimble's motion. [Exc. 215-33] This

[17] For both items (3) and (4), see also R. 3378 (jury was specifically instructed on causation of damages, although the verdict form for the contract claims did not contain this element expressly).

appeal timely followed.

STANDARDS OF REVIEW

When considering a motion for JNOV, the trial court is required to determine "whether the evidence, and all reasonable inferences which may be drawn from the evidence, viewed in the light most favorable to the non-moving party, permits room for diversity of opinion among reasonable jurors."[18] The court may not weigh conflicting evidence or judge credibility, whether considering the evidence offered to establish liability or the evidence supporting a damages award.[19] "[G]enerally the only evidence that should be considered is the evidence favorable to the non-moving party[.]"[20]

This Court applies the same test as it directs the superior court to apply.[21] It reviews the record de novo, without deference to the superior court.[22] It scrutinizes the record applying "a principle of minimum intrusion into the right to jury trial guaranteed under the Alaska Constitution."[23]

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18 *Cameron v. Chang-Craft*, 251 P.3d 1008, 1017 (Alaska 2011) (internal quotes omitted).

19 *See id.* at 1017-18 (liability), 1023-24 (damages amount).

20 *Id.* at 1018.

21 *See Borgen*, 273 P.3d at 584.

22 *See Cameron*, 251 P.3d at 1018.

23 *Id.* (internal quotes omitted); *see also Korean Air Lines Co., Ltd. v. State*, 779 P.2d 333, 338 (Alaska 1989) (Supreme Court's review of the evidence "is objective; and, if there is room for diversity of opinion among reasonable people, the question is one for the jury.") (internal quotes omitted).

ARGUMENT

I. THE SUPERIOR COURT ERRED IN GRANTING JNOV TO TRIMBLE.

A. INTRODUCTION

In reviewing the record, this Court must truly abide by the standard of review it has established. Nothing else will give fair regard for the constitutional right to have a jury – not a judge – decide disputed issues of fact.

The superior court gave lip service to the correct standard of review [Exc. 219], but failed to apply it in ruling on the motion for JNOV. The analysis in the court's order granting JNOV reads like Trimble's closing argument. [Exc. 222-32; *cf.* Tr. 1483-87] On key issues, the court accepted testimony from Chaur-Fong Chen and from Trimble's economist, Neal Beaton, rather than testimony of RDS's witnesses and reasonable inferences the jury could draw from that testimony. [*E.g.*, Exc. 223-25, 230-31] During trial, Chen was impeached repeatedly on important inconsistencies and outright lies;[24] the jury properly could have disregarded everything he claimed was true.[25] Likewise, the jury could have found that Beaton was a "hired gun"[26] and could have disregarded his opinions in their entirety, even if they were uncontradicted.[27]

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24 *See supra* n.11.

25 *See* R. 3356 (jury instruction on evaluating credibility of witnesses).

26 *See, e.g.*, Tr. 1283 (Beaton was hired exclusively for the litigation), 1252 (Beaton was well paid for his opinions), 1277-80 (Beaton's firm earned roughly a half billion dollars working for Lehman Brothers and earned notoriety as a "corporate doctor"), 1257-73, 1285-93 (Beaton made key assumptions that the jury reasonably could have rejected); *see generally* Exc. 146-47 (compiling problems with Beaton's analysis).

27 *See* R. 3358 (jury instruction on evaluating credibility of expert witness).

As a matter of law, the jury could have rejected *all* the testimony supporting Trimble as self-serving and dishonest. Although Trimble's witnesses denied receiving confidential information about the Project, the jury could have inferred from the uncanny similarities between the Project's HuntZone and Trimble's ReconHunt that Chen had provided employees of Trimble Outdoors with the Project's ideas, then lied to RDS about Trimble's development of a competing project, allowing Trimble to market its product first and deny RDS first-mover advantage. If jurors accepted that scenario, then they also could find that RDS was damaged by Trimble's misconduct. The superior court failed to respect the jury's right to view the evidence in the light most favorable to RDS.

Besides not honoring the standard for reviewing the evidence, the superior court erred in confusing the analysis and standard of proof for the *fact* of damages with the analysis and standard of proof for the *amount* of damages. The court's decision blurs these concepts, without realizing that two distinct issues are presented. [Exc. 220-33]

The following section sets forth the different legal standards that apply to proving the fact and the amount of damages. Section C applies the correct standards to RDS's proof that it was damaged, demonstrating that the superior court erred in concluding that no evidence supported that finding. Section D applies the proper standards to RDS's proof of the amount of damages, demonstrating that, on this issue too, the jury verdict should have been upheld.

The arguments address only the evidence related to damages, because the superior court resolved the case based on the alleged insufficiency of the evidence to support RDS's claims for damages. Trimble moved for JNOV on multiple other grounds as well.

[Exc. 54-75] The comprehensive Statement of Facts above provides the factual basis for sustaining the jury's verdict in all respects. If Trimble's appellee brief relies on grounds other than the evidence related to damages as alternative bases for upholding the superior court's grant of JNOV, RDS will respond to those specific arguments in its reply.

Based on this Court's own review of the record, this Court should determine that evidence supports the jury's verdict in full when the evidence is viewed in the correct light, with proper deference to the jury that clearly believed RDS's witnesses over Trimble's, yet analyzed the evidence independently and did not uncritically adopt everything that RDS's counsel argued. Consequently, this Court should reverse the order granting JNOV to Trimble.

B. Legal Standards For Proving The Fact And Amount Of Damages

A plaintiff must prove by a preponderance of the evidence that it was damaged by the defendant's wrongful act. The *fact* of damages is an element of the cause of action, and the same standard of proof applies to it as to every other element of the cause of action.[28] For purposes of a JNOV motion, when conflicting evidence is not considered,[29] the real question is whether any evidence exists from which a reasonable juror could

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[28] *See Pluid v. B.K.*, 948 P.2d 981, 984 (Alaska 1997) ("It is, of course, the law that the *fact* of damages must be proven by a preponderance of the evidence.") (emphasis in original); *accord, e.g.*, *Lynden Inc. v. Walker*, 30 P.3d 609, 619 (Alaska 2001); *Power Constructors, Inc. v. Taylor & Hintze*, 960 P.2d 20, 43 (Alaska 1998).

[29] *See* 9B WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE § 2529 (3d ed. 2008) ("unfavorable evidence that contradicts the favorable evidence must be disregarded"); *Cameron*, 251 P.3d at 1018.

conclude that the plaintiff was damaged by the defendant's actions.[30] No different standard applies for a new business as compared to an established business.

As to the *amount* of damages, a less demanding standard of proof applies. When a plaintiff sues to recover profits that it was deprived of by the defendant's wrongful acts, the plaintiff need not prove the amount of its lost profits precisely but needs to offer simply "a reasonable basis" for computing an award.[31] In this Court's words, once the fact of damages is proved by a preponderance of the evidence, "the *amount* of such damages, on the other hand, need only be proven to such a degree as to allow the finder of fact to reasonably estimate the amount to be allowed for [the] item [of damages]."[32] Proof of what would have happened but for the defendant's wrongful conduct is inherently uncertain; courts therefore require that the defendant bear the risk of some uncertainty as to the amount of damages.[33] In the context of a JNOV motion, the

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30 *See Cameron*, 251 P.3d at 1020-21.

31 *Id.* at 1021 (internal quotes omitted); *see also Reeves*, 56 P.3d at 669 ("reasonable approximations" are sufficient to support a damages award); *Alaska Tae Woong Venture, Inc. v. Westward Seafoods, Inc.*, 963 P.2d 1055, 1061 (Alaska 1998) (requiring only a factual basis to "reasonably estimate" damages, and noting that, once plaintiff proves it sustained damages as a result of defendant's misconduct, the lack of certainty as to the margin of profit "has relatively minor importance"); *Power Constructors*, 960 P.2d at 43 (once plaintiff proved that defendant caused it harm, the "relative weakness of [plaintiff]'s evidence on precise damages" was not important).

32 *Pluid*, 948 P.2d at 984 (internal quotes omitted) (emphasis in original).

33 *See Reeves*, 56 P.3d at 669; *Native Alaskan Reclamation & Pest Control, Inc. v. United Bank Alaska*, 685 P.2d 1211, 1222-23 (Alaska 1984) (quoting RESTATEMENT (SECOND) OF CONTRACTS (hereafter "RESTATEMENT") § 352 cmt. a (1981), on why doubts about the amount of damages should be resolved against the defendant who, by its breach, forced plaintiff to seek compensation in damages); *see also Alaska Rent-A-Car, Inc. v. Avis Budget Group, Inc.*, 738 F.3d 960, 968 (9th Cir. 2013) ("As in any damages

question becomes simply: did plaintiff provide evidence from which the jury reasonably could compute a damages award, or is the verdict amount "purely speculative"?[34]

Courts are more cautious in upholding awards of lost profits to new businesses as compared to established businesses, because such awards risk being based on speculation or wishful thinking.[35] In *Guard v. P & R Enterprises, Inc.*, this Court held that lost profits for a new business must be proved to a "reasonable certainty."[36]

Fair reading of this Court's cases establishes that the critical component of "reasonable certainty" is that the damages estimate must be grounded in fact, rather than conjecture or speculation. *Guard* cited *City of Whittier v. Whittier Fuel & Marine Corp.*[37] for the proposition that "[t]he evidence must afford sufficient data from which the court or jury may properly estimate the amount of damages, which data shall be established by facts rather than by mere conclusions of witnesses."[38] The facts relied on do not need to be proved to a reasonable certainty, because it is impossible to know with reasonable certainty what would have happened if the defendant had not committed a tort or breached a contract. Rather, the evidence relied on to support a damages estimate

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case, the calculation [of lost profits] had to address a hypothetical world that never existed, one in which other things remained the same but the breach had not occurred.").

34 *Cameron*, 251 P.3d at 1021; *see Reeves*, 56 P.3d at 668 (JNOV motion requires the court "to inquire narrowly whether any record evidence, viewed favorably to [plaintiff], might reasonably support the jury's . . . award").

35 *See, e.g., Guard*, 631 P.2d at 1071-72.

36 *Id.* at 1072.

37 577 P.2d 216 (Alaska 1978).

38 *Id.* at 223 (internal quotes omitted); *see also Sisters of Providence in Washington v. A.A. Pain Clinic, Inc.*, 81 P.3d 989, 1007 (Alaska 2003) (quoting this passage from *City of Whittier*).

must be reasonable and fact-based. Speaking specifically to proof of lost profits by a new business, the RESTATEMENT (SECOND) OF CONTRACTS explains:

> The difficulty of proving lost profits varies greatly with the nature of the transaction. . . . If the breach prevents the injured party from carrying on a well-established business, the resulting loss of profits can often be proved with sufficient certainty. Evidence of past performance will form the basis for a reasonable prediction as to the future. . . . However, if the business is a new one or if it is a speculative one that is subject to great fluctuations in volume, cost or prices, proof will be more difficult. Nevertheless, damages may be established with reasonable certainty with the aid of expert testimony, economic and financial data, market surveys and analyses, business records of similar enterprises, and the like.[39]

A footnote in *Guard* states that a new business generally may not prove the amount of its lost profits through "statistical projections alone."[40] *Guard* did not explain what it meant by "statistical projections," but the dictum in the footnote cannot be read to disallow all proof of damages based on any kind of forecast or prediction. This Court has often followed the RESTATEMENT, including in particular section 352, which states the "reasonable certainty" requirement for proving an amount of damages.[41] As quoted above, the commentary to section 352 specifically endorses both expert testimony and market surveys as ways a new business can meet the reasonable certainty requirement – and both these types of proof rely on statistical projections. Context suggests that this

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39 RESTATEMENT § 352 cmt. b.

40 631 P.2d at 1072 n.4.

41 *See, e.g., State v. Nw. Constr., Inc.*, 741 P.2d 235, 237 (Alaska 1987) (holding that the trial court "correctly held that [plaintiff] need only prove its damages to a 'reasonable certainty'" and not with mathematical precision, and citing RESTATEMENT § 352 & cmt. a); *Native Alaskan Reclamation*, 685 P.2d at 1222-23 (quoting RESTATEMENT § 352 & cmt. a on "reasonable certainty").

Court likely intended to disallow projections developed by the plaintiff alone, perhaps as part of an optimistic business plan or created specifically for trial.

And, again, when considering a JNOV motion, these standards inform a court's ruling but they must be applied with deference to the jury as the finder of fact. The superior court and this Court do not determine whether they find plaintiff's proof reasonable but rather whether a reasonable jury could find that the evidence provided a sufficient factual basis to support a reasonable and not speculative estimate of the amount of plaintiff's loss.[42] Finally, failure of proof as to the *amount* of damages cannot be the basis for a JNOV, but would instead support at most striking the jury's damages award and directing entry of judgment for nominal damages only.[43]

C. RDS Presented Evidence From Which The Jury Could Find That RDS Sustained Damages As A Result Of Trimble's Tortious Conduct And Its Breaches Of Contract.

1. RDS's damages claims

The superior court did not separately analyze the tort and contract claims, reflecting the way the parties approached the case at trial. RDS presented essentially the same theory for damages with respect to its tort and contract claims.

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42 *See Borgen*, 273 P.3d at 584; *Sisters of Providence*, 81 P.3d at 1007.

43 *See Anchorage Chrysler Center, Inc. v. DaimlerChrysler Motors Corp.*, 221 P.3d 977, 990-92, 994-95 (Alaska 2009) (for both tort and contract claims, nominal damages should be awarded when plaintiff proves an actual loss or injury – even a small one – but fails to prove the extent and amount of its damages); *Sisters of Providence*, 81 P.3d at 1008-09; *see generally* RESTATEMENT § 352, cmt. a & illus. 1 & 2 (explaining that, when a plaintiff proves a breach of contract but cannot establish the amount of damages to a reasonable certainty, plaintiff may recover nominal damages).

On the tort claims, RDS contended that Trimble deceived it when its representatives, primarily Chen but also Wolff, stated more than once that the Trimble–Cabela's product did not compete with the Copper Center Project.[44] RDS claimed it was damaged as a result of these misrepresentations: RDS was lulled into inaction by continuing to wait for Trimble to complete the hardware it had promised to develop, thereby losing the opportunity to proceed as a first mover, by itself or with different partners, to launch standalone apps or a pre-loaded ruggedized phone. [Tr. 76-79, 112, 238-39, 708-09, 1438-39 (closing argument); *see also infra* at Sec. I.C.3-4]

On the contract claims, RDS's damages theory was similar. RDS claimed that Trimble formed a partnership with it to develop the Project, then breached the fiduciary duty it owed its partner in a number of ways, including disclosing confidential information and lying about its involvement in a competing project.[45] Again, RDS asserted that Trimble's actions damaged it by depriving RDS of the ability to capitalize on first-mover advantage in the sale of either standalone apps or a specialized phone preloaded with apps that RDS would design. [Tr. 76-79, 112, 238-39, 708-09, 1468-69 (closing); *see also infra* at Sec. I.C.3-4]

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[44] *See supra* at 13-14 (providing cites to the transcript). RDS also alleged other misrepresentations [Tr. 1415-44], but the jury needed to find only one in order to find for RDS on its tort claims. [Exc. 49-50; R. 3365, 3370] For simplicity, in this appeal (as in its opposition to the JNOV motion) RDS focuses on just one misrepresentation.

[45] *See supra* at 3-4, 5-6, 9-10, 13-14 (providing cites to trial evidence). RDS also claimed breach of the NDA as a separate cause of action [Tr. 1446-61], but that claim was essentially synonymous with one of the claims for breach of fiduciary duty, and the jury only needed to find one or the other contract breach in order to award damages for breach of contract. [Exc. 50-51 (verdict form)] As with the multiple tort claims, this brief, for simplicity, focuses on just one of the contract claims.

2. The court applied the wrong burden of proof.

The trial court stated repeatedly that the burden of proof on RDS was to show to a "reasonable certainty" that it sustained a loss as a result of Trimble's misconduct. [Exc. 219-22, 233] This was mistaken. As noted earlier, RDS needed to establish the *fact* that it was damaged by Trimble's misconduct by only a preponderance of the evidence.[46] The "reasonable certainty" requirement applies to proof of the *amount* of damages.[47]

More important, the court appeared to consider it her prerogative to weigh the credibility of RDS's evidence. The following section shows numerous examples where the court failed to base her ruling on the correct test: whether there was *any* evidence that, viewed in the light most favorable to RDS, supported the jury's finding that RDS was damaged by Trimble.[48]

3. The court erroneously relied on evidence favoring Trimble and disregarded evidence and reasonable inferences favoring RDS.

In ruling on a motion for JNOV, "generally the only evidence that should be considered is the evidence favorable to the non-moving party[.]"[49] However, in concluding that the evidence did not support a finding that Trimble damaged RDS, the superior court relied heavily on evidence that supported Trimble, rather than testimony from RDS's witnesses. Using the analysis offered by Trimble's expert witness and counsel, the superior court particularly focused on hurdles RDS faced, and it accepted

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46 *See supra* n.28 and accompanying text.

47 *See supra* nn.31-34 and accompanying text.

48 *See Cameron*, 251 P.3d at 1017-18.

49 *Id.* at 1018.

evidence favoring Trimble to conclude that these alleged hurdles were insurmountable. [Exc. 221-26; *compare* Tr. 1246, 1254-58 (Beaton's testimony), 1483-86 (Trimble's closing argument)] The court essentially adopted Beaton's opinion – that he was "pretty close to 99 percent" certain that the Copper Center Project "was not going to be successful." [Exc. 223 (quoting Tr. 1272)] To be faithful to the requirement to view the evidence in the light most favorable to RDS, the court should instead have quoted Miller: "I think it is highly likely [that RDS could have moved forward without Trimble . . . if they still maintained the first-mover advantage]." [Tr. 708-09]

Contrary to the trial court's misguided analysis, in the light most favorable to RDS, evidence supported Miller's opinion that RDS could have moved forward without Trimble and Remington. The jury therefore reasonably could have found that Trimble's misconduct (not RDS's own deficiencies) was the key factor in denying RDS the opportunity to benefit from first-mover advantage in marketing a specialized phone to hunters and fishermen, or at least in marketing standalone apps.[50] Below, RDS points to evidence that supported finding that RDS could have succeeded despite each "hurdle" trumpeted by Trimble. Once this testimony was admitted, without objection that it was too speculative, the jury could rely on it, and the court could not properly reject it in favor of other testimony that she believed discredited RDS's claims.

RDS could have found a different hardware partner: In 2009, when RDS was first shopping its ideas, RDS was approached by "another large player in the GPS industry" – and RDS chose not to pursue this because it had committed to giving Trimble time to

[50] *See infra* at Sec. I.C.4.

evaluate its ideas. [Tr. 51; Exh. 31] The fact that another hardware company found the RDS proposal interesting supports a reasonable inference that RDS could have returned to that company or found another if Trimble had withdrawn honestly, without stringing RDS along and disclosing its confidential ideas. That history reinforced Miller's specific testimony that he could have found another hardware partner. [Tr. 708[51]] Given Miller's history of successful business development [Tr. 660-64], the jury reasonably could have concluded that this testimony was not just an empty boast.

RDS could have found another marketing partner: Miller testified that, through his contacts in the industry, RDS could have located a marketing partner to replace Remington. [Tr. 683,[52] 706] He demonstrated his ability to get a high-level meeting with Cabela's. [Tr. 685; Exh. 9 at p.3 (describing expected attendees)] The jury reasonably could have inferred Miller would have succeeded in finding another marketing partner if Trimble had not withdrawn from the Project to launch the competing ReconHunt. The jury did not need to share the court's view that RDS's project was likely to fail because RDS did not prove that it had "any firm leads" on Remington's replacement. [Exc. 223]

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[51] Miller testified: "Q: [W]ould you have been successful in bringing on another hardware person or company? A: That would have taken a little bit more time, but, yeah. There are definitely folks out there that have the hardware expertise to do this." [Tr. 708]

[52] Miller testified: "Q: Do you have, based on your time in the industry, contacts that relate to hardware providers and marketers? A: Certainly. . . . I was the executive chairman of Freedom Group [a billion-dollar firearms company that owned Remington and other brands]. So, I knew most of our competitors personally. I knew our suppliers. I knew our customers, . . . both the big-box stores, you know, the Cabela's, the Bass Pros, the Gander Mountains, Sportsmen Warehouse, those folks. And the distributors who sold to the smaller dealers. A lot of people in the industry. . . . Q: . . . [D]id you have the capability to bring in another person to replace Remington, based on your historical contacts in the industry? A: Yes." [Tr. 683]

RDS could have found a carrier: Feucht and the Copper Center Project team secured a meeting with AT&T with relative ease, and also had an introductory meeting with Verizon. [Tr. 157, 753-54] Although AT&T ultimately did not become the Project's carrier partner, the Copper Center Project team never received a definitive "no" from AT&T [Tr. 175], and so did not timely realize that it needed to find a new carrier. Chen testified that Feucht had "very impressive contact[s]" in the sphere of phone carriers. [Tr. 864] The jury therefore reasonably could have inferred, from the initial meetings with AT&T and Verizon and Feucht's impressive contacts within the industry, that RDS could have found a carrier partner.

RDS could have raised the funds necessary for software development: RDS could not begin designing its software until Trimble designed its promised hardware. [Tr. 76] RDS therefore had no incentive to solicit funding before the hardware was designed, particularly while there was reason to believe Trimble would acquire RDS. Miller testified that he could help RDS secure funding "fairly easily." [Tr. 708[53]] Given Feucht's history of successful business fundraising [Tr. 9, 18-19] and Miller's connections in the world of venture capital [Tr. 707-08], the jury reasonably could have inferred that funding was not an insurmountable hurdle.

RDS could have designed the software: The superior court found RDS's proof deficient because RDS had not actually designed the software when the Project collapsed. [Exc. 225-26] But even the court accepted that the evidence established that the software

[53] Miller testified: "Q: If Trimble had just walked away from the RDS deal at this time, would you have been able to raise the $6 to $8 million fairly easily? A: I believe so." [Tr. 708]

could not be designed until the hardware was designed. [Exc. 225] The court improperly penalized RDS for a delay that resulted directly from Trimble's delay in producing its promised hardware. No evidence at trial supported questioning RDS's ability to produce the necessary software. Feucht's successful history with software development [Tr. 8-10, 19] was evidence the jury could rely on in concluding that RDS would be able to produce the software once the hardware was complete.

Indeed, as to virtually every perceived obstacle, the superior court inappropriately found RDS's proof inadequate in large part because RDS had not actively continued its work to move the Project forward after it was dead because Trimble and Cabela's had launched ReconHunt, depriving RDS of first-mover advantage. The court criticized RDS for not having actually found a new marketing partner, hardware partner, carrier, or funding for software development. [Exc. 222-26] But no law requires a plaintiff to engage in such wasteful exercises to prove that, despite the defendant's misconduct, the project could be developed in other ways.[54] The jury did not need the kind of proof the court demanded. The jury reasonably could have inferred from the evidence presented at trial that RDS could have succeeded with the Copper Center Project but for Trimble's misconduct, and therefore that RDS was damaged by Trimble's misconduct.

In short, contrary to the superior court's conclusion, from the testimony and exhibits presented at trial, a reasonable jury could have found that Trimble's misconduct damaged RDS.

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[54] Indeed, RDS would not have been allowed to recover any expenses it incurred unnecessarily. *See* RESTATEMENT § 347(c) (party injured by breach of contract may not cover any cost or loss he has avoided by not having to perform).

4. The court erroneously failed to consider that RDS could have profited from its ideas even without production of a ruggedized cell phone.

The court assumed that proof of the fact of damages under any theory required proof to a reasonable certainty that, but for Trimble's misconduct, RDS would have been able to advance the Project to market. [Exc. 222-26] This perspective was erroneously narrow. On the evidence presented, a jury could have found damages in other ways.

For example, the jury could have found that RDS was damaged by losing its ability to use its patent to timely develop and market specialized software as downloadable apps, independent of associated hardware. Evidence established that Feucht was a successful software developer; it was entirely reasonable to infer that he could have capitalized on the patent and developed and marketed apps without a hardware partner, marketing partner, carrier, or substantial software development budget. [Tr. 8-11, 17-19] Trimble itself demonstrated that it was profitable to sell software apps without associated hardware. [Tr. 1159-60; *cf.* Tr. 609 (Hill noted the profitability of an apps-based business model)] The popular press and common experiences of jurors in 2014 provided a basis for the jury to know that independent small developers make profits on apps, particularly when one is the first mover in the field.

In short, the jury reasonably could have found that Trimble's steady false reassurances caused RDS not to develop software that it could have marketed on its own. Thus, to find that Trimble damaged RDS, the jury did not need to find (as the superior court assumed) that RDS could have found substitute partners and marketed a product akin to the Copper Center Project.

Proof of *any* damage in fact resulting from Trimble's misconduct suffices to establish Trimble's liability in tort and contract. The superior court thus erred in ignoring the reasonable inferences from the evidence that support finding that RDS was damaged at least by losing the opportunity to market apps, in addition to or instead of being damaged by losing first-mover advantage in the launch of a phone like that envisioned by the Copper Center Project.

5. Conclusion

In the light most favorable to RDS, evidence supports the jury's finding that RDS was damaged in fact by Trimble's repeated misrepresentations that it was not pursuing a competing project and by Trimble's breach of its fiduciary obligations. This entitles RDS *at minimum* to an award of nominal damages, for nominal damages should be awarded when a plaintiff proves it was damaged but fails to provide the jury a reasonable basis for determining the amount of damages.[55]

D. THE EVIDENCE PROVIDED THE JURY A REASONABLE BASIS FOR AWARDING $51.3 MILLION IN DAMAGES.

1. RDS's evidence on valuing its damages

To provide the jury with a reasonable basis for assessing the amount of damages it sustained, RDS relied principally on two exhibits and the testimony explaining these exhibits: Exhibit 28, the profit-and-loss statement that Trimble, Remington, and RDS together developed and agreed on based on their market research, then used in presentations to third parties; and Exhibit 30, the picture of the table prepared by

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55 *See supra* n.43.

Trimble's Steve Wolff, showing the values he assigned to RDS based on various assumptions about the expected success of the Copper Center Project. [Exc. 180-86, 187-88; *see generally supra* at 7-8, 10-11 (summarizing the testimony about these exhibits)]

During trial, neither party attempted to associate specific damages with the tort causes of action as distinct from the contract claims. In closing arguments, for example, RDS's counsel talked about total damages. [Tr. 1472-75] One jury instruction explained how to determine the amount of damages for any claim, and another directed the jury to assign a separate damages amount for the tort and contract claims but not to award duplicate damages. [R. 3378, 3382] Because the instructions gave the jury no guidance on how to determine separate damage awards for different causes of action, the best way to analyze the damages is the way they were approached in the trial court: as a total.

The jury awarded a total of $51.3 million in damages, apportioned as $12.8 million in lost profits due to Trimble's breaches of its contracts with RDS and $38.5 million in lost profits due to Trimble's tortious misrepresentations. [Exc. 50-51]

As discussed below, the evidence at trial supports the jury's verdict as to the amount of damages, and therefore the superior court erred in granting JNOV.[56]

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[56] JNOV would not be an appropriate remedy even if the evidence at trial did not support the *amount* of the damages verdict. If the damages award is unsupported, the remedy is remittitur to the largest amount supported by the evidence. *See City of Fairbanks v. Rice*, 20 P.3d 1097, 1107 (Alaska 2000) ("Remittitur is proper when a jury, without acting under the type of passion or prejudice that would warrant a new trial, nonetheless awards an amount that is unreasonable given the evidence. The appropriate measurement is the maximum possible recovery a reasonable jury could have awarded.") (footnotes and internal quotes omitted); *Alaska Tae Woong Venture*, 963 P.2d at 1061 ("a remittitur may not reduce an award below the maximum possible award supported by the

2. The superior court erred in imposing an improperly heavy burden on RDS to establish the amount of its damages.

To describe RDS's burden of proof as to the amount of its damages, the superior court used the term "reasonable certainty." [Exc. 215, 233] The term is quoted correctly from this Court's cases, but the superior court gave the phrase a much more rigorous meaning than this Court's cases establish is intended. The superior court treated the phrase as if it means proof by something more than a preponderance of the evidence. But, as described above, this Court's cases make clear that the burden of proof for the amount of damages is *less* demanding than the burden of proof for the fact of damages, and therefore more amenable to estimates and approximations.[57]

Moreover, when ruling on a JNOV motion, it is essential that the trial court not stray into assessing the credibility of the testimony offered. The court must determine only whether the evidence, if believed by the jury, supports a determination based on facts and not just speculation.[58] The task is similar to the judge's role as gatekeeper when ruling on a *Daubert* motion; there, the court must determine whether the expert's opinion is grounded on facts and uses a methodology recognized by other experts in the field – but the court may not evaluate the credibility of the expert's opinion.[59] No more intense

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evidence"). If no dollar amount is supported by evidence, then the court should enter an award for nominal damages. *See supra* n.43.

57 *See supra* nn.28-34 and accompanying text.

58 *See Cameron*, 251 P.3d at 1021; *Reeves*, 56 P.3d at 668.

59 *See Alaska Rent-A-Car*, 738 F.3d at 969-70; *see generally Daubert v. Merrell Dow Pharm.*, 509 U.S. 579, 593-95 (1993); *State v. Coon*, 974 P.2d 386, 395 (Alaska 1999).

scrutiny of the facts and conclusions of witnesses should be permitted when a plaintiff relies on lay rather than expert testimony.

3. The superior court erred in rejecting RDS's proof as inadequate to meet the reasonable certainty standard.

As discussed above, RDS's proof of the amount of its damages relied principally on two exhibits. The existence of two complementary exhibits, both showing damages in the millions of dollars, made RDS's proof more reasonably certain than if there had been only a single basis for estimating damages. While recognizing that the two exhibits reinforce each other – that the whole is more than the sum of the parts – this brief follows the approach of the superior court and addresses the two exhibits separately.

a. *The profit-and-loss statement provided reasonably certain evidence on which the jury could rely.*

The superior court rejected reliance on Exhibit 28, the profit-and-loss statement, based on her reading of *Guard v. P & R Enterprises, Inc.*[60] Post-trial, Trimble referred to the profit-and-loss statement as "a dubious statistical projection of lost profits" [Exc. 90], and the superior court essentially accepted this analysis. [Exc. 227-32] But Trimble took a very different position about the profit-and-loss statement while it was part of the Project. In the light most favorable to RDS, the testimony about how the profit-and-loss statement was developed and used by all members of the Project establishes that Trimble and the superior court erred in likening the profit-and-loss statement to the "statistical

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[60] 631 P.2d 1068 (Alaska 1981).

projections" disallowed in *Guard*. The court therefore erred in dismissing Exhibit 28 as merely an inadequate statistical projection.[61]

The types of statistical projection rejected in *Guard* are fundamentally different from the profit-and-loss statement relied on by RDS in this case.

First, the profits predicted in the profit-and-loss statement were not developed by the plaintiff alone but were developed in conjunction with both Trimble (the defendant) and Remington, which was, at the time of trial, a disinterested party that expressly endorsed the statement as reasonable and reliable.[62] Their profit-and-loss statement was not developed for purposes of litigation, but for purposes of planning and promoting a joint business venture.[63]

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61 During trial and in the JNOV briefing, Trimble argued for an even narrower reading of *Guard* than the superior court adopted. Trimble contended that *Guard* disallows any lost profits award to a new business unless the new business proves the lost profits in one of two very specific ways. [Exc. 89-90; Tr. 200-03, 444-45, 801-02] The superior court correctly declined to read *Guard* that narrowly. *See Guard*, 631 P.2d at 1072-73 (authorizing a new business to recover lost profits, if it can prove without undue speculation what its profits would have been but for defendant's misconduct, and discussing two ways in which other courts have allowed lost profits to be proved, without stating that these are the only types of proof acceptable); *see also Alaska Travel Specialists, Inc. v. First Nat'l Bank of Anchorage*, 919 P.2d 759, 766 (Alaska 1996) (summarizing *Guard*'s statement but neither endorsing or applying it as an exclusive means of proving lost profits); *Geolar, Inc. v. Gilbert/Commonwealth Inc.*, 874 P.2d 937, 946 (Alaska 1994) (reading *Guard* as "noting that a business without an established profit history might rely on its principals' profit history on similar jobs or on the profit history of others similarly situated," without treating *Guard* as establishing an inflexible rule limiting proof to these two approaches).

62 *See supra* at 7-8 (compiling transcript cites); *see also* Tr. 377 (Boehnen called the data "clean," that is, unbiased), 411, 612, 614 (Hill called the data "statistically valid" and "solid").

63 *See supra* at 7-8 (compiling transcript cites).

Second, Trimble relied on and vouched for the data in Exhibit 28. During the time the companies worked together, Trimble repeatedly endorsed the reliability of the profit-and-loss statement and relied on the statement in making presentations to third parties that Trimble hoped to persuade to join the Copper Center Project.[64] Trimble also evidently relied on the data internally, at minimum for purposes of approving Chen's time and travel expenses devoted to advancing the Project. [Tr. 657] Based on the data in Exhibit 28, Trimble conveyed to Remington that it was "ready to go" – meaning ready to invest in the Copper Center Project. [Tr. 398; *see also* Tr. 391, 412][65]

Third, the data were not mere projections but were factually based on government statistics and market research, which disinterested witnesses endorsed as yielding valid and reliable results.[66] Trimble's witness endorsed reliance on exactly this type of market research when deciding whether to pursue a new product because such research yields a sound basis for predicting that the new product will be profitable. [Tr. 1060, 1132-40, 1142-48, 1153-58; *see also* Tr. 391-92]

Fourth, Trimble relied on virtually identical projections in launching its own apps that competed with the Copper Center Project. [Tr. 1146-48, 1153-75]

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64 *See generally supra* at 8; *see also* Tr. 391 (Boehnen testified that Chen was "in agreement that the data was not only a good population, a good data set, but also that the responses were valid"), 629-31 (Chen believed the data supported *larger* predicted profits than stated in Exh. 28).

65 *See Sisters of Providence*, 81 P.3d at 1007 (noting the importance of the defendant's projections as corroborating plaintiff's damages testimony).

66 Boehnen: Tr. 374-75, 384-85, 388, 413, 417-18, 453-58, 459 (calling the data provided by market research "very accurate" and "reasonably reliable and accurate to a reasonable certainty"); Hill: Tr. 607-16; Miller: Tr. 668-71.

Finally, other evidence at trial corroborated the reasonableness of the assumptions developed through market research. Exhibit 29 contained data on how long it took for other specialized smart phones to reach one million sales; the Project's assumptions in Exhibit 28 were much more conservative than these demonstrated track records.

The superior court discounted all these distinctions and criticized RDS for not presenting the specific results of the data analysis or market research. [Exc. 227-28] The court was wrong both factually and legally. Factually, many results of the market surveys *were* provided to the jury. [Exc. 172-79 (results); Exh. 44 (copy of survey)] Legally, the court's desire to see the underlying data was but another example of her failing to view the evidence in the light most favorable to RDS. Even if the court herself was not ready to credit the survey results as reliable, the jury received sufficient background information so that it reasonably could rely on the results. The jury heard testimony about the way questions were developed for the market survey, how the research was conducted, the significance of using an independent company to conduct the survey, the source of the government statistics, and the use of a widely accepted adoption rate curve.[67] The jury heard that Trimble regularly relies on data developed in a similar fashion. [Tr. 1060, 1132-58] After objections to Boehnen's offering an opinion about the research results were properly overruled, Boehnen testified about the value and validity of the market research and called the results "reasonably certain." [Tr. 472] From all this testimony, the jury reasonably could determine that the profit-and-loss

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67 Tr. 370-71, 376-77, 379-82, 389-90, 453-59, 460-61, 514-15, 610-15, 1175-76.

statement was reliable and factually based and met the requirement for proving damages to a reasonable certainty.

The superior court also denied the adequacy of the profit-and-loss statement for a series of other reasons beyond its being a statistical projection. [Exc. 227-32] All of these reasons improperly reflected her view of the credibility of the evidence. The court's analysis failed to view the evidence in the light most favorable to RDS and instead accepted Trimble's attempts to impeach the data. For example, the court repeatedly cited Chen's trial testimony, particularly as to the claim that the survey data were preliminary and yet another survey was needed. [*E.g.*, Exc. 231 (citing Exh. 58)] But the jury did not need to believe a word Chen said and instead could have believed testimony from Boehnen, Hill, Miller, and Feucht that their procedures led to reliable, even conservative, predictions, and testimony that all three companies accepted the data as solid enough that they staked their reputations on them when making presentations to third parties.[68]

For all these reasons, the superior court erred in concluding that the jury could not find that the lost profit estimates in Exhibit 28 provided a way to establish damages to a reasonable certainty. This exhibit provided a basis for an award to RDS of over $111 million in lost profits, substantially more than the jury awarded.

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[68] Tr. 89-90, 181, 184-85, 260, 398, 412, 433, 611, 615, 617-19.

b. *The valuations on the whiteboard provided reasonably certain evidence on which the jury could rely.*

The superior court dismissed Exhibit 30 as "a disputed photograph of a partially illegible handwritten chart scribbled on a whiteboard." [Exc. 226-27] This characterization well illustrates the court's failure to view the evidence in the light most favorable to RDS. In fact, there was no dispute about who prepared the table or when: It was drawn by Trimble MCS's controller Steve Wolff at the December 2010 meeting between Trimble and RDS at which the possibility of Trimble's acquiring RDS was discussed; Chen photographed the whiteboard and emailed the picture to Feucht and Wolff. [Tr. 127, 131; Exc. 187] Trimble did not oppose admitting the exhibit. [Tr. 132] Trial testimony conflicted on whether at this meeting Trimble made an offer to purchase RDS,[69] but the salient point – for purposes of the evidence supporting RDS's claim for damages – is the valuation assigned by Trimble, not whether Trimble offered to pay that amount on any given day.[70] Feucht described the whiteboard as Wolff's valuation of RDS. [Tr. 134-37] He corresponded with Wolff after the meeting about why he did not accept the methodology used to assign a value. [Exh. J (stating he was "not sure NPV is

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[69] *Compare* Tr. 130-37 (Feucht testified that Trimble wanted to acquire RDS in late 2010, and that Wolff thought the appropriate valuation of RDS was at the 47% level of the chart), 997 (Chen answered "yes" to a question containing the premise that Trimble offered to buy RDS) *with* 1047 (Chen, on redirect testimony, testified that Trimble made no offer to acquire RDS).

[70] There are many reasons a potential buyer does not actually offer to buy, even after determining the fair value of the possible acquisition. In this case, a jury could conclude either that an offer was made or that no offer was made principally because by December 2010 Trimble knew that it was advancing a competing product.

the correct way to value RDS")[71] No one gave any different description of what the whiteboard table represented, and the superior court relied on no evidence in stating she did not accept the photograph as evidence of Trimble's valuation of RDS. [Exc. 226-27]

The superior court also held that Exhibit 30 could not support the lost profits award because "valuation" is "not the same thing as reasonably certain lost profits." [Exc. 226] This view again fails to accept reasonable inferences from the evidence: testimony indicated that RDS had few if any tangible assets contributing to its valuation, so its valuation was a reasonable proxy for its future profits reduced to present value.[72]

In sum, the jury properly could rely on Exhibit 30, a document prepared by Trimble, to reach a reasonable estimate of RDS's lost future profits. If the jury accepted the evidence that supported assuming that the Copper Center Project would reach 75% of its revenue goal, then it reasonably could award $38.5 million as lost profits. If it accepted that the Copper Center Project would reach 100% of its revenue goals, the jury could award a total of $51.3 million in lost profits, exactly what the jury did award.[73]

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[71] "NPV" stands for Net Present Value, which measures the difference between the present value of cash inflows and the present value of cash outflows; it is a standard method used to analyze the profitability of an investment or a project. *See http://www.investopedia.com/terms/n/npv.asp.*

[72] In his expert report, which was not produced to the jury, Trimble's expert calculated that lost profits would be estimated at $16 million if the profit-and-loss statement was accepted, a 60% discount was applied, and future profits were reduced to present value. [R. 1469] This estimate approximates the value that Wolff assigned to RDS based on the assumption that the Copper Center Project would achieve 47% of its revenue goals. [Exc. 188 (assigning a value of $18.4 million)]

[73] The jury's award on the tort claims equals the valuation assigned by Trimble at the 75% success level, and the amount awarded on the contract claim is one-third of that, so that together the two awards total the valuation that would be assigned by extrapolating

The superior court erred in finding that the whiteboard exhibit did not provide a reasonably certain estimate of lost profits of up to $51.3 million.

c. *The jury verdict can stand even though no witness or attorney urged the precise damages amount that the jury awarded.*

As a matter of law, it does not matter that no witness testified specifically that RDS sustained total lost profits of $51.3 million. Because the evidence supports an award of up to $111 million, based on Exhibit 28, by definition any lesser amount is also supported by the evidence. As this Court observed in the context of a case approving a remittitur, "defendant cannot complain of any judgment within the permissible limits."[74]

A jury is always entitled to think for itself and to analyze the evidence differently than the witnesses or attorneys did. This jury undeniably did; it requested a calculator, easel, and Post-It notes. [R. 3410] This Court frequently has upheld damage awards for specific amounts that were not testified to by any witness.[75] In endorsing a jury's

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the value at the 75% level to the 100% level. That is, if RDS was worth $38.5 million if it is assumed that the Copper Center Project would earn 75% of its projected revenue, it would be worth $51.3 million (the total awarded by the jury) if it is assumed that the Project would earn 100% of its projected revenue. *Cf.* R. 3410 (jury note requesting a calculator).

74 *Exxon Corp. v. Alvey*, 690 P.2d 733, 742 (Alaska 1984); *see also Borgen*, 273 P.3d at 592 (where verdict was within the range of damages established by the evidence, there was no basis to set aside the award).

75 *See, e.g.*, *Cameron*, 251 P.3d at 1023 (upholding award in part because it was less than plaintiff requested, suggesting that the jury had considered defendant's evidence and followed the court's instructions); *N. Slope Borough v. Brower*, 215 P.3d 308, 319 (Alaska 2009) (approving order upholding jury's damages award in part because it was less than plaintiff's witness and counsel urged); *Maddox v. Hardy*, 187 P.3d 486, 494-95 (Alaska 2008) (upholding damages award not testified to by any witness); *Sisters of Providence*, 81 P.3d at 1000, 1006-07 (upholding damages award that did not reflect any

determination that differed from anything presented by the parties and their counsel, this Court commented, "The jury is entitled to combine evidence from multiple sources to reach its determination."[76]

Here, for example, the jury could have believed most of RDS's evidence, but discounted its claim for lost profits, accepting that portion of Trimble's expert's testimony suggesting that the Project participants did not account for all the competition they likely would have faced. Or the jury could have rested its verdict largely on Trimble's own valuation of RDS as set forth on the whiteboard, but concluded, based on the conservative assumptions built into the whiteboard numbers, or Chen's enthusiasm for the Project, that the 75% success level was too pessimistic.

Because the evidence at trial supported a verdict of as much as $111 million, this Court must find that the jury's actual verdict for less than half that amount is supported by the evidence, and that the superior court erred in striking the verdict and awarding nothing to RDS. If the Court does not find support for the $51.3 million awarded by the jury, then it should order a remittitur to the largest amount supported by the evidence. At minimum, because RDS proved that it was damaged, it was entitled to an award of nominal damages.

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specific figure testified to at trial); *Alaska Tae Woong Venture*, 963 P.2d at 1060-62 (upholding award for lost profits even though the jury awarded the amount plaintiff's expert proposed for lost revenues, without a deduction for costs, where evidence supported a conclusion that plaintiff lost revenue after incurring all necessary costs).

[76] *Maddox*, 187 P.3d at 495.

CONCLUSION

This Court should find that evidence in the record supports the jury's verdict. This Court should reverse the superior court's grant of JNOV to Trimble and should reinstate the jury's verdict.

Respectfully submitted, this 24 day of August, 2015.

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