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IN THE SUPREME COURT OF THE STATE OF ALASKA

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ALASKA SUPREME COURT  
ALASKA APPELLATE COURTS  
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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

APPELLANT'S EXCERPT OF RECORD  
VOLUME 1 OF 1

Filed in the Supreme Court  
of the State of Alaska  
on this 8 day of  
Sept., 2015

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# APPELLANT'S EXCERPT OF RECORD

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FILED  
STATE OF ALASKA  
THIRD DISTRICT

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA  
THIRD JUDICIAL DISTRICT AT ANCHORAGE

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CLERK TRIAL COURTS  
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RECREATIONAL DATA SERVICES, LLC,  
an Alaska Limited Liability Company,

Plaintiff,

v.

TRIMBLE NAVIGATION LIMITED, a  
California corporation, CABELA'S  
INCORPORATED, a Delaware corporation,  
AT&T MOBILITY, LLC., a Delaware  
corporation, and ALASCOM, INC., an Alaska  
corporation ,

Defendants.

Case No. 3AN-11-10519 CI

AMENDED COMPLAINT

(Breach of Contract, Breach of Fiduciary Duty, Interference with Contract,  
Promissory Estoppel, Specific Performance, Fraud, Misrepresentation, Punitive Damages,  
Preliminary and Permanent Injunction)

COMES NOW Plaintiff, Recreational Data Services, Inc., an Alaska Corporation  
("RDS"), by and through its attorneys, Frontier Law Group, LLC, and alleges as follows:

1. RDS is an Alaska Corporation doing business in Alaska, and is legally qualified in all respects to bring this action.
2. Trimble Navigation Limited ("*Trimble*") is a California corporation with business ties to RDS in Alaska and in all respects subject to the jurisdiction of Alaska State Court.

PLAINTIFFS AMENDED COMPLAINT

*Recreation Data Services, Inc. v. Trimble Navigation Limited, et al.*, Case No. 3AN-11-10519 CI

Page 1 of 25

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3. Cabela's Incorporated ("*Cabela's*") is a Delaware corporation with business ties to RDS in Alaska and is in all respects subject to the jurisdiction of Alaska State Court.
4. Alascom, Inc. ("*Alascom*") is an Alaska corporation doing business in Alaska and is in all respects subject to the jurisdiction of this Court.
5. AT&T Mobility, LLC ("*ATTM*" and, together with Alascom, "*AT&T*") is a Delaware limited liability company registered as a foreign company doing business in Alaska and is in all respects subject to the jurisdiction of Alaska State Court.
6. Trimble, Cabela's, Alascom and ATTM are hereinafter referred to jointly as the "*Defendants*" and each as a "*Defendant*."

#### FACTS PERTINENT TO ALL COUNTS

7. RDS was initially formed to research, develop, market and distribute proprietary software solutions designed to benefit recreational consumers, including hunters, fishermen, and other outdoor enthusiasts, worldwide.
8. The RDS business model was based on producing a suite of software applications for GPS units and mobile devices based on proprietary and patented<sup>1</sup> technology licensed exclusively to RDS

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<sup>1</sup> See Exhibit 1 (Copy of the patent currently under an exclusive license to RDS)

9. After conducting extensive market research, RDS executives focused on finding an OEM manufacturer (like Trimble) to develop a proprietary platform capable of using RDS's proprietary suite of applications.
10. In February 2009, RDS executives met with Mr. Ken Wineberg, a senior sales executive with Trimble, whereby RDS and Mr. Wineberg scheduled a conference call between himself, RDS executives, and Mr. Chaur-Fong Chen, Director of Strategic Business Development for Trimble Navigation Limited.<sup>2</sup>
11. After the initial conceptual discussions that took place in February, Mr. Wineberg expressed his desire to learn more about RDS's products. On or about March 11, 2009, Mr. Wineberg and Mr. Chaur-Fong Chen met with the RDS executive team.
12. Following those meetings, Mr. Chen discussed the subject matter of the meetings with the President and two directors of Trimble,<sup>3</sup> where Mr. Chen obtained corporate approval for proceeding with the project.
13. On March 13, 2009, Trimble (through its subsidiary, Tripod Data Systems) and RDS entered into a mutual non-disclosure agreement.<sup>4</sup>
14. Once the Trimble Agreement was executed, RDS made full disclosure to Trimble of its proprietary business model, technology and trade secrets.

<sup>2</sup> See Exhibit 2 (Email sent from Chaur-Fong Chen, Trimble's Director of Strategic Business Development, expressing his enthusiasm for the project and setting up future meetings)

<sup>3</sup> See Exhibit 3 (Email sent from Mr. Chen stating that the President and two directors have been briefed on the project and receiving the approval to move forward with the project)

<sup>4</sup> See Exhibit 4 (The non-disclosure agreement signed by Tripod Data Systems, and adopted by Trimble)

15. At that point RDS and Trimble agreed to work as partners to jointly develop and market RDS's products.<sup>5</sup>
16. On or about April 6, 2009, Mr. Chen brought in the Trimble Outdoors division.<sup>6</sup>
17. On or about April 6, 2009, RDS met and talked with representatives from Remington and Cabela's about the roles they could play in the Trimble-RDS partnership.<sup>7</sup>
18. On or about April 8, 2009, Mr. Chen had lengthy discussions with Trimble's legal department about the Copper Center Project.<sup>8</sup>
19. At that time Trimble conducted a feasibility study for conducting business with RDS. A summary of that study was sent to RDS on April 9, 2009.<sup>9</sup>
20. On May 8, 2009, RDS informed Trimble about Remington's interest in a GPS unit, the work they are conducting on a marketing plan, and their access to Cabela's.<sup>10</sup>
21. Thereafter, on or about May 17, 2009 and as a result of RDS's efforts, Remington Arms Company, LLC ("Remington"), joined as a partner in the Rimfire Project (later renamed Copper Center) and Mr. Chen, on behalf of Trimble, once again obtained corporate approval thereof from Trimble's president and board of Directors.

<sup>5</sup> See Exhibit 5 (Email from Brian Feucht stating that "Trimble is the best fit for a partner and [RDS] will not shop to any other potential partner)  
<sup>6</sup> See Exhibit 6 (Email from Chaur-Fong Chen stating that he had been communicating with another Trimble division)  
<sup>7</sup> See Exhibit 7 (Email from Brian Feucht informing Mr. Chen about talks with Remington and Cabela's and their possible involvement with the partnership)  
<sup>8</sup> See Exhibit 8 (Email from Chaur-Fong Chen briefing Mr. Feucht about current activity within Trimble)  
<sup>9</sup> See Exhibit 9 (Trimble result of a feasibility study regarding conducting business with RDS)  
<sup>10</sup> See Exhibit 10 (RDS informing Trimble about possibly bringing Remington in as a partner on the project)



22. After becoming a partner in the project, Remington conducted an extensive market research analysis regarding (i) the feasibility of introducing a unit created by the Trimble/RDS/Remington partnership, (ii) what "key" features it should have, and, (iii) who would be the partnership's target market.<sup>11</sup>
23. On or about September 17<sup>th</sup>, 2009, Trimble and Remington sent representatives to Alaska to attend a partnership, planning and roles meeting in Copper Center Alaska (thus the partnership's Copper Center Project name).<sup>12</sup>
24. At that meeting, the partners agreed: Trimble would develop the project's hardware, Remington would undertake marketing and distribution<sup>13</sup>, RDS would provide the software applications and the three partners would jointly seek a third party telecom carrier such as AT&T<sup>14</sup>.
25. On or about August 17<sup>th</sup>, 2009 RDS began communications with Alascom in a meeting with Mr. Michael T. Felix, President of AT&T Alascom.<sup>15</sup>
26. Alascom is AT&T, for all intents and purposes, in Alaska.<sup>16</sup>
27. In that meeting Mr. Felix indicated that AT&T might be interested in working with RDS and offered to point RDS in the right direction within his organization.<sup>17</sup>

<sup>11</sup> See Exhibit 11 (Summary of the findings from a study conducted by Remington. This study was conducted to determine the target market and specific features consumers are interested in)

<sup>12</sup> See Exhibit 12 (page 1 is an email sent from Remington requesting meeting between the three partners [Trimble/RDS/Remington] to get everyone on the same page. Page 2 and 3 are the itineraries from Trimble and Remington, respectively)

<sup>13</sup> The partners agreed at that time that the key marketing target was Cabela's, as the former CEO of Remington just took the job as CEO for Cabela's

<sup>14</sup> See Exhibit 13 An attachment to an email sent by Mr. Chen further identifying the partners for the Copper Center Project and the potential role to be played by AT&T or another carrier

<sup>15</sup> See Exhibit 14 at paragraph 4 (Affidavit of Brian Feucht)

<sup>16</sup> See Exhibit 15 Screen shot of Alascom in the search bar and results showing AT&T Alaska

28. Following that meeting, Mr. Feucht obtained Mr. Felix's direct line through his contact at Alaska Growth Capital.<sup>18</sup>

29. On September 28<sup>th</sup>, 2009, the partners agreed to conduct weekly partnership meetings to bring the Copper Center Project's products to market on an accelerated basis.<sup>19</sup>

30. Thereafter, Trimble started putting together a price to manufacture a device that the partners could bring to market and the partners came to the conclusion that it would be more effective to bring a cellular device to the market rather than a simple GPS unit.<sup>20</sup>

31. During Mr. Feucht's conversation with personnel at Mr. Felix's office, RDS was directed to the appropriate person within Mr. Felix's organization, Mr. Brian Twiner of AT&T, who would be able to evaluate the Copper Center Project.

32. RDS and AT&T agreed on the terms of a non-disclosure agreement (the "AT&T NDA") and a copy was sent to RDS on September 14<sup>th</sup> 2010.<sup>21</sup>

33. At a "meeting of the minds" between AT&T, Remington, and Trimble in Atlanta,<sup>22</sup> Mr. Twiner stated that the NDA was being counter-signed by AT&T legal and that it would be sent following the meeting.<sup>23</sup>

<sup>17</sup> See Exhibit 14 at paragraph 6

<sup>18</sup> See Exhibit 16 Email from William Phelan to Brian Feucht informing him of Mr. Felix's direct phone line.

<sup>19</sup> See Exhibit 17 (Emails between Mr. Chen and Mr. Boehnen scheduling a time to conduct a weekly meeting to discuss the project)

<sup>20</sup> See Exhibit 18 (A power-point presentation prepared by Mr. Chen and presented to the President and Executives of Trimble. The presentation outlines the use of RDS's patent, the responsibilities of the parties, and Trimble's acquisition of RDS.)

<sup>21</sup> See Exhibit 19 (Copy of the AT&T non-disclosure agreement)

34. Once RDS was assured that the AT&T NDA was executed, RDS, Trimble, and Remington made a full disclosure of the Copper Center Project and the Trimble/RDS/Remington partnership.
35. Thereafter, RDS executives flew down to Corvallis and met with three Trimble executives to ascertain the best way to move forward with the project.
36. On or about October 14, 2010, Trimble first proposed an acquisition of RDS<sup>24</sup>.
37. During the discussions between the partners, all of RDS's proprietary information was made available to Trimble, and Trimble made a structured proposal to acquire RDS's partnership interest.<sup>25</sup>
38. Shortly after the discussion about acquisition, RDS began to notice a change in Trimble's attitude<sup>26</sup> and experienced tremendous difficulty getting the senior executive from Trimble to attend previously scheduled partnership meetings.
39. At the time of these meeting and the days following, RDS was under the assurance that Trimble's CEO, COO, and Board supported the partnership and the project's direction.<sup>27</sup>

<sup>22</sup> See Exhibit 20 (Email from Mr. Chen to Mr. Twiner and Mr. Feucht outlining the schedule for the meeting with AT&T)

<sup>23</sup> See Exhibit 21 (A signed non-disclosure agreement by AT&T and Trimble) (In the agreement it clearly states that the parties will "protect from unauthorized disclosure all confidential and proprietary information, of whatever source, to which they have access." Further, this agreement bound AT&T any all of their "Affiliates". "Affiliates" being defined as "any entity owned in whole or in part . . . directly or indirectly through a subsidiary, by a party hereto or under common ownership, in whole or in part with a party." See AT&T Non-disclosure agreement).

<sup>24</sup> See Exhibit 22 (Email from Brian Feucht informing Andrew Schmucker that Trimble had agreed to start the formal acquisition process)

<sup>25</sup> See Exhibit 23 (Copy of the initial proposal prepared by Trimble's executive, Mr. Steve Wolff)

<sup>26</sup> See Exhibit 24 (Email from Brian Feucht voicing his concern about Trimble Outdoors involvement with the project and the direction that it would be taking)

40. After being re-assured by Mr. Chen, RDS was tasked with establishing a business relationship for the partnership with Cabela's and was assured that Trimble was on board.
41. RDS at that stage engaged Paul Miller, the former Chairman of the Freedom Group and a personal friend of Cabela's CEO, as RDS's COO to facilitate that relationship.
42. With the help of Cabela's Tommy Milner, RDS set up a meeting with Cabela's senior executive team and entered into a confidentiality agreement covering the Copper Center Project (the "Cabela's Agreement").<sup>28</sup>
43. Once the Cabela's Agreement was executed, a full disclosure was made of the Copper Center Project and the Trimble/RDS/Remington partnership.
44. At the same time, Trimble was tasked with producing mock-ups of the device for integration into the new presentation.
45. Representatives from RDS and Trimble agreed to attend the Cabela's meeting in person.<sup>29</sup>
46. On a call with Trimble's Jim Sheldon, while in route to the Cabela's meeting, RDS was told that Trimble was no longer willing to support the Cabela's meeting or

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<sup>27</sup> See Exhibit 25 (Email from Mr. Chen re-assuring RDS that progress is being made on the Copper Center Project. Mr. Chen further asserts that upper management is in the process of being scheduled to meet and address the legal issues.)

<sup>28</sup> See Exhibit 26 (Cabela's agreement)

<sup>29</sup> See Exhibit 27 (Email sent by Steve Wolff scheduling the meeting with Cabela's)

pursue the Copper Center Project with RDS, and stated that RDS was free to approach other potential partners.

47. RDS went ahead with the meeting with Cabela's management and discovered that Trimble had copied all of the Copper Center Project software, data, and proprietary trade secrets and had launched its own competing product through Cabela's marketing channel.

48. Cabela's is now providing a distribution channel for RDS's proprietary software, data and trade secrets under the "Recon Hunt" mark.<sup>30</sup>

49. AT&T, with full knowledge of the proprietary nature of RDS's technology and Trimble's misappropriation thereof, is now marketing<sup>31</sup>, and developing devices to market, RDS's proprietary products in violation of the Cabela's Agreement, the Trimble Agreement, and its own nondisclosure agreement it has in place with the project partners.

**COUNT I**  
**BREACH OF CONTRACT/FIDUCIARY DUTY**

**TRIMBLE**

50. Plaintiff incorporates all prior paragraphs as though fully set forth herein.

51. Trimble and RDS started working together in an effort to develop a product using RDS's proprietary software and data. Through the development of the product,

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<sup>30</sup> See Exhibit 28

<sup>31</sup> See Exhibit 29 (Copy of page 13 of AT&T's annual report to its shareholders extolling the virtues of its new partnership with Trimble to market RDS's products)

their relationship turned into a partnership and required bringing in outside parties to facilitate the marketing and distribution of the partnership's products. While in route to a meeting with the CEO's of Trimble and Cabela's, RDS was told that Trimble was backing out of the partnership. During the meeting with Cabela's, RDS became aware that Trimble was secretly working with Cabela's on a competing product using the proprietary software and data belonging to RDS.

52. Trimble's failure to honor the terms and conditions of the parties' partnership agreement and the Trimble Agreement was a breach of contract and a violation of the covenant of good faith and fair dealing.

53. As a result of Trimble's breach, RDS has lost the benefit of its bargain, the value of its proprietary information, the investments made in compliance with the partnership agreement and other contracts to perform as agreed, the value of the Copper Center Project and future implementations based thereon.

54. In addition and because of Trimble's breach, RDS has lost the value of the reasonable profits that RDS was projected to receive as a partner in the Copper Center Project<sup>32</sup> and Trimble understood that RDS would lose that value as the foreseeable result of Trimble's failure to keep its promises to RDS.

55. Trimble is a sophisticated business entity which has specific knowledge concerning specialized GPS and related hardware and, prior to breaking its

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<sup>32</sup> See Exhibit 30 (Reasonably projected by the partners to be in excess of \$111,666,973 for the first five years of production. Page 7 of 8 bottom line is Trimble's projections for RDS's portion (the software) of the first five years of the Copper Center Project operations)

promises to RDS, Trimble had reason to know what the losses would be that RDS would suffer as a result of Trimble's breaches.

56. RDS has suffered economic losses as a result of Trimble's breaches of contract in the amount of not less than \$111,666,973.00, the exact amount to be proven at trial.

**COUNT II**  
**BREACH OF CONTRACT**

**CABELA'S**

57. RDS incorporates all prior paragraphs as though fully set forth herein.

58. Despite signing the non-disclosure agreement between RDS and Cabela's, Cabela's made a side agreement to, and did, market a competing product developed by Trimble using RDS's proprietary software and data.

59. The failure of Cabela's to honor the terms and conditions of their confidentiality agreement was a breach of contract and a violation off the covenant of good faith and fair dealing.

60. As a result of Cabela's breach, RDS has lost the benefit of its bargain, the value of their proprietary information, the investments made in compliance with Cabela's agreement and other contracts to perform as agreed, the value of the Copper Center Project and future implementations based thereon.

61. In addition and because of Cabela's breach, RDS has lost the value of the reasonable profits that RDS was projected to receive as a partner in the Copper

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Center Project and Cabela's understood that RDS would lose that value as the foreseeable result of Cabela's failure to keep their promises to RDS.

62. Cabela's is a sophisticated business entity which has specific knowledge of the distribution of software and applications and related products and, prior to breaking its promises to RDS, Cabela's had reason to know what the losses RDS would suffer as a result of those breaches.

63. RDS has suffered economic losses as a result of Cabela's breaches of contract in the amount of not less than \$111,666,973.00, the exact amount to be proven at trial.

#### AT&T

64. RDS incorporates all prior paragraphs as though fully set forth herein.

65. Despite signing non-disclosure agreements with RDS and its partners, Trimble and Remington, AT&T proceeded to market a competing product marketed by Trimble using proprietary software and data belonging to RDS.

66. The failure of AT&T to honor the terms and conditions of their confidentiality agreements was a breach of contract and a violation of the covenant of good faith and fair dealing.

67. As a result of AT&T's breach, RDS has lost the benefit of its bargain, the value of their proprietary information, the investments made in compliance with AT&T's

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agreement and other contracts to perform as agreed, the value of the Copper Center Project and future implementations based thereon.

68. In addition and because of the breach by AT&T, RDS has lost the value of the reasonable profits that RDS was projected to receive as a partner in the Copper Center Project and AT&T understood that RDS would lose that value as the foreseeable result of AT&T failure to keep their promises to RDS.

69. AT&T is a sophisticated business entity which has specific knowledge of the distribution of software and applications and related products and, prior to breaking its promises to RDS, AT&T had reason to know what the losses RDS would suffer as a result of those breaches.

70. RDS has suffered economic losses as a result of AT&T's breaches of contract in the amount of not less than \$111,666,973.00, the exact amount to be proven at trial.

**COUNT III**  
**PROMISSORY ESTOPPEL**

**TRIMBLE**

71. RDS incorporates all prior paragraphs as though fully set forth herein.

72. After RDS started expressing concerns about the timeline of the project and difficulties making previously scheduled meetings, RDS was assured by Trimble that steady progress was being made on the Copper Center Project.

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73. By signing the non-disclosure agreement Trimble agreed not to disclose any proprietary information received by RDS or concerning the Copper Center Project without authorization, and knowing that RDS would rely on that promise, Trimble developed, marketed, and distributed a product using RDS's proprietary software and data.

74. When Trimble entered into a partnership with RDS and Remington, Trimble promised to act in the best interest of the partnership. By Trimble secretly working on, marketing, and distributing a competing product, not for the benefit of the partnership, using the partnerships proprietary software and data developed by RDS, Trimble broke that promise.

75. The statements and actions of Trimble's agents, attorneys, managers and employees described above promised RDS that RDS had, and would continue to have the benefit of their partnership agreement and the Trimble NDA, and subsequent software development for the Copper Center Project in the future.

76. RDS relied upon those promises and were induced by those promises to invest hundreds of thousands of dollars in anticipation of performing under the parties' partnership agreement and/or the Trimble Agreement.

77. Trimble knew that RDS would rely upon its promises to make those investments.

78. Defendants knew at the time Plaintiffs were making those investments that those investments were being made.

79. Enforcement of Trimble's promises to RDS is necessary in the interest of justice.

CABELA'S

80. RDS incorporates all prior paragraphs as though fully set forth herein.

81. By signing the non-disclosure agreement Cabela's agreed not to disclose any proprietary information received by RDS or concerning the Copper Center Project without authorization, and knowing that RDS would rely on that promise, Cabela's marketed and distributed a competing product developed by Trimble using the partnerships proprietary software and data developed by RDS.

82. The statements and actions of Cabela's agents, attorneys, managers and employees described above promised RDS that RDS had, and would continue to have the benefit of their partnership agreement and related agreements, and subsequent software development for the Copper Center Project in the future.

83. RDS relied upon those promises and were induced by those promises to invest hundreds of thousands of dollars in anticipation of performing under the parties' partnership agreement and related agreements.

84. Cabela's knew that RDS would rely upon its promises to make those investments.

85. Cabela's knew at the time RDS was making those investments and those investments were being made.

86. Enforcement of Cabela's promises to RDS is necessary in the interest of justice.

AT&T

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87. RDS incorporates all prior paragraphs as though fully set forth herein.

88. By signing the non-disclosure agreement AT&T agreed not to disclose any proprietary information received by RDS or concerning the Copper Center Project without authorization, and knowing that RDS would rely on that promise, AT&T marketed and distributed a competing product developed by Trimble using the partnership's proprietary software and data developed by RDS.

89. The statements and actions of AT&T agents, attorneys, managers and employees described above promised RDS that RDS had, and would continue to have the benefit of their partnership agreement and related agreements, and subsequent software development for the Copper Center Project in the future.

90. RDS relied upon those promises and were induced by those promises to invest hundreds of thousands of dollars in anticipation of performing under the parties' partnership agreement and related agreements.

91. AT&T knew that RDS would rely upon its promises to make those investments.

92. AT&T knew at the time RDS was making those investments and those investments were being made.

93. Enforcement of AT&T's promises to RDS is necessary in the interest of justice.

**COUNT IV**  
**INTERFERENCE WITH CONTRACT**

**TRIMBLE**

94. RDS incorporates all prior paragraphs as though fully set forth herein.

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95. Knowing that a partnership existed between RDS, Remington, Trimble, and contracts existed between Cabela's and AT&T for the marketing and distribution of the partnership's project, Trimble marketed a competing product with Cabela's and AT&T using the partnership's proprietary data and software developed by RDS.

96. Trimble knows, and at all times relevant knew, that RDS was either a party to or entitle to perform under the partnership agreement with Remington and/or Cabela's and/or AT&T and Trimble intended to induce a breach thereof.

97. Trimble has breached their agreements with RDS.

98. The Breach caused RDS damages and Trimble's conduct was not privileged or justified.

99. To the extent that Trimble had a direct financial interest in another agreement, Trimble was motivated by spite, malice, or some other improper objective, not by the desire to protect its own economic interest.

100. As a result of Trimble's conduct, RDS has been, and in the future will be, economically damaged in the amount of up to, or in excess of \$111,666,973.00, plus any attorney fees, the exact amount to be proven at trial.

#### CABELA'S

101. RDS incorporates all prior paragraphs as though fully set forth herein.

102. Knowing that a partnership existed between RDS, Remington, Trimble, and a contract existed between Cabela's and AT&T for marketing and distribution of the Copper Center product, Cabela's agreed to market and distribute a competing product for Trimble using the partnership's proprietary data and software developed by RDS for use in connection with the Copper Center Project,
103. Cabela's knows, and at all times relevant knew, that RDS was either a party to or entitle to perform under the partnership agreement with Trimble and/or Remington and/or AT&T and Cabela's intended to induce a breach thereof.
104. Cabela's has breached their agreements with RDS.
105. The Breach caused RDS damages and Cabela's conduct was not privileged or justified.
106. To the extent that Cabela's had a direct financial interest in another agreement, Cabela's was motivated by spite, malice, or some other improper objective, not by the desire to protect its own economic interest.
107. As a result of Cabela's conduct, RDS has been, and in the future will be, economically damaged in the amount of up to, or in excess of \$111,666,973.00, plus any attorney fees, the exact amount to be proven at trial.

AT&T

108. RDS incorporates all prior paragraphs as though fully set forth herein.

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109. Knowing that a partnership existed between RDS, Remington, Trimble, and a contract existed between Cabela's and AT&T for marketing and distribution of the Copper Center product, AT&T agreed to market and distribute a competing product for Trimble using the partnership's proprietary data and software developed by RDS for use in connection with the Copper Center Project.

110. AT&T knows, and at all times relevant knew, that RDS was either a party to or entitle to perform under the partnership agreement with Trimble and/or Remington and/or Cabela's and AT&T intended to induce a breach thereof.

111. AT&T has breached their agreements with RDS.

112. The Breach caused RDS damages and AT&T's conduct was not privileged or justified.

113. To the extent that AT&T had a direct financial interest in another agreement, AT&T was motivated by spite, malice, or some other improper objective, not by the desire to protect its own economic interest.

114. As a result of AT&T's conduct, RDS has been, and in the future will be, economically damaged in the amount of up to, or in excess of \$111,666,973.00, plus any attorney fees, the exact amount to be proven at trial.

**COUNT V**  
**FRAUD**  
**(Trimble)**

115. RDS incorporates all prior paragraphs as though fully set forth herein.

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116. Trimble signed a non-disclosure agreement with RDS agreeing not to disclose RDS's proprietary data or software. Trimble shared this information with a subsidiary of Trimble, Trimble Outdoors. RDS was assured that the sharing of information was necessary for the development of the Copper Center Product. After receiving these assurances, RDS proceeded with their obligations under the partnership agreement. Trimble proceeded to market a competing product using RDS's proprietary information gained from the non-disclosure agreement.

117. There statements and acts of Trimble's agents, attorneys, managers and employees were made intentionally or made with reckless disregard of the consequences to RDS.

118. The misrepresentations made through the statements and acts of Trimble's agents, attorneys, managers and employees were fraudulent and material.

119. RDS reasonably relied upon the misrepresentations of RDS's agents, attorneys, managers and employees.

120. RDS's reliance was justified and Trimble's misrepresentations induced RDS into disclosing RDS proprietary data and business plan and incurring costs in anticipation of performing under the parties' partnership agreement and/or the Trimble Agreement.



121. Trimble's misrepresentations induced RDS to reasonably rely upon Trimble's misrepresentations and to invest hundreds of thousands of dollars in anticipation of performing under the partnership agreement.

122. As a result of RDS's justifiable and reasonable reliance on Trimble's misrepresentations, RDS has been, and in the future will be, economically damaged in the amount of not less than \$111,666,973.00, the exact amount to be proven at trial.

**COUNT VI**  
**NEGLIGENT MISREPRESENTATION**  
(Trimble)

123. RDS incorporates all prior paragraphs as though fully set forth herein.

124. Trimble signed a non-disclosure agreement with RDS agreeing not to disclose RDS's proprietary data or software. Trimble shared this information with a subsidiary of Trimble, Trimble Outdoors. RDS was assured that the sharing of information was necessary for the development of the Copper Center Product. After receiving these assurances, RDS proceeded with their obligations under the partnership agreement. Trimble proceeded to market a competing product using RDS's proprietary information gained from the non-disclosure agreement.

125. The misrepresentations made by Trimble's agents, attorneys, managers, and employees described above, were made in the course of each individual's business profession or employment with Trimble.

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126. Each misrepresentation communicated false information to RDS and RDS justifiably relied upon the false information that was communicated to them by Trimble.

127. The above described agents, attorneys, managers and employees of Trimble failed to exercise reasonable care or competence in obtaining or communicating the false information to RDS.

128. As a result of RDS's justifiable reliance on Trimble's misrepresentations, Defendant has been, and in the future will be, economically damaged in the amount of not less than \$111,666,973.00, the exact amount to be proven at trial.

**COUNT VII**  
**PUNITIVE DAMAGES**

129. Plaintiff incorporates all prior paragraphs as though fully set forth herein.

130. The breaches of duty, and misrepresentation set forth in the preceding paragraphs were intentional, outrageous, and made with reckless indifference to the rights of plaintiff such that an award of punitive damages is appropriate.

**COUNT VIII**  
**SPECIFIC ENFORCEMENT, PRELIMINARY AND PERMANENT INJUNCTION**

131. Plaintiff incorporates all prior paragraphs as though fully set forth herein.

132. Defendants have deprived RDS of the benefit of its bargain to perform under the parties' various agreements.

133. Should Defendants be successful, RDS's business in the limited market will be usurped by the Defendants, hundreds of millions of dollars in potential profits will be wasted and RDS will be caused irreparable and financially fatal injury from which RDS could not, and will not, recover.

134. Should the Court fail to specifically enforce and/or enjoin Defendants from continuing to breach each such defendant's respective agreement (in accordance with the terms thereof) with RDS, Defendant will continue to receive the benefits of the RDS's proprietary software in violation of their respective agreements and RDS will continue to suffer irreparable harm for which money damages alone will not be sufficient.

#### **PRAYER FOR RELIEF**

Wherefore Plaintiff prays for relief as follows:

1. Plaintiff prays for an award of general, past and future economic and other direct damages in the amount to be proven at trial.
2. Plaintiff prays for an award of indirect, special, consequential, exemplary, extraordinary, and/or punitive damages in the amount to be proven at trial.
3. Plaintiff prays for an award of damages for fraud in the amount, plus punitive damages in the amounts to be proven at trial.
4. Plaintiff prays for the return of its investments in the amount to be proven at trial.

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5. Plaintiff prays for a preliminary and permanent injunction to specifically enforce the parties' agreement and/or Contract until such time as the Court shall decide the issues in this case then later.
6. Plaintiff prays that the court award such costs, interest and attorney's fees to which they are entitled under law, and
7. Plaintiff prays that the Court award then such other relief they are entitled to under law.

DATED this 7<sup>th</sup> day of June, 2012.

FRONTIER LAW GROUP, LLC

By: 

Christopher D. Cyphers, Alaska Bar No. 9812085  
Attorneys for Plaintiffs, Recreation Data Services, Inc

**CERTIFICATE OF SERVICE**

I hereby certify that on June 7, 2012, a true and correct copy of the foregoing Amended Complaint was served electronically on the following:


|   |  |
|---|--|
| <p><u>Jennifer Coughlin</u><br/>K&amp;L Gates, LLP<br/>420 L Street, Suite 400<br/>Anchorage, AK 99501-1971</p> | <p><u>James Leik</u><br/>Perkins Coie, LLP<br/>1029 West Third Avenue, Suite 300<br/>Anchorage, AK 99501-1981</p>        |
| <p><u>David Bateman</u><br/>K&amp;L Gates, LLP<br/>925 Fourth Avenue<br/>Seattle, WA 98104</p>                  | <p><u>Daniel Elms</u><br/>Bell, Nunnally &amp; Martin, LLP<br/>3252 McKinney Avenue, Suite 1400<br/>Dallas, TX 75204</p> |

PLAINTIFFS AMENDED COMPLAINT  
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Attorneys for Defendants:  
Cabela's Incorporated, AT&T Mobility,  
LLC, and Alascom, Inc.

Attorneys for Trimble Navigation LTD

By:   
Christopher D. Cyphers, Alaska Bar No. 9812085  
Attorneys for Plaintiffs, Recreation Data Services, Inc

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PLAINTIFFS AMENDED COMPLAINT  
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2. Trimble admits that Trimble is a California corporation. The remaining allegations contained in paragraph 2 are legal conclusions to which no answer is necessary. To the extent an answer is required by the Court, Trimble denies the remaining allegations.

3. Trimble does not have knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 3 and therefore denies these allegations.

4. Trimble does not have knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 4 and therefore denies these allegations.

5. Trimble does not have knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 5 and therefore denies these allegations.

6. Trimble admits that RDS refers to all Defendants jointly as "Defendants" and each as "Defendant."

#### PLAINTIFF'S FACTUAL ALLEGATIONS

7. Trimble does not have knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 7 and therefore denies these allegations.

8. Trimble does not have knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 8 and therefore denies these allegations.

9. Trimble does not have knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 9 and therefore denies these allegations.

10. Trimble admits that Ken Wineberg ("Wineberg") met with representatives from RDS in or around February 2009. Trimble denies the remaining allegations contained in paragraph 10 and footnote 2.

11. Trimble admits that Wineberg and Chaur-Fong Chen ("Chen") met with representatives from RDS on or about March 11, 2009. Trimble denies the remaining allegations contained in paragraph 11.

12. Trimble admits that Chen discussed RDS with other Trimble representatives. Trimble denies the remaining allegations contained in paragraph 12 and footnote 3.

13. Trimble admits that Tripod Data Systems entered into a mutual non-disclosure agreement with RDS on or around March 13, 2009. Trimble denies the remaining allegations contained in paragraph 13 and footnote 4.

14. Trimble denies the allegations contained in paragraph 14.

15. Trimble denies the allegations contained in paragraph 15 and footnote 5.

16. Trimble denies the allegations contained in paragraph 16 and footnote 6.

17. Trimble denies the existence of a partnership between Trimble and RDS. Trimble does not have knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 17.

18. Trimble admits on or before April 8, 2009, Chen had discussions with representatives from Trimble's legal department. Trimble denies the remaining allegations contained in paragraph 18 and footnote 8.

19. Trimble admits that Chen created a document entitled "Recreational Data Systems Business Feasibility Study - Summary," dated April 9, 2009. Trimble denies the remaining allegations contained in paragraph 19 and footnote 9.



20. Trimble admits that RDS advised Trimble that Remington Arms Company, LLC ("Remington"), was interested in developing a GPS unit. Trimble denies the remaining allegations contained in paragraph 20 and footnote 10.

21. Trimble denies that a partnership was ever formed between Trimble and RDS or that Trimble's president or board of directors ever approved the formation of such partnership. Trimble does not have knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 21 regarding Remington and therefore denies these allegations.

22. Trimble denies that a partnership was ever formed between Trimble and RDS. Trimble does not have knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in paragraph 22 and footnote 11 and therefore denies these allegations.

23. Trimble denies that a partnership was ever formed between Trimble and RDS. Trimble does not have knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in paragraph 23 and footnote 12 and therefore denies these allegations.

24. Trimble denies that a partnership was ever formed between Trimble and RDS, and denies all other allegations contained in paragraph 24 and footnotes 13-14 regarding Trimble. Trimble does not have knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 24 and footnotes 13-14 regarding any other parties and therefore denies these allegations.

25. Trimble does not have knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 25 and footnote 15 and therefore denies these allegations.

26. Trimble does not have knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 26 and footnote 16 and therefore denies these allegations.

27. Trimble does not have knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 27 and footnote 17 and therefore denies these allegations.

28. Trimble does not have knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 28 and footnote 18 and therefore denies these allegations.

29. Trimble denies that a partnership was ever formed between Trimble and RDS. Trimble does not have knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in paragraph 29 and footnote 19 and therefore denies these allegations.

30. Trimble denies that a partnership was ever formed between Trimble and RDS. Trimble does not have knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in paragraph 30 and footnote 20 and therefore denies these allegations.

31. Trimble does not have knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 31 and therefore denies these allegations.

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32. Trimble does not have knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 32 and footnote 21 and therefore denies these allegations.

33. The allegations contained in paragraph 33 contain legal conclusions to which no response is necessary. To the extent an answer is required by the Court, Trimble denies the allegations contained in paragraph 33 and footnote 23, except that Trimble does not have knowledge or information sufficient to form a belief as to the truth of the allegations regarding any parties other than Trimble and therefore denies these allegations.

34. Trimble denies that a partnership was ever formed between Trimble and RDS and all other allegations contained in paragraph 34 regarding Trimble. Trimble does not have knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 34 regarding any other parties.

35. Trimble admits that representatives from Trimble met with representatives from RDS. Trimble denies the remaining allegations contained in paragraph 35.

36. Trimble denies that Trimble ever proposed to acquire RDS.

37. Trimble denies the allegations contained in paragraph 37 and footnote 25.

38. Trimble denies the allegations contained in paragraph 38 and footnote 26.

39. Trimble denies the allegations contained in paragraph 39 and footnote 27.

40. Trimble denies the allegations contained in paragraph 40 and footnote 28.

41. Trimble does not have knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 41.

42. Trimble does not have knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 42 and footnote 28 and therefore denies these allegations.

43. Trimble denies the allegations contained in paragraph 43, except that Trimble does not have knowledge or information sufficient to form a belief as to the truth of the allegations regarding any parties other than Trimble.

44. Trimble denies the allegations contained in paragraph 44.

45. Trimble admits that Trimble met with Cabelas and RDS. Trimble denies the remaining allegations contained in paragraph 45 and footnote 29, except that Trimble does not have knowledge or information sufficient to form a belief as to the truth of the allegations regarding any parties other than Trimble and therefore denies these allegations.

46. Trimble admits that Trimble never formed a partnership with RDS. Trimble denies the remaining allegations contained in paragraph 46, except that Trimble does not have knowledge or information sufficient to form a belief as to the truth of the allegations regarding any parties other than Trimble.

47. Trimble denies the allegations contained in paragraph 47, except that Trimble does not have knowledge or information sufficient to form a belief as to the truth of the allegations regarding any parties other than Trimble.

48. Trimble denies the allegations contained in paragraph 48 and footnote 30.

49. Trimble denies the allegations contained in paragraph 49 and footnote 31.

**COUNT I**  
**BREACH OF CONTRACT/FIDUCIARY DUTY**

**TRIMBLE**

50. Trimble repeats and adopts by reference its responses to paragraphs 1 through 49, as if fully set forth herein.

51. Trimble denies that a partnership was ever formed between Trimble and RDS or that RDS ever provided Trimble with trade secrets or proprietary information and all other allegations contained in paragraph 51 regarding Trimble. Trimble does not have knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 51 regarding any other parties and therefore denies these allegations.

52. Trimble denies the allegations contained in paragraph 52.

53. Trimble denies the allegations contained in paragraph 53.

54. Trimble denies the allegations contained in paragraph 54.

55. Trimble denies the allegations contained in paragraph 55.

56. Trimble denies the allegations contained in paragraph 56.

**COUNT TWO**  
**BREACH OF CONTRACT**

**CABELA'S**

57. Trimble repeats and adopts by reference its responses to paragraphs 1 through 56, as if fully set forth herein.

58. Trimble denies the allegations contained in paragraph 58 regarding Trimble. Trimble does not have knowledge or information sufficient to form a belief as to the truth of the

allegations contained in paragraph 58 regarding any other parties and therefore denies these allegations.

59. Trimble does not have knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 59 and therefore denies these allegations.

60. Trimble does not have knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 60 and therefore denies these allegations.

61. Trimble does not have knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 61 and therefore denies these allegations.

62. Trimble does not have knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 62 and therefore denies these allegations.

63. Trimble does not have knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 63 and therefore denies these allegations.

AT&T

64. Trimble repeats and adopts by reference its responses to paragraphs 1 through 63, as if fully set forth herein.

65. Trimble denies the allegations contained in paragraph 65.

66. Trimble does not have knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 66 and therefore denies these allegations.

67. Trimble does not have knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 67 and therefore denies these allegations.

68. Trimble does not have knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 68 and therefore denies these allegations.

69. Trimble does not have knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 69 and therefore denies these allegations.

70. Trimble does not have knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 70 and therefore denies these allegations.

**COUNT III**  
**PROMISSORY ESTOPPEL**

**TRIMBLE**

71. Trimble repeats and adopts by reference its responses to paragraphs 1 through 70, as if fully set forth herein.

72. Trimble denies the allegations contained in paragraph 72.

73. Trimble denies the allegations contained in paragraph 73.

74. Trimble denies the allegations contained in paragraph 74.

75. Trimble denies the allegations contained in paragraph 75.

76. Trimble denies the allegations contained in paragraph 76.

77. Trimble denies the allegations contained in paragraph 77.

78. Trimble denies the allegations contained in paragraph 78.

79. Trimble denies the allegations contained in paragraph 79.

**CABELA'S**

80. Trimble repeats and adopts by reference its responses to paragraphs 1 through 79, as if fully set forth herein.

81. Trimble denies the allegations contained in paragraph 81.

82. Trimble does not have knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 82 and therefore denies these allegations.

83. Trimble does not have knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 83 and therefore denies these allegations.

84. Trimble does not have knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 84 and therefore denies these allegations.

85. Trimble does not have knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 85 and therefore denies these allegations.

86. Trimble does not have knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 86 and therefore denies these allegations.

AT&T

87. Trimble repeats and adopts by reference its responses to paragraphs 1 through 86, as if fully set forth herein.

88. Trimble denies the allegations contained in paragraph 88.

89. Trimble does not have knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 89 and therefore denies these allegations.

90. Trimble does not have knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 90 and therefore denies these allegations.

91. Trimble does not have knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 91 and therefore denies these allegations.

92. Trimble does not have knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 92 and therefore denies these allegations.



93. Trimble does not have knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 93 and therefore denies these allegations.

**COUNT IV**  
**INTERFERENCE WITH CONTRACT**

**TRIMBLE**

94. Trimble repeats and adopts by reference its responses to paragraphs 1 through 93, as if fully set forth herein.

95. Trimble denies the allegations contained in paragraph 95.

96. Trimble denies the allegations contained in paragraph 96.

97. Trimble denies the allegations contained in paragraph 97.

98. Trimble denies the allegations contained in paragraph 98.

99. Trimble denies the allegations contained in paragraph 99.

100. Trimble denies the allegations contained in paragraph 100.

**CABELA'S**

101. Trimble repeats and adopts by reference its responses to paragraphs 1 through 100, as if fully set forth herein.

102. Trimble denies the allegations contained in paragraph 102.

103. Trimble denies the allegations contained in paragraph 103 regarding Trimble. Trimble does not have knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 103 regarding any other parties and therefore denies these allegations.

104. Trimble does not have knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 104 and therefore denies these allegations.

105. Trimble does not have knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 105 and therefore denies these allegations.

106. Trimble does not have knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 106 and therefore denies these allegations.

107. Trimble does not have knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 107 and therefore denies these allegations.

AT&T

108. Trimble repeats and adopts by reference its responses to paragraphs 1 through 107, as if fully set forth herein.

109. Trimble denies the allegations contained in paragraph 109.

110. Trimble denies the allegations contained in paragraph 110 regarding Trimble. Trimble does not have knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 110 regarding any other parties and therefore denies these allegations.

111. Trimble does not have knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 111 and therefore denies these allegations.

112. Trimble does not have knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 112 and therefore denies these allegations.

113. Trimble does not have knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 113 and therefore denies these allegations.

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114. Trimble does not have knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 114 and therefore denies these allegations.

**COUNT V**  
**FRAUD**  
(Trimble)

115. Trimble repeats and adopts by reference its responses to paragraphs 1 through 114, as if fully set forth herein.

116. Trimble denies the allegations contained in paragraph 116.

117. Trimble denies the allegations contained in paragraph 117.

118. Trimble denies the allegations contained in paragraph 118.

119. Trimble denies the allegations contained in paragraph 119.

120. Trimble denies the allegations contained in paragraph 120.

121. Trimble denies the allegations contained in paragraph 121.

122. Trimble denies the allegations contained in paragraph 122.

**COUNT VI**  
**NEGLIGENT MISREPRESENTATION**  
(Trimble)

123. Trimble repeats and adopts by reference its responses to paragraphs 1 through 122, as if fully set forth herein.

124. Trimble denies the allegations contained in paragraph 124.

125. Trimble denies the allegations contained in paragraph 125.

126. Trimble denies the allegations contained in paragraph 126.

127. Trimble denies the allegations contained in paragraph 127.

128. Trimble denies the allegations contained in paragraph 128.

**COUNT VII**  
**PUNITIVE DAMAGES**

129. Trimble repeats and adopts by reference its responses to paragraphs 1 through 128, as if fully set forth herein.

130. The allegations contained in paragraph 130 are legal conclusions to which no response is necessary. To the extent an answer is required by the Court, Trimble denies the allegations contained in paragraph 130 regarding Trimble. Trimble does not have knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 130 regarding any other parties and therefore denies these allegations.

**COUNT VIII**  
**SPECIFIC ENFORCEMENT, PRELIMINARY AND PERMANENT INJUNCTION**

131. Trimble repeats and adopts by reference its responses to paragraphs 1 through 130, as if fully set forth herein.

132. The allegations contained in paragraph 132 are legal conclusions to which no response is necessary. To the extent an answer is required by the Court, Trimble denies the allegations contained in paragraph 132 regarding Trimble. Trimble does not have knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 132 regarding any other parties and therefore denies these allegations.

133. The allegations contained in paragraph 133 are legal conclusions to which no response is necessary. To the extent an answer is required by the Court, Trimble denies the allegations contained in paragraph 133 regarding Trimble. Trimble does not have knowledge or

information sufficient to form a belief as to the truth of the allegations contained in paragraph 133 regarding any other parties and therefore denies these allegations.

134. The allegations contained in paragraph 134 are legal conclusions to which no response is necessary. To the extent an answer is required by the Court, Trimble denies the allegations contained in paragraph 134 regarding Trimble. Trimble does not have knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 134 regarding any other parties and therefore denies these allegations.

**PRAYER FOR RELIEF**

135. Trimble denies that Plaintiff is entitled to any of the requested relief.

**AFFIRMATIVE DEFENSES TO THE COMPLAINT**

**First Affirmative Defense**

136. The Complaint fails to state a claim upon which relief may be granted.

**Second Affirmative Defense**

137. Plaintiff's claims are barred, in whole or in part, by the application of the relevant statute of limitations.

**Third Affirmative Defense**

138. Plaintiff's claims are barred, in whole or in part, by the doctrines of waiver, acquiescence, estoppel, and laches.

**Fourth Affirmative Defense**

139. Plaintiff's claims are barred, in whole or in part, by the doctrine of unclean hands.

**Fifth Affirmative Defense**

140. Plaintiff has suffered no damages as a result of the conduct of Trimble.

**Sixth Affirmative Defense**

141. Plaintiff's claims are barred, in whole or in part, because its own conduct, or the conduct of persons or entities other than Trimble, has caused Plaintiff to suffer any damages for which it seeks recovery.

**Seventh Affirmative Defense**

142. Plaintiff's claims are barred, in whole or in part, by its failure to mitigate damages.

**Eighth Affirmative Defense**

143. Any damages suffered by Plaintiff were not proximately caused by Trimble.

**Ninth Affirmative Defense**

144. Plaintiffs' alleged damages, if any, were caused by the fault of persons or entities other than Trimble, and fault and liability for such damages must be apportioned to such persons or entities pursuant to Alaska Statutes 09.17.060, 09.17.080, and 09.17.900.

**Tenth Affirmative Defense**

145. In the event it is found that any binding and enforceable contracts were entered between Plaintiff and any Defendant, Plaintiff's claims are barred by its own material breaches of such contracts.

**Eleventh Affirmative Defense**

146. In the event it is found that any binding and enforceable contracts were entered between Plaintiff and any Defendant, Plaintiff's claims are barred by its failure to satisfy general conditions and conditions precedent, concurrent or subsequent for recovery under such contracts.

**Twelfth Affirmative Defense**

147. In the event Trimble is found to have committed the conduct alleged, any such conduct was privileged and/or justified as the pursuit of Trimble's economic, business, and financial interest.

**Thirteenth Affirmative Defense**

148. In the event Trimble is found to have committed the conduct alleged, any such conduct was privileged and/or justified because Trimble was not a stranger to the contracts alleged to have been interfered with.

**Fourteenth Affirmative Defense**

149. In the event Trimble is found to have committed the conduct alleged, any such conduct was privileged and/or justified as the good-faith and proper assertion, exercise, and protection of a legal interest.

**Fifteenth Affirmative Defense**

150. In the event Trimble is found to have committed the conduct alleged, any such conduct was privileged and/or justified as legitimate business competition.

**Sixteenth Affirmative Defense**

151. Plaintiff's claims are barred against Trimble, in whole or in part, because Trimble did not commit and/or lacked capacity to commit the conduct alleged.

**Seventeenth Affirmative Defense**

152. Plaintiff's claims are barred, in whole or in part, by the absence of malice, fraudulent or criminal conduct on the part of Trimble.

**Eighteenth Affirmative Defense**

153. Plaintiff's claims are barred by the statute of frauds.

**Nineteenth Affirmative Defense**

154. Plaintiff lacks standing to bring the claims asserted in the Complaint.

**Twentieth Affirmative Defense**

155. In the event Plaintiff is able to prove any of the Trimble employees engaged in any intentionally tortious conduct, any such tortious conduct was committed outside the scope of such employees' employment, and Trimble is not liable for such conduct.

**Twenty-First Affirmative Defense**

156. Plaintiff's claims are barred, in whole or in part, to the extent that Plaintiff has released, settled, entered into an accord and satisfaction or otherwise compromised its claims.

**Twenty-Second Affirmative Defense**

157. Plaintiff's claims are barred because this Court lacks subject matter jurisdiction over Plaintiff's claims.

**PRAYER FOR RELIEF**

**WHEREFORE**, Trimble prays for relief and judgment against Plaintiff as follows:

1. Dismissing the Complaint in its entirety;
2. Awarding Trimble costs and expenses incurred herein, including attorneys' fees;  
and,
3. For such other and further relief as the Court may deem just and proper.



Respectfully submitted,

By: *Daniel P. Elms*

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**ATTORNEYS FOR DEFENDANT  
TRIMBLE NAVIGATION LIMITED**

ORIGINAL ANSWER AND AFFIRMATIVE DEFENSES  
TO FIRST AMENDED COMPLAINT  
*Recreational Data Services v. Trimble Navigation Ltd., et al.*  
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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on June 22, 2012, a true and correct copy of the foregoing was served by U.S. Mail on the following:

Christopher D. Cyphers  
**Frontier Law Group, LLC**  
333 West 4<sup>th</sup> Avenue, Suite 311  
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*Attorneys for Plaintiff*

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*Attorneys for Defendants Cabela's  
Incorporated, AT&T Mobility, LLC and  
Alascom, Inc.*



Kim Parran

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA  
THIRD JUDICIAL DISTRICT AT ANCHORAGE

RECREATIONAL DATA  
SERVICES, LLC,

PLAINTIFF,

v.

Case No. 3AN-11-10519 CI

TRIMBLE NAVIGATION LIMITED,  
a California corporation, CABELA'S  
INCORPORATED, a Delaware  
corporation

DEFENDANTS.

ORDER

Having considered Defendant Trimble Navigation Limited's Motion in Limine to Exclude Plaintiff's Damages Expert Witness and Evidence of Lost Profits and any opposition and reply thereto, it is hereby ordered that (1) Plaintiff's expert witness Gregory J. Urbanchuk is excluded from offering any expert opinion regarding lost profits at trial and (2) any evidence regarding lost profits submitted by Plaintiff at trial must be established with reasonable certainty.<sup>1</sup> "An award of lost profits is not appropriate if it is

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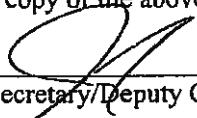
<sup>1</sup> *Guard v. P & R Enters., Inc.*, 631 P.2d 1068, 1071-1073 Alaska 1981).  
Order re Mot. in Limine  
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the result of speculation.”<sup>2</sup> Plaintiff must provide data established by facts rather than mere conclusions of the witness.<sup>3</sup>

IT IS SO ORDERED.

DATED at Anchorage, Alaska this 16<sup>th</sup> day of July 2014.

  
\_\_\_\_\_  
CATHERINE M. EASTER  
Superior Court Judge

I certify that on 7/17/14  
a copy of the above was mailed to: D. Elms  
J. Coughlin  
J. Leik  
C. Cyphers  
  
\_\_\_\_\_  
Secretary/Deputy Clerk

<sup>2</sup> *Alaska Travel Specialists, Inc. v. First Nat. Bank of Anchorage*, 919 P.2d 759, 766 (Alaska 1996).

<sup>3</sup> *Geolar, Inc. v. Gilbert/Commonwealth Inc. of Michigan*, 874 P.2d 937, 946 (Alaska 1994).

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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA  
THIRD JUDICIAL DISTRICT AT ANCHORAGE

Recreational Data Services,  
LLC,  
Plaintiff,

v.

Trimble Navigation Limited,  
Defendant.

FILED IN OPEN COURT

Date: 9.26.14

Clerk: AN

Case No. 3AN-11-10519 CI

SPECIAL VERDICT

We, the jury in the above-entitled case, answer the questions submitted to us as follows:

PART I

(1) Did the defendant make an intentional misrepresentation to the plaintiff?

Answer "yes" or "no." Answer: yes (10-2)

If your answer to Question No. 1 was "no", do not answer Question No. 2 and go to question No. 3. If your answer to Question No. 1 was "yes," answer Question No. 2.

(2) Was the defendant's intentional misrepresentation a substantial factor in causing harm to the plaintiff?

Answer "yes" or "no." Answer: yes (10-2)

(3) Did the defendant make a negligent misrepresentation to the plaintiff?

Answer "yes" or "no." Answer: yes

If your answer to Question No. 3 was "no", do not answer Question No. 4 and go to Question No. 5. If your answer to Question No. 3 was "yes," answer Question No. 4.

(4) Was the defendant's negligent misrepresentation a substantial factor in causing harm to the plaintiff?

Answer "yes" or "no." Answer: yes (11-1)

If your answers to both Question No. 3 and No. 4 were "yes," you must answer Questions No. 5 and 6.

(5) What are the total damages, if any, to the plaintiff that were caused by the defendant's intentional or negligent misrepresentation?

Enter total amount of damages: \$ 38.5 million

(6) Is the plaintiff eligible for an award of punitive damages from the defendant on the claims for intentional misrepresentation?

Answer "yes" or "no." Answer: no (10-2)

## PART II

(7) Did the defendant breach the terms of its Mutual Nondisclosure Agreement with the plaintiff?

Answer "yes" or "no." Answer: yes

(8) Did the plaintiff and defendant enter into a partnership?

Answer "yes" or "no." Answer: yes

If your answer to Questions No. 7 and 8 was "no", go to Question No. 11. If your answer to Question No. 8 was "yes," you must answer Question No. 9 before proceeding to Questions No. 10.

(9) Did the defendant breach its fiduciary duty of loyalty to the plaintiff?

Answer "yes" or "no." Answer: yes (11-1)

If your answer to Questions No. 8 and No. 9 was "yes," you must answer Questions No. 10.

(10) What are the total damages, if any, to the plaintiff that were caused by the defendant's breach of the Mutual Nondisclosure Agreement or fiduciary duty of loyalty?

Enter total amount of damages: \$ 12.8 million

PART III

(11) Enter total amount of damages awarded in Part I and Part II:

\$ 51.3 million

The foreperson should date and sign this verdict form.

DATED at Anchorage, Alaska, this 26 day of September, 2014.

Stanish K Mathew  
Foreperson of the Jury

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA  
THIRD JUDICIAL DISTRICT

RECREATIONAL DATA SERVICES, LLC,  
an Alaska Limited Liability Company,

Plaintiff,

v.

TRIMBLE NAVIGATION LIMITED, a  
California corporation,

Defendant.

Filed in the Trial Courts  
STATE OF ALASKA THIRD DISTRICT

NOV 13 2014

Clerk of the Trial Courts  
By \_\_\_\_\_ Deputy

CASE NO. 3AN-11-10519 CI

**MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION FOR  
JUDGMENT NOTWITHSTANDING THE VERDICT  
OR, ALTERNATIVELY, FOR NEW TRIAL  
(SUBSTITUTE)**

Defendant Trimble Navigation Limited submits this Memorandum in Support of its Motion for Judgment Notwithstanding the Verdict or, in the Alternative, Motion for New Trial.

**INTRODUCTION**

The jury's verdict should be rejected because is not supported by the evidence presented at trial and is not consistent with the law applicable to RDS's claims. RDS's multitude of evidentiary failures fall into three broad categories. First, RDS failed to present evidence from which a reasonable jury could find that Trimble is liable for any negligent or intentional misrepresentations, that RDS and Trimble ever formed a legal partnership, or that Trimble breached its contract with RDS. Second, RDS failed to present evidence sufficient to support a finding that any of Trimble's actions or statements could have caused RDS to lose out on any profits from the Copper Center Project. Finally, RDS did not seek or present any evidence of the only proper measure of damages for its claims, and then failed to present evidence proving

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either the existence or amount of its alleged lost profits with “reasonable certainty,” as Alaska law commands.

Accordingly, Trimble moves the Court to enter judgment notwithstanding that verdict, and order that RDS take nothing by its claims. Alternatively, Trimble moves the Court to order a new trial on all liability and/or damages issues.

### ARGUMENT AND AUTHORITIES

#### I. Legal Standards

##### A. Judgment Notwithstanding the Verdict (JNOV)

Under Rule 50(b), a motion for judgment notwithstanding the verdict should be granted if the “evidence is insufficient to allow a reasonable juror to find for the non-moving party.” *Cameron v. Chang-Craft*, 251 P.3d 1008, 1018 (Alaska 2011); see also *L.D.G., Inc. v. Brown*, 211 P.3d 1110, 1118 (Alaska 2009). JNOV depends on “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.” *Cameron*, 251 P.3d at 1017.

A JNOV may be granted when the damages are excessive or not supported by the evidence presented at trial. In that case, the question is whether, after reviewing the record in the light most favorable to the non-moving party, any reasonable juror would award those damages. See *Wiersum v. Harder*, 316 P.3d 557, 570 (Alaska 2013) (JNOV should have been entered because “no reasonable juror would award restoration costs totaling more than four times the full fair market value of [the plaintiff’s] property before the trespass”).

##### B. New Trial

Under Rule 59(a), a court may grant a new trial “if required in the interest of

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justice.” Alaska R. Civ. P. 59(a). A new trial is in the interest of justice if the verdict is “against the weight of the evidence.” *Hogg v. Raven Contractors, Inc.*, 134 P.3d 349, 352 (Alaska 2006) (quoting *Kava v. Am. Honda Motor Co.*, 48 P.3d 1170, 1176 (Alaska 2002)). Importantly, the trial court is not required to view the evidence in the light most favorable to the non-moving party. In deciding a motion for new trial, the trial court must weigh the evidence independently. *Id.* “A court may set aside a verdict as being against the weight of the evidence even when there is substantial evidence to support it.” *Id.* When the “interest of justice” standard is met, a court may grant a new trial “on all or part of the issues” tried to a jury, including damages. Alaska R. Civ. P. 59(a); *Pugliese v. Perdue*, 988 P.2d 577, 581 (Alaska 1999) (reversing denial of new trial on damages).

**II. The Jury’s Verdicts on Intentional and Negligent Misrepresentations Are Not Supported by Legally Competent Evidence.**

Under Alaska law, an intentional misrepresentation claim requires proof of: (1) a misrepresentation of fact or intention; (2) made fraudulently (with “scienter”); (3) for the purposes or with the expectation of inducing another to act in reliance; (4) with justifiable reliance by the recipient; and (5) causing loss. *Lightle v. State of Alaska*, 146 P.3d 980, 983 (Alaska 2006). The negligent misrepresentation elements are similar, except that the plaintiff need not prove that the statement was made with fraudulent scienter: (1) the defendant made a statement in the course of a business, employment, or some other enterprise in which it had a pecuniary interest; (2) the statement was false when made; (3) the plaintiff justifiably relied on the statement to its detriment; and (4) the defendant failed to exercise reasonable care when making the statement. *Southern Alaska Carpenters Health and Security Trust Fund v. Jones*, 177 P.3d 844, 857 (Alaska 2008).

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Proof of justifiable reliance is an essential element of intentional and negligent misrepresentation claims. *Anchorage Chrysler Center, Inc. v. DaimlerChrysler Motors Corp.*, 129 P.3d 905, 915 (Alaska 2006); *Diblik v. Marcy*, 166 P.3d 23, 28 (Alaska 2007); *Willard v. Khotol Services Corp.*, 171 P.3d 108, 118-19 (Alaska 2007); *Valdez Fisheries Dev. Ass'n v. Alyeska Pipeline Service Co.*, 45 P.3d 657, 671 (Alaska 2002) (negligent misrepresentation). The plaintiff must prove that it actually relied on the false statement, and that its reliance was justifiable. *Anchorage Chrysler Center*, 129 P.3d at 915 (“actual reliance and justifiable reliance are both prerequisites to claims of negligent and intentional misrepresentation.”) See also RESTATEMENT (SECOND) OF TORTS § 537 and comment b (“The recipient must not only *in fact* rely upon the misrepresentation, but his reliance *must be justifiable*.” (emphasis added)). Moreover, any damages claimed must be caused by the plaintiff’s reliance on the false statement. *Anchorage Chrysler Center, Inc. v. DaimlerChrysler Motors Corp.*, 221 P.3d 977, 991 (Alaska 2009) (“the loss in fraudulent misrepresentation must be a pecuniary loss that is caused by the plaintiff’s reliance on the misrepresentation.”).

In all claims of either fraudulent or negligent misrepresentation, the claimant must prove causation. Alaska law requires that each alleged false statement must be separately analyzed to determine if a causal link exists between the alleged statement and the claimed injury or damage. *Anchorage Chrysler*, 221 P.3d at 991; *Barber v National Bank of Alaska*, 815 P.2d 857, 862-63 (Alaska 1991) (affirming directed verdict on statements which had no causal link to alleged damages).

At the close of the trial, RDS claimed that Trimble had made four false statements: (i) that RDS and Trimble were partners; (ii) that Trimble would provide a device for the Copper Center Project; (iii) that the Recon Hunt Application did not “compete” with the Copper Center Project; and (iv) that Trimble offered to purchase

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RDS. At trial, RDS presented scant evidence that these statements were actually made, and in many instances, the evidence confirmed that they were likely not made. Moreover, even if these statements were made, RDS did not present any evidence that it relied on such statements; that its reliance would have been justified, or that the statements were the legal cause of any damage that RDS claims to have suffered.

**A. Alleged Statement that RDS and Trimble Were Partners.**

Throughout this case, RDS claimed that RDS and Trimble were legal partners, and that Trimble had breached its obligations as a partner. In closing argument, RDS made a drastic change in course. In its closing argument, RDS argued that Trimble is liable for misrepresentation because Trimble repeatedly made the *false* statement that Trimble was RDS's partner, when in fact it was not. RDS urged the jury to "accept that [Trimble] never intended to be partners" and "take [Trimble's] word on one thing, that they weren't partners."<sup>1</sup>

RDS's last-minute decision to abandon its claim that Trimble and RDS were partners obviously decimates RDS's claim that Trimble breached fiduciary duties to RDS arising out of a partnership. That point is discussed below. At the same time, RDS's misrepresentation claims based on Trimble's statements that RDS and Trimble were partners are equally untenable. No reasonable juror could find in favor of RDS on this misrepresentation theory.

The starting point is Trimble's allegedly false statements that "RDS and Trimble are partners." In claiming that Trimble's statements of partnership were

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<sup>1</sup> Trial Transcript ("Tr.") at 1415; 1428.

*false*, RDS necessarily concedes that under the law governing partnership, RDS and Trimble were *not* partners. To turn this into a viable misrepresentation claim, RDS would need to show that RDS *believed* that, in fact, RDS and Trimble *were* legal partners, and RDS reasonably relied on this belief to its detriment. But the very same evidence that establishes that RDS and Trimble were not legal partners also shows that RDS did not reasonably believe they were legal partners, and establishes that RDS did not rely on this legal status in making decisions about the Copper Center Project.

Alaska law defines a partnership as “an association of two or more persons to become co-owners of a business for profit.”<sup>2</sup> Mr. Feucht testified unequivocally that RDS and Trimble never agreed to be co-owners of a business for profit--the fundamental requirement of a legal partnership:

Q: *Did you or did you not on that date at Copper Center agree with the other parties that you were going to become co-owners of a business together?*

A: *I would not classify it as co-owners of a business.*

\* \* \*

Q: *Did you ever -- that's the Copper Center meeting. Did you ever have an agreement with Trimble and Remington that the three entities would become co-owners of a business together?*

A: *No.*<sup>3</sup>

Mr. Feucht's admissions are perfectly consistent with the Product Alliance Agreement that he proposed to memorialize the parties' relationship. Many months after RDS claims a “partnership” was formed, Remington drafted and circulated a

<sup>2</sup> AS 32.06.202; *see also* Jury Instruction No. 21.

<sup>3</sup> Tr. at 263.

Product Alliance Agreement.<sup>4</sup> This document was reviewed and edited by both Mr. Feucht and Chris Cyphers, RDS's legal counsel, and then forwarded to Trimble.<sup>5</sup> The Product Alliance Agreement plainly states that RDS, Trimble, and Remington would not be partners, or anything like partners:

Notwithstanding any provision hereof which may indicate otherwise, it is the specific intent of the Parties that this Agreement and the Alliance created hereby is to be *construed only as a business alliance between independent business entities and is not, nor shall it be deemed to be, a separate legal entity or a partnership or any similar arrangement.*<sup>6</sup>

At trial, Mr. Feucht testified that the purpose of the Product Alliance Agreement was "so that each party would know exactly what it was doing to clearly define the relationship of the parties in a contractual manner..."<sup>7</sup>, and he described the Product Alliance Agreement as "Final" before sending it to Trimble.<sup>8</sup> For its part, Remington (the other alleged "partner") actually signed the Product Alliance Agreement, and Mr. Boehnen testified that he "wanted RDS to sign and Trimble to sign to agree to that exact same relationship and that exact same structure, 'We are not partners.'"<sup>9</sup>

Mr. Feucht's testimony about the parties' obligations also demonstrates his awareness that there was no legal partnership between RDS and Trimble. RDS

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<sup>4</sup> Defendant's Trial Exhibit I.

<sup>5</sup> Tr. at 274-277.

<sup>6</sup> Defendant's Trial Exhibits I, M, and EEE at Section 4.1 (language is identical in every version).

<sup>7</sup> Tr. at 271-272.

<sup>8</sup> Defendant's Trial Exhibits CCC and EEE.

<sup>9</sup> Tr. at 486.

admitted that it knew that Trimble could have walked away from the Copper Center Project at any time.

Q: [W]as Trimble permitted, yes or no, to withdraw from the Copper Center Project and decline to go forward with it at any time?

A: Yes.<sup>10</sup>

Even as late as March 2011, Mr. Miller told Trimble that it would only be committed to the Copper Center Project “if [the parties] can negotiate and execute agreements to be partners” on the project.<sup>11</sup>

Remington, the other so-called “partner”, did withdraw from the Copper Center Project in late 2010. RDS never complained about Remington withdrawing from the Copper Center Project, and Remington believes it was fully permitted to do so.<sup>12</sup> This evidence confirms that RDS knew the parties never agreed to be “partners” in the way that RDS has alleged in this lawsuit, and its alleged reliance on any such statement is unsupported.

RDS also failed to present any evidence of damages caused by its reliance on the allegedly false statement. The only damages claimed by RDS were “lost profits” from the successful completion of the anticipated Copper Center phone. RDS presented no evidence that this alleged loss of profit was caused by RDS’s reliance on any statement by Trimble that it was RDS’s partner. And there is no logical linkage

<sup>10</sup> Tr. at 241.

<sup>11</sup> Plaintiff’s Trial Exhibit 21 (emphasis added).

<sup>12</sup> Tr. at 510. Mr. Boehnen also believes that Trimble was permitted to withdraw from the Copper Center Project at any time. Tr. at 521.

between the alleged false statement about partnership, and the damages claimed. Suppose, for example, that Trimble had not used the word "partner" to refer to RDS -- there was no evidence that in that event, RDS would have earned \$38,500,000, or any other amount, in profits from the Copper Center Project.

**B. Alleged Statement that Trimble Would Provide a Device for the Copper Center Project.**

RDS's second misrepresentation claim is based on a single March 9, 2010, email from Mr. Chen in which he discusses a "Plan A" and "Plan B", and writes that "in any case, there will be a device for the project to proceed."<sup>13</sup> RDS claimed that this email was a false statement of Trimble unequivocally committing to supply a hardware piece for the Copper Center Project.

Reasonable jurors could not find for RDS on this claim. Mr. Chen sent this email in the early stages of the project, when all the evidence shows that the entire project was still being evaluated by the three participants. The March 9, 2010, email itself states that Mr. Chen was "still working on a cost model" and "needs a creditable P&L financial model to proceed."<sup>14</sup> Moreover, Mr. Chen testified that Trimble never committed to either proposed Plan A or Plan B, and that if Plan B had been selected, someone *other than* Trimble would be providing the device.<sup>15</sup>

Furthermore, as discussed above, Mr. Feucht admitted that Trimble was permitted to walk away from the Copper Center Project at any time. This reality is not consistent with RDS reasonably relying on a statement by Mr. Chen that Trimble

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<sup>13</sup> Plaintiff's Trial Exhibit 26.

<sup>14</sup> *Id.*

<sup>15</sup> Tr. at 935; 1035-1036.



had committed to provided a device for the Copper Center Project. RDS cannot legitimately claim that it justifiably relied on this alleged promise, while knowing that Trimble had the right and ability to back out of the Copper Center Project if it chose to do so.

Moreover, the evidence shows that even RDS did not believe that Trimble had ever made a firm commitment to provide hardware for the Copper Center Project. All of the following occurred after Mr. Chen's March 9, 2010, email allegedly reflecting Trimble's promise to provide a device:

- September 2010 – Mr. Boehnen tells RDS and Trimble about several “Project Risks”, including the absence of executive approval of the financials and their commitment to fund the project.<sup>16</sup>
- November 2010 – Mr. Feucht tells Trimble that he “needs to know that we have a deal or I need another supplier.”<sup>17</sup>
- December 2010 – Mr. Feucht asks Trimble “[i]f I approach Cabela’s and they are a go, for anything less than the Remington Margin, [is Trimble] committed to the project. Or am I going to have to back-peddle and risk my and Paul’s relationship with them?” Mr. Feucht also asks Trimble “[a]re these the parameters under which the project moves forward?”<sup>18</sup>
- March 24, 2011 – Mr. Miller tells Trimble that it will be “committed to following through” on the Copper Center Project “if [the parties] can negotiate and execute agreements to be partners...”<sup>19</sup>
- March 31, 2011 – Mr. Feucht asks Trimble “Odds, where do we stand and what direction are the thumbs pointing. Up/down” regarding Trimble’s involvement in the Copper Center Project.<sup>20</sup>

<sup>16</sup> Defendant’s Trial Exhibit NN.

<sup>17</sup> Plaintiff’s Trial Exhibit 54.

<sup>18</sup> Defendant’s Trial Exhibit J.

<sup>19</sup> Plaintiff’s Trial Exhibit 21 (emphasis added).

<sup>20</sup> Plaintiff’s Trial Exhibit 22.

- April 2011 – Mr. Miller tells Trimble that RDS “will need to proceed on another path” if Trimble is not interested in participating in the Copper Center Project.<sup>21</sup>

The trial evidence confirms that RDS knew that Trimble did not have any obligation to provide a device for the Copper Center Project, and RDS cannot misconstrue Mr. Chen’s March 2010 email to suggest otherwise. RDS may choose willful blindness to this evidence, but Alaska law does not.

Moreover, accepting for purposes of argument that when RDS received the March 9, 2010 email, it believed this was a final and unconditional commitment by Trimble to supply a phone for the Copper Center project, RDS’s continued reliance was unreasonable in light of the later events described above. These facts are fatal to a misrepresentation claim, as illustrated by *Valdez Fisheries Development Ass’n v. Alyeska Pipeline Svc. Co.*, 45 P.3d 657, 672 (Alaska 2002). In that case, the plaintiff claimed that Alyeska made false statements about its future intentions in January 1994, but failed to carry through on those representations several months later. The Supreme Court affirmed dismissal of the claim on summary judgment because the plaintiff could not justifiably rely on Alyeska’s past statements of intent as the basis for believing that it intended to proceed with the project several months later. Here too, RDS could not have reasonably and justifiably relied on the March 9, 2010 email to guide its actions in later months, when the facts and circumstances related to the Copper Center Project were no longer the same.

Similarly, in order to prove a claim for misrepresentation, RDS must prove that

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<sup>21</sup> Defendant’s Trial Exhibit II. Mr. Miller testified that this “other path” was “to go out and find another hardware provider to basically take Trimble’s spot.” Tr. at 747.

the statement was false when made. *Bubbel v. Wien Air Alaska*, 682 P.2d 374, 381 (Alaska 1984); *Valdez Fisheries*, 45 P.3d at 672. “A statement made as to future intentions and action is not a misrepresentation if it is accurate when it is made, even if future events render it inaccurate.” *Id.* The March 9, 2010, email that RDS relies on was sent before Remington quit the project, before getting any commitment from a wireless carrier to subsidize the phone, and (as reflected in the email itself) before Mr. Chen had developed a cost model and received a creditable P&L model for the project. Trimble had numerous reasons to ultimately decide not to manufacture a device for the Copper Center Project, and RDS admits that Trimble had the right to do that. RDS presented no evidence that this alleged promise of a device was false *when made*, and it therefore cannot support a finding of misrepresentation.

Finally, there was no evidence from which reasonable jurors could conclude that the damages awarded for this claim were caused by RDS’s reliance on the statement in the March 9, 2010, email. The only evidence of damage presented in the case was lost profits that RDS allegedly would have earned if the Copper Center Project proceeded. There was no evidence from which a reasonable jury could conclude that RDS’s reliance on the statement in the March 9, 2010 email caused RDS to lose \$38,500,000 in profits from the Copper Center Project.

**C. Alleged Statement that the Recon Hunt Application Did Not Compete with the Copper Center Project.**

RDS next claims that it was told that the Recon Hunt Application did not “compete” with the Copper Center Project. Again, the evidence does not support this, and instead reflects that Mr. Feucht was, in fact, told that the two projects did potentially compete. Immediately following his conversation on this topic with Mr. Chen in November 2010, Mr. Feucht sent an email stating that “he was very

concerned about Trimble Outdoors” and that “making the jump to this market is not at all logical based on their prior work.”<sup>22</sup> At trial, Mr. Feucht admitted that Mr. Chen had told him that the Trimble Outdoors product was a smartphone application that would be targeted to the hunting and fishing markets.<sup>23</sup>

Even if Mr. Chen had told Mr. Feucht that the projects did not compete (which Mr. Chen denies), RDS failed to present competent evidence that it relied on any such statement. “To rely, the plaintiff must enter a transaction in whole or in part because of the representation.” 3 D. Dobbs, et al., *THE LAW OF TORTS* (2d ed. 2011) § 671; *see also* *RESTATEMENT (SECOND) OF TORTS* § 537(a). Significantly, the plaintiff has not relied on the statement if it “would have entered into the transaction whether or not the misrepresentation had been made.” Dobbs, § 671.

Neither Mr. Feucht nor Mr. Miller ever testified that RDS would have done anything differently if they had been told that the Recon Hunt Application would compete with the smartphone contemplated by the Copper Center Project. In fact, the evidence instead confirms that RDS proceeded on exactly the same course after it learned that the two projects did potentially compete with each other.

Mr. Feucht and Mr. Miller both testified that they became fully aware of the nature and scope of the Recon Hunt Application upon visiting Cabela’s offices on March 25, 2011. Specifically, Mr. Feucht testified that he saw an advertisement for Recon Hunt and “Everything that we were going to do on the software side was right there,” and that “[t]his is an absolute rip off of my idea.”<sup>24</sup> Mr. Miller similarly

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<sup>22</sup> Plaintiff’s Trial Exhibit 54.

<sup>23</sup> Tr. at 300.

<sup>24</sup> Tr. at 112; 303-304.

testified that this Recon Hunt advertisement “looked like it was straight off of one of our view graphs” and that it “stole the idea from the partnership.”<sup>25</sup> Thus, as of March 25, 2011, RDS had unquestionably concluded that the Recon Hunt Application did, in fact, compete with the Copper Center Project.

But RDS’s subsequent actions confirm that it never relied on any contrary representation. First, Mr. Feucht proceeded with the Cabela’s meeting later that day and admitted that he “reinforced [to Cabela’s] that Trimble was a good partner.”<sup>26</sup> About a week after that meeting, on March 31, 2011, RDS told Trimble that it “look[ed] forward to resuming this project with Trimble and... believe[d] that Trimble is a great partner.”<sup>27</sup> And then a week after that, on April 8, 2011 RDS again told Trimble that it “still wanted Trimble as our partner on this project and hope that you come to the same conclusion...”<sup>28</sup>

So even after RDS was fully aware that the Recon Hunt Application would compete with the planned Copper Center smartphone, and after allegedly forming a belief that the Recon Hunt Application “ripped off” and “stole the idea” from the Copper Center Project, RDS nevertheless wanted to proceed with the Copper Center Project and wanted Trimble as its partner. Thus, even if Mr. Chen had told Mr. Feucht in November 2010 that the projects “competed”, there is no credible basis to conclude that RDS would have changed its position or done anything differently. In short, RDS did not prove that it relied on any statement by Mr. Chen about the Recon Hunt Application not competing with the planned Copper Center Project smartphone.

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<sup>25</sup> Tr. at 701.

<sup>26</sup> Tr. at 110.

<sup>27</sup> Plaintiff’s Trial Exhibit 23.

<sup>28</sup> Defendant’s Trial Exhibit II.

Furthermore, any reliance by RDS on such a statement could not be justifiable because the NDA expressly-reserved Trimble's right to develop competing products. RDS admitted that the NDA was the only written contract between RDS and Trimble, and further admitted that it was never altered or terminated.<sup>29</sup> The NDA expressly permitted Trimble to develop competing products:

The Disclosing Party acknowledges that the Receiving Party may currently, or in the future, be developing information internally, or receiving information from other[s] that is similar to the Confidential Information. Accordingly, nothing in this Agreement shall be construed as a representation or agreement that the Receiving Party will not develop or have developed for its products, concepts, systems or techniques *that are similar to, or compete with*, the products, concepts systems or techniques contemplated or embodied in the Confidential Information, provided that the Receiving Party does not violate any of its obligations under the Agreement in connection with such development.<sup>30</sup>

RDS knew that the NDA established the terms of its relationship with Trimble. That contract precludes the possibility that RDS could have reasonably relied on any statement that a Trimble Outdoors product (or any other product) did not compete with the Copper Center Project.

Finally, there was no evidence from which a reasonable jury could conclude that RDS's reliance on this statement caused the damages awarded on this claim. The only evidence RDS presented regarding its damages was lost profits that RDS allegedly would have earned if the Copper Center project had been successfully completed. There was no evidence from which a reasonable jury could conclude that

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<sup>29</sup> Tr. at 43-44; 268-269.

<sup>30</sup> Plaintiff's Trial Exhibit 2 at Section 6.5 (emphasis added).

RDS's alleged reliance on Mr. Chen's alleged November 2010 statement caused RDS to lose \$38,500,000 in profits.

**D. Alleged Statement that Trimble Offered to Purchase RDS.**

The last statement that RDS identified as the basis for its misrepresentation claim was the claim that Trimble offered to buy RDS. RDS's only evidence suggesting that Trimble ever made such an offer was a photograph of handwriting on a whiteboard. This whiteboard photograph says nothing about an offer or proposal to purchase RDS, much less an acceptance by RDS of any such offer. But even if the jury could have reasonably concluded that Trimble did make such an offer, this cannot legally support a misrepresentation claim.

First, this claim simply makes no sense within the framework of misrepresentation.<sup>31</sup> RDS appears to be claiming that Trimble made an offer to buy RDS, but did not really intend to go through with the purchase. If so, the claim fails for lack of reliance on the offer by RDS. There is no evidence that RDS ever *accepted* an offer from Trimble, or even tried to do so.

To the contrary, just days after the meeting that generated the whiteboard photograph, Mr. Feucht sent an email to Trimble stating that he was "not sure that NPV is the correct way to value RDS. I will come back with some arguments."<sup>32</sup> Similarly, Mr. Feucht testified at trial that he "didn't think that his valuation methodology [for RDS] was appropriate for what we were doing."<sup>33</sup> Thus, even if Trimble did

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<sup>31</sup> If Trimble made an offer to buy RDS, and RDS accepted the offer, and RDS later claimed that its offer to buy RDS was false, Trimble's remedy would be an action for breach of contract. But RDS has never claimed that it ever accepted an offer from Trimble to buy RDS, or that Trimble breached any contract to buy RDS.

<sup>32</sup> Defendant's Trial Exhibit J.

<sup>33</sup> Tr. at 138.

make such an offer at that meeting, it was rejected by Mr. Feucht. RDS could not have reasonably relied on an offer that it knew it was not going to accept.

Second, RDS never presented any evidence that this alleged "offer" was false when made. Trimble had a right to change its mind, so long as its statements were accurate when made. RDS freely admitted this:

Q: *Trimble didn't have an obligation to acquire RDS, did it?*

A: *No.*

Q: *Remington didn't have an obligation to acquire RDS, did it?*

A: *No.*

Q: *So, if both of those companies had said, "Look, as it happens, we don't think we want to acquire RDS," they didn't have to do that; is that fair?*

A: *Yes.*<sup>34</sup>

Trimble had numerous reasons to ultimately decide not to acquire RDS, including, just as examples, Remington's abandonment of the Copper Center Project, RDS's inability to raise the millions it was required to contribute to the Copper Center Project, or its failure to develop the software it had promised or even hire a single software engineer in furtherance of that effort. As discussed above, "a statement made as to future intentions and action is not a misrepresentation if it is accurate when it is made, even if future events render it inaccurate." *Bubbel*, 682 P.2d at 381; *Valdez Fisheries*, 45 P.3d at 672. RDS has never claimed, much less presented any evidence, that Trimble's alleged offer to purchase RDS was false when made. Thus, even if

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<sup>34</sup> Tr. at 292.



such a statement was made, and even if that statement turned out to be false, it cannot support the jury's verdict on intentional or negligent misrepresentation.

Finally, there is no evidence that any reliance on the alleged false statement concerning an offer to buy RDS caused any financial loss to RDS. The only damage evidence presented at trial was RDS's alleged lost profits from the Copper Center Project. There is no evidence from which a reasonable jury could conclude that RDS's reliance on an alleged offer to purchase by Trimble caused RDS to lose \$38,500,000 in profits that it otherwise would have earned through successful completion of the Copper Center Project.

**III. The Jury's Verdict on the Existence of a Partnership And Breach of Fiduciary Duty Is Not Supported by Legally Competent Evidence.**

Alaska law recognizes four essential elements for formation of a partnership: (1) "associational intent," which requires "the existence of an agreement to combine the partners' property, money, effects, skill and knowledge to carry out a business enterprise"; (2) co-ownership, shown by shared management and profit-sharing; (3) the activity is a business enterprise; (4) that is intended to make a profit. *Hall v. TWS, Inc.*, 113 P.3d 1207, 1211 (Alaska 2005); *Chocknok v. State*, 696 P.2d 669, 675 (Alaska 1985). The Alaska partnership statute (and the instruction to the jury) defines partnership as "the association of two or more persons to carry on as co-owners a business for profit."<sup>35</sup> As discussed above, RDS admitted at trial that Trimble and RDS never agreed to become partners – as a partnership is defined under Alaska law.

Mr. Feucht testified unequivocally that Trimble and RDS never agreed to become co-owners of a business for profit,<sup>36</sup> meaning that they never agreed to the

<sup>35</sup> AS 32.06.202; see also Jury Instruction No. 21.

<sup>36</sup> Tr. at 263.

very essence of a partnership under Alaska law. The draft Product Alliance Agreement – which Mr. Feucht and Mr. Boehnen both intended to memorialize and reflect the terms of the parties’ relationship – confirms this with clear language that the parties are not, and will not be, partners or anything similar.<sup>37</sup> Finally, RDS admits that Trimble and Remington were permitted to simply walk away from the Copper Center Project (which Remington actually did, rendering it “dead,” according to Mr. Feucht). This further confirms that this was never a partnership in the way that RDS now claims.

Contrary to RDS’s apparent belief, and contrary to its repeated misstatements to the jury, whether or not the parties referred to each other as partners does not determine whether it meets the legal definition of a partnership. *Parker v. Northern Mining Co.*, 756 P.2d 881, 887 n. 11 (Alaska 1988). RDS should not be rewarded for misrepresenting the law to the jury by stating that “if you hold yourself out to be partners, that creates a partnership.”<sup>38</sup> This is not the law in Alaska.

Lastly, RDS effectively abandoned this claim during its closing argument. As discussed above, RDS implored the jury to “accept that [Trimble] never intended to be partners” and to “take [Trimble’s] word on one thing, that they weren’t

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<sup>37</sup> Defendant’s Trial Exhibits I, M, and EEE at Section 4.1; *see also* Tr. at 271-272; *see also* Tr. at 486.

<sup>38</sup> Tr. at 1419. RDS’s misunderstanding of partnership is further revealed by Mr. Feucht’s testimony that he and James Belz were “equal partners” in RDS – an Alaska corporation. Tr. at 27.

partners.”<sup>39</sup> If the jury accepts that Trimble never intended to partner with RDS, it is not possible for the jury to also find that Trimble had the “associational intent” to become partners with RDS. *See Hall*, 113 P.3d at 1211. Mr. Miller further confirmed this when he testified that relationship between the parties had not moved “from concept to contract” and there was never a “meeting of the minds and agreements between the principals.”<sup>40</sup>

The claimed partnership was the only basis for any alleged fiduciary relationship between RDS and Trimble. Thus, because RDS has admitted that no partnership existed, the jury’s verdict on breach of fiduciary duty cannot stand.

**IV. The Jury’s Verdict on Breach of the Nondisclosure Agreement Is Not Supported by Legally Competent Evidence.**

RDS failed to present evidence sufficient for a reasonable jury to find a breach of the NDA. The NDA prohibits disclosure of a limited category of “Confidential Information.”<sup>41</sup> The Disclosing Party (here, RDS) was required to specifically identify all of its claimed “Confidential Information.” For written information, RDS was required to affix a written statement that the information was confidential. For information that was orally disclosed, RDS was required to state that the information was confidential at the time of disclosure and then confirm in writing that the information was confidential.<sup>42</sup> There was no evidence at trial that RDS ever made any such designations, and without such evidence, there could be no basis for the jury to find that Trimble breached the NDA by disclosing Confidential Information.

<sup>39</sup> Tr. at 1415; 1428.

<sup>40</sup> Tr. at 725-726.

<sup>41</sup> Plaintiff’s Trial Exhibit 2 at Section 4.

<sup>42</sup> *Id.* at Section 3.

Moreover, under the NDA, certain categories of information were defined as not constituting Confidential Information.<sup>43</sup> These exclusions included information already known to Trimble prior to RDS's disclosure of the information, information that Trimble developed independently, information that became publicly known without any wrongful act by Trimble, and information that Trimble lawfully received from "Others" (defined as non-parties to the NDA).<sup>44</sup> The information that RDS identified at trial as the basis for claiming a breach of the NDA fell within these excluded categories.

At trial, RDS testified that the "confidential information" it brought to the Copper Center Project fell into three narrow categories: (i) the patent relating to hunting and fishing regulations; (ii) information about "players" in the outdoors industry; and (iii) the idea for a suite of applications that would be useful to hunters and fishermen.<sup>45</sup> But RDS's exact misappropriation claims were difficult to discern. At one point, for example, RDS told the jury that "this isn't a case about [Trimble] stealing ... RDS's idea."<sup>46</sup>

Nevertheless, RDS's misappropriation claim appears to be based on two allegations. First, notwithstanding the above, RDS seems to argue that Trimble misused the "idea" for a hunter/outdoorsman ruggedized smartphone. Second, RDS claims that Trimble wrongfully disclosed the market research and resulting financial projections to one of its other business units. RDS did not present competent evidence sufficient for a reasonable jury to find either one.

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<sup>43</sup> *Id.* at Section 2.

<sup>44</sup> *Id.* at Section 1.1.

<sup>45</sup> Tr. at 250-252.

<sup>46</sup> Tr. at 1464.

First, RDS never presented any evidence that the idea for a suite of applications for hunters and fishermen was confidential to RDS. RDS also failed to present any evidence that it told Trimble that this idea was to be treated as confidential. In fact, RDS's actions were contrary to this. RDS admitted that Trimble was free to disclose the RDS Executive Summary because it was not marked "confidential" and was disclosed to Trimble before the NDA was signed.<sup>47</sup> Similarly, Mr. Miller admitted that he disclosed the "concept" and the "features" of the Copper Center Project to Cabela's before it had even signed a nondisclosure agreement.<sup>48</sup>

Second, the Recon Hunt Application was a joint project between Trimble Outdoors and Cabela's. Mr. Feucht admitted that Cabela's was perfectly capable of coming up with its own list of features and functions that might be useful to a hunter or fisherman. Mr. Feucht further admitted that Cabela's would have been able to advise Trimble Outdoors what those features and functions would be.<sup>49</sup> And Larry Fox testified that the idea and content for the Recon Hunt Application came from Cabela's.<sup>50</sup> RDS did not present any evidence that the Recon Hunt Application, or another Trimble product, was based on RDS's ideas.

RDS's other claim for breach of the NDA was Mr. Chen's alleged disclosure of Remington's market research and the resulting financial calculations to Trimble

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<sup>47</sup> Tr. at 1452.

<sup>48</sup> Tr. at 758-763.

<sup>49</sup> Tr. at 252-254.

<sup>50</sup> Tr. at 1073-1074.

Outdoors.<sup>51</sup> But Mr. Feucht admitted that this market research came from Remington – not RDS:

Q: *Once [Remington] pulled out of the project, using your language there, what happened to the survey data, the market research, the contributions that Remington had made to the Copper Center project?*

A: *I called up Mark Hill, the chief marketing officer at Remington, and sent a follow-up email requesting respectfully permission to use all of the marketing and survey data that Remington had provided up until this point. Because it was part of the partnership, and I didn't think it was appropriate to use their information to go pursue the other partners in it.*<sup>52</sup>

Undeniably, the NDA only protects RDS's confidential information.<sup>53</sup> Remington was not a party to the NDA, and that contract cannot be construed to apply to any of Remington's confidential information. Furthermore, RDS admitted at trial that there was no contract among RDS, Trimble, and Remington with respect to the Copper Center Project.<sup>54</sup> This means that there were no *contractual* obligations or limitations with respect to the use or disclosure of information that Remington may have provided to that project, or information that may have come out of that project. The NDA between Trimble and RDS cannot be stretched to cover Remington's market research or the resulting financial projections. Thus, RDS's allegations about

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<sup>51</sup> Tr. at 1446-1461.

<sup>52</sup> Tr. at 103-104.

<sup>53</sup> Plaintiff's Trial Exhibit 2.

<sup>54</sup> Tr. at 142.

Trimble's alleged disclosure of the market research or financial projections cannot support the jury's verdict on breach of the NDA.

**V. RDS Did Not Present Competent Evidence that Trimble's Conduct Was the Legal Cause of any Lost Profits.**

Alaska law requires RDS to prove that Trimble's actions were the legal cause of its alleged damages. The core premise of RDS's lost profits argument is that "but-for" Trimble's actions, a smartphone would have been launched and generated enormous profits for RDS. But RDS's admissions at trial reveal that this was pure fantasy. The reality was that the Copper Center smartphone had numerous critical hurdles that had to be overcome before a single device was ever designed, manufactured, or sold. And RDS did not present competent evidence that this could or would ever happen – completely apart from anything Trimble said or did.

Causation is an essential element of both tort and contract claims. RDS must prove that its damages were actually caused by Trimble's alleged tortious acts or its alleged broken promises. *Anchorage Chrysler*, 221 P.3d at 991 (requiring proof that loss was caused by reliance on false statement); *Barber*, 815 P.2d at 863 (misrepresentation claim failed because plaintiff failed to prove a causal link between alleged false statement and alleged damages); *Transamerica Title Ins. Co. v. Ramsey*, 507 P.2d 492, 497 (Alaska 1973) (loss claimed for misrepresentation must be proximately caused by defendant's conduct); *Fairbanks North Star Borough v. Kandik Construction, Inc.*, 795 P.2d 793, 798 (Alaska 1990) ("Recovery of damages for a breach of contract is not allowed unless acceptable evidence demonstrates that the damages claimed resulted from and were caused by the breach"); *Winn v. Mannhalter*, 708 P.2d 444, 450 (Alaska 1985) ("Causation is a required element in an action for breach of contract"); *City of Whittier v. Whittier Fuel & Marine Corp.*, 577

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Ex. 075

P.2d. 216, 224 (Alaska 1978) (requiring certainty with respect to causation of damages); RESTATEMENT (SECOND) OF CONTRACTS § 347 and comment e (“The injured party is limited to damages based on his actual loss caused by the breach”). See also *DeNardo v. GCI Communication Corp.*, 983 P.2d 1288, 1290-91 (Alaska 1999) (failure of proof that breach of contract was legal cause of claimed damages).

Unless RDS can prove that the Copper Center Project would have been a success but for Trimble’s actions, it is not possible that Trimble could have caused RDS to suffer any lost profits. At trial, RDS admitted that numerous events had to occur before a smartphone could ever be launched, but never presented any evidence that any (much less all) of these preconditions could and would have ever been satisfied. Thus, RDS failed to prove that Trimble’s actions actually *caused* RDS to lose any profits.

**A. RDS Had to Secure a Commitment from a Marketing/ Distribution Channel to Replace Remington.**

It is undisputed that Remington quit on the Copper Center Project in or around October or November 2010.<sup>55</sup> It is also undisputed that the Copper Center Project absolutely required a commitment from someone to perform the marketing and distribution functions that Remington had abandoned:

Q: *Will you agree with me, Mr. Feucht, that when Remington quit the project in late 2010, the project was dead, unless someone could be found to fill that role?*

A: *Correct.*<sup>56</sup>

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<sup>55</sup> Tr. at 654.

<sup>56</sup> Tr. at 245.



Mr. Feucht further testified that “if there wasn’t a marketing partner for the solution, both myself and Trimble didn’t think that we could bring the [Copper Center Project] to fruition.”<sup>57</sup> And RDS admits that Trimble had nothing to do with Remington deciding to abandon the Copper Center Project.<sup>58</sup>

Once Remington quit, Mr. Feucht believed that Cabela’s was the “only one real logical partner” for the project “because they were the No. 1 player in the industry” and he had relationships who “could make it happen relatively quickly.”<sup>59</sup> Mr. Miller was tasked with investigating Cabela’s interest in the Copper Center Project. When Mr. Miller first discussed this idea with Cabela’s, he was told that they were “not excited about getting into the cell phone market.”<sup>60</sup> Mr. Feucht likewise admitted that he was aware from the beginning that Cabela’s was reluctant to get into the business of selling mobile phones.<sup>61</sup>

In March 2011, RDS pitched the Copper Center Project, but Cabela’s refused to participate. Mr. Miller admitted that Cabela’s declined to participate in the Copper Center Project for the same reasons it had told him when he first contacted them – that Cabela’s didn’t want to get into the mobile phone business:

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<sup>57</sup> Tr. at 104.

<sup>58</sup> Tr. at 294. (Q: *You don't believe that Trimble had anything to do with Remington backing out of the project or withdrawing from it, do you?* A: No.)

<sup>59</sup> Tr. at 105.

<sup>60</sup> Defendant’s Trial Exhibit RR; *see also* Paul Miller September 18, 2014 Trial Testimony, Transcript p. 414; *accord* September 18, 2014 Trial Log Notes at 8:50:44 a.m. - 8:55:13 a.m.

<sup>61</sup> Tr. at 312-314.

Q: *And, then, in fact, in your view, Mr. Miller, the reason that Cabela's declined to participate in this project was their original concern about getting into the -- about selling phones and phone services, right?*

A: *Yes. Selling phones and minutes, plans, and having broken ones returned to them at their stores. They didn't want to get into that.*

Q: *Cabela's just didn't think this was the right project for them, from your perspective? That's what you gathered, right?*

A: *From a retailer perspective, yes.*<sup>62</sup>

This fact was confirmed by Cabela's itself. Soon after the pitch meeting, Cabela's notified RDS that it was declining to participate in the Copper Center Project because "strategically, it does not fit for us to put the necessary resources in a business sector that we have so little experience in."<sup>63</sup> Similarly, Tom Rosdail, Cabela's Vice-President of Marketing, testified at trial that Cabela's declined because it "[was] not a telecommunications company", it "[did not] understand that piece of business", the project required a "huge outlay of cash," and was a "high risk on a product that has a short shelf life."<sup>64</sup> Chris Sprangers, Cabela's Marketing Manager, testified that Cabela's declined the Copper Center Project because it was "far from our core business, which we had never intended on selling cell phones."<sup>65</sup>

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<sup>62</sup> Tr. at 733.

<sup>63</sup> Plaintiff's Trial Exhibit 8.

<sup>64</sup> Tr. at 1313.

<sup>65</sup> Tr. at 1317-1318.

The reality of the Copper Center Project was that Remington killed it, and Cabela's declined to resurrect it.

Q: *You testified earlier, Mr. Feucht, that with Remington having withdrawn from the project, unless a replacement was found, the project was dead, right?*

A: *That's correct.*

Q: *And when Cabela's declined to come in and be that replacement, again, Copper Center Project is dead, true?*

A: *That's correct.*<sup>66</sup>

RDS was never going to earn any profits from the Copper Center Project, completely irrespective of anything Trimble did or did not do. Thus, it is not possible to reasonably conclude that Trimble "caused" RDS to lose out on any profits.

**B. RDS Had to Secure \$6—\$8 Million in Pre-Launch Financing and the Contractual Commitments from the Parties to Support It.**

RDS admitted that it was required to come up with as much as \$8 million as its pre-launch financial commitment to the Copper Center Project. Mr. Feucht also admitted that the project would go nowhere unless and until it did.

Q: *Do you recall how much money each of the parties was required to invest before you even got to day one?*

A: *I believe it was... \$6 to \$8 [million] from RDS...*<sup>67</sup>

Mr. Miller similarly testified that RDS would have to secure \$6—\$8 million in funding just to get "this project to go."<sup>68</sup>

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<sup>66</sup> Tr. at 313-314.

<sup>67</sup> Tr. at 256.

Mr. Feucht admitted that RDS was rejected by the only funding source that it ever met with.<sup>69</sup> Mr. Feucht also admitted that RDS was never offered any financing from any source for this project.<sup>70</sup> Nevertheless, based solely on gross speculation and hope, RDS blithely claimed that it would be able to raise this money. But Mr. Miller recognized and admitted that the Copper Center Project parties did not have any contractual relationship among themselves, and that until they did, outside funding for RDS would not be possible.

Q: *Until the parties had a contractual relationship among them, in your opinion, RDS was not going to get outside funding, right?*

A: *Correct.*

\* \* \*

Q: *And that, in your view, until that final contract happened, there would be no outside venture capital funding for the \$6 million; is that your opinion?*

A: *Yes.*<sup>71</sup>

Thus, the uncontroverted evidence at trial was that RDS needed as much as \$8 million for its contribution to the Copper Center Project, that the parties had never agreed to a final contract with respect to that project, and that unless and until that contract existed, outside funding was not an option for RDS. Even worse, one of the parties that would have had to sign this contract (Remington) abandoned the project,

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<sup>68</sup> Tr. at 727.

<sup>69</sup> Tr. at 291-292.

<sup>70</sup> *Id.* (Q: *Did anybody ever offer you -- offer RDS anything to help finance its obligations to this project? A: No.*)

<sup>71</sup> Tr. pp. 727-728.

and its would-be replacement (Cabela's) declined to get involved. Thus, the final contract that Mr. Miller knew was needed before anyone would finance RDS did not exist and could never exist.<sup>72</sup> In short, RDS did not have the money to make the Copper Center Project work, and had no way to get it.

**C. RDS Had to Hire Approximately 43 Software Engineers to Develop and Write the Software.**

RDS admitted that the Copper Center Project required software to succeed.<sup>73</sup> But that software required a massive team of engineers to develop and write it, and hiring those engineers was RDS's responsibility.

Q: *Do you remember how many software engineers RDS was going to have to hire, you know, the estimate?*

A: *It was in the 20s to 30s, I believe.*

Q: *If I told you 43, would that sound familiar?*

A: *That sounds familiar, yes.*<sup>74</sup>

Thus, even assuming RDS had been able to raise the millions necessary to hire these employees, they would still have to located and hired to do the work. RDS offered no

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<sup>72</sup> Mr. Feucht's alternative plan for Trimble or Remington to acquire RDS and cover its portion of the Copper Center Project funding is a red herring because Mr. Feucht admitted that neither Trimble nor Remington had any obligation to do that. Tr. at 291-292.

<sup>73</sup> Tr. at 258-259. (Q: *You had to— somebody had to develop the software, or you weren't going to have a project; is that right?* A: *Correct.*).

<sup>74</sup> Tr. at 727.

evidence that 43 qualified software engineers were available to the Copper Center Project, much less whether any or all of them were interested in working for RDS.

**D. RDS Needed a Realistic Projection of the Number of Devices that Might Be Sold.**

The Copper Center Project would never happen unless and until the parties had a realistic and accurate projection of how many smartphones they would be able to sell. Mr. Feucht testified that “[t]o develop the software, I needed to know how many phones we were going to sell” and that having realistic sales projections “was the deciding criteria on the hardware and marketing component” of the project. The evidence at trial confirmed that the parties never developed any realistic or accurate projections.

Mark Hill, Remington’s Chief Marketing Officer, admitted that the “user adoption rate” for the Copper Center Project was “the extent to which a user would actually go out and buy the hardware and software that was going to be sold in this project.” He then testified that this number was “unknown and unknowable” and that the parties had “no idea” what it might be.<sup>75</sup> Patrick Boehnen similarly admitted (both in his contemporaneous email correspondence and in his testimony at trial) that the user adoption rate was unknown, and that he had discussed this fact with RDS and Trimble many times.<sup>76</sup> Mr. Boehnen described this ignorance about the user adoption rate as a “Project Risk.”<sup>77</sup> Consistent with this reality, Mr. Chen notified Mr. Feucht

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<sup>75</sup> Tr. at 651-653.

<sup>76</sup> Defendant’s Trial Exhibit NN; see also Tr. at 490. (Q: *You had talked to Mr. Feucht and Mr. Chen, and at least in your view the user adoption rate was unknown, wasn’t it? A: Yes.*)

<sup>77</sup> Defendant’s Trial Exhibit NN.

in late 2010 that “[t]he team will be conducting another comprehensive national survey to re-qualify the market potential and product adoption scenarios.”<sup>78</sup> This never happened because Remington quit.

RDS also failed to present any evidence to reflect projected sales after Remington abandoned the project. Since Remington was charged with the marketing and distribution aspects of the Copper Center Project, the financial projections would obviously be affected when Remington abandoned it. Mr. Miller confirmed this when he admitted that if Cabela’s had agreed to take over Remington’s role as the marketing/distribution channel, the financial projections would have changed.

Q: *[Y]ou were talking about the financials that you had looked at in kind of getting up to speed on the project. Do you remember that?*

A: *Yes, sir.*

Q: *Did I understand you correctly to say that if Cabela’s had come in to take over as the marketing and distribution arm, that those numbers would have changed to some extent?*

A: *Yes.*

\* \* \*

Q: *So, if you had Cabela’s come in as the replacement for Remington, you had done the – Remington and RDS had done this financial modeling based on those three parties, that modeling would be a little bit different if Cabela’s were to replace Remington, true?*

A: *Correct.*<sup>79</sup>

<sup>78</sup> Plaintiff’s Trial Exhibit 58.

<sup>79</sup> Tr. at 750-751; see also Tr. at 693. (“We knew that there would be some changes [in the profit and loss and data market research] because Cabela’s is a retailer and, and Remington is not.”)

The evidence shows that the parties never had reliable financial projections even when Remington was involved. And when Remington quit, those financial projections were necessarily inaccurate because the introduction of a different marketing and distribution participant (assuming one was ever found) would have changed them. The absence of reliable projections – both with and without Remington – meant the Copper Center Project would never go forward.

**E. RDS Needed a Commitment from Trimble (or Other Hardware Manufacturer) to Develop and Build the Hardware.**

RDS admitted that for the Copper Center Project to succeed, it needed a party to be responsible for three distinct elements – hardware, software, and marketing and distribution.

Q: *The project, as you imagined it, the Copper Center Project had sort of three [ ] legs to the stool; is that fair?*

A: *Correct.*

Q: *And that was a hardware piece, a software piece, and then a – call it, sales and marketing or distribution piece; is that right?*

A: *Correct.*<sup>80</sup>

\* \* \*

Q: *And if one of those legs fell away and wasn't replaced, no Copper Center Project, right?*

A: *Correct.*<sup>81</sup>

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<sup>80</sup> Tr. at 245.

<sup>81</sup> Tr. at 255.



The evidence at trial was uniform that the Copper Center Project would go nowhere unless it had someone committed to each of these three roles.

As discussed above, there is no dispute that Remington eventually abandoned its role as the “sales and marketing or distribution piece,” and that Cabela’s declined to take over that role. But, as discussed above, RDS also admitted that Trimble was never required to manufacture any hardware for the Copper Center Project, and could have withdrawn from the project at any time. Thus, RDS admits that it never had a commitment from Trimble to manufacture the hardware for the Copper Center Project, and there was no evidence that RDS had even discussed this role with anyone else, much less received any commitment to accept it.

One serious obstacle in designing and manufacturing this hardware was its cost. Mr. Feucht admitted that one of the project’s challenges was to “figure out how much this [hardware] was going to cost.”<sup>82</sup> And Mr. Chen testified extensively about that exact issue. He testified that the cost for the device demanded by the market survey data was in the neighborhood of \$1,200 per device. At this production cost, the estimated price to the consumer (even assuming a subsidy from a wireless carrier) would be approximately \$800.<sup>83</sup> RDS did not dispute any of this evidence. And there was no evidence that the Copper Center Project could succeed at an \$800 price. In fact, Mr. Chen testified (again, without any contradiction from RDS) that the demand for a device at this price was less than 1% of the consumers surveyed.<sup>84</sup>

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<sup>82</sup> Tr. at 149.

<sup>83</sup> Tr. at 877-881; 883-884.

<sup>84</sup> *Id.*

Finally, even after the software and hardware were both designed and manufactured, those components still had to be integrated. Mr. Feucht testified that having “the hardware closely integrated with the software was the [hook] to get people to buy the new device” and that “it was very important that we had a totally integrated package.”<sup>85</sup> Mr. Chen similarly testified about the challenge to avoid building a “lunchbox phone” – something so unwieldy that no one would purchase it – and figuring out how to eliminate component interference so that it could be certified by a wireless carrier.<sup>86</sup> RDS never disputed Mr. Chen’s testimony about the challenges in integrating the hardware and software, or presented any evidence that these challenges could be resolved so that the Copper Center Project could produce a device that someone might actually buy.

**F. RDS Had to Secure a Commitment from a Wireless Service Carrier to Subsidize the Price and Sell the Smartphone.**

From the very beginning, the Copper Center Phone required a commitment from a wireless services provider (e.g. AT&T, Verizon, etc.) to subsidize the price of the phone and actually sell it. Mr. Feucht readily admitted that the Copper Center Project would not happen unless and until it got that commitment.

Q: *The last thing is, this phone, because of the price you needed to sell it, it had to be subsidized by a wireless carrier, true?*

A: *I think there was -- yeah, I would say that's true.*

\* \* \*

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<sup>85</sup> Tr. at 76-77.

<sup>86</sup> Tr. at 876-877.

Q: *Unless you had a carrier to commit to subsidizing this phone, the Copper Center Project was not going to happen; is that right?*

A: *Correct.*<sup>87</sup>

Mr. Miller similarly characterized the commitment of a wireless carrier as an “essential hurdle” to the success of the Copper Center Project.<sup>88</sup>

At trial, RDS testified that it met with AT&T about providing that commitment. Jeffrey Howard, the Vice-President of Devices and Accessories for AT&T Mobility, testified that it would have been his group’s decision whether to take on the Copper Center Project smartphone, but that his group never approved AT&T selling that smartphone.<sup>89</sup> In the end, Mr. Miller admitted that neither AT&T nor any other wireless services carrier ever committed to participate in the Copper Center Project.<sup>90</sup> But RDS’s own admission, this means that the Copper Center Project had no chance of any success, much less the astronomical success that RDS seeks to recover in this lawsuit.

**VI. The Jury’s Damages Award Should Be Rejected Because Lost Profits Are Not Recoverable for RDS’s Claims and Because RDS Failed to Present Legally Competent Evidence to Support Lost Profits.**

The jury’s lost profits award to RDS is improper and should be rejected for two reasons (in addition to the arguments set forth above). First, the Alaska Supreme

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<sup>87</sup> Tr. at 261.

<sup>88</sup> Tr. at 752.

<sup>89</sup> Tr. at 1310.

<sup>90</sup> Tr. at 753. (Q: *There was no commitment from any carrier to the project, true?*

A: *Correct.*”).

Court has held that lost profits are not recoverable on a claim that the defendant misused a proprietary or confidential idea of the plaintiff – the precise description of RDS’s claims against Trimble. Second, even if lost profits are recoverable for that type of claim, RDS failed to present legally competent and sufficient evidence to support the jury’s award, or an award of any other amount.

**A. RDS’s Sole Measure of Damages Is the Profits (if any) Earned by Trimble from the Alleged Misuse of RDS’s Confidential Information.**

The correct measure of damages for this type of case was established in *Reeves v. Alyeska Pipeline Serv. Co.*, 56 P.3d 660 (Alaska 2002). Reeves had an idea to build a visitor center at a turnout overlooking the Trans-Alaska Pipeline. Reeves described his idea to Alyeska in exchange for its promise not to use the idea without allowing Reeves to participate in its implementation. But Alyeska subsequently stopped dealing with Reeves and proceeded to build the visitor center on its own. *Id.* at 662. Reeves sued Alyeska, and a jury awarded him damages under various alternative contract and tort theories.

The Alaska Supreme Court affirmed the damages instruction which “reflected the profits that Alyeska actually derived from its breach of the disclosure agreement: ‘the amount of the value of the idea to Alyeska.’” *Id.* at 668. The Court held this instruction “would entitle the jury to base its damages calculation on evidence of the profit or benefit that Alyeska realized from the visitor center, as opposed to the theoretical value of Reeves’s services in developing and disclosing his idea *or the potential but unrealized profits of either Reeves or Alyeska.*” *Id.* (emphasis added). The Court ultimately held that, “[t]he proper measure of damages for breach of the disclosure agreement in this case is the value of the benefit that Alyeska enjoyed as a result of its breach.” *Id.* at 672.

As this Court has previously observed, the *Reeves* decision was the result of an evenly divided Supreme Court of just four justices, with Justice Eastaugh not participating. *Id.* at 672. The *Reeves* opinion was based on two justices' views that the only proper measure of damages was the disgorgement of the profits (if any) earned by the defendant's wrongful use of the confidential idea. The dissenting justices argued that the proper measure of damages should be the "value of the services Reeves provided in developing and disclosing" the allegedly confidential idea. *Id.* Thus, even though the Court was divided on the correct measure of damages, none of the four justices sitting in *Reeves* approved the recovery of lost profits from the never-developed project. RDS did not plead or prove any of the damages approved by *Reeves* (either the majority or the dissent), and it is therefore barred from recovery.

**B. RDS Failed to Prove the Amount of its Alleged Lost Profits with Reasonable Certainty.**

RDS was also required to prove the *amount* of its loss with reasonable certainty. *Azimi v. Johns*, 254 P. 3d 1054, 1065 (Alaska 2011); *Guard*, 631 P.2d at 1072 (Alaska 1981); *see also* Jury Instruction No. 25. An award of lost profits cannot be based on guess, speculation, or conjecture. *Alaska Travel Specialists, Inc. v. First Nat. Bank of Anchorage*, 919 P.2d 759, 766 (Alaska 1996); *Guard*, 631 P.2d at 1071; *see also* Jury Instruction No. 26. RDS sought asked the jury to award one of two amounts as lost profits: (i) \$111,666,973 based on the so-called P&L Statement; or (ii) \$18,400,000, based on Trimble's alleged valuation of RDS as reflected in the handwritten whiteboard photograph.

Alaska law imposes specific requirements for the recovery of lost profits by a new business. In *Guard v. P & R Enters.*, 631 P.2d 1068, 1071 (Alaska 1981), the

Alaska Supreme Court set forth the two exclusive ways to calculate the lost profits of a new business:

- (1) The profit history from the injured party's similar business at a different location; or
- (2) The profit history of the business in question if it was successfully run by someone else before the plaintiff.

This rule has been repeatedly followed by the Alaska Supreme Court.<sup>91</sup> RDS admitted that it was new business pursuing a new project.<sup>92</sup> RDS did not, however, present any evidence of a profit history from the Copper Center Project, or any similar project, in any context. Thus, RDS failed to meet either of the options set forth in *Guard*.

Instead, RDS relied on a dubious statistical projection of lost profits – the so-called “P&L Statement”.<sup>93</sup> The *Guard* Court expressly rejected the use of statistical projections as the sole basis to establish lost profits for a new business:

In antitrust litigation, the injured party may prove damages for lost profits by use of statistical projections alone without showing any history of profits. The policies of antitrust law favor a less stringent certainty requirement for lost profits than contract law policy. . . . Because P & R's claim falls within the latter category, it will not be allowed to rely solely on statistical projections to prove lost profits.

<sup>91</sup> See, e.g., *Alaska Travel Specialists, Inc. v. First Nat. Bank of Anchorage*, 919 P.2d 759, 766 (Alaska 1996) (plaintiff could not recover lost profits because it could not show a profit history from a substantially similar business run by plaintiff or from the same business run by a predecessor); *Geolar, Inc. v. Gilbert/Commonwealth Inc. of Michigan*, 874 P.2d 937, 946 (Alaska 1994) (reversing jury's award of lost profits where plaintiff “offered no evidence of its own profit margins on other projects [or] profits obtained by other contractors performing similar jobs...”).

<sup>92</sup> Tr. at 245-246.

<sup>93</sup> See Plaintiff's Trial Exhibit 28.

*Id.* at 1072 n. 4. At trial, instead of offering any competent damages evidence, RDS repeatedly emphasized the “conservative” nature of this statistical projection. But ~~*Guard*~~, recognizes that statistical projections for new businesses are inherently speculative – irrespective of how conservative a statistical projection might be – and they are not legally sufficient evidence to support an award of lost profits to a new business.

The jury rejected both of the amounts RDS requested, and instead awarded damages of \$38,500,000 for intentional or negligent misrepresentation, and \$12,800,000 for breach of fiduciary duty and/or breach of the NDA. The \$38,500,000 figure is reflected on the whiteboard photograph, although it is impossible to know if that was the source for the jury’s award since RDS never sought that amount as a damages amount. The \$12,800,000 figure does not appear anywhere in the evidence, and was never uttered by any lawyer, witness, or document at any point in the trial.

Alaska law does not permit a jury to simply make up a damages amount when the plaintiff fails to prove its losses with “reasonable certainty.” Moreover, if a plaintiff fails to prove its damages with reasonable certainty, it is not entitled to recover anything. To its credit, even RDS admits this:

You cannot go in between. [] Because the law requires damages to be reasonably certain, you are going have to either agree with the \$111 million in the profits and losses that everybody else has agreed with all along, or you’re going to have to disagree that those numbers aren’t reasonably certain. And if you disagree that those numbers are not reasonably certain profits and losses that RDS could have enjoyed moving forward with either Trimble and Remington or two completely separate entities, *if you find that those numbers are not accurate for the profits and losses, you can’t award any on that. You couldn’t say,*

*'Well, \$111 million they said was accurate, but we're going to cut that in half, because we just don't think that's right.'*<sup>94</sup>

RDS also admitted that a directed verdict by this Court is the proper remedy for its failure to prove the amounts it claimed with reasonable certainty:

*"I will be the first one to say, I have researched this so much. If the jury's verdict is inconsistent with the lost profits analysis, either by way of the valuation and the offer of \$18.4 million, or the \$111 million and change, then the Court will direct that verdict. And, legally, the court should."*<sup>95</sup>

Accordingly, as RDS itself correctly admits, it cannot recover any such damages, and the Court should direct a verdict in Trimble's favor.

Even though it never claimed damages of this amount, RDS may argue that the \$38,500,000 reflects Trimble's valuation of RDS, and that this valuation is a proxy for the profits that RDS would have made from the Copper Center Project. This argument fails for several reasons. First, RDS presented no competent evidence that this alleged valuation had anything to do with the profits that RDS might have made from the Copper Center Project. Even worse, RDS admitted that this valuation was derived from the so-called P&L Statement – the same type of statistical projection that Alaska law has rejected for lost profits claims for new businesses.<sup>96</sup> Second, RDS never alleged or presented any evidence that Trimble valued RDS at this amount. When asked about the numbers in the "valuations" column of the whiteboard photograph, Mr. Feucht repeatedly testified that Trimble "thought the appropriate

<sup>94</sup> Tr. at 1473-1474. (emphasis added).

<sup>95</sup> Tr. at 1359-1361. (emphasis added).

<sup>96</sup> Tr. at 130-131.



valuation was number two," which was the \$18,400,000 valuation.<sup>97</sup> This figure is less than 40% of the amount awarded by the jury.

RDS simply assumes that the valuation of a company is necessarily the same thing as a projection of lost profits. RDS did not present any expert witness testimony to this effect, or cite any legal authority to support this notion. Furthermore, as discussed above, RDS admitted that these valuations were based on statistical sales projections for the Copper Center Project. If the statistical projections themselves are not proper evidence for lost profits, then an alleged valuation of a company based on those projections is likewise inadequate.

**C. RDS's Lost Profit Award is Barred Because its Lost Profit Damages Were Not Reasonably Foreseeable When Trimble Made the Alleged Promises to RDS.**

The jury awarded RDS \$12.8 million in lost profit damages arising from breach of the NDA or breach of fiduciary duty arising out of the alleged agreement to become partners. These damages are barred by the principle that contract damages must be "reasonably foreseeable" *at the time the alleged promise was made*. *Native Alaska Reclamation v. United Bank Alaska*, 685 P.2d 1211 (Alaska 1984) ; *Alaska Tae Woong Venture, Inc. v Westward Seafoods*, 963 P. 2d 1055 (Alaska 1998). No reasonable jury could conclude that these lost profit damages were reasonably foreseeable at the time Trimble made a contractual promise to RDS.

In its verdict, the jury found that Trimble breached the NDA. Trimble and RDS signed the NDA in March 2009. Trimble can only be held liable for damages that were reasonably foreseeable as of that date. RDS's foreseeable damages from

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<sup>97</sup> Tr. at 136-137; 316-317.

breach of the NDA do not include lost profits that would be generated by a joint business venture between RDS and Trimble. The NDA expressly stated that Trimble was not agreeing to go into business with RDS, or do anything other than protect RDS's confidential information.<sup>98</sup> RDS also admitted at trial that the NDA did not require Trimble to go into business with RDS.<sup>99</sup> It is impossible for a reasonable jury to conclude that when Trimble signed the NDA in March 2009, Trimble could reasonably foresee that it could be liable for lost profits that would be generated by a joint business, when the NDA expressly stated that Trimble and RDS were not agreeing to form such a business. Accordingly, lost profits are not recoverable for any alleged breach of the NDA.

The same principle applies to any portion of this damage award that is attributable to an alleged breach of fiduciary duties. Under these facts, RDS's breach of fiduciary duty claim is contractual in nature, because the alleged fiduciary relationship is based solely on an alleged agreement to become partners.<sup>100</sup> Thus, any damages that the jury awarded for a breach of fiduciary duties should be considered contract damages for purposes of the foreseeability requirement.

Lost profit damages were not reasonably foreseeable from the alleged partnership relationship. According to Mr. Feucht, the partnership came into existence at a meeting in Copper Center in September 2009. Mr. Feucht testified that this alleged partnership did not include an agreement that Trimble and RDS were or

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<sup>98</sup> Plaintiff's Trial Exhibit 2; *see also* Tr. at 266-268.

<sup>99</sup> *Id.*

<sup>100</sup> The characterization of breach of fiduciary duty damages as either tort or contract damages depends on the gravamen of the claim. *Shields v. Cape Fox Corp.*, 42 P.3d 1083 (Alaska 2002).

would become co-owners of a business for profit.<sup>101</sup> Thus, by Mr. Feucht's own description, at the time when RDS and Trimble entered into this "partnership" relationship, damages to RDS from "lost profits" were not reasonably foreseeable. Moreover, the P&L Statement that RDS relies on as the basis for both the existence and amount of its alleged lost profits was not created until September 2010 – more than a year after the alleged partnership was formed.<sup>102</sup>

### CONCLUSION

The jury's verdict in this case should be disregarded because it is contrary to the evidence that was presented at trial and the law governing RDS's claims. The evidence at trial confirmed that no reasonable jury could find that Trimble made any negligent or intentional misrepresentations to RDS, that Trimble breached its contract with RDS, or that a legal partnership (or any corresponding fiduciary duties) ever existed between the parties. Moreover, the evidence is overwhelming that RDS never relied on any alleged false statements by Trimble, or that anything that Trimble ever did or said could have actually *caused* RDS to lose out on profits from the Copper Center Project. Lastly, RDS obviously failed to prove its claimed damages with reasonable certainty, as reflected in the jury's rejection of those amounts. And the amounts that the jury did award are not supported by any competent evidence and are not consistent with Alaska law.

Accordingly, Trimble moves the Court to enter judgment notwithstanding that verdict, and order that RDS take nothing by its claims. Alternatively, Trimble moves the Court to order a new trial on all liability and/or damages findings.

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<sup>101</sup> Tr. at 263.

<sup>102</sup> Plaintiff's Trial Exhibit 28.



**CERTIFICATE OF SERVICE**

This is to certify that on November 13, 2014, a true and correct copy of the foregoing document was served by U.S. Mail and email on the following:

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