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

RECREATIONAL DATA SERVICES, LLC,	)	
Plaintiff,	)	
v.	)	
TRIMBLE NAVIGATION, LTD.,	)	
Defendant.	)	
	)	Case No. 3AN-11-10519CI

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STATE OF ALASKA
THIRD DISTRICT
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RECREATIONAL DATA SERVICES'S OPPOSITION TO TRIMBLE'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT, OR IN THE ALTERNATIVE, FOR NEW TRIAL

RDS opposes Trimble's motions for JNOV and new trial. The jury's verdict is supported by substantial evidence and is not unjust. This court should respect the jury's decisions and deny Trimble's motions in their entirety.

I. The court should deny Trimble's motion for judgment notwithstanding the verdict.

A. Legal standard

When considering a motion for JNOV, this court determines "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."[1] The court may not weigh conflicting evidence or judge

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

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credibility[2]:

> [G]enerally the only evidence that should be considered is the evidence favorable to the non-moving party – if that evidence is insufficient to allow a reasonable juror to find for the non-moving party, the trial court should grant a directed verdict or JNOV motion. But such motions should be scrutinized under a principle of minimum intrusion into the right to jury trial guaranteed under the Alaska Constitution. . . . If there is any doubt, questions of fact should be submitted to the jury.[3]

B. Ample evidence supports the jury's verdict on each element of each cause of action.

Although Trimble acknowledges the legal standard, its memorandum completely ignores the perspective from which this court must view the evidence. Trimble recounts the facts in the light most favorable to itself – and sometimes it misrepresents the record. Below, RDS shows that, when the evidence is viewed as legally required, there should be no question but that the record provides evidence that supports finding in RDS's favor on each element of each claim. Thus, the motion for JNOV should be denied.

Rather than critique Trimble's account seriatim, in the sections that follow RDS addresses the question this court must answer: Was the evidence presented at trial, viewed in the light most favorable to RDS, sufficient to let a reasonable jury find for RDS? Because the answer to this question necessarily depends on the evidence presented to support each element of each of RDS's causes of action, this opposition closely tracks the jury instructions defining the elements of each claim. The introductory quotation in each section is from the relevant jury instruction.

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[2] *See id.* at 1017-18.

[3] *Id.* at 1018 (internal quotes omitted).

1. **First cause of action: Trimble made an intentional misrepresentation to RDS[4].**

(a) ***Trimble made a false or misleading statement to RDS***: RDS presented evidence of multiple false or misleading statements by Trimble. RDS's attorney highlighted four examples in his closing argument [Tr. 1415-44[5]], but he also told the jurors, "You folks probably have 20 or 30" other examples of misrepresentation on which they could base a verdict for RDS. [Tr. 1415] Proof of even one misrepresentation suffices to support the jury's verdict.

One false or misleading statement by Trimble to RDS is Chen's statement, on November 29 or 30, 2010, that Trimble was working on a project with Cabela's, but that the Trimble–Cabela's project did not compete with the Copper Center Project. Brian Feucht testified, "Chaur-Fong told me . . . that Trimble Outdoors was working on a project with Cabela's. And that that project did not compete with the Copper Center Project." [Tr. 118; *see* Tr. 119-20, Exhibit 54 (providing the date)][6] Chen repeated the claim that the projects do not compete. [Tr. 324 (referring to the November 29 or 30 phone call *and* to the meeting in Corvallis in December 2010); *see* Tr. 127 (dating the Corvallis meeting)]

Feucht testified that Chen described the Trimble–Cabela's project as "a cataloging

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[4] The elements of this cause of action are set out in Jury Instruction No. 13.

[5] RDS has separately filed all of the trial transcript that is currently available, which covers Days 2–11 of trial. The transcript pages cited in this document are therefore not separately attached as exhibits to this pleading.

[6] All references to numbered exhibits are to Plaintiff's Trial Exhibits. References to lettered exhibits are to Defendant's Trial Exhibits. Copies of the plaintiff's exhibits cited in this motion are attached.

app." [Tr. 118; *see also* Tr. 324 ("He told me that Trimble Outdoors was working with Cabela's to produce a catalog app," that is, a "Mobile catalog.")] He said Chen "told me that they [the two separate projects] did not overlap." [Tr. 325]

In fact, the Trimble–Cabela's project did overlap and compete with the Copper Center Project. Feucht learned, after hearing Chen's disavowals, that the project Chen referred to was the "Recon Hunt line of applications." [Tr. 323] This was not just a mobile catalog app. [Exhibit 52; Tr. 736-38] There was in fact substantial overlap. Just before the November meeting at which Chen denied an overlap, Mark Harrington of Trimble Outdoors wrote to Chen:

> Also, I have had an update from Rich Rudow regarding the project he is working on confidentially with Cabellas [*sic*] and an acquisition. In combination, there appears to be a fair amount of overlap, but it would be worth having the three of us on the phone to discuss. Not to say that there would be a conflict; maybe there is an interesting collaboration.

[Exhibit 6][7] RDS demonstrated the substantial overlap with Exhibit 52, a PowerPoint presentation prepared by Cabela's regarding the Trimble–Cabela's project. [Exhibit 52; Tr. 224][8] Brian Feucht characterized this presentation as "very similar" to what the Copper Center Project had previously prepared: "it appears to be the Copper Center

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[7] Reflecting the focus on the Copper Center Project, the subject line of the initial email in the chain was, "Copper center update and action items." [Exhibit 6]

[8] The presentation is not separately dated, but the reasonable inference is that it was prepared on or about November 7, 2010. It referred to Cabela's market capitalization value as of "11/7," i.e., November 7. [Exhibit 52 at 3, 4] Its data for the market share of the Cabela's website were current as of October 2010, and showed comparable figures for the preceding months of May–September 2010. [*Id.* at 16, 17] And it referred to upcoming store openings in 2011, the Turkey Camp media event in spring 2011, and a launch date for the new product in the first quarter of 2011. [*Id.* at 3, 4, 18, 19, 25]

project with Cabela's as the marketing partner, Trimble as the software partner, and Casio as the hardware partner." [Tr. 224] Verizon was on board as the cellular carrier. [*Id.*] As the presentation shows, the Trimble–Cabela's venture presented a "lifestyle application" featuring "Maps, navigation, and mobile tools," married to a "Rugged, Waterproof" "camouflage phone" that would come with a "Pre-loaded application" for Trimble Outdoors. [Exhibit 52 at 23, 27, 28] This is much more than a simple Cabela's catalog optimized for a mobile device. Tellingly, Trimble introduced no evidence of a separate, stand-alone mobile catalog app that Cabela's developed in this period along with Trimble.[9]

The testimony of Tom Rosdail, who worked for Cabela's, confirmed that the two projects competed. Rosdail testified that he was surprised to learn that Trimble had been involved with the Copper Center Project. [Tr. 793] He was surprised "Because we were working with Trimble for quite a while at this time on a project that took GPSs. In our case, a licensed GPS product and put it on a cell phone. And what we were being presented [in the Copper Center Project] seemed to be along those same lines." [*Id.*] He answered "yes" to the question, " Did it appear to you . . . that the two projects seemed to compete with each other?" [*Id.*] Rosdail confirmed his views that the two projects directly competed in an email he wrote in March 2011. [Exhibit 7]

In short, there was ample evidence from which the jury could find that Trimble, through Chen, made more than one false and misleading statement when he told RDS

[9] *Cf.* Tr. 697-98 (testimony of Paul Miller that he did not recall Trimble ever telling him anything about a catalog app).

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repeatedly that the two projects did not compete or overlap.

(b) ***Trimble knew the statement was false or misleading when Trimble made it***: Jury Instruction No. 15 explained in pertinent part: "Trimble knew the statement was false or misleading if, at the time it was made . . . Trimble knew or believed the matter was not as it represented." Substantial evidence showed that Trimble knew its statements were false or misleading when made because at the time it made the statements it knew or believed that the two projects did overlap and compete.

Although Chen stated to RDS on November 29 or November 30, 2010, that the projects did not compete and did not overlap [Tr. 118, 323-25], he admitted at trial that he had met with Trimble's Rich Rudow and Mark Harrington on November 20, "And at that meeting, they informed you that there was overlap, right?" [Tr. 988] This admission by itself supports a finding that Chen knew the statement about no overlap was false when he made it. Chen's admitted deception on this point also supports the finding that he was knowingly untruthful when he spoke to RDS. The jury heard that Chen testified in a deposition that he was not informed at that meeting "that there may have been a fair amount of overlap" involving the Trimble–Cabela's project and the Copper Center Project. [Tr. 987-88] At trial, he admitted he lied in his deposition. [Tr. 989] At trial, he also attempted to back away from his admission that he had been told about the overlap. [Tr. 1016-17] A reasonable juror could accept the first part of his testimony and not the second, or could infer from the totality of Chen's testimony that he was well aware in November 2010 that the projects overlapped and competed but did not want to

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admit this at trial.[10]

Chen's testimony alone is sufficient evidence to support a conclusion that Chen knew his statements to RDS were false when he made them. But the jury heard much more than that. Evidence showed that as early as September 2010 Chen was advised about likely competition or overlap between the two projects. On September 29, Rudow wrote to Chen, "We are signing a deal with Cabelas (under NDA so please hold in confidence) and it sounds like what we are doing with Cabelas might be similar to what you want to do with Remington. You should at least be aware of our plans." [Exhibit 13] Chen responded by proposing a phone conversation with Rudow, which would have been held on October 4. [*Id.*] Chen therefore knew as of late September about the Trimble–Cabela's project. He knew more about this as of early October after speaking with Rudow.

Chen received another email on November 18 [Exhibit 6 (discussed in the preceding section)] that clearly advised him before his November statements to RDS about the overlap of the projects and supports the conclusion that Chen knew when he denied overlap that his statements were false or misleading. The PowerPoint presentation apparently prepared in early November [Exhibit 52] also shows that Trimble knew before the end of November that the two projects overlapped and competed.[11]

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[10] Once the jury finds a witness has been untruthful in any portion of his testimony, it may reject all of his testimony. [Jury Instruction No. 6]

[11] This PowerPoint presentation was developed by Cabela's but it unquestionably reflects Trimble's involvement. Several pages contain a logo for Trimble Outdoors. [Exhibit 52 at 21-25] The business objectives for the new product included "Leverage the mobile and GPS strengths of Trimble with the passion of the Cabela's customer" and

Finally, the testimony from Tom Rosdail supports the conclusion that Chen knew in late November and December that the two projects conflicted and overlapped. Rosdail testified that, as of March 2011, the Trimble–Cabela's project had been underway for "quite a while." [Tr. 793] Coupled with the other evidence about timing, this testimony supports the conclusion that Chen knew that the projects competed when he denied this to RDS just a few months earlier in November and December 2010.

(c) ***Trimble intended or had reason to expect that RDS would rely on the statement***: Trimble had reason to expect that RDS would rely on the statement that its other project did not compete with the Copper Center Project. Having RDS believe that Trimble was not working on a competing project would encourage RDS to maintain its working relationship with Trimble, rather than take its ideas and its patent elsewhere. Having RDS wait patiently would give Trimble more time in which to bring the Trimble–Cabela's product to market, without having to compete with RDS.

Feucht's testimony described RDS's ongoing concerns that it would lose its ability to partner with Trimble and thus lose the first-mover advantage. [Tr. 94-95, 238-39] In response, Chen regularly reassured the RDS principals that Trimble remained committed to the Copper Center Project and to RDS. [Tr. 94-95, 238] Indeed, the only reasonable inference from the parties' relationship and Trimble's separate, secret development of its

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"Successfully leverage the brand of Cabela's and Trimble." [*Id.* at 22] And the presentation described an application that would present unique attributes "that no other conventional GPS device can provide," a "Best in class mobile application suited primarily towards hunting and fishing." [*Id.* at 24, 25] It would be unreasonable to infer that Trimble was not aware of the contents of the PowerPoint nor that it was not just a "mobile catalog." Trimble's fingerprints were undeniably all over this presentation.

own project is that Trimble intended RDS to rely on its statements about the lack of overlap or competition from a Trimble–Cabela's product, so that RDS would remain quiet while Trimble continued to work to launch the competing product.

(d) ***RDS justifiably relied on the statement***: Reliance is justified in general terms if "a reasonable person would consider the statement important when deciding whether to act," or, more specifically in this case, if "Trimble knew or had reason to know that this particular plaintiff, RDS, would consider this statement important when deciding whether to act." [Jury Instruction No. 16]

A reasonable person in RDS's position in late 2010 would consider Chen's statements important when deciding whether to act. RDS had to decide then whether to continue waiting for Trimble to provide the hardware for the Copper Center Project device, or whether to seek out another hardware partner. [*Cf.* Tr. 708] A reasonable person would consider Trimble's statements that it was not competing with RDS of crucial importance in deciding whether to act. Put another way, if Trimble had told RDS something different on November 30 – for example, "you should know that we are actively going behind your back to partner with Cabela's to bring a competing product to market" – then RDS would have taken different action at that time. It would have begun pursuing a different hardware provider in earnest. It might have initiated legal action. It certainly would not have waited four more months before ultimately learning that Trimble did not want to cooperate with it. This was information important to a reasonable person's decision on whether or not to act.

Further, Trimble had reason to know that RDS would consider its statements

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important in deciding whether to act. From early in the relationship, after the signing of the NDA but even before the meeting in Copper Center, Chen knew that RDS was giving Trimble in effect a right of first refusal to be the hardware provider for this project: As Brian Feucht testified, "Trimble was engaged, and we were going to stick with Trimble until Trimble told us that they weren't engaged with us." [Tr. 54] As early as April 2009, RDS believed that it could have pitched its idea to "another company in place of Trimble," and yet it did not. [Tr. 55] RDS refrained from this action because "we had an agreement in discussion with Chaur-Fong that we wouldn't." [*Id.*] Trimble knew that RDS was committed to Trimble, until Trimble said otherwise. This commitment was unchanged in late 2010, at the time of the statements in question. [*Cf.* Tr. 699] There was therefore substantial evidence presented establishing that Trimble knew that RDS would rely on its statements that it was not engaged in developing a competing product.

(e) ***RDS suffered a monetary loss:*** The monetary loss that RDS claimed was lost profits. [Jury Instruction No. 24] Ample evidence supported the jury's finding that RDS suffered lost profits because it accepted Trimble's reassurances that it was not developing a competing product.

Trimble has argued that RDS cannot claim lost profits because RDS had no way to profit from its ideas without Trimble – and Trimble had no contractual obligation to proceed to market with RDS. This takes the evidence in the light most favorable to Trimble. Evidence at trial viewed in the light most favorable to RDS shows that RDS had the ability to profit from its ideas without Trimble, so long as it moved quickly. Paul Miller testified that there were other partnerships that RDS could have pursued starting in

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late November or early December 2010, if it had not waited for Trimble. These included approaching the many other potential hardware manufacturers in this field. [Tr. 708; *cf.* Tr. 94][12] Miller asserted that there were "certainly other viable candidates out there" to provide the hardware. [Tr. 708] RDS could have raised the necessary initial capital from other sources "fairly easily." [*Id.*] And it "could have moved forward without Trimble Outdoors," so long as "they still maintain the first-mover advantage." [Tr. 708-09][13]

The jury heard that Trimble, in connection with Remington and RDS, developed evidence that the Copper Center Project device would be highly profitable. [Exhibit 28] Section I.C.4, *infra*, explains how the data estimating the lost profits were reliable.

Because Trimble's false statements removed the first-mover advantage from RDS, Trimble caused RDS to suffer financial losses.

(f) ***RDS's reliance on the statement was a substantial factor in causing RDS's loss***: RDS's reliance on Trimble's statement was a substantial factor in causing RDS's harm if "the harm would not have occurred if RDS had not relied upon the

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[12] *See also* Tr. 708 (Miller: "Q. And would you have been successful in bringing on another hardware person or company? A. That would have taken a little bit more time, but, yeah. There are definitely folks out there that have the hardware expertise to do this. Q. Based on the market research and the profit and loss numbers that were developed on that research, would you have had a hard time finding a hardware partner? A. I don't think so. Obviously, you lose time, because you are – you have got someone that you brought along to a very mature state who is completing your sentences, as opposed to someone you have to start back to square one and go through the process, but, yeah, there is certainly other viable candidates out there.").

[13] *See also* Tr. 709 (Miller: "Q. When the first-mover advantage went away, was this project done? A. Yes. Q. Was this project done – would this project have been done with RDS if the first-mover advantage had not gone away? A. I think there still would have been a way to make this happen, yes.").

statement" and "RDS's reliance on Trimble's statement was important enough in causing the harm that a reasonable person would hold Trimble responsible. RDS's reliance on Trimble's statement cannot be a remote or trivial factor in causing RDS's harm." [Jury Instruction No. 17]

The harm that RDS suffered was the inability to bring its product to market in a timely manner with the first-mover advantage. This harm would not have occurred if RDS had not relied upon Chen's statements. As discussed above, if RDS had not been lulled into inaction by reliance on Chen's false statements, RDS could have moved forward on its own in a timely manner. Contrary to Trimble's claims, the jury did not have to accept its theory that RDS's loss occurred because Trimble decided not to pursue the market with RDS, which Trimble was entitled to do. The jury reasonably could find that RDS's loss occurred because Trimble persuaded it to do nothing while Trimble developed a competing product. [*Cf.* Tr. 771] Had RDS not relied on Trimble's statements, it would have been able to enter the market earlier.

Finally, the jury could find that RDS's reliance on Trimble's statements was an important factor in causing RDS the harm of lost profits. It was this reliance that caused RDS to continue to wait for Trimble, to refrain from approaching other hardware manufacturers, to refrain from soliciting additional capital, and to avoid taking proactive steps to bring its product to market before the Trimble–Cabela's product got there. Trimble's false statements that Recon Hunt was not in competition with the Copper Center Project were of integral importance in reassuring RDS that it did not need to take additional steps either to protect itself or to finalize its own product as quickly as

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possible. RDS's reliance on Trimble's false reassurances was a central reason that RDS incurred the lost profits that the jury found it had suffered.

Conclusion: Evidence supports each element of the intentional misrepresentation cause of action, and the jury verdict on this claim should stand.

2. Second cause of action: Trimble made a negligent misrepresentation to RDS[14]

The jury found that Trimble made both an intentional and a negligent misrepresentation to RDS. This section briefly surveys the evidence supporting those elements of the negligent misrepresentation claim that are not shared with the intentional misrepresentation claim. Because intentionality is a more difficult standard to meet than mere negligence, the evidence outlined above readily supports the jury's finding that Trimble committed a negligent misrepresentation.

(a) ***Trimble made a statement in the course of business . . . or some other enterprise or transaction in which it had a financial interest:*** Although there were multiple misstatements, RDS again focuses on the misstatements that the Trimble–Cabela's product did not overlap or compete with the Copper Center Project device. These statements were undeniably made in the course of business, or some other enterprise or transaction in which Trimble had a financial interest. Trimble had been in business with RDS since at least the Copper Center meeting in September 2009. [Tr. 72] It had a vested financial interest in the success of the Copper Center Project, having negotiated profit-sharing agreements with the other two partners [Tr. 318-19] and

[14] The elements of this cause of action are set out in Jury Instruction No. 18.

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contributed data to a set of financial performance models on which all three partners extensively relied. [Tr. 393, 394, 944-48] Trimble cannot plausibly identify any non-business context in which these statements possibly could have been made.

(b) ***The statement was false at the time it was made*:** Sections I.B.I.(a)-(b) above describe the evidence that established that the statements were false and that Trimble *knew* the statements were false when they were made. For its negligent misrepresentation claim, RDS must establish only the former.

(c) ***Trimble failed to use reasonable care when making the statement*:** The evidence summarized in Section I.B.I.(b) establishing that Trimble knew these statements were false or misleading when it made them also proves they were made without reasonable care. A businessman who knowingly makes a false or misleading statement necessarily also acts negligently and fails to use reasonable care when he speaks.

(d) Remaining elements: The fourth, fifth, and sixth elements are the same for both intentional and negligent misrepresentation. [*Compare* Jury Instruction No. 13 *with* No. 18] RDS relies on its previous analysis regarding these elements.

Conclusion: Substantial evidence supported RDS's negligent misrepresentation claim as well as its claim for intentional misrepresentation.

3. Third cause of action: Trimble breached the terms of its Mutual Nondisclosure Agreement with RDS[15]

(a) There was a contract: Trimble does not appear to dispute that the NDA was a contract between itself and RDS. The evidence was undisputed that Trimble and

[15] The court instructed the jury on the cause of action involving breach of the NDA in Jury Instructions Nos. 19 and 20.

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RDS both signed the Mutual Nondisclosure Agreement in March 2009, and were bound by it going forward. [Exhibit 2; Tr. 559] Trimble never disputed that Chen's unit, Trimble MCS, was bound by William Martin's signature on the NDA form. [Tr. 1010]

(b) Trimble did not keep its promise: The NDA required Trimble not to disclose Confidential Information to non-parties even to other divisions within the signatories' companies except on a "need to know" basis. [Exhibit 2 ¶ 5.2.1] The evidence showed that Chen breached this requirement repeatedly.

The NDA was signed in March 2009. [Exhibit 2] Chen testified that in April 2009, after speaking with Feucht, he "immediately had a conversation with [Rich] Rudow and . . . told him the software might be good for his business." [Tr. 1011] Chen testified that he discussed the Copper Center Project with Rudow again in October 2009 [Tr. 1012] and in September 2010 [Tr. 1012-16; Exhibit 13]. Chen agreed at trial that Rudow worked in a separate division, Trimble Outdoors, and was not a party to the NDA. [Tr. 1011-12] Chen did not claim that Rudow had a need to know the information he shared.

Chen testified that he discussed the Copper Center Project again with Rudow, along with Mark Harrington, part of the Trimble executive management team and also not a party to the NDA [Tr. 531], in November 2010 [Tr. 1015-16, 1029-31], at a meeting to discuss the apparent similarities between the Copper Center Project and the deal that Trimble was already pursuing with Cabela's. [Exhibit 13]

Besides sharing the ideas that RDS had provided in confidence concerning software, Chen shared the market research and profit and loss statement that Chen received through the joint efforts of Remington, RDS, and Trimble. [Tr. 1029-31] Chen

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agreed that it would be "inappropriate and a violation of the NDA" to share the Copper Center Project financial information with "anybody outside of the two parties" who had signed the NDA. [Tr. 1026][16]

Chen also shared information with Trimble Geographic Information Systems or Trimble GIS, which he agreed was not part of the NDA. [Tr. 835, 1031, 1033; *see also* Tr. 1033 (Chen did not ask Remington or RDS if he could share this information)]

In its motion, Trimble does not appear to deny that Chen shared information that even he admitted was a violation of the NDA. Rather, Trimble emphasizes the fact that the information that was shared was not designated "confidential." But the profit and loss statement (admitted as Exhibit 28) was designated in this manner. The first page of Exhibit 28 contains a confidentiality designation that is fully complies with Section 3 of the NDA: "This email and any files transmitted with it are RDS, MDS, and AOI property, are confidential, and are intended solely for the use of the individual or entity to whom this email is addressed." [Exhibit 28 at 1] This unambiguous designation disposes of Trimble's initial argument.

Trimble also asserts that the profit and loss statement in particular was not covered by the NDA, because it was developed mostly by Remington. However, the evidence at

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[15] Chen originally denied at trial that he had sent such financial information to parties not covered by the NDA. [Tr. 1029] But he was impeached with his contradictory deposition testimony. [Tr. 1030-31] The jury could have decided not to believe Chen's testimony on *any* issue, in light of the fact that he was impeached so many times on central issues. *Cf.* Jury Instruction No. 6 ("If you believe that part of a witness's testimony is false, you may also choose to distrust other parts of that witness's testimony, but you are not required to do so."). *See also infra* at 46-47 (compiling points where Chen was impeached).

trial established that RDS contributed its own confidential cost estimates for this document. [Tr. 416, 418][17] The NDA clearly covered that information, and clearly that was shared.

The evidence supports the jury's determination that Trimble breached the NDA.

4. Fourth cause of action: Trimble breached its fiduciary duty of loyalty to RDS[18]

There was a partnership between Trimble and RDS: The fiduciary duty of loyalty applied only if the jury first found that Trimble and RDS entered into a partnership. The jury did make this finding. Instruction 21 defined a partnership as "an association of two or more persons to carry on as co-owners a business for profit." The instruction then lists factors to consider that could support a finding of partnership. As shown below, evidence supports the jury's partnership finding, both under the general definition and the specific suggested factors.

(a) ***An association of two or more persons***: Unquestionably, there was "an association of two or more persons" [Jury Instruction No. 21] who formed the Copper Center Project: RDS's Brian Feucht, Remington's Pat Boehnen, and Trimble's Chaur-Fong Chen. Moreover, every plaintiff witness to testify at trial, *and* lead defense witness Chaur-Fong Chen expressly characterized the association as a partnership.

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[17] Moreover, Paragraph 1.2 does not limit confidential information to that contributed exclusively by one of the signatories. It states that "Confidential Information" means "any information or material of a confidential or proprietary nature relating to the existing or prospective business and/or technology of a Party or *Others* . . . ." (emphasis added).

[18] The jury instructions covering this cause of action are Jury Instruction No. 21 (defining a partnership) and No. 22 (defining a partner's fiduciary duties).

Feucht testified that at the close of the three men's charter meeting in Copper Center in September 2009, "we shook hands and we decided that we were going to be partners and we were going to push this project forward to fruition." [Tr. 72] He testified that, for at least a year, the three organizations behind the Copper Center Project went to "multiple corporations presenting ourselves as partners. . . . All of these meetings we presented as partners." [Tr. 92] He stated that Trimble "represented themselves as partners" along with RDS and Remington. [Tr. 93][19]

Curtis McQueen, of the Eklutna Native corporation, agreed that Chen presented Trimble "as partners with RDS, in [his] discussions" about the Copper Center Project. [Tr. 335, 337] He testified that Chen sent an email that referred to the group as "partners." [Tr. 335-36] He had no "reason to believe that they were not partners." [Tr. 338]

Pat Boehnen, like McQueen a disinterested witness not directly involved with the litigation, testified, "We were all tied together in this project, and we all had a very large benefit in partnering together and working on this project together." [Tr. 361] He described what each company contributed to the Project and concluded that "we were all kind of joined at the hip on this project." [Tr. 360-61] When the three companies together met with AT&T, he said, "It appeared to me that we walked in as partners in

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[19] *See also* Tr. 88 (stating that in meeting with Eklutna, Inc., "The tenor of that meeting was we were pitching as partners a relationship with Eklutna Corporation," and that the term partner, "I think . . . [was] shared by both Chaur-Fong and myself"), 95 ("[E]arly on in the project, Pat Boehnen from Remington set up a conference bridge, and we had a regularly scheduled call every week to keep everyone informed how the partnership was working. And if there were any concerns that any of the partners had with each other, needed help on something, so on and so forth."), 130, 180, 181, 318-19, 320-21.

agreement on the project scope and its status." [Tr. 394] There was no question in his mind that Remington, Trimble, and RDS "were partners at this point in time when [the profit and loss statements] were developed." [Tr. 473][20]

Marc Hill, another neutral witness, testified that he never met with Feucht or Chen individually, but always as a pair: "they always came together. There was never a meeting where we had Brian by himself or Trimble by themselves. They always came as a – as a – a couple is the wrong word, but as a pair, maybe. As partners, whatever the right terminology is." [Tr. 606] Indeed, he testified that he would not "have had that [initial] meeting with Mr. Boehnen, Chen, and Mr. Feucht" if they had not come to him "as partners." [Tr. 630][21]

Paul Miller testified that, from his first involvement with Trimble, Remington, and RDS, he had recognized them as a partnership. [Tr. 667] He agreed that Chen was "holding himself [out] as a partner in his dealings with RDS." [Tr. 667-68] Indeed, as Miller described one early meeting with Feucht and Chen: "The two of them were finishing each other's sentences. And depending whether we were talking about software, or whether we were talking about hardware, each would take the lead at the

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[20] *See also* Tr. 473-74 ("Q. How many months would you anticipate, based on your working with Chen and Trimble and Mr. Feucht and RDS, did you guys engage in a partnership? A. Probably about 14 months."), 511 ("We were acting as partners throughout. That document [Exhibit I] is really a document that puts it in writing. Our actions were as partners."), 512-13.

[21] *See also* Tr. 637, 638.

appropriate time and carry the conversation." [Tr. 668][22]

Finally, even Chen stated on direct examination that, when he refers to someone as a "partner," he means "a group of people, maybe two people that [are] working together on the project or some kind of activities." [Tr. 825] He admitted that he could not think of a single example, from a fifteen-year career with Trimble, in which Trimble "has presented with a partner to a third party when they really weren't partners." [Tr. 922] He agreed that AT&T "wouldn't even have met with [Trimble, RDS, and Remington] if you didn't assert you were partners." [Tr. 929] And Chen's emails repeatedly referred to the team as "partners": In April 2009 Chen wrote that RDS "ha[d] a strong interest in partner[ing] up with Trimble" [Exhibit 12]; he described Remington as "one of the partners" in the Copper Center Project "team" [Exhibit 58]; and he stated Trimble's view that "Brian Feucht, president of RDS," is "our key partner on both Remington and [a different] project." [Exhibit 15] Chen wrote in that last email: "Remington project is code named 'Copper Center – include device, SW, and connected outdoor community' among the partner (Trimble, RDS, Remington)." [*Id.*]

(b) ***Co-owners in a business for profit*:** The Copper Center Project was unquestionably intended to be a for-profit business.[23] It was founded and designed with

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[22] *See also* Tr. 666 ("And, so, seeing, you know, Remington, RDS, and Trimble together as partners was – was important."), 668 (stating that Chen never said anything "regarding him not being partners with RDS"), 679, 680, 681, 685 ("The partnership had to show up [at an important meeting]. So, it was going to be Trimble and Remington – Trimble and RDS. Sorry."), 686, 688, 692, 698, 699, 700, 701, 702.

[23] The legal test is not, "Did the partners' business earn profits?" but rather, "Was the partners' business a for-profit business?" *See Hall v. TWS, Inc.*, 113 P.3d 1207, 1212

the intention of making profits for its co-owners [Tr. 25, 26; Exhibit 5], who determined that the business had the potential to earn a substantial sum of money,[24] which the co-owners intended to share. [Tr. 318-19][25]

The three men repeatedly represented their enterprise to others as a business. They met – seeking business relationships – with AT&T [Tr. 392-94], Microsoft [Tr. 92], Symbian [*id.*], Eklutna, Inc. [Tr. 85-89], and financial services firm Janney Montgomery Scott [Tr. 290], among others, each time presenting themselves as established business partners.[26] Indeed, Boehnen testified that people in their situation would not be able to meet with CEOs, or with a massive cellular carrier, if they were not holding themselves out as legitimate business partners.[27]

Finally, the three partners carried on as co-owners in this business. They worked together to develop the financial performance model, introduced at trial as Exhibit 28 [Tr.

(Alaska 2005) (final element for analyzing existence of a partnership is "that the business must be *intended to* make a profit") (emphasis added).

[24] *See* Exhibit 5 (executive summary with initial revenue projections), Exhibit 28 (financial performance model); Tr. 776 (Paul Miller, who agreed to work with RDS, testified that that a company "is going [to have] to do in excess of 100 million [dollars] top line, probably closer to a billion," before he will be interested in working with it).

[25] *See* Jury Instruction No. 21 (instructing that any person who actually receives a share of the profits of a business is presumed to be a partner). Although the Copper Center Project did not actually ever make and distribute profits, the intent to share profits is a relevant factor that the jury could consider. *See id.*

[26] *See also* Tr. 145 (Feucht described multiple additional trips the business partners made over the course of the project).

[27] Tr. 369 (Boehnen: "To get to the point over the course of 18 months where we are talking with arguably one of the largest cell phone carriers in the country, you better be going in as partners. I think that's the expectation that AT&T would have, that you are not coming to me with some kind of harebrained idea where the parties are going to blow apart as soon as you walk out my door."); *see also* Tr. 929 (Chen).

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447], which they then together repeatedly presented to other businesses. [Exhibit 28; Tr. 412-13, 413-19, 422-36][28] All three companies contributed the data on which this chart was based. Feucht provided information for RDS and the software side. [Tr. 416] Boehnen provided information from Remington for the marketing side. [Tr. 417] Chen, on behalf of Trimble, "made estimates on the cost of hardware development." [Tr. 415][29]

Additionally, Feucht testified that the men negotiated numerous areas that business partners typically discuss. Feucht testified that they negotiated, among other things, "profit sharing," "risks," "job duties," and "when and where to meet." [Tr. 318-19] And this was "not an exhaustive list." [Tr. 319] As Feucht testified, they negotiated everything "down to who was answering support calls when people had issues with technology. Where to send hardware if there is a hardware component that was a problem." [*Id.*]

The testimony was more than sufficient for a reasonable jury to find that Trimble and RDS carried on as co-owners in a business for profit.[30]

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[28] *See also* Tr. 181-82 (testimony of Brian Feucht as to why it was "very important" for the three of them to discuss and agree on the numbers: "Trimble was interested in what my numbers were, because we had to make sure that when we presented this, not in my case, but in Trimble's and Remington's case, that we each bought off on each other's numbers . . . . [W]e all had to make sure that our numbers all made sense to each other.").

[29] *See also* Tr. 416 (Boehnen: "Q. The numbers in the section that applied to Trimble, all their revenues, all their costs, all their investments, everything, where did those numbers come from? A. They would have had to have come from Chaur-Fong. Q. Okay. So . . . Chen gave you those numbers to input into this chart? A. Correct.").

[30] The jury instructions properly advised that the lack of a written partnership agreement is not dispositive: "Whether a partnership existed is a question of fact to be determined by the totality of the evidence by the jury." [Jury Instruction No. 21] Nor was the parties' intent controlling. *See also* AS 32.06.202(a) ("Except as otherwise provided in

(c) Other relevant information supporting the existence of a partnership: Jury Instruction No. 21 told jurors they could consider any relevant evidence. It listed several specific factors the jury could consider. These support the finding of partnership.

Whether RDS and Trimble intended or did combine assets, knowledge, or abilities to carry out a business enterprise: RDS and Trimble intended to combine RDS's "patented software capabilities" [Tr. 399] with Trimble's "ability to build hardware" [*id.*] to carry out their business. RDS also offered the patent that RDS, but not Trimble, had the exclusive right to use. [Tr. 322, 399, 1288-89] That the business never materialized is not significant. The Jury Instruction makes clear that the *intention* to combine assets and knowledge is relevant to whether a partnership was formed.

Whether RDS and Trimble co-owned the business, as evidenced by shared management and/or profit sharing: The partners negotiated profit-sharing arrangements [Tr. 318-19] and the way they would share management. [Tr. 319] They shared management of the development of the profit and loss statement, a significant joint effort they completed before their relationship soured. [Tr. 414-18, 944-51]

Whether the business was for-profit: As discussed above, the Copper Center Project was clearly "intended to make a profit."[31] [Tr. 25, 26; Exhibit 5]

Conclusion: The jury's verdict that Trimble and RDS established a partnership is supported by substantial evidence.

(b) of this section, the association of two or more persons to carry on as co-owners a business for profit forms a partnership, *whether or not the persons intend to form a partnership*.") (emphasis added).

[31] *Hall*, 113 P.3d at 1212.

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Trimble breached its fiduciary duty of loyalty to RDS. Once the jury determined that a partnership existed, it followed as a matter of law that Trimble had a fiduciary duty of loyalty to RDS. [Jury Instruction 22] The jury instruction suggests several ways in which that fiduciary duty may be breached. The evidence at trial supported finding a breach in more than one of these ways.

(a) *A partner must hold as trustee for the partnership any property or benefit derived by the partner in the conduct of the partnership business or derived from the use by the partner of partnership property*: As part of the partnership agreement, Trimble obtained valuable market research data. [Tr. 101, 180-86, 317, 370-98, 453-72, 611-20, 679] Trimble did not hold these data as a trustee for the partnership. Instead, Trimble took these data and shared them with groups not privy to the partnership's Mutual Nondisclosure Agreement. [Tr. 1011-12, 1012-16, 1015, 1015-16, 1026, 1029, 1030-31, 1033] Most critically, Trimble shared the data with Cabela's, thereby enabling a third party to release a competing product and to destroy the Copper Center Project's first-mover advantage for its product. [Exhibit 52; Tr. 701-02, 708-09]

(b) *A partner must refrain from dealing with the partnership as a party having an interest adverse to the partnership*: Almost from the inception of the partnership, Trimble dealt with RDS as a party with interests adverse to the partnership. Trimble repeatedly violated the parties' Mutual Nondisclosure Agreement by sharing information outside of the partnership [Tr. 1011-12, 1012-16, 1015, 1015-16, 1026, 1029, 1030-31, 1033], then later lied about what it had done. [Tr. 1029-30] Further, the reasonable inferences from the evidence include that Trimble at best dragged its feet in working with

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RDS [Tr. 636-37], in order to gain the opportunity to bring a competing product to market with an outside party. [Exhibit 52] At worst, the jury could infer that the Trimble–Cabela's product was so similar to that being developed by the Copper Center Project that Trimble went behind RDS's back to provide information to Cabela's to help bring the competing product to market. [Tr. 111-17, 121-23, 698, 701-02]

(c) *A partner must refrain from competing with the partnership in the conduct of the partnership business before the dissolution of the partnership*: Trimble's actions against the interest of the partnership, described above, specifically involved competing with the partnership business: At a time before the partnership had been dissolved, Trimble went behind RDS's back to violate the terms of the nondisclosure agreement by providing information to non-covered parties who went on to directly compete with partnership business during the lifespan of the partnership. [Tr. 111-17, 121-23, 698, 701-02, 1011-12, 1012-16, 1015, 1015-16, 1026, 1029, 1030-31, 1033; Exhibit 52]

(d) *A partner must discharge its duties of loyalty in accordance with the obligation of good faith and fair dealing*: "Trimble violated the implied promise of good faith and fair dealing if . . . it is more likely true than not true that Trimble deprived RDS of a benefit of the contract: (1) intentionally; or (2) by acting in a manner that a reasonable person would regard as unfair." [Jury Instruction No. 23]

Trimble deprived RDS of a benefit of the contract intentionally. A central benefit of the partners' contract, the Mutual Nondisclosure Agreement, was the ability of RDS to work freely with Trimble to develop the Copper Center Project. That is, given the secrecy of the information involved, and the considerable commercial potential of the

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idea underlying the Copper Center Project, the chance to freely share information within the partnership was a key benefit of the partners' contract. Trimble intentionally deprived RDS of the benefits of unfettered communication of confidential information by taking confidential information developed exclusively for the partnership, and sharing it with outside parties not bound by the contract. This deprived RDS of the expected benefits of the contract.

Trimble acted in a manner that a reasonable person would regard as unfair. The evidence at trial supports finding that Trimble took and misused confidential partnership data, sold out its partners, and lied about what it had done. Reasonable inferences from the evidence include that Trimble used these data to work with Cabela's to bring a competing product to market.

Besides the improper disclosure, Trimble acted in other ways a reasonable person would find unfair. The key benefit that RDS expected from its contract with Trimble was the ability to capitalize on first-mover advantage in a highly competitive industry. The evidence at trial established that getting one's product to market first provides a critical strategic advantage. [Tr. 517, 519, 618, 622-24][32] Trimble deprived RDS of the first-mover advantage by acting in an unfair manner – by deliberately delaying and stalling in order to prevent RDS from going elsewhere. By the time RDS finally realized that

[32] For example, consumers will make an initial investment in one manufacturer's platform, then be reluctant to switch in the future as a result. [Tr. 517, 622-24] This advantage "is particularly important on the software side" because of the concept of "'software sticky'" – "a consumer gets used to software, and they are resistant to change." [Tr. 517] *Cf.* Cabela's description of one of the objectives of the Trimble–Cabela's project: "A tool for users to establish and/or remain connected with Cabela's – driver of data use *and customer stickiness*." [Exhibit 52 at 23 (emphasis added)]

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Trimble was not going to provide the hardware it had discussed, the first-mover advantage of the Copper Center Project had been lost to the competing product developed in partial reliance on the Copper Center Project data. Trimble gained the time to develop this competing product only because it reassured RDS that they were still working together, even while it negotiated with Cabela's to "kill the RDS deal."[33] Reasonable people would view this as unfair and a breach of the fiduciary duty of loyalty owed by a partner.

Trimble's multiple breaches of the NDA and of its fiduciary duty of loyalty caused RDS harm. The central element in Trimble's breach of both the NDA and its fiduciary duty was its disclosure of confidential information to parties outside the NDA. [Tr. 1015-16, 1026] Chen disclosed information to Rudow and Harrington, who had leadership positions with or were otherwise a conduit to Trimble Outdoors. [Tr. 531, 537, 1015-16, 1191] And it was Trimble Outdoors that was already working on a product with Cabela's, and that mere months later formally launched that Trimble–Cabela's project, Recon Hunt. [Exhibit 52; Tr. 224] Chen's breaches enabled third parties to rush a competing product to market, occupying this product niche and robbing the Copper Center Project of its first-mover advantage. [Tr. 517, 519, 618, 622-24]

These breaches of contractual duties caused RDS harm for largely the same

[33] Exhibit 9. The quote is from an email sent in May 2011, shortly after Trimble pulled out of the Copper Center Project. [*Id.*] The email was from Rich Rudow to several participants, including Chen, Harrington, and Fox. The full context for the quote is: "Tommy will delegate this [Cabela's speaking with Trimble] to Tom Rosdale [*sic*] and Tom will need to jump through hoops answering the mail. Tom didn't appreciate the hoop jumping he just completed to kill the RDS deal. It was unnecessary and Trimble was part of the problem." [*Id.*]

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reasons that Trimble's tortious conduct caused it harm: They rendered RDS unable to develop the Copper Center Project device in a timely fashion that would ensure its first-mover advantage. By delaying and stalling in its dealings with RDS, Trimble kept RDS from pursuing other avenues in order to develop its product. *See supra* at 26-27. By failing to refrain from competing with the partnership, Trimble gave information to parties not covered by the NDA, which went on to directly compete with the partnership business during the lifespan of the partnership. *See supra* at 24. And this all occurred only because Trimble breached the NDA, and its duty of loyalty, by sharing information with Trimble Outdoors to share with Cabela's.

The evidence presented above in the misrepresentation section also establishes that RDS suffered a monetary loss caused by Trimble's contractual breaches. *See supra* Sec. I.B.1.(e)-(f). The breaches of the NDA and of the duty of loyalty left RDS in substantially the same place as the false reassurances that Trimble was only developing a non-competing product: waiting on Trimble to fulfill its partnership obligations and refraining from seeking out a new hardware partner, marketing partner, or source of venture capital funding. *See id.* As established above, these breaches led RDS to suffer a monetary loss caused by Trimble's conduct. *Id.*

C. Ample evidence supports the damages awards, as well as the jury's findings on liability.

1. Legal standard

The legal standard for determining whether a damages award may stand or must be set aside as unsupported by evidence does not differ significantly from the standard for

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evaluating the jury findings on liability. Again, the court must accept the evidence in the light most favorable to the prevailing party.[34] Questions regarding credibility are left to the jurors.[35] Further, because the defendant's misconduct often makes it impossible to determine damages with precision,[36] a plaintiff need only provide a sufficient a factual basis from which damages may reasonably be estimated.[37] If the *fact* of damages is proved by a preponderance of the evidence, then plaintiff must supply only "a reasonable basis for computing an award."[38] The Alaska Supreme Court has explained:

> The applicable standard is that the evidence must afford sufficient data from which the court or jury may properly estimate the amount of damages,

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[34] *Reeves v. Alyeska Pipeline Serv. Co.*, 56 P.3d 660, 668 (Alaska 2002); *Alaska Tae Woong Venture, Inc. v. Westward Seafoods, Inc.*, 963 P.2d 1055, 1061 (Alaska 1998) (when evaluating whether a damages award may stand, court must consider whether "any evidence in the record could support" the jury's award); *id.* at 1061-62 (accepting the evidence in the record in the light most favorable to plaintiff).

[35] *See Cameron*, 251 P.3d at 1023 (discussing how the credibility of testimony related to damages is left to the jury).

[36] *See Reeves*, 56 P.3d at 669; *Native Alaskan Reclamation & Pest Control, Inc. v. United Bank Alaska*, 685 P.2d 1211, 1222-23 (Alaska 1984) (quoting RESTATEMENT (SECOND) OF CONTRACTS § 352 (1981) on why doubts as to the amount of damages must be resolved against the defendant who, by its breach, forced plaintiff to seek compensation in damages).

[37] *See Sisters of Providence in Washington v. A.A. Pain Clinic, Inc.*, 81 P.3d 989, 1006 (Alaska 2003) (accepting "reasonable certainty"); *Reeves*, 56 P.3d at 669 ("reasonable approximations" are upheld); *Alaska Tae Woong Venture*, 963 P.2d at 1061 (requiring only a factual basis to "reasonably estimate" damages).

[38] *Cameron*, 251 P.3d at 1021 (internal quotes omitted); *see also Alaska Tae Woong Venture*, 963 P.2d at 1061 (once plaintiff has proved actual damages, the lack of certainty as to the margin of profit "has relatively minor importance"); *Power Constructors, Inc. v. Taylor & Hintze*, 960 P.2d 20, 43 (Alaska 1998) (once plaintiff made a strong showing that defendant caused it actual harm, the "relative weakness of [plaintiff's] evidence on precise damages" was not important); *Alaska Children's Servs., Inc. v. Smart*, 677 P.2d 899, 902 (Alaska 1984).

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which data shall be established by facts rather than by mere conclusions of witnesses.[39]

If the court finds the award is unsupported by any facts, the court may remit the damages but must leave the verdict standing to the largest extent possible.[40]

2. The court should not reconsider its decision to allow the jury to award lost profits, if proved to a reasonable certainty.

Trimble repeats an argument that it advanced and that this court rejected during trial: that RDS was not entitled to its lost profits, but only the profits, if any, that Trimble derived from using RDS's confidential information. [Memo. at 37-38] As before, Trimble relies entirely on *Reeves v. Alyeska Pipeline Service Co.*, which is a decision by an evenly divided Court with no precedential value.[41] Moreover, *Reeves* involved a very different type of contract. There, plaintiff had an unoriginal idea, which he agreed to discuss with defendant in exchange for a promise to include him in the project if it ever were implemented.[42] In the current case, RDS offered original ideas and entered into a contract that precluded Trimble from disclosing those ideas. [Exhibit 2]

Furthermore, regardless of whether *Reeves* indicates anything regarding the proper

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[39] *Sisters of Providence*, 81 P.3d at 1007 (internal quotes omitted); *see also* cases cited *supra* n.37.

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

[41] *See* 56 P.3d at 663 n.1.

[42] *See id.* at 663-64.

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measure of damages on some types of contract claims, it provides no guidance regarding the measure of damages on a misrepresentation claim. The *Reeves* jury awarded no compensatory damages on the misrepresentation claim, so the Court did not address that award.[43] *Reeves* thus provides no basis for departing from the standard principle that on a misrepresentation claim a plaintiff may recover lost profits if it proves it suffered such a loss as a result of the defendant's tortious conduct.

After full briefing and argument during trial, this court declined to instruct the jury in accordance with Trimble's theory of the law on the recovery of lost profits – and Trimble has offered no persuasive reason to reconsider that decision.

3. The decision in *Guard v. P & R Enterprises, Inc.*, does not establish the exclusive ways that RDS could prove lost profits.

Trimble re-asserts another argument that this court has rejected – namely, that *Guard v. P & R Enterprises, Inc.*,[44] holds that a new business may establish its lost profits in only one of two ways, both involving comparisons to a similar, profitable business. [Memo. at 38-39] As this court previously recognized, that is not a fair reading of *Guard* and subsequent cases. In *Guard*, the Court expressly authorized a new business, with no track record, to recover lost profits, if it can prove without undue speculation what its profits would have been but for defendant's misconduct.[45] *Guard* discussed two ways in which other courts have allowed a new business to prove lost profits; it then ruled against the plaintiff because plaintiff offered evidence based on the history of a business that was

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[43] *See id.* at 665.

[44] 631 P.2d 1068 (Alaska 1981).

[45] *See id.* at 1072.

not in fact comparable.[46] Because no other types of proof were offered or discussed, the case cannot fairly be interpreted to establish an inflexible rule that the *only* acceptable way for a new business to prove lost profits is by comparison to a comparable business.

Subsequent cases reinforce that *Guard* did not announce such an inflexible rule. In *Alaska Travel Specialists, Inc. v. First National Bank of Anchorage*,[47] another case relied on by Trimble, defendant argued for a narrow reading of *Guard*, and the Supreme Court summarized the argument but did not endorse or apply it.[48] The Court considered the other types of evidence plaintiff offered, and ruled against plaintiff, not because plaintiff used the wrong method of proof, but because plaintiff's lost profits claim was "wildly speculative."[49] Trimble also cites *Geolar, Inc. v. Gilbert/Commonwealth Inc.*,[50] as another case purporting to apply the *Guard* "rule" on how a new business may prove lost profits. However, the *Geolar* Court's parenthetical describing *Guard* is particularly telling and refutes the idea that the Court reads *Guard* as having adopted a rule. In the Court's words, *Guard* "not[es] that a business without an established profit history might rely on its principals' profit history on similar jobs or on the profit history of others similarly situated."[51] In short, this court should not reconsider the conclusion it reached during trial when it rejected Trimble's argument that RDS's proof was insufficient

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[46] *See id.* at 1072-73.

[47] 919 P.2d 759 (Alaska 1996).

[48] *See id.* at 766.

[49] *Id.*

[50] 874 P.2d 937 (Alaska 1994).

[51] *Id.* at 946.

because it was not based on the profit history of a comparable company.

4. Evidence admitted at trial supports the jury's determination that RDS proved to a reasonable certainty that it suffered a loss of at least $51.3 million in future profits.

Trimble seizes upon a footnote in *Guard* to support claims about what kind of evidence may *not* be used to prove lost profits of a new business. This footnote states that a plaintiff in a contract case may not rely "solely on statistical projections to prove lost profits."[52] As *Guard* indicates, courts are rightly skeptical of lost profits claims based solely on the plaintiff's statistical projections, particularly when those projections are not developed until litigation arises. This does not describe RDS's proof. As the court will recall, and as outlined below, RDS relied at trial on data developed by an independent market research firm selected by Remington; Trimble and Remington endorsed the data and relied on them to make business decisions.

RDS presented a solid factual basis for the jury's damages award. It offered two major categories of evidence in support of its request for damages: (1) the profit and loss ("P & L") statement developed by Trimble, Remington, and RDS using market research data assembled by a third-party, and (2) Trimble's valuation of RDS. Trimble now calls the P & L statement a "dubious statistical projection of lost profits" [Memo. at 39], but that was not how Trimble's own representatives treated the statement when Trimble participated in developing it.

The trial evidence showed that the P & L statement was developed using statistics from the U.S. government as the starting point. [Tr. 385, 453] No one questioned their

[52] 631 P.2d at 1072 n.4.

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validity. Remington's Pat Boehnen called these data "very accurate." [Tr. 453] An experienced independent firm then conducted market research to develop the percentage of hunters and fishermen who would be interested in the Copper Center Project's product. [Tr. 180, 380, 456-58, 610] The jury was informed about how the market research survey was done. [Tr. 370-71, 376, 380-82, 389-90, 453-58, 611-14][53] Neutral witnesses called the market research data "clean" (meaning unbiased), "statistically valid," and "solid." [Tr. 377 (Boehnen[54]), 612, 614 (Hill)] Boehnen testified that the numbers provided by the market research are "reasonably reliable and accurate to a reasonable certainty." [Tr. 459] Trimble, through Mr. Chen, was "in agreement that the data was not only a good population, a good data set, but also that the responses were valid." [Tr. 391 (Boehnen)]

Market research, as was done here, is routine in the business world. [Tr. 374, 388 (Boehnen), 670 (Miller)] Market research surveys, such as were done here, are the best way to develop reliable numbers for business decisions. [Tr. 413 (Boehnen)]. Market research is the foundation for how to develop products. [Tr. 607 (Hall)]

After the market research determined reasonable estimates for the number of people interested in purchasing the Copper Center Project's product, adoption rates were determined using a standard business formula, the Rogers Adoption Curve. [Tr. 460]

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[53] The court received additional information during voir dire before deciding to admit Exhibit 28. [Tr. 422-47]

[54] The name of the testifying witness is provided occasionally in order to emphasize how much of the important testimony came from disinterested witnesses.

This is a well-known, "widely-accepted," "proven" model – not a formula developed by sheer guess or for purposes of this case only. [Tr. 460-61, 514 (Boehnen), 1176 (Fox)]

Trimble, Remington, and RDS all offered input for the design of the survey. [Tr. 380-81, 946-51] An analyst at Remington "crunched the numbers" provided by the market research firm. [Tr. 385-86] After the market research data were available, representatives of Trimble, Remington, and RDS discussed them with each other, and then separately with their own companies. [Tr. 180-81] Based on cost data provided by each company, Remington's Boehnen consolidated the information to produce the P & L statement. [Tr. 415, 418] The parties made a series of conservative assumptions to decrease the predicted profits. [Tr. 472, 618-19, 630] Chaur-Fong Chen believed the projected sales figures should have been even larger. [Tr. 631]

Trimble, Remington, and RDS all recognized that the numbers in the P & L statement had to be reliable because they were expecting corporations – their own and others – to make investments based on this statement. [Tr. 317, 611, 630-31] Remington considered the P & L statement reliable and relied on it. [Tr. 386-87, 395, 411] Trimble made clear that it considered the statement reliable and was prepared to invest based on it. [Tr. 391, 398 (Boehnen "Trimble . . . was ready to go."), 521 (Boehnen: Trimble "never said they weren't reliable")] The parties jointly embraced the numbers in the P & L statement and made several joint presentations to other corporations, treating the figures in the statement as reliable. [Tr. 391-96] Trimble asked AT&T to accept the

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numbers. [Tr. 394][55]

Mr. Boehnen testified expressly that, because the estimates were conservative and based on well-founded numbers, the figure of $111 million in expected profits to RDS was "reasonably certain." [Tr. 472]

Anecdotal evidence from other projects corroborated the reasonableness of the P & L statement's estimates. For example, during trial, the iPhone 6 was launched and, as two witnesses pointed out, it sold millions of phones on the first day. [Tr. 471, 615-16] RDS's claim for lost profits was based on survey data that led to a much more modest estimate of selling of 158,000 phones in the first year, and 2.8 million phones over five years. [Exhibit 28; Tr. 471, 615-16] The Copper Center Project's estimate was also conservative compared to the estimate Trimble made when it teamed with Cabela's and estimated sales of 500,000 phones in one year. [Tr. 1171-73]

In sum, although courts may prohibit claims for lost profit based solely on statistical projections developed by a plaintiff for trial, the evidence in this case was far different in three main respects. First, the profit prediction was not produced by the plaintiff but by a team that included the defendant. Second, it was not prepared for trial but was developed years earlier in the course of business; the underlying data were objectively based on market research by a contractor otherwise uninvolved in the Copper Center Project, and it was *endorsed by Trimble* and a neutral third party. Third, the

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[55] Even in closing arguments and in the post-trial briefing, while Trimble challenged the revenue claims, it has not challenged any of the parties' cost estimates as unrealistic or unreasonable.

revenue projections were *relied on by Trimble for making business decisions.*[56] Trimble cites no case in which a court rejected as too speculative a claim for lost profits based on numbers the defendant endorsed before the litigation began. Because RDS's estimate of lost profits was based on facts disclosed to the jury, and is not merely the opinion of interested witnesses, it meets the standards established by the Alaska Supreme Court for the type of evidence on which an award of lost profits may be based.

Trimble notes that no witness specifically testified that damages should total $51.3 million, or that the contract and tort awards individually should be $12.8 and $38.5 million. The absence of such testimony does not matter, and does not establish that the damages awards are unsupported by the evidence.[57] As discussed above, the trial record supports reliance on the P & L statement – and that in itself would support damages of nearly twice what the jury awarded.[58] "The jury is entitled to combine evidence from multiple sources to reach its determination."[59] The jurors also heard testimony from which they reasonably could conclude that the P & L statement's estimates were unduly

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

[57] This memorandum focuses mostly on the total damages award – rather than on the two separate awards in isolation – because the only type of damage requested was lost profits, and Jury Instruction No. 27 advised the jury that it could not award duplicate damages. It appears that the jury most likely decided on a total amount of lost profits that it believed was supported by the evidence, then divided that total between the tort and contract causes of action.

[58] The $51.3 million award is very close to 47% of $111 million, as if possibly the jurors combined two pieces of evidence – the parties' assessment of revenues using what they believed were conservative assumptions and Trimble's 2010 focus on the 47% figure in determining how to value RDS. [Exhibit 30; Tr. 136]

[59] *Maddox v. Hardy*, 187 P.3d 486, 495 (Alaska 2008).

optimistic, despite the parties' contemporaneous beliefs that the numbers were conservative.[60] Since an award of $111 million would have been justified by the record, any lower number also is justified and not unreasonable.[61] Trimble can hardly complain that the award is improper because the jury evidently accepted some of the impeachment evidence that Trimble presented. In multiple cases, the Alaska Supreme Court has upheld damage awards for specific amounts that were not testified to by any witness.[62]

Case law on remittitur is instructive here. When a court finds a damages award to be unsupported, it may order remittitur only to the largest amount supported by the evidence.[63] Here, for the reasons discussed above, the court would have to find an award of $111 million supported by the evidence; it could not order a remittitur to some amount

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[60] To cite just one example, the jury heard testimony about other competitors who moved into the field where RDS and Trimble hoped to profit. [*E.g.*. Tr. 1260-61] The jury reasonably could conclude that, even with first-mover advantage, the Copper Center Project would have been generally successful, but would not have garnered as large a market share as the market research data suggested.

[61] RDS counsel's argument that the award must be $111 million or $18.4 million [Tr. 1473-74] has no legal significance. The arguments of counsel are not evidence [Jury Instruction No. 5], and no jury ever has to accept counsel's analysis of the evidence rather than reaching its own conclusions based on its independent review of the evidence.

[62] *See, e.g.*, *Cameron*, 251 P.3d at 1023 (upholding award in part because it was less than plaintiff requested, suggesting that the jury considered defendant's evidence and followed the court's instructions); *North Slope Borough v. Brower*, 215 P.3d 308, 319 (Alaska 2009) (reprinting with approval superior court order upholding jury's damages award in part because it was less than plaintiff's witnesses and counsel urged); *Maddox*, 187 P.3d at 494-95; *Sisters of Providence*, 81 P.3d at 1000, 1006-07 (upholding damages award that did not reflect any specific figure testified to at trial); *Alaska Tae Woong Venture*, 963 P.2d at 1060-62 (upholding award for lost profits even though the jury awarded the number that plaintiff's expert proposed for lost revenues, without a deduction for costs, where other evidence in the record could support a conclusion that plaintiff lost revenue after incurring all necessary costs).

[63] *See* cases cited *supra* n.40.

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less than that. Accordingly, it also could not find that the lower verdict amount is unsupported.

Moreover, the award of $51.3 million is corroborated by Trimble's own valuation of RDS, as shown in Exhibit 30. Trimble unquestionably valued RDS in December 2010 at $38.5 million, if the Copper Center Project met 75% of its revenue goal. Mathematically, the jury's award accepts that valuation and awards Trimble's valuation based on the Copper Center Project meeting its 100% goal. (That is, if RDS was worth $38.5 million if the Project earned 75% of its projected revenue, it was worth $51.3 million if the Project succeeded at the 100% level.) Trimble's valuation of RDS is a reasonable proxy for its lost profits, because the record showed that RDS had essentially no assets beyond its future profitability.

At minimum, the record supports an award of $18.4 million, based on Exhibit 30 and the trial testimony that in December 2010 Trimble's controller especially focused on the second line of that chart. [Tr. 136-37] This number draws on the P & L statement developed and endorsed by the partnership – but it mostly reflects Trimble's controller's own analysis on how to value RDS. It is not an amount developed purely for litigation. It is a valuation that Trimble developed and memorialized. Trimble has denied that it intended to acquire RDS – but that is immaterial. Trimble did not ever disavow that it had in fact valued RDS in December 2010 as worth $18.4 million if the Project met 47% of its revenue goal – and more if the Project succeeded to a greater degree. A reasonable jury could infer that Trimble's focus on the 47% line was either a negotiating strategy because Trimble actually believed the Project would do far better, or at minimum an

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honest expression of Trimble's belief about the Project's likely performance. Trimble did not contend that it had merely pulled the valuation numbers from thin air, as distinct from exercising informed business judgment to generate those estimates. The jury reasonably could accept Trimble's own valuation of RDS as a reasonably certain estimate of the future profits that RDS lost as a result of Trimble's tortious conduct.

5. The $12.8 million award for lost profits on the contract claim is not barred due to lack of foreseeability.

Trimble's final attack on the damages award focuses just on the award for breach of contract. As this court instructed, any damages awarded for breach of contract must have been foreseeable when the contract was entered into. [Jury Instruction No. 25] Trimble argues that RDS's lost profits were not foreseeable when the parties signed the NDA, because at that time there was no commitment to develop and market a product. [Memo. at 43]

"[F]oreseeability is a fact question for the jury."[64] This court must evaluate the jury's implicit finding of foreseeability under the same deferential standards that it applies to all the jury's other fact findings.[65]

Trimble's challenge fails because, again, it takes the evidence in the light most favorable to itself. Further, it appears to misunderstand the concept of "foreseeable." This jury was instructed that "Trimble had reason to foresee that a loss would be a probable result if either (a) the loss follows in the ordinary course of events from a failure

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[64] *Alaska Tae Woong Venture*, 963 P.2d at 1063.

[65] *Id.*

to keep the promise, or (b) the loss follows from special circumstances which Trimble had reason to know about when the promise was made."[66] This does not mean that, when signing the contract, Trimble had to know or expect that, when RDS learned of Trimble's breach, the parties would be well along in discussing a specific project and making plans to bring it to market, such that RDS would suffer lost profits as a result of the breach. Foreseeability means only that the damages must be of the type that follow naturally from a breach or from unusual facts known to the defendant at the time of contracting.

Native Alaskan Reclamation illustrates what the Alaska Supreme Court means by foreseeability. The case involved breach of a financing agreement; plaintiff sought damages that resulted when it could not secure alternative financing, and thus lost the property it had financed through defendant. The superior court found that the defendant could not be expected to foresee plaintiff's inability to secure a replacement loan – and the Supreme Court reversed this finding as clearly erroneous.[67] Although the consequences to plaintiff of defendant's breach resulted many months after the contract was signed and involved only one of a myriad set of possible outcomes, the Court determined that defendant could have foreseen that, if it breached the contract, plaintiff could not have found an alternative lender.[68] Similarly, in *Alaska Tae Woong Venture*, the Alaska Supreme Court reversed the superior court's determination that plaintiff's

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[66] Jury Instruction No. 25. The test is properly taken from *Native Alaskan Reclamation*, where the Alaska Supreme Court adopted the test from RESTATEMENT (SECOND) OF CONTRACTS § 351 (1981) as the test of foreseeability in Alaska. *See* 685 P.2d at 1219.

[67] *Native Alaskan Reclamation*, 685 P.2d at 1220-22.

[68] *See id.*

need to sell its fishing vessel was not a foreseeable result of defendant's breach of a contract to accept fish deliveries from plaintiff.[69]

In other words, a defendant has a reason to foresee a loss if it knows facts that make the plaintiff's actual loss one among the many outcomes that could result directly from defendant's breach of the contract. The foreseeability rule does not require defendant to have a crystal ball and to know at what stage in its dealings with plaintiff the breach will occur. Here, when Trimble entered into the NDA with RDS, it was foreseeable that the parties would develop a joint business venture and therefore foreseeable that Trimble's breach would cause RDS to lose the profits it would have gained if the business venture had gone forward without Trimble's breach.

This court has no basis to overturn the jury's finding that lost profits were a foreseeable result of Trimble's breach of the NDA.

II. The court should deny Trimble's motion for a new trial.

A. Legal standard

Under Alaska Civil Rule 59(a), a trial judge may grant a new trial "on all or part of the issues in an action in which there has been a trial by jury . . . if required in the interest of justice." One recognized ground for granting a new trial in the interest of justice is when "the verdict is against the clear weight of the evidence."[70] Trimble's new trial

[69] *See* 963 P.2d at 1063.

[70] *Sloan v. Atlantic Richfield Co.*, 541 P.2d 717, 723 n.11 (Alaska 1975) (internal quotes omitted, but quoting 6A MOORE'S FEDERAL PRACTICE ¶ 59.08[5] at 59-155-58 (2d ed. 1974), which in turn quoted *Aetna Cas. & Surety Co. v. Yeatts*, 122 F.2d 350, 352 (4th Cir. 1941)).

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motion argues exclusively that the verdict is against the weight of the evidence. It does not argue that the verdict was infected by passion or prejudice or any kind of misconduct.

Unlike when considering a motion for JNOV, when ruling on a motion for a new trial this court need not view the evidence in the light most favorable to the prevailing party. Instead, the court is expected the view the evidence independently; where conflicting evidence was presented, the court should weigh the evidence in the context of its own determinations on witness credibility.[71]

Alaska Supreme Court cases establish that a trial court *must* grant a new trial if the evidence supporting the verdict is "so completely lacking or slight and unconvincing as to make the verdict plainly unreasonable and unjust."[72] But when the evidence supporting the verdict is more substantial than that, the court must exercise discretion. The Court has not expressly discussed the factors that should guide the trial court's discretion, but it has repeatedly cited to treatises that offer such guidance. Both *Hogg* and *Kava*, the two cases most relied on by Trimble, cite to the Wright and Miller treatise, FEDERAL PRACTICE AND PROCEDURE.[73] The treatise makes clear that, when exercising discretion in deciding whether to grant a new trial, a judge should not lightly substitute its own views for that of the jury. As Wright and Miller state the task of the trial judge:

> On the one hand, the trial judge does not sit to approve miscarriages of justice. The judge's power to set aside the verdict is supported by clear precedent at common law and, far from being a denigration or a usurpation

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[71] *See Hogg v. Raven Contractors, Inc.*, 134 P.3d 349, 352 (Alaska 2006); *Kava v. American Honda Motor Co., Inc.*, 48 P.3d 1170, 1176 (Alaska 2002).

[72] *Hogg*, 134 P.3d at 352 (internal quotes omitted).

[73] *See id.* at 352 n.3; *Kava*, 48 P.3d at 1176 n.15.

> of jury trial, has long been regarded as an integral part of trial by jury as we know it. On the other hand, a decent respect for the collective wisdom of the jury, and for the function entrusted to it in our system, certainly suggests that in most cases the judge should accept the findings of the jury, regardless of the judge's own doubts in the matter. Probably all that the judge can do is to balance these conflicting principles in the light of the facts of the particular case. If, having given full respect to the jury's findings, the judge on the entire evidence is left with the definite and firm conviction that a mistake has been committed, it is to be expected that the judge will grant a new trial.[74]

In an earlier opinion, *Hash v. Hogan*,[75] the Court approvingly quoted the other most widely respected treatise, MOORE'S FEDERAL PRACTICE, which states a similar rule:

> [I]n dealing with motions for new trial based on the ground that the verdict is against the weight of the evidence, the trial judge should exercise a mature, judicial discretion in viewing the verdict in the light of the whole setting of the trial, the character of the evidence, and the complexity or simplicity of the legal and factual issues; and his discretion should be exercised to nullify a *seriously erroneous* result and to prevent a miscarriage of justice.[76]

In a following footnote, the Court continued:

> [I]n regard to the trial court's deciding motions for a new trial on the ground that the verdict is inadequate or excessive: "[T]he court should avoid substituting its judgment for that of the jury."[77]

Before *Hash*, in *Ahlstrom v. Cummings*,[78] the Court referred to an oft-cited federal case, which stated the standard for exercising discretion as follows:

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[74] 11 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 2806 (online ed. 2012) (footnotes omitted).

[75] 453 P.2d 468 (Alaska 1969).

[76] *Id.* at 472 (emphasis added; quoting 6A J. MOORE, FEDERAL PRACTICE ¶ 59.05[3], at 3742-43 (2d ed. 1966) (footnotes omitted)).

[77] *Id.* at 472 n.13 (quoting FEDERAL PRACTICE, *supra* n.76, ¶ 59.08[6] at 3824).

[78] 388 P.2d 261 (Alaska 1964).

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> If the court reaches the conclusion that the verdict is contrary to the weight of the evidence and that a miscarriage of justice may have resulted, the verdict may be set aside and a new trial granted. Manifestly this authority should be exercised sparingly and cautiously. It should be invoked only in cases in which the evidence preponderates heavily against the verdict.[79]

In short, the authority regularly referred to by the Alaska Supreme Court makes clear that, in exercising discretion on whether to grant a new trial, the trial judge must be guided by more than whether he or she personally would have reached the same verdict as the jurors. Such a casual granting of a new trial would contravene well-established Alaska law that respects the jury's role as fact-finder and recognizes that deference is due to jurors in that role.[80] Thus, this court should review the evidence independently but should exercise its discretion to deny the motion for new trial unless the court is firmly convinced that the jury has reached a seriously erroneous result, and a new trial is necessary to avoid a miscarriage of justice.[81]

B. Considering all the evidence, the jury's verdict is not clearly mistaken, and a new trial is not required in the interest of justice.

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[79] *Miller v. Pennsylvania R. Co.*, 161 F. Supp. 633, 641 (D.D.C. 1958); *see Ahlstrom*, 388 P.2d at 262 n.1 (citing *Miller*).

[80] *See generally* ALASKA CONST. art. I, § 16; Alaska Civ. R. 38(a); *Loomis Elec. Protection, Inc. v. Schaefer*, 549 P.2d 1341, 1344 n.16 (Alaska 1976) ("There has always been a strong policy favoring jury trials in Alaska."); *State v. Browder*, 486 P.2d 925, 937 (Alaska 1971) ("right to jury trial holds a central position in the framework of American justice").

[81] If this court denies a new trial, that decision is reviewed very deferentially by the Supreme Court, which will view the evidence in the light most favorable to the party that prevailed at trial and will uphold the denial of a new trial if there is an evidentiary basis for the verdict. *See Hogg*, 134 P.3d at 352; *Kava*, 48 P.3d at 1173. Recent cases illustrating this deferential appellate review and affirming the denial of a new trial sought on weight of the evidence grounds include *Cameron*, 251 P.3d at1023-24; *Kingery v. Barrett*, 249 P.3d 275, 283-84 (Alaska 2011); and *Maddox*, 187 P.3d at 493-95.

The discussion in Section I of this memorandum demonstrated that the jury's verdict is supported by evidence in the record. The discussion below reviews some of the additional evidence, including that proffered by Trimble, and shows that the jury's decision is not against the clear weight of the credible evidence. Trimble received a full and fair trial, and the verdict was rendered by a conscientious jury, whose diligence and integrity Trimble does not impugn. Whether or not this court would have reached the identical verdict, this court should conclude that the jury's verdict is not seriously erroneous, and that allowing the jury's verdict to stand is not unjust.

Trimble's case largely turned on the testimony of Chaur-Fong Chen. Chen was Trimble's representative within the Copper Center Project, and was involved from the outset with the events giving rise to this litigation. It was his statements that the jury found were tortious misrepresentations, and his actions that the jury found were contractual violations. If the jury had found all of Chen's testimony to be credible, it would not have found for RDS on any of its claims.

The jury was justified in finding that Chen was not a credible witness. The jury heard evidence that Chen had lied on multiple occasions, about events of integral importance to the litigation. The jury heard Chen testify that he had not referred to RDS as a potential partner in early 2009, then saw him confronted with an email showing that he had done precisely this. [Tr. 912, 914] Chen initially testified that he had colleagues who call each other "partners" when that is not the case, then later said that that was not an accurate statement. [Tr. 919, 922] The jury learned that Chen had simply lied in his deposition about not helping to prepare the questions used for the Copper Center

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Project's market research survey, when evidence introduced at trial showed that he had repeatedly assisted with those questions. [Tr. 946-51] He also lied in his deposition about the crucial fact that he had allegedly not been told about overlap with the Trimble–Cabela's project at his November 2010 meeting with Harrington and Rudow, and he admitted at trial that he had not been truthful. [Tr. 987-93]. He even lied on the stand about being out of the country in late March 2011 [Tr. 1001-03], when the RDS team was meeting with Cabela's and Trimble's absence was "the 900-pound elephant in the corner of the room." [Tr. 690] Chen told the jury, "I think my memory doesn't serve me very well" [Tr. 951] – but the jury could find that he was intentionally deceptive. The jury was instructed that, "If you believe that part of a witness's testimony is false, you may also choose to distrust other parts of that witness's testimony, but you are not required to do so." [Jury Instruction No. 6] The jury had ample reason not to believe a word that Chen said.

In contrast to Trimble, whose defense relied almost entirely on Chen and other interested witnesses, RDS's case relied extensively on neutral witnesses – McQueen, Boehnen, Hill, and Miller, and defense witness Harrington – all of whom had nothing to gain by testifying as they did. The jury was not clearly mistaken in accepting their testimony over conflicting testimony proffered by Trimble's witnesses.

This court must now make independent determinations of credibility. Based on all the evidence, this court should find, as the jury did, that Chen's testimony was incredible and that RDS's evidence was simply more credible than Trimble's on every point of conflict.

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The same analysis applies to the testimony on damages. RDS's evidence on damages was based on numbers developed by the parties, *including Trimble*, and relied on by the parties, *including Trimble*, during the life of the Copper Center Project, both internally and in presenting the business to others. *See supra*, Sec. I.C.4 (summarizing evidence on damages). Trimble's evidence on damages, by contrast, came exclusively from a constructive expert,[82] Neil Beaton, who was hired in 2013 exclusively for litigation and trial. [Tr. 1283] The jury learned that Beaton charged $550 an hour, and that he was assisted by a staff whose time was billed at $125 to $450 an hour. [Tr. 1252, 1301-02] The jury heard that Beaton testified 140 times in the last four years, notwithstanding Beaton's earlier statement that "very little" of his work "is litigation." [Tr. 1250, 1299-1301] And it learned that his firm's principals had worked on the Arthur Andersen restructuring and fallout, and that the firm was doing ongoing work in support of the Lehman Brothers bankruptcy. [Tr. 1277-78, 1279-80]

The jury may have decided, and this court could similarly decide, that it wished to put greater weight on damages numbers developed by Trimble itself than by Trimble's hired expert. It may also have decided that it found more credible the P & L statement developed in fall 2010, in the midst of the partnership, as compared to damages calculations prepared for litigation in 2014, years after the fact. Finally, the jury may have decided to give little weight to the testimony of a self-described "corporate doctor[]" whose firm had earned roughly a half billion dollars in fees in dealing with the

[82] Beaton was never qualified as an expert, but the court ruled that he was effectively treated as one. [Tr. 1320-23] The jury was therefore instructed on how to analyze the testimony of an expert witness. [Jury Instruction No. 7]

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collapse of Lehman Brothers. [Tr. 1280] Any of these decisions alone would be reason enough to find RDS's evidence of damages more credible than Trimble's.

Furthermore, the jury heard evidence that at least three assumptions central to Beaton's analysis were incorrect. First, the jury learned that Beaton had formed his opinion in reliance on the conclusion that "RDS didn't own the intellectual property." [Tr. 1257] This was an important assumption for Beaton's analysis. [Tr. 1257-58] But Beaton did not account for the fact that the patent was licensed to Alaska Outdoor Innovations, which was in turn a partnership between Brian Feucht and the original patent holder, Jim Belz. [Tr. 1288-89] Belz was Feucht's business partner in RDS. [Tr. 1285-86] Thus, while it may be literally true that it was not RDS *per se* that owned the patent, the license was held by one of RDS's partners. Second, the jury heard extensive testimony on alleged competition in the marketplace that would have made the Copper Center Project device less likely to succeed. [Tr. 1258-73] But none of these examples presented the single-suite phone with preloaded applications that the Copper Center Project was proposing; they were all either ruggedized phones *or* outdoor applications. So Beaton's assumptions of a crowded marketplace were fatally flawed. And third, Beaton assumed that the Copper Center Project would be unable to obtain the funding that was a necessary precursor to moving ahead with any other step of the project. [Tr. 1257-58] But he acknowledged that he did not account for Paul Miller's involvement with the Copper Center Project. [Tr. 1285-87] Miller told the jury (before Beaton testified) that he had been involved with the Copper Center Project since at least

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September 2010[83] – and that he was prepared to do extensive work on behalf of the partnership, including finding a new marketing partner, finding a new hardware partner, and raising venture capital. [Tr. 683, 708-09] Miller described his business background and testified that he could have raised the required funding "fairly easily," since he brought to RDS a valuable Rolodex of outdoor industry contacts. [Tr. 683, 708] The jury could have found Miller credible and found Beaton's conclusions worthless because he did not account for Miller's involvement. Given the problems with these three foundational assumptions of Beaton's analysis, the jury reasonably could have decided not to accept any of his conclusions on damages.

This court must review the evidence independently and make its own credibility determinations, but it should ultimately reach the same outcome as the properly instructed jury that the preponderance of the evidence supports Trimble's liability on every cause of action. At minimum, this court should conclude that the jury's verdict is not seriously erroneous, and that allowing the jury's verdict to stand is not unjust.

Conclusion

For the reasons stated above, this court should deny Trimble's motions.

Respectfully submitted, this 17th day of November, 2014.

Gavin Kentch (Alaska Bar No. 1111081)

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[83] Tr. 666. Miller's title was Chief Operating Officer Designee, i.e., it "was designated that [he] would become the COO when [the phone] moved into production." [Tr. 707]

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