

MUTUAL NONDISCLOSURE AGREEMENT

This MUTUAL NON-DISCLOSURE AGREEMENT (the "Agreement") is by and between Recreational Data Services ("Company"), with a place of business located at 3330 Creekside Dr. Anchorage, AK 99518, and Tripod Data Systems, Inc. ("TDS"), with its principal place of business at 345 SW Avery Avenue, Corvallis, OR 97333. (each a "Party" and collectively the "Parties").

RECITALS

- A. The Parties desire to assure the protection and preservation of the confidential and/or proprietary nature of information, which may be Disclosed or made available to each other for the limited purpose of discussing the terms of a prospective business relationship ("Purpose"). In the course of the Parties' discussions relating to the Purpose, the Parties expect that each is or may become a Recipient of the other Party's Confidential Information, as defined below
B. The Parties intend by this Agreement, among other things, to limit the manner and extent to which each Recipient may use or Disclose the other Party's Confidential Information.
C. In consideration of the Parties' mutual promises below, and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Parties agree as follows:

AGREEMENT

1. Definitions.

- 1.1. "Others" shall mean any individual or entity not a Party
1.2. "Confidential Information" shall mean 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 or to the Purpose. Confidential Information includes, but is not limited to a Party's business, customer, technical or engineering information
1.3. "Disclosing Party" shall mean the Party that makes a Disclosure of information to the Recipient.
1.4. "Disclose" shall mean to communicate in writing; electronically; in machine readable form; by demonstration; by access to plans, diagrams or equipment or orally, either directly, or through a Party's agents. Derivatives of the word "Disclose" (e.g., Disclosure, Discloses, etc.) shall have substantially the same meaning.
1.5. "Recipient" shall mean the Party that receives a Disclosure of a Disclosing Party's Confidential Information, whether from the Disclosing Party or otherwise.

2. Exclusions. Notwithstanding any other provisions of this Agreement, each Party acknowledges that Confidential Information shall not include any information which:

- 2.1. Is already known by Recipient prior to the Disclosure without restriction on Disclosure;
2.2. Is independently developed by or for the Recipient without breach of this Agreement;
2.3. Becomes publicly known through no wrongful act of Recipient;
2.4. Is lawfully received, without obligation of confidentiality, by Recipient from Others;

3. Designation of Confidential Information. Each Disclosing Party shall affix or incorporate in any written Confidential Information it Discloses to a Recipient an appropriate statement identifying the information as the Disclosing Party's Confidential Information, such as "[name of Party] Confidential Information" or words of like meaning. If the Confidential Information is orally disclosed, the Disclosing Party must indicate the confidential nature of the information at the time of disclosure and confirm in writing, that such information was confidential and proprietary within thirty (30) days of making such an oral disclosure of Confidential Information.

4. Obligations of Confidence. Except as expressly permitted or further restricted by Paragraph 5, each Party agrees as Recipient of an Disclosing Party's Confidential Information that it will:

- 4.1. Not Disclose such Confidential Information to Others.
4.2. Exercise the same degree of care to protect such Confidential Information from any possession, use or Disclosure not expressly permitted by this Agreement, that the Recipient generally uses to protect its own information of similar nature, but no less than a reasonable standard of care.

5. Permitted Possession, Use and Disclosure. Each Disclosing Party's Confidential Information may be possessed, used and Disclosed by a Recipient only as follows:

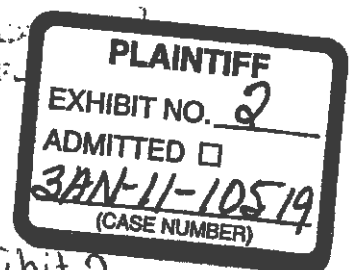
5.1 Possession and Use. A Recipient may possess, use and reproduce such Confidential Information solely for the purpose of the Purpose and having discussions between the Parties relating to the Confidential Information or the Purpose. Such use shall not include Disclosure except as expressly permitted below. The Parties agree that nothing in this Agreement prohibits competition of the Parties in the marketplace.

5.2 Disclosure

5.2.1. Employees and Consultants. A Recipient may Disclose such Confidential Information to its employees, legal and financial advisors, and consultants on a strict "need to know" basis and solely for the use specified above in Paragraph 5.1, provided that each such person to whom such Disclosure is made is notified of the confidential nature of the Disclosure and agrees in advance not to use or Disclose such Confidential Information except as expressly permitted by the terms of this Agreement. Notwithstanding the above, the recipient of Confidential Information may disclose Confidential Information to (1) employees of its parent company or, (2) employees of a wholly-owned subsidiary of its parent company or, (3) employees of the recipient of Confidential Information's wholly owned subsidiaries, provided that such employees have a need to know for the purposes of this Agreement and are under an obligation to hold such information in confidence.

5.2.2. Required Disclosures. Disclosure of any Confidential Information by a Party hereunder shall not be precluded if such Disclosure is required by the Recipient pursuant to court or administrative order, but only to the extent required and provided that the Recipient in each instance before making such Disclosure first (i) promptly upon receipt of such order notifies the other Party of such order, and (ii) cooperates with the other Party in making, if available under applicable law, a good faith effort to obtain a protective order or other appropriate determination against or limiting Disclosure or use of the Confidential Information, at no cost to Recipient.

5.3. Return or Destruction of Confidential Information. Upon conclusion of the Purpose, the Recipient shall, at the



Disclosing Party's option, either: (a) promptly destroy all copies of the written Confidential Information in its and its representatives' possession and confirm such destruction to the Disclosing Party in writing, or (b) promptly deliver to the Disclosing Party all copies of the written Confidential Information in its and its representatives' possession.

5. **WARRANTIES.**

5.1. Each Party warrants that it has the right to Disclose all Confidential Information provided under this Agreement and agrees to indemnify and hold harmless the other Party from any liability arising from a breach of this warranty. Furthermore, the Parties agree that the Confidential Information provided by either Party to the other Party is provided "as is". No other warranties with respect to Confidential Information are made by either Party.

5.2. The Recipient acknowledges that remedies at law may be inadequate to protect the Disclosing Party against any actual or threatened breach of this Agreement by the Recipient or by its representatives and, without prejudice to any other rights and remedies otherwise available to the Disclosing Party, the Recipient agrees to the granting of injunctive or other equitable relief in the Disclosing Party's favor without proof of actual damages.

5.3. Each Party certifies and warrants that such Party will not export, directly or indirectly, the other Party's Confidential Information or any portion thereof in violation of any relevant law or regulation, including without limitation any law or regulation of the United States government or any agency thereof.

5.4. Nothing in this Agreement shall operate to create or transfer an ownership or other interest in any Confidential Information nor require the Disclosure by a Disclosing Party of any of its Confidential Information, nor restrict, inhibit or encumber any Disclosing Party's right or ability to dispose of, use, distribute, disclose or disseminate in any way its own Confidential Information or to release or modify by further agreement the obligations of any Recipient or Others with respect to such Disclosing Party's Confidential Information.

5.5. Nothing herein shall obligate either Party to enter into any business arrangements or agreements with the other Party. The terms of confidentiality under this Agreement shall not be construed to limit either Party's right to independently develop or acquire products without use of the other Party's Confidential Information. The Disclosing Party acknowledges that the Receiving Party may currently, or in the future, be developing information externally or receiving information from

other that is similar to the Confidential Information. Accordingly, nothing in this Agreement will be construed as a representation or agreement that the Receiving Party will not develop or have developed for its products, concepts, systems or techniques that are similar to, or compete with, the products, concepts, systems or techniques contemplated by or embodied in the Confidential Information provided that the Receiving Party does not violate any of its obligations under the Agreement in connection with such development.

5.6. This Agreement shall be effective as of the date the Agreement is fully executed and shall continue for a period of one (1) year thereafter unless terminated earlier by written notice from one Party to the other. Either Party may terminate this Agreement at any time with or without cause upon notice to the other Party. The obligation of confidence and non-use set forth under this Agreement shall be for five (5) years from the date of Disclosure despite any earlier termination of this Agreement. Neither Party may enforce the existence or terms of this Agreement without the prior express written consent of the other Party.

5.7. Should any provision of this Agreement be deemed illegal or otherwise unenforceable, that provision shall be severed and the remainder of this Agreement shall remain in full force and effect.

5.8. Neither Party may transfer or otherwise assign its rights, duties or obligations under this Agreement to any other person or entity, in whole or in part, without the prior written consent of the other Party.

5.9. If a legal action between or among any Parties arises from this Agreement or the conduct of any Party with respect to any Disclosing Party's Confidential Information, a prevailing Party shall recover from the other Party or Parties to the action its reasonable attorney fees and costs of suit.

5.10. This Agreement shall be governed by the laws of the State of Oregon, without reference to conflict of laws principles of provisions.

5.11. No waiver or modification of this Agreement will be binding upon either Party unless made in writing and signed by a duly authorized representative of each Party.

5.12. The signatories hereto warrant and represent that they are duly authorized to bind their respective entities and to execute this Agreement.

5.13. This Agreement contains the sole and entire agreement between the Parties related to the Disclosure of Confidential Information with respect to the Purpose.

WITH INTENT TO BE BOUND, TDS and Company have executed this Mutual NonDisclosure Agreement, effective as of the later of the dates indicated below.

TDS:

Typed Data Systems, Inc.

By

William Martin
Printed Name: WILLIAM MARTIN
And Title: PRESIDENT

Dated

3/12/09

Company:

Recreational Data Services, Inc.

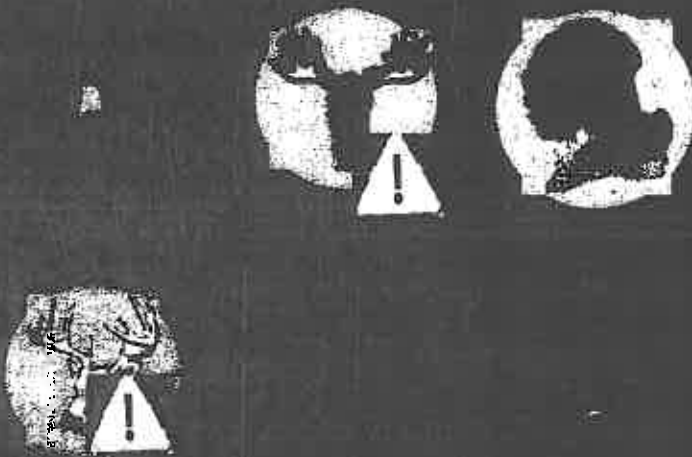
By

Brian Feucht
Printed Name: BRIAN FEUCHT
And Title: PRESIDENT

Dated

3/12/09

Friday, March 13, 2009.jpg



Recreational Data Systems

Executive Summary

For

Trimble Outdoors

Exc. 151

PLAINTIFF
EXHIBIT NO. 5
ADMITTED
3AN-11-10159
(CASE NUMBER)

Executive Summary

Complying with state mandated hunting, fishing, and recreation regulations while in the field is cumbersome and one small mistake can result in heavy fines, loss of hunting and fishing privileges and even incarceration.

Today, sportsmen must carry the same kinds of voluminous and complex paper regulations that their grandparents used to determine compliance regarding which species can be hunted, the allowable hunting methods and the exact times and dates of season openings and closures. Recreational Data Systems, an Alaskan-based company has acquired the exclusive patent rights (**U. S. patent # 6,459,372 B1**) to develop the only contemporary and practical solution to the regulations compliance problem. We are bringing to market a platform-agnostic service that provides easy and immediate access to the state-determined hunting and fishing regulations.

With our service, a hunter will be able to determine if a specific animal in a precise location can be taken simply by consulting their GPS-enabled device, eliminating the need for users to consult cumbersome state regulation pamphlets while in the field. This service will indicate to the user the fishing and hunting regional boundaries, type and number of fish or game that can be pursued, the type of hunting and fishing methods allowed, date and time of season openings and closures, a species identification feature that provides detailed pictures of each species that can be pursued in a given area, and it will highlight any emergency closures issued by the state department of fish and game. Additionally, users are provided information about public land boundaries and usage, indicating, for instance, Forest Service, BLM, or National Park boundaries, if it is possible to camp in the region, if campfires are allowed, and the types of vehicles that can or cannot be used. Obviously, this service will be attractive to all individuals that use public lands for hiking, biking, rafting and camping.

The data for these services will be taken directly from each state's Fish and Game departments, BLM, or local ordinances in such a manner that there will be no issues with translation and subsequent liability. These services will be labeled "HuntZone", "FishZone" and "RecZone". All of the user functionally described above is covered by our patent and we are prepared to defend it aggressively.

Users will purchase a one-year subscription to the service for each state at a cost of \$20.00 per service giving us **150 sku's with one underlining platform**. After purchase, users will

receive updates about all regulations changes to their GPS-enabled device at regular intervals via cellular or, for an additional fee, GPS.

Simply stated, the potential market for these services is massive. According to the 2006 National Survey of Fishing, Hunting and Wildlife-Associated Recreation, there are roughly 30 million people who fish and 12.5 million people who hunt in the United States. The total number of "sportspersons" is approximately 42 million. Furthermore, there are an additional 77 million general outdoor recreation users that can derive value from our Reczone.

HuntZone, FishZone and RecZone will be initially taken to market as downloadable software available from the iPhone App Store, followed by offerings in other non-traditional GPS marketplaces. Future distribution of the products for other platforms will include OEM arrangements with GPS device providers such as Garmin, Magellan, Trimble and TomTom.

Our extremely conservative projections, based on product availability in the top 10 hunting and fishing states and excluding all Reczone sales, indicate that the net revenue for the first four years will be approximately:

- Year 1 = \$550,000.00
- Year 2 = \$4,900,000.00
- Year 3 = \$19,600,000.00
- Year 4 = \$26,000,000.00

Conclusion:

RDS provides a service that solves a significant problem for a highly addressable market with a product that has strong intellectual property protection. It will utilize a capital-efficient business model that takes advantage of the burgeoning opportunities in the GPS-enabled smart phone market. RDS has an experienced management team that will exploit an efficient offshore product development model. In The market for our offerings is massive with more than 127 million potential users in the United States alone.

RDS has identified \$1.2 million in funding for a 10% stake in the company, which we are prepared to take in order to aggressively develop our product and go to market. Management believes that our product will be complimentary to Trimble's product lines, but if launched as a separate corporation could potentially cloud the market. We believe that we offer Trimble both an offensive and defensive acquisition opportunity that has the potential to be the underpinnings of a business model that could displace, **with protected IP**, the standalone recreational GPS unit.

Organization

Management

Chief Executive Officer: Brian Feucht

Mr. Feucht has extensive experience in growing niche software companies from conception to profitability. He has raised capital from Legg, Mason, Walker, Wood LLP, H. Ross Perot, and various federal buckets. Brian has appeared many times in industry publications such as CIO Magazine and the Wall Street Journal. Additionally, he has been asked to testify before Congress about the uses of technology with transitioning veterans. Recently, he was involved with Cerberus Capital's venture in the firearms and training industry, serving as a board member during the transition process and providing guidance to the CEO of its fledgling start-up Tier 1 Group. Prior to entering into business, Mr. Feucht was a member of the United States Marine Corps, Fleet Anti-Terrorism Security Team, where he served as a sniper.

Chief Technical Officer: Chris Beall

Chris has over 25 years of technology product development and operations experience. Prior to RDS, Chris was Executive Vice President of Products at Epiance, Inc., an enterprise process improvement software company, later spun off into Qlip Media, Inc. Previously he was the Chief Technology Officer and Chief Strategy Officer of Requisite Technology, Inc., where he was instrumental in creating solutions that became the core of Oracle's and SAP's e-commerce offerings and drove the company from startup to \$42 million in revenue. Earlier he was Chief Technology Officer of Cadis, Inc. He has also held management positions at companies such as Sun Microsystems, NCR, Martin Marietta, and Bell Labs. Chris holds a B.A.E., with honors, in Physics from Arizona State University.

VP Sales and Marketing: Aaron Hampton

Aaron has extensive experience in the firearms and outdoor products industry, he has developed product lines and product enhancements for Leatherman Tool Group, DS Arms, Leupold and Stevens and SureFire LLC among others. Aaron has served as executive producer and content advisor for the Outdoor Channel and Discovery Networks as well as segment development for Shooting USA and Sighting in with Shooting USA. Recently Aaron served as lead consultant for Tier 1 Group to establish a marketing campaign and currently advises their VP of sales on service and industry specific marketing opportunities. Aaron is a lead member on the NRA presidents special committee for Multi-gun opportunities, a position that keeps him in contact with the shooting community. Prior to entering business Mr. Hampton was a member of the US Army holding numerous leadership positions in

Recruiting Command and as the Non Commissioned Officer in Charge of the US Army Action Shooting and Combat Training Team. During his tenure Aaron was responsible for increasing the Army Marksmanship Units media exposure by 356% with minimal investment. Mr. Hampton currently serves as President of The Committee Consulting LLC.

General Counsel: Chris Cyphers

Mr. Cyphers has enjoyed a storied career specializing in emerging companies with 6 IPO's and additional private funding rounds with prestigious firms such as Wilson, Sonsini, Goodrich and Rosatti, Perkins Coie, and Preston Gates & Ellis. Chris spends his time in Alaska nurturing and guiding Alaska's few Entrepreneurs and spending time with his family

VP Operations: Patrick Dulin, Ph.D.

Dr. Dulin has been employed by numerous universities (University of Alaska, Massey University in New Zealand) as a psychology professor and prior to this was a mountaineering and leadership instructor with the Colorado Outward Bound School. He has lead numerous international research projects and hospital-based clinical teams. He will bring his expertise in management and human relations factors to bear in his role with RDS.

Advisor: Jim Cummiskey

Jim is the Director of Tactical Systems in the Intelligence & Space Systems business unit of the Boeing Company. Tactical Systems has a 30 year legacy of providing enhanced battlefield situational awareness to the warfighter. Jim was born and raised in Anchorage, Alaska. After enlisting in the Marine Corps, he was commissioned and served 20 years as both an infantry and communications officer. During his Marine career, Jim specialized in adapting Commercial-off-the-Shelf technologies towards the development of innovative battlefield wireless networking applications. His mobile computing work was featured in Bill Gates' book, "Business @ the Speed of Thought," and has been covered in numerous publications including the "Wall Street Journal" and the "Los Angeles Times." Jim has also worked as an industry analyst and consultant in Silicon Valley for numerous Fortune 500 clients, and has held various executive positions at wireless start-up companies funded by Microsoft, Qualcomm and Sprint.

Jim has worked as a Technical Editor for IDG Books, and has written numerous articles on wireless and mobile computing issues for a wide variety of publications including Red Herring, Computer World, and Pocket PC Magazine. Jim has also been a popular featured speaker and moderator at wireless industry conferences including Spring and Fall COMDEX, Mobile Insights, the Institute for International Research, Venture 2000 and

Venture Market Europe conferences and events. He holds bachelor of science and master of science degrees in computer science, and a master of business administration degree from the University of California, Irvine.

Jim is also an FAA-certificated Airline Transport Pilot and Gold Seal Flight Instructor. He flies his Beech A36 Bonanza and classic 1946 Globe Swift aircraft (a high-performance, retractable-gear, aerobatic tail-dragger) every chance he gets. His recent trips include flights from Southern California to Canada, Alaska, Mexico, the Caribbean and Central America. Jim is also active in humanitarian and charitable flying organizations. He is a founder and board member of the "On Madine's Wings Foundation"—a charitable organization that serves as an intermediary for people with a passion for aviation to serve the needs of others in their communities.

For more information:

Brian Feucht
bfeucht@ftaalaska.com
(907) 868-2858
8021 Resurrection Dr.
Unit B
Anchorage, AK 99504

Chris Beall
cbeall@qlipmedia.com
(408) 203-4321
6741 Hampton Dr.
San Jose, CA 95120



FREEDOM GROUP

Remington Sportsman™ Smartphone

Project Code Name: Copper Center

Marketing By: Remington

Engineered By: Trimble

Powered by: RDS

Company confidential – do not distribute

PLAINTIFF
EXHIBIT NO. 24
ADMITTED <input type="checkbox"/>
3AN-11-10519
(CASE NUMBER)





FREEDOM GROUP

Positioning Statement

Hunt Confidentially

Your Gun and the Remington Sportsman are the only Must Haves

The only Smartphone designed specifically for hunting and outdoor related activities. A phone so robust and so smart that it will change the way you hunt.

Company confidential – do not distribute





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Market Overview

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Building to the Number

Based upon the smartphone market survey

- Base Populations
 - 12.4 MM hunters (based upon 14.5 MM licenses issued)
 - 34 MM Fishermen
 - 76 MM Outdoor Recreation Enthusiasts (Not included in this analysis)

Exc. 162

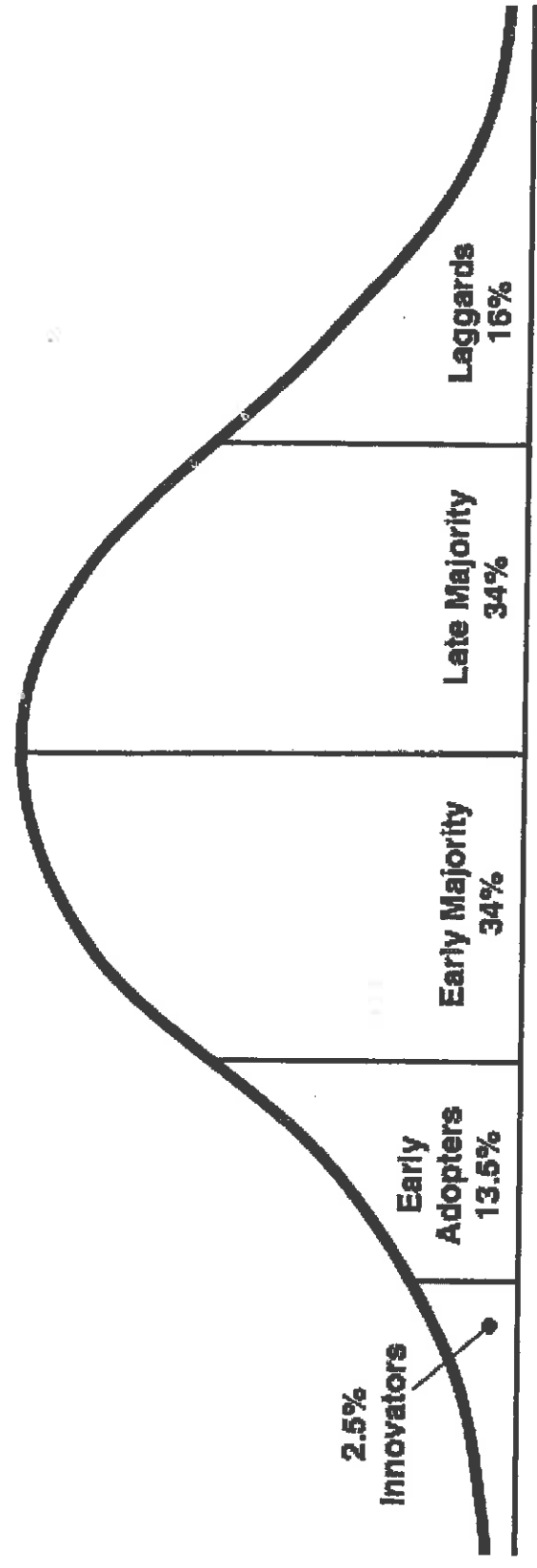
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Roger's Adoption Model



Source: Everett Rogers, Diffusion of Innovations, 1962

Adoption rates are based upon the widely accepted Roger's Adoption Model

Exc. 164





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5 Year Sportsman Hardware Sales

	Year 1	Year 2	Year 3	Year 4	Year 5
Hunters	58,835	379,385	472,527	129,563	6,343
Fishermen	99,639	642,508	800,247	219,421	10,743
Totals	158,474	1,021,893	1,272,774	348,984	17,086

2,819,211 Potential Unit Sales

The refresh rate on hardware is every 3 years, so a new model would be introduced late in the second year, which would create new volume and incremental revenue as the old model phases out, self perpetuating the product category. Next generation model volumes are not reflected here

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FREEDOM GROUP

NYSE: FFG

Highlights

Ex. 168





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Interest Ratings

Application	All Concept Acceptors
Satellite-enabled emergency locator	4.1
Topographical maps with hunting/fishing boundaries	3.9
GPS field tracking and routing	3.9
Digital compass	3.8
Localized XM Weather reports	3.7
Easy transmission between like units	3.6
Hunting/fishing regulations	3.5
Graphical depictions and limits of fish/game	3.4
Private property alerts	3.4
Photo-tag to report game	3.4
Altimeter	3.3
Barometer	3.3
Emergency stop orders	3.3
Ballistics calculator	3.3

Note: 5-point scale ranging from Extremely Interested (5) to Not at all Interested (1)

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Summary Financials





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Pre-Launch Investment

Trimble

- Foxconn non-reoccurring engineering - \$3MM
- Internal Hardware Development - \$8MM

RDS

- Internal Software Development - \$7MM

Remington

- Marketing Development - \$6MM

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Customer Survey Information

Exc. 172

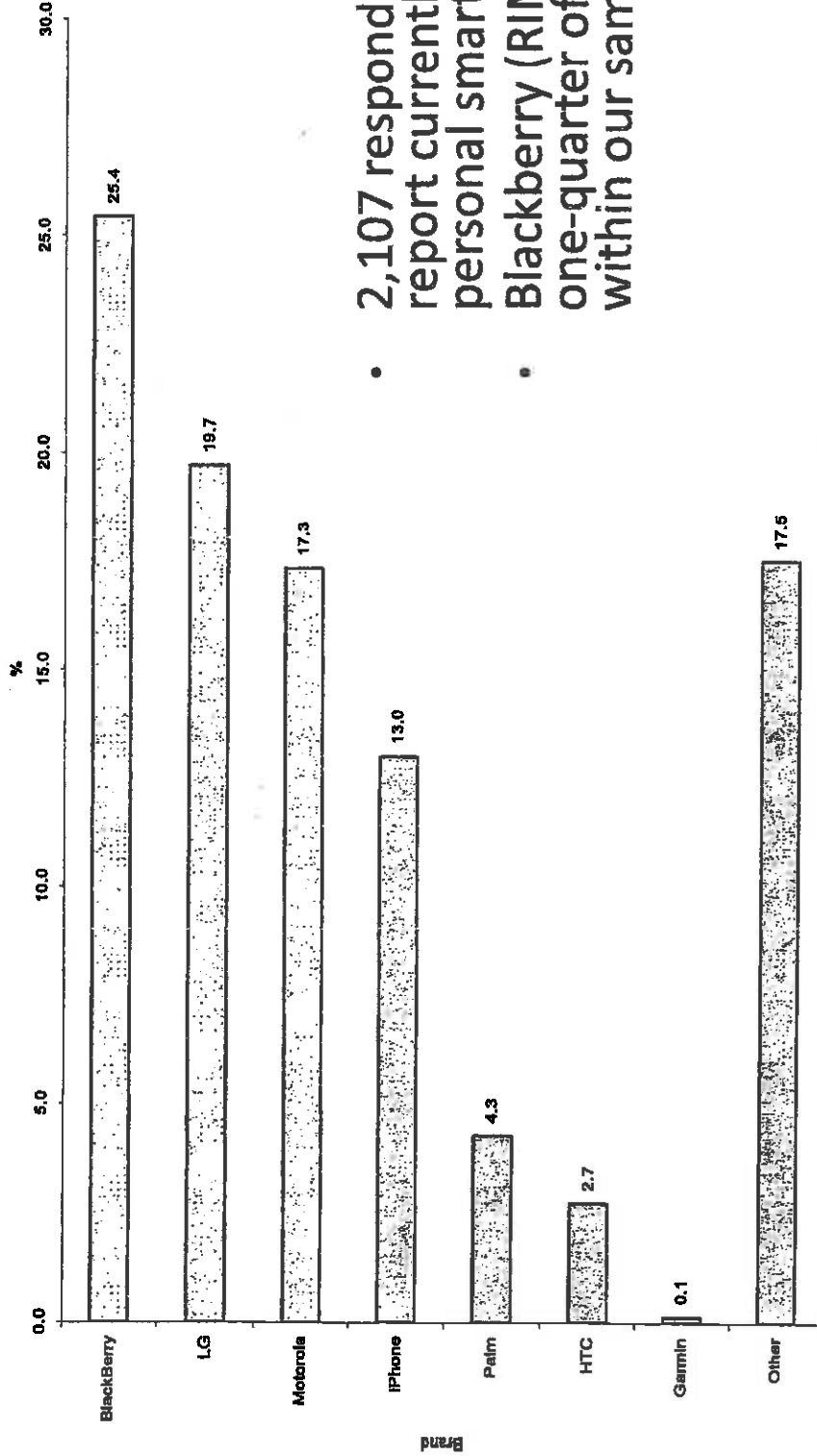
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Current Smartphone Ownership



- 2,107 responders (37%) report currently owning a personal smartphone
- Blackberry (RIM) controls one-quarter of the market within our sample

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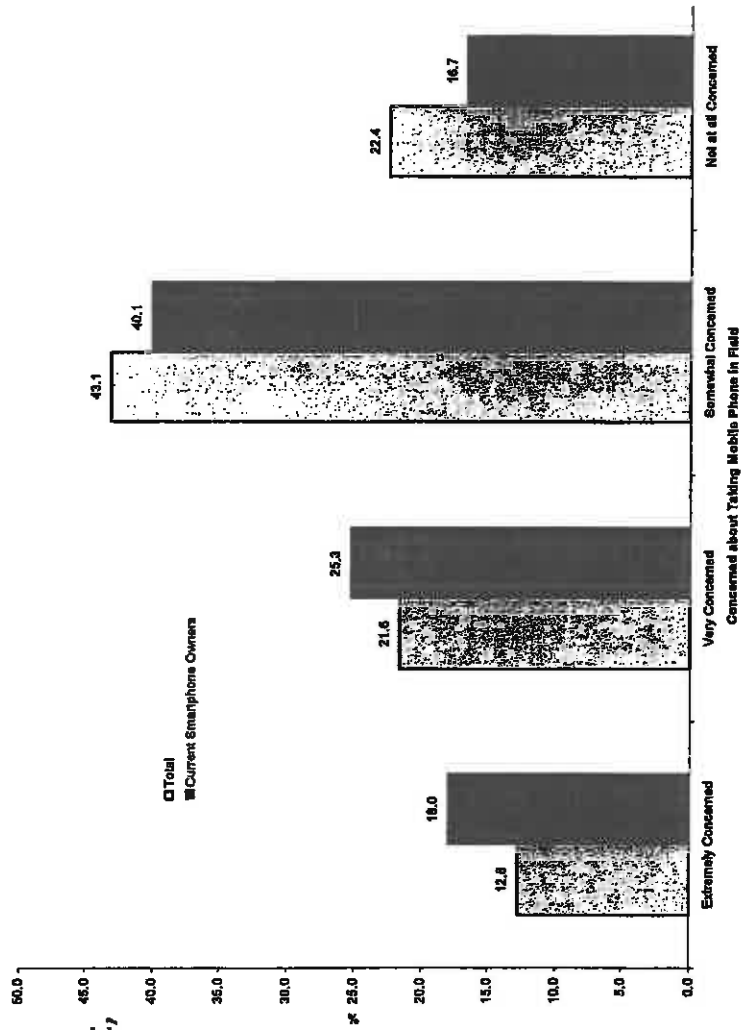


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Mobile Phone Field Concerns

- Over 3/4 of respondents report being at least somewhat concerned about taking their mobile phone where it might get wet, dropped, or dirty

- Current smartphone owners are somewhat more concerned



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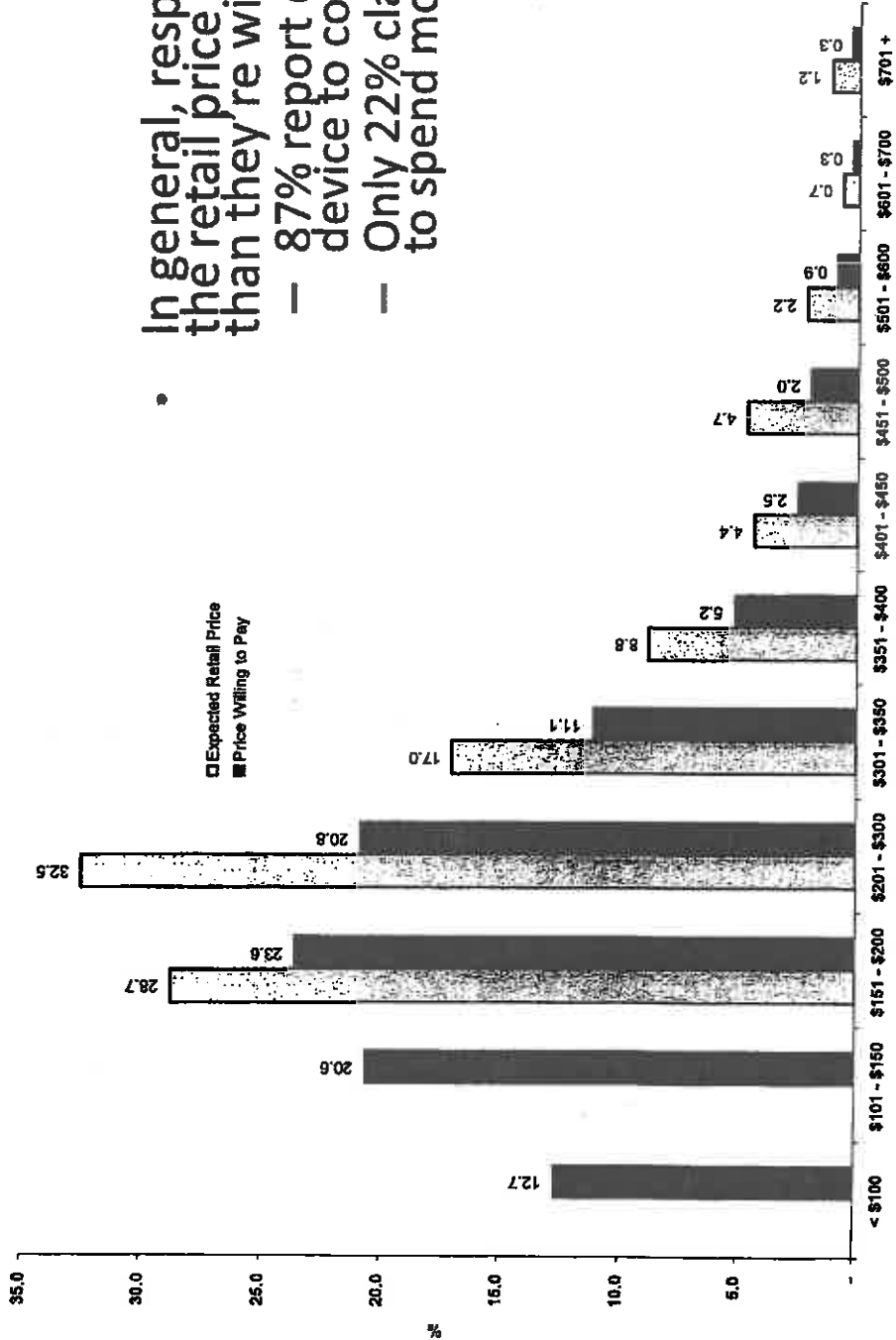




FREEDOM GROUP

Price Expectations

- In general, respondents expect the retail price to be higher than they're willing to pay
 - 87% report expecting such a device to cost \$400 or less
 - Only 22% claim to be willing to spend more than \$300



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Exhibit 1

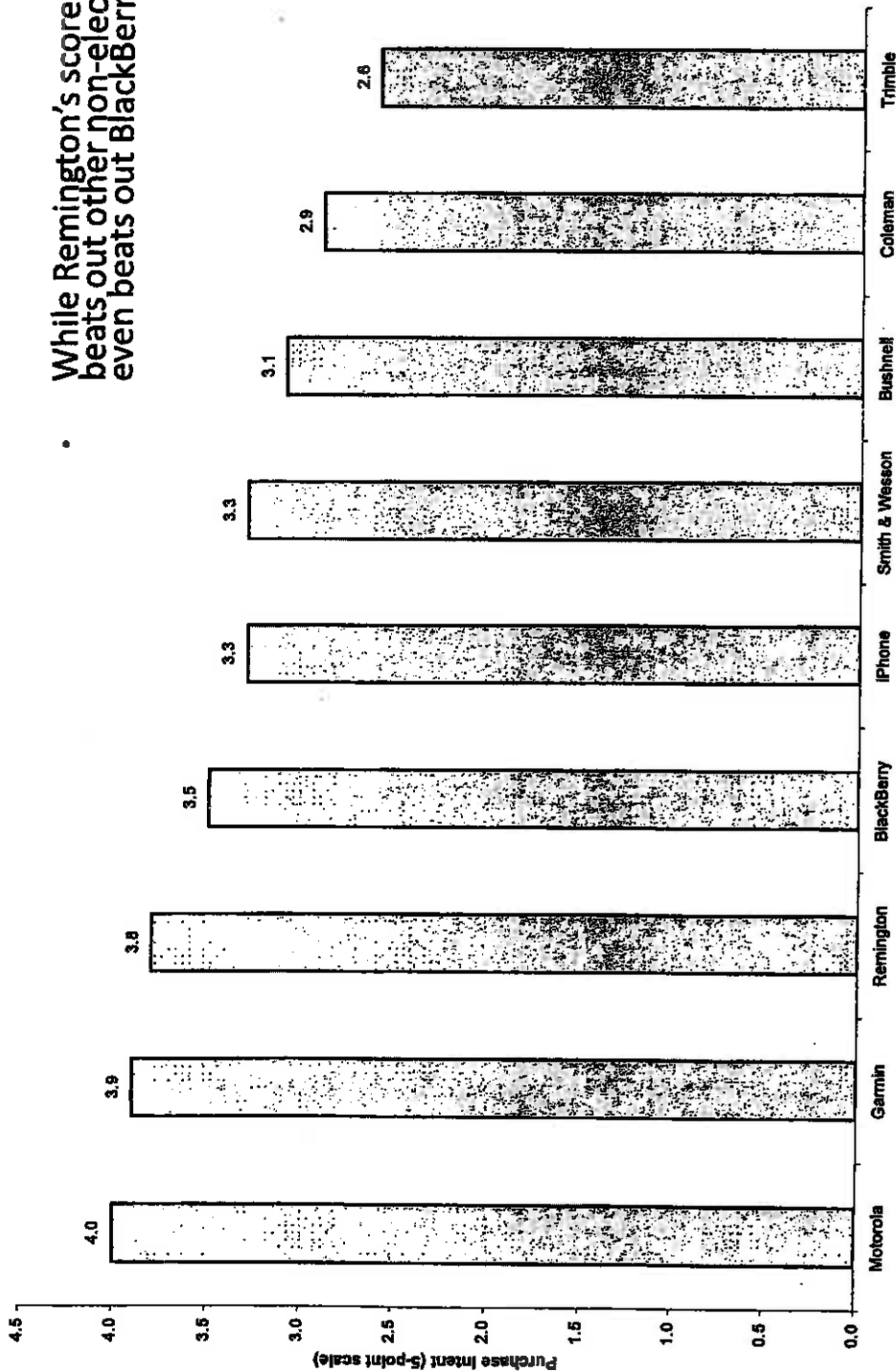




FREEDOM GROUP

Branded Purchase Intent

While Remington's score isn't the highest, it beats out other non-electronics suppliers, and even beats out BlackBerry and iPhone



Exc. 178

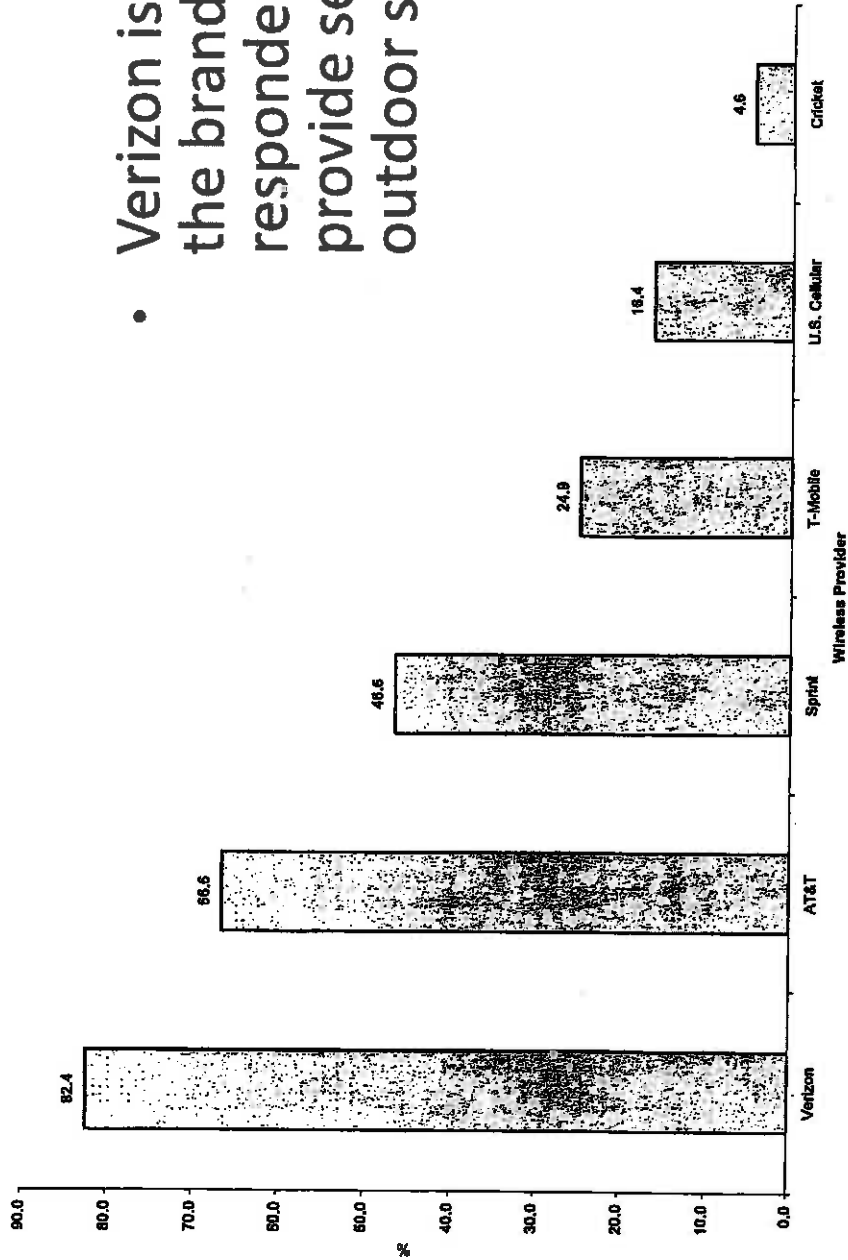




FREEDOM GROUP

Expected Wireless Providers

- Verizon is clearly noted as the brand most respondents expect to provide service for an outdoor smartphone



Ex. 179



Brian Feucht

From: Chaur-Fong Chen [ChaurFong_Chen@Trimble.com]
Sent: Thursday, September 30, 2010 9:20 PM
To: Brian Feucht; Boehnen, Patrick W
Subject: Consolidated P&L
Attachments: Copper Center Project RDS-Remington-Trimble P&L 093010.xlsx

Importance: High

All,
The spreadsheet with all 3 P&Ls.

CF

Brian, I am confirmed on the early flight back to PDX on 7:18 am Friday.
My flight arrives Washington D.C around 3:00 PM Sunday (Oct 3rd). I am leaving D.C Thursday 10/7 6:00 AM to meet Rich in Phoenix.

From: Brian Feucht [<mailto:bfeucht@aialaska.com>]
Sent: Thu 9/30/2010 8:17 AM
To: 'Boehnen, Patrick W.'; Chaur-Fong Chen
Subject: Revised

Brian Feucht

President

Alaska Outdoor Innovations

bfeucht@aialaska.com

(907)223-7507

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PLAINTIFF
EXHIBIT NO. <u>28</u>
ADMITTED <input type="checkbox"/>
<u>3AN-11-10519</u>
(CASE NUMBER)

Base calculation

14.5 MM hunting licenses issued (12.4 MM Hunters)

34 MM Fishermen (21MM for Mid spot estimate)

Low spot estimate assumes that all hunters are fishermen

76 MM Outdoor Recreation Enthusiasts (43MM for Mid spot estimate)

Low spot estimate assumes that all hunters and fishermen are all recreation enthusiasts

User owns a personal cell phone or personal smartphone

At least somewhat concerned about taking there phone outdoors

User is at least somewhat interested in the concept of a robust phone

Users are at least likely to switch carriers to purchase the concept phone

Only those who own a personal cell phone or smartphone

Adpotion rates are based upon Roger's Adoption Model

AT&T Selected as carrier

Calculation

# of unit sales - (Assuming all user groups are mutually inclusive)					
Group name	Population	Adjusted population	Yr 1	Yr2	Yr3
(1) Hunters	12,400,000	12,400,000	10,295	66,383	82,680
(2) Fishermen	34,000,000	21,600,000	17,434	112,423	140,023
Total of (1)+(2)	46,400,000	34,000,000	27,729	178,806	222,703
(3) Recreation	76,000,000	42,000,000	35,699	230,199	285,714
Total (1)+(2)+(3)	122,400,000	76,000,000	63,428	409,005	509,417

of unit sales - (Assuming 50 % user's groups overlap)

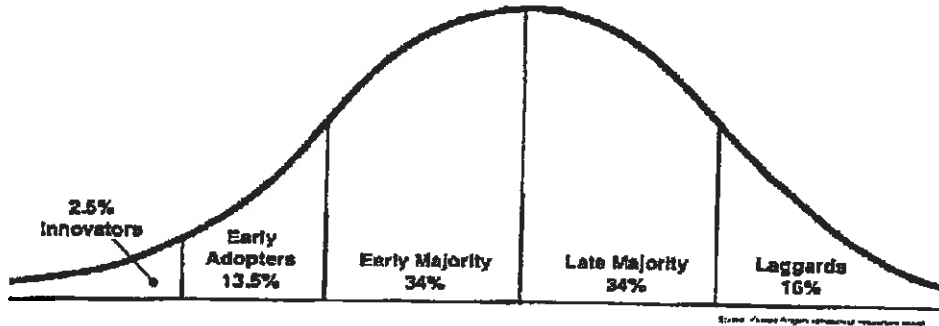
Group name	Population	Adjusted population	Yr 1	Yr2	Yr3
(1) Hunters	12,400,000	12,400,000	58,835	379,385	472,527
(2) Fishermen	34,000,000	27,800,000	99,639	642,508	800,247
Total of (1)+(2)	46,400,000	40,200,000	158,474	1,021,893	1,272,774
(3) Recreation	76,000,000	55,900,000	204,023	1,315,611	1,638,602
Total (1)+(2)+(3)	122,400,000	96,100,000	362,497	2,337,504	2,911,376

of unit sales - High estimate case (assuming 25 % user's groups overlap)

Group name	Population	Adjusted population	Yr 1	Yr2	Yr3
(1) Hunters	12,400,000	12,400,000	58,835	379,385	472,527
(2) Fishermen	34,000,000	30,900,000	116,863	753,570	938,576
Total of (1)+(2)	46,400,000	43,300,000	175,698	1,132,955	1,411,103
(3) Recreation	76,000,000	65,175,000	261,434	1,685,818	2,099,697
Total (1)+(2)+(3)	122,400,000	108,475,000	437,132	2,818,773	3,510,800

0566

Adoption model



Yr4	Yr5	5 yr total
22,670	1,110	183,138
38,393	1,880	310,153
61,063	2,990	493,291
78,615	3,849	635,076
139,678	6,839	1,128,367

Low

Yr4	Yr5	5 yr total
129,563	6,343	1,046,653
219,421	10,743	1,772,558
348,984	17,086	2,819,211
449,291	21,997	3,629,524
798,275	39,083	6,448,735

Mid

58835	379385	472527	129563
99639	642508	800247	219421

Yr4	Yr5	5 yr total
129,563	6,343	1,046,653
257,350	12,600	2,078,959
386,913	18,943	3,125,612
575,719	28,187	4,650,855
962,632	47,130	7,776,467

High

0567

11

6343
10743

0568

Copper Center Project Financial Performance Model

Assumption: 5 year production and planning cycle with mixes of both Basic and Pro models
 Note: not include the accessories sales

ASR to carrier	Year 1	Year 2	Year 3	Year 4	Year 5
BOM cost (inc. manufacturing cost)	\$ 749				4%
COG (variable)	\$ 400				2%
					8%

	Year 1	Year 2	Year 3	Year 4	Year 5	5 year total
Annual unit sales	182,474	1,021,893	1,272,774	348,984	17,086	2,819,211
Cumulative unit sales	182,474	1,180,367	2,453,141	2,802,125	2,819,211	2,819,211
HW Revenue	118,897,026	765,397,857	953,907,726	264,389,816	12,797,414	2,111,589,039
COG	76,969,331	474,399,489	585,478,040	180,532,640	7,859,660	1,325,239,150
PCOG	8,308,792	53,577,850	68,791,541	18,287,231	895,819	135,861,242
Remington Margin	9,465,782	61,231,829	76,264,618	20,911,121	1,033,763	168,927,123
Gross margin	24,323,141	175,188,680	234,835,927	61,048,024	3,018,242	489,413,814
GM (in %)	20.45%	23.02%	23.58%	23.58%	23.58%	23.58%
Expense	4,747,881	30,615,814	38,132,308	10,450,551	511,897	84,463,562
R&D	2,373,941	15,307,957	19,056,156	5,237,780	255,948	42,231,781
G&A	7,124,432	45,938,871	57,180,464	15,683,341	767,845	128,695,342
Total expense	17,397,319	130,284,438	167,657,064	45,964,669	2,250,397	363,318,281
N.O.I.	14.5%	17.0%	17.6%	17.6%	17.6%	17.6%

Notes:
 NRE (Trimble) 3,000,000
 Year to amortize 1
 Add. Cost/unit 18.93
 NRE (DIM partner) 5,000,000
 Year to amortize 2
 Add. Cost/unit 4.24

NRE Calculator

Factory NRE cost	5,000,000
NRE amortize (yr)	2
NRE cost (\$/unit)	4.24

MCS NRE cost	3,000,000
NRE amortize (yr)	1
NRE cost (\$/unit)	18.93

Minimum order
 Take off per model from Trimble except this model?
 Cf propose a \$20 - \$40 unit penalty

Need changes

RDS SW Revenue (mid range) no date sales or Ads	82,976,118
Revenue	6,586,969
Expense	80,389,131
NCL NOI	

Copper Center Project Remington Financial Performance Model

Assumption: 5 year production and planning cycle with mixes of both Basic and Pro models
 Note: not include the accessories sales

	Year 1		Year 2		Year 3		Year 4		Year 5		5 year total	
	ASP	749	Cost to carrier	Web	Others	1.87%						
TV	18.69%											
Prints	8.35%											
Annual unit sales	158,474	1,021,893	1,272,774	348,884	17,086							2,819,211
Cumulative unit sales	158,474	1,180,367	2,453,141	2,802,125	2,819,211							
Gross HW revenue	118,897,028	765,397,857	963,307,728	281,389,016	12,797,414							\$ 2,111,589,039
Gross SW revenue	4,508,536	33,214,789	72,240,159	87,091,148	89,005,178							\$ 286,060,810
Total gross revenue	123,206,562	798,612,646	1,025,547,885	348,480,164	101,802,592							\$ 2,397,649,849
Remington revenue												
HW Revenue	9,495,782	61,231,829	76,264,618	20,911,121	1,023,793							\$ 168,927,123
SW Revenue	1,213,594	11,603,729	32,669,969	48,017,016	51,544,568							\$ 145,048,877
Total revenue	10,709,356	72,835,558	108,934,587	68,928,137	52,588,362							\$ 313,976,000
% of Remington/Gross Marketing	8.7%	9.1%	10.6%	19.8%	51.6%							
Pre-launch	800,000											
TV (47.62% of marketing)	2,001,579	13,612,966	20,359,874	12,882,669	9,825,027							
Prints (23.8% of total mkt)	1,001,325	6,810,125	10,185,364	6,444,781	4,915,142							
Web (4.8% of total mkt)	200,255	1,362,025	2,037,077	1,286,956	883,028							
Others (23.8% of total mkt)	1,501,452	6,810,125	10,185,364	6,444,781	4,915,142							
Total marketing	5,304,620	28,595,240	42,767,719	27,081,187	20,638,339							\$ 124,367,105
Remington net revenue	5,404,736	44,240,319	66,166,888	41,866,951	31,830,023							\$ 189,608,895
Remington margin %	50.5%	60.7%	60.7%	60.7%	60.7%							60.4%
% of gross sales	4.4%	5.5%	6.5%	12.0%	31.4%							7.9%

0570

Copper Center Project SW Financial Performance Model

Assumption: 6 year production and planning cycle with mixes of both Basic and Pro models
 Note: not include the accessories sales

ASP	20	/see come with 1 home zone free for the first year				
3rd party charge	30%					

	Year 1	Year 2	Year 3	Year 4	Year 5	5 year total
Annual unit sales	150,474	1,021,603	1,272,774	348,984	17,006	2,819,211
Cumulative unit sales	150,474	1,180,367	2,453,141	2,802,125	2,819,211	2,819,211
SW Revenue	4,609,508	33,214,786	72,240,189	87,091,148	89,033,172	\$ 285,940,810
Zone SW initial purchase	1,267,792	8,178,144	10,182,192	2,791,872	138,888	\$ 33,266,680
Zone SW User 1st Year	1,289,893	12,056,337	15,016,733	4,119,011	201,815	\$ 33,266,680
Zone SW User continuing	976,666	7,286,339	30,028,530	63,407,907	71,286,060	\$ 57,548,509
3rd party apps	395,105	1,532,640	15,101,538	17,246,882	17,395,168	\$ 63,872,911
Updated data sales	190,530		1,909,161	523,478	25,628	\$ 2,651,800
COG						
Zone SW	1,121,898	9,653,830	27,028,362	38,915,551	42,882,605	\$ 129,612,483
3rd party apps	487,783	3,633,170	7,550,763	8,624,941	8,677,593	\$ 28,974,255
Total COGS	1,609,779	13,287,119	34,579,130	48,540,492	51,570,198	\$ 149,586,718
Remington's Revenue	1,213,584	11,603,729	32,668,969	48,017,016	51,544,569	\$ 145,048,877
	26.5%	34.5%	45.2%	55.1%	57.9%	
Gross margin (RDS)	3,999,737	19,827,670	37,661,829	38,660,866	37,453,960	\$ 136,474,093
GM (in %)	64.30%	60.00%	52.13%	44.28%	42.05%	
Expense						
R&D+G&A+OpM	8,108,870	4,881,886	4,919,420	4,943,622	4,948,522	\$ 24,807,119
Total expense	5,108,970	4,891,685	4,915,420	4,948,522	4,948,522	\$ 24,807,119
N.O.I	(3,209,113)	15,083,978	32,743,609	33,695,194	32,483,438	\$ 111,666,973
	-49.0%	45.3%	43.3%	39.6%	36.3%	

The number represents total revenue (gross)

sum of the 3rd party apps sales (similar to Apple apps store)

5.38 of cumulative less than 1000000 nearest sales

COGS for RDS is the Remington's cost

This line for reference only

Apple's actual sales (billio)

RDS head counts pre-launch 39 1, 25, 2, 26, 3, 25, 4, 26,

0571

Brian Feucht

From: Chaur-Fong [chencf001@aol.com]
Sent: Thursday, December 16, 2010 4:36 PM
To: Brian Feucht; Steve Wolff
Subject: Document
Attachments: Document.pdf

Scanned with TurboScan.

PLAINTIFF
EXHIBIT NO. <u>30</u>
ADMITTED <input type="checkbox"/>
<u>3AN-11-10159</u>
(CASE NUMBER)

RDS

Scenario	Valuation	Revenue Goal %	COGs	Expense	License Exp
Assumptions: • 75% Revenue goal	\$38.5 MM	75% / 28.875 MM	138 MM	\$23.2	\$30.2
• 47% Rev Goal	\$18.4 MM	47% / 14.8 MM	\$86.5	\$23.2	\$18.9
• Cut staff after year 1	OK 4M	17% / 5.29	30.8	\$10.4 MM	\$6.8 MM
• Cut staff after year 2	(\$5.7) MM	5% / 1.915 MM	5.2 MM	\$10.5 MM	\$2 MM

Assumptions

- 75% Revenue goal
- 47% Rev Goal
- Cut staff after year 1
- Cut staff after year 2

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STATE OF ALASKA
THIRD DISTRICT

2014 NOV 28 PM 2:19

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT
CLERK TRIAL COURTS

BY: _____
DEPUTY CLERK

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

Plaintiff,

v.

TRIMBLE NAVIGATION LIMITED, a
California corporation,

Defendant.

CASE NO. 3AN-11-10519 CI

**TRIMBLE NAVIGATION'S REPLY IN SUPPORT OF ITS MOTION
FOR JUDGMENT NOTWITHSTANDING THE VERDICT
OR, ALTERNATIVELY, MOTION FOR NEW TRIAL**

Defendant Trimble Navigation Limited submits this Reply in Support of its Motion for Judgment Notwithstanding the Verdict or, Alternatively, Motion for New Trial ("Trimble JNOV Motion").

INTRODUCTION

The jury's verdict is legally and factually unsupportable, and should be rejected. In its Opposition to Trimble's motion, RDS is not asking the Court to confirm a verdict that is legitimately supported by the evidence, or even to evaluate the evidence in a light most favorable to RDS. Instead, RDS is asking the Court to pretend that crucial, dispositive evidence simply does not exist. For instance, RDS's JNOV Opposition Brief does not even mention Mr. Feucht's unequivocal admission that Trimble and RDS never agreed to become co-owners of a business for profit – the legal definition of a partnership. RDS instead takes the absurd position that RDS can admit that a partnership was never formed, but that a reasonable jury could find that it was.

Reply in Support of Motion for JNOV or New Trial
Recreational Data Services v. Trimble Navigation Ltd.
Case No. 3AN-11-10519 CI
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09015-0034/LEGAL124339227.3

PERKINS COIE LLP
1029 W. Third Avenue, Suite 300
Anchorage, Alaska 99501
907.279-8561 / Facsimile 907.276.3108

RDS also ignores Remington's decision to quit the Copper Center Project, the absolute and admitted necessity of having someone perform the functions that Remington abandoned, and the absence of any commitment to fill that role. In fact, RDS largely fails to address any of the myriad reasons that the Copper Center Project could never be described as "reasonably certain" to ever launch, much less generate the massive profits that RDS imagined.

Lastly, RDS obviously failed to prove the amount of its damages with reasonable certainty, as reflected by the jury's rejection of the only two damages numbers that RDS has ever claimed. Nevertheless, RDS now recants its statements at trial that the Court "will and should" direct a verdict against it because the jury did not award one of these two figures. RDS was right the first time. The jury's damages awards are not supported by any evidence or law, and the Court should enter judgment in favor of Trimble, notwithstanding the jury's verdict.

ARGUMENT AND AUTHORITIES

I. RDS Did Not Present Sufficient Evidence at Trial to Support a Finding of Intentional or Negligent Misrepresentation.

In its JNOV Opposition Brief, RDS abandons all of the alleged misrepresentations that it argued at trial, except for the claim that in November 2010, Mr. Chen falsely told Mr. Feucht that the Trimble Outdoors/Cabela's project did not "compete" with the Copper Center Project.¹ Trimble disputes that this ever happened.² But more importantly for these purposes, RDS failed to present competent proof that it relied on any such statement, or that any such reliance caused

¹ RDS JNOV Opposition Brief at 3-5.

² Mr. Chen told Mr. Feucht that the two projects did not "conflict"; he never told him that they did not "compete." Chaur-Fong Chen Testimony, Trial Transcript at 907-08.

the damages it seeks.

A. RDS Did Not Rely on Mr. Chen's Alleged Statement that the Projects Did Not "Compete".

RDS failed to present evidence from which a reasonable jury could find that RDS relied on a statement that the Trimble Outdoors/Cabela's project did not compete with the proposed Copper Center smartphone. Both actual reliance and justifiable reliance are prerequisites to claims of negligent and intentional misrepresentation. *Anchorage Chrysler Center, Inc. v. DaimlerChrysler Corp.*, 129 P.3d 905, 915 (Alaska 2006). Significantly, a plaintiff does not rely on a false statement if it "would have entered the transaction whether or not the misrepresentation had been made." 3 D. Dobbs, et al., *THE LAW OF TORTS* (2d ed. 2011) § 671; *see also* RESTATEMENT (SECOND) OF TORTS § 537(a).

First, even assuming that RDS presented sufficient proof that Mr. Chen told Mr. Feucht that Trimble Outdoors/Cabela's project did not "compete" with the Copper Center Project, the evidence clearly showed that Mr. Feucht did not believe him. Mr. Feucht admitted that Mr. Chen told him that the Trimble Outdoors/Cabela's project was a smartphone application that would be targeted to the hunting and fishing markets.³ Mr. Feucht also admitted that it "didn't sit right with [him]"⁴ and that it "just . . . started to stink."⁵ He promptly sent an email to Mr. Chen stating that "he was very concerned about Trimble Outdoors" and that "making the jump to this market is not at all logical based on their prior work."⁶ RDS cannot prove that it

³ Brian Feucht Testimony, Trial Transcript at 176-77.

⁴ Brian Feucht Testimony, Trial Transcript at 119.

⁵ Brian Feucht Testimony, Trial Transcript at 122.

⁶ Plaintiff's Trial Exhibit 54.

relied on Mr. Chen's alleged statement because the evidence shows that Mr. Feucht did not believe that the statement was true. *Shehata v. Salvation Army*, 225 P.3d 1106, 1114 (Alaska 2010) (generally, a person cannot justifiably rely on a statement he knows to be false), citing 2 D. Dobbs, *The Law of Torts* § 474 (2001); *see also* Restatement (Second) of Torts § 541.

Second, RDS presented no evidence at trial to prove that if Mr. Chen had told Mr. Feucht that the two projects competed, RDS would have taken a different course. RDS's JNOV Opposition Brief highlights this – it lists a number of things that RDS claims it could have done, or that it would have been able to do, but RDS does not include a single cite to any evidence that RDS would have actually done any of those things.⁷ No such evidence exists, because neither Mr. Feucht nor Mr. Miller nor any other witness testified that if Mr. Chen had told RDS that the two projects competed, RDS would have acted differently than it did. The only evidence of what RDS would have done if it had been told that the two projects competed is what happened after RDS concedes that it knew that the two projects did compete.

RDS admitted that it knew that the Trimble Outdoors/Cabela's project and the Copper Center Project competed with each other when Mr. Feucht and Mr. Miller arrived at Cabela's offices for the meeting on March 25, 2011.⁸ Mr. Feucht testified that, even with this knowledge, he went forward with the meeting and "reinforced [to Cabela's] that Trimble was a good partner."⁹ On March 31, 2011, about a week after that meeting, Mr. Miller sent an email to Trimble expressing RDS's desire that Trimble remain committed to the Copper Center Project: "*We look forward to*

⁷ RDS JNOV Opposition Brief at 9, 12.

⁸ Brian Feucht Testimony, Trial Transcript at 325.

⁹ Brian Feucht Testimony, Trial Transcript at 110.

resuming this project with Trimble and as we told Cabela's senior management, we believe that Trimble is a great partner."¹⁰ RDS communicated that same message again on April 8, 2011, when Mr. Miller sent another email to Trimble, again stating that RDS "*still wanted Trimble as our partner on this project* and hope that you come to the same conclusion... ."¹¹

Thus, RDS admits that *even after* it knew that the Cabela's and Copper Center Projects competed, RDS was pleading with Trimble to continue to pursue the Copper Center Project. The only reasonable conclusion from this evidence is that even if Mr. Chen had disclosed the "competition" in the November 29 conversation, RDS would have continued on the same path with Trimble and the Copper Center Project. RDS offered no testimony or other evidence suggesting that it would have done anything differently. Thus, there is no basis on which a reasonable jury could have found that RDS relied on a statement by Mr. Chen that the projects did not compete.

C. RDS's Alleged Reliance on Mr. Chen's Statement Did Not Cause RDS to Suffer a Monetary Loss.

RDS admits that the earliest that Mr. Chen made his alleged false statement was on November 29, 2010.¹² It is undisputed that Trimble Outdoors and Cabela's launched the Recon Hunt Application on March 7, 2011.¹³ Alaska law requires proof of a causal connection between RDS's reliance on Mr. Chen's alleged false statement

¹⁰ Plaintiff's Trial Exhibit 23 (emphasis added).

¹¹ Defendant's Trial Exhibit II (emphasis added).

¹² RDS JNOV Opposition Brief at 3.

¹³ Lawrence Fox Testimony, Trial Transcript at 1088 (Recon Hunt Application launched in early 2011); *see also* Paul Miller Testimony, Trial Transcript at 736-38 (Mr. Miller admits receiving a marketing piece for the launch of the Recon Hunt Application on or about March 7, 2011).

and the harm that RDS claims to have suffered. *Anchorage Chrysler Center, Inc. v. Anchorage DaimlerChrysler Motors Corp.*, 221 P.3d 977, 991 (Alaska 2009) (“the loss in fraudulent misrepresentation must be a pecuniary loss that is caused by the plaintiff’s reliance on the misrepresentation”). RDS must prove a causal link between the specific misrepresentation alleged and the damages claimed. *See Barber v. National Bank of Alaska*, 815 P.2d 857, 862-63 (Alaska 1991) (separately analyzing the reliance element as to each false statement alleged).

RDS claims that the launch of the Recon Hunt Application eliminated its so-called “first-mover advantage.”¹⁴ RDS also claims that Mr. Chen’s statement about the projects not competing lulled RDS into not taking a (non-existent) Copper Center Project smartphone to market sooner, thus losing out on this first-mover advantage.¹⁵

For this argument to work, however, RDS had to prove that: (1) if Mr. Chen had not misrepresented the facts on November 29, 2010, RDS would have taken different action, and (2) by taking this different action, RDS would have successfully achieved the profits that it claims, *i.e.*, the profits that were available to the “first-mover” in the market. In other words, RDS had to prove that if Mr. Chen had told RDS the truth on November 29, 2010, RDS would have earned its claimed “first mover” profits by launching the Copper Center Project smartphone *before* the Recon Hunt Application hit the market on March 7, 2011.

RDS presented no evidence to support this scenario. To the contrary, the undisputed evidence identified numerous and severe barriers to the launch of a Copper Center Project smartphone. The undisputed evidence was that RDS had to accomplish all of the following (among other things) before a device could be

¹⁴ RDS JNOV Opposition Brief at 27.

¹⁵ RDS JNOV Opposition Brief at 8, 28.

designed, manufactured, or sold: (i) secure a marketing/distribution channel to replace Remington; (ii) secure its \$6-\$8 million in pre-launch financing; (iii) hire approximately 43 software engineers and write the software; (iv) obtain realistic projections about the number of devices that might be sold; (v) secure a commitment from a manufacturer to produce the hardware; and (vi) secure a commitment from a wireless carrier to subsidize the price and take the device to market.¹⁶ RDS barely addressed, much less disputed, any of these impediments in its JNOV Opposition Brief.¹⁷ And even if all of these hurdles had been cleared, RDS still had to manufacture the device and distribute it for sale to customers. To obtain the “first-mover” advantage and earn the projected profits that are the basis for RDS’s damage claim, RDS had to accomplish all of this *before* the Recon Hunt Application launched in March 2011.

RDS knows that there was no chance a Copper Center Project smartphone could have been launched by March 2011. In the briefing on its request for pre-judgment interest, RDS admitted that the launch of a Copper Center Project device would not happen until July 2012 – well more than a year after the Recon Hunt Application launched.¹⁸ At trial and in its JNOV Opposition Brief, RDS admitted that

¹⁶ See generally Trimble’s JNOV Brief at 25-36. Trimble fully incorporates herein its JNOV Brief by reference.

¹⁷ RDS’s only response to any of these issues was to cite Mr. Miller’s opinion that RDS would likely be able to raise \$6--\$8 million and that other hardware providers were available. See generally, RDS JNOV Opposition Brief at 11. As to the former, RDS did not address Mr. Miller’s other testimony that “RDS was not going to get outside funding” unless and until the parties entered into a contractual relationship, which was impossible after Remington quit. Paul Miller Testimony, Trial Transcript at 727-28. As to the latter, RDS offered no evidence that it had ever contacted any of these other hardware providers, much less that any of them was interested in this project.

¹⁸ See Recreational Data Services’ Reply to Defendant Trimble Navigation Limited’s

if it had elected to proceed with a hardware provider other than Trimble, it would have “lost time” because it would “have to start back to square one and go through the process”¹⁹

There is no evidence from which a reasonable juror could conclude that, “but for” Mr. Chen’s alleged false statement on November 29, 2010, RDS would have solved all of the problems, and would have launched a Copper Center Project smartphone ahead of the Recon Hunt Application launch that occurred barely 90 days later. Thus, there is no evidence from which a reasonable juror could conclude that Mr. Chen’s alleged false statement caused RDS to lose the profits that it claims it would have otherwise earned as the “first mover” of a device with these features. A judgment notwithstanding the verdict should be granted because RDS did not prove that Mr. Chen’s alleged statement caused it to suffer the injury it now claims.

II. RDS Did Not Present Sufficient Evidence at Trial to Support a Finding of Breach of the NDA.

RDS offers two arguments in support of the jury’s finding that Trimble breached the NDA. First, RDS claims that Mr. Chen “discussed the Copper Center Project” with certain other Trimble divisions or employees.²⁰ Second, RDS complains that Mr. Chen “shared the market research and profit and loss statement”

Objections to Plaintiff’s Proposed Final Judgment at 7 (claiming that July 1, 2012 was the “most likely release date” for the Copper Center Project smartphone). Trimble disputes that this launch date was realistic, but agrees that it could never be earlier than that.

¹⁹ RDS JNOV Opposition Brief at 11, n. 12, *citing* Paul Miller Testimony, Trial Transcript at 708.

²⁰ RDS JNOV Opposition Brief at 15-16. RDS also alleges that Mr. Chen shared “information” with Trimble’s GIS Division, but never identifies what this information was or claims that it was confidential. *Id.* at 16.

with Trimble Outdoors.²¹ Neither of these claims can support the jury's verdict.

A. RDS Never Alleged or Proved that the Concept or Idea for the Copper Center Project was Confidential.

The jury's finding that Trimble breached the NDA cannot be based on Mr. Chen's discussing the Copper Center Project with others within Trimble because RDS never proved, or even alleged, that the concept or idea for the project was confidential. To the contrary, on or about February 26, 2009, Mr. Feucht sent an Executive Summary of RDS's ideas for the Copper Center Project to Trimble.²² At trial, RDS admitted this Executive Summary was not confidential and that Trimble was free to share that information with anyone.²³ Moreover, RDS's Executive Summary was not marked "confidential" or anything similar, so it was not protected by the NDA.²⁴

But RDS's own actions are the most compelling evidence that it did not consider the Copper Center Project concept to be confidential. It is undisputed that Mr. Chen told Mr. Feucht in April 2009 that he was discussing the concept with other Trimble divisions,²⁵ and Mr. Feucht never questioned or complained about this.²⁶ Mr. Miller similarly admitted that he disclosed the "concept" and the "features" of the

²¹ *Id.* at 15-16.

²² Plaintiff's Trial Exhibits 1, 5.

²³ RDS's Closing Argument, Trial Transcript at 1452.

²⁴ *Id.*; accord Plaintiff's Trial Exhibit 2 at § 3.

²⁵ Plaintiff's Trial Exhibit 4 (Mr. Chen writes to Mr. Feucht: "I am talking to one other Trimble division to work out a plausible approach to this solution.")

²⁶ Chaur-Fong Chen Testimony, Trial Transcript at 834 (Q: *Did Mr. Feucht ever complain to you about that you shouldn't share this with another division? A: No, he didn't.*). RDS never disputed this testimony.

Copper Center Project to Cabela's before it signed a nondisclosure agreement.²⁷ Thus, a finding of breach of the NDA cannot be based on Mr. Chen "discuss[ing] the Copper Center Project" with anyone because the project itself was never considered, identified, or treated by RDS as "Confidential Information" as defined in the NDA.

B. The Copper Center Project's Market Survey Data and Resulting Financials Were Not RDS's Confidential Information.

RDS's claim that it provided any Confidential Information regarding the market survey data or the financial projections is not supported by any evidence presented at trial. To the contrary, Mr. Feucht was very clear about the three (and only three) types of Confidential Information that RDS brought to the Copper Center Project: (i) the patent relating to hunting and fishing regulations; (ii) information about "players" in the outdoors industry; and (iii) the idea for a suite of applications that would be useful to hunters and fishermen.²⁸ The jury heard no evidence that any aspect of the market survey data or the financial projections was "Confidential Information" of RDS. The only testimony cited in RDS's JNOV Opposition Brief relates to its alleged "cost estimates."²⁹ But neither Mr. Feucht nor any other witness testified that these cost estimates were Confidential Information, much less that RDS designated or identified them as such.

In fact, the evidence at trial was that the market survey data and resulting

²⁷ Paul Miller Testimony, Trial Transcript at 758-59.

²⁸ Brian Feucht Testimony, Trial Transcript at 250-52 ("Q: *Now I want to go through each one of these, because this is the confidential information that you claim RDS brought to the Copper Center Project, right?* A: Yes.").

²⁹ RDS JNOV Opposition Brief at 17, citing Trial Transcript at 416, 418.

financial projections were created by and owned by Remington.³⁰ RDS misrepresents Mr. Chen's testimony on this issue, claiming that he admitted to sharing market research and the P&L Statement resulting from the "joint efforts" of RDS, Trimble, and Remington.³¹ To the contrary, the testimony cited by RDS reflects only that Mr. Chen disclosed "the financials that we got from Remington."³² The NDA does not cover Remington's financial information, and there is no evidence that this financial information was ever owned by, or confidential to, RDS.³³

Finally, Section 3 of the NDA says that information is not protected by the NDA unless the Disclosing Party specifically designates and identifies the information as "Confidential Information." RDS acknowledges this requirement, but identifies just one instance in which it claims that the financial projections for the Copper Center Project were so identified.³⁴ RDS relies entirely on boilerplate language that appears in a footer to Brian Feucht's September 30, 2010 email

³⁰ Brian Feucht Testimony, Trial Transcript at 103-104 ("Q: *Once [Remington] pulled out of the project... what happened to the survey data, the market research, the contributions that Remington had made to the Copper Center project?* A: *I called up Mark Hill... requesting respectfully permission to use all of marketing and survey data that Remington had provided up until this point. Because it was part of the partnership, and I didn't think it was appropriate to use their information to go pursue the other partners in it.*") (emphasis added).

³¹ RDS JNOV Opposition Brief at 15.

³² Chaur Fong Chen Testimony, Trial Transcript at 1030-31.

³³ RDS argues that the NDA covers Remington's information by observing that its definition of "Confidential Information" can include information "relating to the existing or prospective business and/or technology of...Others." RDS JNOV Opposition Brief at 17, n. 17. This means simply that RDS's confidential information is protectable under the NDA even if the information "relates to" someone or something other than RDS. It does not mean that confidential information of someone who is not a party to the NDA is likewise protected.

³⁴ RDS JNOV Opposition Brief at 16, *citing* Plaintiff's Trial Exhibit 28.

(Plaintiff's Trial Exhibit 28). RDS claims that this email designated "any files transmitted with it" as Confidential Information under the NDA.

This argument fails for multiple reasons. First, RDS fails to identify any documents that were transmitted to Trimble with Mr. Feucht's September 30, 2010 email. Plaintiff's Trial Exhibit 28 reflects an email from Mr. Chen, stating that it includes "Attachments: Copper Center Project RDS-Remington-Trimble P&L 0930130.slsx." And the text of Mr. Chen's email refers to "The spreadsheet with all 3 P&Ls." Thus, it is clear that *Mr. Chen's* email transmitted the attachments that follow in Exhibit 28, and his email does not contain any type of "confidentiality" designation. And the exhibit contains nothing to indicate that *Mr. Feucht's preceding email* included any attachments. Thus, the exhibit contains nothing from which the jury could reasonably conclude that the footer in Mr. Feucht's September 30, 2010 email referred to an attachment that included the P&L material, and thereby designated that material as "Confidential Information" under the NDA.

Moreover, even if the P&L data was attached to Mr. Feucht's September 30, 2010 email, the boilerplate language at the bottom of his email does not comply with the requirements in Section 3 of the NDA. This Section requires a party designating information as "Confidential Information" to "affix or incorporate in any Confidential Information . . . an appropriate statement identifying the information as the Disclosing Party's Confidential Information, such as '[name of Party] Confidential Information' or words of like meaning." The boilerplate paragraph at the end of Mr. Feucht's email did not meet these requirements, and thus RDS failed to designate any attachment to this email as "Confidential Information" under the NDA.

In the end, RDS does not cite a single instance in which it designated the market survey data or the financial projections as "Confidential Information" pursuant

to the NDA. Thus, this information was not covered by the NDA, and that alleged disclosure of this information cannot support a finding of breach of the NDA.

III. RDS Did Not Present Evidence Sufficient to Support the Jury's Finding of a "Partnership" Between RDS and Trimble.

RDS admits that the sole basis for its breach of fiduciary duty claim is the alleged partnership between it and Trimble.³⁵ RDS then sets out to prove two points that Trimble has never disputed – that the parties referred to each other as “partners” and that they worked together on the Copper Center Project. But none of the evidence cited by RDS changes the simple fact that RDS unequivocally admitted that Trimble and RDS never formed a partnership under Alaska law.

A. RDS Admitted that Trimble and RDS Never Formed a Partnership.

RDS does not dispute, nor could it, that Mr. Feucht admitted at trial that Trimble and RDS never formed a partnership, as that is defined under Alaska law and as the jury was charged on the issue:

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

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

* * *

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

A: *No.*³⁶

RSD's argument on this point is nonsensical. RDS is claiming that a reasonable jury

³⁵ RDS JNOV Opposition Brief at 17.

³⁶ Brian Feucht Testimony, Trial Transcript at 263.

could have found a relationship (a legal partnership) that the party urging such a finding (RDS) has admitted did not exist. RDS's position is even more absurd in light of its closing argument that the jury should "accept that [Trimble] never intended to be partners" and "take [Trimble's] word on one thing, that they weren't partners."³⁷

B. The Parties' Reference to Each Other as "Partners" Is Irrelevant.

RDS relies almost exclusively on the fact that Mr. Chen and others referred to Trimble, RDS, and Remington as "partners" on the Copper Center Project. The parties' reference to each other as "partners" does not determine whether their relationship met the legal definition of a partnership. *Parker v. Northern Mining Co.*, 756 P.2d 881, 887 n. 11 (Alaska 1988).

[E]ven if a business relationship is called a 'partnership' by its participants (or, as is more often the case, even if the participants refer to themselves as 'partners'), the arrangement will not be treated as a partnership for state law purposes unless it meets the state's statutory partnership definitional requirements.

J. Callison and M. Sullivan, *PARTNERSHIP LAW AND PRACTICE: GENERAL AND LIMITED PARTNERSHIPS* § 5:1 (2013).³⁸

Other evidence confirms that RDS knew that the parties never agreed to form a legal partnership, irrespective of their use of the term "partner." The Product Alliance Agreement, for example, stated that the parties' relationship "*is not, nor shall it be deemed to be, a separate legal entity or a partnership or any similar*

³⁷ RDS's Closing Argument, Trial Transcript at 1415, 1428.

³⁸ The same rule applies when participants call themselves "partners" to third parties, such that the third party could allege "partnership by estoppel." See AS 32.06.308 (adopting concept of "purported partnership"). "This doctrine of *apparent partnership*, another term for *partnership by estoppel*, ***applies only to third parties and has no application between the parties themselves.***" Callison & Sullivan at § 5:25 (bold emphasis added).

*arrangement.*³⁹ Mr. Feucht testified that the Product Alliance Agreement was “so that each party would know exactly what it was doing to clearly define the relationship of the parties in a contractual manner...”⁴⁰ Remington actually signed the Product Alliance Agreement,⁴¹ and Mr. Boehnen testified that he “wanted RDS to sign and Trimble to sign to agree to that exact same relationship and that exact same structure. *We are not partners.*”⁴²

C. RDS Admitted that Trimble Was Never Committed or Obligated to the Copper Center Project.

Lastly, the evidence shows that none of the parties acted in a manner suggesting the formation of a legal partnership. RDS admitted that Trimble was permitted to withdraw and decline to go forward with the Copper Center Project at any time.⁴³ And Remington, the other so-called “partner”, did withdraw from the Copper Center Project in late 2010. RDS never complained about Remington withdrawing from the Copper Center Project, and Remington believes it was fully permitted to do so.⁴⁴ All of these undisputed facts confirm that the parties never agreed to become co-owners of a business, notwithstanding the use of the term “partner” to refer to each other. No reasonable jury could have concluded otherwise.

³⁹ Defendant’s Trial Exhibits I, M, and EEE at Section 4.1 (language is identical in every version) (emphasis added).

⁴⁰ Brian Feucht Testimony, Trial Transcript at 271.

⁴¹ Defendant’s Trial Exhibit I.

⁴² Patrick Boehnen Testimony, Trial Transcript at 486 (emphasis added).

⁴³ Brian Feucht Testimony, Trial Transcript at 241.

⁴⁴ Patrick Boehnen Testimony, Trial Transcript at 294. Mr. Boehnen also believes that Trimble was permitted to withdraw from the Copper Center Project at any time. *Id.*

IV. RDS Failed to Present Sufficient Evidence for a Reasonable Jury to Award Lost Profits Damages.

RDS failed to present competent evidence that Trimble's actions caused – with reasonable certainty – the loss of any profits from the Copper Center Project. Moreover, the amounts of the jury's damages awards are unsupported because RDS did not present evidence of the proper measure of damages, RDS did not present evidence sufficient to support an award of lost profits to a new business, the verdict was not consistent with any of the damages evidence that was presented, and RDS's alleged lost profits were not foreseeable.

A. The Evidence at Trial Was Insufficient to Show that Trimble's Conduct Caused the Lost Profits Claimed by RDS.

RDS does not dispute its burden of proving that Trimble's conduct caused the claimed tort and contract damages.⁴⁵ In its JNOV Brief, Trimble reviewed in detail the undisputed evidence supporting six independent reasons why the Copper Center Project was extremely unlikely to ever succeed, which means that RDS's claims for lost profits fail for lack of proof of causation.⁴⁶ These failures of proof render all of RDS's lost profits claims speculative, as RDS's theories required the jury to speculate that RDS would overcome the numerous obstacles to launching the Copper Center Project smartphone and generating these enormous profits.

RDS did not respond in any coherent way. In its JNOV Opposition Brief, RDS makes occasional references to Mr. Miller's testimony regarding RDS's alleged

⁴⁵ Trimble JNOV Brief at 24-25.

⁴⁶ Trimble JNOV Brief at 25-36.

opportunities to obtain its financing or find another hardware manufacturer.⁴⁷ As discussed above, however, this testimony was Mr. Miller's personal opinions, was pure speculation, and was contradicted by his other statements on these issues.⁴⁸ RDS provided the jury with no substantive basis for concluding that the Copper Center Project would have ever overcome the undisputed obstacles and generated any profit, completely irrespective of anything Trimble did or did not do.

B. RDS Failed to Prove Damages that Comply with the Proper Measure of Damages for Trimble's Alleged Breach.

In *Reeves v. Alyeska Pipeline Service Co.*, 56 P.3d 660 (Alaska 2002), two justices said the proper measure of damages in a similar situation was not the profit that the originator could have been earned with his idea, but the profit earned by the recipient of the information.⁴⁹ RDS's principal response is that *Reeves* is not controlling precedent.⁵⁰ The fact that *Reeves* is not controlling precedent only means that this Court is not *required* to follow the lead of the two justices who said the proper measure of damages was the profits earned by Alyeska.⁵¹ But their analysis, and the authorities they cite, are persuasive that the correct measure of damages for

⁴⁷ RDS JNOV Response Brief at 11, n. 12. RDS's response said nothing about any of the other hurdles facing the Copper Center Project, including Remington's abandonment of it, and Cabela's and AT&T's rejection of it.

⁴⁸ *See supra*, n. 17.

⁴⁹ 56 P.3d at 666-68.

⁵⁰ RDS JNOV Brief at 30.

⁵¹ Significantly, none of the justices in *Reeves* accepted the plaintiff's argument that his damages should be the lost profits from a project that never happened. *See Reeves*, 56 P.3d at 672-74 (dissenting opinion) (Reeves' recovery should be limited to the fair market value of the services that he provided to Alyeska, not the potential commercial value of his idea).

the wrongful use of an idea is the profit, if any, that the recipient allegedly earned by using the confidential ideas.⁵²

RDS attempts to distinguish *Reeves* based on the difference between using an “unoriginal idea” and a supposedly “original” idea, but offers no explanation why this makes any difference. Indeed, RDS acknowledged that its idea was not original, when Mr. Feucht admitted that Cabela’s would have been able to identify on its own the types of features and functions that might be useful to a hunter or fisherman in a mobile device.⁵³ RDS also relies on the fact the final judgment in *Reeves* did not include tort damages for a misrepresentation claim. But RDS has essentially conflated its misrepresentation claim with its claim for breach of the NDA. The misrepresentation claim is, in essence, that Trimble lied about its breach of the NDA and its consequences.⁵⁴ RDS offers no reason why the measure of damages for these tort and contract claims should not be the same, *i.e.*, Trimble’s profits from its alleged use of RDS’s confidential ideas.

⁵² One of the most persuasive reasons for using the damages measure that is discussed in *Reeves* is that it avoids speculative damages of the sort claimed by RDS. Instead of focusing on unknown and unknowable profits that “might have been” generated if the idea’s originator participated in a venture that never happened, the proper measure of damages focuses on numbers that can be determined: the *actual* profits the recipient earned, if any, by wrongfully using the idea.

⁵³ Brian Feucht Testimony, Trial Transcript at 254.

⁵⁴ RDS JNOV Opposition Brief at 3-5. RDS has always claimed the same damages (lost profits) for both its tort and contract claims.

C. RDS Failed to Prove the Amount of its Damages with Reasonable Certainty.

1. RDS Did Not Present Evidence Required for Recovery of Lost Profits by a New Business

In *Guard v. P. & R Enterprises, Inc.*, 631 P.2d 1068 (Alaska 1981), the Alaska Supreme Court articulated a rule governing lost profits claims by new businesses; *i.e.*, businesses that do not have a track record as the basis for claiming lost profits. In subsequent cases, the Supreme Court denied awards of lost profits when the plaintiffs failed to meet these standards of proof.⁵⁵ RDS fails to distinguish *Guard* or the other controlling authorities.

RDS seeks lost profits for a new business from a new project that never previously existed. RDS's lost profit claims are based solely on a statistical projection from survey data. *Guard* holds that such projections are too speculative to support an award of lost profits to a new business.⁵⁶ Similarly, *Alaska Travel* involved an effort to recover lost profits for a newly-established business. The Supreme Court again rejected the lost profits claim as speculative.⁵⁷ Lastly, *Geolar* involved a claim for lost profits by a business that "had no prior experience with contracts of [the] size and complexity" presented in that case. The Supreme Court closely followed *Guard*, saying that *Geolar* failed to offer evidence of the type specifically required by *Guard* – "evidence of its own profit margins on other projects

⁵⁵ *E.g.*, *Alaska Travel Specialists, Inc. v. First Nat'l Bank of Anchorage*, 919 P.2d 759 (Alaska 1996); *Geolar, Inc. v. Gilbert/Commonwealth Inc. of Michigan*, 874 P.2d 937 (Alaska 1994).

⁵⁶ 631 P.2d at 1071-73.

⁵⁷ 919 P.2d at 765-66.

[or] evidence of the profits obtained by other contractors performing similar jobs.” On this basis, the Court rejected Geolar’s lost profit claims.⁵⁸

In sum, the Alaska Supreme Court’s decisions consistently prohibit a new business from recovering lost profits based on projections that are unsupported by comparable experience – either by the plaintiff, or by another party engaged in a closely comparable business venture. RDS did not present any such evidence. Tellingly, RDS does not cite a single Alaska Supreme Court decision that supports an award of lost profits to a new business based on evidence comparable to the profit projections that RDS presented.⁵⁹

In an effort to avoid *Guard*, RDS attempts to establish the trustworthiness of its profit projections. RDS identifies three reasons why the projections should be considered trustworthy,⁶⁰ but none of them addresses the fundamental concern underlying the holding in *Guard* and similar cases. Even though someone other than RDS worked on these projections, and even though the projections were not prepared for trial, and even if Trimble relied on the projections for some purposes, the P&L statement is still a *statistical projection* of future profits for a new business, pursuing a new project, without a track record. Those projections are not based on actual experience by anyone, and certainly not on actual experience by anyone involved in

⁵⁸ 874 P.2d at 946-47.

⁵⁹ RDS cites *Sisters of Providence in Washington v. A.A. Pain Clinic, Inc.*, 81 P.3d 989 (Alaska 2003), but it is distinguishable from this case for multiple reasons: (1) the plaintiff physicians had an *existing* business that was harmed by the defendant’s anticompetitive conduct (*Id.* at 993-94); (2) the lost profit claim was supported in part by testimony of physicians who were engaged in the same business (*Id.* at 1007); and (3) the lost profit claim was brought under antitrust statutes (*Id.* at 1005), which are more forgiving with respect to proof of lost profits, *see Guard*, 631 P.2d at 1072 n. 4.

⁶⁰ RDS JNOV Opposition Brief at 36-37.

the Copper Center Project, or anyone operating a similar business under similar circumstances. Thus, RDS's evidence is insufficient as a matter of law to support an award of lost profits to a new business.

2. The P&L Statement and the "Whiteboard Photograph" Are Not Competent Evidence of Lost Profits.

RDS's only evidence concerning projected or anticipated profits was the P&L statement. For reasons discussed here and in Trimble's JNOV brief, the P&L statement does not support an award of lost profits, and the jury obviously agreed, as it rejected the lost profits calculation therein. There was no evidentiary support for any other calculation of lost profits.

RDS tries to support the jury's awards by referring to the "whiteboard photograph" evidence. But there was no testimony that this evidence reflected RDS's projected lost profits. Even considered in the light most favorable to RDS, the data on the whiteboard showed Trimble's valuation of RDS, based on its projected *revenue*. There was no testimony or other evidence that this information showed RDS's expected *profit* from the Copper Center Project or anything else. Furthermore, RDS admitted that the "whiteboard photograph" came from RDS's statistical revenue projections,⁶¹ meaning that those valuation numbers are no more legally reliable than the P&L statement.

In its JNOV Opposition Brief, RDS attempts to rationalize the jury's damage awards, but its explanations are pure guesswork, not grounded in any evidence.⁶² At

⁶¹ Brian Feucht Testimony, Trial Transcript at 134-36.

⁶² RDS has already admitted that the jury's award of any amount other than \$111,666,973 or \$18.4 million requires the Court to direct a verdict in favor of Trimble. *See* RDS's Directed Verdict Argument, Trial Transcript at 1360 ("If the jury's verdict is inconsistent with the lost

one point, RDS speculates that the total damage award of \$51.3 million makes sense because \$51.3 million is "close to" 47% of \$111 million.⁶³ The reference to "47%" comes from an entry on the whiteboard photograph, but there was no testimony about what this percentage meant, or how it was derived, and thus it provides no evidentiary support for a lost profits calculation.

RDS also speculates that the \$51.3 million damage award is based on the idea that Trimble valued RDS at \$38.5 million if the project achieved 75% of revenue goals, and the jury must have instead concluded that the project would achieve 100% of revenue goals. Here, RDS has equated Trimble's alleged "valuation" with RDS's lost profits, without any evidence to support this linkage.⁶⁴ Furthermore, RDS never claimed or presented any evidence that Trimble ever valued RDS at \$38.5 million. Mr. Feucht repeatedly testified that Trimble "thought the appropriate valuation [of RDS] was [\$18,400,000]."⁶⁵

RDS eventually retreats to its claim that the lost profits awards are supported by Trimble's alleged valuation of RDS at \$18.4 million.⁶⁶ Again, there is no testimony or other evidence that supports equating Trimble's alleged valuation of RDS with RDS's prospective lost profits. But even if the evidence showed that

profits analysis either by way of the valuation and offer of \$18.4 million, or the 111 million and change, then the Court will direct that verdict. And, legally, the Court should."); *see also* RDS's Closing Argument, Trial Transcript at 1473-74.

⁶³ RDS JNOV Opposition Brief at 37, n. 58.

⁶⁴ RDS JNOV Opposition Brief at 39 (claiming that the valuation is a proxy for lost profits, but not citing any testimony or other evidence that supports this "proxy" claim); *see also* Trimble JNOV Brief at 41.

⁶⁵ Brian Feucht Testimony, Trial Transcript at 136-37 ("Q: *What is the - what is Trimble's valuation of RDS that Steve Wolff put on the board for - A: \$18.4 million.*") and 316-17 (\$18.4 million reflected "*how [Trimble] would value an organization like RDS.*")

⁶⁶ RDS JNOV Opposition Brief at 39.

RDS's projected lost profits were \$18.4 million, the verdict must be set aside because the jury awarded RDS 280% of this amount.

D. Lost Profit Damages Were Not Reasonably Foreseeable.

RDS accepts the legal proposition that its contract damages of \$12.8 million must have been foreseeable *as of the date when the parties entered into the contract*. The only contract at issue here is the NDA. Thus, any damages that the jury awarded for breach of contract must have been reasonably foreseeable when the parties signed the NDA in March 2009. When the parties signed the NDA, they expressly agreed that they were *not* committing to do business together, in any fashion.⁶⁷

In its opposition, RDS ignores this dispositive provision of the NDA. When the parties explicitly said that they were *not* agreeing to do business together, how could they reasonably foresee that a breach of their agreement would cause lost profits damages from a joint business venture? RDS does not discuss the effect of the NDA provision disclaiming a business relationship between RDS and Trimble, because it has no answer. Lost profits from a business venture between Trimble and RDS were not reasonably foreseeable when the parties signed the NDA, and therefore cannot be awarded for breach of the NDA.

CONCLUSION

In opposing Trimble's post-trial motions, RDS asks the Court to ignore fatal gaps in the evidence required to prove its claims. These include RDS's failure to

⁶⁷ Plaintiff's Trial Exhibit 2 at § 6.5. Mr. Feucht did not claim that RDS and Trimble made any commitment to each other until the September 2009 meeting in Copper Center. Brian Feucht Testimony, Trial Transcript at 72. And he admitted that the NDA cannot be construed to create a "partnership" between RDS and Trimble. Brian Feucht Testimony, Trial Transcript at 264.

prove reliance or causation with respect to an alleged misrepresentation, Mr. Feucht's candid admission that the parties never agreed to an essential element of a partnership, the undisputed barriers to the launch of the Copper Center Project's smartphone, and RDS's failure to prove its claimed lost profits with competent evidence.

The Court should enter judgment in favor of Trimble notwithstanding the verdict because even when giving RDS all *reasonable* inferences from the evidence, and viewing the evidence in the light most favorable to RDS, reasonable jurors could not find that RDS proved all essential elements of its claims. Alternatively, the Court should grant a new trial in the interest of justice because the jury's verdict is against the weight of the evidence.⁶⁸

⁶⁸See *Cameron v. Chang-Craft*, 251 P.3d 1008, 1022 (Alaska 2011); *Hogg v. Raven Contractors, Inc.*, 134 P.3d 349, 352 (Alaska 2006); *Kava v. American Honda Motor Co., Inc.*, 48 P.3d 1170 (Alaska 2002). Contrary to RDS's suggestion, the law does not require the Court to "deny the [a motion for new trial] unless it is firmly convinced that the jury has reached a seriously erroneous result." RDS JNOV Opposition Brief at 45. The Alaska Supreme Court's recent decisions cited above do not adopt this standard, and RDS instead cites authorities from nearly 50 years ago that did not explicitly adopt this rule.

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Reply in Support of Motion for JNOV or New Trial
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CERTIFICATE OF SERVICE

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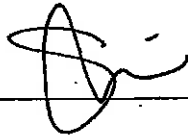
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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

RECREATIONAL DATA
SERVICES, INC.,

Plaintiff,

v.

TRIMBLE NAVIGATION, LTD.,

Defendant.

Case No. 3AN-11-10519 CI

**ORDER GRANTING DEFENDANT'S MOTION FOR JUDGMENT
NOTWITHSTANDING THE VERDICT**

I. INTRODUCTION

The Court grants Defendant's Motion for Judgment Notwithstanding the Verdict because Plaintiff's evidence is insufficient as a matter of law to support an award of lost profits for an unestablished business. Plaintiff claims only lost profits damages. Because the Court finds that Plaintiff cannot prove lost profits with reasonable certainty, Plaintiff cannot prove its damages claim and Defendant's Motion for Judgment Notwithstanding the Verdict is granted.

II. FACTUAL BACKGROUND

This case involves a commercial dispute in which Recreational Data Services, Inc. (RDS) alleges that Trimble Navigation, Limited (Trimble) misappropriated RDS's *RDS, Inc. v. Trimble Navigation, Ltd.*

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confidential information and trade secrets and breached fiduciary duties to RDS based on the alleged formation of a partnership. RDS admits that Trimble did not infringe upon its patent. RDS sought over \$111 million in damages.

RDS is a privately held Alaska corporation. Its president is Brian Feucht. RDS formed to research, develop, market and distribute proprietary software solutions to benefit recreational customers, including hunters, fishermen, and other outdoor enthusiasts worldwide.

Trimble Navigation Limited is a worldwide company that develops, manufactures, and sells global positioning technology. The uses for Trimble's products range from industrial applications, such as surveying transportation and agriculture, to individual consumer uses, such as personal navigation and tracking. Trimble Navigation has numerous divisions. Trimble Outdoors develops and sells software that is marketed to hikers, campers, and other outdoorsmen. Trimble Mobile Computing Solutions division (Trimble MCS) primarily designs and manufactures hardware, such as hand-held GPS units and similar devices. Chaur-Fong Chen is Trimble MCS's Director of Strategic Business Development.

Beginning in 2007, before RDS existed, Trimble Outdoors created and launched a series of mobile phone applications called "Trimble Outdoors Navigator," "AllSport GPS," and "Geocache Navigator." These applications allow users to track running or biking workouts, navigate on hiking or camping trips, and participate in "geocaching," a type of scavenger hunt for GPS-connected markers placed by other "geocachers." The

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“Trimble Outdoors Navigator” application provides a digital compass, online mapping, waypoint marking/tracking, and various other features.

In February 2009, RDS met with Trimble to present a software application and discuss a prospective business relationship given Trimble’s experience in GPS technologies and handheld devices. The general concept was that RDS would design and write the software, Trimble would manufacture the hardware, and a third participant (eventually Remington) would provide marketing and channel support. RDS’s contribution would be the right to use a patent that would monitor a user’s location and compare it to the hunting and fishing game regulations governing that area.¹ The project was titled the “Copper Center Project,” after the location where some meetings occurred.

On February 26, 2009, after the initial meeting, RDS sent a copy of its “Executive Summary” of the project to Trimble. The Executive Summary was not marked as confidential. On March 11, 2009, RDS again met with Trimble, including Chaur-Fong Chen, the Director of Strategic Business Development for Trimble MCS. On March 12, 2009, RDS and Trimble executed a Mutual Nondisclosure Agreement (NDA). The pertinent portion of the NDA states:

Nothing herein shall obligate either Party to enter into any business arrangements or agreements with the other Party. The terms of confidentiality under this Agreement shall not be construed to limit either Party’s right to independently develop or acquire products without use of the other Party’s Confidential Information. The Disclosing Party acknowledges that the Receiving Party may currently, or in the future, be

¹ See Trial Tr. at 603 (Remington’s chief marketing office, Marc Hill, testified that the defining feature of RDS’s idea was that the phone would make an audible sound when entering or leaving a hunting area.).

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developing information internally, or receiving information from others that is similar to the Confidential Information. Accordingly, nothing in this Agreement will be construed as a representation or agreement that the Receiving Party will not develop or have developed for its products, concepts, systems, or techniques that are similar to, or compete with, the products concepts or techniques contemplated by or embodied in the Confidential Information provided that the Receiving Party does not violate any of its obligations under this Agreement in connection with such development.²

RDS (software) and Trimble (hardware) continued communications and Remington Arms Company, LLC (Remington) (marketing and distribution) joined the conversation in May 2009. Through 2009 and 2010, RDS, Remington and Trimble exchanged e-mails and held meetings to further discuss the Copper Center Project.

Around December 2010, Remington withdrew from the Copper Center Project. In early 2011, RDS pursued Cabela's as a replacement for Remington but Cabela's declined. Around April 2011, Trimble decided that it did not want to proceed with the Copper Center Project.

A jury trial was held on September 9-25, 2014. RDS argued numerous claims but claimed that its only damages were lost profits. The Court denied Trimble's motion for directed verdict. The jury returned a verdict for Plaintiff and awarded \$51.3 million in damages. Trimble filed the current motion.

III. LEGAL STANDARD

Under Rule 59(a), a court may grant a new trial "on all or part of the issues...if required in the interest of justice." A new trial is in the interest of justice if the verdict is

² Pl.'s Trial Exhibit 2.

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“against the weight of the evidence.”³ In this case, a new trial under Rule 59(a) is not appropriate because the Court finds that RDS cannot prove lost profits with reasonable certainty and, therefore, cannot prevail on any of its claims.

A trial court may grant remittitur “when a jury returns an otherwise proper verdict awarding an amount of damages that the evidence cannot reasonably support.”⁴ “Remittitur is appropriate 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.”⁵ The Court finds that remittitur is not appropriate because the jury verdict was not proper given that RDS’s claim for lost profits is unsupported by the evidence, especially considering the heightened standard of proof for an unestablished business.

Under Rule 50(b), a motion for judgment notwithstanding the verdict should be granted if the “evidence is insufficient to allow a reasonable juror to find for the non-moving party.”⁶ The 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.”⁷

³ *Hogg v. Raven Contractors, Inc.*, 134 P.3d 349, 352 (Alaska 2006).

⁴ *Cameron v. Chang-Craft*, 251 P.3d 1008, 1021 (Alaska 2011) (citing *Reeves v. Alyeska Pipeline Serv. Co.*, 56 P.3d 660, 668 (Alaska 2002)).

⁵ *Chang-Craft*, 251 P.3d at 1021 (internal quotations omitted).

⁶ *Id.* at 1017.

⁷ *Id.* (internal quotations omitted).

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IV. DISCUSSION

Alaska law requires that lost profits be proven with reasonable certainty.⁸ While some Courts interpret this principle to deny recovery for lost profits of an unestablished business as an invariable rule, Alaska does not apply an inflexible rule.⁹ Yet, in Alaska, as in other jurisdictions that do not per se deny recovery of lost profits of an unestablished business, proving reasonable certainty is a very high standard.¹⁰

The *Restatement (Second) of Contracts* embraces the idea that a new business may recover lost profits that it proves with reasonable certainty but also recognizes the natural limitations of that standard on new businesses.¹¹ Comment b of the *Restatement (Second) of Contracts* succinctly states the rule as follows:

[I]f the business is a new one . . . proof will be more difficult. Nevertheless, damages may be established with reasonable certainty with the aid of expert testimony, economic and financial data, market surveys and analyses, business records of similar enterprises, and the like.¹²

Reasonably certain damages are not based on speculation, guess, or conjecture.¹³ Statistical projections alone are insufficient for an unestablished business to prove lost profits with reasonable certainty.¹⁴ "The evidence must afford sufficient data from which

⁸ *Geolar, Inc. v. Gilbert/Commonwealth Inc. of Michigan*, 874 P.2d 937, 946 (Alaska 1994); *Alaska Travel Specialists, Inc. v. First Nat. Bank of Anchorage*, 919 P.2d 759, 766 (Alaska 1996); *Guard v. P&R Enters. Inc.*, 631 P.2d 1068, 1071-72 (Alaska 1981).

⁹ *Guard*, 631 P.2d at 1071.

¹⁰ *Id.* at 1072.

¹¹ RESTATEMENT (SECOND) OF CONTRACTS §347, 352 comment b (1981).

¹² *Id.*

¹³ *Alaska Travel Specialists, Inc.*, 919 P.2d at 766; *Guard*, 631 P.2d at 1071; Jury Instruction No. 25 ("You may not award damages to RDS on the basis of speculation, guess, or conjecture.").

¹⁴ *Guard*, 631 P.2d at 1072 n.4 (rejecting the use of statistical projections as the sole basis to establish lost profits for a new business: "In antitrust litigation, the injured party may prove damages for lost profits by *RDS, Inc. v. Trimble Navigation, Ltd.*

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the court or jury may properly estimate the amount of damages, which data shall be established by facts rather than mere conclusions of witnesses.”¹⁵ The courts impose this high standard to prevent one party from becoming the guarantor of another party’s ability to make a profit in their new venture.”¹⁶

In this case, RDS asked the jury to award one of two amounts as lost profits: (i) \$111,666,973.00 based on the highest net operating income reflected in the preliminary profit and loss statement (“P&L Statement”) that was prepared by Remington based on an early survey conducted on Remington’s customer base or (ii) \$18,400,000.00, which RDS alleges is Trimble’s valuation of RDS based on a photograph of a handwritten, partially illegible chart written on a whiteboard. The Court finds that RDS’s evidence contained too many variables, unsupported assumptions, and mere conclusions of witnesses and too little data supported by facts to establish its lost profits projections within a reasonable degree of certainty.

The Copper Center Project was a business idea that was not only merely in contemplation but was also faced with numerous hurdles before it could have operated, much less generate profits of \$111 million claimed by RDS or \$51.3 million awarded by the jury. With numerous contingencies and almost no reliable data to support the

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

¹⁵ *Geolar, Inc.*, 874 P.2d at 946.

¹⁶ *Guard*, 631 P.2d at 1073 (“Since P & R had the ability to negotiate the allocation of risk, the Guards should not be the guarantors of P & R’s anticipated profits in the absence of more certain proof establishing that profits would have eventuated.”).

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amounts claimed, RDS did not establish its claim for lost profits of an unestablished business with reasonable certainty.

A. RDS had not secured contractual commitments.

The evidence at trial was that the Copper Center Project could not proceed unless it had companies legally committed to each of three roles – hardware, software, and marketing and distribution – and had a commitment from a wireless service carrier to subsidize and sell the phone.¹⁷

RDS needed a commitment from Trimble or another company to develop the hardware. It was undisputed that Trimble had no obligation to develop the hardware and could have withdrawn at any time.¹⁸ RDS presented no evidence that it had any other leads for the hardware role.

RDS needed to secure a third partner for the marketing.¹⁹ It is undisputed that Remington withdrew from the Copper Center Project in late 2010.²⁰ It is also undisputed that the Copper Center Project required someone to perform the marketing and distribution functions that Remington abandoned.²¹ RDS pitched the idea to Cabela's and Cabela's declined to participate.²² Without a marketing and distribution partner,

¹⁷ Trial Tr. at 245, 255.

¹⁸ Trial Tr. at 241 (Q: [W]as Trimble permitted, yes or no, to withdraw from the Copper Center Project and decline to go forward with it at any time? A: Yes:).

¹⁹ Trial Tr. at 83, 184 (Q: You testified earlier, Mr. Feucht, that with Remington having withdrawn from the project, unless a replacement was found, the project was dead. Right? A: That's correct. Q: And when Cabela's declined to come in and be that replacement, again, Copper Center Project is dead. True? A: That's correct.").

²⁰ Trial Tr. at 372.

²¹ Trial Tr. at 83, 184.

²² Pl.'s Trial Exhibit 8.

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RDS was never going to earn any profits from the Copper Center Project, irrespective of anything Trimble did or did not do. RDS offered no proof that it had any firm leads on anyone to fill that role, especially with a trusted, household name like Remington.

Even if the Copper Center Project had legal commitments for each role, it would then need to find a wireless service provider such as AT&T or Verizon. The Copper Center Project required a commitment from a wireless service provider to subsidize the price of the phone and actually sell it.²³ RDS's own witness characterized the commitment of a wireless carrier as an "essential hurdle" to the success of the Copper Center Project.²⁴ In fact, RDS testified that it met with AT&T but did not secure a commitment.²⁵ RDS presented no evidence that any wireless service carrier ever committed to participate in the Copper Center Project.²⁶

Trimble's expert witness, Mr. Neal Beaton, testified that he was "pretty close to 99 percent" certain that the Copper Center Project "was not going to be successful."²⁷ Mr. Beaton testified that without a clearly defined legal relationship, it was highly unlikely that venture capitalists would invest millions of dollars.²⁸ He also testified that the

²³ Trial Tr. at 261.

²⁴ Trial Tr. at 752.

²⁵ Trial Tr. at 174-75, 752-53 (Q: Did Mr. Feucht, AT&T, anybody else in the universe ever tell you that AT&T was committed to the Copper Center project? A: In any way, other than what I just said, no.").

²⁶ Trial Tr. at 753 ("Q: There was no commitment from any carrier to the project, true? A: Correct.").

²⁷ Trial Tr. at 1272 ("...I am not saying 100 percent, but pretty close to 99 that that was not going to be successful, given what I know about technology and the companies that I have worked with.").

²⁸ Trial Tr. at 1256 ("The first issue, just – and probable one of the – it is almost a nonstarter, would be one – it wasn't RDS's product, right? It was a joint – it was I don't know if it was a joint venture. It was a partnership, or agreement, or whatever it was, I don't know what their – what it is going to come out to be"... "Well the venture capitalist is going to look at that and say, 'Well, what do I own? And what do I get out of it?'").

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market was saturated with rugged smartphones by established companies such as Samsung and Motorola, which were not realizing huge success.²⁹ He testified that "...there were a number of apps there were almost identical to what was being presented, not all in one package, but apps that said, okay, where is the public land? Where is the private land?"³⁰ RDS provided no evidence of other rugged smartphone companies' revenues or profits, which may have provided some comparative data. The evidence at trial from both parties made it clear that overcoming these "essential hurdles" was necessary yet RDS presented little evidence that it could overcome the hurdles.

B. RDS had to secure \$6 to \$8 million in capital.

RDS needed to obtain \$6 to \$8 million in capital as a pre-launch financial commitment.³¹ Mr. Feucht testified that RDS met with one venture capitalist to request a capital commitment and was rejected.³² Mr. Feucht also admitted that RDS was never offered any financing from any source for this project.³³ RDS's witness and "COO designee," Paul Miller, testified that he had a "Rolodex of both industry people and enthusiasts" so he could help RDS secure such financing "fairly easily."³⁴ Mr. Miller testified about one of the business connections in his Rolodex who was going to be at a meeting: "Tommy Millner is a friend of mine. He is a friend of mine on Facebook. I

²⁹ Trial Tr. at 1260-68.

³⁰ Trial Tr. at 1259.

³¹ Trial Tr. at 150 (Q: Do you recall how much money each of the parties was required to invest before you even got to day one? A: I believe it was...\$6 to \$8 [million] from RDS...").

³² Trial Tr. at 291-292 ("Q: Well, there was at least one meeting, wasn't there, Mr. Feucht? A: One. Q: With Janney Montgomery? A: One, yes. Q: And thaw answer was no? A: Correct.")

³³ *Id.*(Q: Did anybody ever offer you – offer RDS anything to help finance its obligations to this project? A: No.)

³⁴ Trial Tr. at 707-08.

know his dogs. I know his wife..."³⁵ But aside from Mr. Miller's own conclusions, RDS offers no proof that Mr. Miller's assumption that he could secure capital "easily" was realistic or how Mr. Miller's Facebook friend would help them secure \$6 to \$8 million in capital. In fact, Mr. Miller admitted that outside funding for RDS would be difficult unless the Copper Center Project had a contractual relationship.³⁶ It is undisputed that the Copper Center Project lacked a definite contractual relationship. Trimble's expert also testified that securing \$6 to \$8 million was unrealistic given the lack of commitment to each of the essential roles.³⁷

C. RDS did not have a prototype of its software.

RDS needed to develop its software idea. To do this, RDS would need to hire approximately 40 software engineers to write the necessary software.³⁸ RDS offered no evidence that it had a job description, money to pay 40 engineers or that 40 qualified engineers were available. RDS presented no evidence that it had done any work to develop the software idea. In fact, Mr. Feucht testified that RDS could not build the software until the hardware was developed.³⁹ Yet the Copper Center Project did not have a commitment for hardware development. Mr. Beaton explained that the Copper Center Project was "squarely a seed stage...they were a business plan, if you will. Not even a

³⁵ Trial Tr. 689.

³⁶ Trial Tr. at 727-28.

³⁷ Trial Tr. at 1254-1258.

³⁸ Trial Tr. at 285-59, 727 (When discussing the number of engineers necessary, "Q: If I told you 43, would that sound familiar? A: That sounds familiar, yes.").

³⁹ Trial Tr. at 76 ("Operating systems are another thing that drive software development. So, we couldn't start building software until there was a hardware device that was actually, you know, this is the hardware, this is the screen size, this is the battery size, this is the operating system that we are going to be using. But until you know that operating system, you can't build it.").

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business plan.”⁴⁰ In short, the hardware role lacked a commitment and the software was still merely an idea, and until both the software and hardware were developed the Copper Center Project could not even begin the difficult interfacing process.⁴¹

D. The whiteboard photograph does not establish anything with reasonable certainty.

Aside from mere conclusions of witnesses, RDS offered no evidence as to the certainty of the photograph of the handwritten chart scribbled on the whiteboard. RDS alleges that the numbers represent Trimble’s offer to buy out RDS. RDS’s position is that “Trimble unquestionably valued RDS in December 2010 at \$38.5 million, the Copper Center Project met 75% of its revenue goal.”⁴² Trimble denies that it made such an offer. In its Executive Summary, RDS projected \$26 million in net revenue in four years and stated that it had “identified \$1.2 million in funding for a 10% stake in the company.”⁴³ Even if the Court accepted that the whiteboard photograph is in fact Trimble’s valuation of RDS, which it does not, the valuation of a company is not the same thing as reasonably certain lost profits. The Court finds that a disputed photograph

⁴⁰ Trial Tr. at 1246.

⁴¹ Trial Tr. at 1271 ([T]he experience that these other phone manufacturers had, the mating of software and hardware is very difficult. And, again, a lot of my technology companies try to figure out, okay, I can come up with a nice app, I can come up with the hardware, but how do I get it to interface with the hardware, with the phone...I see my wife on her Galaxy all the time, she is trying to break the screen because it is not working, it is not interfacing, the application doesn’t work. So, you have the Copper Center project trying to mate software that wasn’t developed yet, hasn’t even been involved, with hardware that hadn’t been developed. And yet you see the problems.).

⁴² Pl.’s Opp’n to Mot. for JNOV and for New Trial at 39.

⁴³ Pl.’s Trial Exhibit 5; see Trial Tr. at 40 (Mr. Feucht testified that “[t]here were some very rudimentary numbers that were gathered from statistical information that was publicly available online.” But, as with all other evidence in this case, RDS offers nothing except for Mr. Feucht’s conclusion to show how RDS established the “rudimentary numbers.”).

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of a partially illegible handwritten chart scribbled on a whiteboard does not establish a \$51.3 million lost profit damages award with any degree of certainty, reasonable or otherwise.

E. The profit and loss statement is based solely on preliminary statistical projections.

In addition to the whiteboard photograph, RDS relied heavily on the "P&L Statement" to prove lost profits.⁴⁴ RDS argues that the P&L is reliable because of Trimble's involvement in preparing and subsequent reliance on the projection.⁴⁵ RDS also points out that the projection was not prepared for trial but developed years earlier in the course of business.⁴⁶ RDS suggests that using U.S. government statistics as a base makes the numbers more reliable.⁴⁷ The Court disagrees that such evidence is enough to make the P&L numbers reasonably certain for an unestablished business and finds that that the P&L Statement was based solely on statistical projections and is not reliable evidence to support a \$51.3 million damages award. RDS does not offer the market survey that was used to prepare the P&L statement. RDS does not offer any data analysis supporting the projections in the P&L statement. RDS did not offer expert testimony regarding the reliability of the projections.

Remington, Trimble, and RDS all testified that the P&L statement was prepared to essentially give them a starting point for business discussions. Remington prepared the

⁴⁴ Pl.'s Trial Exhibit 28.

⁴⁵ Pl.'s Opp'n to Mot. for JNOV or for New Trial at 33-37.

⁴⁶ *Id.* at 33.

⁴⁷ *Id.*

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market survey and P&L statement to “begin building a business case around this idea.”⁴⁸ Marc Hill, Remington’s former Chief Marketing Officer, stated that the profit and loss statement contained “projections, financial projections.”⁴⁹ Trimble used the market survey and P&L statement “[to] build a business case, it might make sense, but it didn’t fit into, for example, the Trimble business, or it didn’t fit into any business areas...or maybe the resources are not there to make it happen.”⁵⁰

RDS did not present the market survey and its responses as evidence but asked its witnesses to testify about how it was conducted. Pat Boehnen testified that,

...some of the questions included in the survey were along the lines of: Who is your cell phone carrier today? What is your likelihood of changing cell phone carriers in order to have a smartphone of this type? And what is your willingness to pay? And we would give them a number of different price points to see where they would align.⁵¹

Mr. Boehnen noted that RDS, Trimble, and Remington all had the opportunity to give input into the market survey questions before conducting the survey.⁵² Mr. Feucht explained,

...[W]hen we were developing the market survey research was, all the parties put their input on it, because had to make sure that it was relevant to all the individual parties’ concerns. So it wasn’t just like Remington was off creating market research survey without direct input from all the partners.⁵³

⁴⁸ Trial Tr. at 363.

⁴⁹ *Id.*

⁵⁰ Trial Tr. at 824.

⁵¹ Trial Tr. at 383-84.

⁵² Trial Tr. at 380.

⁵³ Trial Tr. at 179-80.

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Remington testified that “the target was 3,000 responses...I think we got maybe 4200 responses during the window that it was open...”⁵⁴ At the time, Remington had “1.3 million hunters and shooters in [its] database that [it] could ping.”⁵⁵ Boehnen explained how Remington used the U.S. Bureau of Fish and Wildlife statistics to “build our numbers.” He stated,

“the U.S. Bureau of Fish and Wildlife publishes how many people apply for and receive a hunting license in the United States. So, you know that number. When you then query [Remington’s] database of known hunters and outdoor enthusiasts, and you ask them, ‘Do you own a smartphone,’ and 35 percent of them respond yes, you can then infer that of the 14.4 million U.S. hunters, probably about 35 percent of those all own a – at least one smart phone.”⁵⁶

Based on the answers to the survey questions, Remington’s data analyst on staff “pare[d] down those numbers to a point where we would identify with a high level of likelihood who the customer base would be, and their willingness and likelihood to purchase.”⁵⁷

RDS’s witness testified that the market research was “relied on in two primary ways. To help define what the product is, ultimately. And then to gauge success and build your business case. You need a foundation, an understanding of who the customer is, and what their probability of purchase is.”⁵⁸

⁵⁴ Trial Tr. at 389.

⁵⁵ Trial Tr. at 610.

⁵⁶ Trial Tr. at 384-85.

⁵⁷ Trial Tr. at 386.

⁵⁸ Trial Tr. at 382.

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The market survey and P&L statement assumed that the device would cost approximately \$350.⁵⁹ Mr. Chen testified that the cost for the device actually demanded would cost approximately \$1,200 per device to build.⁶⁰ RDS did not present evidence contradicting that the device would cost approximately \$1,200. And Mr. Chen testified that at this production cost, assuming a subsidy from a wireless carrier, the estimated price to the consumer would be approximately \$800.⁶¹ Mr. Chen testified that that the market survey indicated the demand for a device at this price was less than 1%.⁶² Yet, the numbers in the P&L statement are based on a \$350 device, not an \$800 device, and a significantly higher adoption rate.

Remington testified about how market surveys and subsequent preliminary data can help companies to consider the feasibility of projects.

You have to understand that Remington or Freedom Group or any other company has hundreds of ideas. But they started a big funnel. You have to bring the funnel down. So, a lot of projects get weeded out quickly. When the research came back, there is nothing there, or we can't get the cost right, because the consumer is only willing to spend \$100, but it costs us \$120 to make it.⁶³

RDS presented no evidence that the P&L statement was adjusted to reflect the discrepancy between the price surveyed and the actual cost of the device demanded by the survey. Instead, RDS offered the mere conclusions of its witnesses that the P&L

⁵⁹ Trial Tr. at 880-81.

⁶⁰ Trial Tr. at 877-86.

⁶¹ *Id.*

⁶² *Id.*

⁶³ Trial Tr. at 614.

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numbers were “conservative.” But mere conclusions of witnesses are insufficient evidence for a jury to estimate damages.⁶⁴

Trimble presented evidence that it was “still working on a cost model” and “needs a creditable P&L financial model to proceed.” Mr. Chen expressed his concern in an e-mail stating, “The team will also be conducting another comprehensive national survey to requalify the market potential and product adoption scenarios.”⁶⁵ But the market was not re-qualified and the profit and loss projections were never reanalyzed.

The P&L statement also failed to reflect the potential competition from other rugged smartphone companies.⁶⁶ Neal Beaton found it notable that the P&L failed to account for potential competition. He stated,

In the P&L...Pat Boehnen was in individual that put together the presentations for Remington. And in his questioning he was asked, ‘In the numbers you put together on that spreadsheet, did you incorporate the impact of new entrance [sic] into the market?’ He said, ‘No, not there.’...So, those numbers actually don’t reflect any of this potential competition.⁶⁷

Also, Remington withdrew from the Project and the Court finds it critical that the P&L statement numbers assume not only a \$350 device but also that Remington was committed to the Copper Center Project. The Copper Center Project never resurveyed the market or reanalyzed the P&L projections after Remington withdrew. RDS offers that Remington’s representatives, Pat Boehnen and Marc Hill, testified that the P&L

⁶⁴ *Geolar, Inc.*, 874 P.2d at 946.

⁶⁵ Pl. Trial Exhibit 58.

⁶⁶ Trial Tr. at 1266-1271.

⁶⁷ Trial Tr. at 1270.

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numbers were "accurate to a reasonable certainty"⁶⁸ and that it was prepared to invest.⁶⁹

Yet, Marc Hill testified about why Remington decided to abandon the Copper Center Project:

- "I met with Bob. Took him through the whole 120 pages. And his answer was – to me was, 'I spoke to Ivan' – I think he was the CEO of Verizon. He said, "There is no money in software. It is all in the hardware. We should not get into this business."⁷⁰

So Remington was out but the entire P&L statement is based on Remington being involved.

Pat Boehnen and Marc Hill both spoke to the significance of Remington's name.

Mr. Boehnen stated,

The group of people was actually from our Remington database, which we – Remington has a very, very loyal customer base. And we are able to query that database... There is over 1.3 million gun owners in that database. So, the demographic is the – is – we know to be exactly the demographic that we are targeting. So, to talk to those people is a very good indication of success in this marketplace.⁷¹

Marc Hill said, "[W]ith the Remington brand, Remington is a very trusted brand.

That is a 90-plus brand awareness. The brand has been around for 196 years. So, having that brand with the technology and be a first-mover was a huge step for us. *And the P&L was reflecting that.*"⁷²

⁶⁸ Trial Tr. at 459

⁶⁹ Trial Tr. at 386-87, 395, 411.

⁷⁰ Trial Tr. at 655.

⁷¹ Trial Tr. at 371.

⁷² Trial Tr. at 616 (emphasis added).

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V. CONCLUSION

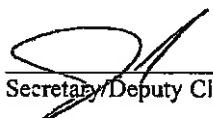
Under the circumstances of this case, RDS's lost profits are too speculative to support an award of lost profits for an unestablished business. Having viewed the evidence presented in the light most favorable to RDS, the Court finds that reasonable persons could not differ in their judgment that RDS, an unestablished business, did not prove any amount of lost profits with reasonable certainty. Trimble's Motion for Judgment Notwithstanding the Verdict is granted.

IT IS SO ORDERED.

DATED at Anchorage, Alaska this 29th day of Jan 2015.


CATHERINE M. EASTER
Superior Court Judge

I certify that on 1/29/15
a copy of the above was mailed to:


Secretary/Deputy Clerk

J. Fannon
G. Parvin
G. Kentch
S. Orlansky
D. Elms
J. Leik

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

RECREATIONAL DATA SERVICES, INC.,

Plaintiff,

v.

TRIMBLE NAVIGATION LIMITED, a
California Corporation,

Defendant.

CASE NO. 3AN-11-10519 CI

CORRECTED FINAL JUDGMENT

The Court having granted defendant Trimble Navigation Limited's Motion for Judgment Notwithstanding the Verdict, it is hereby ORDERED, ADJUDGED AND DECREED that plaintiff Recreational Data Services, Inc. is denied any recovery in this action, and all of its claims and causes of action are dismissed with prejudice.

The Final Judgment in this action dated October 22, 2014 is vacated.

Defendant Trimble Navigation Limited shall recover from and have judgment against plaintiff Recreational Data Services, Inc. as follows:

A. Attorney's Fees \$327,001.72

Date Awarded: _____

Judge: _____

FINAL JUDGMENT

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Exc. 234

PERKINS COIE LLP
1029 W. Third Avenue, Suite 300
Anchorage, Alaska 99501
907.279-8561 / Facsimile 907.276.3108
APR 02 2015

B. Costs \$318,168.30
Date Awarded: _____
Clerk: _____
C. TOTAL JUDGMENT \$645,170.02
D. Post-Judgment Interest Rate 3.75%

DATED at Anchorage, Alaska this 18th day of March, 2015.


Catherine M. Easter
Superior Court Judge

4/20/15

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Exc. 205

CERTIFICATE OF SERVICE

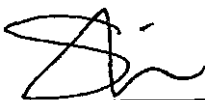
This is to certify that on April 2, 2015 a true and correct copy of the CORRECTED FINAL JUDGMENT was served by U.S. Mail upon the following:

Joshua F. Fannon
Law Office of Joshua F. Fannon
550 S. Alaska Street, Suite 203
Palmer, Alaska 99645

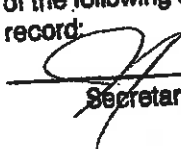
Gregory Parvin
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Anchorage, Alaska 99501

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Law Office of Gavin Kentch, LLC
601 West Fifth Avenue, Second Floor
Anchorage, Alaska 99501



Tae Kim

I certify that on 4/22/15
a copy of the above was mailed to each
of the following at their addresses of
record:

Secretary/Deputy Clerk
Fannon
Parvin
Kentch
Orlansky
Elms
Leik

CERTIFICATE OF SERVICE FOR CORRECTED FINAL JUDGMENT
Recreational Data Services v. Trimble Navigation Ltd., et al.
Case No. 3AN-11-10519 CI
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