IN THE SUPREME COURT OF THE STATE OF ALASKA

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

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

BRIEF OF APPELLEE TRIMBLE NAVIGATION LIMITED

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Alaska Statute 32.06.202. Formation of partnership.

(a) Except as otherwise provided in (b) of this section, the association of two or more persons to carry on as co-owners a business for profit forms a partnership, whether or not the persons intend to form a partnership.

(b) An association formed under a statute other than this chapter, a predecessor statute, or a comparable statute of another jurisdiction is not a partnership under this chapter.

(c) In determining whether a partnership is formed, the following rules apply:

(1) joint tenancy, tenancy in common, tenancy by the entirety, joint property, common property, or part ownership does not by itself establish a partnership, even if the co-owners share profits made by the use of the property;

(2) the sharing of gross returns does not by itself establish a partnership, even if the persons sharing them have a joint or common right or interest in property from which the returns are derived;

(3) a person who receives a share of the profits of a business is presumed to be a partner in the business, unless the profits are received in payment

(A) of a debt by installments or otherwise;

(B) for services as an independent contractor, or of wages or other compensation to an employee;

(C) of rent;

(D) of an annuity or other retirement or health benefit provided to a beneficiary, representative, or designee of a deceased or retired partner;

(E) of interest or other charge on a loan, even if the amount of payment varies with the profits of the business, including a direct or indirect present or future ownership of the collateral, or rights to income, proceeds, or increase in value derived from the collateral; or

(F) for the sale of the good will of a business or other property by installments or otherwise.

INTRODUCTION

In this appeal, Recreational Data Services, Inc. ("RDS") asks this Court to reinstate a verdict that awarded RDS $51.3 million in lost profits, based on projected sales of a product that never existed. Alaska law does not support RDS's effort to reverse the Superior Court's judgment.

Brian Feucht had an idea to use GPS technology to allow outdoorsmen to access hunting and fishing regulations while in the field. Mr. Feucht formed RDS to develop this idea. In 2009-2010, RDS, Trimble Navigation Limited and Remington Arms Company explored the possibility of manufacturing a smartphone that would include this feature, among others. The parties would eventually call this venture the "Copper Center Project."

By early 2011, both Remington and Trimble had stopped pursuing the Copper Center Project, as RDS concedes they had the right to do. At that point, RDS had no one to manufacture the phone, no money or employees to develop the necessary software, no one to market or distribute the phone, and no wireless carrier to subsidize the phone's cost to consumers. RDS admitted that each of these was a fatal impediment to the Project. The Copper Center Project never resulted in the design, manufacture, or sale of a single smartphone.

RDS sued Trimble, claiming that Trimble's actions caused RDS to lose $111 million in profits that RDS claimed it would have earned over a five year period if the Copper Center Project smartphone had hit the market. The jury awarded RDS $51.3

million in lost profit damages, but the Superior Court granted Trimble's motion for judgment notwithstanding the verdict and entered judgment in Trimble's favor.

JNOV should be affirmed because the jury awarded RDS speculative lost future profits from the hypothetical sale of a product that never existed. The jury's award of lost profits damages violated well-established legal principles that prohibit speculative awards of lost profits to new business ventures. The law requires specific categories of evidence to establish lost profits for a new business venture. RDS failed to submit any of the required evidence, and instead relied solely on the venture's own statistical projections of future profits. Moreover, RDS failed to prove a causal relationship between Trimble's alleged conduct and the claimed loss of future profits, or the essential elements of RDS's liability theories.

FACTS

Trimble submits the following undisputed facts to supplement the "Statement of Facts" in Appellant's Brief.

A. RDS Pitches the Copper Center Project to Trimble.

In or around January 2008, Brian Feucht had an idea to use GPS technology to provide hunters and fishermen with access to hunting and fishing regulations while in the field. [Tr. 20-22]. Mr. Feucht formed RDS solely to pursue this idea, and obtained licensee rights to a patent designed for this purpose. [Tr. 27-28; 280-81]. RDS did not have any other assets, and had never conducted any business before. [Tr. 245-46].

In February 2009, RDS contacted a Trimble subsidiary about an idea for a device that would include this function, and sent it an Executive Summary of RDS's idea.

[Exhs. 1; 6].[1] Trimble directed RDS's inquiry to Char-Fong Chen, the Director of Strategic Business Development for Trimble's Mobile Computer Solutions division. [Tr. 821-22]. Trimble agreed to work on the project with RDS, but had numerous reservations from the beginning about whether the idea was viable. [Tr. 59-60; 70; 281-83; Exh. N; Exc. 264]. Importantly, Trimble was never required to pursue or participate in the Copper Center Project. Mr. Feucht admitted that Trimble was "permitted [ ] to withdraw from the Copper Center Project and decline to go forward with it at any time" [Tr. 241], which RDS again admits in its Appellant's Brief.[2]

B. RDS and Trimble Execute a Mutual Non-Disclosure Agreement.

Trimble's and RDS's next step was to execute a Mutual Non-Disclosure Agreement ("NDA") in March 2009. [Exc. 149-50]. The NDA was the only written contract between RDS and Trimble, and it was never amended or terminated. [Tr. 268]. The NDA did not require Trimble to go into business with RDS, and it allowed Trimble to develop products that were similar to, or competitive with, whatever might result from the Copper Center Project. [Tr. 267-68; Exc. 150 at § 6.5].

The NDA prohibited disclosure of a limited category of "Confidential Information" [Exc. 149 at § 4], but RDS was required to follow certain procedures to trigger those protections. For written information, RDS was required to affix a written

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[1] The Trimble subsidiary was named Tripod Data Systems, Inc. The subsidiary later merged with Trimble Navigation Limited. In this brief, appellee will refer to Tripod Data Systems, Inc. and Trimble Navigation Limited as "Trimble."

[2] Appellant's Brief at 18 ("RDS did not claim that any contract obligated Trimble to build a product with RDS…").

statement that the information was confidential. For information that was orally disclosed, RDS was required to state that the information was confidential at the time of disclosure and then confirm it in writing. [Exc. 149 at § 3].

The NDA also identified certain categories of information that were not "Confidential Information." [Exc. 149 at § 2]. This included information already known to Trimble before RDS's disclosure of the information, information that Trimble developed independently, information that became publicly known without any wrongful act by Trimble, and information that Trimble lawfully received from anyone who was not a party to the NDA. [Exc. 149 at § 1.1].

C. Remington Agrees to Participate in the Copper Center Project.

One of Trimble's biggest concerns about the Copper Center Project was how any product would get to market, and Mr. Feucht admitted that this was a "very valid concern[]." [Tr. 59-60; 70; 281-83; Exh. N; Exc. 264]. Mr. Feucht also admitted that the Copper Center Project would be dead without someone to handle its marketing and distribution. [Tr. 245]. Thus, Mr. Feucht contacted Mark Hill (VP of Marketing) and Patrick Boehnen (Product Development Manager) at Remington Arms as a candidate to handle marketing and distribution. [Tr. 70-71].

The parties agreed to explore a possible venture in which RDS would handle development and creation of the software, Trimble would handle design and manufacture of the device, and Remington would handle marketing and distribution. [Tr. 74]. RDS knew that having someone responsible for each of these three functions

was necessary for the Copper Center Project to proceed. [Tr. 244-45; 253-55].

D. RDS, Trimble, and Remington Refer to Each Other as "Partners."

Throughout their work on the Copper Center Project, the parties frequently referred to each other as "partners" on the Project. There was significant disagreement at trial over what the parties intended that term to mean. But Mr. Feucht admitted that the parties never agreed to become co-owners of a business [Tr. 263], the definition of a partnership under Alaska law.[3]

In December 2009, several months into the Project, Remington drafted and circulated a Product Alliance Agreement. [Exc. 248-261]. This document was reviewed by both Mr. Feucht and Chris Cyphers, RDS's legal counsel, and then forwarded to Trimble. [Exh. M; Tr. 275-76]. The Product Alliance Agreement states that the parties' relationship "*is not, nor shall it be deemed to be, a separate legal entity or a partnership or any similar arrangement.*" [Exc. 252; 271; Exh. M] (emphasis added)].

Mr. Feucht testified that the purpose of the Product Alliance Agreement was "so that each party would know exactly what it was doing to clearly define the relationship of the parties in a contractual manner…" [Tr. 271]. And Mr. Feucht described the Product Alliance Agreement as "Final" before sending it to Trimble. [Exh. CCC; Exc. 267-280]. Mr. Boehnen signed the Product Alliance Agreement, and testified that

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[3] AS 32.06.202.

Remington "wanted RDS to sign and Trimble to sign to agree to that exact same relationship and that exact same structure -- we are not partners." [Tr. 486].

E. RDS Develops Financial Projections for the Copper Center Project.

The parties needed to determine whether and to what extent there might be any interest in the contemplated device. Remington sent out surveys to a group of hunters and fishermen pulled from Remington's database. [Tr. 100-01; 370-71]. The surveys were designed to discover two things: (1) what features hunters and fishermen wanted from a ruggedized smartphone; and (2) how much they were willing to pay for it. [Tr. 502-03]. The survey data suggested that the market would pay around $300 for a ruggedized smartphone that had, among other features, an environmental sensor, a laser range finder, multi-mode communication (cell, satellite, and emergency locator), and XM real-time weather. [Tr. 502-03, 507; Exc. 167; 246].

Based on the results of this survey data, documents called "Copper Center Project Financial Performance Models" (the "P&L Statements") were created for each of RDS, Trimble, and Remington. [Exc. 180-86]. The parties knew, however, that the production costs and expenses reflected in those P&L Statements were only "estimates." [Tr. 415; 417].

F. Trimble's Alleged Offer to Acquire RDS.

RDS claims that Trimble offered to acquire RDS in or around December 2010, and that Trimble's valuation of RDS is reflected in the photograph of a whiteboard sketch prepared by Mr. Feucht and Steve Wolff, Trimble MCS's Controller. [Tr. 129-

31; Exc. 187-88]. Although Trimble and RDS disputed at trial whether Trimble ever made an offer to acquire RDS, there was no disagreement about what the figures in the whiteboard photograph represented.

First, Mr. Feucht admitted that the "valuation" figures were RDS's projected or potential ***revenues.*** [Tr. 134-35]. Second, Mr. Feucht admitted that these valuation estimates were based on "spreadsheets" reflecting RDS's projected performance that he had provided to Mr. Chen and Mr. Wolff. [Tr. 134-36]. Lastly, Mr. Feucht thought the valuations were wrong. Mr. Feucht told Trimble that he was "not sure that NPV is the correct way to value RDS. I will come back with some arguments." [Exc. 262]. Similarly, Mr. Feucht testified that he "didn't think that [Trimble's] valuation methodology [for RDS] was appropriate for what we were doing." [Tr. 138].

G. Remington Abandons the Copper Center Project.

In late 2010 or early 2011 Bob Nardelli, Remington's new CEO, pulled it out of the Copper Center Project. [Tr. 293; 654]. Remington abandoned the Copper Center Project because Mr. Nardelli did not believe that it would be profitable and did not believe that the contemplated software would have any value. [Tr. 355; 497; 501-02; 654-55]. Mr. Feucht testified that "if there wasn't a marketing partner for the solution, both myself and Trimble didn't think we could bring the Copper Center Project to fruition." [Tr. 104]. Mr. Feucht knew and admitted that Remington's withdrawal killed the Copper Center Project. [Tr. 245].

H. Paul Miller Joins RDS as "Chief Operating Officer-Designee."

When Remington quit, Mr. Feucht contacted Paul Miller about providing consulting services to the Copper Center Project and eventually taking a position as RDS's Chief Operating Officer. [Tr. 104-06]. Mr. Feucht chose Mr. Miller for this role partly because Mr. Miller had contacts at Cabela's, which Mr. Feucht imagined as a replacement for Remington. [Tr. 104-06]. When Mr. Miller approached Cabela's about the idea, Cabela's told him that they were "not excited about getting into the cell phone market." [Exh. RR; Tr. 729-31]. Mr. Miller never signed a consulting or employment agreement with RDS because there was never a "meeting of the minds and agreements between the principals" on the Copper Center Project [Tr. 724-25], and because the Project never changed "from concept to a contract." [Tr. 726].

I. The Trimble/Cabela's Recon Hunt Application Project.

In the Fall of 2010, Mr. Chen learned that another division of Trimble called Trimble Outdoors was jointly developing with Cabela's a software application targeted to hunters and fishermen. [Tr. 901-03]. The Copper Center Project and the Recon Hunt Application project were fundamentally different. The Copper Center Project involved the potential design, manufacture, and sale of an integrated, ruggedized smartphone pre-loaded with RDS's anticipated software [Tr. 27-28; 246], while the Recon Hunt Application project involved only the sale of software applications that a purchaser would download to their own phone. [Tr. 112-13; 1064-65]. The Recon Hunt Application launched in March 2011. [Tr. 1088].

Mr. Chen told Mr. Feucht that the Trimble Outdoors/Cabela's product was a smartphone application that would be targeted to the hunting and fishing markets. [Tr. at 300]. Mr. Feucht responded by stating that he was "very concerned about Trimble Outdoors" and that "[m]aking the jump to this market is not at all logical based on their prior work." [Exc. 247]. Mr. Feucht testified that this information "just didn't sit right with [him]" [Tr. 119], and that it "just . . . started to stink." [Tr. 122].

J. RDS Pitches the Copper Center Project to Cabela's, but Cabela's Declines to Participate.

In late March 2011, RDS met with Cabela's to pitch it on being the replacement for Remington. Trimble did not participate in this meeting because it needed time to reconcile any potential conflicts between the Copper Center Project and the Recon Hunt project because they both might potentially involve Cabela's. [Tr. 696-97; 699-700]. RDS stated that it did not want to "short-circuit those considerations" [Exc. 243], and Mr. Miller testified that he understood that Trimble needed to get this issue resolved. [Tr. 742].

Cabela's declined to participate in the Copper Center Project. Cabela's told RDS that "strategically, it does not fit for us to put the necessary resources in a business sector that we have so little experience in." [Exc. 237]. Tom Rosdail, Cabela's Vice-President of Marketing, testified that Cabela's declined because it was "not a telecommunications company," it "[did not] understand that piece of business," the project required a "huge outlay of cash," and was a "high risk on a product that has a short shelf life." [Tr. 1313]. Chris Sprangers, Cabela's Marketing Manager, similarly

testified that it declined because the Copper Center Project was "far from our core business, which we never intended on selling cell phones." [Tr. 1317-18].

Mr. Miller admitted that Cabela's declined to participate in the Copper Center Project for the same reasons it had told him when he first contacted them – that Cabela's didn't want to get into the mobile phone business. [Tr. 730-31]. And Mr. Feucht admitted that after Remington killed the Copper Center Project, Cabela's had declined to resurrect it. [Tr. 245; 313-14].

K. RDS Sues Trimble and Cabela's.

After the effort to interest Cabela's in the Copper Center Project failed, Trimble and RDS did not pursue the project any further. In October 2011, RDS filed this lawsuit against Trimble and Cabela's, claiming that certain actions by Trimble and Cabela's caused RDS to lose $111 million in future profits that it would have earned if the Copper Center Project smartphone had been designed, manufactured, and sold.[4] Throughout this lawsuit, RDS has steadfastly sought only one category of damages: lost future profits.[5]

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[4] Cabela's settled with RDS shortly before trial.

[5] Prior to trial, the Superior Court ordered RDS to specify the damages it was seeking, as required by Rule 26(a). [R. 2236-37]. RDS subsequently asserted that its compensatory damages were "computed as follows: $111,666,973.00 in lost profits." [R. 1406]. *See also* RDS's Trial Brief [R. 2446, 2449-51] (RDS's compensatory damage claim is for lost profits); RDS's Proposed Jury Instructions 19 & 20 [R. 2442-43] ("The loss claimed by RDS is Lost Profit."). *See also* Tr. 713 (RDS's counsel confirming to the Superior Court that lost profits are the only damages RDS seeks).

STANDARD OF REVIEW

This Court "review[s] *de novo* the grant of a directed verdict and the grant of a judgment notwithstanding the verdict to determine whether the evidence, viewed in the light most favorable to the non-moving party, is such that reasonable persons could not differ in their judgment."[6] A directed verdict or JNOV may be affirmed when the damages are excessive or not supported by the evidence presented at trial. In that case, the question is whether, after reviewing the record in the light most favorable to the non-moving party, any reasonable juror would award those damages.[7]

This Court should review "*the full record presented to the jury* in the light most favorable to the non-moving party" to determine whether a reasonable juror could find in that party's favor.[8] RDS incorrectly suggests that this Court should ignore uncontested evidence that is contrary to the jury's verdict, and highlights the statement in *Cameron v. Chang-Craft* that "generally the only evidence that should be considered is the evidence favorable to the non-moving party."[9] But this general observation

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[6] *L.D.G., Inc. v. Brown*, 211 P.3d 1110, 1117-1118 (Alaska 2009).

[7] *Wiersum v. Harder*, 316 P.3d 557, 570 (Alaska 2013) (remanding for entry of JNOV after concluding that a jury award of $161,000 for restoration costs was unreasonable in light of evidence introduced by the moving party that the property could be reasonably restored for much less).

[8] *Id.* at 568-70 (emphasis added).

[9] *See* Appellant's Brief at 23, citing *Cameron v. Chang-Craft*, 251 P.3d 1008, 1017-18 (Alaska 2011); *see* also Appellant's Brief at 26 (suggesting that "conflicting evidence" need not be considered).

should not be read in conflict with the longstanding rule that the Court should review "the full record presented to the jury."[10] If the full record contains uncontradicted or unimpeached evidence supporting the moving party, that evidence must be considered.[11]

ARGUMENT

The Superior Court granted JNOV after determining that RDS failed to prove the fact or amount of its alleged lost profits damages. This Court can affirm that judgment on any basis that is supported by the record.[12] Because the Superior Court's order addressed damages, and because damages are also the focus of RDS's appeal brief, Trimble will address the damages issues first. Trimble will then address RDS's failure to prove Trimble's liability on any claims.

I. The Superior Court Properly Granted JNOV Because RDS Failed to Prove the Fact or Amount of Its Alleged Damages With Reasonable Certainty.

A fundamental concept in both tort and contract law is that a damage award

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[10] *Wiersum*, 316 P.3d at 562-63 (citing *Cameron*). The fact that *Wiersum* cited *Cameron* for the proposition that the Court should review "the full record presented to the jury" suggests that the two cases are not in conflict. *See also Wal-Mart, Inc. v. Stewart*, 990 P.2d 626, 632-34 (Alaska 1999) (court should review "the evidence presented at trial" in light most favorable to nonmoving party).

[11] *See Wiersum*, 316 P.3d at 568-70 (remanding for entry of JNOV after concluding that a jury award of $161,000 for restoration costs was unreasonable in light of evidence introduced by the moving party that the property could be reasonably restored for much less). *See also Reeves v. Sanderson Plumbing Prod., Inc.*, 530 U.S. 133, 150-51 (2000) (on appeal, courts should review all evidence in the record, in the light most favorable to the non-moving party).

[12] *See Ennen v. Integon Indem. Corp.*, 268 P.3d 277, 281 (Alaska 2012) ("We may affirm the superior court on any basis appearing in the record.") (reviewing directed verdict).

cannot be the product of speculation or conjecture, either with respect to causation or amount. "Damages should not be awarded on the basis of speculation, surmise or conjecture."[13] This Court has repeatedly rejected speculative damage awards.[14]

RDS had to prove that Trimble's alleged false statements[15] or its alleged breach of contract[16] caused the claimed damages. A plaintiff must show more than just the

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[13] *Orsini v. Bratten*, 713 P.2d 791, 794 n.6 (Alaska 1986). *See also Central Bering Sea Fishermen's Ass'n v. Anderson*, 54 P.3d 271, 279 n. 20 (Alaska 2002) (damages for future losses cannot be based on speculation or conjecture); *Transamerica Title Ins. Co. v. Ramsey*, 507 P.2d 492, 497 (Alaska 1973) (in misrepresentation actions, damages must not be speculative or contingent).

[14] *See, e.g., DeNardo v. GCI Commc'n Co.*, 983 P.2d 1288, 1290-91 (Alaska 1999) (conjecture with respect to causation of damages); *Alaska Travel Specialists, Inc. v. First Nat'l Bank of Anchorage*, 919 P.2d 759, 766 (Alaska 1996) (speculative lost profits); *Ben Lomond, Inc. v. Schwartz*, 915 P.2d 632, 636-37 (Alaska 1996) (speculation as to causation and amount); *Geolar, Inc. v. Gilbert / Commonwealth, Inc. of Mich.*, 874 P.2d 937, 946 (Alaska 1994) (speculative award of lost profits); *Conam Alaska v. Bell Lavalin, Inc.*, 842 P.2d 148, 157 (Alaska 1992) (speculative causation of damages); *Lee Houston & Associates, Ltd. v. Racine*, 806 P.2d 848, 855 (Alaska 1991) (speculation that plaintiff would have been able to foreclose on property and outbid others at an auction); *Orsini*, 713 P.2d at 794 (speculation regarding plaintiff's future real estate investments); *Guard v. P & R Enterprises, Inc.*, 631 P.2d 1068, 1071 (Alaska 1981) (speculative lost profits); *City of Whittier v. Whittier Fuel & Marine Corp.*, 577 P.2d 216, 224 (Alaska 1978) (speculative causation).

[15] *Anchorage Chrysler Center, Inc. v. DaimlerChrysler Motors Corp.*, 221 P.3d 977, 990-91 (Alaska 2009) (requiring proof that claimed loss was caused by plaintiff's reliance on false statement); *Barber v. Nat'l Bank of Alaska*, 815 P.2d 857, 862-63 (Alaska 1991) (misrepresentation claim failed because plaintiff failed to prove a causal link between alleged false statement and alleged damages); *Transamerica Title*, 507 P.2d at 497 (loss claimed for misrepresentation must be proximately caused by defendant's false statement).

[16] *Fairbanks North Star Borough v. Kandik Constr., Inc.*, 795 P.2d 793, 798 (Alaska 1990) ("Recovery of damages for a breach of contract is not allowed unless acceptable evidence demonstrates that the damages claimed resulted from and were

mere possibility that it would have earned the alleged damages but for the defendant's actions; it must also prove that "the damages [it] alleges are not so remote from the alleged breach as to be conjectural."[17]

The only damages that RDS ever claimed were lost future profits.[18] RDS had the burden of proving its claim for lost profits with reasonable certainty.[19] "Reasonable certainty requires a showing of actual loss of profits and a reasonable basis upon which to compute an award."[20] The "reasonable certainty" requirement limits recovery of lost profits to only those businesses or projects that are otherwise viable and likely to succeed. "[C]laims which are truly speculative, in that they depend on unrealized contingencies, unproved products, or the like, are screened out by the requirements of reasonable certainty, while damages which can be proven are allowed."[21]

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caused by the breach"); *Winn v. Mannhalter*, 708 P.2d 444, 450 (Alaska 1985) ("Causation is a required element in an action for breach of contract"); *City of Whittier*, 577 P.2d at 224 (requiring certainty with respect to causation of contract damages); Restatement (Second) of Contracts § 347 and comment e ("The injured party is limited to damages based on his actual loss caused by the breach"). *See also DeNardo*, 983 P.2d at 1290-91 (failure to prove causation with respect to contract damages).

[17] *DeNardo*, 983 P.2d at 1290.

[18] *See* footnote 5 *supra*.

[19] *Azimi v. Johns*, 254 P.3d 1054, 1065 (Alaska 2011); *Geolar*, 874 P.2d at 946; *Guard*, 631 P.2d at 1072.

[20] *Johnson v. Alaska Dept. of Fish & Game*, 836 P.2d 896, 910 (Alaska 1991). *See also City of Whittier*, 577 P.2d at 224 ("Two aspects of certainty are involved: certainty as to amount and certainty as to causation…").

[21] *State v. Hammer*, 550 P.2d 820, 824-25 (Alaska 1976) (quoted in *Alaskasland.com, LLC v. Cross*, No. 7057, slip op. at 21 n. 40 (Sept. 25, 2015).

This Court's decisions in cases involving lost profits claims for new business ventures reflect these principles. In *Guard v. P & R Enterprises*, the Court confirmed that lost profits cannot be awarded if they are the result of speculation.[22] To avoid speculative awards, the Court held that lost profits for a new business "must be proven with *reasonable certainty,*" and identified the evidence that is required to establish lost profits for a new business.[23] The Court observed that if the plaintiff was "allowed to recover . . . without establishing *the certainty of profits*, the [defendant] would become the guarantors of [the plaintiff's] ability to make a future profit in their new venture."[24]

Similarly, in *Alaska Travel Specialists, Inc. v. First Nat'l Bank of Anchorage*,[25] a travel agency alleged that the defendant bank wrongfully prevented it from proceeding with a new reservation center, and claimed that the agency would have otherwise made $40 million in profits from the new venture. The Court reiterated that "[a]n award of lost profits is not appropriate if it is the result of speculation" and affirmed summary judgment against the lost profits claim, which it characterized as "wildly speculative."[26] And in *Geolar v Gilbert/Commonwealth of Michigan*,[27] a jury awarded a contractor lost

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[22] 631 P.3d at 1071.

[23] *Id.* at 1072 (emphasis added); *see also* Section I C infra.

[24] *Id.* at 1073 (emphasis added).

[25] 919 P.2d 759 (Alaska 1996).

[26] *Id.* at 766.

[27] 874 P.2d 937 (Alaska 1994).

profits for its work in an area where it had no prior experience and no track record. This Court repeated the rule that lost profits must be proved with reasonable certainty, concluded that the contractor's claim was simply "too speculative to support an award of lost profits," and vacated the jury's lost profits damage award. [28]

Alaska's stringent requirements for proving lost future profits are consistent with other jurisdictions, particularly when lost profits are sought by a new or untested business. In *MindGames, Inc. v. Western Pub. Co., Inc.*, for example, Judge Posner stated that "a start-up company should not be permitted to obtain pie-in-the-sky damages upon allegations that it was snuffed out before it could begin to operate ... capitalizing fantastic earnings in to a huge present value sought as damages...."[29] Another federal court summarized the law and logic behind these rules:

> The rationale for applying heightened skepticism to new businesses' claims of lost profits is clear: the commercial success of a new venture should be determined in the marketplace, not in the courtroom. An endorsement of the alternative would permit start-up corporations to reap unearned profits without bearing the costs and risks that every other entrepreneur must shoulder. To avoid the result, even courts that have abandoned the 'new business' rule routinely reject lost profit claims from unestablished businesses.[30]

Courts in many jurisdictions have adopted a skeptical eye and heightened standards of

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[28] *Id.* at 946.

[29] 218 F.3d 652, 658 (7th Cir. 2000).

[30] *Alphamed Pharm. Corp. v. Arriva Pharm., Inc.*, 432 F.Supp. 2d 1319, 1340 (S.D.Fla. 2006), *aff'd*, 294 Fed. Appx. 501 (11th Cir. 2008) (citing cases).

proof when a new business seeks to recover lost future profits as damages.[31]

Even if RDS met its burden of proving that a breach by Trimble caused lost profits, RDS also had to prove the amount of its lost profits with reasonable certainty. Although RDS was not required to prove an exact amount of its alleged lost profits, it was required to present evidence that gave the jury a reasonable basis for determining the amount of damages.[32] "The trier of fact must be able to determine the amount of lost profits from evidence on the record and reasonable inferences therefrom, not from mere speculation and wishful thinking."[33]

A. The Jury's Award of Lost Profits Violated the Prohibition Against Awarding Speculative Lost Future Profits to a New Business.

The core premise of RDS's lost profits argument is that "but for" Trimble's actions, an integrated, ruggedized smartphone would have been designed, manufactured, certified, and launched, and would have generated enormous profits for

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[31] *See, e.g., Mrozek v. Intra Financial Group*, 699 N.W.2d 54 (Wis. 2005) (lost profits from new business were speculative where plaintiff did not present evidence of net profits of a comparable business); *Hernandez v. Sovereign Cherokee Nation Tejas*, 343 S.W.3d 162 (Tex. App. 2011) (lost profits damages claimed from casino project that never existed were too speculative to be recovered, even though defendant's projections forecasted substantial profits); *Resort Video, Ltd. v. Laser Video, Ltd.*, 35 Cal. App. 4th 1679 (1995) (claimed lost profits from new venture to develop presentations of resort hotels on laser discs speculative where no evidence of profits or operating history introduced); *Thoroughbred Ford, Inc. v. Ford Motor Co.*, 908 S.W.2d 719 (Mo. App. 1995) (profits from new auto dealership were speculative where there was no proof that average performance of auto dealerships in the area, which was a reliable indicator of how any particular auto dealership would perform).

[32] *Ben Lomond,* 915 P.2d at 636; ; *City of Palmer v. Anderson*, 603 P.2d 495, 500 (Alaska 1979); *City of Whittier*, 577 P.2d at 222, 224.

[33] *Hammer*, 550 P.2d at 824-25.

RDS.[34] At trial, RDS admitted that numerous events had to occur before a smartphone could ever be launched, but never presented any evidence that any (much less all) of these contingencies could and would have ever been satisfied. RDS's damages claim required the jury to speculate that the Copper Center Project would have overcome all of the following hurdles and generated the massive profits that RDS imagined.

First, after Remington abandoned the Copper Center Project, it was never replaced as the necessary marketing and distribution channel. [Tr. 293, 497]. RDS never complained about Remington withdrawing from the Copper Center Project, and Remington believed it was fully permitted to do so. [Tr. 294, 300] And RDS admits that Trimble had nothing to do with Remington quitting on the Copper Center Project. [Tr. 294]. It is undisputed that the Copper Center Project required a commitment from someone to perform the marketing and distribution functions that Remington had abandoned. [Tr. 245 (the Project "was dead, unless someone could be found to fill that role")].

In its brief, RDS argues that there was some evidence that it would have found someone else for marketing and distribution.[35] But Mr. Feucht admitted that once Remington quit, Cabela's was the Project's "only one real logical partner" for these roles. [Tr. 105]. In the end, Cabela's declined to join the Copper Center Project

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[34] *See* Appellant's Brief at 31 ("Trimble's actions damaged [RDS] by depriving RDS of the ability to capitalize on first-mover advantage in the sale of either standalone apps or a specialized phone preloaded with apps that RDS would design.")

[35] Appellant's Brief at 34.

because, among other reasons, it "was a high risk on a project that has a short shelf life." [Tr. 720; 1313; 1317-18]. Cabela's decision left the Copper Center Project with no one to perform the essential marketing and distribution functions, and Mr. Feucht admitted that there were no other viable candidates for those roles.

Second, RDS did not have its required $6 to $8 million in pre-launch financing. RDS admitted that it was required to come up with as much as $8 million as its pre-launch financial commitment to the Copper Center Project. [Tr. 255-57; 289]. Mr. Feucht also admitted that the Copper Center Project would go nowhere unless and until it did. [Tr. 255-57; 289]. Mr. Miller similarly testified that RDS would have to secure $6 to $8 million in funding just to get "this project to go." [Tr. 726-27]. Mr. Feucht admitted that RDS was rejected by the only funding source it ever met with, and that RDS was never offered any financing from any source. [Tr. 289-91].

RDS suggests that it would have been able to find this money somewhere, and cites Mr. Miller's testimony that he could do so with ease.[36] But Mr. Miller admitted that outside funding for RDS was not possible because the parties never executed a final contract relating to the Project. [Tr. 727-28]. And when Remington's departure killed the Copper Center Project, and Cabela's declined to resurrect it, a final contract for the Project was no longer possible.

Third, Mr. Feucht admitted that RDS was required to write software for the Copper Center Project. [Tr. 246]. Mr. Miller testified that this would require

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[36] Appellant's Brief at 35.

approximately 40 engineers, and hiring those engineers was RDS's responsibility. [Tr. 727 (estimating that RDS would need to hire 43 software engineers); *see also* Exc. 180-86 (identifying RDS's "pre-launch headcount" at 39)]. Even assuming RDS had been able to raise the millions necessary to hire these employees, they would still have to be located and hired to do the work. RDS offered no evidence that 40 qualified software engineers were available to the Copper Center Project, much less that RDS could afford to hire and pay them, much less that any of them were interested in working for RDS.

Fourth, the Copper Center Project never developed realistic financial and sales projections for its proposed smartphone. Mr. Feucht testified that "[t]o develop the software, I needed to know how many phones we were going to sell" and that having realistic sales projections "was the deciding criteria on the hardware and marketing component" of the Project. [Tr. 259-60]. Mr. Feucht and Mr. Boehnen also admitted that unless all parties were comfortable with the projected financials for the Project, the hardware component would not go forward. [Tr. 260-61; 508].

Mr. Hill testified that the "user adoption rate" for the Copper Center Project was "the extent to which a user would actually go out and buy the hardware and software that was going to be sold in this project." [Tr. 652-53]. Mr. Hill then admitted that this number was "unknown and unknowable" and that the parties had "no idea" what it might be. [Tr. 648-49; 652-53]. Mr. Boehnen similarly admitted that the user adoption rate was unknown and unknowable, and that he had discussed this fact with RDS and Trimble many times. [Tr. 489-90]. Mr. Boehnen described this ignorance about the

user adoption rate as a "Project Risk." [Tr. 489-90; Exc. 266].

RDS also failed to create any financial projections that accounted for Remington's abandonment of the Project. Mr. Feucht testified that Remington was chosen as a marketing and distribution channel because a Remington-branded product could be sold through multiple retailers (*e.g.* Cabela's, Bass Pro Shops, Gander Mountain). [Tr. 105]. Mr. Feucht testified that "Remington seemed like the better fit [than Cabela's] because it had multiple channels that they could put the product through." [Tr. 106]. According to Mr. Feucht, using Cabela's instead of Remington would "kind of limit[] the market because if you are a Bass Pro Shops guy, you don't go to Cabela's and buy things. It is kind of a very -- it is a very loyal crowd." [Tr. 105]. Mr. Hill similarly testified that the P&L Statements reflected Remington's involvement and participation in the Project. [Tr. 615-16]. Yet RDS never prepared any financials or sales projections that accounted for Remington's departure.

Fifth, RDS admitted that for the Copper Center Project to succeed, it needed someone responsible for three distinct elements – hardware, software, and marketing/distribution – and the absence of any one of those parts would be fatal to the Project. [Tr. 244-45; 255]. RDS admitted (and restates in its Appellant's Brief) that Trimble was never required to manufacture any hardware for the Copper Center Project, and could have withdrawn from the Project at any time. [Tr. 241; Appellant's Brief at 18].

RDS claims that another player in the GPS industry had expressed interest in the

Project in April 2009 – nearly two years before the Project wound down.[37] RDS does not identify who this was, whether they might still be interested in the Project, or whether they would be willing and able to invest the $18 million pre-launch investment or the $1.4 billion hardware purchase that would be required of the party agreeing to build the device. [Tr. 255-56]. RDS's assertion that is could have found someone to take on this role is pure speculation and wishful thinking.

Sixth, the Copper Center Project smartphone could not be built at an acceptable cost or with a design that would work. The parties knew that the price of the Copper Center Project smartphone would have to be subsidized by a wireless carrier. [Tr. 261; 752]. All of the financial projections for the Project assumed that the wireless carrier would pay approximately $625 for the smartphone, and that the end-user/consumer would pay approximately $300 for the smartphone. [Tr. 458-59; 503; 506-07].

Mr. Chen testified that the production cost for the smartphone demanded by the consumer survey data was approximately $1,200.[38] [Tr. 877-78]. At this production cost, even assuming a subsidy from a wireless carrier, the end-user/consumer would have to pay approximately $800 for the smartphone. [Tr. 879-80]. RDS did not dispute any of this testimony and presented no evidence that the Copper Center Project could succeed at an $800 consumer price. In fact, Mr. Chen testified (again, without any contradiction from RDS) that only 1% of the consumers surveyed were willing to pay

[37] Appellant's Brief at 33-34.

[38] Mr. Boehnen admitted that the production costs reflected in the P&L Statements were just "estimates." [Tr. 415; 417].

$800 for this smartphone. [Tr. 880; 883].

Mr. Chen also testified about technical problems in designing and manufacturing a smartphone that would satisfy the consumers' demands. He testified that the design resulted in a "lunchbox phone" (something so unwieldy that no one would purchase it) and would cause component interference such that getting the device certified by a wireless carrier would be an issue. [Tr. 878-79]. RDS never disputed Mr. Chen's testimony about the challenges in integrating the hardware and software, or presented any evidence that these challenges could be resolved so that the Copper Center Project could produce a device that someone might actually buy.

Seventh, the Copper Center Project required a commitment from a wireless services provider to subsidize the price of the smartphone. Both Mr. Feucht and Mr. Miller admitted that the Copper Center Project would not happen unless and until it got that commitment. [Tr. 261; 752 (calling it an "essential hurdle")]. RDS testified that it only met with AT&T about providing that commitment. [Tr. 174-75]. Jeffrey Howard, the Vice-President of Devices and Accessories for AT&T Mobility, testified that it would have been his group's decision whether to take on the Copper Center Project smartphone, but his group never approved it. [Tr. 1304; 1307-08; 1310].

In the end, Mr. Miller admitted that neither AT&T nor any other wireless carrier ever committed to participate in the Copper Center Project. [Tr. 752-53]. RDS's argument that it did not know it needed to seek an alternative to AT&T is not competent

evidence that RDS could have found another carrier to subsidize the smartphone.[39] Furthermore, RDS does not dispute Mr. Chen's testimony that the interference from the various components would have prevented any wireless carrier from certifying and subsidizing the proposed smartphone. [Tr. 859-60; 879; 927-28].

In summary, the uncontroverted evidence at trial was that the Copper Center Project faced numerous hurdles and impediments, each of which was fatal to its success. RDS failed to prove that all of these contingencies would or could be resolved. The evidence presented at trial confirmed that the Copper Center Project would have never resulted in the manufacture or sale of a single device, completely irrespective of Trimble's actions.

B. RDS Failed to Prove that Any Breach by Trimble Caused the Claimed Lost Profits.

RDS had to prove that any lost profits it claimed were caused by Trimble's breach of a legal or contractual duty.[40] Importantly, RDS has never claimed that Trimble acted tortiously or breached any contract by withdrawing from the Copper Center Project. To the contrary, RDS concedes that Trimble was never obligated to manufacture the hardware for the Copper Center Project,[41] and that Trimble could have withdrawn from the Project at any time. [Tr. 241]. RDS also admits that Trimble was free to compete with the Copper Center Project, as long as it did not use RDS's

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[39] Appellant's Brief at 35.

[40] See cases cited at footnotes 15 and 16 *supra*.

[41] Appellant's Brief at 18.

confidential information to do so.[42]

Thus, the jury could not award lost profits to RDS because the Copper Center Project ended without ever producing or selling a phone, or because Trimble and Cabela's developed the Recon Hunt Application and launched it in March 2011. Instead, RDS had to prove lost profits that were caused by Trimble's actionable conduct that satisfied all of the elements of one of RDS's liability theories.

1. RDS Failed to Prove that a False Statement by Trimble Caused the Lost Profits Awarded by the Jury.

As the basis for its misrepresentation claims, RDS alleges that in November or December 2010, Mr. Chen and Mr. Wolff falsely told Mr. Feucht that the Copper Center Project's smartphone and the Recon Hunt Application "did not compete."[43] RDS argues that this false statement lulled RDS into refraining from seeking another path to get a Copper Center Project smartphone to market ahead of the Recon Hunt

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[42] *Id.*

[43] *Id.* at 17, 31. RDS did not identify any other allegedly false statement by Mr. Chen or anyone else from Trimble in either its Opposition to Trimble's Motion for JNOV (Exc. 98, 100) or in Appellant's Brief. Thus, RDS has waived all arguments based on any such statements. *See Alyeska Pipeline Serv. Co. v. State*, 288 P.3d 736, 743 (Alaska 2012) ("Arguments are waived on appeal if they are inadequately briefed or raised for the first time in a reply brief."); *Kingery v. Barrett*, 249 P.3d 275, 281 & n.15 (Alaska 2011) (citing cases) (holding party waives argument on appeal if not raised in motion for directed verdict or jury charge in court below); *Stormont v. Astoria Ltd.*, 889 P.2d 1059, 1061 n.1 (Alaska 1995) (appellant waived arguments regarding misrepresentation that were not made in its opposition to summary judgment or in its opening brief on appeal).

Application and reaping a "first-mover advantage."[44] Alaska law requires that each alleged false statement must be separately analyzed to determine if a causal link exists between the specific statement and the claimed injury or damages.[45]

For RDS's causation argument to work, it had to prove that: (1) if Trimble had *not* made this statement in November or December 2010, RDS would have taken a different course of action (*i.e.*, that RDS acted in reliance), *and* (2) by taking this different course of action, RDS would have successfully achieved the $38.5 million in profits that the jury awarded as damages for the fraud/misrepresentation claims (*i.e.*, profits that would have resulted from a Copper Center Project smartphone being the "first-mover" in the market). In other words, RDS had to prove that if Trimble told RDS in November or December 2010 that the Recon Hunt Application *did compete* with the Copper Center Project smartphone, RDS would have launched a Copper Center Project smartphone before the Recon Hunt Application hit the market on March 7, 2011, and would have earned $38.5 million in profits.

RDS presented no evidence at trial to support this scenario. To the contrary, the undisputed evidence identified numerous barriers to the launch of a Copper Center Project smartphone. As discussed above, all of the following (among other things) had

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[44] Appellant's Brief at 18, 31 ("as a result of these misrepresentations, RDS was lulled into inaction . . . thereby losing the opportunity to proceed as a first mover . . .")

[45] *See Anchorage Chrysler*, 221 P.3d at 991 ("The loss in fraudulent misrepresentation must be a pecuniary loss that is caused by the plaintiff's reliance on the misrepresentation."); *Barber*, 815 P.2d at 862-63 (separately analyzing each false statement alleged, and affirming directed verdict on statements that had no causal link to the alleged damages).

to be accomplished before it could be designed, manufactured, or sold: (i) secure a marketing/distribution channel to replace Remington; (ii) secure RDS's $6-$8 million in pre-launch financing; (iii) locate and hire approximately 40 software engineers and write the necessary 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; (vi) design a smartphone with the necessary features at an acceptable cost; and (vii) secure a commitment from a wireless carrier to subsidize the price. To obtain the "first-mover advantage" and earn the projected profits that underlie RDS's damages claim, RDS had to resolve all of these contingencies *before* the Recon Hunt Application launched in March 2011.

But RDS recognized that even if all of the above hurdles could have been satisfied, there was no chance a Copper Center Project smartphone could have been launched before March 2011. In its briefing on pre-judgment interest, RDS admitted that the launch of a Copper Center Project device would not have happened until July 2012[46] – well more than a year after the Recon Hunt Application launched. There is no reasonable basis to conclude that "but for" Trimble's alleged statements in November or December 2010, RDS would have resolved all of these issues and launched a Copper Center Project smartphone ahead of the Recon Hunt Application that launched barely 90

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[46] *See* Recreational Data Services' Reply to Defendant Trimble Navigation Limited's Objections to Plaintiff's Proposed Final Judgment at 7 [R. 3326-37] (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.

days later.

2. RDS Failed to Prove that Any Breach of Contract or Fiduciary Duty by Trimble Caused the Lost Profits Awarded by the Jury.

RDS also failed to prove a causal relationship between the alleged breach of contract or fiduciary duties and the damages awarded by the jury. RDS alleges that Trimble breached the NDA and its fiduciary duties by disclosing some of the Copper Center Project's financial information to Trimble Outdoors in November 2010.[47] But RDS failed to prove that this disclosure caused any lost future profits. For example, RDS presented no evidence that Trimble Outdoors used this information in a way that allowed the Recon Hunt Application to advance to market any sooner than it would have otherwise, or that the disclosure of this information to Trimble Outdoors impeded RDS in any way from pursuing the Copper Center Project.

Moreover, with respect to this alleged breach, RDS again claims that Trimble's actions deprived RDS of the ability to bring its product to market ahead of the Recon Hunt Application and reap "first mover" profits.[48] Again, there is no basis for a jury to conclude that *but for* the disclosure of this financial information to Trimble Outdoors, RDS would have been able to bring a Copper Center Project smartphone to market ahead of the Recon Hunt Application, and thereby capture any "first mover advantage." Stated differently, RDS must prove that if Mr. Chen had *not* disclosed this financial information to Trimble Outdoors in November 2010, RDS would have had a Copper

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[47] Appellant's Brief at 13, 17, 31.

[48] Appellant's Brief at 31, 36.

Center Project smartphone on the market before the Recon Hunt Application launched in March 2011. For the reasons discussed above, and as RDS has admitted, there is no rational basis for such a conclusion.

It is no answer to suggest that RDS could have switched gears entirely and instead sold its idea as a stand-alone application rather than as an integrated smartphone.[49] Setting aside whether this was technically possible, there was absolutely no evidence at trial concerning the hypothetical profits that RDS would have earned by developing and selling its idea as a stand-alone application. A jury would have been required to simply make up this number, which is what RDS suggests it should have done.[50]

3. RDS's Lost Profit Award Is Unsupportable Because Lost Profits Were Not Reasonably Foreseeable When Trimble Made the Alleged Promises to RDS.

The jury awarded RDS $12.8 million in lost profits damages based on breach of the NDA or breach of fiduciary duty arising out of an alleged agreement to become partners.[51] These damages are barred because contract damages must be "reasonably

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[49] Although RDS never suggested or presented any evidence on this at trial, it now suggests it as an alternative damages model. *See* Appellant's Brief at 37.

[50] RDS implicitly admits the absence of any evidence on this point by asserting that the profits from selling applications are within the "common experience" of jurors. *Id.*

[51] RDS admitted that its claim for breach of the NDA and its claim for breach of fiduciary duty are "essentially synonymous." Appellant's Brief at 31, n. 45.

foreseeable" at the time the alleged promise is made.[52] No reasonable jury could have concluded that lost profits were reasonably foreseeable at the time Trimble made any contractual promise to RDS.

The only written contract between RDS and Trimble was the March 2009 NDA. The NDA expressly stated that Trimble was not agreeing to go into business with RDS, or do anything other than protect RDS's confidential information. [Exc. 149 at § 6.5]. RDS also admitted at trial that the NDA did not require Trimble to go into business with RDS. [Tr. 141; 267-68]. No reasonable jury could conclude that when Trimble signed the NDA in March 2009, Trimble could have reasonably foreseen that it could be liable for lost future profits generated by a joint business, when the NDA expressly stated that Trimble and RDS were not agreeing to form such a business.

The same principle applies to any portion of the damage award that was attributable to Trimble's alleged breach of fiduciary duty. In this case, RDS's breach of fiduciary duty claim is contractual in nature, because the alleged fiduciary relationship is based solely on an alleged agreement to become partners. Thus, any damages that the jury awarded for a breach of fiduciary duty should be treated as contract damages for purposes of the foreseeability requirement.

Lost future profits were not reasonably foreseeable when the alleged partnership was formed. According to Mr. Feucht, the partnership came into existence at a meeting

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[52] *Native Alaskan Reclamation & Pest Control, Inc. v. United Bank Alaska*, 685 P.2d 1211, 1219-20 (Alaska 1984).

in Copper Center in September 2009. Mr. Feucht testified that this alleged partnership did not include an agreement that Trimble and RDS were or would become co-owners of a business. [Tr. 263]. In light of this admission, no reasonable juror could have found that future profits were foreseeable when the parties allegedly agreed to become partners because they did not agree to operate a business at that time, or at any other time.

C. RDS Failed to Prove the Amount of its Alleged Lost Profits Damages With Reasonable Certainty.

As discussed above, no reasonable jury could have found that RDS actually suffered any lost future profits, or that Trimble's actions caused any such loss. RDS also failed to prove the amount of its alleged lost profits with reasonable certainty, as Alaska law requires.[53] RDS asked the jury to award one of two amounts as lost future profits: (i) $111,666,973, based on the P&L Statements; or (ii) $18,400,000, based on Trimble's alleged valuation of RDS as reflected in the handwritten whiteboard photograph. RDS admitted that no other amount was supported by the evidence presented to the jury.[54]

RDS was a new business pursuing a new project. [Tr. 245-46]. Alaska law

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[53] *Azimi*, 254 P.3d at 1065; *Guard*, 631 P.2d at 1071.

[54] RDS told that jury that "if you find that [either $111 million or $18.3 million] are not accurate for the profits and losses, you can't award any on that. You couldn't say, 'Well, $111 million they said was accurate, but we're going to cut that in half, because we just don't think that's right.'" [Tr. 1473-74]. RDS also admitted to the Superior Court that a directed verdict is the only proper remedy if the jury did not award one of those two amounts. [Tr. 1359-61].

imposes specific evidentiary requirements for proving the amount of lost profits claimed by a new business. In *Guard*, this Court identified only two ways to establish lost profits for a new business: (1) the profit history from the injured party's similar business at a different location; or (2) the profit history of the business in question that was successfully run by someone else before the plaintiff.[55] This Court has repeatedly followed this rule.

For example, *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 Court closely followed *Guard*, finding that Geolar failed to offer lost profits evidence of the type specifically required by *Guard* – "evidence of its own profit margins on other projects [or] evidence of the profits obtained by other contractors performing similar jobs." On this basis, the Court rejected Geolar's lost profits claim.[56]

Guard also held that a new business cannot rely on statistical projections alone to prove lost future profits:

> In antitrust litigation, the injured party may prove damages for lost profits by use of statistical projections alone without showing any history of profits. The policies of antitrust law favor a less stringent certainty requirement for lost profits than contract law policy. . . Because P & R's claim falls within the latter category, it will not be allowed to rely solely on statistical projections to prove lost profits.[57]

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[55] *Guard*, 631 P.2d at 1072.

[56] *Id.* at 946-47.

[57] *Guard*, 631 P.2d at 1072 n. 4 (citations omitted). This Court again rejected the use of statistical projections to support lost future profits in *Alaska Travel Specialists*, 919 P.2d at 765-66.

In its brief, RDS refers to the Restatement (Second) of Contracts § 352, comment b, arguing that it endorses the use of market surveys as the basis for lost profits awards for new businesses.[58] But comment b does not say that a new business can do what RDS is trying to do here – rely *solely* on statistical projections of lost future profits, without any support from actual experience of a comparable business. To the contrary, the Restatement comment that RDS relies on cites Illustration 6, which gives an example that is very similar to this Court's approach in *Guard*.

Illustration 6 discusses a new theatre business, and says that to prove lost profits for its new business with reasonable certainty, the theater "can use records of the theater's subsequent operation and of the operation of similar theatres in the same locality [which is nearly identical to the rule in *Guard*], ***along with*** other evidence including market surveys and expert testimony."[59] In this illustration, the new business's lost profits claim is supported by *actual* relevant experience from one location or another, as required by *Guard*. If and when that type of evidence is present, market surveys or expert opinion can bolster a lost profits claim. But *Guard* plainly

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[58] Appellant's Brief at 29. RDS suggests that comment b is applicable because this Court "has often followed the Restatement, including in particular section 352." But this Court has never adopted or cited § 352, comment b. This Court has cited § 352, comment a, which says that "[a] party cannot recover damages for breach of a contract for loss beyond the amount that the evidence permits to be established with reasonable certainty," *See, e.g., State v. Nw. Constr., Inc.*, 741 P.2d 235, 237 (Alaska 1987); *Native Alaskan Reclamation*, 685 P.2d at 1222-23.

[59] Restatement (Second) of Contracts § 352, comment b, Illustration 6 (emphasis added).

states that market surveys and statistical projections are not enough by themselves to prove lost future profits for a new business, and Restatement § 352, comment b embraces this rule.

RDS failed to present evidence that meets the requirements for proving the amount of lost future profits for a new business, reflected in cases like *Guard, Geolar* and *Alaska Travel Specialists*. RDS did not present profit history from operation of a similar business by any of the parties involved in the Copper Center Project. Nor did RDS present evidence of profits earned by a similar business operated by others.[60]

1. The Statistical Projections in the P&L Statements Are Not Competent Damages Evidence.

Instead of presenting the evidence required by Alaska law, RDS relied on the Copper Center Project's self-generated statistical projections of its future profits – the "P&L Statements." [Exc. 180-86]. Mr. Feucht, Mr. Boehnen, and Mr. Hill all admitted that the P&L Statements were statistical projections of lost future profits. [Tr. 315; 426; 429; 640-41]. This Court's decisions consistently prohibit a new business from recovering lost profits based solely on that new business's statistical predictions of its own profits, unsupported by evidence of actual profits generated by a comparable business operated by the plaintiff, or by another party engaged in a closely comparable business venture. Tellingly, RDS does not cite a single Alaska Supreme Court decision that supports an award of lost future profits to a new business based solely on evidence

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[60] *See Geolar*, 874 P.2d at 946 (Court rejected new business lost profit claim because plaintiff failed to show "evidence of its own profit margins on other projects [or] evidence of the profits obtained by other contractors performing similar jobs.").

comparable to the self-generated statistical projections that RDS relies on here.[61]

In an effort to distinguish *Guard* and its progeny, RDS offers various reasons why the Copper Center Project's statistical projections of its own future profits should be considered trustworthy, but none of them addresses the fundamental concern underlying the holding in *Guard* and similar cases.[62] 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 Statements are still *statistical projections* of future profits for a new business, pursuing a new project to manufacture and sell a new product, without a track record. Those projections are not based on actual experience by anyone, and certainly not on actual experience by anyone involved in the Copper Center Project, or anyone operating a similar business under similar circumstances. Thus, RDS's statistical projections were insufficient as a matter of law to support an award of lost profits to a new business.

2. The Handwritten Whiteboard Photograph Is Not Competent Damages Evidence.

RDS also relies on the "whiteboard photograph" to prove its lost profits. But this evidence did not show RDS's lost profits, and certainly did not meet the standards set

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[61] *Sisters of Providence in Wash. v. A.A. Pain Clinic, Inc.*, 81 P.3d 989 (Alaska 2003), 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.

[62] Appellant's Brief at 42-43.

by this Court in *Guard*.

First, the whiteboard photograph did not purport to reflect RDS's anticipated lost profits. Rather, according to Mr. Feucht, the numbers on the whiteboard showed alternative valuations of RDS. RDS never claimed damages for loss of the company's value; it claimed lost profits only.[63] The "valuation evidence" plainly did not show, or even purport to show, RDS's lost profits. The whiteboard valuation evidence cannot fill this fatal gap in RDS's proof.

Second, if RDS's argument is that these valuations were based on RDS's anticipated profits, and somehow served as a proxy for its lost profits, the record does not support that claim. Mr. Feucht testified that the whiteboard valuations were based on RDS's anticipated ***revenues***, not its anticipated ***profits***. "[T]his is what we expected the Copper Center project, the revenues, to be created…if -- you know, if you hit 75% of the revenue numbers, this is kind of what the valuation would look like. If you hit 47%, less than 50 % of what we actually thought we were going to do, this is -- this would be the revenue numbers. And this was 17% of the revenue numbers. And this was 5% of the revenue numbers." [Tr. 134-35; Exc. 188]. Revenues are not the same thing as profits, and cannot serve as the basis for an award of lost profits.[64]

Third, Mr. Feucht admitted that these revenue projections were derived from unidentified "spreadsheets" that he had provided to Trimble, and that these spreadsheets

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[63] *See* footnote 5, *supra*.

[64] *See, e.g., Magestro v. North Star Envtl. Const.*, 649 N.W.2d 722, 726 (Wis. App. 2002) (evidence of lost revenues inadequate to show lost profits).

reflected Mr. Feucht's projections of "what we expected to do." [Tr. 130-31; 134; 136]. If statistical projections of a new business's lost future profits are not competent evidence, as this Court held in *Guard* and subsequent cases, a projection of revenues based on that same statistical data is likewise incompetent.

Finally, Mr. Feucht thought the valuations on the whiteboard photograph were wrong. Mr. Feucht told Trimble that he was "not sure that NPV is the correct way to value RDS. I will come back with some arguments." [Exc. 262]. Similarly, Mr. Feucht testified that he "didn't think [Trimble's] valuation methodology [for RDS] was appropriate for what we were doing." [Tr. 138]. Thus, RDS has taken the untenable position that the jury could base lost profits damages on valuations that RDS itself thought were inaccurate.

3. Damages for the Development of Stand-Alone Applications Would Require Pure Speculation by the Jury.

In a last-ditch effort to justify any damages, RDS argues that the Superior Court erroneously failed to consider that RDS could have profited from its idea even without producing a ruggedized smartphone, perhaps by selling standalone software applications.[65] RDS presented no evidence about the profits it would have earned through such endeavors. The P&L Statements and the whiteboard photograph (which was derived from the P&L Statements) addressed an entirely different business model – the sale of an integrated, ruggedized smartphone. [Tr. 495]. These documents provide no evidence whatsoever regarding the profits that RDS would have earned if RDS sold

[65] Appellant's Brief at 33, 37.

software applications alone.

RDS effectively concedes the complete absence of evidence about what profit it would have made by selling stand-alone applications, suggesting that the jury could just figure this out on its own, because "[t]he popular press and common experiences of jurors in 2014 provided a basis for the jury to know that independent small developers make profits on apps, particularly when one is the first mover in the field."[66] This is the height of speculation, and demonstrates RDS's efforts to recover damages with no legally competent evidence to support them.

II. JNOV was Proper Because No Reasonable Jury Could Find that Trimble was Liable for Intentional or Negligent Misrepresentation, Breach of Contract, or Breach of Fiduciary Duty.

This Court may affirm the judgment on any ground supported by the record.[67] In its order granting Trimble's motion for JNOV, the Superior Court focused on RDS's failure to prove damages caused by Trimble's alleged misrepresentation or breach of contract, and did not reach Trimble's other liability arguments. [Exc. 215.] But as discussed below, alternate grounds support the Superior Court's JNOV because the evidence at trial did not support the verdicts for breach of fiduciary duty arising out of a partnership, misrepresentation, or breach of contract.

A. No Reasonable Jury Could Have Found a Partnership or Breach of Fiduciary Duty.

RDS claimed that Trimble breached a fiduciary duty arising out of a partnership.

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[66] Appellant's Brief at 37.

[67] *See* footnote 12, *supra*.

But RDS failed to prove the existence of a partnership, and also failed to prove that Trimble breached any fiduciary duty that arises from a partnership.

1. No Reasonable Jury Could Have Found that Trimble and RDS Were Partners.

Alaska's partnership statute defines partnership as "the association of two or more persons to carry on as co-owners a business for profit."[68] Mr. Feucht testified unequivocally that Trimble and RDS never agreed to become co-owners of a business.[69] [Tr. 263]. This testimony flatly denied the fundamental requirements for existence of a partnership under Alaska law.[70]

Similarly, RDS approved and circulated a draft Product Alliance Agreement that denied the existence of a partnership, stating that the parties' relationship was not a partnership or any similar arrangement. [Tr. 271-78; 481-86; Exh. M; Exc. 252, 271 at § 4.1]. Mr. Miller further confirmed that the parties' relationship had not moved "from concept to a contract" and there was never a "meeting of the minds and agreements

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[68] AS 32.06.202. Consistent with this statute, Alaska law recognizes four essential elements for the formation of a partnership: (1) "associational intent," which requires "the existence of an agreement to combine the partners' property, money, effects, skill and knowledge to carry out a business enterprise"; (2) co-ownership, shown by shared management and profit-sharing; (3) the activity is a business enterprise; (4) the business enterprise is intended to make a profit. *Hall v. TWS, Inc.*, 113 P.3d 1207, 1211 (Alaska 2005); *Chocknok v. State*, 696 P.2d 669, 675 (Alaska 1985).

[69] Q: Did you ever have an agreement with Trimble and Remington that the three entities would become co-owners of a business together? A: No." [Tr. 263].

[70] AS 32.06.202. RDS further confirmed this fact in its closing argument when it implored the jury to "accept that [Trimble] never intended to be partners" and to "take [Trimble's] word on one thing, that they weren't partners." [Tr. 1415; 1428].

between the principals." [Tr. 725-26]. And RDS admitted that Trimble and Remington were free to simply walk away from the Copper Center Project at any time. [Tr. 241].

There was evidence at trial that Trimble used the term "partner" to refer to RDS and/or Remington. But the fact that persons refer to each other as "partners" does not establish the existence of a legal "partnership" that meets the statutory requirements. As a leading partnership treatise explains:

> [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.[71]

Mr. Feucht's own testimony established that the relationship between Trimble and RDS did not meet the legal requirements for a partnership under Alaska law.[72]

2. No Reasonable Jury Could Have Found that Trimble Breached Any Fiduciary Duty Arising from a Partnership.

Assuming that a partnership existed, RDS failed to show breach of any fiduciary duty that arises from a partnership. Alaska's partnership statute (which is based on the Uniform Partnership Act (1997)) strictly limits the fiduciary duties that arise from a

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[71] J. Callison and M. Sullivan, Partnership Law and Practice: General and Limited Partnerships § 5:1 (2013). *See also Parker v. Northern Mixing Co.*, 756 P.2d 881, 887 n. 11 (Alaska 1988).

[72] As to *third parties*, such references may give rise to partnership by estoppel, or "apparent partnership." *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).

partnership.[73] In its brief, RDS refers generally to a "breach of the duty of loyalty," but there was no evidence that Trimble breached any of the specific duties of loyalty that are recognized in AS 32.06.404(b).[74] Specifically, RDS's amorphous claim that Trimble "strung RDS along" does not fall within any of the duties of loyalty that are recognized under Alaska's partnership statute.[75]

B. No Reasonable Jury Could Have Found that Trimble Was Liable to RDS for Intentional or Negligent Misrepresentation.

Under Alaska law, an intentional misrepresentation claim requires proof of: (1) a misrepresentation of fact or intention; (2) made fraudulently (with "scienter"); (3) for the purposes or with the expectation of inducing another to act in reliance; (4) with

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[73] "*The only* fiduciary duties a partner owes to the partnership and the other partners are the duty of loyalty and the duty of care stated in (b) and (c) of this section." AS 32.06.404(a) (emphasis added).

[74] "Section 404(b) provides three specific rules that comprise a partner's duty of loyalty. These rules are exclusive and encompass the entire duty of loyalty." Uniform Partnership Act (1997), section 404, official comment no. 2.

[75] RDS claims that Trimble breached its fiduciary duties to RDS by "furthering its own interests at the expense of RDS." Appellant's Brief at 18. But AS 32.06.404(e) states: "Each partner does not violate a duty or obligation under this chapter or under the partnership agreement merely because the partner's conduct furthers the partner's own interest." RDS also claims that Trimble breached the duty of loyalty by disclosing confidential marketing or financial information to Trimble Outdoors. Appellant's Brief at 31. Any argument that such disclosure constituted "use of partnership property" under AS 32.06.404(b)(1) fails because, among other reasons, there was no evidence at trial that any of this marketing or financial data met the definition of "partnership property" in AS 32.06.204. To the contrary, the undisputed testimony was that the marketing data came from and belonged to Remington. [Tr. 103-04]. *See* Section II C, *infra*.

justifiable reliance by the recipient; and (5) causing loss.[76] Proof of justifiable reliance is an essential element of intentional and negligent misrepresentation claims.[77] The plaintiff must prove that it actually relied on the false statement *and* that its reliance was justifiable.[78]

The only false statement that RDS alleged in opposition to JNOV and on appeal was that in November or December 2010, Mr. Chen and/or Mr. Wolff allegedly told Mr. Feucht that the Recon Hunt Application "did not compete" with the Copper Center Project.[79] Assuming that they made this statement, RDS failed to present any evidence that it justifiably relied on it.

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[76] *Lightle v. Alaska*, 146 P.3d 980, 983 (Alaska 2006). The elements of negligent misrepresentation are similar, except that the plaintiff need not prove that the statement was made with fraudulent scienter. *Southern Alaska Carpenters Health and Sec. Trust Fund v. Jones*, 177 P.3d 844, 857 (Alaska 2008).

[77] *Anchorage Chrysler Center, Inc. v. DaimlerChrysler Motors Corp.*, 129 P.3d 905, 915 (Alaska 2006); *Diblik v. Marcy*, 166 P.3d 23, 28 (Alaska 2007); *Willard v. Khotol Services Corp.*, 171 P.3d 108, 118-19 (Alaska 2007); *Valdez Fisheries Dev. Ass'n v. Alyeska Pipeline Service Co.*, 45 P.3d 657, 671 (Alaska 2002) (negligent misrepresentation).

[78] *Anchorage Chrysler*, 129 P.3d at 915 ("actual reliance and justifiable reliance are both prerequisites to claims of negligent and intentional misrepresentation.") *See also* Restatement (Second) of Torts § 537 and comment b ("The recipient must not only *in fact* rely upon the misrepresentation, but his reliance *must be justifiable*." (emphasis added)).

[79] Appellant's Brief at 17, 31.

First, a person cannot justifiably rely on a statement that he knows or believes to be false.[80] Mr. Feucht admitted that when Mr. Chen told him about the Recon Hunt project, "it just did not sit right with [him]" [Tr. 119], and that it "just . . . started to stink." [Tr. 122]. Mr. Feucht promptly told Mr. Chen that he was "very concerned about Trimble [O]utdoors" and that "[m]aking the jump to this market is not at all logical based on their prior work." [Exc. 247]. These statements plainly demonstrate that Mr. Feucht did not believe Mr. Chen's alleged statement that the two projects did not compete, and RDS therefore could not have justifiably relied on any such statement.

Second, justifiable reliance requires proof that the plaintiff changed its position in some way. "To rely, the plaintiff must enter a transaction in whole or in part because of the representation."[81] Significantly, a plaintiff has not relied on the statement if it "would have entered the transaction whether or not the misrepresentation had been made."[82] Here, the evidence demonstrated that whether the Recon Hunt Application did or did not compete with the Copper Center Project had absolutely no effect on RDS's actions.

Mr. Feucht and Mr. Miller both testified that they became fully aware of the nature and scope of the Recon Hunt Application upon visiting Cabela's offices on

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[80] *Shehata v. Salvation Army*, 225 P.3d 1106, 1114 (Alaska 2010), citing 2 D. Dobbs, The Law of Torts § 474 (2001); *see also* Restatement (Second) of Torts § 541.

[81] 3 D. Dobbs, et al., The Law of Torts (2d ed. 2011) § 671; *see also* Restatement (Second) of Torts § 537(a).

[82] Dobbs, § 671.

March 25, 2011. Specifically, Mr. Feucht testified that he saw an advertisement for the Recon Hunt Application and "[e]verything that we were going to do on the software side was right there," and that "[t]his is an absolute rip-off of my idea." [Tr. 112; 303-04]. Mr. Miller similarly testified that the Recon Hunt Application advertisement "looked like it was straight off of one of our view graphs" and that it "stole the idea from the partnership." [Tr. 701]. Thus, as of March 25, 2011, RDS had unquestionably concluded that the Recon Hunt Application did, in fact, compete with the Copper Center Project. [Tr. 325].

But RDS's subsequent actions reveal that it never relied on any contrary statement. Mr. Feucht proceeded with the Cabela's meeting later that day and admitted that he "reinforced [to Cabela's] that Trimble was a good partner." [Tr. 110]. About a week after that meeting, RDS told Trimble that it "look[ed] forward to resuming this project with Trimble and...believe[d] that Trimble is a great partner. [Exc. 245]. And then a week after that, RDS again told Trimble that it "still wanted Trimble as our partner on this project and hope that you come to the same conclusion... ." [Exc. 265].

So even after RDS determined that the Recon Hunt Application would compete with the planned Copper Center Project smartphone, and after concluding that the Recon Hunt Application "ripped off" and "stole the idea" from the Copper Center Project, RDS nevertheless wanted to proceed with the Copper Center Project and wanted Trimble as its partner. [Tr. 110; 112; 303-04; 701; Exc. 245; 265]. Thus, even if Trimble had told Mr. Feucht in November 2010 that the two projects "competed,"

there is no credible basis to conclude that RDS would have changed its position or done anything differently. In short, RDS did not prove that it relied on any statement about the Recon Hunt Application not competing with the proposed Copper Center Project smartphone.

RDS also failed to prove another essential element of intentional and negligent misrepresentation: a pecuniary loss that was caused by RDS's reliance on the false statement.[83] As discussed above, RDS failed to prove that any lost profits were caused by its reliance on Trimble's alleged false statement that the two projects did not compete. RDS's failure to prove this required element of these torts is an alternative ground for JNOV on the intentional and negligent misrepresentation claims.

C. No Reasonable Jury Could Have Found that Trimble Breached the NDA.

RDS failed to present evidence sufficient for a reasonable jury to find that Trimble disclosed any confidential information in violation of the NDA. RDS argues that Trimble breached the NDA by disclosing the P&L Statements to one of Trimble's other divisions, Trimble Outdoors.[84] RDS does not identify any other allegedly

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[83] "[A]n actual loss is one of the five required elements for proving a claim of fraudulent misrepresentation." *Anchorage Chrysler*, 221 P.3d at 990. "The loss in fraudulent misrepresentation must be a pecuniary loss that is caused by the plaintiff's reliance on the misrepresentation. *Id.* at 991. *See also* Restatement (Second) of Torts § 552 (negligent misrepresentation requires proof of pecuniary loss caused by justifiable reliance on false information).

[84] Appellant's Brief at 13.

confidential information that Trimble used or disclosed in violation of the NDA.[85]

RDS presented no evidence that Mr. Chen ever disclosed the P&L Statements to Trimble Outdoors or anyone else. RDS's only evidence on this point was Mr. Chen's testimony that he transmitted "the financials that we got *from Remington*" (emphasis added) [Tr. 1030-31].[86] This testimony says nothing about transmitting the P&L Statements.

Furthermore, this testimony refers to the transmittal of information received *from Remington* – not information that Trimble had received from RDS.[87] The NDA states that information Trimble received from parties other than RDS was not "Confidential Information" protected by the NDA. "Notwithstanding any other provisions of this [NDA], each Party acknowledges that Confidential Information shall not include any information which . . . is lawfully received, without obligation of confidentiality, by Recipient *from Others*." [Exc. 149 at § 2.4].[88] Thus, any information that Trimble

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[85] RDS claims that Mr. Chen "regularly conferred" with Trimble Outdoors, see Appellant's Brief at 4, but RDS does not identify any confidential information that Mr. Chen allegedly disclosed to Trimble Outdoors on any of those occasions.

[86] Contrary to RDS's statement at page 13 of its Brief, Mr. Chen never testified that he transmitted the Project's "consolidated profit-and-loss statement" to Trimble Outdoors.

[87] Indeed, Mr. Feucht confirmed that all of the Project's "marketing and survey data" had come from Remington. [Tr. 103-04; 315; 317]. Mr. Feucht also detailed the "confidential information" that RDS allegedly contributed to the Copper Center Project, and it did not include any financial information or market data. [Tr. 250-52].

[88] The term "Others" is defined as "any individual or entity not a Party" to the NDA. [Exc. 149 at § 1.1].

received *from Remington* was not subject to the NDA, and could not be the basis for a verdict that Trimble breached the NDA.[89]

In addition, there was no evidence that RDS designated the P&L Statements or any financial data as "Confidential Information." The NDA states that information is not protected unless the disclosing party specifically designates and identifies it as "Confidential Information." [Exc. 149 at § 3]. There is no record of any such designation by RDS.

In the trial court, RDS responded to this point by relying on language in a boilerplate statement that appeared on Mr. Feucht's September 30, 2010 email. [Exc. 113 (citing Plaintiff's Trial Exhibit 28, Exc. 180)]. RDS claimed that this statement designated any documents transmitted with the email as "Confidential Information" under the NDA. But the boilerplate language at the bottom of Mr. Feucht's email did not comply with the NDA. A party designating information as "Confidential Information" must "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

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[89] At trial, RDS referred to NDA § 1.2, which says that "Confidential Information" can include information "relating to the existing or prospective business and/or technology of a Party or Others or the Purpose." This provision recognizes that Confidential Information disclosed to Trimble *by RDS* could be protected, even if that information "relates to" someone or something other than RDS. But it cannot mean that information disclosed to Trimble *by someone other than RDS* (i.e., by "Others") is subject to the NDA.

meaning." [Exc. 149 at § 3]. The boilerplate paragraph at the end of Mr. Feucht's email did not meet these requirements.

III. RDS has Presented No Basis for Nominal Damages or Remittitur.

Having failed to prove any loss at trial, RDS nevertheless claims that it should be awarded nominal damages.[90] RDS's request should be rejected for two reasons. First, RDS waived any claim for nominal damages by failing to propose a nominal damages instruction, and by failing to object to the absence of a nominal damages instruction. Having made this tactical decision not to give the jury the option of awarding nominal damages, RDS cannot now claim nominal damages.[91]

Second, RDS did not meet the requirements for an award of nominal damages. To receive nominal damages for any claim, RDS was required to prove all elements of the claim, including an actual loss caused by the breach.[92] RDS claimed, and attempted to prove, only one type of "actual loss": lost future profits. But RDS failed to prove that Trimble's conduct caused any lost profits. Thus, RDS failed to prove an essential element of its claims, and cannot be awarded any damages, including nominal damages.

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[90] Appellant's Brief at footnotes 43 and 56.

[91] Alaska R. Civ. P. 51(a) ("No party may assign as error . . . the failure to give an instruction unless the party objects thereto before the jury retires to consider its verdict . . . ."); *see also Jaso v. McCarthy*, 923 P.2d 795, 799-800 (Alaska 1996); *Miller v. Albright*, 657 F.3d 733 (8th Cir. 2011) (plaintiff waived right to nominal damages by failing to request nominal damages instruction or object to omission); *Oliver v. Falla*, 258 F.3d 1277 (11th Cir. 2001) (same).

[92] *E.g., Anchorage Chrysler*, 221 P.3d at 990-91 (to recover nominal damages for misrepresentation, plaintiff must prove all elements of the tort, including a pecuniary loss proximately caused by plaintiff's reliance on the misrepresentation).

Remittitur is inappropriate for similar reasons. Remittitur is permitted only when the plaintiff has proved all elements of its claim, including damages, but the damage amount that is supported by the evidence is less than the amount that the jury awarded. Here, RDS failed to prove *any* amount of lost future profits that meets the requirements of proof discussed above.

CONCLUSION

The Superior Court's judgment notwithstanding the verdict should be affirmed. The jury awarded RDS $51.3 million in damages based on unsupported speculation that the Copper Center Project smartphone would have been built, and would have generated millions in future profits. Moreover, there was insufficient evidence to support the conclusion that any of the breaches claimed by RDS caused the claimed lost profit damages. In addition, the judgment should be affirmed because RDS failed to carry its burden on any of its liability theories.

DATED: October 28, 2015.

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CERTIFICATE OF SERVICE

I certify that on October 28, 2015 a true and correct copy of the foregoing **BRIEF OF APPELLEE TRIMBLE NAVIGATION LIMITED** was served by U.S. Mail upon the following:

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I further certify, pursuant to Appellate Rule 513.5, that the font used in the document is Times New Roman 13 point typeface.

Tae Kim