IN THE SUPREME COURT OF THE STATE OF ALASKA

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

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

REPLY BRIEF OF APPELLANT RECREATIONAL DATA SERVICES, INC.

Filed in the Supreme Court
of the State of Alaska
on this 11 day of
December, 2015

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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.

Alaska Statute 32.06.404. General standards of partner's conduct.

(a) 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.

(b) A partner's duty of loyalty to the partnership and the other partners is limited to the following:

(1) to account to the partnership and hold as trustee for it any property, profit, or benefit derived by the partner in the conduct and winding up of the partnership business or derived from a use by the partner of partnership property, including the appropriation of a partnership opportunity;

(2) to refrain from dealing with the partnership in the conduct or winding up of the partnership business as or on behalf of a party having an interest adverse to the partnership; and

(3) to refrain from competing with the partnership in the conduct of the partnership business before the dissolution of the partnership.

(c) A partner's duty of care to the partnership and the other partners in the conduct and winding up of the partnership business is limited to refraining from engaging in grossly negligent or reckless conduct, intentional misconduct, or a knowing violation of law.

(d) A partner shall discharge the duties to the partnership and the other partners under this chapter and the duties under the partnership agreement and exercise any rights in accordance with the obligation of good faith and fair dealing.

(e) 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.

(f) A partner may lend money to and transact other business with the partnership, and the rights and obligations of the partner are the same with regard to the loan or transaction as the rights and obligations of a person who is not a partner, subject to other applicable law.

(g) This section applies to a person winding up the partnership business as the personal or legal representative of the last surviving partner as if the person were a partner.

STANDARD OF REVIEW

Trimble correctly states that this Court reviews a JNOV ruling de novo, and that this Court must review the evidence in the light most favorable to the non-moving party. [Ae. Br. 11; *cf.* At. Br. 23]

Trimble errs when it asserts that this Court must consider anything other than the evidence favorable to RDS. [Ae. Br. 11-12] Trimble cites *Wiersum v. Harder*[1] for the proposition that this Court must review "the full record presented to the jury."[2] But the *Wiersum* Court made this remark because it was ruling on both a mid-trial motion for a directed verdict and a post-trial motion for JNOV.[3] *Wiersum* clarified that, despite the directed verdict motion made midway through trial, the post-trial JNOV motion required the reviewing Court to consider evidence presented after the motion for a directed verdict, that is, "the full record" from the entire trial. Precisely the same thing occurred in *Cameron v. Chang-Craft*,[4] on which Trimble also relies. [Ae. Br. 11-12]

Cameron stated: "Because conflicting evidence is not to be weighed and witness

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1 316 P.3d 557 (Alaska 2013).

2 *See* Ae. Br. 11 (citing *Wiersum*, 316 P.3d at 568-70). The phrase actually occurs on page 563 of the *Wiersum* opinion.

3 *Wiersum*, 316 P.3d at 563 n.9. *See also id.*: "Because the Wiersums renewed their mid-trial motion at the close of all the evidence, we review their motion on the full record presented to the jury."

4 *See Cameron v. Chang-Craft*, 251 P.3d 1008, 1017 (Alaska 2011): "The denial of a mid-trial directed verdict due to a factual dispute likely should be treated in similar fashion [to denial of a motion for summary judgment], but because [the defendant] again moved for a directed verdict at the close of the evidence, we review the denial of the directed verdict motions, along with the denial of the JNOV motion, on the full record presented to the jury."

credibility is not to be judged on appeal, generally the only evidence that should be considered is the evidence favorable to the non-moving party . . . ."[5] This is not, as Trimble puts it, simply a "general observation." [Ae. Br. 11] It is, rather, a fundamental statement about the proper role of this Court, and the types of evidence it may appropriately consider. No "longstanding rule" [Ae. Br. 12] requires this Court to consider evidence supporting Trimble if it was uncontradicted.[6] In *Alaska Fur Gallery*,[7] this Court recently reaffirmed that jurors are free to disbelieve even uncontested testimony – and this Court did the same in reviewing the decision denying JNOV.[8] Trimble is wrong that *Wiersum* limited or rejected *Cameron*. [Ae. Br. 12 n.10]

ARGUMENTS

In its Brief of Appellee, Trimble addresses causation and damages in Part I, then duty and breach in Part II. RDS responds in kind, though discusses liability first, in Part I *infra*, and causation and damages second, in Part II.

I. A REASONABLE JURY COULD HAVE FOUND THAT TRIMBLE WAS LIABLE FOR BREACH OF FIDUCIARY DUTY, INTENTIONAL OR NEGLIGENT MISREPRESENTATION, AND BREACH OF CONTRACT.

The superior court found twice during trial that the evidence in the record, viewed in the light most favorable to RDS, supported a verdict for RDS. [Tr. 818, 1370-71] She

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5 *Id.* at 1017-18 (internal footnote omitted).

6 The existing longstanding rule is simply that "unfavorable evidence that contradicts the favorable evidence must be disregarded." At. Br. 26 n.29 (citing WRIGHT & MILLER on appropriate JNOV review); *cf. Cameron*, 251 P.3d at 1017 n.19 (citing neighboring section of WRIGHT & MILLER on appropriate JNOV review).

7 *Alaska Fur Gallery, Inc. v. First Nat'l Bank Alaska*, 345 P.3d 76 (Alaska 2015).

8 *See id.* at 91 & n.48; *see also* R. 3356-57 (jury instruction advising jurors that they could disregard any evidence).

did not explain how she could reach the opposite conclusion post-trial. Trimble's arguments on appeal all rely on evidence the jury could have rejected.

A. A Reasonable Jury Could Have Found The Existence Of A Partnership And A Breach Of A Fiduciary Duty.

Existence of a partnership: Trimble argues that the jury could not have found that a partnership existed between RDS and Trimble. [Ae. Br. 39-40] Trimble ignores the facts presented at trial[9] and the relevant legal test.

Testimony supported finding that the Copper Center Project was an "association of two or more persons to carry on as co-owners a business for profit."[10] Two or more persons associated: Brian Feucht for RDS, Pat Boehnen for Remington, and Chaur-Fong Chen for Trimble. [At. Br. 3-10] Many witnesses, including Chen, expressly characterized the association as a partnership.[11] Trimble notes statements that the men did not believe they were agreeing to co-own a business [Ae. Br. 39], but the jury could rely on the actions that showed they were doing just that. The three companies' representatives worked together to develop a financial performance model for their joint business, which they presented

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9 This court looks only to *facts* from trial in making a legal ruling on the superior court's entry of JNOV. Trimble's reliance on the argument of RDS's trial counsel [Ae. Br. 39 n.70] is therefore unavailing; as the jury was instructed, arguments of counsel are not evidence. [R. 3354]

Space limitations restrict RDS's ability to discuss at length all of the relevant facts presented at trial. RDS's more detailed factual argument from the superior court, including additional transcript cites, may be found at Exc. 100-125.

10 AS 32.06.202(a).

11 Brian Feucht: Tr. 72, 88, 92, 93, 95, 130, 180, 181, 318-19, 320-21; Curtis McQueen (of Eklutna, Inc.): Tr. 335-38; Pat Boehnen: Tr. 360-61, 394, 473-74, 511, 512-13; Marc Hill: Tr. 606, 630, 637, 638; Paul Miller: Tr. 666-68, 679, 680, 681, 685, 686, 688, 692, 698-702; Chaur-Fong Chen: Tr. 825, 922, 929, and Exh. 12, 15, 58.

together to other businesses. [Exc. 180-86; Tr. 181-82, 412-13, 413-19, 422-36, 447] All three companies contributed data on which the model was based. [Tr. 415-17] They negotiated numerous areas that business partners typically discuss, such as profit sharing, risks, job duties, and "when and where to meet." [Tr. 318-19] And they did so in the service of what was unquestionably intended to be a for-profit business.[12] [Tr. 25, 26, 776; Exc. 151-56, 180-86] They intended to share those profits. [Tr. 318-19]

Feucht's testimony about the lack of a formal partnership agreement [Tr. 263; *see* Ae. Br. 39] is not dispositive. As the Alaska partnership statute explains, the association of multiple people to carry on as co-owners of a business for profit forms a partnership "whether or not the persons intend to form a partnership."[13] The jury, which was properly instructed that the existence of a partnership was a question of fact for it to determine based on the totality of the evidence,[14] could have reasonably found that Trimble and RDS were partners based on the evidence described above.

Evidence regarding a draft agreement written by Remington [Tr. 482-86; Exc. 249-61, 267-80; *cf.* Ae. Br. 39] also does not disprove the partnership. Neither RDS nor Trimble

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12 *See Hall v. TWS, Inc.*, 113 P.3d 1207, 1212 (Alaska 2005) (final element for analyzing existence of a partnership is that the business "must be intended to make a profit," not that it actually earns profits).

13 AS 32.06.202(a).

14 *See* R. 3374. The jury may also have considered other factors explicitly suggested by the jury instruction [*id.*]: that RDS and Trimble *intended to* (but did not actually have to) combine their assets, knowledge, or abilities to carry out a business enterprise [Tr. 322, 399, 1288-89]; that shared management or profit sharing shows co-ownership [Tr. 318-19, 414-18, 944-51]; and that the men intended to create a for-profit business. [Tr. 25, 26; Exh. 5]

signed this document [Exc. 256-57, 275-76]; it has no legal effect.[15]

Breach of a fiduciary duty: Trimble's argument regarding its breach of a fiduciary duty [Ae. Br. 40-41] artificially narrows the grounds on which the jury could have found that Trimble breached this duty. The jury was properly instructed on this subject in Jury Instruction No. 22 [R. 3375-76], which Trimble does not challenge.[16] Instruction No. 22 presented several potential breaches that the jury reasonably could have found.

For one, the jury could have found that Trimble failed to hold as trustee for the partnership any property or benefit derived by the partner from the partnership business. [*See* R. 3375] Trimble obtained valuable market research data from the partnership [Tr. 101, 180-86, 317, 370-98, 453-72, 611-20, 679], failed to hold them as a trustee by sharing these data with third-parties not subject to the Mutual Nondisclosure Agreement ("NDA") [Tr. 1011-12, 1012-16, 1026, 1029, 1030-31, 1033], and even shared them with Cabela's, thereby enabling Cabela's to release a competing product. [Tr. 701-02, 708-09; Exh. 52] Second, the jury could have found that Trimble did not refrain from dealing with the partnership as a party having an adverse interest. [*See* R. 3375] Rather, Trimble repeatedly violated the NDA [Tr. 1011-12, 1012-16, 1026, 1029, 1030-31, 1033], then lied about what it had done. [Tr. 1029-30] And third, the jury could have found that Trimble did not refrain from competing with the partnership in the conduct of the partnership business. [*See* R.

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15 Tellingly, Boehnen testified that Remington wanted RDS and Trimble to sign this document because it stated, essentially, "'We are not partners.'" [Tr. 486] If this unsigned document means anything, it is that RDS and Trimble did not want to be bound by a document that characterized their relationship as something other than a partnership.

16 Trimble emphasizes that AS 32.06.404 sets forth a partner's duties. [Ae. Br. 40-41] Jury Instruction No. 22 largely restates this statute. *Cf.* R. 3375-76.

3375] Evidence showed that, before the partnership dissolved, Trimble joined with Cabela's to compete with the Copper Center Project. [Tr. 111-17, 121-23, 698, 701-02, 1011-12, 1012-16, 1026, 1029, 1030-31, 1033]

Additionally, the jury could have found that Trimble violated its obligation of good faith and fair dealing. [*See* R. 3375-77] It could have found that Trimble intentionally deprived RDS of a benefit of their contract [*see* R. 3377], when it denied RDS the benefits of unfettered communication of confidential information by taking confidential information developed exclusively for the partnership and sharing it with others not bound by the contract. *See infra* Sec. I.C. Or it could have found that Trimble acted in a manner that a reasonable person would regard as unfair: The evidence at trial supports finding that Trimble misused confidential partnership data, sold out its erstwhile partner, and lied about what it had done. [Exc. 112-14 (compiling transcript cites)] Reasonable inferences from the evidence include that Trimble then used the partnership data to work with Cabela's to bring a competing product to market. [Exc. 100-105 (compiling transcript cites)] Reasonable people would find this unfair.

For all these reasons, a reasonable jury could have found that Trimble and RDS were partners, and that Trimble breached a fiduciary duty arising from this partnership.

B. A Reasonable Jury Could Have Found That Trimble Was Liable For Intentional Or Negligent Misrepresentation.

Trimble sets forth five elements of the tort of intentional misrepresentation.[17] It

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[17] Ae. Br. 41-42; *cf.* R. 3365. Trimble nowhere meaningfully addresses the tort of *negligent* misrepresentation [*cf.* Ae. Br. 41-45], which is an independent ground for upholding both damages and liability for RDS's tort claim. [Exc. 50-51 (special verdict

does not contest that three of them were met, focusing only on the elements of justifiable reliance and causation of a monetary loss.[18]

Trimble first argues that Feucht could not have relied on Chen's misrepresentation, because he thought it was false. [Ae. Br. 43] Trimble ignores evidence from trial contradicting its argument: Feucht's testimony that he did not think Chen's statement was false. For example, Feucht testified that he "Absolutely" took Chen at his word when Chen stated that the projects did not compete. [Tr. 118] And he did not initially ask Chen for additional details about the Trimble–Cabela's project because, Feucht testified, "I had no reason to suspect anything else. We had been working together for a year and a half at the time." [*Id.*] When Feucht sought reassurance in December, Trimble repeated the lie. [Tr. 139-40] The jury could believe Feucht's testimony that he accepted Trimble's statements as truthful. Feucht's actions confirmed that he believed Trimble. He continued his attempts to work with Trimble, hoping to "merge the two deals together" [Tr. 120] in a beneficial way. And all the evidence that Trimble compiles to argue that RDS did not change its position as a result of Chen's statement [Ae. Br. 43-45] supports finding that Feucht did not know or believe that Chen's statement was false.

Trimble then argues that RDS must show that RDS "changed its position in some

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form)] And Trimble does not address those elements of negligent misrepresentation that are different from the elements of intentional misrepresentation. [*See* R. 3365, 3370] Even if the jury did not find that Trimble had committed an intentional misrepresentation, it could still find that Trimble had committed a negligent misrepresentation. And the entire tort claim, and damages therefor, still would stand. [*See* Exc. 50-51]

[18] Ae. Br. 42-45. RDS compiled the evidence supporting all five elements in its briefing in the superior court. *See* Exc. 100-110.

way." [Ae. Br. 43] This analysis, which does not cite a single case [*see id.* at 43 nn.81-82], ignores both the relevant jury instructions and the relevant time frame.

The jury instructions (which Trimble proposed [R. 2502, 3368]) advised that "RDS justifiably relied on [Trimble's] statement if" either "a reasonable person would consider the statement important when deciding whether to act" or "Trimble knew or had reason to know that this particular plaintiff, RDS, would consider the statement important when deciding whether to act." [R. 3368] The jury reasonably could find justifiable reliance under either test.

A reasonable person in RDS's position in late 2010 would consider Chen's statements important when deciding whether to act. RDS had to decide then whether to continue waiting for Trimble to provide the hardware for the Copper Center Project, or whether to seek out another hardware partner. [*Cf.* Tr. 708] Hearing that Trimble was not competing was crucial to RDS's choice to act by waiting for Trimble. The jury could conclude that, if Trimble had told RDS something different, and truthful, then RDS would have taken different action: RDS would have begun pursuing a different hardware provider. It would have begun developing stand-alone apps, comparable to the Trimble–Cabela's ReconHunt app but augmented by the patent to which RDS had exclusive rights. It might have initiated legal action. It certainly would not have waited four more months before ultimately learning that Trimble did not want to cooperate with it. Trimble's lie was information a reasonable person would find important in deciding how to act.

Trimble also had reason to know that RDS specifically would consider its statements important in deciding how to act. From early in the relationship, after the

signing of the NDA but even before the meeting in Copper Center, Chen knew that RDS was giving Trimble in effect a right of first refusal to be the hardware provider for this project: As Feucht testified, "Trimble was engaged, and we were going to stick with Trimble until Trimble told us that they weren't engaged with us." [Tr. 54] As early as April 2009, RDS believed that it could have pitched its idea to "another company in place of Trimble," and yet it did not because "we had an agreement in discussion with Chaur-Fong [Chen] that we wouldn't." [Tr. 55] Trimble knew that RDS was committed to Trimble, until Trimble said otherwise. Under the instructions given, a reasonable jury could have found that RDS justifiably relied on Chen's statement by continuing to support the Copper Center Project and not taking other action.

Trimble's analysis of RDS's supposed non-reliance *begins* with Feucht and Miller's anagnorisis (i.e., moment of discovery) on March 25, 2011. [Ae. Br. 44] This ignores the multiple intervening months between November 2010 and March 2011 and the steps RDS could have taken then if it had not been lied to, including steps to bring a competing product to market, either a full-on phone or a series of independent apps. [At. Br. 33-38; Exc. 107-10, 123-25]

Finally, Trimble briefly argues that RDS failed to prove that Trimble's misrepresentation led to a monetary loss. [Ae. Br. 45] In Section II.A.2 *infra*, RDS outlines the evidence from which the jury could conclude that Trimble's tortious conduct caused it lost profits.

For all these reasons, a reasonable jury could have found that Trimble committed an intentional or a negligent misrepresentation.

C. A REASONABLE JURY COULD HAVE FOUND THAT TRIMBLE BREACHED THE NDA.

Trimble does not dispute that it would violate the parties' NDA for Chen to disclose confidential information to another Trimble division not party to the NDA, such as Trimble Outdoors.[19] [At. Br. 4, 13; Ae. Br. 45-56] Instead, Trimble argues that Chen did not transmit information covered by the NDA, and that any information transmitted was not appropriately designated as confidential. [Ae. Br. 45-48] Neither conclusion is required by the record.

The record supports concluding that Chen sent Trimble Outdoors the consolidated profit-and-loss statement [Exc. 180-86], containing RDS's confidential data [Tr. 415-19], and not some other document containing purely Remington's financial data. Chen's sharing of information with Trimble Outdoors was discussed at Transcript 1025-31. Chen answered several questions that assumed that "the financial data that w[ere] gathered as a result of the market research" [Tr. 1025] were equivalent to "the profits and loss" [Tr. 1026] or "the financial profits and loss numbers that were developed by Remington, RDS, and Trimble MCS" [*id.*]. He never questioned or corrected this assumption. [*See* Tr. 1025-27] Chen was then asked about Exhibit 6. [Tr. 1030] In that exhibit, Mark Harrington of Trimble Outdoors asked Chen to "'send the Copper Center presentation to me and Rich before our call today.'" [*Id.* (quoting Exh. 6)] Chen responded by sending "the Copper Center presentation." [*Id.*] He was asked at trial, "'Is that presentation the executive

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[19] Trimble's argument notwithstanding [Ae. Br. 46 n.85], RDS has consistently identified multiple actions that violated the NDA. *See* Exc. 112-13; *cf.* At. Br. 4 n.4.

summary, or is that something different?'" [*Id.* (quoting deposition)] He answered, "'Something different. That was some of the financial that we (inaudible) Remington." [*Id.*] In follow-up questions and answers, RDS's counsel and Chen distinguished between the executive summary and some other document, such as "the financials." [Tr. 1030-31] Chen agreed that sharing the profit-and-loss statement with Trimble Outdoors would violate the NDA [Tr. 1025-26], while sharing the executive summary would not. [Tr. 1031] He was clear he did not send the executive summary; he shared "the financials that we got from Remington." [*Id.*]

Trimble seizes on this final statement to argue that Chen sent something other than the profit-and-loss statement. [Ae. Br. 46] However, Trimble identifies no other document that Chen could have shared, and the record contains no alternative document, presenting solely financial information from Remington, that Chen could have sent. Chen had the consolidated profit-and-loss statement in his email; Feucht had sent it to him earlier that fall. [Exc. 180] This document reflected the financial market research that Remington developed based on input from RDS and Trimble, *as well as cost estimates from each of the companies, including RDS.* [Tr. 415-17; Exc. 180-86] Likely, the *only* document Chen could have shared that contained "Remington's financials" was the profit-and-loss statement. At minimum, the jury reasonably could have found that Chen shared the parties' consolidated profit-and-loss statement, not some unspecified, unidentified, and likely nonexistent alternative document.

The jury also could have found that RDS properly labeled the profit-and-loss

statement "confidential" as required by the NDA.[20] (RDS agrees with Trimble that the appropriate document to consider here is Feucht's email transmitting the profit-and-loss statement. [Ae. Br. 47-48]) The NDA required RDS to include a designation "such as '[name of Party] Confidential Information' *or words of like meaning*." [Exc. 149 (§ 3) (emphasis added)] Feucht's email stated, "This email and any files transmitted with it are RDS . . . property, are confidential, and are intended solely for the use of the individuals or entity to whom this email is addressed." [Exc. 180] This sentence plainly qualifies as "words of like meaning" to the phrase "RDS Confidential Information." [Exc. 149]

Trimble next argues that the NDA was not breached because it received the information from Remington. [Ae. Br. 46-47] This assertion is wrong factually. As discussed above, the record shows that Chen sent information that he received *from RDS*, including RDS's confidential financial information. [Tr. 1025-31] That the document also included Remington's confidential financial information is immaterial.

Therefore, a reasonable jury could have found that Trimble breached the NDA.

II. THE EVIDENCE SUPPORTS THE JURY'S DETERMINATION THAT TRIMBLE'S MISCONDUCT CAUSED DAMAGES TO RDS, AS WELL AS THE JURY'S DETERMINATION AS TO THE AMOUNT OF DAMAGES.

A. RDS PROVED THAT TRIMBLE'S MISCONDUCT DAMAGED RDS.

Trimble's brief repeats a fundamental error of the superior court: conflating the questions of whether RDS proved that Trimble's actions caused damage to RDS and

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[20] Trimble cites no authority to support its cursory argument that Feucht's confidentiality designation does not comply with the requirements of the NDA. *See Petersen v. Mutual Life Ins. Co. of New York*, 803 P.2d 406, 410 (Alaska 1990) (party must advance a "substantive legal argument," not just a cursory statement, to support its assertions).

whether RDS provided an adequate basis for estimating damages. [Ae. Br. 12-29; Exc. 220-32; *see* At. Br. 32] Whether Trimble damaged RDS is an element of each cause of action. As the jury instructions to which Trimble agreed advised, the elements must be proved by a preponderance of the evidence – not by any more demanding standard.[21]

Trimble's brief also continues to rely heavily on the evidence that it wishes the jury had accepted [Ae. Br. 12-29], ignoring the requirement to view the evidence in the light most favorable to RDS and to accept that jurors could have disregarded all of the testimony that favors Trimble, no matter which witness spoke the words.[22]

1. The jury did not need to accept Trimble's theory that RDS faced many hurdles that it could not have surmounted, so that it could not have succeeded even without Trimble's misconduct.

Continuing its strategy from the superior court, Trimble sets out the series of hurdles that it contends RDS could not have surmounted. [Ae. Br. 18-24] RDS answered most of these points in its opening brief, pointing to the specific evidence on which the jury could have relied to find that the Copper Center Project could have succeeded if Trimble had withdrawn from the Project without tortious misstatements, breaches of contract, and violations of its fiduciary duties. [At. Br. 33-36] Trimble does not contend that RDS misstated any of those facts. [Ae. Br. 18-24] Instead, Trimble has added three new

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21 *See* R. 3365, 3370 (jury must find it "more likely true than not true" that RDS suffered a loss and that its reliance on Trimble's misstatement was a substantial factor in causing the loss), 3373 (if jury determines it is "more likely true than not true" that Trimble did not keep a promise to RDS, then jury should enter a verdict for RDS on the breach of contract claim), 3378 (for any loss claimed by RDS, jury must find it is "more likely true than not true" that RDS suffered the loss and that Trimble's conduct was the legal cause of the loss); *cf.* R. 3379, 3381 (instructions on measuring the *amount* of loss).

22 *See supra* at 1-2; At. Br. 23.

"hurdles" to the list; RDS responds briefly to these.

Trimble's new "third" asserts that RDS did not show that it could have hired engineers to write software for the Project. [Ae. Br. 19-20] Had Trimble raised this issue at trial, RDS could have offered an explicit answer. Because the "hurdle" is posited for the first time on appeal, RDS can respond only with generalities: Feucht described his history of successfully developing companies based on software design. [Tr. 8-10, 18-19] The jury reasonably could conclude that, having done it before, he could do it again. Further, because software design could not commence before Trimble completed the hardware design, the jury could conclude that RDS was not yet required to start locating software engineers. [Tr. 76, 465-66] Premature hiring exercises would have been a wasteful expense, for which RDS could not have sought compensation. [*See* At. Br. 36 n.54] Finally, until late 2011, there was a high likelihood that Trimble would acquire RDS, relieving RDS of the need to raise its own funds or to hire engineers. [Tr. 129-30]

Trimble's new "fourth" asserts that "the Copper Center Project never developed realistic financial and sales projections for its proposed smartphone." [Ae. Br. 20] The jury did not have to agree with this assertion. During Trimble's participation in the Project, it touted the jointly developed profit-and-loss statement as reliable, and it asked third parties to accept the sales projections that the partners developed using the adoption rate they agreed on and the market research they all helped develop. [Tr. 394-96, 398, 412-13, 424, 628-31; Exc. 160, 164-65]

Trimble's new "sixth" asserts that the Copper Center Project phone would not have been marketable because it would have been too expensive and unwieldy. [Ae. Br. 22-23]

Trimble relies entirely on Chen's testimony, which the jury did not have to believe. Rather than accept Trimble's claim that the Project was unworkable, jurors could have relied on Trimble's launch of ReconHunt, a suite of software programs available for download into any smartphone, almost identical to the software that the Copper Center Project planned to use. [Tr. 112-14, 701, 1106-17; Exh. 24 at pp.27-28, 32-47; Exh. 52 at pp.24-25; Exh. 69 at pp.8-11] This certainly suggests that a phone with the features planned by the Copper Center Project was both technologically feasible and affordable.

In short, the jury did not need to conclude that the Copper Center Project was doomed to fail. Trimble endorsed the Project enthusiastically before it withdrew. [Tr. 369, 398] A reasonable jury could find from the evidence that the Project could have succeeded if Trimble had withdrawn honestly, without tortious misconduct or breaches of contractual duties.

2. Evidence supports the jury's determination that Trimble's tortious misstatements caused RDS to suffer lost profits.

Trimble asserts that, to recover damages for Trimble's misrepresentations, RDS needed to prove that it could have launched a phone by March 2011 and profited by $38.5 million. [Ae. Br. 26-27] Again, Trimble confuses the questions of causation and amount of damages. To prevail on the tort claim, RDS needed to prove only that its reliance on Trimble's misstatements was a substantial factor in causing *some* loss. [R. 3365, 3370]

The jury reasonably could have determined that RDS was harmed by relying on Trimble's false assertions that its project with Cabela's did not compete with the Copper Center Project. Based on these false reassurances, RDS did not develop software or seek

another hardware partner, and it relied on Trimble's commitment to approach Cabela's to be the new marketing partner, which Trimble withdrew only the day before the meeting. [Tr. 76, 94-96, 106, 109; Exh. 9; Exh. 16] Had Trimble honestly said in November 2010, "yes, we're competing," RDS could have moved quickly to find new partners; it could have taken legal action to enjoin competition that used its confidential information; and at minimum it could have shifted gears and brought its own apps to market before Trimble launched ReconHunt. With consumer loyalty on its side, RDS later could have worked with other partners to launch a ruggedized phone preloaded with apps.[23] This entirely plausible alternative scenario is sufficient to support the jury's finding that Trimble's false statements lulled RDS into inaction and that RDS was damaged as a result. [Tr. 1695-96][24]

3. Evidence supports the jury's determination that Trimble's breach of contract and/or breach of fiduciary duty caused RDS to suffer lost profits.

With respect to RDS's claim that it was damaged by Trimble's breach of contract or breach of fiduciary duties, Trimble repeats the argument it made regarding the tort claim: that RDS cannot prevail unless it shows that, but for Trimble's breaches, RDS could have launched a specialized smartphone with hunter-and-fisherman apps before March 2011. [Ae. Br. 28] Essentially the same answer applies: RDS could prove damages in other ways

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[23] *See* Tr. 259-60 (Feucht recognized that certain obstacles could preclude development of the hardware but would not affect the software), 517 (first-mover advantage "is particularly important on the software side"), 656 (noting that money can readily be made in marketing apps); *see generally* At. Br. 36-37.

[24] RDS agrees that the record does not support finding that RDS could have launched a ruggedized smartphone by March 2011. This is based on the Copper Center Project's own timeline [Exh. 27], projecting the first quarter of 2012 for when the phone could be launched, not on RDS's counsel's assertion in the post-trial briefing on interest.

as well. [*See supra* at Sec. II.A.2]

Chen breached the NDA in November 2010 by forwarding RDS's confidential financial information to Trimble Outdoors. [*See supra* at Sec. I.C] The NDA *assumes* that breach of the agreement causes harm. [Exc. 150 (§ 5.2)][25] Here, the similarities between ReconHunt and the software planned for the Copper Center Project support the inferences that Trimble moved forward using RDS's ideas *and* that it moved expeditiously because the profit-and-loss statement showed the ideas would be hugely profitable. [Tr. 112-14, 701, 1106-17; Exh. 24 at pp.27-28, 32-47; Exh. 52 at pp.24-25; Exh. 69 at pp.8-11; Exc. 184] The jury could infer that Trimble's breach of the NDA caused RDS to suffer lost profits, at minimum from the lost opportunity to be the first-mover in marketing specialized apps.

As to the damages caused by Trimble's breach of its fiduciary duties to RDS, the evidence supports finding that this breach occurred substantially before November 2010, a fact Trimble ignores. [Ae. Br. 28-29] From September 2009 onward, when the Copper Center Project partnership was formed, Chen persuaded RDS not to market software without the Project's phone, then Trimble delayed and never developed the promised hardware. [Tr. 76, 95-95, 1028] Meanwhile, Chen was sharing information with Rich Rudow of Trimble Outdoors, allowing the competing Trimble–Cabela's project to advance while the Copper Center Project stalled. [Tr. 150-56, 1010-19, 1028-33] The time between

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[25] The terms of the NDA thus support an award of nominal damages, even if the Court concludes that the record does not support the specific damages the jury awarded for breach of contract. *See infra* Part III (further discussing nominal damages).

these breaches and the launch of ReconHunt particularly justifies the jury's finding that Trimble's breach of its partnership duties harmed RDS; had Trimble not surreptitiously promoted a competing project but had honestly, from the start, informed RDS it was disengaging from the partnership, RDS would have had time to act to protect itself. The evidence supports finding that RDS was harmed by Trimble's breaches, even if it does not establish that, but for the breaches, RDS could have produced and marketed an alternate smartphone before March 2011.

4. The evidence showed that Trimble could have foreseen that it would cause RDS to lose future profits if Trimble breached the NDA or its fiduciary duties to its partners.

"[F]oreseeability is a fact question for the jury."[26] The jury was properly instructed that it could only award lost profit damages for breach of contract if, at the time Trimble entered into the contract, it had reason to foresee that lost profits would be a probable result of a breach. [R. 3379] This Court must uphold the jury's implicit finding on foreseeability if any evidence in the record supports this finding.[27]

Trimble treats foreseeability as if it required a crystal ball, such that one contracting party must know exactly what damages the other would sustain if the agreement were breached years later. [Ae. Br. 30-32] The law is not that demanding. Alaska cases illustrate that the defendant can be expected to foresee myriad consequences that could result from breaching a contract. For example, in *Native Alaskan Reclamation*, defendant

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[26] *Alaska Tae Woong Venture, Inc. v. Westward Seafoods, Inc.*, 963 P.2d 1055, 1063 (Alaska 1998).

[27] *See id.* at 1062-63 (in reviewing an order granting JNOV, this Court must uphold the jury's finding if it is supported by any evidence in the record).

breached an agreement to provide financing for plaintiff; this Court held that a jury could decide that defendant could foresee that plaintiff could suffer losses due to an inability to obtain alternative financing.[28] In *Alaska Tae Woong Venture*, defendant breached an agreement to accept fish delivered by plaintiff; this Court upheld the jury's implicit finding that defendant could have foreseen that, if it breached the contract, plaintiff could need to sell its fishing vessel and suffer losses as a result.[29] The foreseeability of lost profits is no less clear here. When Trimble signed the NDA, it had to foresee that the parties could work together to market a profitable product: that was the principal reason for accepting RDS's confidential information. [Exc. 149-50] Chen immediately spoke with Trimble's president and made plans to create a business case. [Tr. 46] When Trimble entered into the partnership to market a product, it was even clearer that lost profits were probable if Trimble breached the agreement. [Tr. 73 ("we decided that we were . . . going to push this project forward to fruition")] Success of the product was not guaranteed, but it was nonetheless foreseeable that a breach of either agreement could cause lost profits.

B. RDS Presented Evidence That Provided A Basis For The Jury's Award Of Damages.

Standard of proof: Proving the amount of damages to a "reasonable certainty" requires that the jury have a factual basis for estimating damages.[30] In this context,

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28 *See* 685 P.2d at 1218-22.

29 *See* 963 P.2d at 1063.

30 *See Azimi v. Johns*, 254 P.3d 1054, 1065 (Alaska 2011); *City of Whittier v. Whittier Fuel & Marine Corp.*, 577 P.2d 216, 223-24 (Alaska 1978).

"reasonable certainty" is the opposite of "conjecture" and "speculation."[31] The "reasonable certainty" standard that applies to the *amount* of damages is less demanding than the preponderance of the evidence standard that applies to the *fact* of damages.[32]

Rules for a new business: Alaska law unquestionably allows even a new business to recover lost profits if it can prove the amount of loss to a reasonable certainty.[33] And, contrary to Trimble's claims [Ae. Br. 32], this Court has not adopted a one-size-fits-all rule for the only ways in which a new business may prove lost profits. Past cases suggest the types of evidence that a new business might rely on,[34] but this Court has never vacated a damages award merely because it did not rest on a specific type of evidence.[35]

RDS's evidence: RDS relied on two principal pieces of evidence to give the jury a

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[31] *See Geolar, Inc. v. Gilbert/Commonwealth Inc.*, 874 P.2d 937, 946-47 (Alaska 1994); *Guard v. P & R Enters., Inc.*, 631 P.2d 1068, 1071-72 (Alaska 1981); *State v. Hammer*, 550 P.2d 820, 825 (Alaska 1976).

[32] *See Alaska Tae Woong Venture*, 963 P.2d at 1061; *Power Constructors, Inc. v. Taylor & Hintze*, 960 P.2d 20, 43 (Alaska 1998); *Native Alaskan Reclamation*, 685 P.2d at 1222-23; *see also* At. Br. 26-27.

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

[34] *See, e.g., Geolar*, 874 P.2d at 946 (describing *Guard* as "noting that a business without an established profit history *might* rely on its principals' profit history on similar jobs or on the profit history of others similarly situated" (emphasis added)); *see also Alaska Travel Specialists, Inc. v. First National Bank*, 919 P.2d 759, 776 (Alaska 1996) (also citing *Guard*).

[35] And if the Court rejects RDS's argument that it proved the amount of damages to a reasonable certainty, the result is not, as Trimble keeps suggesting, affirmance of the JNOV. Rather, once RDS proved that it was damaged by Trimble's misconduct, it was entitled to at least nominal damages. *See* At. Br. 30 & n.43 (citing cases); *see also Alaska Travel Specialists*, 919 P.2d at 766 (summary judgment on damages claim was improper even though a portion of the claim was speculative, where evidence supported finding *some* financial damages); *City of Whittier*, 577 P.2d at 224 n.32 (court must deny JNOV or directed verdict when evidence supports an award of *some* damages); *infra* Part III.

non-speculative way to estimate damages. Both exhibits differed from evidence relied on in prior Alaska cases, but that did not make them "incompetent" evidence. [*See* Ae. Br. 34-37][36]

The profit-and-loss statement [Exc. 180-86] is not a statistical projection of the type condemned in *Guard*.[37] Most fundamentally, the profit-and-loss statement is not "self-generated," as Trimble claims. [Ae. Br. 35] Rather, it was prepared by Trimble as much as by RDS [Tr. 179-83, 188], it rested on market research prepared by an independent third party [Tr. 427-29, 435-36], and Trimble repeatedly approved the data.[38] Additionally, a non-party witness testified that the sales estimates were "accurate to a reasonable certainty" and that RDS's profit estimate was "conservative." [Tr. 459, 472] Trimble accuses RDS

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[36] Showing how fact-specific every decision is, Trimble cites several cases where courts found proof of lost profits to be inadequate. [Ae. Br. 16-17] Yet other cases uphold lost profit awards to new businesses, even where plaintiff could not point to either its own profit history or that of a comparable business. *See, e.g.*, *Mid-America Tablewares, Inc. v. Mogi Trading Co., Ltd.*, 100 F.3d 1353, 1365-67 (7th Cir. 1996) (citing additional cases at 1366); *Upjohn Co. v. Rachelle Labs., Inc.*, 661 F.2d 1105, 1112-14 (6th Cir. 1981) (allowing plaintiff to rely on "marketing forecasts prepared well before litigation was anticipated, by employees specializing in economic forecasting"); *Cardinal Consulting Co. v. Circo Resorts, Inc.*, 297 N.W.2d 260, 266-68 (Minn. 1980); *Aronowicz v. Nalley's, Inc.*, 30 Cal. App. 3d 27, 52-53 (1972); *see also MindGames, Inc. v. Western Pub. Co., Inc.*, 218 F.3d 652, 658 (7th Cir. 2000) (discussed by Trimble, but distinguishable because Feucht, unlike plaintiff there, was a proven entrepreneur and plaintiff there offered no basis to determine its lost royalties "to even a rough approximation").

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

[38] *See* Tr. 412, 631 (Chen vouched for the reliability of the profit-and-loss statement to his superiors and he personally believed the sales estimates were too low), 412-13, 418, 424 (Trimble relied on the market research in making presentations to other companies); *see also* Tr. 1060, 1132-40, 1142-46, 1152-58 (Trimble's witnesses affirmed that they rely on this type of market research), 1171-76 (Trimble developed very similar sales projections when it considered marketing a phone preloaded with apps).

of not finding another case upholding reliance on similar evidence to prove lost profits. [Ae. Br. 34-35] But Trimble equally has located no case holding that such a document was inadequate. Evidently, the facts of this case are unique.

The whiteboard [Exc. 188] offered an alternative calculation that the jury could rely on. Trimble asserts that the jury could not accept those numbers, because the whiteboard entries reflect revenues, not profits. [Ae. Br. 36] Trimble is wrong. Exactly how the whiteboard figures were determined is not clear. But it is clear that they were developed by Trimble MCS's controller and that the first column unambiguously represents the *value* that he assigned to RDS, based on several different assumptions about the success of the Copper Center Project. [Tr. 134, 136-37; At. Br. 46-47] RDS acknowledges again that "value" is not synonymous with "future lost profits," but even Trimble does not dispute that it is a reasonable proxy, especially for a company like RDS that had no value in fixed assets or real estate; its only real value was its estimated future profits reduced to present value. [At. Br. 47; *see* Ae. Br. 2] Because Trimble developed those valuations – and, accepting the evidence most favorable to RDS, offered to buy RDS for $18.4 million, the value on the chart's second line [Tr. 997] – the whiteboard was competent evidence to support the jury's award of damages.[39]

The jury therefore could have relied on either of RDS's exhibits. It does not matter that the amount awarded does not precisely match either exhibit or RDS's closing

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[39] Feucht's rejection of Wolff's methodology does not make it "untenable" for RDS to rely on Wolff's number on appeal. [Ae. Br. 37] On this point, the jury could have chosen to believe Wolff rather than Feucht.

argument. [*Cf.* At. Br. 47 n.73] Because there was an evidentiary basis for awarding up to $111 million, this Court should uphold the award of less than half that amount.[40]

C. THE RECORD ALSO OFFERS A BASIS FOR AWARDING LOST PROFITS BASED ON THE LOST OPPORTUNITY TO BE FIRST-MOVER IN THE MARKET FOR SPECIALIZED APPS FOR HUNTERS AND FISHERMEN.

If the evidence does not support the jury's award of lost profits for the Copper Center Project, this Court could alternatively award lost profits due to RDS's lost opportunity to be the first to market a suite of apps for hunters and fishermen. [At. Br. 37-38] Trimble claims any such award would be speculative [Ae. Br. 37-38], but in fact the record provides a basis for estimating RDS's loss. The jury heard Trimble's estimate that it would earn annual profits of $2 to 2.5 million from its sale of apps. [Tr. 1159-60] That offers a reasonable basis for estimating profits for the comparable product that RDS could have marketed if RDS had been able to gain first-mover advantage in this field.

Finally, if the Court sustains either liability verdict but finds that the evidence does not support any specific damages award, the Court must order an award of at least nominal damages. *See* At. Br. 39 n.56; *infra* Part III.

III. IN THE ALTERNATIVE, RDS IS ENTITLED TO AN AWARD OF NOMINAL DAMAGES OR REMITTITUR.

Trimble argues that, if this Court finds that RDS is not entitled to the full award of $51.3 million, this Court may not then award either nominal damages or remittitur. [Ae. Br. 48-49] Trimble is mistaken.

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[40] *See* At. Br. 48-49 & nn.74-76 (citing cases upholding awards of amounts not testified to by any witness); *see also* R. 3354 (instructing jurors that statements of counsel are not evidence).

Procedurally, Trimble claims that RDS may not receive nominal damages now because it failed to request them below. [Ae. Br. 48] This Court rejected precisely this argument in *Anchorage Chrysler.*[41] There, the appellee contended that nominal damages were waived because this claim was first raised on appeal.[42] But this Court, citing its "liberal approach towards determining whether an issue or theory of a case was raised in a lower court proceeding," explained, "we will consider new arguments on appeal if they are closely related to the trial court arguments and could have been gleaned from [the] pleadings."[43] This Court observed that the complaint raised the substantive legal ground for which nominal damages were later sought, and requested both compensatory damages and "'such other and further relief as the court may deem just and appropriate.'"[44] Thus, the "current request for nominal damages [was] properly before this court."[45]

The record in this case is similar. RDS properly pled all causes for which it now seeks relief in the form of nominal damages. [Exc. 9-23; R. 231-37] Its initial and amended complaints requested both unspecified damages and additional relief. [Exc. 23-24; R. 237-38] Under *Anchorage Chrysler*, RDS's appellate claim for at least nominal damages is properly before this Court. Trimble's reliance on cases discussing plain error [Ae. Br. 48 n.91] does not change this conclusion; RDS does not argue that the superior court erred in

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41 *Anchorage Chrysler Center v. DaimlerChrysler Motors Corp.*, 221 P.3d 977 (Alaska 2009).

42 *See id.* at 990.

43 *Id.* (internal quotation marks omitted).

44 *Id.* (quoting complaint).

45 *Id.*

failing to give a non-requested jury instruction.

Substantively, Trimble argues that both nominal damages and remittitur are unavailable because RDS did not prove the underlying elements of its claim. [Ae. Br. 48-49] But RDS has shown that it proved that Trimble breached its obligations in both tort and contract and that its breaches caused harm to RDS. [*See supra* Parts I-II; At. Br. 30-38]

Therefore, if this Court does not uphold the particular damage amounts awarded by the jury, it should hold that RDS is, at minimum, entitled to a lesser award in the form of either remittitur or nominal damages.

CONCLUSION

For the reasons set forth above, this Court should reverse the superior court's grant of JNOV to Trimble and should reinstate the jury's verdict.

Respectfully submitted, this 7th day of December, 2015.

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