

No. _____

**In The
SUPREME COURT OF THE UNITED STATES**

Recreational Data Services, Inc.,

Petitioner

v.

Trimble Navigation Limited, A California Corporation,

Respondent

**ON PETITION FOR WRIT OF CERTIORARI
TO THE ALASKA SUPREME COURT**

APPENDIX VOL 1 OF 2

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THE SUPREME COURT OF THE STATE OF ALASKA

RECREATIONAL DATA	)
SERVICES, INC.,	)
	)
Appellant,	)Supreme Court No.
	)S-15893
	)
v.	)Superior Court No.
	)3AN-11-10519CI
TRIMBLE NAVIGATION	)
LIMITED, A California	) <u>OPINION</u>
Corporation,	)NO. 7162-March 24,
	) 2017
Appellee.	)
_____	)

Appeal from the Superior Court of the State of Alaska,
Third Judicial District, Anchorage, Catherine M. Easter,
Judge.

Appearances: Susan Orlansky, Reeves Amodio, LLC.,
Gavin Kentch, Law Office of Gavin Kentch, LLC., Josh

Fannon, Law Offices of Joshua Fannon, Palmer, and Greg Parvin, Law Office of Gregory S. Parvin, Wasilla for Appellant. Ajems N. Leik and Brian P. Samuelson, Perkins Coie, LLP, Anchorage Daniel P. Elms, Bell Nunnally & Martin, LLP., Dallas, Texas, for Appellee.

Before: Stowers, Chief Justice, Fabe, Winfree, MAassen and Bolger, Justices.

MAASSEN, Justice.

I. INTRODUCTION

Recreational Data Services, Inc. (RDS) is an Alaska corporation that attempted to develop and market a smartphone that would come preloaded with outdoor-oriented software. RDS pursued a partnership to advance the project with Trimble Navigation Limited, through one of its divisions, Trimble Mobile Computing Services (Trimble Mobile)¹, and Remington Arms Company.

¹ Trimble Navigation, the named party in this case, has two distinct divisions relevant here: Trimble Mobile Computing Solutions and Trimble Outdoors. In this appeal we refer to Trimble Navigation and its divisions collectively as “Trimble.” We identify Trimble Navigation, Trimble Mobile, or Trimble Outdoors individually when the fact of the entity’s separate existence is important to the context.

Remington withdrew from the project after about two years of research and review. Several months later Trimble Mobile left the project too — shortly before a different Trimble division, Trimble Outdoors, launched a similar product. RDS sued Trimble for misrepresentation, breach of contract, and breach of fiduciary duty, alleging that Trimble Mobile intentionally delayed RDS's project while sharing confidential information about it with Trimble Outdoors.

A jury agreed with RDS and awarded it \$51.3 million in lost profits. The superior court, however, concluded that RDS had not proven the amount of lost

profits with reasonable certainty and granted Trimble a judgment notwithstanding the verdict. RDS appeals. It argues that the superior court erroneously conflated the standards of proof for the fact of harm and the amount of damages and asks that the jury verdict be reinstated. Trimble responds that no reasonable jury could have found that RDS satisfied all elements of its claims.

We conclude that it was error to grant a judgment notwithstanding the verdict because a reasonable juror could conclude that RDS proved all elements of its claims. We also hold, however, that the superior court was correct to conclude that RDS failed to

prove any amount of lost profits to a reasonable certainty as the law requires. We therefore grant remittitur, directing the superior court to make an award of nominal damages and enter judgment for RDS.

II. FACTS AND PROCEEDINGS²

A. Facts

In 2008 Brian Feucht and his business partner, Jim Belz, came up with an idea for a “ruggedized” smartphone with a pre-loaded suite of

² The oral arguments in this case took place before an audience of students and teachers at West High School in Anchorage as part of the “Supreme Court Live” community outreach program.

applications (apps) designed for outdoors enthusiasts.

They formed RDS to develop the product they envisioned.

In February 2009 RDS sent an executive summary to Trimble Outdoors introducing three suites of anticipated software: HuntZone, FishZone, and RecZone.

RDS proposed that it would develop the software and Trimble would build the phone's hardware. RDS received a positive response from Chaur-Fong Chen, the Director of Strategic Business Development for Trimble Mobile, a different Trimble division, and in March 2009 Trimble Mobile and RDS signed a mutual nondisclosure agreement. The nondisclosure agreement stated the

parties' purpose, defined confidential information, and restricted the disclosure of confidential information to parent companies, subsidiaries, and employees on a need-to-know basis. Trimble Mobile was the only Trimble entity to sign the nondisclosure agreement.

RDS approached Remington about doing the marketing for the planned smartphone. In September 2009 Feucht, Belz, and Chen met with Pat Boehnen, a Remington project manager and marketing director, in Copper Center to discuss how the project would move forward. They agreed that RDS would be responsible for software, Trimble Mobile for hardware, and Remington for

marketing. They also discussed research responsibilities, potential revenue, and the sharing of profits. They called the plan that emerged from this meeting the “Copper Center Project.” Feucht testified that Chen and Boehnen both advised him not to launch a stand-alone app before the smartphone was complete; this would protect future hardware sales and ensure that the hardware and software were integrated.

The parties dispute whether they had created a partnership at this point. Feucht testified that at the end of the Copper Center trip “we shook hands and we

decided that we were going to be partners and we were going to push this project forward to fruition.” But according to Trimble, the parties “agreed to explore a possible venture” but stopped short of forming a partnership. The parties do agree that they all understood they could leave the Copper Center Project at any time.

After the Copper Center meeting, Remington conducted two large-scale market research surveys to evaluate what features the phone needed and how much consumers would be willing to pay for it. Using this data,

RDS, Trimble Mobile, and Remington generated profit and loss statements predicting the phone's sales and each party's role. The parties also developed a PowerPoint presentation which identified them as partners and which was presented to potential third-party investors, including AT&T, Eklutna Corporation, Symbian, and Janney Montgomery Scott. Around September 2010 RDS approached Paul Miller, a former Remington executive, about acting as the Copper Center Project's Chief Operating Officer. Miller joined the project as an informal consultant pending a final contract between the companies.

In October or November 2010 Remington signaled its intent to withdraw from the Copper Center Project. Also in November 2010 Chen alerted Feucht for the first time that Trimble Outdoors was working on a similar project with the retail chain Cabela's, though Chen assured Feucht the two projects did not compete. Feucht traveled to Trimble's headquarters in December and met with Chen and Steve Wolff, a Trimble Mobile employee who had joined Chen in the Copper Center Project, to discuss how they could move forward without Remington. During this meeting Wolff wrote on a whiteboard a series of valuations and projected revenues based on information

Feucht provided. RDS alleges that during this meeting Trimble Mobile offered to acquire RDS, but Trimble disputes this.

RDS and Trimble Mobile decided to investigate whether Cabela's would be willing to replace Remington as the Copper Center Project's marketing arm. Miller arranged for them to meet with Cabela's in March 2011. But Chen emailed Feucht and Miller on the day of the meeting to say that Trimble Mobile would not attend. On their way to the meeting Feucht and Miller stopped at a restaurant inside Cabela's, where they saw advertisements for Cabela's new phone apps — ReconHunt

and ReconFish — which they testified were almost identical to the software suite RDS had envisioned. They went through with the Cabela's meeting but felt disheartened, and a few weeks later Cabela's declined to work with them.

B. Proceedings

In September 2011 RDS sued Trimble, alleging various causes of action for breach of contract, fraud, and breach of fiduciary duty.³ A jury heard the case

³ RDS's complaint also named Cabela's, AT&T, and Alascom as defendants. At the time of trial, Trimble was the only remaining defendant.

in September 2014. RDS sought to prove through testimony and emails between Chen and other Trimble employees that Chen regularly conferred with Trimble Outdoors in violation of the parties' nondisclosure agreement and that Chen shared confidential information that Trimble Outdoors and Cabela's used to their advantage to create the ReconHunt and ReconFish apps. RDS also alleged that Trimble Mobile delayed the release of RDS's product while it "strung RDS along through deceptive statements." Finally, RDS argued that Chen had misrepresented that the Trimble Outdoors project did not compete with the Copper Center Project. To prove

damages, RDS relied on the profit and loss projections that RDS, Trimble Mobile, and Remington generated for the Copper Center Project and the whiteboard valuations Wolff created during their December 2010 meeting.

Trimble moved for a directed verdict mid-trial and at the end of trial. The superior court denied the first motion, concluding that the issue was “very close” but that there was room for diversity of opinion among fair-minded jurors when viewing the evidence in the light most favorable to RDS. The superior court denied the later motion “[f]or the reasons previously stated.”

The jury then returned a verdict in favor of RDS on all claims, awarding it \$38.5 million for intentional and negligent misrepresentation and \$12.8 million for breach of contract and fiduciary duty; these numbers added up to 100% of Wolff's whiteboard valuation of the project. The jury declined to award punitive damages.

Trimble moved for judgment notwithstanding the verdict or a new trial, arguing that RDS had failed to prove the elements of its claims and that the damage award was not supported by reasonably certain evidence of lost profits. The superior court granted Trimble's motion, concluding that "reasonable

persons could not differ in their judgment that RDS, an unestablished business, did not prove any amount of lost profits with reasonable certainty.” The court therefore entered judgment in favor of Trimble.

RDS now appeals, contending that the superior court failed to view the evidence in the light most favorable to it as the non-moving party. RDS also contends that a judgment notwithstanding the verdict was inappropriate because if the amount of the award could not be calculated with reasonable certainty, then RDS was nonetheless entitled to a judgment in its favor and, at a minimum, an award of nominal damages.

III. STANDARD OF REVIEW

Whether there is sufficient evidence to support a jury verdict is a question of law we review de novo.⁴ We assess “whether, after reviewing the full record presented to the jury in the light most favorable to the non-moving party, a reasonable juror could possibly find in that party’s favor.”⁵

IV. DISCUSSION

⁴ *Cameron v. Chang-Craft*, 251 P. 3d 1008, 1018 (Alaska 2011) (citing *L.D.G., Inc. v. Brown*, 211 P. 3d 1110, 1117-18 (Alaska 2009)).

⁵ *Wiersum v. Harder*, 316 P.3d 557, 563 (Alaska 2013) (citing *L.D.G.*, 211 P.3d at 1117).

The superior court erred in granting a judgment notwithstanding the verdict. As discussed in Section A, a reasonable juror could find, as this jury did, that RDS proved all elements of its claims for misrepresentation, breach of contract, and breach of fiduciary duty by a preponderance of the evidence. But as explained in Section B, although it was error to conflate the fact of harm and the amount of damages in granting the judgment notwithstanding the verdict, the court correctly concluded that RDS did not prove any amount of lost profits to a reasonable certainty. Remittitur for an award

of nominal damages is therefore appropriate, as discussed in Section C.

A. It Was Error To Grant A Judgment Notwithstanding The Verdict Because A Reasonable Juror Could Find That RDS Proved All Elements Of Each Of Its Claims By A Preponderance Of The Evidence.

In ruling on a motion for a judgment notwithstanding the verdict, a trial court must determine “whether, after reviewing the full record presented to the jury in the light most favorable to the non-moving party, a reasonable juror could possibly find in that party’s favor.”⁶ Thus, the fundamental question we consider here de novo

⁶ *Id.* (citing *Cameron*, 251 P.3d at 1017).

is whether the evidence viewed in the light most favorable to RDS “permits room for diversity of opinion among reasonable jurors.”⁷

1. A reasonable juror could find that Trimble Mobile misrepresented that the Trimble Outdoors application did not compete with the Cooper Center Project.

To show fraudulent misrepresentation RDS was required to prove these elements: “(1) a misrepresentation of fact or intention, (2) made fraudulently (that is, with ‘scienter’), (3) for the purpose or with the expectation of inducing another to act in reliance, (4) with justifiable

⁷ *Cameron*, 251 P.3d at 1017 (quoting *City of Delta Junction v. Mack Trucks, Inc.*, 670 P.2d 1128, 1130 (Alaska 1983)).

reliance by the recipient, (5) causing loss.”⁸ The elements of negligent misrepresentation are essentially the same, except that instead of scienter the plaintiff has to prove the defendant’s lack of “reasonable care when making the statement.”⁹ Trimble challenges only whether RDS proved justifiable and actual reliance; our analysis of this element

⁸ *Lightle v. State, Real Estate Comm’n*, 143 P.3d 980, 983 (Alaska 2006) (quoting RESTATEMENT (SECOND) OF TORTS §§ 525, 526, 531 (AM, Law Inst. 1977)).

⁹ *S. Alaska Carpenters Health & Sec. Tr. Fund v. Jones*, 177 P.3d 844, 857 (Alaska 2008) (citing *Bubbel v. Wien Air Alaska, Inc.*, 682 P.2d 374, 380 (Alaska 1984)).

applies to both the intentional and the negligent misrepresentation claims¹⁰.

**a. A reasonable juror could find that
RDS justifiably relied on Trimble
Mobile’s misrepresentations.**

A plaintiff who knows that a statement is false “cannot justifiably rely” on it.¹¹ Trimble argues that

¹⁰ *Anchorage Chrysler Center, Inc. v. DaimlerChrysler Corp.*, 129 P.3d 905, 915 (Alaska 2006) (“[A]ctual reliance and justifiable reliance are both prerequisites to claims of negligent and intentional misrepresentations...”).

¹¹ *Shehata v. Salvation Army*, 225 P.3d 1106, 1114 (Alaska 2010) (citing 2 DAN B. DOBBS, THE LAW OF TORTS § 474 (2001)); *see also* RESTATEMENT (SECOND) OF TORTS § 541 cmt. a (AM. LAW INST. 1977) (“Although the recipient . . . is not barred from recovery because he could have discovered its falsity . . . by investigating its truth, he is nonetheless required to use his senses, and cannot

RDS knew that the ReconHunt and ReconFish apps developed by Trimble Outdoors competed with the Copper Center Project because Feucht emailed Chen on November 30, 2010, to say he was “very concerned” about the Trimble Outdoors project and its possible entry into the same market. Feucht ended the email by telling Chen, “I need to know we have a deal or I need another supplier.”

recover if he blindly relies upon a misrepresentation the falsity of which would be patent to him if he had utilized his opportunity to make a cursory examination or investigation.”).

Feucht testified that he sent this email the same day or the day after Chen first told him Trimble Outdoors was working with Cabela's on a product that "did not compete with the Copper Center Project." Feucht admitted that Chen never answered his email, but he testified that a month later, in December 2010, he traveled to Trimble Mobile's headquarters and met with Chen and Wolff "to reassess the project and move the project forward" in light of Remington's imminent departure. Feucht testified that he was again reassured by both Chen and Wolff that Trimble Outdoors' project "was totally different. And we shouldn't worry about it." A reasonable juror could

find it more likely than not that these assurances were given and that Feucht accepted them. And Trimble identifies no evidence that Feucht learned of the specifics of ReconHunt and ReconFish or of their similarity to the Copper Center Project before March 2011, when he saw advertisements for the apps at the Cabela's restaurant.

b. A reasonable juror could find that RDS relied on Trimble Mobile's misrepresentations by acting or refraining from action.

Trimble also argues that RDS failed to prove that it "relie[d] on [Trimble Mobile's] misrepresentation in

acting or refraining from action.”¹² To support this assertion Trimble cites Feucht’s testimony that he realized in March 2011 that ReconHunt was “an absolute rip-off of my idea” but proceeded with the pitch to Cabela’s while continuing to treat Trimble Mobile as a partner. Trimble argues that “there is no credible basis to conclude that RDS would have changed its position or done anything differently” if Trimble Mobile had admitted early on that the projects competed.

¹² RESTATEMENT (SECOND) OF TORTS § 537(a) (AM. LAW INST. 1977).

But Trimble's argument slights the period from December 2010 to March 2011. A reasonable juror could conclude that had RDS known by December 2010 that Cabela's and Trimble Outdoors were creating a competing product, it would have used the next few months to pursue a different hardware provider, would have considered launching a separate software application, or would have taken some other action rather than waiting for its next meeting with Trimble Mobile. The fact that RDS went ahead with the Cabela's meeting in March 2011 could indicate that RDS relied on Trimble Mobile's assurances until it was too late to shift gears. A

reasonable juror could thus find that RDS proved by a preponderance of the evidence that it actually relied on Trimble Mobile's misrepresentations.

2. A reasonable juror could find that Trimble Mobile breached the nondisclosure agreement by sharing financial information with Trimble Outdoors

The nondisclosure agreement signed by RDS and Trimble Mobile early in their relationship prohibited either party from disclosing "Confidential Information." "Confidential Information" was defined in the agreement as "any information or material of a confidential or proprietary nature relating to the existing or prospective business . . . of a Party or Others" or relating to "the terms

of a prospective business relationship.” The agreement also required the parties to identify confidential information in their written communications by attaching a statement “such as ‘[name of Party] Confidential Information’ or words of like meaning.”

RDS argued at trial that Trimble Mobile breached the nondisclosure agreement by sharing confidential information with Trimble Outdoors, specifically the profit and loss statements prepared by RDS, Trimble Mobile, and Remington based on Remington’s market research data. On appeal Trimble argues that the evidence at trial was insufficient to support

a finding that the agreement was breached. Trimble contends

(a) that Trimble Mobile did not disclose confidential information to Trimble Outdoors;

(b) that RDS had not properly identified the project's profit and loss statements as confidential; and (c) that information shared by Trimble Outdoors was not covered by the nondisclosure agreement.

a. A reasonable juror could find that Chen shared confidential information with Trimble Outdoors

Trimble argues that RDS failed to prove that Chen improperly shared the profit and loss statements because Chen described the documents he

shared as “the financials . . . from Remington” but never specified which documents those were. But a reasonable juror could rely on context to conclude that the documents Chen referred to included the profit and loss statements.

The parties’ emails indicated that Chen received the profit and loss statements from Feucht on September 30, 2010; and Chen testified that on November 20 he forwarded financial data to Mark Harrington of Trimble Navigation and Rich Rudow of Trimble Outdoors. While cross-examining Chen on this subject, RDS’s attorney emphasized repeatedly that he was asking about

“the market research data as it applied to the financials, profits and losses.” Chen confirmed his earlier deposition testimony that what he forwarded to the other Trimble employees was “the financials that we got from Remington,” but he equivocated as to whether it would have been appropriate for him to share the related profit and loss information with others in the Trimble organization. From this, a juror could reasonably conclude that the profit and loss statements from Feucht’s September 30 email were included in the information that Chen forwarded to Harrington and Rudow.

Conversations between Chen and Rudow in April and October 2009 and September and November 2010 provide additional context for a jury finding that Chen shared confidential information with Trimble Navigation and Trimble Outdoors. Chen testified at trial that he told Rudow in April 2009 that the Copper Center Project “software might be good for his business.” In October 2009 Chen emailed Rudow to say he was preparing a presentation for Remington, Cabela’s, and AT&T that he would show Rudow later. In September 2010 Chen emailed Rudow to say that since Rudow had “been working on the Outdoor related market and ha[d]

gained a lot of experience in user's adoption and carrier behavior, Steve [Berglund, the Trimble Navigation CEO,] suggested that we should work together to see if we can address the concerns he has on the [Copper Center] project." As part of their meeting, Chen said he would like "to go through the current business plan and ask for your advice on various issues." In October 2010 Chen emailed Rudow to set up a meeting "to go through the plan in person [because] there [is] quite a bit of confidential stuff that right now is not the time to send it through email[]." At trial Chen testified that he, Rudow, and Harrington met in November 2010 to discuss "[p]otential overlap"

between the projects. As discussed above, the evidence supported a conclusion that Chen sent Rudow and Harrington confidential information from the Copper Center Project in preparation for this meeting.

Viewing the evidence in the light most favorable to RDS, a reasonable juror could find that it was more likely than not that Chen did disclose confidential information to Rudow and Harrington, neither of whom worked for Trimble Mobile. This was a violation of the nondisclosure agreement.

- b. Feucht's email properly designated the profit and loss statements as confidential**

Feucht's email transmitting the profit and loss statements contained this notice: "This email and any files transmitted with it are RDS . . . property, are confidential, and are intended solely for the use of the individual or entity to whom this email is addressed."

Trimble argues that "[t]he boilerplate paragraph at the end of Mr. Feucht's email did not meet [the nondisclosure agreement's] requirements." But Trimble does not elaborate on how the language was deficient. And although Trimble describes it as "boilerplate," there do not appear to be any other emails from Feucht in the record that contain the same or similar language.

Whether the notice satisfied the demands of the nondisclosure agreement presents a question of law.¹³ Our object in interpreting a contract “is to give effect to the reasonable expectations of the parties.”¹⁴ We do this by “look[ing] to the language of the disputed provision, the language of other provisions of the contract, relevant extrinsic evidence, and case law interpreting similar

¹³ *Herring v. Herring*, 373 P.3d 521, 528 (Alaska 2016) (citing *Cook v. Cook*, 249 P.3d 1070, 1077 (Alaska 2011) (observing that the interpretation of contract language is a question of law reviewed de novo on appeal).

¹⁴ *Alaska Fur Gallery, Inc. v. First Nat’l Bank Alaska*, 345 P.3d 76, 98 (Alaska 2015) (quoting *Peterson v. Wirum*, 625 P.2d 866, 872 n.10 (Alaska 1981)).

provisions.”¹⁵ We conclude that Feucht’s notice did constitute “words of like meaning” under the nondisclosure agreement’s provision for identifying confidential information, as the notice identified the disclosing party and explicitly stated that the emails and file were confidential¹⁶. And Feucht did “affix or incorporate” the notice to the profit and loss statements when he attached

¹⁵ *Id.* (quoting *Peterson*, 625 P.2d at 872 n.10).

¹⁶ The partners did not always use the nondisclosure agreement’s language verbatim. A Product Alliance Agreement, for example, was marked “Confidential — for Internal Discussion Purposes Only,” while the parties’ joint Copper Center Project presentation was marked “Company confidential — do not distribute.”

the statements to an email describing the “files transmitted” as “confidential.” This interpretation of the nondisclosure agreement’s language seems straightforward, and Trimble directs us to no extrinsic evidence that would require us to interpret it differently. We therefore conclude that the profit and loss statements were properly designated as confidential under the nondisclosure agreement.

c. The nondisclosure agreement protected the profit and loss statements.

Trimble contends that the “financials . . . from Remington” are not covered by the nondisclosure

agreement because the agreement says “Confidential Information shall not include any information which . . . [i]s lawfully received, without obligation of confidentiality, by Recipient from Others.” Trimble argues that the market research data were produced by Remington, who was not a party to the nondisclosure agreement, and that Trimble Mobile received “the financials” from Remington — an “Other.”

But confidential information under the nondisclosure agreement is defined by the party that sent it, not the party that generated it. Trimble points to no

evidence that Trimble Mobile actually received the profit and loss statements from Remington.¹⁷ Rather, the evidence indicated that Chen, Boehnen, and Feucht each created individual profit and loss statements based on Remington's market survey data, and that Boehnen and Feucht then forwarded their statements to Chen, who

¹⁷ The origin of the profit and loss statements is not immediately apparent from the document used as an exhibit at trial, though at one point Trimble's attorney clarified: "[I]t is an email from Mr. Chen transmitting a document. That's true. The content, the substance of the attachment, the data that is in that attachment, is from Mr. Feucht."

consolidated the statements into a single file. A juror could reasonably find that the profit and loss statements were information that related to the purpose of the nondisclosure agreement — for “discuss[ion of] the terms of a prospective business relationship” — since they forecast RDS’s and Trimble Mobile’s contributions and success if the Copper Center Project progressed. And a juror could reasonably find that the profit and loss statements were “material of a confidential or proprietary nature relating to the . . . prospective business and/or technology of a Party” since they projected the financial performance of the Copper Center Project and revealed

information about how the participants expected the project to play out. Because Trimble Mobile received the confidential information from RDS, the profit and loss statements were protected by the nondisclosure agreement.

3. A reasonable juror could find that Trimble Mobile breached its fiduciary duty as RDS's partner.

Trimble also contends that the superior court was correct to conclude that RDS's claim for breach of fiduciary duty was not supported by the evidence. Trimble argues that no reasonable juror could have found that Trimble Mobile and RDS were partners or that

Trimble Mobile breached a fiduciary duty arising out of such a partnership.

a. A reasonable juror could find that Trimble Mobile and RDS was partners.

A legal partnership is defined by statute as

“the association of two or more persons to carry on as co-owners a business for profit . . . whether or not the persons intend to form a partnership.”¹⁸ This definition can be reduced to four “key elements”: (1) there is associational intent; (2) there is co-ownership of the resulting business; (3) the partners are in business; and (4) the business is

¹⁸ AS 32.06.202(a).

intended to make a profit.¹⁹ “Whether a partnership exists . . . is normally a question of fact for the fact finder.”²⁰ Parties’ description “of [their] relationship as one of partnership or not is not controlling; their intent may be inferred from their actions.”²¹ The jury in this case was

¹⁹ *Hall v. TWS, Inc.*, 113 P.3d 1207, 1211-12 (Alaska 2005) (citing *Chocknok v. State, Commerical Fisheries Entry Comm’n*, 696 P.2d 669, 675-76 (Alaska 1985)).

²⁰ *Parker v. N. Mixing Co.*, 756 P.2d 881, 887 n.11 (Alaska 1988) (citing *Peterson v. Prince*, 430 N.E.2d 297, 300 (Ill. App. 1982); *Pruitt v. Fetty*, 134 S.E.2d 713, 716 (W. Va. 1964)).

²¹ *Id.* (citing *Greene v. Brooks*, 45 Cal. Rptr. 99, 102 (Cal. App. 1965); *Anderson Hay & Grain Co. v. Dunn*, 467 P.2d 5, 7 (N.M. 1970); *Taylor v. Lewis*, 553 S.W.2d 153, 158 (Tex. App. 1977)).

properly instructed that “[a] partnership need not be documented in writing” and could exist “whether or not the persons intend to form a partnership.”

Trimble contends that the evidence did not support two of the key elements that define a partnership: associational intent and co-ownership of a business. Associational intent requires “an agreement to combine the [partners’] property, money, effects, skill and knowledge to carry out a business enterprise.”²² If there is no written

²² *Hall*, 113 P.3d at 1211 (alteration in original) (quoting *Chocknok*, 696 P.2d at 675-76).

partnership agreement, “the existence of a partnership must be proven by credible evidence,”²³ which may include “ ‘the transactions, conduct and declarations’ of the parties.”²⁴ Co-ownership of a business “is evidenced by shared management authority and profit-sharing.”²⁵

As for the factor of associational intent, Trimble relies on the testimony of Paul Miller, the project consultant, that “[t]here was not a final contract” among

²³ *Id.* (citing 59A AM. JUR. 2D, *Partnership* § 90 (2003)).

²⁴ *Id.* (quoting *Innes v. Beauchene*, 370 P.2d 174, 176 (Alaska 1962)).

²⁵ *Id.* at 1211-12 (citing *Chocknok*, 696 P.2d at 675).

the parties and that there was not “some meeting of the minds and agreements between the principals.” But Miller later clarified, “I believe [RDS and Trimble Mobile] were acting as partners. And in terms of meeting of the minds, I meant the final construct, the dates, the dollars, how that was going to be rolled forward” A reasonable juror was not required to interpret Miller’s testimony that there was no “final contract” to mean that there was no associational intent.

Trimble also notes that a draft Product Alliance Agreement circulated by Remington expressly denied that a partnership existed. But only Remington

signed that document. As RDS notes, a reasonable juror could conclude that the other parties ultimately did not sign it because they “did not want to be bound by a document that characterized their relationship as something other than a partnership”; and a reasonable juror could read the agreement’s language, even if indicative of the parties’ intent, in light of the other evidence that they *acted* as partners.

Rather than focusing on the labels the parties gave their relationship, the jury instructions asked whether, based on their conduct, “RDS and Trimble [Mobile] intended or did combine assets, knowledge, or

abilities to carry out a business enterprise.”²⁶ The jury heard testimony that RDS, Trimble Mobile, and Remington were assigned responsibilities in the Copper Center Project based on their respective skills and assets. A reasonable juror could also infer from their representations to third parties that the three entities intended to combine their resources. The presentation the parties used in such meetings labeled each of the three participants as a “partner,” gave an estimate of each partner’s pre-launch

²⁶ *See id.*, 113 P.3d at 1211 (quoting *Innes*, 370 P.2d at 176).

financial investment, and identified each partner's individual responsibilities.

As for the co-ownership factor, Trimble argues that no reasonable juror could find that a partnership existed because Feucht testified at trial that RDS, Trimble Mobile, and Remington did not agree to co-own a business together. But while Feucht testified that he would not classify their relationship “as co-owners of a business,” he later explained his meaning in terms that differ from the legal definition: “I think co-owners of a business is — if we were going to form a separate

corporation and have equity, versus a partnership where we are each contributing core pieces of the project.” And Feucht conceded that he did not know how partnership was defined in the law. A reasonable juror could thus have discounted Feucht’s layperson’s view of the project’s legal status and relied on other aspects of his testimony that were more consistent with the legal definition’s requirement of co-ownership. And the jury had been instructed that the parties’ intent to create a partnership was not determinative as to whether they had in fact done so; thus, even if Feucht had testified that the parties did not intend to co-own a business, a reasonable juror could

still find that the parties acted as if they did intend to co-own a business, thus creating a partnership.

Furthermore, a juror who decided that RDS and Trimble Mobile intended to collaborate on the Copper Center Project could also reasonably conclude that they intended to co-own the resulting business. The parties had negotiated job duties, profit-sharing, and risks related not just to start-up but also to operations. Although the parties never earned profits, the return of their investment in the

Copper Center Project and any future revenue were contingent on the project's success.²⁷

Viewing the evidence in the light most favorable to RDS, a reasonable juror could find by a preponderance of the evidence that RDS, Trimble Mobile, and Remington were partners.

b. A reasonable juror could find that Trimble Mobile breached its fiduciary duty of loyalty as RDS's partner.

Alaska Statute 32.06.404(b)(2) defines a partner's duty of loyalty as including the duty "to refrain from dealing with the partnership in the

²⁷ See *Parker v. N. Mixing Co.*, 756 P.2d 881, 887-88 (Alaska 1988).

conduct . . . of the partnership business as or on behalf of a party having an interest adverse to the partnership.” RDS contends that Trimble Mobile violated this duty when it shared information with Trimble Outdoors in violation of the nondisclosure agreement and concealed what it was doing. RDS argues that Trimble Mobile also “deliberately strung RDS along through deceptive statements, thereby protecting Trimble’s ability to get to market first with its products and denying RDS the opportunity to gain first-mover advantage in marketing either standalone apps or a phone preloaded with a specialized suite of

apps.” Quoting AS 32.06.404(e), Trimble responds that a partner does not violate its duty of loyalty “merely because the partner’s conduct furthers the partner’s own interest” and that Trimble Mobile did not share “partnership property” with Trimble Outdoors because the information in question was data produced by Remington, not RDS. But we conclude that a reasonable juror could find that Trimble Mobile breached its fiduciary duty as a partner.²⁸

²⁸ AS 32.06.404(b)(2). Because we conclude that a reasonable juror could find that Trimble Mobile breached its fiduciary duty under this section, we do not discuss in any depth RDS’s arguments that

A reasonable juror could find that the market research data produced by Remington and the corresponding financial information were partnership property: the material was specific to the Copper Center Project, it was produced in furtherance of the project, and there was evidence that RDS and Trimble Mobile contributed to its development — all three companies reviewed the market research questions and had the opportunity to change or refine them.²⁹ And Chen

Trimble Mobile also violated AS 32.06.404(b)(1) & (3) and its obligation of good faith and fair dealing.

²⁹ See AS 32.06.204 (explaining when property is partnership property); REVISED UNIF. P'SHIP ACT § 204 Authors' Comments,

admitted at trial that he sent “some of the financial[s]” from the Copper Center Project to Harrington and Rudow, who were outside the nondisclosure agreement, and that the market research was sent to Trimble Outdoors and Cabela’s. The jury also heard testimony that Trimble Mobile repeatedly reassured RDS that the Trimble Outdoors project did not compete with the Copper Center Project. A reasonable juror could thus conclude that Trimble Mobile’s conduct — both in sharing partnership

cmt. 8 (West 2015-16 ed.) (“Although internally generated assets may not literally fall within Section 204, its principles should apply at least by analogy.”).

information with outside parties and in misrepresenting that the Copper Center Project and Trimble Outdoors’s project did not compete with each other — was that of a “party having an interest adverse to the partnership.”³⁰

The jury also heard evidence that Trimble Mobile ceded important decision-making about the Copper Center Project to others in the Trimble organization who lacked the same incentive to promote the project. The jury heard testimony that it was not Chen but Rudow — in

³⁰ *See* AS 32.06.404(b)(2).

charge of Trimble Outdoors's competing project — who decided that Trimble Mobile would not attend the partnership's March 2011 meeting with Cabela's. The jury saw a series of emails involving Chen, Wolff, and Rudow from a few months later, in which Rudow reprimanded Chen and Wolff for approaching the Cabela's CEO with the Copper Center Project while Trimble Outdoors was also meeting regularly with Cabela's because it might "screw it up for all of us." Rudow then wrote that "Tom [Rosdale, Cabela's Vice President of Marketing,] didn't appreciate the hoop jumping he just completed to kill the RDS deal. It was unnecessary and Trimble was part of the problem."

Larry Fox, Trimble Outdoors's main contact with Cabela's, testified that Rosdale contacted him because he was confused by the need to meet with different Trimble divisions. Although Rosdale and a Cabela's marketing manager both testified by deposition that they declined the Copper Center Project because Cabela's was "not a telecommunication company," a reasonable juror could find instead, based on this record, that the project was stymied by purposeful interference from Trimble Outdoors, with Trimble Mobile's acquiescence.

4. A reasonable juror could find that Trimble Mobile's actions were a legal cause of RDS's harm.

In granting judgment notwithstanding the verdict, the superior court relied on several facts to conclude that the Copper Center Project would not have succeeded regardless of Trimble's challenged conduct: that RDS had not secured contractual commitments from its partners or a wireless provider, that it had not raised the \$6 to \$8 million it had committed to raise before the product launch, and that it had not created a software prototype. Trimble points to these same facts on appeal to argue that RDS failed to prove legal causation for any of its

claims. Trimble also argues that the Copper Center Project could not have built its product at an acceptable cost and that RDS failed to develop financial and sales projections that would have enabled the project to move forward. But construing the evidence in the light most favorable to RDS, we conclude that a reasonable juror could find by a preponderance of the evidence that Trimble Mobile's conduct caused RDS to lose profits.

- a. A reasonable juror could find that the hurdles faced by the Copper Creek Center Projects were not insurmountable.
 - i. A reasonable juror could find that the Copper Center Project could have found a marketing partner.

The superior court noted that the Copper Center Project could never earn profits without a marketing and distribution partner, and that “RDS offered no proof that it had any firm leads on anyone to fill that role.” Trimble now argues that the project would never have succeeded in replacing Remington, citing Feucht’s testimony that “there was only one real logical partner once Remington was out, and that was going to be Cabela’s, because they were the number one player in the industry.” And Trimble contends that Cabela’s declined to participate not because of Trimble’s interference but because the project entailed “a huge outlay of cash with a high risk on

a product that has a short shelf life.” But there was evidence that Cabela’s considered selling a similar app on a “ruggedized, shockproof, and waterproof” phone produced and designed by Casio around the same time it was approached by RDS. Viewing this evidence in the light most favorable to RDS, a reasonable juror could conclude that Cabela’s *was* interested in marketing a ruggedized phone with preloaded apps but was diverted from the Copper Center Project by Trimble Outdoors’s competing product.

There was also evidence that another marketing partner would have stepped up if Cabela’s, for

whatever reason, declined the opportunity. Project consultant Miller testified that, from his time as chairman of Freedom Group, he was personally familiar with “the big-box stores, you know, the Cabela’s, the Bass Pros, the Gander Mountains, Sportsmen Warehouse, those folks. And the distributors who sold to smaller dealers. A lot of people in the industry.” Miller testified that he had “the capability to bring in another person to replace Remington, based on [his] historical contacts in this industry” — and that he had done just that by arranging the meeting with Cabela’s. A reasonable juror could believe Miller’s testimony and conclude that, although RDS saw Cabela’s

as the most logical replacement for Remington, it was more likely than not that Miller would have secured other meetings and eventually another marketing partner had the Copper Center Project not died so soon after the Cabela's meeting.

- ii. **A reasonable juror conclude that the Copper Center Project could have found a mobile carrier.**

Trimble also points to Chen's testimony that no carrier was likely to certify the phone, testimony it asserts was uncontested. The superior court had the same concerns, observing that RDS failed to secure a commitment from AT&T and "presented no

evidence that any wireless service carrier ever committed” to the project.

But Miller, the project consultant, testified that he would not expect a carrier to commit while the Copper Center Project was still in its early stages. And although Chen testified that “certification [by a wireless carrier was] going to be an issue” because of problems with data and audio quality, a reasonable juror could conclude that the partnership would continue to improve its hardware until it could be certified for wireless use.

There was also evidence that a wireless carrier would have committed to the Copper Center Project once the project had a viable phone. Chen admitted that Feucht had “very impressive contact[s]” with wireless providers; Feucht did succeed in arranging a meeting with AT&T through “a prior relationship with” an AT&T vice president. Trimble highlights testimony from an AT&T executive that the carrier was not interested in the phone because it was a “niche opportunity,” but AT&T was not the only wireless carrier on RDS’s horizon, and the jury was aware that other “niche” phones existed and had found wireless carriers to support them. A reasonable

juror could conclude that the Copper Center Project would more likely than not have succeeded in finding a wireless carrier.

iii. A reasonable juror could find that RDS could have secured pre-launch finding

When granting a judgment notwithstanding the verdict, the superior court also noted — and Trimble emphasizes on appeal — that at the time Trimble Mobile withdrew from the Copper Center Project, RDS had not yet secured the money for its pre-launch financial commitment of \$6 to \$8 million. The superior court was concerned that RDS may have relied too optimistically on

“Miller’s assumption that he could secure capital ‘easily,’ ”
and Trimble adds “that RDS was rejected by the only
funding source it ever met with.” Trimble also argues that
it would have been impossible for RDS to secure funds
before the partners finalized some kind of contractual
relationship.

A reasonable juror need not have found
these arguments convincing. Feucht testified that RDS’s
financial contribution was earmarked for paying software
engineers, that RDS “couldn’t start building software
until there was a hardware device,” and that “[t]here
wasn’t a concerted effort on [RDS’s] part” to raise the

funds while the hardware was still in the design stage.

The question the jury faced, thus, was whether RDS

would be able to raise funds once the partners had

formalized their relationship and developed a hardware

prototype. A reasonable juror could accept Miller's

testimony that \$6 to \$8 million was an attainable sum.

Miller testified it was "not a lot of money to raise. You

know, I have seen . . . projects with . . . less merit and

less wherewithal that raised . . . north of \$10 million by

just, you know, contacting a number of high net worth

individuals." He said he had "a Rolodex of both industry

people and enthusiasts" who would be interested in

investing in the Copper Center Project even if Trimble Mobile walked away. He testified about his experience as an executive who was currently “buying and selling companies” for Cerberus Capital, had served as chairman of Bushmaster when it acquired Remington, had worked in telecommunications for two nationwide wireless companies, and had “negotiated a billion-dollar contract with NASA” for Lockheed Martin. A reasonable juror could conclude based on Miller’s experience and expertise that RDS would more likely than not raise the funds it needed for pre-launch financing when it became necessary for it to do so.

- iv. **A reasonable juror could conclude that RDS could have hired engineers and developed a software prototype.**

The superior court also observed, and Trimble argues on appeal, that at the time Trimble Mobile withdrew from the project RDS had yet to hire software engineers or develop its software prototype. But again there was evidence of RDS's ability to perform these tasks when the time was right. Feucht testified at trial that he had been chief information officer, then chief executive officer, of a company at which he built software, was responsible for "all [of] the technology within the entire corporation," and managed software partners and

expenses. He left that company to start his own software company. His work with those two companies was featured in a magazine for senior IT executives and in the Wall Street Journal. When he moved to Alaska he served as a consultant for local businesses and in one case “built a software system with myself and another engineer that did all the local route planning, scheduling, [and] maintenance of the machines” for a coffee delivery company. A reasonable juror could conclude that it was more likely than not that someone with Feucht’s practical experience was capable of hiring software engineers for the Copper

Center Project and that the software could be developed once the hardware existed to support it.

- v. A reasonable juror could conclude that the smartphone could have been built at an acceptable cost.**

Trimble argues that the smartphone's hardware could not satisfy consumer demands and that the final product would prove to be too expensive. According to Chen's trial testimony, the market survey data showed that consumers wanted a versatile phone that worked well in daily life while including such features as a satellite emergency locator, weather information, a ballistics calculator, and a laser

rangefinder. Chen testified, however, that those features would likely interfere with the phone's performance and give it a bulky package. He also testified that initial cost estimates for the phone were about \$1,200, with an \$800 cost to the consumer if a wireless carrier subsidized the phone — an amount, according to the survey data, that was more than consumers were willing to pay.

However, the jury also heard testimony about other products similar to RDS's proposed smartphone that were affordable and technologically viable. For instance, the jury heard from a Cabela's marketing director that Casio had built a "ruggedized,

shockproof, and waterproof” phone that Cabela’s considered selling with preloaded apps. An expert for Trimble testified that several ruggedized phones had been produced since 2006; he also testified about existing phone apps that were “almost identical to what was being presented” by RDS, although not “all in one package” as RDS proposed. From this evidence that other, similar products had been created for market without the problems Chen identified, a reasonable juror could conclude that the Copper Center Project more likely than not could have produced a marketable product.

- vi. **A reasonable juror could find that the Copper Center Project could have been realized despite the lack of exact financial and sales projections.**

Another barrier to the success of the Copper Center Project, according to Trimble, was the lack of realistic financial and sales projections. Trimble notes RDS's own admission that the project could not go forward unless "all parties were comfortable with the projected financials." And, Trimble claims, the projected financials had not been sufficiently well established for two reasons: first, the "user adoption rate" of the proposed smartphone was unknowable; and second, the projection did not account for

Remington's departure from the project. But a reasonable juror could reject Trimble's characterization of these unknowns as insurmountable barriers to the project's continued development or success.

Boehnen, Remington's project manager and marketing director, testified that although the actual user adoption rate for a novel product was "unknown" and "unknowable," he could calculate the Copper Center Project's user adoption rate based on the adoption rate for innovative products historically, using a simple projection model called "Robert's Adoption Curve." A reasonable

juror could conclude from Boehnen's testimony that the project would have moved forward as he projected and that the risk of an otherwise "unknowable" user adoption rate was an acceptable one to partners dealing with an innovative product.

Also, although the project's financials were based on Remington's participation, a reasonable juror could conclude it was more likely than not that the project would have found a different marketing partner, as explained above, and that with a new marketing partner the project would have seen success similar to that estimated based on Remington's participation.

Since a reasonable juror could find that none of the hurdles identified by Trimble was insurmountable, a reasonable juror could find that RDS proved the element of causation for each of its claims by a preponderance of the evidence.

b. A reasonable juror could find that RDS's reliance on Trimble Mobile's misrepresentations caused RDS to lose profits.

The superior court properly instructed the jury that to find for RDS on its claims of negligent and intentional misrepresentation, the jury needed to find by a preponderance of the evidence that RDS's reliance on Trimble Mobile's misstatements was a substantial factor in

causing RDS's monetary loss. Trimble challenges the jury's causation findings on RDS's tort claims, contending that RDS did not prove it "would have taken a different course of action" enabling it to earn profits absent Trimble Mobile's misrepresentations about Trimble Outdoors's competing project.

In order to prove causation, RDS needed to demonstrate only that the misrepresentations caused *some* monetary loss. RDS concedes that the record does not support a finding that the Copper Center Project could have produced a marketable phone by March 2011 even if Trimble Mobile had been forthcoming about the competing

project. But Feucht testified that Chen and Boehnen convinced RDS to hold off developing the software for an earlier launch “because they thought it was going to take away from the hardware sales.” A juror could reasonably conclude that RDS could have spent the time between November 2010 and March 2011 developing competitive apps while it sought new partners for the later creation and launch of a ruggedized smartphone. Accordingly, a reasonable juror could find it was more likely than not that Trimble Mobile’s misrepresentations prevented RDS from taking action that would have either delayed the launch of Trimble Outdoors’s competing product or sent an RDS

software product to market sooner — thus causing RDS to lose some profit.

- c. **A reasonable juror could find that Trimble Mobile's breach of the nondisclosure agreement and breach of fiduciary duty caused RDS to lose profits.**

Trimble also contends that RDS failed to prove that it lost profits due to Trimble Mobile's breaches of contract and fiduciary duty. Trimble argues that RDS was unable to show how Trimble Outdoors used the market research data or profit and loss statements to speed up the release of its own apps, ReconHunt and ReconFish, or how the alleged breaches prevented RDS from achieving the

“first mover” advantage by releasing the Copper Center Project smartphone first.

However, a reasonable juror could conclude that Trimble Outdoors used the confidential data disclosed by Chen. As RDS argues, the similarities between ReconHunt and HuntZone support an inference that Trimble Outdoors used RDS’s ideas and accelerated ReconHunt’s release once the Remington-generated data and the profit and loss statements showed that those “ideas would be hugely profitable.” A reasonable juror could also conclude that Trimble Mobile delayed producing the hardware and persuaded RDS not to

market its software separately in order to prevent RDS from competing with ReconHunt and ReconFish. And a reasonable juror could conclude that Trimble Mobile delayed its own departure from the partnership until it was too late for RDS to create even a competitive app on its own. Weaving these conclusions together, a reasonable juror could find that RDS more likely than not lost first-mover status to Trimble Outdoors because Trimble Mobile's breach accelerated the production of ReconHunt and ReconFish while delaying the Copper Center Project.

Trimble also argues it was unforeseeable that "it could be liable for lost future profits generated by a joint

business” when the only formal agreement between the parties was the nondisclosure agreement, the limited purpose of which was to protect confidential information, not commit the parties to a joint profit-making venture.

Contract damages are recoverable only if foreseeable, and they are foreseeable when they follow from the breach “in the ordinary course of events, or . . . as a result of special circumstances . . . that the party in breach had reason to know.”³¹ The nondisclosure

³¹ *Native Alaskan Reclamation & Pest Control, Inc. v. United Bank Alaska*, 685 P.2d 1211, 1219 (Alaska 1984) (noting that lost profits may be reasonably foreseeable “as a probable result of a breach” when

agreement's stated purpose was "the protection and preservation of the confidential and/or proprietary nature of information" the parties disclosed to each other while they discussed "the terms of a prospective business relationship." Even though the nondisclosure agreement itself did not create a partnership, the parties foresaw the possibility that a more formal business relationship would evolve from their agreement. And even if there never was a partnership, it was reasonably foreseeable that RDS's

the parties entered the contract "because [the loss] follows from the breach." (quoting RESTATEMENT (SECOND) OF CONTRACTS § 351 (AM. LAW INST. 1981))).

prospective business would be damaged and any future venture related to RDS's ruggedized smartphone would lose profits "in the ordinary course of events" if Trimble Mobile divulged confidential information protected by the nondisclosure agreement; indeed, to prevent such harm was the agreement's fundamental purpose. A reasonable juror could thus find it was foreseeable that RDS would be damaged if Trimble Mobile breached the nondisclosure agreement and that RDS was in fact damaged.

B. Although It Was Error To Grant A Judgment Notwithstanding The Verdict, The Superior Court Was Correct to Conclude That The Evidence At Trial Did Not Support The Damages Award.

1. The judgment notwithstanding the verdict erroneously conflated the fact of damages and the amount of damages

In granting Trimble a judgment notwithstanding the verdict, the superior court found that because RDS “cannot prove lost profits with reasonable certainty, [RDS] cannot prove its damages claim.” RDS contends on appeal that the court’s finding, and its decision to grant a judgment notwithstanding the verdict, resulted from the court’s erroneous conflation of two different burdens of proof: the burden required to show that RDS suffered damages and the burden required to show the amount of those damages.

RDS correctly observes that the elements of a tort cause of action — including the *fact* of damages (i.e., the fact that the plaintiff suffered harm) — must be proven by a preponderance of the evidence;³² the *amount* of damages is a separate factual issue that, in the case of lost profits, must be proven to a reasonable certainty, based on evidence that “afford[s] sufficient data from which the court or jury may properly estimate the amount

³² *Fernandes v. Portwine*, 56 P.3d 1, 5 (Alaska 2002) (“Preponderance of the evidence is the general burden of persuasion in civil cases.” (citing *Addington v. Texas*, 441 U.S. 418, 423 (1979))).

of damages.”³³ Because the fact of lost-profit damages and their amount are different issues, a plaintiff may fail to prove the amount of lost profits to a reasonable certainty even after having proved by a preponderance of the

³³ *Azimi v. Johns*, 254 P.3d 1054, 1065 (Alaska 2011) (quoting *Sisters of Providence in Wash. v. A.A. Pain Clinic, Inc.*, 81 P.3d 989, 1007 (Alaska 2003)).

evidence that it was harmed.³⁴ This dichotomy is reflected in the Restatements of Contracts and Torts.³⁵

³⁴ See, e.g., *Geolar, Inc. v. Gilbert/Commonwealth Inc. of Mich.*, 874

P.2d 937, 943, 947 (Alaska 1994) (finding evidence sufficient to support jury finding that defendant breached its contract but reversing award of lost profits as “too speculative”).

³⁵ See RESTATEMENT (SECOND) OF CONTRACTS § 352 cmt. a, illus. 2 (AM. LAW INST. 1981) (noting that recovery is limited to reliance or nominal damages if a plaintiff fails to prove lost profits with reasonable certainty); RESTATEMENT (SECOND) OF TORTS § 774A cmt. c (AM. LAW INST. 1979) (“Sometimes, when the court is convinced that damages have been incurred but the amount cannot be proved with reasonable certainty, it awards nominal damages.”); *id.* at § 912 cmt. c, illus. 1.

Here, the jury was correctly instructed on the difference between the proof required to show the fact of damages and that required to determine the amount of an award of lost profits. The instructions for finding intentional and negligent misrepresentation stated that “RDS must prove it is more likely true than not” that it suffered a monetary loss as a result of its reliance on Trimble Mobile’s misrepresentation. For the contract claims, the instructions explained that the jury must find that it is “more likely true than not true that Trimble deprived RDS of a benefit of the contract.” But the jury instruction for damages provided that “[i]f you decide in

favor of RDS on any of its claims, you must *then* decide how much money, *if any*, will fairly compensate RDS.” (Emphasis added.) The damages instruction also explained that the damages RDS sought — lost profits — had to be proven with reasonable certainty. The jury was thus correctly instructed that RDS could prevail on its claims by proving their elements by a preponderance of the evidence and yet receive no lost-profits damages, if the evidence did not support such an award to a reasonable certainty.

In granting a judgment notwithstanding the verdict, however, the superior court applied only the reasonable certainty standard when considering whether RDS lost profits as a result of the demise of the Copper Center Project. This was error, as it resulted in setting aside the jury's finding of liability based on the higher standard of proof for lost-profit damages.

2. The evidence did not provide a reasonably certain basis for an award of lost profits to RDS

Although we conclude that the evidence was sufficient to allow a reasonable juror to find that RDS proved the elements of its causes of action by a

preponderance of the evidence, we must also conclude that the superior court was correct to find the evidence insufficient to show lost profits to a reasonable certainty. The jury was instructed that reasonable certainty meant it could “not award damages to RDS on the basis of speculation, guess, or conjecture.” But there was nothing else on which the jury could base a lost-profits award in this case.

Alaska permits recovery of lost profits for a business that is yet to be established, but it holds new businesses to the same standard of proof as established

businesses.³⁶ The plaintiff must provide “sufficient data from which the court or jury may properly estimate the amount of damages, which data shall be established by facts rather than by mere conclusions of witnesses.”³⁷ In *Guard v. P&R Enterprises, Inc.*, we observed that courts have considered “the profit history from the plaintiff’s similar business at a different location” and “the profit

³⁶ See *Guard v. P & R Enterprises, Inc.*, 631 P.2d 1068, 1072 (Alaska 1981).

³⁷ *City of Whittier v. Whittier Fuel & Marine Corp.*, 577 P.2d 216, 223 (Alaska 1978) (quoting *Levene v. City of Salem*, 229 P.2d 255, 263 (Or. 1951)), *disapproved of on other grounds by Native Alaskan Reclamation & Pest Control, Inc. v. United Bank Alaska*, 685 P.2d 1211 (Alaska 1984).

history from the business in question if it was successfully run by someone else before the plaintiff” in calculating a new business’s lost profits.³⁸ In *Guard* we also held that a plaintiff may not “rely solely on statistical projections to prove lost profits.”³⁹

³⁸ *City of Whittier v. Whittier Fuel & Marine Corp.*, 577 P.2d 216, 223 (Alaska 1978) (quoting *Levene v. City of Salem*, 229 P.2d 255, 263 (Or. 1951)), *disapproved of on other grounds by Native Alaskan Reclamation & Pest Control, Inc. v. United Bank Alaska*, 685 P.2d 1211 (Alaska 1984).

³⁹ *Guard*, 631 P.2d at 1072 n.4 (citing *Whittier Fuel & Marine Corp.*, 577 P.2d at 223 n.27)).

RDS argues that *Guard* does not intend to exclude “all proof of damages based on any kind of forecast or prediction,” because Alaska courts have since relied on the Restatement’s analysis of lost profits. The Restatement notes that “damages may be established with reasonable certainty with the aid of expert testimony, economic and financial data, market surveys and analyses, business records of similar enterprises, and the like.”⁴⁰ But RDS did not present any of these types of evidence at trial.

⁴⁰ RESTATEMENT (SECOND) OF CONTRACTS § 352 cmt. b (AM. LAW INST. 1981).

It relied on two sources: the profit and loss statements generated from the Remington market research data following the partners' September 2009 meeting at Copper Center and the valuation sketched out on the whiteboard by a Trimble Mobile employee at the December 2010 meeting after Remington had announced its withdrawal from the project. The project also generated market surveys, but RDS did not use these to support its statistical projections; nor did it present evidence that its projections were corroborated by the experience of similar businesses. The jury appeared to base its verdict on the "whiteboard" numbers, which valued the project at \$38.5

million assuming a “75% revenue goal”; extrapolating from this number to 100% of the project’s revenue goals results in \$51.3 million, the amount of the jury’s verdict.

RDS argues that its evidence can be distinguished from the “statistical projections” we disapproved in *Guard* because Trimble Mobile helped develop and approve the profit and loss statements and generated the whiteboard valuation itself. RDS suggests we clarify that *Guard* “intended to disallow projections developed by the plaintiff alone, perhaps as part of an optimistic business plan or created specifically for trial.” But projected profits are not more reliable simply because

the defendant agreed with them at the time they were created; both parties may be equally detached from the economic realities on which the jury is required to base its award.⁴¹

Here, even assuming that a juror concluded that both parties *believed* the financial statements were

⁴¹ See *Hernandez v. Sovereign Cherokee Nation Tejas*, 343 S.W.3d 162, 174 (Tex. App. 2011) (noting that hope, “even when that hope is realistic, is not enough for recovery of lost profits” and distinguishing a case in which testimony supporting projections included “actual data from operating casinos in calculations” (first quoting *Tex. Instruments, Inc. v. Teletron Energy Mgmt., Inc.*, 877 S.W.2d 276, 280 (Tex. 1994); then citing *Bright v. Addison*, 171 S.W.3d 588, 602-03 (Tex. App. 2005))).

realistic when they were created, RDS did not present sufficient evidence that the statements actually *were* realistic.⁴² They were calculated using research based on Remington's customer base; with Remington gone, they provided at most a rough estimate for the phone's success, without accounting for how new partners, a new marketing strategy, and a new customer base might affect the project's actual profits.

⁴² *Cf. Geolar, Inc. v. Gilbert/Commonwealth Inc. of Mich.*, 874 P.2d 937, 946 (Alaska 1994) ("Because [plaintiff] had no prior experience with contracts of this size and complexity, its own estimates, offered without proof of how they were reached, are unreliable.").

As for the whiteboard valuation of projected revenues, RDS admits that “[e]xactly how the whiteboard figures were determined is not clear.” RDS gave no explanation of how the figures calculated the cost of producing the smartphone, its retail value, or RDS’s estimated expenses. Although we do assume, viewing the evidence in the light most favorable to RDS, that the whiteboard represents Trimble Mobile’s valuation of RDS at the time and depicts the phone’s expected profit, the numbers have no obvious factual basis, lack real-world corroboration from comparable sources, and cannot be said

to show the amount of RDS's lost profits with reasonable certainty.

Nor was there any other evidence supporting an award of lost profits. As an alternative to the jury verdict, RDS argues that it is entitled at least to an award of lost profits from sales of a stand-alone app, because a reasonable juror could conclude that RDS's and Trimble Outdoors's apps were strikingly similar, and Larry Fox of Trimble Outdoors testified that "the anticipated profit and loss" for Trimble Outdoors's apps in 2012 "should have [amounted to] about two to two and a half million."

But Fox’s explanation of how he reached these numbers indicates that they, too, were simply projections, based on “estimations of subscriber goals that we would have liked to have seen.” Like the whiteboard valuation and the profit and loss statements, Trimble Outdoors’s *hoped-for* profits for the stand-alone apps, without more, are not a sufficient basis for a damage award to RDS.⁴³ We are forced to conclude that, although the jury’s verdict in

⁴³ *See id.* (suggesting the plaintiff could have offered “profits obtained by other contractors performing similar jobs”); *Guard*, 631 P.2d at 1072 n.4 (noting a plaintiff may not “rely solely on statistical projections to prove lost profits”).

favor of RDS is otherwise supportable, its award of damages must be vacated.

C. RDS Is Entitled To Nominal Damages.

RDS contends that “[a]t minimum, because RDS proved that it was damaged, it was entitled to an award of nominal damages.” We agree. Trimble objects to such an award, arguing that RDS waived it by failing to propose a nominal damages instruction at trial and that RDS failed to prove the damage element of its claims. Having rejected the latter argument in the preceding discussion, we also hold that the nominal damages claim is not waived.

In *Anchorage Chrysler Center v.*

DaimlerChrysler Motors Corp., we allowed an award of nominal damages even though that claim was raised for the first time on appeal.⁴⁴ The plaintiff sued for fraudulent misrepresentation but at a bench trial “failed to prove the extent and amount of damages.”⁴⁵ The plaintiff’s complaint had requested “declaratory relief, injunctive relief, and compensatory and punitive damages,” but not nominal damages.⁴⁶ The defendant argued that the

⁴⁴ 221 P.3d 977, 990 (Alaska 2009).

⁴⁵ *Id.* (quoting *Zok v. State*, 903 P.2d 574, 577-78 (Alaska 1995)).

⁴⁶ *Id.* at 982.

plaintiff waived its nominal damages claim because it raised the issue for the first time on appeal, but we rejected that argument.⁴⁷ Instead, we analyzed whether the new arguments were “closely related to the trial court arguments and ‘could have been gleaned from [the] pleadings.’ ”⁴⁸ We concluded that the question of nominal damages was properly before the court because the complaint “raised the issue of [defendant’s] misrepresentations and requested unspecified damages

⁴⁷ *Id.* at 990.

⁴⁸ *Id.* (alteration in original) (quoting *Zeman v. Lufthansa German Airlines*, 699 P.2d 1274, 1280 (Alaska 1985)).

and additional relief.”⁴⁹ We then determined that nominal damages were available for a claim of fraudulent misrepresentation where a party “proved that it did suffer a loss but was not able to establish the extent or amount of damages.”⁵⁰ Since the plaintiff had proved it incurred losses when it replaced logos in reliance on the defendant’s misrepresentations about expanding its business but failed to quantify the cost of doing so, we held that nominal damages were appropriate.⁵¹ In this case, RDS’s complaint

⁴⁹ *Id.*

⁵⁰ *Id.* at 991.

⁵¹ *Id.* at 992.

alleged breaches of contract and fiduciary duty and that it “suffered economic losses as a result of Trimble’s breaches of contract in the amount of not less than \$111,666,973.00, the exact amount to be proven at trial.” The complaint also alleged that fraudulent and negligent misrepresentation each caused economic damages “in the amount of not less than \$111,666,973.00, the exact amount to be proven at trial.” RDS requested “an award of general, past and future economic and other direct damages in the amount to be proven at trial,” “an award of indirect, special, consequential, exemplary, extraordinary, and/or punitive damages in the amount to be proven at trial,” and “an

award of damages for fraud in the amount, plus punitive damages in the amounts to be proven at trial.” Finally, RDS requested “such other relief [as it is] entitled to under law.”

Following *Anchorage Chrysler Center*, we conclude that RDS’s nominal damages claim is properly before us despite RDS’s failure to request an instruction on the issue. A right to at least nominal damages is closely related to the arguments made at trial and could have been gleaned from the pleadings, since RDS did request general damages in an “amount to be proven at trial” and “such other relief” to which it was entitled. Because RDS proved

that it “incur[red] a pecuniary loss of undetermined amount” as a result of Trimble Mobile’s conduct, it is entitled to nominal damages.⁵²

V. CONCLUSION

We REVERSE the superior court’s grant of judgment notwithstanding the verdict. We GRANT REMITTITUR on the jury’s award of damages for lost profits and REMAND for a determination of nominal damages.

⁵² *Id.* at 991.

In the Supreme Court of the State of Alaska

Recreational Data Services, Inc.,	)	
	)	
Appellant,	)	Supreme Court No. S-15983
	)	
v.	)	
	)	Order
Trimble Navigation Limited,	)	
A California Corp.,	)	
	)	
Appellee.	)	Date of Order: 9/26/17
	)	

Trial Court Case # 3AN-11-10519CI

Before: Stowers, Chief Justice, Winfree, Maassen,
and Bolger, Justices, and Fabe, Senior
Justice.¹ [Carney, Justice not participating.]

The appellant filed a petition for rehearing on 8/16/17, and
a motion for oral argument on 8/18/17. On consideration of these
matters,

IT IS ORDERED: The petition for rehearing is
DENIED. The motion for oral argument is also **DENIED.**

¹ Sitting by assignment made under article IV, section 11 of the
Alaska Constitution and Alaska Administrative Rule 23(a).

App. 119

Entered by the direction of the court.

Clerk of the Appellate Courts

s/Marilyn May
Marilyn May

Cc: Supreme Court Justices
Judge Easter
Trial Court Appeals Clerk-Anchorage

In the Supreme Court of the State of Alaska

Recreational Data Services, Inc.,	)	
	)	
	)	
Appellant,	)	Supreme Court No. S-15983
	)	
v.	)	
	)	Order
Trimble Navigation Limited,	)	
A California Corp.,	)	
	)	
Appellee.	)	Date of Order: 9/26/17
Trial Court Case # 3AN-11-10519CI		

On consideration of appellant's 8/14/17 Motion to Stay Effective

Date of Judgment, and Modified Opinion, Decision and Order, and

Return of Jurisdiction and File to Alaska Superior Court, and no

opposition having been filed, **IT IS ORDERED:** The motion is

DENIED.

Entered at the direction of an individual justice.

App. 121

Clerk of the Appellate Courts

s/Beth A. Pechota,
Beth A. Pechota, Deputy Clerk

In the Supreme Court of the State of Alaska

Recreational Data Services, Inc.,	)	
	)	
	)	
Appellant,	)	Supreme Court No. S-15983
	)	
v.	)	
	)	Order
Trimble Navigation Limited,	)	
A California Corp.,	)	
	)	
Appellee.	)	Date of Order: 8/4/2017
Trial Court Case # 3AN-11-10519CI		

On the Appellant's 6/27/2017 motion for reconsideration
of the Clerk's 6/26/2017 decision, and the Appellee's 7/10/17
limited opposition, **IT IS ORDERED:**

The motion for reconsideration is **DENIED**. Oral
argument will not be held on the petition for rehearing.

Entered at the direction of an individual justice.

App. 123

Clerk of the Appellate Courts

s/ Meredith Montgomery
Meredith Montgomery
Chief Deputy Clerk

In the Supreme Court of the State of Alaska

Recreational Data Services, Inc.,	)	
	)	
	)	
Appellant,	)	Supreme Court No. S-15983
	)	
v.	)	
	)	Order
Trimble Navigation Limited,	)	
A California Corp.,	)	
	)	
Appellee.	)	Date of Order: 8/3/2017
Trial Court Case # 3AN-11-10519CI		

Before: Stowers, Chief Justice, Winfree,
Maassen, and Bolger, Justices, and
Fabe, Senior Justice

On consideration of the appellant's **May 30, 2017**, petition
for rehearing and the opposition filed on **June 15, 2017**,

IT IS ORDERED:

The petition for rehearing is **GRANTED IN PART**.

Opinion No. 7162, published **March 24, 2017**, is amended as
follows:

At page 3, lines 3-4, the sentence "We therefore grant remittitur, directing the superior court to make an award of nominal damages and enter judgment for RDS" is stricken and replaced with the following: "We therefore direct the superior court to enter a nominal damages award and judgment for RDS."

At page 32, line 18, the word "higher" is replaced with "different."

At page 34, line 6, a footnote is added following the line "RDS did not present any of these types of evidence at trial":

FN: Two PowerPoint presentations admitted as exhibits — one from the Copper Center Project and one from the competing project of Trimble Outdoors and Cabela's — referred to the results of market surveys, but only in their discussions of consumer demand and marketing opportunities.

They did not address profitability. And the market survey data themselves were not introduced into evidence.

At page 38, lines 21-22, the sentence "We GRANT REMITTITUR on the jury's award of damages for lost profits and **REMAND** for a determination of nominal damages" is stricken and replaced with the following: "We **VACATE** the jury's award of damages for lost profits and **REMAND** for entry of an award of nominal damages."

Entered at the direction of the court.

Clerk of the Appellate Courts

s/ Meredith Montgomery
Meredith Montgomery
Chief Deputy Clerk

Cc: Supreme Court Justices
Judge Easter
West Publishing
Other Publishers

In the Supreme Court of the State of Alaska

Recreational Data Services, Inc.,	)	
	)	
	)	
Appellant,	)	Supreme Court No. S-15983
	)	
v.	)	
	)	Order
Trimble Navigation Limited,	)	
A California Corp.,	)	
	)	
Appellee.	)	Date of Order: 5/182017
Trial Court Case # 3AN-11-10519CI		

Before: Stowers, Chief Justice, Fabe, Winfree,
and Bolger, Justices, [Carney, Justice, not
participating]

On consideration of the appellant's motion to file
overlength petition for rehearing and motion for oral
argument on the petition for rehearing, both filed on **4/17/15**,

IT IS ORDERED:

1. The motion to file overlength petition for rehearing is
GRANTED IN PART. Appellant RDS may file an overlength

petition for rehearing that is up to **15 pages** long — provided, however, that for every legal issue raised, it must identify where it raised the issue in the briefing before this court; that for every case cited, it must identify where it cited the case in the briefing before this court; and for every factual issue raised, it must identify where it relied upon those facts in the briefing before this court.

2. The petition for rehearing is due on or before **5/30/17**.

3. Within 10 days of service of the petition for rehearing, appellee may file a response to the petition of no more than 15 pages in length.

4. The request for oral argument on the petition for rehearing is **DENIED**.

Entered by direction of the court.

App. 129

Courts Clerk of the Appellate

s/Marilyn May
Marilyn May

Cc: Supreme Court Justices

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

Recreational Data Services, Inc.,	)	
	)	
	)	
Appellant,	)	
	)	
v.	)	
	)	
Trimble Navigation Limited,	)	Case No. 3AN-11-10519CI
A California Corp.,	)	
	)	
Appellee.	)	

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

I. INTRODUCTION

The Court grants Defendant's Motion for Judgment Notwithstanding the Verdict because Plaintiff's evidence is insufficient as a matter of law to support an award of lost profits for an unestablished business. Plaintiff claims only lost profits damages. Because the Court finds that Plaintiff

cannot prove lost profits with reasonable certainty, Plaintiff cannot prove its damages claim and Defendant's Motion for Judgment Notwithstanding the Verdict is granted.

II. FACTUAL BACKGROUND

This case involves a commercial dispute in which Recreational Data Services, Inc. (RDS) alleges that Trimble Navigation, Limited (Trimble) misappropriated RDS's confidential information and trade secrets and breached fiduciary duties to RDS based on the alleged formation of a partnership. RDS admits that Trimble did

not infringe upon its patent. RDS sought over \$111 million in damages.

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

Trimble Navigation Limited is a worldwide company that develops, manufactures, and sells global positioning technology. The uses for Trimble's products range from

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

Beginning in 2007, before RDS existed, Trimble Outdoors created and launched a series of mobile phone

applications called "Trimble Outdoors Navigator," "AliSport OPS," and "Geocache Navigator." These applications allow users to track running or biking workouts, navigate on hiking or camping trips, and participate in "geocaching," a type of scavenger hunt for OPS-connected markers placed by other "geocachers." The "Trimble Outdoors Navigator" application provides a digital compass, online mapping, waypoint marking/tracking, and various other features.

In February 2009, RDS met with Trimble to present a software application and discuss a prospective business relationship given Trimble's experience in GPS technologies

and handheld devices, The general concept was that RDS would design and write the software, Trimble would manufacture the hardware, and a third participant (eventually Remington) would provide marketing and channel support. RDS's contribution would be the right to use a patent that would monitor a user's location and compare it to the hunting and fishing game regulations governing that area¹. The project was titled the "Copper

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

Center Project," after the location where some meetings occurred.

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

Nothing herein shall obligate either Party to enter into any business arrangements or agreements with the other Party. The terms of confidentiality under this Agreement shall not be construed to limit either Party's right to independently develop or acquire products without use of the other Party's Confidential Information. The Disclosing Party acknowledges that the Receiving Party may currently, or in the future, be developing information internally, or receiving information from others that is similar to the Confidential Information. Accordingly, nothing in this Agreement will be construed as a representation or agreement that the Receiving Party will not develop or have developed for its products, concepts, systems, or techniques that are similar to, or compete with, the products concepts or techniques contemplated by or embodied in the Confidential Information provided that the Receiving Party does not violate any of its obligations under this Agreement in connection with such development.²

RDS (software) and Trimble (hardware) continued

communications and Remington Arms Company, LLC

² Pl.'s Trial Exhibit 2.

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

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

A jury trial was held on September 9-25, 2014. RDS argued numerous claims but claimed that its only

damages were lost profits. The Court denied Trimble's motion for directed verdict, The jury returned a verdict for Plaintiff and awarded \$51.3 million in damages. Trimble filed the current motion.

I. LEGAL STANDARD

Under Rule 59(a), a court may grant a new trial "on all or part of the issues...if required in the interest of justice." A new trial is in the interest of justice if the verdict is "against the weight of the evidence."³ In this case, a new trial under Rule 59(a) is not appropriate because the Court

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

finds that RIDS cannot prove lost profits with reasonable certainty and, therefore, cannot prevail on any of its claims.

A trial court may grant remittitur "when a jury returns an otherwise proper verdict awarding an amount of damages that the evidence cannot reasonably support,"⁴ "Remittitur is appropriate when a jury without acting under the type of passion or prejudice that would warrant a new trial, nonetheless awards an amount that is

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

unreasonable given the evidence,"⁵ The Court finds that remittitur is not appropriate because the jury verdict was not proper given that RDS's claim for lost profits is unsupported by the evidence, especially considering the heightened standard of proof for an unestablished business.

Under Rule 50(b), a motion for judgment notwithstanding the verdict should be granted if the "evidence is insufficient to allow a reasonable juror to find

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

for the nonmoving party."⁶ The court determines "whether the evidence, and all reasonable inferences which may be drawn from the evidence, viewed in the light most favorable to the non-moving party, permits room for diversity of opinion among reasonable jurors."⁷

IV. DISCUSSION

Alaska law requires that lost profits be proven with reasonable certainty.⁸ While some Courts interpret this

⁶ *Id.* at 1017.

⁷ *Id.* (internal quotations omitted).

⁸ *Geolar, Inc. v. Gilbert/Commonwealth Inc. of Michigan*, 874 P.2d 937, 946 (Alaska 1994); *Alaska Thavel Specialists, Inc. v. First Nat.*

principle to deny recovery for lost profits of an unestablished business as an invariable rule, Alaska does not apply an inflexible rule.⁹ Yet, in Alaska, as in other jurisdictions that do not per se deny recovery of lost profits of an unestablished business, proving reasonable certainty is a very high standard¹⁰.

The *Restatement (Second) of Contracts* embraces the idea that a new business may recover lost profits that

Bank of Anchorage, 919 P.2d 759, 766 (Alaska 1996); *Guard v. MR Enters. Inc.*, 631 P.2d 1068, 1071-72 (Alaska 1981).

⁹ *Guard*, 631 P.2d at 1071.

¹⁰ *Id.* at 1072.

it proves with reasonable certainty but also recognizes the natural limitations of that standard on new businesses.¹¹

Comment b of the *Restatement (Second) of Contracts*

succinctly states the rule as follows:

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

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

¹² *Id.*

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

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

¹⁴ *Guard*, 631 P.2d at 1072 n.4 (rejecting the use of statistical projections as the sole basis to establish lost profits for a new business: "In antitrust litigation, the injured party may prove damages for lost profits by use of statistic projections alone without showing any history of profits. The Policies of antitrust law favor a less stringent certainty requirement for lost profits than contract law policy... Because P&R's claim falls within the latter category, it will not be allowed to rely solely on the statistical projections to prove lost profits.")

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

¹⁵ *Geolar, Inc.*, 874 P.2d at 946.

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

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

establish its lost profits projections within a reasonable degree of certainty.

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

A. RDS had not secured contractual commitments.

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

RDS needed a commitment from Trimble or another company to develop the hardware. It was undisputed that Trimble had no obligation to develop the hardware and

¹⁷ Trial Tr. at 245, 255.

could have withdrawn at any time.¹⁸ RDS presented no evidence that it had any other leads for the hardware role.

RDS needed to secure a third partner for the marketing.¹⁹ It is undisputed that Remington withdrew from the Copper Center Project in late 2010²⁰ It is also undisputed that the Copper Center Project required

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

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

²⁰ Trial Tr. at 372.

someone to perform the marketing and distribution functions that Remington abandoned.²¹ RIDS pitched the idea to Cabela's and Cabela's declined to participate.²² Without a marketing and distribution partner, RDS was never going to earn any profits from the Copper Center Project, irrespective of anything Trimble did or did not do. RDS offered no proof that it had any firm leads on anyone to fill that role, especially with a trusted, household name like Remington,

²¹ Trial Tr. at 83, 184,

²² Pl.'s Trial Exhibit 8.

Even if the Copper Center Project had legal commitments for each role, it would then need to find a wireless service provider such as AT&T or Verizon. The Copper Center Project required a commitment from a wireless service provider to subsidize the price of the phone and actually sell it.²³ RDS's own witness characterized the commitment of a wireless carrier as an "essential hurdle" to the success of the Copper Center Project.²⁴ In fact, RDS testified that it met with AT&T but

²³ Trial Tr. at 261.

²⁴ Trial Tr. at 752.

did not secure a commitment.²⁵ RDS presented no evidence that any wireless service carrier ever committed to participate in the Copper Center Project.²⁶

Trimble's expert witness, Mr. Neal Beaton, testified that he was "pretty close to 99 percent" certain that the Copper Center Project "was not going to be successful."²⁷

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

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

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

Mr. Beaton testified that without a clearly defined legal relationship, it was highly unlikely that venture capitalists would invest millions of dollars.²⁸ He also testified that the market was saturated with rugged smartphones by established companies such as

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

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

²⁹ Trial Tr. at 126068.

³⁰ Trial Tr. at 1259.

hurdles" was necessary yet RDS presented little evidence that it could overcome the hurdles.

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

RDS needed to obtain \$6 to \$8 million in capital as a pre-launch financial commitment.³¹ Mr. Feucht testified that RDS met with one venture capitalist to request a capital commitment and was rejected.³² Mr. Feucht also

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

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

admitted that RDS was never offered any financing from any source for this project.³³ RDS's witness and "COO designee," Paul Miller, testified that he had a "Rolodex of both industry people and enthusiasts" so he could help RDS secure such financing "fairly easily."³⁴ Mr. Miller testified about one of the business connections in his Rolodex who was going to be at a meeting: "Tommy Millner is a friend of mine. He is a friend of mine on Facebook. I

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

³⁴ Trial Tr. at 707-08.

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

³⁵ Trial Tr. 689.

³⁶ Trial Tr. at 727-28.

testified that securing \$6 to \$8 million was unrealistic given the lack of commitment to each of the essential roles,³⁷

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

RDS needed to develop its software idea. To do this, RDS would need to hire approximately 40 software engineers to write the necessary software.³⁸ RDS offered no evidence that it had a job description, money to pay 40 engineers or that 40 qualified engineers were available, RIDS presented no evidence that it had done any work to.

³⁷ Trial Tr. at 1254-125 8.

³⁸ Trial Tr. at 28559, 727 (When discussing the number of engineers necessary, "Q: If I told you 43, would that sound familiar? A: That sounds familiar, yes.").

develop the software idea, In fact, Mr. Feucht testified that RDS could not build the software until the hardware was developed,³⁹ Yet the Copper Center Project did not have a commitment for hardware development. Mr. Beaton explained that the Copper Center Project was "squarely a seed stage—they were a business plan, if you will, Not even a business plan."⁴⁰ In short, the hardware role lacked a

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

⁴⁰ Trial Tr. at 1246.

commitment and the software was still merely an idea, and until both the software and hardware were developed the Copper Center Project could not even begin the difficult interfacing process.⁴¹

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

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

Aside from mere conclusions of witnesses, RDS offered no evidence as to the certainty of the photograph of the handwritten chart scribbled on the whiteboard. RDS alleges that the numbers represent Trimble's offer to buy out RDS, RDS's position is that "Trimble unquestionably valued RDS in December 2010 at \$38.5 million, the Copper Center Project met '75% of its revenue goal."⁴² Trimble denies that it made such an offer. In its Executive Summary, RIDS projected \$26 million in net revenue in

⁴² P1,'s Opp'n to Mot. for JNOV and for New Trial at 39.

four years and stated that it had "identified \$1,2 million in funding for a 10% stake in the company."⁴³ Even if the Court accepted that the whiteboard photograph is in fact Trimble's valuation of RDS, which it does not, the valuation of a company is not the same thing as reasonably certain lost profits. The Court finds that a disputed photograph of a partially illegible handwritten chart scribbled on a

⁴³ P1,'s Trial Exhibit 5; *see* Trial Tr. at 40 (Mr. Feucht testified that "(t)here were some very rudimentary numbers that were gathered from statistical information that was publicly available online." But, as with all other evidence in this ease, RDS offers nothing except for Mr, Feucht's conclusion to show how RDS established the "rudimentary numbers.").

whiteboard does not establish a \$5 1.3 million lost profit damages award with any degree of certainty, reasonable or otherwise.

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

In addition to the whiteboard photograph, RDS relied heavily on the "P&L Statement" to prove lost profits.⁴⁴ RDS argues that the P&L is reliable because of Trimble's involvement in preparing and subsequent reliance on the projection.⁴⁵ RDS also points out that the projection was not prepared for trial but developed years earlier in the course

⁴⁴ Pl.'s Trial Exhibit 28.

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

of business,⁴⁶ RDS suggests that using U.S. government statistics as a base makes the numbers more reliable.⁴⁷ The Court disagrees that such evidence is enough to make the P&L numbers reasonably certain for an unestablished business and finds that the P&L Statement was based solely on statistical projections and is not reliable evidence to support a \$51.3 million damages award. RDS does not offer the market survey that was used to prepare the P&L statement. RDS does not offer any data analysis supporting the projections in the P&L statement, RDS did not offer

⁴⁶ *Id* at 33.

⁴⁷ *Id.*

expert testimony regarding the reliability of the projections.

Remington, Trimble, and RDS all testified that the P&L statement was prepared to essentially give them a starting point for business discussions. Remington prepared the market survey and P&L statement to "begin building a business case around this idea."⁴⁸ Marc Hill, Remington's former Chief Marketing Officer, stated that the profit and loss statement contained "projections, financial projections."⁴⁹ Trimble used the market survey

⁴⁸ Trial Tr. at 363.

⁴⁹ *Id*

and P&L statement "[to] build a business case, it might make sense, but it didn't fit into, for example, the Trimble business, or it didn't fit into any business areas...or maybe the resources are not there to make it happen,"⁵⁰

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

...some of the questions included in the survey were along the lines of: Who is your cell phone carrier today? What is your likelihood of changing cell phone carriers in order to have a smartphone of this type? And what is your willingness to pay? And we

⁵⁰ Trial Tr. at 824.

would give them a number of different price points to see where they would align⁵¹.

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

..[W]hen we were developing the market survey research was, all the parties put their input on it, because had to make sure that it was relevant to all the individual parties' concerns. So it wasn't just like Remington was off creating market research survey without direct input from all the partners.⁵³ Remington testified that "the target was 3,000 responses...I think we got maybe 4200 responses during the window that it was open,.." ⁵⁴ At the time, Remington

⁵¹ Trial Tr, at 38384.

⁵² Trial Tr. at 380.

⁵³ Trial Tr. at 179-80.

⁵⁴ Trial Tr. at 389.

had "1.3 million hunters and shooters in [its] database that [it] could ping,"⁵⁵ Boehnen explained how Remington used the U.S. Bureau of Fish and Wildlife statistics to "build our numbers," He stated,

"the U.S. Bureau of Fish and Wildlife publishes how many people apply for and receive a hunting license in the United States. So, you know that number. When you then query [Remington's] database of known hunters and outdoor enthusiasts, and you ask them, 'Do you own a smartphone,' and 35 percent of them respond yes, you can then infer that of the 14,4 million U.S. hunters, probably about 35 percent of those all own a — at least one smart phone,"⁵⁶

Based on the answers to the survey questions,

Remington's data analyst on staff "pare[d] down those

numbers to a point where we would identify with a high

⁵⁵ Trial Tr. at 610.

⁵⁶ Trial Tr. at 384-85.

level of likelihood who the customer base would be, and their willingness and likelihood to purchase,"⁵⁷

RDS's witness testified that the market research was "relied on in two primary ways. To help define what the product is, ultimately. And then to gauge success and build your business case, You need a foundation, an understanding of who the customer is, and what their probability of purchase is."⁵⁸ The market survey and P&L statement assumed that the device would cost

⁵⁷ Trial Tr. at 386.

⁵⁸ Trial Tr. at 382.

approximately \$350.⁵⁹ Mr. Chen testified that the cost for the device actually demanded would cost approximately \$1,200 per device to build,⁶⁰ RDS did not present evidence contradicting that the device would cost approximately \$1,200, And Mr. Chen testified that at this production cost, assuming a subsidy from a wireless carrier, the estimated price to the consumer would be approximately \$800.⁶¹ Mr. Chen testified that that the market survey indicated the demand for a device at this price was less

⁵⁹ Trial Tr.at880-81.

⁶⁰ Trial Tr.at877-86.

⁶¹ *Id.*

than 1%,⁶² Yet, the numbers in the P&L statement are based on a \$350 device, not an \$800 device, and a significantly higher adoption rate.

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

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

⁶² *Id.*

⁶³ Trial Tr, at 614.

RDS presented no evidence that the P&L statement was adjusted to reflect the discrepancy between the price surveyed and the actual cost of the device demanded by the survey. Instead, RDS offered the mere conclusions of its witnesses that numbers were "conservative.". But mere conclusions of witnesses are insufficient evidence for a jury to estimate damages.⁶⁴

Trimble presented evidence that it was "still working on a cost model" and "needs a creditable P&L financial model to proceed." Mr, Chen expressed his concern in an email

⁶⁴ *Geolar, Inc.*, 874 F.2d at 946.

stating, "The team will also be conducting another comprehensive national survey to requalify the market potential and product adoption scenarios."⁶⁵ But the market was not re-qualified and the profit and loss projections were never reanalyzed.

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

In the P&L...Pat Boehnen was in individual that put together the presentations for Remington, And in his questioning he was

⁶⁵ Pl. Trial Exhibit 58.

⁶⁶ Trial Tr. at 1266-1271.

asked, 'In the numbers you put together on that spreadsheet, did you incorporate the impact of new entrance [sic] into the market?' He said, 'No, not there.' ...So, those numbers actually don't reflect any of this potential competition.⁶⁷

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

⁶⁷ Trial Tr. at 1270.

numbers were "accurate to a reasonable certainty"⁶⁸ and that it was prepared to invest.⁶⁹ Yet, Marc Hill testified about why Remington decided to abandon the Copper Center Project:

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

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

⁶⁸ Trial Tr. at 459

⁶⁹ Trial Tr. at 386-87, 395, 411.

⁷⁰ Trial Tr. at 655.

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

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

Marc Hill said, "[W]ith the Remington brand,

Remington is a very trusted brand. That is a 90-plus

brand awareness. The brand has been around for 196

years. So, having that brand with the technology and be

⁷¹ Trial Tr. at 371.

a first-mover was a huge step for us. *And the P&L was reflecting that.*"⁷²

V. CONCLUSION

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

⁷² Trial Tr. at 616 (emphasis added).

reasonable certainty. Trimble's Motion for Judgment

Notwithstanding the Verdict is granted.

IT IS SO ORDERED.

Dated at Anchorage, Alaska this 28th day of

January, 2015.

s/Catherine M. Easter
CATHERINE M. EASTER
Superior Court Judge