

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 2 OF 2

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**RECORD EXCERPTS REGARDING RULE 14(1)(g)(i)
COMPLIANCE**

Federal questions as to jury trial, due process,

equal protection, proper standard and burden of proof,

prohibition against “re-examining” a jury’s factual

findings, or courts’ weighing and arguing credibility,

strength of evidence, or discriminating against new

innovative software company, such as RDS with novel

and not yet marketed product as to jury’s findings

regarding “amount” of lost profit damages were raised

repeatedly before the Trial Court and Alaska Supreme

Court. This included, doing so before the Trial Court in

RDS’s Opposition to Trimble’s Motion(s) for JNOV

(Petitioner’s Appendix at 346), in RDS’s Opening Brief to the Alaska Supreme Court (Petitioner’s Appendix at 278), in RDS’s First Petition for Rehearing of May 30, 2017, from the Alaska Supreme Court’s Opinion of March 24, 2017 (Petitioner’s Appendix at 225); RDS’s subsequent Petition for Rehearing of August 14, 2017, after Opinion of March 17, 2017 (Petitioner’s Appendix at 1) was modified on August 3, 2017 (Petitioner’s Appendix at 207); and in the Request to the Alaska Supreme Court for Oral Argument En Banc of August 18, 2017 (Petitioner’s Appendix at 183). “*The Upjohn*” Sixth Circuit authority was cited in RDS’s Reply Brief to Alaska Supreme Court

App. 182

at page 21, and repeated in Petition(s) for Rehearing
and/or Request(s) for Oral Argument.

**IN THE SUPREME COURT OF THE STATE OF
ALASKA**

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

**TYP0 CORRECTED¹ REQUEST FOR CONSIDERATION EN
BANC OF REQUEST AND/OR MOTION FOR ORAL
ARGUMENT; REQUESTAND/OR MOTION FOR ORAL
ARGUMENT RE PETITION FOR REHEARING PURSUANT
TO ALASKA APPELLATE RULE 506 AS TO SUPREME**

¹ Note that since the Court closes early on Friday to ensure timely filing and prompt receipt by the Court these documents were filed by U.S. mail on August 18, 2017. Duplicate Originals are being filed if need be, with the Clerk on Monday August 21, 2017. They also contain certain typo corrections, but no new discussion.

COURT OPINION NO S-15893 (SIC, SHOULD BE NO.7162)²
INITIALLY ISSUED ON MARCH 24, 2017 AND MODIFIED
BY THE SUPREME COURT DECISION AND ORDER ON
REHEARING OF AUGUST 03, 2017

Recreational Data Services, Inc., by and through counsel

Phillip Paul Weidner of Weidner & Associates, APC., and

Joshua Fannon of the Law Offices of Joshua Fannon, hereby

request and/or move pursuant to Appellate Rules 503(a) and (g),

and 506 for Oral Argument as to the pending PETITION FOR

REHEARING PURSUANT TO ALASKA APPELLATE RULE

506 AS TO SUPREME COURT OPINION NO S-15893 (SIC,

² The Instant Petition For Rehearing in its title inadvertently referred to Opinion No. S-15893(which is the Supreme Court Case number); correct reference to “Opinion No. 7162” was made in the Petition for Hearing.

SHOULD BE NO.7162)³ INITIALLY ISSUED ON MARCH 24,
2017 AND MODIFIED BY THE SUPREME COURT DECISION
AND ORDER ON REHEARING OF AUGUST 03, 2017.

Given the importance of the issues presented in the Initial
Conformed Petition For Rehearing and the Instant Petition For
Rehearing in this case, as to the U.S. and Alaska Constitutional
issues, and implications for the business community in Alaska,
and for Alaska and U.S. Corporations, and Citizens doing
business in Alaska, this Court is respectfully requested to
consider en banc, under Rule 503(g) and 506 this Request and/or

³ See footnote 2, supra.

Motion for Oral Argument. Accordingly, the original and 5
copies of said Request and/or Motion are filed for circulation by
the Clerk of the Court to the full Court.

This Request and/or Motion is made on the grounds, that
a current Petition For Rehearing, has been timely and
substantively filed. That is, the Instant Petition for Rehearing,
was timely and substantively filed under Alaska Appellate Rule
506(a)(1)(2)(3) and (b).⁴

⁴ If necessary said Instant Petition for Rehearing should also be
treated as a Motion for Reconsideration, as timely filed under
Appellate Rule 503(h)(1) and (2)(C), as to the Decision and Order
entered in this matter on August 03, 2017, which granted Rehearing

Under Alaska Rule of Appellate Procedure 506(a)(1)(2)(3) and (b) the current Petition for Rehearing seeks Rehearing as to the “Modified Opinion” and/or “other decision”, reflected by the Decision and Order in this matter of August 03, 2017, which granted Rehearing in part and modified this Court’s Opinion No. 7162 published May 24, 2017.

As set out in said Initial Conforming Petition for Rehearing and Instant Petition For Rehearing, there are substantial grounds which mandate, and to grant, Rehearing as

in part, and modified this Court’s Opinion No. 7162, published March 24, 2017.

to said Decision and Order On Rehearing, of August 03, 2017
and Modified Opinion, and to further modify the Court's Opinion
No. 7162, in order to ensure that proper factual and legal
rulings, including in particular, rulings of great constitutional
import under of the U.S. and Alaska Constitutions are made.

While the Court denied Oral Argument, as to granting the
initial Petition For Rehearing, and further did not actually grant
Oral Argument, once Rehearing was ordered,⁵ it is apparent

⁵ Note that counsel had filed a Request /Motion For Oral Argument,
as to the Conformed Petition, as to Oral Argument, once Rehearing
was granted. However, although this Court recognized that errors in
the Initial Opinion No. 7162 were made and existed such that
Rehearing be granted, it did not act on the Request /Motion for Oral

from the initial Opinion, the Modified Opinion, and the new
Petition For Rehearing, the Court continues to misunderstand,
misconstrue, misapply and/or overlook or ignore significant
facts, legal principles and issues and Constitutional Rights.

This includes in particular, rights of Citizen Corporations
such as Recreational Data Services, Inc. and/or U.S. and
Alaskan citizens doing business in Alaska: 1) to a jury trial; 2) to

Argument, once Rehearing was granted, or grant Oral Argument
[which counsel respectfully suggests it should have, to insure the
issues were properly addressed and resolved] and thus the Court
should now grant Oral Argument, to insure all such relevant issues
are fully and properly addressed and resolved in a constitutionally
proper manner.

the benefit of an “estimate” by a jury, of loss profit damages,

merely with reasonable certainty, [and not to reasonable

certainty] which estimate “with reasonable certainty”, is merely

“non-speculative” to serve as a sufficient basis for the jury

verdict and finding by a preponderance of the evidence, as to lost

profit damages; 3) to not have unconstitutionally imposed upon

RDS or similar harmed plaintiff(s) a different or higher standard

of burden of proof as to lost profit damages; 4) to recognize the

actual evidence presented and admitted of record which is

sufficient, to meet the Guard standard if applied; 4) for neither

the Superior Court nor the Supreme Court to unconstitutionally

weigh or argue the strength of the evidence, or invade the

province and unfettered discretion of the jury; 5) and the Court not to insist, nor impose on a innovative company such as RDS, that there has to be an impossible burden of production as to evidence of “profits and sales” by “similar business(es)”.

The Court has clearly still erred in that regard, and counsel respectfully requests an opportunity, for a candid, open, and forthright, intellectual, legal, and Constitutional discussion of the issues and facts, to ensure that the record, evidence, and issues, are properly considered and resolved and justice is done.

Counsel respectfully suggests, that it is inappropriate for the Court to on the one hand acknowledge on Rehearing, the

error in the Opinion No. 7162, with the initial language, and
holding, that there is a “higher” standard or burden of proof, for
lost damages profits, but then merely substitute the word
“different”, and further to add a footnote, which is likewise clear
error and a mischaracterization of the actual evidence,
presented by RDS and admitted by the Trial Court, as to

profitability,⁶ and data⁷, and ignore the violation of the right to jury trial, or violation of the absolute U.S. and Alaska

⁶ The Modified Opinion, and Decision and Order, of August 03, 2017,
now state with the new footnote added at Pg. 34, line 6

But RDS did not present any of these
types of evidence at trial(Sic). FN
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.
(Sic) And the market survey data
themselves were not introduced into
evidence (Sic)(e.a.).

This is still flat wrong. See Instant Petition For Rehearing at Pg. 3-4, especially at footnotes 4 and 5 as to market survey and data offered and admitted as to profitability.

⁷ See also, Trial Transcript Pg. 966, Lines 8-25, Pg. 967, Lines 1-16 of cross-exam of Trimble's Chaur Fong, and his testimony the data was used and presented via the "P&L's and finances from RDS to analyze, and support profitability for RDS and thus loss profits".

Q. Okay. And then the last paragraph you are talking about that there will be a device for the project to proceed, yes? **A. Yes** Q. Okay. Now, when you talk about needing credible P&L financials, that is where the – the market research supports, rights, the P&Ls, right, the market research was used to support the profits and loss? A. Correct. Q. Okay. And you are asking in March 9th of 2010 for credible

profits and loss documents, right? A.

That's correct. Q. Okay, Exhibit 26. I
need 26. One moment, Mr. Chen.(Sic?)

Sir, I am going to ask you to look at
Exhibit 28. **A. Okay. Yes.** Q. Can you –

that is an e-mail from you to Brian
and Pat, right? **A. Yes.** Q. Brian

Feucht and Pat Boehnen? **A. Yes** Q.

And that is the—what is the subject
on that e-mail you sent? A. Subject is

consolidated P&L. Q. So, these are
consolidated profits and loss for RDS,

Trimble, and Remington, right? A.

Yeah. Q. For the Copper Center
project under the attachments? A. Yes

Q. And what was the importance you
put on that? A. High Q. And can you

just read the first line of that e-mail?

A. “The spreadsheet was (inaudible)
P&Ls.”

Constitutional doctrines that neither the Superior Court, or the Supreme Court, can interfere with the discretion of the jury, as to its estimate of damages, or for either Court to weigh or argue the strength of the evidence and substitute its own belief for that of the jury.

Counsel accordingly respectfully suggests it is important that Oral Argument now be granted, so that such open, direct, and candid discussion can occur, between Plaintiff/Appellant

Trial Transcript at Pg. 966, Lines 8-25, Pg. 967, Lines 1-16 (e.a.). See also Modified Opinion at 12, P&L's included "The market research data as it applied to the finances, profits and losses" (e.a.).

Counsel, and all five Justices of this Court, as to the significant issues presented, including both the U.S. and Alaska Constitutional issues, and the severe and unconstitutional implications for the business community and citizens of Alaska and citizens of United States.

With due respect to the Court, in granting Rehearing in part, the Court obviously recognized that its initial Opinion was in error, with said Opinion stating words, there was a “higher” burden, and standard of proof, as to a jury’s finding and verdict reference lost profit damages.

However, the crucial issues in the case, were still either inadvertently, or perhaps studiously, avoided and ignored, concerning the right to a jury trial and the proper burden and standard of proof, and the difference between a jury estimating lost profit damages with reasonable certainty, and any requirements of proving lost profit damages to a preponderance of evidence, or to a “different” or “higher” standard of proof of “reasonable certainty” [which “higher” or “different” standard of proof is constitutionally non-existent and precluded as the sole standard and burden of proof is preponderance of the evidence.]

Since these issues have great implications for the U.S. and Alaska Constitutions, the right to a jury trial, and due

process, and equal protection as to the rights of not only RDS,
but similar Citizen Corporations and/or Citizens, the Court
should afford counsel an opportunity for a direct dialogue, as to
the issues which can not be overlooked or ignored. Oral
Argument should be granted as to these said issues, particularly
since the Court has recognized the errors in the initial Opinion
No. 7162 but never afforded Oral Argument, when Rehearing
was granted, and the real issues had been crystallized.

Counsel respectfully submits that RDS should be given
the right to directly discuss with the Court these important
issues, to insure they are understood, addressed, and not again
overlooked and/or ignored.

Thus counsel requests an opportunity to address the Court in Oral Argument, both as to why the Order and Decision of August 03, 2017 and Modified Opinion still contain factual, legal, and constitutional error and the Instant Petition for Rehearing should be granted, and why; 1) Said Modified Opinion No. 7162 is still in such constitutional error as to the facts, record, law and constitutional issues; 2) The Modified Opinion should be further appropriately modified on Rehearing, to honor said U.S. and Alaska Constitutional rights.

This includes to correctly state: 1) The standard and burden of proof; 2) The doctrine of a jury estimating lost profit damages with reasonable certainty and not finding same to a

“different” or “higher” standard and burden of proof of

“reasonable certainty” 3) The prohibition against a Superior

Court or Supreme Court interfering with the jury verdict, or

weighing or arguing the strength of the evidence, or disturbing

the discretion of the jury; 4) the Constitutional prohibition

against imposing an impossible burden on an innovative

company such as RDS of evidence of “similar sales and profits”

from similar businesses, which is not only functionally

impossible, but which “similar sales and profits” is only one of

the methods by which Plaintiffs, such as RDS can demonstrate

lost profit damages to a jury, for the jury to merely so estimate

with reasonable certainty.

Further, it is imperative that there be such a candid, forth
right, and open exchange, as to the reality of the evidence in this
case, which is certainly non-speculative, sufficient to allow a
jury to (as only required) merely estimate, as it did, lost profit
damages with reasonable certainty, based on evidence, and data,
which was duly gathered, analyzed, and presented and
admitted, as to market data, market research, evidence as to
profitability,⁸ and properly summarized, analyzed and

⁸ See Slip Opinion at Pg. 21; as to issues of lost profit evidence, i.e.
jury estimate of lost profits, with reasonable certainty, such lost
profits evidence, must be viewed in “light most favorable to RDS.”
Slip Opinion Pg. 21-22.

presented, backed up by experts, and was non-speculative and was essentially not challenged as to its accuracy or reliability by the defendants .

Said evidence was properly admitted by the Trial Court as reliable, and subject to cross examination, and backed by hybrid expert testimony, and testimony of industry qualified witness(s) as to reliability. The lower Court ruled, and the

“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”.

(e.a.)

record reflects, it was relevant and admissible as to the
reliability as to a jury estimate of lost profit with reasonable
certainty. The lower Court also ruled, and admitted the
evidence, under the Alaska Rule(s) of Evidence 803 (6) and (23)
as admissible and reliable, and as necessary to allow an
innovative company such as RDS to do so, with its status as to
“innovation”, to seek and obtain justice in the Alaska Court(s).

See Conformed Petition For Rehearing(“CP”), Appendix, at 0001;

TR 446-447, CP 13]. Thus, neither the Superior Court not the

Supreme Court can “switch positions” as to same or argue

strength or weight of the evidence. (See footnote 8, as to “light

most favorable to RDS”.)

Thus, RDS requests, Oral Argument, at this juncture, with direct oral communication between counsel and the Court, so that the Court can be both fully addressed, and advised as to the relevant issues, and counsel can answer any appropriate questions, and all the relevant factual and legal and constitutional issues are actually addressed, and justice is truly done; such that RDS does not suffer the clear violation(s), of its U.S. and Alaska Constitutional rights to a jury estimate of loss profit damages, and a jury verdict, as to same; and most importantly similarly situated Alaska and/or U.S. Corporation(s) citizens and/or individual citizens, do not have their legal and constitutional rights so violated; and that such inappropriate

doctrine and law by the Alaska Supreme Court does not exist in these crucial U.S. and Alaska Constitutional areas, which has grave implications for Citizens, of all the 50 states, and for all State, and Federal Law.

**IN THE SUPREME COURT OF THE STATE OF
ALASKA**

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

PETITION FOR REHEARING PURSUANT TO ALASKA
APPELLATE RULE 506 AS TO SUPREME COURT
OPINION NO S-15893 INITIALLY ISSUED ON MARCH
24, 2017, AND MODIFIED BY THE SUPREME COURT
DECISION AND ORDER ON REHEARING OF AUGUST

Recreational Data Services, Inc., by and through counsel

Phillip Paul Weidner of Weidner & Associates, APC., and

Joshua Fannon of the Law Office of Joshua Fannon, hereby

petition for rehearing under Alaska Appellate Rule

506(a)(1)(2)(3) and (b), from the Decision and Order in this

matter of August 3, 2017 [(Exhibit A herewith) hereinafter
“Order”], which granted rehearing in part and modified this
Court’s Opinion No. 7162 published March 24, 2017. This
Petition is timely and conforms to the Appellate Rule¹.

The Decision, Order, and Modified Opinion, overlook,
misapply, misconceive, or fail to consider principles directly
controlling, material facts, and propositions of law, as to right(s)
to jury trial, due process and equal protection under U.S. and

¹ Appellate Rule 506(b) provides “an original Petition for Rehearing must be filed within 10 days after the date of notice of the Opinion, or other decision”. This Petition timely and substantively, seeks Rehearing on the modified “Opinion” and/or “other decision”.

AK Constitutions, including 7th, 5th, and 14th amendments. This includes rights to recover damages based on a jury's estimate of lost profit damages, finding of lost profit damages by preponderance of evidence [only appropriate burden and standard of proof, not some other "different" or "higher" burden or standard]. Any evidentiary doctrine that a jury must have evidence from which it can find lost profit damages with reasonable certainty, is not a constitutional-allowed doctrine, by which a "different" or "higher standard or burden of proof" can be imposed [which this Court and Trial Court did]. The Court continues to ignore, overlook and misconceive material question(s) in this case as to whether the Superior or Supreme

Court, can interfere with a jury's discretion or decision, as to its estimate, and verdict as to lost profit damages, or argue strength of the evidence [all of which actions are constitutionally barred]; further, misconstruing, misconceiving the real facts as to the type of evidence actually produced by RDS and admitted, which is non-speculative, was and is sufficient to allow a jury to estimate, thus find with [not to] "reasonable certainty", under a preponderance of evidence standard, lost profit damages at issue. All that is required, is some non-speculative evidence by which a jury can estimate the amount of lost profit damages with reasonable certainty. The Court found, and affirmed, a jury verdict as to Trimble's culpability, re contract and tort liability,

and that some lost profits damages occurred [*See*, Conforming
Petition for Rehearing, “CP”, p. 7, nt 7]; thus, the verdict and
amount re lost profits damages is solely for a jury’s estimate, at
their discretion. The Order and Decision states, in part, “At page
32, line 18, the word “higher” is replaced with “different”. This in
no way cures the errors, pointed out in the CP which the Court
continues to miss.² At p. 32, lines 1-17, the Opinion continues to

² There is no “different” standard or burden of proof for a jury to find
lost profit damages, but rather, the universal standard of proof of
preponderance of evidence, and no “reasonable certainty standard”
(sic, e.a.), or burden of proof [*See*, Opinion, p. 32, line 16], nor such a
“different” standard to “support such an award [of lost profits] to a
reasonable certainty.” [sic, e.a.] *Id* at line 14.

equate criteria for the standard and burden of proof re the
subject of sufficiency of lost profits evidence, as an incorrect
“different” standard and/or burden of proof, i.e., that lost profits
“had to be proven (sic) with reasonable certainty” [e.a.]; stating
that “evidence did not support such an award to a reasonable
certainty,” [e.a.], and there is a “difference (sic) between the
proof required to show the fact of damages and that required to
determine the amount of lost profits”. Mere sleight of hand by

substituting “different” for “higher” does not cure the error³. The error is also contained at p. 31, ¶ 2.

The *fact* of damages (i.e., the fact that plaintiff suffered harm)—must be proven by preponderance of evidence; the amount of damages is a separate factual issue that, in the case of lost profits, must be proven to (sic) a reasonable certainty..[sic] ...Because the fact of lost-profit damages and their amount are difference issues, a plaintiff may fail to prove the amount of lost profits to a reasonable

³ See, also continued error in Modified Opinion at p. 33, line 1, “evidence insufficient to show [i.e. proven to a standard and burden of proof], to a reasonable certainty.”

certainty [sic] even after having proved by a
preponderance of the evidence that is was harmed.

Plaintiff does not have to prove lost profits to a standard
or burden of proof of reasonable certainty, but merely there has
to be evidence by which a jury can estimate lost profit with
reasonable certainty and then find by a preponderance, based on
some non-speculative evidence, with a reasonable jury estimate,
which occurred here and cannot be set aside or constitutionally
disturbed. The Court likewise continues to overlook, misapply,
ignore, and/or fail to consider constitutional principles directly
controlling re right to a jury trial, material facts and
propositions of law as to same, and material questions in the

case, with the note added at p. 34, line 6, where the Opinion still states the clear factual error that “RDS did not present any of these type of evidence at trial”.⁴ As pointed out in the CP at nt. 1, 2, p. 9-13, and reflected in the record, underlining data was summarized and contained in evidence presented,⁵ thus, it was

⁴ That statement, and the new footnote, are plainly wrong. The new footnote continues to make same mistake Superior court did, stating evidence “referred to the results of market surveys, but only in the discussions of consumer demand and marketing opportunities. They did not address profitability, and the market survey data themselves were not entered into evidence”.

⁵ Concerning issues of market survey data, the data as reflected by the record was gathered by an independent company, there were no questions re its reliability, it was summarized when presented, verified by expert testimony, and specifically addressed profitability (CP at nt 19, App. to CP at 0149-10151), and was admitted by the

presented and admitted with no sustained challenge to foundation, or dispute as to reliability or accuracy. There is testimony as to its validity by experts (CP at nt 9, p. 11-12), and it did address profitability. *See*, CP at p. 2, line 3-8, nt 2, p. 9-13, nt 9, 12, 14, and 18.⁶ The modifications to the Opinion at p. 3,

Court as reliable with an adequate foundation and cross-examination and necessary to allow an innovative “new age” Plaintiffs’ company such as RDS to enjoy their rights, [*See*, App. to CP at p. 0061], and that the evidence was admissible to “allow the jury to make a finding” with a reasonable degree of certainty” [TR446-447; App. 001; CP 13].

⁶ *See*, especially the CP, App. at 0149-0151, with a focus on 0151.

Opinion’s claim that Exhibit 28 [Profit and Loss] is not tied to Market Research data and analysis is flat wrong. App, 0146, line 1-6 is base population of customers to which product could be sold. In Market Research, this information is in Exhibit 24, Pg 74. Note general outdoor recreation users were immediately removed, as potential to

buy was too speculative, leaving Addressable Market. Addressable Market was limited to users that would buy. See Profit and Loss, (“P&L”) Exhibit 28, App 0146, lines 9-15, Exhibit 24, page 75, in summary and pgs 0112-0118. Only most conservative numbers were selected. Changing from AT&T to Verizon alone almost doubles buyers, see Exhibit 44, pgs 159-169. Next step limited overlap of hunters and fisherman, and applied Roger’s Adoption Curve. See Exhibit 28, CP App. 146-147. Second spread sheet shows predicted buyers used in Profit and Loss. Note 3rd line down on 2nd box: Yr1 158,474; Yr2 1,021,893; Yr3 1,272,744 App 147; Yr4 348,984; Yr5 17,086. These numbers decline in year 4 and 5 due to phasing out and replacing this version of the product; new one is not factored into Profit and Loss. Again, conservative. Finally, see Ex. 24, CP App 0151, line 8 “Annual Unit Sales”. This is RDS’s Profit and Loss. *See* market research numbers applied to RDS’s P&L. P&L accounts for Gross Revenue, COGS (Cost of Goods Sold), R&D (Development), G&A (General and Administrative Costs), and Operations: Summarizing expected profit. Note these numbers also reflected on Trimble’s P&L, Page 149, Developed by Trimble’s Chaur-Fong, and Remington’s Page 150. Thus, there is a logical rational basis, from

line 3-4, and at p. 38, lines 21-27, do not cure the error(s) by the Superior and Supreme Courts in invading the province of the jury, and arguing the strength and weight of the evidence, at Opinion p. 33 to 36; *See*, CP at 6-9. Regardless, if the Opinion(s) are cast as granting a remittitur, or vacating the jury's award for lost profits, it is irrelevant to the unconstitutional invasion of the province of the jury and the violation of jury trial rights, due process and equal protection rights. The Restatement notes there are various separate non-speculative types of evidence, by

evidence admitted in record, to estimate lost profits damages with reasonable certainty, i.e., move from Market Research to P&L's profitability and lost profit damages with all the information reliable, non-speculative and sufficient.

which a jury may estimate damages with reasonable certainty, including “expert testimony, economic and financial data, market surveys and analysis of business records of similar enterprises and the like.” As set out in the CP, nt 1, 2, page 9-13, RDS provided expert testimony, economic and financial data, market surveys and analysis which addressed not merely the feasibility and projected sales but likewise profitability, and thus, all data and analysis and expert opinion were admitted. All these types of evidence do not have to be produced.⁷ To

⁷ There is no case law, nor legal authority that the actual now market survey responses or raw data be produced, especially when not challenged, and the Superior Court did not reject the evidence for lack of foundation.

impose a strict requirement of “business records of similar enterprises” (Modified Opinion at 33, line 9-14; p. 34, line 12-13), is an impossible burden to place on an innovative company such as RDS, in these circumstances. Holding RDS to such impossible burden, cannot be used to justify invading the province of the jury and denying RDS the right to a jury trial, and the jury’s estimate and verdict as to damages. Note, the Supreme Court found in the Opinion at p. 7 to 30, there was proper evidence by preponderance of the evidence as a basis for culpability and liability, and a proper finding by the jury Trimble’s actions “caused RDS to lose profits” (p. 28-30) from violations via

misrepresentations, breach of fiduciary duty, contract, and tort harm.

Accordingly, it violates the right to a jury trial to impose a higher different standard or burden of proof or strict requirement of records of other business or in particular for the Superior Court or the Appellate Court to argue the strength of the evidence or weight the evidence and set aside the jury's estimate and verdict which it is the exclusive province of the jury. See, CP at pages 14-15, with analysis of *Upjohn Company v. Rachelle Laboratories, Inc.*, 661 F.2d 1105 (6th Cir. 1981); said case, in particular, as to why both the Superior and Supreme

Court's actions in this case violate the right to jury trial under the U.S. and AK Constitutions.

**IN THE SUPREME COURT OF THE STATE OF
ALASKA**

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

**MOTION TO STAY EFFECTIVE DATE OF JUDGMENT, AND
MODIFIED OPINION, DECISION AND ORDER, AND
RETURN OF JURISDICTION AND FILE TO ALASKA
SUPERIOR COURT**

Recreational Data Services, Inc., by and through counsel

Phillip Paul Weidner of Weidner & Associates, APC., Joshua

Fannon of the Law Offices of Joshua Fannon, hereby move this

Court, pursuant to Appellate Rule 506, 507(a) and (b), and

512(a)(1), 512(a)(3), and 512(b), to stay the effective date of the

Judgment, and Modified Opinion, and Decision and Order on Rehearing, said modified Opinion issued with this Court's Decision and Order on August 3, 2017, which granted rehearing in part and modified this Court's Opinion No. 7162, published March 24, 2017.

This Motion is made on the grounds that a timely Petition for Rehearing is being filed in conformance with the Appellate Rules as to said modified "Opinion" and "other decision" under Appellate Rule 506(b), and thus the Judgment and Modified Opinion and Decision and Order should not take effect, and the file and jurisdiction should not be returned to the Superior Court, until disposition of said timely Petition for Rehearing.

**IN THE SUPREME COURT OF THE STATE OF
ALASKA**

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

CONFORMED PETITION FOR REHEARING
PURSUANT TO RULE 506

Recreational Data Services, Inc., by and through

counsel Phillip Paul Weidner of Weidner & Associates,

APC., and Joshua Fannon of the Law Office of Joshua

Fannon, hereby petition for rehearing under Alaska

Appellate Rule 506(a)(1)(2)(3), from the Opinion in this

matter issued as Supreme Court No. S-15893 on March 24, 2017, (hereinafter “Opinion”). This Petition conforms to this Courts Order of May 18, 2017¹.

¹ As required by Court’s Order of May 18, 2017 references are made [in brackets in the body of the Petition] to where legal and factual issues were raised and discussed in Appellant’s Briefing on Appeal (Appellant’s Brief as “AB” and Appellants Reply Brief as “ARB”). Similar references are made in the Table of Authorities as to where cases were cited in Appellants Briefing. Two cases *Kocurek v. Wagner*, 2017 W.L. 839443 (AK 2017), and *Marshall v. Peter and Nelson*, 377 P.3d 952 (Alaska 2016), were not cited in Appellant’s Briefing, but they are properly cited in the Petition as appropriate authority under Rule 506(a)(1)(2)(3) as they are Alaska Supreme Court opinions that relate to the law concerning issues properly raised in the Appellate Briefing and were issued after Appellants Opening and Reply Briefs were filed.

Under applicable federal (7th Amendment) and state constitutional jury right principles, was there any unreasonable uncertainty in jury's factual estimates of substantial damages. “Reasonable Certainty” test requires only some rational basis for a jury to make an estimate of lost profit damages by a preponderance of the evidence. No higher standard or burden exists -- regardless of whether jury awards \$1 million or \$51 million. The jury exclusively assesses weight, strength and credibility of the evidence. Rehearing should be granted to review whether portions of Opinion vacating jury's estimate and award of compensatory damages

violated RDS's constitutional jury trial rights including overlooking evidence of record².

I. GROUNDS FOR REHEARING

² See, footnote 2 *infra*, and discussion, *infra* at page 9, et. seq., testimony in Appendix and Exhibits 24, 28, 44 and 52 regarding such overlooked but properly offered and admitted evidence supported and corroborated by “hybrid expert” and industry qualified witnesses, with extensive data market research and survey for “P&L” statements including that lost profit projections were “still reliable and valid” without Remington (See, pg 12, *infra*), and but for Trimble’s fraud and breach of contract, RDS still could have maintained “first mover” status as to any competing business or product [AB 33, 34; S.O. 29]. The market research provided was not “partner specific”; i.e. not tied to Remington’s consumer base as purchasers, but “product specific” tied to all the consumers in market or industry as a whole. See, *infra* at 3, as to Slip Opinion concession at 27 RDS profits would be similar even without Remington.

Court has overlooked, misapplied, or failed to consider evidence, legal and constitutional principles directly controlling, including jury trial rights under 7th Amendment to U.S. Constitution, and Alaska Constitution and constitutional protection of same.

The 7th Amendment to the U.S. Constitution
provides:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States,

than according to the rules of the common law. (Emphasis added, “E.A.”).

Opinion is literally at “war” with established constitutional jury trial principles; overlooking, misconceiving, and misconstruing material facts, propositions of law, and questions as to:

- 1) Opinion and Trial Court overlooking evidence presented by RDS, admitted in the record, to support the jury’s lost profit damages estimate with data, market research and surveys, methodology, foundation, analysis and expert testimony, corroborated by Trial Court’s

accepted “hybrid expert”, and industry qualified witnesses, (unheeded by this Court) to serve as some rational basis to allow jury to make a lost profit estimate, and damages finding, “with” (not “to”) reasonable certainty. [See AB 6-8, 10, 19, 20, 21, 44; ARB 20 et seq.].

Opinion overlooked the record.

.... 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. But RDS did not

present any of these types of evidence at
trial.”(sic)....the project also generated
market surveys but RDS did not use these to
support its statistical projection...(sic)[S.O. at
page 24] (E.A.).³

³ See, footnote 2 *infra*, and discussion, *infra* at page 9, et. seq., testimony in Appendix and Exhibits 24, 28, 44 and 52 regarding such overlooked but properly offered and admitted evidence supported and corroborated by “hybrid expert” and industry qualified witnesses, with extensive data market research and survey for “P&L” statements including that lost profit projections were “still reliable and valid” without Remington (See, pg 12, *infra*), and but for Trimble’s fraud and breach of contract, RDS still could have maintained “first mover” status as to any competing business or product [AB 33, 34; S.O. 29]. The market research provided was not “partner specific”; i.e. not tied to Remington’s consumer base as

The Trial Court likewise erred.

RDS does not offer the market survey that
was used to prepare the P&L statement. RDS
does not offer any data analysis supporting
the projections in the P&L statement. RDS
did not offer expert testimony regarding the

purchasers, but “product specific” tied to all the consumers in market
or industry as a whole. See, *infra* at 3, as to Slip Opinion concession
at 27 RDS profits would be similar even without Remington.

reliability of the projections.... (sic) [JNOV
Order (“JNOVO”), 13] (E.A.).

Opinion apparently took Trial Court’s
statement(s) at face value, overlooking evidence of
record, which demonstrated such statements were
incorrect. Court conceded at Slip Opinion 29, RDS’s
first mover status, even without Remington, and at
27 RDS’s lost profits were well based (i.e. none
speculative) without conjecture:

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 on Remington's participation.

(E.A.).

2) Profound constitutional difference, which Opinion and Trial Court erroneously conflated, between proper burden and standard of proof as to sustaining a jury's estimate of lost profits (only some evidence "in the

light most favorable to “(RDS)” to support jury’s estimate of damages, via an application of preponderance of the evidence) versus issues of merely some non-speculative evidence, upon which a jury may rely as a basis to make a reasonable estimate of damages with (not to) a “reasonable certainty”; as to which there is neither a “higher” burden nor standard of proof to “reasonable certainty”, as the Opinion clearly erred by so imposing. [See AB 26-29, (nt 30-33), 30, 32, 40, 41].

“We also hold, however, that the superior court was correct to conclude that RDS failed to prove any amount of lost profits to [(sic) i.e.

not as only required by mere jury estimate
“with reasonable certainty”] a reasonable
certainty as the law requires”... [Slip Opinion
 (“S.O.”), at page 2].

... “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;
the *amount* of damages is a separate factual
issue that, in the case of lost profits, must be
proven to [(sic) i.e. not as only required by
mere jury estimate “with reasonable

certainty”] a reasonable certainty.... [S.O. at 31].

... “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 [(sic) i.e. not as only required by a mere jury’s estimate “with reasonable certainty”] a reasonable certainty even after having proved by a preponderance of the evidence that it was harmed” ... [S.O. at 31].

...“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 [(sic), not a burden or standard of proof and not a higher test] for lost-profit damages."...[S.O. at 32]. (E. A.).

The Trial Court committed similar clear errors.

“Because the Court finds that Plaintiffs cannot prove (sic) [not only as required for the jury to merely estimate with reasonable certainty] lost profits “with reasonable certainty”, Plaintiff cannot prove its damages claim”...[JNOVO, 1].

... “the Court finds that RDS cannot prove (sic) [not only as required for the jury to merely estimate “with reasonable certainty”] lost profits with reasonable certainty and, therefore, cannot prevail on any of its claims.”... [JNOVO, 5].

... “RDS’s claims for lost profits is unsupported by the evidence especially considering the heightened standard of proof for an un-established business.”... (sic)

[JNOVO, 5]

... “Alaska law requires that lost profits be proven (sic) [not only as required for the jury merely to estimate “with reasonable certainty.”] with reasonable certainty...

[JNOVO, 6].

... “proving reasonable certainty is a very high standard.”... (sic) [JNOVO, 6]

... “the Court finds that reasonable persons could not differ in their judgment that RDS, an un-established business, did not prove (sic) [not only for the jury to merely estimate “with reasonable certainty”] any amount of lost profits with reasonable certainty.”... (sic) [JNOVO, 19]. (E.A.).

3) Mistaken analysis of minimum quantity of evidence [only some evidence in light most favorable to prevailing party (RDS)] necessary to support, sustain, and not overturn, a jury’s estimate, findings, and verdict

regarding lost damages, i.e. merely some non-speculative evidence as basis for jury to estimate damages with [and not to] “reasonable certainty”, which is not a “higher” burden or standard of proof as Trial Court and Opinion erroneously held. [See AB 26-29 (nt 30-33), 30, 32, 40, 41].

4) Trial and Appellate Courts’ constitutional duties to sustain, not reconsider, nor disturb jury’s verdict or estimate or factual findings as to lost profit damages, if there is some admitted evidence to support “in the light most favorable to the prevailing party” a reasonable juror’s estimate of damages and jurors’ factual findings with basis of some non-speculative evidence in light of preponderance

of the evidence standard, and not argue or assess or weigh credibility or strength of the evidence⁴, or make de novo factual findings [See AB 23, 24 25-28, 30, 32, 40, 45].

5). Violations of U.S. and Alaska constitutional jury trial rights, and related constitutional guarantee(s), by imposing on a “startup” company such as RDS, with an “innovative product” (i.e. in computer software, intellectual property, etc”), which had not previously been actually manufactured and marketed, a “higher” test of evidence,

⁴ Trial Court engaged in such constitutionally prohibited activity, in its JNOV Order at page 7 through 19, as did the Opinion at page 34 through 36.

standard or burden of proof, as to lost profit damages, thus holding such a Plaintiff to an improper and impossible, unobtainable, unconstitutional and inapplicable standard and burden of proof [See AB 1, 2, 16, 18, 29, 31, 33, 36, 37, 42].

Opinion overlooked evidence in the record; unconstitutionally invading the province of the jury, argued, denigrated and weighed the credibility and strength of the evidence, and erred as to standard and burden of proof. These clear constitutional, factual errors,

and fundamental jury trial violations infect entire analysis and must be rectified⁵.

II. DISCUSSION

⁵ Trial Court and Opinion misstated the law committing clear error regarding concept of principles of “reasonable certainty” requiring Plaintiff to prove damages to (sic) a reasonable certainty [not a mere jury estimate with], i.e. as a burden (sic) and standard of proof (sic) and in fact misstating “reasonable certainty” as a higher standard and burden of proof, than preponderance of the evidence (sic). True test, under case law, is only for some non-speculative evidence for a basis to allow a jury to make a reasonable estimate of damages with [and not to] “reasonable certainty”; no burden or standard of proof at all. Trial Court and Opinion mixed and conflated “to” and “with” and committed clear error as to imposing on RDS an improper “higher” standard and/or burden of proof and in overlooking RDS’s Trial Court admitted evidence as to lost profits, which it must rectify.

A. Clear Constitutional Error By Imposing On
RDS “Reasonable Certainty” As A Higher Standard
And Burden Of Proof.

Jury’s factual findings and estimate as to lost profit damages to RDS, given this Court’s affirming liability, and extensive facts and evidence in this case, cannot be constitutionally disturbed or invaded. Imposing on RDS concept of “reasonable certainty” as incorrect “higher” standard and burden of proof, and to “weigh, credibility or strength of the evidence”, as opposed to mere existence of some “non-speculative” evidence to serve as basis to allow

a jury to make such non-speculative estimate of damages, “with reasonable certainty”; [not proof to reasonable certainty], especially as to RDS (innovative, unique, and new product company) is improper, unobtainable, and impossible requirement of proof, and a 7th amendment violation⁶. Case law is uniform. “Reasonable certainty” is a lesser test than even the preponderance of evidence

⁶ Under Appellate Rule 506(a)(1), as to a “decision or principle directly controlling; *See, Kocurek v. Wagner* (C.J. Stowers), 2017 WL839443, *Marshall v. Peter*, 377 P.3d 952 (Alaska 2016), and *Wiersum v. Harder* (Per Curiam, Massen & Stowers dissenting on denial of Petition for Rehearing), 316 P.3d 557 (Alaska 2013). Those Opinions, correctly reflect sanctity of a jury verdict and findings (solely jury prerogative).

standard⁷. Evidence and juror's estimates and findings regarding damages can only be viewed "in the light most favorable to RDS", e.g. "some evidence", that is mere "non-speculative" evidence, to allow a jury to make a reasonable estimate of damages with [not to] "reasonable certainty",

⁷ "Reasonable certainty", is merely opposite of "conjecture" and "speculation" (ARB, 20). Reasonable certainty test that applies to *amount* of damages is even less demanding, than preponderance of the evidence standard that applies to *fact* of damages. *See, Alaska Tae Woong Venture v. Westward Seafood's, Inc.*, 963 P.2d 1055, at 1061 (Alaska 1991); *Power Constructors, Inc. v. Taylor & Hintze*, 960 P.2d 20, at 43 (Alaska 1998); *Native Alaskan Reclamation v. United Bank Alaska*, 685 P.2d 1211, at 1222-23 (Alaska 1984); *Reeves v. Alyeska Pipeline Service Co.*, 56 P.3d 660 (Alaska 2002); *Cameron v. Chang-Craft*, 251 P.3d 1008 (Alaska 2011) [*See*, AB at 26 to 28].

i.e. not with “pure speculation”. Neither the Trial Court nor this Court are constitutionally permitted to argue or denigrate, or assess weight or credibility or strength of the evidence, or the jury estimate, or to impose a “higher” standard or burden of proof. *See, Upjohn Company v. Rachelle Laboratories, Inc.*, 661 F.2d 1105 (6th Cir. 1981). [ARB, note 36, at 21], discussed *infra* at 14. This Court, in contrast, applying proper constitutional analysis to liability verdict under its mandatory constitutional duties, correctly found RDS legally and factually prevailed on all

liability causes of action and did prove some damages⁸; jury verdict reference liability could not be set aside, to invade

⁸ This Court held: a) Trimble Navigation made misrepresentations and RDS justifiably relied on these misrepresentations; b) Trimble Navigation breached the non-disclosure agreement; c) RDS relied on Trimble's misrepresentation's by acting or refraining from action; d) Trimble Navigation breached its fiduciary duty as RDS's partner; e) Trimble Navigations Actions were the legal cause of RDS's harm; f) the hurdles faced by the Copper Center Project were not insurmountable; g) the Copper Center Project could have found a mobile carrier; h) RDS could have secured prelaunch funding; i) RDS could have hired engineers and developed a software prototype; j) The smart phone could have been built at an acceptable cost; k) Copper Center Project could have been realized despite the lack of exact financial and sales projections; l) RDS could have secured another marketing partner[i.e. Bass Pro, Gander Mountain, Sportsman's Warehouse, etc.]; m) RDS's reliance on Trimble's misrepresentations caused RDS to lose profits [i.e. damages]; n) Trimble's breach of the non-disclosure agreement

province of the jury. Trial Court and Opinion erred,
however, as to constitutional and legal principles regarding
voiding jury's lost profits estimate. Sole standard and
burden of proof regarding compensatory damages in civil
litigation is preponderance of the evidence. "Reasonable
certainty" is neither a burden nor standard of proof, nor
"higher" burden or standard. Opinion cites in footnote 35

violated its fiduciary duty and caused RDS to lose profits[i. e.
damages], [Slip Opinion at 9 to 39]. Thus all of RDS's claims were well
plead, supported by the evidence, the jury liability verdict and
judgment should stand, and that actual damages occurred including
some lost profits [which amount(s) i.e. estimates are solely a jury
issue].

to RESTATEMENT (SECOND) OF CONTRACTS § 352, relating merely to requirement as to estimating lost profits with [not to] reasonable certainty. Distinction between constitutional standard and burden of proof, and a jury's reasonable estimate of damages based upon some evidence with reasonable certainty, is paramount and of profound constitutional significance. This Court's Opinion is a 7th Amendment violation, which RDS challenges, preserving for review, if necessary, for a Petition for Writ of Certiorari to the U.S. Supreme Court⁹. Thus, as Federal Courts hold

⁹ Although use of term “reasonable certainty” may be somewhat confusing, it is only a requirement there be some evidence by which a

squarely, RDS is entitled to rely upon reasonable market research and surveys, data and analysis corroborated by testimony (as it did), which was provided herein to the jury [AB 10, 21; Exhibit 24, 28; Tr. 422-36, 446-47]. *See*, discussion of The *Upjohn Company v. Rachelle Laboratories, Inc.*, [*infra* at 14.] Opinion is not only flawed to extent it read and applied *Guard v. P & R Enterprises, Inc.*, 631 P.2d 1068 (Alaska 1981), in improper light, but

jury can estimate lost profit damages “with reasonable certainty” without “mere speculation”; not that lost profits have to be proven via a higher standard or burden of proof to reasonable certainty, which reasonable jury estimate cannot be reargued, reexamined, weighed or disturbed by Judges.

factually erroneous; overlooking facts and actual evidence in record, for the jury's lost profit estimate, as to market surveys, research re: RDS, lost profits, and expert testimony. [AB 10-13, 21, TR 422-36, 446-447; Exhibits 24, 28, 43, 44, 52]. *Guard* is archaic; issued before the world of innovative and intellectual business products. There is no way to precisely estimate RDS's specific damages from actual similar companies' profits; only way to demonstrate lost profits is through market studies, statistics, profit loss estimates, and experts [as blessed by the Restatement] as

was done here¹⁰. Where “lost profits” are due to defendant’s culpable misconduct, depriving innovative new company of profits. Imposing on RDS a “higher” standard and burden of proof for “new companies” (See Trial Exhibit 65), as to

¹⁰ See, hybrid expert and industry qualified witnesses Pat Boehnen, Marc Hill, and Paul Miller’s testimony (Tr. 363-517, 607-658, 668-708; App. 2 to 41) and this Court’s proper finding (as did the jury) as to fact RDS lost certain profits, even without Trimble and Remington as partners. [See, footnote 7, *supra*]. Guard addresses reasonable certainty concept merely as evidentiary issue as to some evidence (for mere non-speculative basis for estimate) and not requirement estimate of damages be proven to a reasonable certainty, as Trial Court and this Court erroneously held. Nor does Guard doctrine allow argument by Trial or Appellate Courts as to evidence or Trial or Appellate Judges to disturb jury estimate, or assess weight credibility or strength of evidence or estimate.

reasonable certainty for lost profits, is unobtainable requirement and unconstitutional. Distinction between erroneously imposing “a higher level” of proof to a “reasonable certainty”, as did Trial Court and this Court’s and real concepts of jury estimate “with reasonable certainty”, on a mere non-speculative basis, is not a subtle difference. It is glaring with great Constitutional import¹¹.

¹¹ Simple Westlaw search of concept of “reasonable certainty” yields uniform language: “with a reasonable certainty” is solely as to basis and process of how a jury must be able to estimate lost profit damages with “reasonable certainty”, given evidence (merely some non-speculative); not “to a reasonable certainty” nor as a higher burden and standard of proof.

There was sufficient, “non-speculative” evidence, for the jury (as they did) to estimate profits “with reasonable certainty”. Jury estimate must stand.

B. Opinion Overlooked Evidence In The Record

And Unconstitutionally Quarrels With,

Denigrates, Weighs, And Assesses The

Strength Of The Evidence; Which In Fact

Shows Some Non-Speculative Evidentiary

Basis For The Jury to Estimate Lost Profit

Damages “With” Reasonable Certainty”.

Opinion overlooked the record¹², as to extensive evidence presented by RDS, offered, admitted and available for the jury's consideration, even under *Guard* criteria, as to data, market research studies, analysis and methodology, and expert testimony to support jury's

¹² "The Restatement notes that damages may be established with reasonable certainty with the aid of expert testimony, economic and financial data, market surveys and analysis, business records of similar enterprises and the like. But RDS did not present any of these types of evidence at trial (sic). [S.O. at 34]. (E.A.). This is a flat misstatement. Trial Court made similar misstatements: "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 does not offer expert testimony regarding the reliability of the projections. (sic). [JNOVO at 13]. (E.A.) See, notes 1 and 2, supra.

estimate of lost profit damages¹³. Moreover, Opinion's statement that "nor did [RDS] present evidence that its projections [lost profits] were corroborated by the experience of similar businesses" [Slip Opinion at 34] is refuted. [AB 10-13, 21; TR 422-36, 446-47; Ex 24, 28, 44, 52]. Corroborating "non-speculative" evidence, for a jury

¹³ "Market Research" is "The process of gathering, analyzing and interpreting information about a market, about a product or service to be offered for sale in that market, and about the past, present and potential customers for the product or service; research into the characteristics, spending habits, location and needs of your business's target market, the industry as a whole, and the particular competitors you face". See Small Business Encyclopedia defining Market Research.

to make a reasonable estimate of lost profits with [not to]
reasonable certainty, is established by fact
Cabela's/Trimble, in bringing the Cabela's similar
competing project to market, used the same methodology
analysis and data as RDS with similar numbers. (*See*,
Exhibit 52). Hybrid Expert Pat Boehnen and industry
qualified witnesses Paul Miller and Marc Hill testified
that for an innovative product such as that of RDS, the
methods used to project RDS's profits were the only way
that a product can be brought to market based upon a
reasonable estimate of profit and loss. Exhibits 24 and 28
were offered by RDS, and admitted, as accurate and

reliable [Tr. 447; App. 1], supported and corroborated by testimony of a “hybrid” expert (Pat Boehnen) and industry qualified experienced witnesses Marc Hill and Paul Miller. [TR 362-709; App. 1]. They were extensive market surveys research, data, analysis, and profit projections, prepared by Remington, RDS, and Trimble based upon accepted industry practices, market surveys and research, and methodology¹⁴. They included not mere “statistical

¹⁴ Instead of acknowledging the evidence in the record to support the jury estimate as to lost profits (even under a *Guard* analysis), Trial Court and Opinion actually argued against and or overlooked the evidence, unconstitutionally analyzing weight of evidence and credibility of data and “hybrid” expert, and industry qualified witness

analysis”, but market survey and research data from
accepted industry and federal government information,
i.e. surveys, market research, projections of the total
federally identified hunting and fishing “population” that
might purchase the product, i.e. market research as to
what percentage of the population of all hunters and
fishers identified by the federal government; not mere
Remington customers as the Opinion erroneously stated.
(See, Slip Opinion at 35). There was exhaustive testimony

testimony presented; largely based on Trimble’s own arguments and
disputes as to RDS’s commercial future, and economic sustainability
which arguments this Court rejected as to causation in sustaining
liability verdict [nt 7; supra].

from Mr. Pat Boehnen, Director of Marketing for Remington, as to the proper methods that were used, that these actual methods, data, and projections as to the industry as a whole were compiled by an independent research firm (Brothers), which makes it even more reliable under the law. This data and foundation were corroborated by witnesses Pat Boehnen, Marc Hill and Paul Miller. See, testimony of Boehnen, Hill and Miller (Tr. 362-709; App. 2-41)¹⁵. All these witnesses confirmed

¹⁵ Marc Hill was Chief Marketing Officer of the Freedom Group, and Paul Miller, Executive Chairman of the Board of the Freedom Group (a multibillion dollar sporting, fishing, hunting and firearms holding

the projections and data were reasonably certain to a high likelihood of accuracy; were in fact conservative and of a type of information that they would personally rely upon, to report to their own Board of Directors to bring any product to market¹⁶ [See AB at 8-10; nt 7, 19, 42; nt 62]¹⁷.

company which owns Remington, Bushmaster, and many gun manufacturing companies) [AB 8; nt 6].

¹⁶ Trial Court parroted Trimble for 14 pages (6 to 19) quarrelling with lost profit evidence, arguing weight, strength, and credibility (same arguments made as to liability rejected by this Court). Those arguments were only for the jury; do not defeat or abrogate jury's lost profit estimate made with reasonable certainty. Profit projections, were 111 million dollars. It was totally reasonable for jury to estimate lost profits at 51.3 million dollars. [AB, 27, 48].

¹⁷ When Trimble proceeded with Cabela's marketing their competing product they did so with similar methodology, market survey, data

Record testimony establishes RDS could have worked within the industry; other big box stores Bass Pro, Gander Mountain, and Sportsman's Warehouse etc. Thus, all profit projections based upon market research surveys as to all general hunting consumers and outdoor enthusiasts interest in purchasing such a product, are not "partner specific" or "company specific" as to either Cabela's or Remington, or their customer base, or any other hardware or marketing [*See* AB at 5-10, 12-13, 16, 18, 33-35; nt 53, 39, 42-44]. Attempt to weigh the evidence

and projections, and information base, with comparable results, [AB 16; nt 12; Exhibit 52] as to the industry as a whole.

and/or denigrate the evidence by referring to other
“competition”, is solely jury issue. This Court found RDS
could have achieved and maintained “first mover
advantage”. [S. O. at 29]¹⁸. Paul Miller, and Pat Boehnen
testified specifically on cross examination, even if
someone other than Remington had taken the product to
market with RDS, the numbers still would have been
reliable and valid (without Remington’s support), as RDS
could have gone to such other big box stores [Tr. 515-517,

¹⁸ Opinion conceded RDS’s profits would be similar even without
Remington (*supra*, 3).

691-709; AB, 33].¹⁹ Opinion is wrong in stating projections were tied to Remington customers (company specific) as

¹⁹ Opinion inaccurately justified and rationalized disregard of the evidence by incorrectly stating, as to the profit and loss statements:

Even assuming that a juror concluded that both parties believed the financial statements were realistic when they were created, RDS did not present sufficient evidence that the statements actually were realistic. They were calculated using research based on Remington's customer base; with Remington gone they provided at the most a rough estimate of the phones success without accounting for how new partners and new marketing strategy and a new customer base might affect the products actual profits. (Sic) [S.O. at 35]. (E.A.).

This was incorrect. Projections were not tied to Remington Customer Base as actual purchasers, but only using hunters and fishers such as Remington's, to assess all (total federal id'd base) hunter and fisher intentions (i.e.

purchasers and not product specific as to all potential consumers in the industry as a whole. Most significant, Trial Court properly found in admitting Exhibit 24 and then 28 (App. at 1), that under Alaska case law such evidence was proper and could serve as a non-speculative basis corroborated by hybrid expert testimony as to

market industry as a whole), to purchase product. [See AB, 43-44; See also note 1, 2 *supra*]. Not only does this dispel Court's ignoring and rationalization of the evidence as to profit and loss data, methodology, as profit predictions were not "partner specific", but were "product specific" for the market as a whole; it shows clearly that the jury's award "was an estimate" i.e. with reasonable certainty and not mere speculation.

“evidence to allow the jury to make a finding” with a
“reasonable degree of certainty” [See TR. 446-447; AB 21],
and in particular as to “the reliability and the degree of
certainty that these numbers suggest” (*id*), and that the
witness Pat Boehnen was such a “hybrid expert” [See TR.
447; AB 21], and “the witness [Pat Boehnen] could be
cross examined” (*id*). This Court cannot overlook,
disregard or reinterpret same. Exhibit 52 demonstrates
when Cabela’s did its own market research analysis and
surveys (using same method, approach and data), it
reached similar conclusions, as to lost profit estimates for
RDS [AB, 12, 16]. Compare Exhibit 52 to Exhibit 24 & 28.

Coupled with testimony of witness Pat Boehnen as to availability of other big box stores this shows the Trial Court's and Opinion's "argument as to weight" and "strength" of evidence regarding "necessary partners" and/or "competitors", are clearly both constitutionally improper, and erroneous factual and red herring arguments, the 7th Amendment prohibits such claim(s), and they are factually incorrect and cannot be used to defeat jury's lost profit estimate or verdict²⁰.

²⁰ The "Deck", Ex. 24 and 28 (P&L projection), with underlying data and market research and surveys was cornerstone of profit and loss numbers (up to \$111 million); properly admitted by the Court based upon corroborated "hybrid" expert testimony and qualified industry

C. Federal Law, And Case Authority On Point

Demonstrate The Trial Court's and Opinion's

Clear Constitutional Error

witnesses. [See AB 21 and supra at 13]. As discussed in AB, at 48 & 49 (nts 75 and 76), this Court's prior Opinions which are stare decisis, establish jury verdict does not have to be tied to a number testified to by a witness or Exhibit; in fact jury is entitled to combine evidence from multiple sources to reach its determination. *See*, Maddox V. Hardy, 187 P3rd 486 (AK 2008) and notes 1 and 2, supra. Since evidence and testimony Opinion overlooked (Exhibits 24 & 28), is sufficient for the jury's estimate with reasonable certainty as to lost profits of \$111 million, there is no requirement that a lesser jury estimate (\$51.3 million) be tied to any specific testimony or evidence including the "Whiteboard" (Exhibit 32). [*See*, ARB at 20-21]. Slip Opinion discussion at 34-36 of "Whiteboard" is not necessary.

The Upjohn Company v. Rachelle Laboratories, Inc., 661

F.2d 1105 (6th Cir. 1981) is strikingly similar to the issue

in this case, as are its controlling holdings regarding lost

profit damages and prohibitions against a Trial or

Appellate Court invading jury estimate or verdict. [Full

case in Appendix]. *Upjohn* discussed [id. at 1125] similar

evidence as to market surveys, projected lost profit

damages, etc, as to the issue of “reasonable certainty”;

holds any “weakness of the factual basis of [the experts]

opinion”, must only “bear on the weight of the evidence

rather than its admissibility” [citing *Taenzler v.*

Burlington Northern, 608 F.2d 796, 798 N.3 (8th cir.

1979)]. “Upjohn’s proof of lost profits [as discussed *id.* at 1112], and “illustrated [in the chart] in footnote 8”, is in accord with the profit and loss analysis in this case. In fact RDS’s evidence and witness testimony is far more detailed and compelling than in *Upjohn*. See, *Upjohn’s* “chart”, [661 F2d 1105, note 8], Appendix herewith at 0051. The Sixth Circuit held squarely (*id.* at 1113), that it was the “prerogative” of the jury to “have believed” i.e. find the amount of estimated damages for the Plaintiffs. (*id.* at 1113) and even when there is a conflict in the evidence, including on cross examination, all though the Appellate Court, if they “had been members of the jury”,

and “might have found the Plaintiffs proof lacking”, they could and would not do so as “that is not the standard of review we employ”. “There is no requirement to establish profits with “absolute certainty”. There is “inevitably an element of uncertainty”, especially as to future “profitability of an enterprise which only existed briefly”, (*id.* at 1114). *Upjohn* held, as here [given profit and loss projections of \$111 million and jury award of only \$51.3 million] that the “jury’s award was well within the range established by the evidence” (*id.* at 1114), and that “the verdict should stand as “this indicates... the jury made its own assessment of the evidence”. Opinion has great

import, presenting serious prejudice. May likely sound “death knell” to innovative businesses in Alaska, in areas such as intellectual property, computer software, and other innovation, vital to Alaska’s future²¹. Trial Court recognized (but ignored), “if businesses couldn’t rely on this sort of data and bring them into court quite frankly, I don’t think we would have [innovation] in business or technology” [Tr. 447; App. 1].

²¹ Such Victimized “21 century Plaintiffs”, in Alaska, especially those harmed by billion dollar multinational corporations who defraud them, stealing their innovative ideas, must have benefit and constitutional protection of a 7th Amendment jury estimate, verdict, and award of damages or Alaska’s economic future is grim indeed.

III. CONCLUSION

Constitutional, legal and factual errors by Trial Court and Opinion are manifest, calling for Rehearing, with full reinstatement of jury's lost profit estimate and verdict.

**IN THE SUPREME COURT OF THE STATE OF
ALASKA**

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

Appeal From the Superior Court
Third Judicial District At Anchorage
The Honorable Catherine M. Easter, Judge

**BRIEF OF APPELLANT RECREATIONAL DATA
SERVICES, INC.**

Filed in the Supreme Court	Susan Orlansky
Of the State of Alaska	[ABA No. 8106042]
On this ____ day of	REEVES AMODIO, LLC
August, 2015	500 L Street, Ste. 300
	Anchorage, AK 99501
	(907) 222-7117
 Marilyn May, Clerk	 Gavin Kentch
Appellate Courts	[ABA No. 1111081]
	LAW OFFICE OF
	GAVIN
By: _____	KENTCH, LLC

Deputy Clerk

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...

STATEMENT OF JURISDICTION

Recreational Data Services, Inc., appeals to the Alaska Supreme Court from the final judgment entered on March 18, 2015, and amended on March 22, 2015. [R. 43-47; Exc. 234-36] Notice of appeal was timely filed on April 17, 2015.

This Court has jurisdiction over this appeal pursuant to AS 22.05.010.

ISSUE PRESENTED

Did the superior court err in granting JNOV to defendant, setting aside the jury's verdict on all claims?

STATEMENT OF FACTS

This appeal concerns the superior court's decision to grant JNOV in favor of defendant Trimble Navigation, setting aside the jury's verdict in its entirety. Therefore, this brief sets forth the facts in the record in the light most favorable to plaintiff

Recreational Data Services (“RDS”). The Court must adopt this perspective in reviewing the JNOV ruling¹.

...

For each of these claims, RDS sought compensatory damages measured by the lost profits it reasonably would have earned but for Trimble’s tortious misconduct and breaches of contract. [Tr. 1472-75; Exc. 11, 17, 21, 22] RDS also sought punitive damages for intentional misrepresentation. [Tr. 1365, 1475-76; Exc. 22].

¹ See *Borgen v. A & M Motors, Inc.*, 273 P.3d 575, 584 (Alaska 2012).

Pretrial motion to preclude RDS's damages
evidence

Trimble moved to exclude RDS's damages evidence, relying heavily on *Guard v. P & R Enterprises, Inc.*,² which Trimble contended limits the ways in which a new business may prove lost profits. [R. 2112-26; *see also* R. 2105-11 (RDS's opposition)] The superior court granted Trimble's motion to the extent of prohibiting

² 631 P.2d 1068 (Alaska 1981).

RDS's expert from testifying, and ruled that RDS would be required to establish with reasonable.

...

Trial testimony: damages

To provide bases from which the jury could measure lost profits with reasonable certainty, RDS presented two main pieces of evidence: (1) the picture of the whiteboard, Exhibit 30, reflecting the way Trimble valued RDS for possible acquisition in December 2010 [Exc. 188]; and (2) the consolidated profit-and-loss statement, Exhibit 28, that Trimble, Remington, and RDS jointly developed and relied on in their own

operations and their presentations to third parties. [Exc. 180-86] The whiteboard showed valuations of the Project between zero and \$38.5 million, depending on the underlying assumptions about the extent to which the Project met its sales goals, with the highest valuation reflecting an assumption that the Project would meet 75% of its revenue goal. [Exc. 188] The profit-and-loss statement estimated profits for RDS of \$111,666,973 over a five-year period. [Exc. 186]

Trial witnesses supported RDS's damages claims in other ways as well. Remington witnesses Boehnen and Hill – neutral parties who had no stake in the

outcome of the trial – testified that the profit-and-loss statement offered a reasonably certain, very conservative estimate of RDS’s lost profits. [Tr. 467-72, 616-18]

Larry Fox, director of business development for Trimble Outdoors, testified that he had estimated that Trimble could sell 500,000 phones a year with a specialized package of apps for hunters and fishermen. [Tr. 1171-75] He based that number on information he received from Verizon, who termed that total “the typical adoption rate of a cell phone device of this particular nature.” [Tr. 1171-72] Trimble’s estimate of

500,000 phone sales per year was on the same order of magnitude as the estimate that the Copper Center Project participants devised through their market research: their profit-and-loss statement assumed approximately 2.8 million phones purchased in five years, or an average of 560,000 per year. [Exc. 184-86]³

Trimble's numbers were derived from market research

³ See also Exh. 29 at pp.2-3 (summarizing data collected by Boehnen on how quickly other cell phones reached one million sales, and noting that the Copper Center Project anticipated only 158,000 sales in the first year, with more in following years).

based on very similar assumptions to those used for the Copper Center Project. [Tr. 1134-48, 1151-76]

Boehnen testified that, when the iPhone 6 went on sale during trial, over three million were sold on the first day, leading to millions of dollars in profit. [Tr. 471-72]

When Trimble opted to sell downloadable apps only, without marketing a phone, it anticipated profits from those sales of \$2 to \$2.5 million per year. [Tr. 1159-60]

Trimble offered no damages calculation as an alternative to RDS's calculations. Instead, it presented

an expert who opined that RDS was unlikely to have succeeded with marketing any product akin to the Copper Center Project once Remington and Trimble withdrew, and therefore RDS had no viable claim for any lost profits. [Tr. 1251-75]

Mid-trial motions related to damages

During trial, Trimble continued to challenge RDS's proof of damages. It objected to admission of Exhibit 28, the profit-and-loss statement. [Tr. 166-70] The court admitted the exhibit over objection [Tr. 170, 182], then reconsidered and rescinded admission [Tr. 213], then reconsidered again and admitted it, after

hearing foundation testimony from Boehnen, who finalized the consolidated statement. [Tr. 422-36, 446-47]

After RDS rested, Trimble moved for directed verdict on all damages claims. [Tr. 799-818] As with the pretrial motion and with the objections to Exhibit 28, Trimble relied heavily on *Guard*; it also based arguments on *Reeves v. Alyeska Pipeline Service Co.*,¹⁶ contending that this case disallows lost profits as the measure of damages in a case involving wrongful appropriation of an idea. Trimble also argued that RDS had failed to prove that Trimble caused it any damage.

[Tr. 799-807; *see also* Tr. 807-18 (RDS's opposition and Trimble's reply)] The court denied Trimble's oral motion, stating in pertinent part that, although she considered the issue "very close," if she viewed the evidence in the light most favorable to RDS, she could not say that fair-minded jurors in the exercise of reasonable judgment could reach only one conclusion.

[Tr. 818]

At the end of trial, Trimble again moved for directed verdict on all claims, both liability and damages. [Tr. 1334-49] After hearing argument from both sides [Tr. 1334- 70], the court denied the motion,

stating only that she relied on “the reasons previously stated.”

...

Verdict

The jury found for RDS on each of its substantive claims. Specifically, the jury determined:

- (1) Trimble made an intentional misrepresentation that was a substantial factor in causing harm to RDS. [Exc. 49]

- (2) Trimble made a negligent misrepresentation that was a substantial factor in causing harm to RDS. [Exc. 49-50]
- (3) Trimble breached its mutual nondisclosure agreement with RDS. [Exc. 50]
- (4) Trimble entered into a partnership with RDS, and then breached its fiduciary duty of loyalty to its partner. [Exc. 51]⁴

⁴ For both items (3) and (4), see also R. 3378 (jury was specifically instructed on causation of damages, although the verdict form for the contract claims did not contain this element expressly).

For the amount of damages, the jury accepted neither RDS's analysis nor Trimble's. The jury awarded \$38.5 million for the tort claims and \$12.8 million for the breach of contract claims, for a total of \$51.3 million. [Exc. 50-51] The jury rejected RDS's claim for punitive damages. [Exc. 50]

Post-trial motion and appeal

Trimble moved for JNOV on all claims, contending that the evidence at trial supported none of the jury's verdict. [Exc. 52-97] After briefing and argument [Exc. 98- 148, 189-214; Tr. 1674-99], the court

granted Trimble's motion. [Exc. 215-33] This appeal timely followed.

STANDARDS OF REVIEW

When considering a motion for JNOV, the trial court is required to determine "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."⁵ The court may not weigh

⁵ *Cameron v. Chang-Craft*, 251 P.3d 1008, 1017 (Alaska 2011)

(internal quotes omitted).

conflicting evidence or judge credibility, whether considering the evidence offered to establish liability or the evidence supporting a damages award.⁶ “[G]enerally the only evidence that should be considered is the evidence favorable to the non-moving party[.]”⁷

This Court applies the same test as it directs the superior court to apply.⁸ It reviews the record de novo, without deference to the superior court.⁹ It scrutinizes

⁶ *See id.* at 1017-18 (liability), 1023-24 (damages amount).

⁷ *Id.* at 1018.

⁸ *See Borgen*, 273 P.3d at 584.

⁹ *See Cameron*, 251 P.3d at 1018.

the record applying “a principle of minimum intrusion into the right to jury trial guaranteed under the Alaska Constitution.”¹⁰

ARGUMENT

I. THE SUPERIOR COURT ERRED IN GRANTING JNOV TO TRIMBLE.

A. INTRODUCTION

¹⁰ *Id.* (internal quotes omitted); *see also Korean Air Lines Co., Ltd. v. State*, 779 P.2d 333, 338 (Alaska 1989) (Supreme Court’s review of the evidence “is objective; and, if there is room for diversity of opinion among reasonable people, the question is one for the jury.”) (internal quotes omitted).

In reviewing the record, this Court must truly
abide by the standard of review it has established.
Nothing else will give fair regard for the constitutional
right to have a jury – not a judge – decide disputed issues
of fact.

The superior court gave lip service to the correct
standard of review [Exc. 219], but failed to apply it in
ruling on the motion for JNOV. The analysis in the
court's order granting JNOV reads like Trimble's closing
argument. [Exc. 222-32; cf. Tr. 1483-87]

...

The superior court failed to respect the jury's right to view the evidence in the light most favorable to RDS.

Besides not honoring the standard for reviewing the evidence, the superior court erred in confusing the analysis and standard of proof for the *fact* of damages with the analysis and standard of proof for the *amount* of damages. The court's decision blurs these concepts, without realizing that two distinct issues are presented.

[Exc. 220-33]

The following section sets forth the different legal standards that apply to proving the fact and the amount

of damages. Section C applies the correct standards to RDS's proof that it was damaged, demonstrating that the superior court erred in concluding that no evidence supported that finding. Section D applies the proper standards to RDS's proof of the amount of damages, demonstrating that, on this issue too, the jury verdict should have been upheld.

...

Based on this Court's own review of the record, this Court should determine that evidence supports the jury's verdict in full when the evidence is viewed in the

correct light, with proper deference to the jury that
clearly believed RDS's witnesses over Trimble's, yet
analyzed the evidence independently and did not
uncritically adopt everything that RDS's counsel
argued. Consequently, this Court should reverse the
order granting JNOV to Trimble.

B. LEGAL STANDARDS FOR PROVING THE FACT AND AMOUNT OF DAMAGES

A plaintiff must prove by a preponderance of the
evidence that it was damaged by the defendant's
wrongful act. The *fact* of damages is an element of the
cause of action, and the same standard of proof applies
to it as to every other element of the cause of action.¹¹ For

¹¹ See *Pluid v. B.K.*, 948 P.2d 981, 984 (Alaska 1997) (“It is, of course, the law that the *fact* of damages must be proven by a preponderance of the evidence.”) (emphasis in original); *accord, e.g., Lynden Inc. v.*

purposes of a JNOV motion, when conflicting evidence is not considered,¹² the real question is whether any evidence exists from which a reasonable juror could conclude that the plaintiff was damaged by the defendant's actions.¹³ No different standard applies for a new business as compared to an established business.

As to the *amount* of damages, a less demanding standard of proof applies. When a plaintiff sues to recover profits that it was deprived of by the defendant's wrongful acts, the plaintiff need not prove the amount of its lost profits precisely but needs to offer simply "a reasonable basis" for computing an award.¹⁴ In this

Walker, 30 P.3d 609, 619 (Alaska 2001); *Power Constructors, Inc. v. Taylor & Hintze*, 960 P.2d 20, 43 (Alaska 1998).

¹² See 9B WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE § 2529 (3d ed. 2008) ("unfavorable evidence that contradicts the favorable evidence must be disregarded"); *Cameron*, 251 P.3d at 1018.

¹³ See *Cameron*, 251 P.3d at 1020-21.

¹⁴ *Id.* at 1021 (internal quotes omitted); see also *Reeves*, 56 P.3d at 669 ("reasonable

Court's words, once the fact of damages is proved by a preponderance of the evidence, "the *amount* of such damages, on the other hand, need only be proven to such a degree as to allow the finder of fact to reasonably estimate the amount to be allowed for [the] item [of damages]."¹⁵ Proof of what would have happened but for the defendant's wrongful conduct is inherently uncertain; courts therefore require that the defendant bear the risk of some uncertainty as to the amount of damages.¹⁶ In the context of a JNOV motion, the

approximations" are sufficient to support a damages award); *Alaska Tae Woong Venture, Inc. v. Westward Seafoods, Inc.*, 963 P.2d 1055, 1061 (Alaska 1998) (requiring only a factual basis to "reasonably estimate" damages, and noting that, once plaintiff proves it sustained damages as a result of defendant's misconduct, the lack of certainty as to the margin of profit "has relatively minor importance"); *Power Constructors*, 960 P.2d at 43 (once plaintiff proved that defendant caused it harm, the "relative weakness of [plaintiff]'s evidence on precise damages" was not important).

¹⁵ *Pluid*, 948 P.2d at 984 (internal quotes omitted) (emphasis in original).

¹⁶ *See Reeves*, 56 P.3d at 669; *Native Alaskan Reclamation & Pest Control, Inc. v. United Bank Alaska*, 685 P.2d 1211, 1222-23 (Alaska 1984) (quoting RESTATEMENT (SECOND) OF CONTRACTS

question becomes simply: did plaintiff provide evidence from which the jury reasonably could compute a damages award, or is the verdict amount “purely speculative”?¹⁷

Courts are more cautious in upholding awards of

lost profits to new businesses as compared to established

(hereafter “RESTATEMENT”) § 352 cmt. a (1981), on why doubts about the amount of damages should be resolved against the defendant who, by its breach, forced plaintiff to seek compensation in damages); *see also Alaska Rent-A-Car, Inc. v. Avis Budget Group, Inc.*, 738 F.3d 960, 968 (9th Cir. 2013) (“As in any damages case, the calculation [of lost profits] had to address a hypothetical world that never existed, one in which other things remained the same but the breach had not occurred.”).

¹⁷ *Cameron*, 251 P.3d at 1021; *see Reeves*, 56 P.3d at 668 (JNOV motion requires the court “to inquire narrowly whether any record evidence, viewed favorably to [plaintiff], might reasonably support the jury’s . . . award”).

businesses, because such awards risk being based on speculation or wishful thinking.¹⁸ In *Guard v. P & R Enterprises, Inc.*, this Court held that lost profits for a new business must be proved to a “reasonable certainty.”¹⁹

Fair reading of this Court’s cases establishes that the critical component of “reasonable certainty” is that the damages estimate must be grounded in fact, rather than conjecture or speculation. *Guard* cited *City of*

¹⁸ *See, e.g., Guard*, 631 P.2d at 1071-72.

¹⁹ *Id.* at 1072.

*Whittier v. Whittier Fuel & Marine Corp.*²⁰ for the proposition that “[t]he 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 by mere conclusions of witnesses.”²¹

The facts relied on do not need to be proved to a reasonable certainty, because it is impossible to know with reasonable certainty what would have happened if

²⁰ 577 P.2d 216 (Alaska 1978).

²¹ *Id.* at 223 (internal quotes omitted); *see also Sisters of Providence in Washington v. A.A. Pain Clinic, Inc.*, 81 P.3d 989, 1007 (Alaska 2003) (quoting this passage from *City of Whittier*).

the defendant had not committed a tort or breached a contract. Rather, the evidence relied on to support a damages estimate must be reasonable and fact-based.

Speaking specifically to proof of lost profits by a new business, the RESTATEMENT (SECOND) OF CONTRACTS explains:

The difficulty of proving lost profits varies greatly with the nature of the transaction.

. . . If the breach prevents the injured party from carrying on a well-established business, the resulting loss of profits can

often be proved with sufficient certainty.

Evidence of past performance will form the

basis for a reasonable prediction as to the

future. . . . However, if the business is a

new one or if it is a speculative one that is

subject to great fluctuations in volume, cost

or prices, 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.²²

...

And, again, when considering a JNOV motion,
these standards inform a court's ruling but they must be
applied with deference to the jury as the finder of fact.
The superior court and this Court do not determine
whether they find plaintiff's proof reasonable but rather
whether a reasonable jury could find that the evidence
provided a sufficient factual basis to support a

²² RESTATEMENT § 352 cmt. b.

reasonable and not speculative estimate of the amount
of plaintiff's loss.²³

...

**C. RDS PRESENTED EVIDENCE FROM WHICH THE
JURY COULD FIND THAT RDS SUSTAINED
DAMAGES AS A RESULT OF TRIMBLE'S
TORTIOUS CONDUCT AND ITS BREACHES
OF CONTRACT.**

1. RDS's damages claims

The superior court did not separately analyze the
tort and contract claims, reflecting the way the parties
approached the case at trial. RDS presented essentially

²³ See *Borgen*, 273 P.3d at 584; *Sisters of Providence*, 81 P.3d at 1007.

the same theory for damages with respect to its tort and contract claims.

2. The court applied the wrong burden of proof.

The trial court stated repeatedly that the burden of proof on RDS was to show to a “reasonable certainty” that it sustained a loss as a result of Trimble’s misconduct. [Exc. 219-22, 233] This was mistaken. As noted earlier, RDS needed to establish the *fact* that it was damaged by Trimble’s misconduct by only a preponderance of the evidence.²⁴ The “reasonable

²⁴ See *supra* n.28 and accompanying text.

certainty” requirement applies to proof of the *amount* of damages.²⁵

More important, the court appeared to consider it her prerogative to weigh the credibility of RDS’s evidence. The following section shows numerous examples where the court failed to base her ruling on the correct test: whether there was *any* evidence that, viewed in the light most favorable to RDS, supported the jury’s finding that RDS was damaged by Trimble.²⁶

²⁵ See *supra* nn.31-34 and accompanying text.

²⁶ See *Cameron*, 251 P.3d at 1017-18.

3. The court erroneously relied on evidence favoring Trimble and disregarded evidence and reasonable inferences favoring RDS.

In ruling on a motion for JNOV, “generally the only evidence that should be considered is the evidence favorable to the non-moving party[.]”²⁷ However, in concluding that the evidence did not support a finding that Trimble damaged RDS, the superior court relied heavily on evidence that supported Trimble, rather than testimony from RDS’s witnesses. Using the analysis offered by Trimble’s expert witness and counsel, the

²⁷ *Id.* at 1018.

superior court particularly focused on hurdles RDS faced, and it accepted evidence favoring Trimble to conclude that these alleged hurdles were insurmountable. [Exc. 221-26; *compare* Tr. 1246, 1254-58 (Beaton’s testimony), 1483-86 (Trimble’s closing argument)] The court essentially adopted Beaton’s opinion – that he was “pretty close to 99 percent” certain that the Copper Center Project “was not going to be successful.” [Exc. 223 (quoting Tr. 1272)] To be faithful to the requirement to view the evidence in the light most favorable to RDS, the court should instead have quoted Miller: “I think it is highly likely [that RDS could have

moved forward without Trimble . . . if they still maintained the first-mover advantage].” [Tr. 708-09]

...

In short, contrary to the superior court’s conclusion, from the testimony and exhibits presented at trial, a reasonable jury could have found that Trimble’s misconduct damaged RDS.

...

Proof of *any* damage in fact resulting from Trimble’s misconduct suffices to establish Trimble’s liability in tort and contract. The superior court thus erred in ignoring the reasonable inferences from the

evidence that support finding that RDS was damaged at least by losing the opportunity to market apps, in addition to or instead of being damaged by losing first-mover advantage in the launch of a phone like that envisioned by the Copper Center Project.

...

D. THE EVIDENCE PROVIDED THE JURY A REASONABLE BASIS FOR AWARDING \$51.3 MILLION IN DAMAGES.

1. RDS's evidence on valuing its damages

To provide the jury with a reasonable basis for assessing the amount of damages it sustained, RDS relied principally on two exhibits and the testimony

explaining these exhibits: Exhibit 28, the profit-and-loss statement that Trimble, Remington, and RDS together developed and agreed on based on their market research, then used in presentations to third parties; and Exhibit 30, the picture of the table prepared by Trimble's Steve Wolff, showing the values he assigned to RDS based on various assumptions about the expected success of the Copper Center Project. [Exc. 180-86, 187-88; *see generally supra* at 7-8, 10-11 (summarizing the testimony about these exhibits)]

...

The jury awarded a total of \$51.3 million in damages, apportioned as \$12.8 million in lost profits due to Trimble's breaches of its contracts with RDS and \$38.5 million in lost profits due to Trimble's tortious misrepresentations. [Exc. 50-51]

As discussed below, the evidence at trial supports the jury's verdict as to the amount of damages, and therefore the superior court erred in granting JNOV.

2. **The superior court erred in imposing an improperly heavy burden on RDS to establish the amount of its damages.**

To describe RDS's burden of proof as to the amount of its damages, the superior court used the term "reasonable certainty." [Exc. 215, 233] The term is quoted correctly from this Court's cases, but the superior court gave the phrase a much more rigorous meaning than this Court's cases establish is intended. The superior court treated the phrase as if it means proof by something more than a preponderance of the evidence. But, as described above, this Court's cases make clear that the burden of proof for the amount of damages is *less* demanding than the burden of proof for the fact of

damages, and therefore more amenable to estimates and approximations.²⁸

Moreover, when ruling on a JNOV motion, it is essential that the trial court not stray into assessing the credibility of the testimony offered. The court must determine only whether the evidence, if believed by the jury, supports a determination based on facts and not just speculation.²⁹

...

²⁸ See *supra* nn.28-34 and accompanying text.

²⁹ See *Cameron*, 251 P.3d at 1021; *Reeves*, 56 P.3d at 668.

No more intense scrutiny of the facts and conclusions of witnesses should be permitted when a plaintiff relies on lay rather than expert testimony.

3. The superior court erred in rejecting RDS's proof as inadequate to meet the reasonable certainty standard.

As discussed above, RDS's proof of the amount of its damages relied principally on two exhibits. The existence of two complementary exhibits, both showing damages in the millions of dollars, made RDS's proof more reasonably certain than if there had been only a single basis for estimating damages. While recognizing that the two exhibits reinforce each other – that the

whole is more than the sum of the parts – this brief follows the approach of the superior court and addresses the two exhibits separately.

a. The profit-and-loss statement provided reasonably certain evidence on which the jury could rely.

The superior court rejected reliance on Exhibit 28, the profit-and-loss statement, based on her reading of *Guard v. P & R Enterprises, Inc.*³⁰ Post-trial, Trimble referred to the profit-and-loss statement as “a dubious statistical projection of lost profits” [Exc. 90], and the

³⁰ 631 P.2d 1068 (Alaska 1981).

superior court essentially accepted this analysis. [Exc. 227-32] But Trimble took a very different position about the profit-and-loss statement while it was part of the Project. In the light most favorable to RDS, the testimony about how the profit-and-loss statement was developed and used by all members of the Project establishes that Trimble and the superior court erred in likening the profit-and-loss statement to the “statistical projections” disallowed in *Guard*. The court therefore erred in dismissing Exhibit 28 as merely an inadequate statistical projection.

The types of statistical projection rejected in *Guard* are fundamentally different from the profit-and-loss statement relied on by RDS in this case.

First, the profits predicted in the profit-and-loss statement were not developed by the plaintiff alone but were developed in conjunction with both Trimble (the defendant) and Remington, which was, at the time of trial, a disinterested party that expressly endorsed the statement as reasonable and reliable. Their profit-and-loss statement was not developed for purposes of litigation, but for purposes of planning and promoting a joint business venture.

Second, Trimble relied on and vouched for the data in Exhibit 28. During the time the companies worked together, Trimble repeatedly endorsed the reliability of the profit-and-loss statement and relied on the statement in making presentations to third parties that Trimble hoped to persuade to join the Copper Center Project. Trimble also evidently relied on the data internally, at minimum for purposes of approving Chen's time and travel expenses devoted to advancing the Project. [Tr. 657] Based on the data in Exhibit 28, Trimble conveyed to Remington that it was "ready to go"

– meaning ready to invest in the Copper Center Project.

[Tr. 398; *see also* Tr. 391, 412]

Third, the data were not mere projections but
were factually based on government statistics and
market research, which disinterested witnesses
endorsed as yielding valid and reliable results. Trimble's
witness endorsed reliance on exactly this type of market
research when deciding whether to pursue a new
product because such research yields a sound basis for
predicting that the new product will be profitable. [Tr.
1060, 1132-40, 1142-48, 1153-58; *see also* Tr. 391-92]

Fourth, Trimble relied on virtually identical projections in launching its own apps that competed with the Copper Center Project. [Tr. 1146-48, 1153-75]

Finally, other evidence at trial corroborated the reasonableness of the assumptions developed through market research. Exhibit 29 contained data on how long it took for other specialized smart phones to reach one million sales; the Project's assumptions in Exhibit 28 were much more conservative than these demonstrated track records.

The superior court discounted all these distinctions and criticized RDS for not presenting the

specific results of the data analysis or market research.

[Exc. 227-28] The court was wrong both factually and

legally. Factually, many results of the market surveys

were provided to the jury. [Exc. 172-79 (results); Exh.

44 (copy of survey)] Legally, the court's desire to see the

underlying data was but another example of her failing

to view the evidence in the light most favorable to RDS.

Even if the court herself was not ready to credit the

survey results as reliable, the jury received sufficient

background information so that it reasonably could rely

on the results. The jury heard testimony about the way

questions were developed for the market survey, how

the research was conducted, the significance of using an independent company to conduct the survey, the source of the government statistics, and the use of a widely accepted adoption rate curve.³¹ The jury heard that Trimble regularly relies on data developed in a similar fashion. [Tr. 1060, 1132-58] After objections to Boehnen's offering an opinion about the research results were properly overruled, Boehnen testified about the value and validity of the market research and

³¹ Tr. 370-71, 376-77, 379-82, 389-90, 453-59, 460-61, 514-15, 610-15, 1175-76.

called the results “reasonably certain.” [Tr. 472] From all this testimony, the jury reasonably could determine that the profit-and-loss statement was reliable and factually based and met the requirement for proving damages to a reasonable certainty.

The superior court also denied the adequacy of the profit-and-loss statement for a series of other reasons beyond its being a statistical projection. [Exc. 227-32] All of these reasons improperly reflected her view of the credibility of the evidence. The court’s analysis failed to view the evidence in the light most favorable to RDS and instead accepted Trimble’s

attempts to impeach the data. For example, the court repeatedly cited Chen's trial testimony, particularly as to the claim that the survey data were preliminary and yet another survey was needed. [*E.g.*, Exc. 231 (citing Exh. 58)] But the jury did not need to believe a word Chen said and instead could have believed testimony from Boehnen, Hill, Miller, and Feucht that their procedures led to reliable, even conservative, predictions, and testimony that all three companies accepted the data as solid enough that they staked

their reputations on them when making presentations to third parties.³²

For all these reasons, the superior court erred in concluding that the jury could not find that the lost profit estimates in Exhibit 28 provided a way to establish damages to a reasonable certainty. This exhibit provided a basis for an award to RDS of over \$111 million in lost profits, substantially more than the jury awarded.

³² Tr. 89-90, 181, 184-85, 260, 398, 412, 433, 611, 615, 617-19.

- b. *The valuations on the whiteboard provided reasonably certain evidence on which the jury could rely.*

The superior court dismissed Exhibit 30 as “a disputed photograph of a partially illegible handwritten chart scribbled on a whiteboard.” [Exc. 226-27] This characterization well illustrates the court’s failure to view the evidence in the light most favorable to RDS. In fact, there was no dispute about who prepared the table or when: It was drawn by Trimble MCS’s controller Steve Wolff at the December 2010 meeting between Trimble and RDS at which the possibility of Trimble’s acquiring RDS was discussed; Chen photographed the

whiteboard and emailed the picture to Feucht and Wolff. [Tr. 127, 131; Exc. 187] Trimble did not oppose admitting the exhibit. [Tr. 132] Trial testimony conflicted on whether at this meeting Trimble made an offer to purchase RDS,³³ but the salient point – for purposes of the evidence supporting RDS’s claim for damages – is the valuation assigned by Trimble, not

³³ *Compare* Tr. 130-37 (Feucht testified that Trimble wanted to acquire RDS in late 2010, and that Wolff thought the appropriate valuation of RDS was at the 47% level of the chart), 997 (Chen answered “yes” to a question containing the premise that Trimble offered to buy RDS) *with* 1047 (Chen, on redirect testimony, testified that Trimble made no offer to acquire RDS).

whether Trimble offered to pay that amount on any given day.³⁴ Feucht described the whiteboard as Wolff's valuation of RDS. [Tr. 134-37] He corresponded with Wolff after the meeting about why he did not accept the methodology used to assign a value. [Exh. J (stating he was "not sure NPV is the correct way to value RDS")³⁵]

³⁴ There are many reasons a potential buyer does not actually offer to buy, even after determining the fair value of the possible acquisition. In this case, a jury could conclude either that an offer was made or that no offer was made principally because by December 2010 Trimble knew that it was advancing a competing product.

³⁵ "NPV" stands for Net Present Value, which measures the difference between the present value of cash inflows and the present value of

No one gave any different description of what the whiteboard table represented, and the superior court relied on no evidence in stating she did not accept the photograph as evidence of Trimble's valuation of RDS.

[Exc. 226-27]

The superior court also held that Exhibit 30 could not support the lost profits award because "valuation" is "not the same thing as reasonably certain lost profits." [Exc. 226] This view again fails to accept

cash outflows; it is a standard method used to analyze the profitability of an investment or a project. *See* <http://www.investopedia.com/terms/n/npv.asp>.

reasonable inferences from the evidence: testimony indicated that RDS had few if any tangible assets contributing to its valuation, so its valuation was a reasonable proxy for its future profits reduced to present value.³⁶

³⁶ In his expert report, which was not produced to the jury, Trimble's expert

calculated that lost profits would be estimated at \$16 million if the profit-and-loss statement was accepted, a 60% discount was applied, and future profits were reduced to present value. [R. 1469] This estimate approximates the value that Wolff assigned to RDS based on the assumption that the Copper Center Project would achieve 47% of its revenue goals. [Exc. 188 (assigning a value of \$18.4 million)]

In sum, the jury properly could rely on Exhibit 30, a document prepared by Trimble, to reach a reasonable estimate of RDS's lost future profits. If the jury accepted the evidence that supported assuming that the Copper Center Project would reach 75% of its revenue goal, then it reasonably could award \$38.5 million as lost profits. If it accepted that the Copper Center Project would reach 100% of its revenue goals,

the jury could award a total of \$51.3 million in lost profits, exactly what the jury did award.³⁷

³⁷ The jury's award on the tort claims equals the valuation assigned by Trimble at the 75% success level, and the amount awarded on the contract claim is one-third of that, so that together the two awards total the valuation that would be assigned by extrapolating the value at the 75% level to the 100% level. That is, if RDS was worth \$38.5 million if it is assumed that the Copper Center Project would earn 75% of its projected revenue, it would be worth \$51.3 million (the total awarded by the jury) if it is assumed that the Project would earn 100% of its projected revenue. *Cf.* R. 3410 (jury note requesting a calculator).

The superior court erred in finding that the whiteboard exhibit did not provide a reasonably certain estimate of lost profits of up to \$51.3 million.

c. The jury verdict can stand even though no witness or attorney urged the precise damages amount that the jury awarded.

As a matter of law, it does not matter that no witness testified specifically that RDS sustained total lost profits of \$51.3 million. Because the evidence supports an award of up to \$111 million, based on Exhibit 28, by definition any lesser amount is also supported by the evidence. As this Court observed in the context of a case approving a remittitur, “defendant

cannot complain of any judgment within the permissible limits.”³⁸

A jury is always entitled to think for itself and to analyze the evidence differently than the witnesses or attorneys did. This jury undeniably did; it requested a calculator, easel, and Post-It notes. [R. 3410] This Court frequently has upheld damage awards for specific

³⁸ *Exxon Corp. v. Alvey*, 690 P.2d 733, 742 (Alaska 1984); *see also Borgen*, 273 P.3d at 592 (where verdict was within the range of damages established by the evidence, there was no basis to set aside the award).

amounts that were not testified to by any witness.³⁹ In endorsing a jury's determination that differed from

³⁹ See, e.g., *Cameron*, 251 P.3d at 1023 (upholding award in part because it was less than plaintiff requested, suggesting that the jury had considered defendant's evidence and followed the court's instructions); *N. Slope Borough v. Brower*, 215 P.3d 308, 319 (Alaska 2009) (approving order upholding jury's damages award in part because it was less than plaintiff's witness and counsel urged); *Maddox v. Hardy*, 187 P.3d 486, 494-95 (Alaska 2008) (upholding damages award not testified to by any witness); *Sisters of Providence*, 81 P.3d at 1000, 1006-07 (upholding damages award that did not reflect any specific figure testified to at trial); *Alaska Tae Woong Venture*, 963 P.2d at 1060-62 (upholding award for lost profits even though the jury awarded the amount plaintiff's expert proposed for lost revenues, without a deduction for costs, where evidence supported a conclusion that plaintiff lost revenue after incurring all necessary costs).

anything presented by the parties and their counsel, this Court commented, “The jury is entitled to combine evidence from multiple sources to reach its determination.”⁴⁰

Here, for example, the jury could have believed most of RDS’s evidence, but discounted its claim for lost profits, accepting that portion of Trimble’s expert’s testimony suggesting that the Project participants did not account for all the competition they likely would

⁴⁰ *Maddox*, 187 P.3d at 495.

have faced. Or the jury could have rested its verdict largely on Trimble's own valuation of RDS as set forth on the whiteboard, but concluded, based on the conservative assumptions built into the whiteboard numbers, or Chen's enthusiasm for the Project, that the 75% success level was too pessimistic.

Because the evidence at trial supported a verdict of as much as \$111 million, this Court must find that the jury's actual verdict for less than half that amount is supported by the evidence, and that the superior court erred in striking the verdict and awarding nothing to RDS.

...

CONCLUSION

This Court should find that evidence in the record supports the jury's verdict. This Court should reverse the superior court's grant of JNOV to Trimble and should reinstate the jury's verdict.

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.	)	
	)	

**RECREATIONAL DATA SERVICE'S OPPOSITION TO
TRIMBLE'S MOTION FOR JUDGMENT
NOTWITHSTANDING THE VERDICT, OR IN THE
ALTERNATIVE, FOR NEW TRIAL**

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

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

A. Legal standard

When considering a motion for JNOV, this court determines "whether the evidence, and all reasonable inferences which may be drawn from the evidence, viewed in the light most favorable to the non-moving party, permits room for diversity of opinion among reasonable jurors."¹ The court may not weigh conflicting evidence or judge credibility²

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

² *See id.* at 1017-18.

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

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

Although Trimble acknowledges the legal standard, its memorandum completely ignores the perspective from which this court must view the evidence. Trimble recounts the facts in the light most favorable to itself — and sometimes it misrepresents the record. Below, RDS shows that, when the evidence is viewed as legally

required, there should be no question but that the record provides evidence that supports finding in RDS's favor on each element of each claim. Thus, the motion for JNOV should be denied.

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

jury instructions defining the elements of each claim.

The introductory quotation in each section is from the relevant jury instruction.

...

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

1. Legal standard

The legal standard for determining whether a damages award may stand or must be set aside as unsupported by evidence does not differ significantly from the standard for evaluating the jury findings on liability. Again, the court must accept the evidence in the

light most favorable to the prevailing party.³⁴ Questions
regarding credibility are left to the jurors.³⁵ Further,
because the defendant's misconduct often makes it
impossible to determine damages with precision,³⁶ a

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

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

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

plaintiff need only provide a sufficient a factual basis
from which damages may reasonably be estimated.³⁷ If
the *fact* of damages is proved by a preponderance of the
evidence, then plaintiff must supply only "a reasonable

against the defendant who, by its breach, forced plaintiff to seek
compensation in damages).

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

basis for computing an award."³⁸ The Alaska Supreme

Court has explained:

The applicable standard is that the evidence must afford sufficient data from which the court or jury may properly estimate the amount of damages, which data shall be established by facts rather than by mere conclusions of witnesses.³⁹

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

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

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

...

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

⁴⁰ See *City of Fairbanks v. Rice*, 20 P.3d 1097, 1107 (Alaska 2000)

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

Trimble re-asserts another argument that this court has rejected — namely, that *Guard v. P & R Enterprises, Inc.*,⁴⁴ holds that a new business may establish its lost profits in only one of two ways, both involving comparisons to a similar, profitable business. [Memo. at 38-39] As this court previously recognized, that is not a fair reading of *Guard* and subsequent cases. In *Guard*, the Court expressly authorized a new business, with no track record, to recover lost profits, if it can prove without undue speculation what its profits

⁴⁴ 631 P.2d 1068 (Alaska 1981).

would have been but for defendant's misconduct.⁴⁵

Guard discussed two ways in which other courts have allowed a new business to prove lost profits; it then ruled against the plaintiff because plaintiff offered evidence based on the history of a business that was not in fact comparable.⁴⁶ Because no other types of proof were offered or discussed, the case cannot fairly be interpreted to establish an inflexible rule that the *only*

⁴⁵ *See id.* at 1072.

⁴⁶ *See id.* at 1072-73.

acceptable way for a new business to prove lost profits is
by comparison to a comparable business.

...

In short, this court should not reconsider the
conclusion it reached during trial when it rejected
Trimble's argument that RDS's proof was insufficient
because it was not based on the profit history of a
comparable company.

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

Trimble seizes upon a footnote in *Guard* to support claims about what kind of evidence may *not* be used to prove lost profits of a new business. This footnote states that a plaintiff in a contract case may not rely "solely on statistical projections to prove lost profits."⁵² As *Guard* indicates, courts are rightly skeptical of lost profits claims based solely on the plaintiff's statistical projections, particularly when those projections are not developed until litigation arises. This does not describe RDS's proof. As the

⁵² 631 P.2d at 1072 n.4.

court will recall, and as outlined below, RDS relied at trial on data developed by an independent market research firm selected by Remington; Trimble and Remington endorsed the data and relied on them to make business decisions.

RDS presented a solid factual basis for the jury's damages award. It offered two major categories of evidence in support of its request for damages: (1) the profit and loss ("P & L") statement developed by Trimble, Remington, and RDS using market research data assembled by a third-party, and (2) Trimble's valuation of RDS. Trimble now calls the P & L

statement a “dubious statistical projection of lost
profit: [Memo. At 39], but The trial evidence showed
that the P & L statement was developed using
statistics from the U.S. government as the starting
point. [Tr. 385, 453] No one questioned their validity.
Remington's Pat Boehnen called these data "very
accurate." [Tr. 453] An experienced independent firm
then conducted market research to develop the
percentage of hunters and fishermen who would be
interested in the Copper Center Project's product. [Tr.
180, 380, 456-58, 610] The jury was informed about
how the market research survey was done. [Tr. 370-

71, 376, 380-82, 389-90, 453-58, 611-14]⁵³ Neutral

witnesses called the market research data "clean"

(meaning unbiased), "statistically valid," and "solid."

[Tr. 377 (Boehnen⁵⁴), 612, 614 (Hill)] Boehnen

testified that the numbers provided by the market

research are "reasonably reliable and accurate to a

reasonable certainty." [Tr. 459] Trimble, through Mr.

Chen, was "in agreement that the data was not only a

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

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

good population, a good data set, but also that the responses were valid." [Tr. 391 (Boehnen)]

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

After the market research determined reasonable estimates for the number of people This is

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

Trimble, Remington, and RDS all offered input
for the design of the survey. [Tr. 380-81, 946-51] An
analyst at Remington "crunched the numbers"
provided by the market research firm. [Tr. 385-86]

After the market research data were available,
representatives of Trimble, Remington, and RDS
discussed them with each other, and then separately
with their own companies. [Tr. 180-81] Based on cost

data provided by each company, Remington's Boehnen consolidated the information to produce the P & L statement. [Tr. 415, 418] The parties made a series of conservative assumptions to decrease the predicted profits. [Tr. 472, 618-19, 630] Chaur-Fong Chen believed the projected sales figures should have been even larger. [Tr. 631]

Trimble, Remington, and RDS all recognized that the numbers in the P & L statement had to be reliable because they were expecting corporations — their own and others — to make investments based on this statement. [Tr. 317, 611, 630-31] Remington

considering the P & L statement reliable and relied on it. [Tr. 386-87, 395, 411] Trimble made clear that it considered the statement reliable and was prepared to invest based on it. [Tr. 391, 398 (Boehnen “Trimble ...was ready to go”), 521 (Boehnen: Trimble “never said they weren’t reliable”)] The parties jointly embraced the numbers in the P & L statement and made several joint presentations to other corporations, treating the figures in the statement as

reliable. [Tr. 391-96] Trimble asked AT&T to accept the numbers. [Tr. 394]⁵⁵

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

Anecdotal evidence from other projects corroborated the reasonableness of the P & L

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

statement's estimates. For example, during trial, the iPhone 6 was launched and, as two witnesses pointed out, it sold millions of phones on the first day. [Tr.

471, 61516] RDS's claim for lost profits was based on survey data that led to a much more modest estimate of selling of 158,000 phones in the first year, and 2.8 million phones over five years. [Exhibit 28; Tr. 471,

615-16] The Copper Center Project's estimate was also conservative compared to the estimate Trimble made when it teamed with Cabela's and estimated sales of 500,000 phones in one year. [Tr. 1171-73]

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

on by Trimble for making business decisions.⁵⁶

Trimble cites no case in which a court rejected as too speculative a claim for lost profits based on numbers the defendant endorsed before the litigation began.

Because RDS's estimate of lost profits was based on facts disclosed to the jury, and is not merely the opinion of interested witnesses, it meets the standards established by the Alaska Supreme Court

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

for the type of evidence on which an award of lost profits may be based.

Trimble notes that no witness specifically testified that damages should total \$51.3 million, or that the contract and tort awards individually should be \$12.8 and \$38.5 million. The absence of such testimony does not matter, and does not establish that the damages awards are unsupported by the evidence.⁵⁷ As discussed above, the trial record

⁵⁷ This memorandum focuses mostly on the total damages award — rather than on the two separate awards in isolation — because the only type of damage requested was lost profits, and Jury Instruction

supports reliance on the P & L statement — and that in itself would support damages of nearly twice what the jury awarded.⁵⁸ "The jury is entitled to combine evidence from multiple sources to reach its determination."⁵⁹ The jurors also heard testimony

No. 27 advised the jury that it could not award duplicate damages. It appears that the jury most likely decided on a total amount of lost profits that it believed was supported by the evidence, then divided that total between the tort and contract causes of action.

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

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

from which they reasonably could conclude that the P & L statement's estimates were unduly optimistic, despite the parties' contemporaneous beliefs that the numbers were conservative.⁶⁰ Since an award of \$111 million would have been justified by the record, any lower number also is justified and not unreasonable.⁶¹

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

⁶¹ RDS counsel's argument that the award must be \$111 million or \$18.4 million [Tr. 1473-74] has no legal significance. The

Trimble can hardly complain that the award is improper because the jury evidently accepted some of the impeachment evidence that Trimble presented. In multiple cases, the Alaska Supreme Court has upheld damage awards for specific amounts that were not testified to by any witness.⁶²

arguments of counsel are not evidence [Jury Instruction No. 5], and no jury ever has to accept counsel's analysis of the evidence rather than reaching its own conclusions based on its independent review of the evidence.

⁶² *See, e.g., Cameron*, 251 P.3d at 1023 (upholding award in part because it was less than plaintiff requested, suggesting that the jury considered defendant's evidence and followed the court's instructions); *North Slope Borough v. Brower*, 215 P.3d 308, 319

Case law on remittitur is instructive here.

When a court finds a damages award to be

unsupported, it may order remittitur only to the

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

largest amount supported by the evidence.⁶³ Here, for the reasons discussed above, the court would have to find an award of \$111 million supported by the evidence; it could not order a remittitur to some amount less than that. Accordingly, it also could not find that the lower verdict amount is unsupported.

...

Trimble did not contend that it had merely pulled the valuation numbers from thin air, as distinct from

⁶³ See cases cited *supra* n.40.

exercising informed business judgment to generate those estimates. The jury reasonably could accept Trimble's own valuation of RDS as a reasonably certain estimate of the future profits that RDS lost as a result of Trimble's tortious conduct.

...

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

...

In short, the authority regularly referred to by the Alaska Supreme Court makes clear that, in exercising discretion on whether to grant a new trial, the trial

judge must be guided by more than whether he or she personally would have reached the same verdict as the jurors. Such a casual granting of a new trial would contravene well-established Alaska law that respects the jury's role as fact-finder and recognizes that deference is due to jurors in that role.⁸⁰

...

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

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

erroneous, and that allowing the jury's verdict to
stand is not unjust.

...

Conclusion

For the reasons stated above, this court should
deny Trimble's motions. Respectfully submitted, this
17th day of November, 2014.

s/Gavin Kentch
Gavin Kentch
(ABA No. 1111081)

s/Susan Orlansky
Susan Orlansky
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