In The

Supreme Court of Virginia

RECORD NO. 150522

NAVAR, INC.,

Appellant,

v.

FEDERAL BUSINESS COUNCIL and WORLDWIDE SOLUTIONS, INC.,

Appellees.

BRIEF OF APPELLANT

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Navar, Inc. ("Navar") by counsel and pursuant to Rules 5:26 and 5:27 of the Rules of Supreme Court of Virginia, respectfully submits this Opening Brief of Appellant. For the following reasons, this Court should (1) vacate the judgment of the Fairfax County Circuit Court ("Trial Court") in this case, and (2) either enter final judgment for Navar or remand the case for further proceedings.

STATEMENT OF THE CASE

This is an appeal of a $1.25 million judgment entered by the Trial Court against Navar and in favor of Appellees/Plaintiffs Federal Business Council ("FBC") and Worldwide Solutions, Inc. ("WWS"). In the underlying action, FBC/WWS asserted breach of contract and misappropriation of trade secrets claims arising out of a failed government contract teaming agreement with Navar. Although the Trial Court entered judgment against Navar, the jury verdict upon which the judgment is based is legally and factually insupportable in a number of respects. There are several errors, any one of which should result in reversal and final judgment for Navar, or, alternatively, a new trial.

First, the Trial Court erred in allowing the case to go to the jury and in not entering judgment for Navar on Navar's motion to strike. At trial, FBC and WWS presented the theory that Navar breached a nondisclosure

agreement with FBC and WWS and that FBC and WWS did not receive the workshare they allege they were due under a contract with the federal government. However, FBC and WWS offered absolutely no evidence at trial to show that Navar breached the nondisclosure agreement or that Appellees were entitled to their claimed workshare. To the contrary, the evidence offered by FBC and WWS affirmatively disproved at least one element of both Count I (breach of nondisclosure agreement) and Count VII (violation of the Trade Secrets Act).[1] ***Second***, and alternatively, the Trial Court erred in failing to reduce the jury award from $1.25 million to $418,000. Neither FBC nor WWS has been able to articulate how the damages values are in any way related to the scant damages evidence they presented at trial. Rather, the evidence submitted can only support a much lower damages award. Navar requested, but did not receive, the remittitur. The Trial Court incorrectly denied Navar's request because there is simply no evidence to support the issued damages award with any reasonable certainty.

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[1] On Navar's motion for reconsideration of Navar's motion to strike, the Trial Court correctly recognized its error in not entering judgment for Navar on its motion to strike Count II (breach of a teaming agreement) and concluded that the teaming agreement – including the claimed workshare upon which the jury necessarily relied in calculating its damages – was unenforceable as a matter of law. (J.A. 3120, 3135.) This holding is the subject of Appellees' Assignment of Cross-Error.

At stake in this petition is a $1.25 million jury verdict – one of the largest jury awards in the Commonwealth in 2014. Because the judgment is unsupported by, and affirmatively disproved by the evidence, the appeal should be granted, the judgment reversed, and judgment entered in favor of Navar. In the alternative, the case should be remanded for a new trial.

NAVAR, INC.'S ASSIGNMENTS OF ERROR

Appellant Navar assigns the following errors:

1. The Trial Court erred when it did not grant Navar's motion to strike Count I (breach of nondisclosure agreement) and Count VII (violation of the Trade Secrets Act), and also when it denied Navar's motion for reconsideration of Navar's motion to strike those Counts, when the evidence offered by FBC and WWS at trial entirely failed to support at least one element of each claim, and instead affirmatively disproved at least one element of each claim.

Preserved at Nov. 18, 2014 Tr. at 206-207 (J.A. 406-407.); Nov. 19, 2014 Tr. 153 (J.A. 421); Jan. 8, 2015 Order (J.A. 2591); Feb. 20, 2015 Tr. at 32-33 (J.A. 3130-3131); Feb. 20, 2015 Order (J.A. 3135).

2. The Trial Court erred when it did not reduce the amount of the jury award from $1.25 million to $418,000 to conform with the scant damages evidence admitted at trial, even in the light most favorable to the Appellees.

Preserved at Feb. 20, 2015 Tr. at 29-30 (J.A. 3127-3128); Feb. 20, 2015 Order (J.A. 3135).

WORLDWIDE SOLUTIONS, INC. AND FEDERAL BUSINESS COUNCIL'S ASSIGNMENT OF CROSS-ERROR

Appellees WWS and FBC assigned the following error:

1. The Trial Court erred when it granted Navar's motion for reconsideration and entered judgment for Navar notwithstanding the verdict on Count II of the Complaint, when the Trial Court concluded that the teaming agreement was unenforceable as a matter of law. The error is preserved on pages 22-25 of the 2/20/2015 hearing transcript and associated order.

Preserved at Feb. 20, 2015 Tr. at 22-25 (J.A. 3120-3123); Feb. 20, 2015 Order (J.A. 3135).

NATURE OF THE CASE AND MATERIAL PROCEEDINGS BELOW

In this case, FBC and WSS maintain that Navar sought a prime contract with the federal government but did not have the requisite experience to successfully bid. Seeking that experience for its team, Navar entered into two contracts each with FBC and WWS. Under those contracts, all parties would work together to secure the prime contract for Navar. The first contract, a nondisclosure agreement ("NDA"), vaguely states that the parties could not use the other party's confidential information for anything other than evaluating whether to enter into and complete the federal contract. (J.A. 548-549.) The second contract, a teaming agreement ("Teaming Agreement"), required the parties to work together to secure the federal contract. (J.A. 553-566.) If Navar successfully obtained the federal contract, the parties would attempt to

negotiate a subcontract to further describe the "prices [and] terms and conditions acceptable to the parties," (J.A. 554), but Navar had the right to perform "at a minimum, 51%" of the work sought by the government. (J.A. 558,565.)

Pursuant to these agreements, the parties combined efforts to secure the federal contract. (J.A. 472.) Specifically, Appellees participated in the drafting of the bid proposal and in the oral discussions with the government. FBC and WWS testified that they, and not Navar, took complete responsibility in presenting their own capabilities to the government during the procurement process. (J.A. 340, 342, 336-337.) Neither FBC nor WWS presented *any* evidence at trial that Navar ever presented any of FBC's or WWS' capabilities or information. FBC and WWS openly testified at trial that Navar never disclosed any of their confidential information, used their information in any performance of its own contractual obligations, or otherwise misappropriated any trade secrets. (J.A. 336-337, 395.)

In April 2012, the government awarded the prime contract to Navar. (J.A. 175.) Subsequently, the parties attempted to negotiate a subcontract, but FBC and WWS insisted that they receive no less than 49% of the labor hours and labor dollars under the prime contract. (J.A. 2282-83.) As a

result, the negotiations failed, and the parties ended their business relationship. (J.A. 2282-83.) In November 2013, FBC and WWS sued Navar in the Trial Court after FBC and WWS did not receive the workshare to which they erroneously believed they were due. In their complaint, FBC and WWS asserted seven claims. (J.A. 133-155.) All counts except Counts I (breach of the NDA), II (breach of Teaming Agreement), and VII (violation of the Trade Secrets Act) were dismissed or nonsuited prior to entry of judgment in this case. (J.A. 2043-2046.)

At the close of FBC's and WWS's case, Navar moved to strike the evidence on all remaining claims (Counts I, II, and VII). (J.A. 2239-2244.) The Trial Court expressed concern over the sufficiency of the evidence on Count I (breach of the NDA) and Count VII (violation of the Trade Secret Act), and ultimately took the motion to strike under advisement for those counts. (J.A. 2239-2265.) The Trial Court denied the motion to strike Count II (breach of the Teaming Agreement), which was primarily based on a legal argument that the workshare provision of the Teaming Agreement was unenforceable. (J.A. 2239-2265.)

At the close of Navar's case, the Trial Court recognized Navar's renewal of its motion to strike. (J.A. 2475.) The Trial Court did not rule on

the motion to strike, and instead took it under advisement again. (J.A. 2475.)

The jury returned the following verdict against Navar:

- Count I – Judgment for FBC and against Navar for $500,000; judgment for WWS and against Navar for $500,000;
- Count II – Judgment for FBC and against Navar for $500,000; judgment for WWS and against Navar for $500,000;
- Count VII – Judgment for FBC and against Navar for $250,000.

(J.A. 2028.) The $500,000 judgments in Counts I and II were duplicative. (J.A. 2028.) In sum, the jury returned a $1.25 million verdict against Navar, consisting of a $750,000 award for FBC and a $500,000 award for WWS.

The Trial Court entered judgment on the jury verdict on January 8, 2015. (J.A. 2043.) In the judgment order, the Trial Court entered a $500,00 judgment against Navar on Count I (breach of the NDA), a duplicative $500,000 judgment against Navar on Count II (breach of the Teaming Agreement), and a $250,000 judgment against Navar on Count VII (violation of the Trade Secrets Act). (J.A. 2043.) Neither Navar nor FBC and WWS have since been able to articulate how the damages values are in any way related to the damages evidence presented at trial. The January 8, 2015 Order expressly suspended its effectiveness pending post-trial motions. (J.A. 2043.)

Navar filed a motion for reconsideration and, in the alternative, motion for remittitur ("Motion") on January 23, 2015. (J.A. 2047-2058.) The Trial Court heard the Motion on February 20, 2015. (J.A. 3098-3134.) At the conclusion of the hearing, the Trial Court granted Navar's Motion in part and denied it in part. (J.A. 3127-3130.) Specifically, the Trial Court vacated its judgment against Navar on Count II (breach of the Teaming Agreement) and entered judgment for Navar notwithstanding the verdict on Count II on the grounds that the Teaming Agreement is unenforceable as a matter of law (the argument previously rejected on Navar's motion to strike). (J.A. 3127-3130.) In vacating its judgment against Navar on Count II, the Court ruled that the Teaming Agreement provision purportedly obligating Navar to grant FBC and WWS 49% of the labor dollars, which the jury necessarily relied on in calculating its damages award, was unenforceable as a matter of law. (J.A. 3128.) More broadly, the Trial Court held that the Teaming Agreement was "nothing more . . . tha[n] an agreement to negotiate" and therefore, unenforceable as only an agreement to agree. (J.A. 3130.) The Trial Court denied the Motion as it related to Count I (breach of the NDA) and Count VI (violation of the Trade Secrets Act). (J.A. 3127.) Without any substantive explanation, the Trial

Court also denied Navar's request for remittitur of the damages awards. (J.A. 3130.)

Navar timely filed its notice of appeal on January 20, 2015, but it did not have the resources to obtain a suspension bond. Notwithstanding this appeal, FBC and WWS garnished all of Navar's cash accounts in March 2015. Navar did not agree to the garnishment and in fact repeatedly asked FBC and WWS to withhold or at least minimize its garnishment. FBC and WWS declined to halt its aggressive garnishment, leaving Navar with no operating funds and on the brink of financial ruin.

Navar filed a petition for appeal to this Court on April 8, 2015. FBC and WWS filed an Opposition to Navar's Petition for Appeal With Assignment of Cross Error on April 29, 2015. The Court heard oral argument on Navar's Petition for Appeal on October 20, 2015 and granted the petition on October 30, 2015.

STATEMENT OF FACTS

I. PARTIES

Navar is a Small Business Association certified 8(a) small disadvantaged business and an Alaskan Native Corporation ("ANC"), which permits it to compete for federal contracts that are not otherwise available

to many contractors. (J.A. 134.) Navar is incorporated in Alaska, but has its principal offices in Manassas, Virginia. (J.A. 134.)

FBC is a Maryland corporation with its principal office located in Annapolis Junction, Maryland, and is in the business of managing government-sponsored specialty conferences. (J.A. 133.)

WWS is a Virginia corporation, with its principal office located in Reston, Virginia, and is in the business of conducting information technology consulting and training conferences. (J.A. 133.) Neither FBC nor WWS is an ANC. (J.A. 133.)

II. BRIEF STATEMENT OF RELEVANT FACTS

In early 2011, the United States Department of Defense – Defense Threat Reduction Agency ("DTRA") sought contractor assistance for planning and executing events and activities around the world. (J.A. 135.) DTRA only offered this contracting opportunity to ANCs such as Navar. (J.A. 136.)

Navar, in turn, teamed with FBC and WWS to prepare a competitive proposal to submit to DTRA. (J.A. 136.) On May 18, 2011, the parties signed a NDA and Teaming Agreement to memorialize their legal relationship. (J.A. 548-566.) Under the NDA, the parties agreed that they would not use each other's confidential information for any purpose other

than to work together to prepare and submit a bid to DTRA. (J.A. 548-549.) Under the Teaming Agreement, the parties agreed to collaborate to assemble a strong bid for the DTRA contract. (J.A. 553-555.) If DTRA awarded the contract to Navar (the only eligible party), the parties planned to negotiate a subcontract arrangement for FBC and WWS. (J.A. 554.) Specifically, the parties agreed to negotiate "prices, terms and conditions acceptable to the parties" after prime contract award. (J.A. 554, 561.)

The parties indeed collaborated and Navar submitted a bid to DTRA. (J.A. 136-137.) During the bid process, Navar invited FBC and WWS to its meetings with DTRA so FBC and WWS could present their own capabilities and proposed subcontract roles to the government. (J.A. 993-994.) FBC and WWS testified at trial that Navar never presented any of FBC's or WWS's information to the government or used their information in its performance of the DTRA contract. (J.A. 993-994, 1009.)

DTRA awarded Navar the prime contract in April 2012. (J.A. 175.) Upon award, the parties in good faith began negotiating their respective subcontracts. (J.A. 141-142.) The subcontract negotiations, however, failed. FBC and WWS believe, and argue in their Cross-Appeal, that they are entitled to 49% of the work under the DTRA contract even though the Teaming Agreement merely stated that Navar "will receive, at a minimum,

51% of the labor hours and labor dollars in accordance with directed 8(a) awards. (J.A. 558, 565.) The parties were unable to resolve this dispute, and the business relationship ended. (J.A. 2282-83.)

III. EVIDENCE PRESENTED BY FBC AND WWS AT TRIAL

In November 2013, FBC and WWS sued Navar in the Trial Court for several million dollars in compensatory damages. (J.A. 1-21.) At trial, FBC and WWS testified that:

- WWS presented its confidential information to DTRA to review, *see* Nov. 17, 2014 Trial Tr. 136:11-137:11 (J.A. 336-337.) ("I presented it to him");

- WWS gave the presentation to DTRA, *see* Nov. 17, 2014 Trial Tr. 140:3-5 (J.A. 340.) ("These are the presentations we gave to DTRA");

- WWS participated in the oral presentation to DTRA, *see* Nov. 17, 2014 Trial Tr. 141:8-21 (J.A. 342.) (WWS "had to make the presentation");

- WWS provided follow-up information regarding the confidential information provided included in the presentation directly to DTRA, *see* Nov. 17, 2014 Trial Tr. 152:5-153:1 (J.A. 344-345.) ("so we did the presentation, the second presentation");

- WWS has no evidence that Navar used any of the confidential information in performing the DTRA contract, *see* Nov. 17, 2014 Trial Tr. 200: 17-201:14 (J.A. 368.) ("Do you have any evidence that . . . Navar used any of that information in performing the contract?" "No.");

- FBC conducted about 80-90% of the presentation to DTRA, WWS conducted about 10% of the presentation, and Navar conducted

the remaining presentation, *see* Nov. 17, 2014 Trial Tr. 226:12-16 (J.A. 370.) ("and during the presentation we put together, about 80 to 90 percent of that presentation was Federal Business Council in terms of what we presented. There was about 10 percent that was WWS and, you know, a smaller percent that was Navar within the presentation.");

- FBC has no evidence that Navar used any of the confidential information in performing the DTRA contract, *see* Nov. 17, 2014 Trial Tr. 244:13-16 (J.A. 374.) ("Do you have any evidence that [Navar] actually used that in performing the contract?" "Not – not that I can – I can tell . . ."); and

- FBC consented to the disclosure of confidential information to DTRA, *see* Nov. 18, 2014 Trial Tr. 120:1-121:14 (J.A. 845-846) ("Are you claiming that Navar used that information for other procurements?" "No.").

Notably, neither FBC nor WWS ever identified – even vaguely – *what information* Navar purportedly disclosed to the government (or any other third party).

In their opposition to the Motion, FBC and WWS fail to address or otherwise explain away any of this fatal testimony contradicting their own claims. (J.A. 2908-2920.) Instead, they simply state that that they would not have provided their information to Navar under the protection of the NDAs if they believed that Navar would not subcontract with them on their own terms. (J.A. 2909.) Counsel for FBC and WWS further ***argued*** at trial (in violation of *Massie v. Firmstone*, 134 Va. 450 (1922)) that Navar used the information in its performance of the federal contract – an argument in

complete contradiction of their own evidence. (J.A. 401-404.) FBC and WWS have no other defense to the evidence they put on that conclusively refutes their argument that Navar disclosed or used their confidential information.

Also at trial, FBC and WWS presented ***absolutely no lay or expert evidence*** that any of Navar's conduct *caused* any damages. FBC and WWS openly concede this in their opposition to Navar's Motion. (J.A. 2910.) ("Nothing more need be said.") Admittedly, FBC and WWS presented *some* lay witness evidence of damages purportedly sustained as a result of them disclosing their own confidential information to DTRA. (J.A. 361-364.) Specifically, FBC and WWS testified that they were entitled to about $2 million in planning revenues. (J.A. 329.) WWS testified that it generally makes about a 10% profit margin for the type of work that would be performed under Navar's prime contract. (J.A. 361.) FBC testified that it generally makes about a 17% profit margin for this type of work. (J.A. 390-391.) Significantly, FBC and WWS failed to offer any evidence of the workshare split between FBC and WWS – another necessary component to calculating damages for each plaintiff. To the contrary, FBC openly conceded that FBC and WWS ***never agreed*** to a workshare split. (J.A. 379.)

In their opposition to Navar's Motion, and in their Brief in Opposition to Navar's Petition for Appeal, FBC and WWS do not even attempt to articulate a basis for the $500,000 verdicts. Instead, they calculate the maximum supportable damages figure for WWS to be $911,000, and the maximum supportable damages figure for FBC to be $1.54 million. (J.A. 2908-2920.) In its post-trial briefing, Navar calculated the maximum supportable damages figure for WWS to be $100,000, and the maximum supportable damages figure for FBC to be $318,000. (J.A. 2047-2058.) In other words, no party can determine – even generally – how the jury calculated the damages award of $500,000 to FBC for Count I, $500,000 to WWS for Count I, and an additional $250,000 to FBC for Count VII with any reasonable certainty.

In short, FBC and WWS presented clear evidence that Navar did not breach its NDA obligations. They openly concede that they did not present ***any*** evidence of causation. They also only presented scant evidence of damages at trial – none of which can in any way form a reasonably certain basis for the monetary damages awarded by the jury in this case. The judgment in this case is fatally flawed, and this Court should vacate the judgment of the Trial Court.

AUTHORITIES AND ARGUMENT

For the following reasons, this Court should vacate the erroneous Trial Court judgment and either enter final judgment for Navar, or, at the very least, remand the case to the Trial Court. In the alternative, this Court should reduce the amount of the judgment to conform to the evidence presented by FBC and WWS at trial.

I. THE TRIAL COURT ERRED WHEN IT FAILED TO GRANT NAVAR'S MOTION TO STRIKE THE EVIDENCE ON COUNTS I AND VII (Navar Assignment of Error 1).

The jury verdicts for, and judgment on, Count I (breach of the NDA) and Count VII (violation of the Trade Secrets Act) must be vacated because Appellees failed to admit any evidence to support at least one element of each claim.

A. Standard of Review.

When the sufficiency of the evidence is challenged by a motion to strike, the trial court should resolve any reasonable doubt as to the sufficiency of evidence in the plaintiff's favor and should grant the motion only when it is conclusively apparent that the plaintiff has proven no cause of action against defendant, or when it plainly appears that the trial court would be compelled to set aside any verdict found for the plaintiff as being

without evidence to support it. *See Avent v. Commonwealth*, 279 Va. 175, 198-199 (2010).

On appeal, when this Court reviews a trial court's decision to strike a plaintiff's evidence, it likewise views the evidence in the light most favorable to the plaintiff and sufficient to sustain a jury verdict in favor of the plaintiff. *See Volpe v. City of* Lexington, 281 Va. 630, 639 (2011) (*citing TB Venture, LLC v. Arlington Cnty.*, 280 Va. 588, 562-63 (2010)); *see also Fruiterman v.* Granata, 276 Va. 629, 642 (2010). When reviewing a trial court's denial of a motion to strike or to set aside a verdict, this Court considers "whether the evidence presented, taken in the light most favorable to the plaintiff, was sufficient to support the jury verdict in favor of the plaintiff." *Isle of Wight County v. Nogiec*, 281 Va. 140, 147 (2011) (citation omitted). "[I]f it appears that the judgment is plainly wrong or without evidence to support it," it must be set aside. *See Sugarland Run Homeowners Ass'n v. Halfmann*, 260 Va. 36, 371 (2000).

Moreover, under this Court's holding in *Massie v. Firmstone*, 134 Va. 450 (1922), a plaintiff is bound by its unequivocal testimony as to facts within its knowledge and upon which his case turns. *See Bond v. Joyner*, 205 Va. 292, 295 (1964). A litigant cannot be heard to ask that its case be made stronger than it makes it. *See Massie*, 134 Va. at 462. This *Massie*

doctrine applies to a party litigant's statements of fact that are within the litigant's own knowledge. *See Erlich v. Hendrick Constr. Co.*, 217 Va. 108, 114 (1976); *see also Braden v. Isabell K. Horsley Real Estate, Ltd*., 245 Va. 11, 16 (1993). Thus, when a party "clearly and unequivocally testifies to facts that show as a matter of law that he has no case, he is bound thereby and cannot recover." *See Crew v. Nelson*, 188 Va. 108, 144 (1948).

B. <u>This Court Should Vacate The Judgment Entered Against Navar for Count I.</u>

FBC and WWS assert a claim for breach of the NDA agreement against Navar under Count I. In order to prevail on a claim for breach of contract, they must establish (1) a legally enforceable obligation of Navar to FBC and WWS; (2) Navar's violation or breach of that obligation; and (3) injury or damage to FBC and WWS caused by the breach of obligation. *See Filak v. George*, 267 Va. 612, 619 (2004). The failure of the party claiming damages to prove any one of the three essential elements is fatal to his case. *See Shenandoah Milling Co. v. Phosphate Products Corp.*, 161 Va. 642, 645 (1933).

For Count I, the jury returned a verdict, and the Trial Court entered a judgment, of $500,000 for each Plaintiff against Navar. (J.A. 2043-2046.) As a threshold matter, Navar's obligation under the NDA is unenforceable as a matter of law. In any event, this Court should vacate the judgment

because FBC and WWS did not admit any evidence that (1) Navar improperly used or disclosed any of FBC's or WWS' confidential information; and (2) that any improper use of confidential information *caused* FBC or WWS any damages. Moreover, FBC and WWS did not prove the amount of damages with any reasonable certainty. Each of these reasons is an independent basis for this Court to vacate the judgment against Navar for Count I.

i. Navar's Obligation Under The NDA Is Unenforceable.

Navar's nondisclosure obligations under the NDA are unenforceable as a matter of law.

Nondisclosure agreements are a common feature in corporate life and seek to protect trade secrets and, more generally, restrict the disclosure of information. *See*, *e.g. Dionne v. Se. Foam Converting & Packaging, Inc.*, 240 Va. 297, 299 (1990); *Gregory v. Gregory*, No. 1367-14-4, 2015 WL 7253670, at *2 (Va. Ct. App. Nov. 17, 2015). Like any restrictive covenant, a nondisclosure agreement will be strictly construed against the party drafting it. *See Modern Environments, Inc. v. Stinnett*, 263 Va. 491, 493 (2002) (citing *Richardson v. Paxton Co.*, 203 Va. 790, 795 (1962)); 26 No. 11 Va. Emp. L. Letter 3 ("Restrictive covenants are

contractual provisions such as noncompetes, confidentiality agreements, and nondisclosure agreements.”).

Contracts which are vague and indefinite are unenforceable. *See Allen v. Aetna Cas. & Sur. Co.*, 222 Va. 361, 361 (1981). In order to be binding, an agreement must be definite and certain as to its terms and requirements; it must identify the subject matter and spell out the essential commitments and agreements with respect thereto. *See Progressive Constr. Co. v. Thumm*, 209 Va. 24, 27 (1968).

Here, the contractual obligation in the NDA prohibiting certain uses of FBC’s and WWS’s information is contained in Recital B. (J.A. 548.) It provides that “each party receiving the other’s proprietary information shall only use the information to evaluate whether to enter into and complete the aforementioned matter and shall not use it for any other reason.” (J.A. 548.) Although it is not entirely clear, the “aforementioned matter” appears to refer to “teaming discussions for research and development enterprise event and conference support.” (J.A. 548.) The term “research and development enterprise event and conference support” is not defined. (J.A. 548-552.)

This nondisclosure obligation is unenforceable because it is unclear what is actually permitted. The term “whether to enter into and complete”

could be construed narrowly to only permit internal discussions within Navar to determine whether FBC and WWS could be good teaming partners. That narrow permission, however, is inconsistent with the Teaming Agreement provisions that *require* the three businesses to work together to assemble and present a proposal to the government to obtain the prime contract. (J.A. 553, 560.) Notably, the Teaming Agreement was fully executed within a week of execution of the NDAs. (J.A. 558-559, 556-566.)

A broader interpretation of what use is permitted seems more reasonable. Read together with the Teaming Agreement (particularly Paragraph 4.b.), (J.A. 560), this nondisclosure obligation does not prohibit Navar in any way from disclosing FBC's and WWS's capabilities and information to the government in order to obtain "and complete" the prime contract. In short, the nondisclosure provisions upon which FBC and WWS rely can be read narrowly or broadly. This contractual obligation is therefore unenforceable due to the uncertainty and vagueness as to the meaning of this material term. *See Allen v. Aetna Cas. & Sur. Co.*, 222 Va. 361, 361 (1981) (holding that a promise to "effect full and final settlement" was too vague to be enforced); *see Preferred Sys. Sols., Inc. v. GP*

Consulting, LLC, 284 Va. 382, 391 (2012) ("Whether the language of a contract is ambiguous is a question of law that we review *de novo*.").

ii. FBC And WWS Openly Admitted That Navar Did Not Disclose Or Use Any Confidential Information, Therefore Refuting Any Breach Of The NDA.

FBC and WWS did not offer ***any*** evidence that Navar breached any nondisclosure obligation under the NDA. The burden to prove that Navar breached a contractual obligation by a preponderance of the evidence is, of course, on FBC and WWS as the plaintiffs. *See Lawson & Frank, P.C. v. Bettius*, 66 Va. Cir. 93, 97 (Arlington Cnty. 2004) (citing *Mullins v. Mingo Lime, etc., Co.*, 176 Va. 44, 49 (1940)).

In this case, the NDA vaguely provides that each party would only use the other party's confidential "information to evaluate whether to enter into and complete" the procurement for conference support. (J.A. 548-552.) At trial, however, FBC and WWS testified that ***they – and not Navar – voluntarily disclosed*** their own confidential information to the government during the procurement process. (J.A. 336-337, 395.)

FBC and WWS did not offer any evidence that Navar used any confidential information in any way. In fact, FBC and WWS readily admit that they are unaware of any secretive use of their confidential information by Navar. (J.A. 367, 375.) At most, FBC and WWS presented evidence

that Navar knew of the confidential information, (J.A. 386), was responsible for less than ten (10) percent of the presentation to DTRA containing FBC's and WWS' confidential information, (J.A. 370), and that Navar eventually performed some of the event planning work under the prime contract.[2] (J.A. 357.) FBC and WWS did not offer ***any*** evidence, however, that Navar used the information in performing that work or to compete in any future procurement. Indeed, all of the evidence shows that Navar did not. (J.A. 336-337, 395.) The Trial Court seemed to agree with this assessment upon consideration of Navar's motion to strike Count I:

> THE COURT: I want [FBC and WWS] to show me what language in this agreement allows to bootstrap the voluntary disclosure that your clients had – and that was evidence in this case, at least on cross-examination – that Navar could use this information.

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[2] Even if this Court accepts FBC's and WWS' position that Navar was responsible for less than ten (10) percent of the presentation to DTRA containing FBC's and WWS's confidential information, Appellees' contention that Navar somehow breached the NDA still fails. Appellees waived any right to claim breach of the NDA because they intentionally relinquished their right to challenge Navar's alleged disclosure of Appellees' confidential information to DTRA when they watched Navar give the presentation and failed to object to such disclosure. *See Stanley's Cafeteria, Inc. v. Abramson*, 226 Va. 68, 74 (1983) ("Waiver is an intentional relinquishment of a known right."); *see also Orthopaedic & Spine Ctr. v. Muller Martini Mfg. Corp.*, 61 Va. App. 482, 492 (2013). Appellees' claim that Navar's alleged disclosure was permitted at the time of the presentation to DTRA but now suddenly prohibited under the terms of the NDA simply because the parties were unable to reach an agreement is both patently unreasonable and prejudicial to Navar.

(J.A. 403-404.) In short, FBC and WWS did not present any evidence that Navar did anything violative of any provision of the NDA. Navar cannot be held responsible for FBC's and WWS's voluntary decision to disclose their own information to the government in order to get subcontracting work. *See Massie*, 134 Va. at 462. Finally, FBC and WWS presented absolutely no evidence of *what information* exactly Navar disclosed to the government. The jury could not properly find a breach of the NDA without knowing what information Navar presented.

FBC and WWS failed to carry their burden of proof on Count I because they did not present ***any*** evidence of a breach. A judgment on a breach of NDA claim when there is no evidence of a breach plainly cannot stand. *See Whitt v. Godwin*, 205 Va. 797, 802 (1965).

iii. FBC and WWS Failed To Admit Any Evidence Showing That Navar Caused Any Damages.

Neither FBC nor WWS offered ***any*** evidence that Navar's conduct actually and proximately caused them to sustain damages. In Virginia, a plaintiff must prove, among other things, that a defendant's breach caused plaintiff to suffer damages. *See Filak v. George*, 267 Va. 612, 620 (2004). A plaintiff "bears the burden of establishing a causal connection between

the defendant's breach and the damages claimed." *See Haas v. Broyles Excavators, Inc. v. Ramey Bros. Excavating Co.*, 233 Va. 231, 235 (1987).

In this case, FBC and WWS offered evidence that they disclosed ***their own*** confidential information to the government. (J.A. 321.) They also appear to have offered some historic lost profits evidence (unrelated to the prime contract or any related contract) hoping the jury would predict its damages. (J.A. 361-364.) Neither FBC nor WWS, however, connected the ***disclosure*** of their confidential information to any ***pecuniary damage*** sustained. Indeed, Navar (and therefore FBS and WWS) may not have received the prime contract at all if the government did not receive the information. As such, FBC and WWS failed to prove the causation element of their contract claim. A judgment on a breach of the NDA claim cannot be affirmed when there is no evidence of causation.

iv. FBC and WWS Failed To Prove Damages With Reasonable Certainty.

Neither FBC nor WWS offered evidence to support any reasonably calculable damages. In Virginia, plaintiffs must prove their damages with reasonable certainty. *See Barnes v. Graham Virginia Quarries, Inc.*, 204 Va. 414, 420 (1963) (approving trial court's denial of award when plaintiff failed to prove damages with reasonable certainty). While a plaintiff does not need to prove a precise amount of damages, a jury verdict must relate

to the evidence. *See Hale v. Fawcett*, 214 Va. 583, 585 (1974). "There can be no recovery where speculation or conjecture must be resorted to in order to determine what caused the damage complained of." *Id.*

Here, FBC and WWS claim they offered evidence that they spent $97,000 preparing for the bid. (J.A. 423.) They testified that their portion of the work actually would draw $2 million in revenues.[3] (J.A. 425.) WWS testified that it generally makes about a 10% profit margin for the type of work it expected to perform under the prime contract. (J.A. 370, 922, 923.) FBC testified that it generally makes a 17% profit margin on similar work. (J.A. 419, 1783.) FBC's executive testified that FBC was seeking "less" than that in damages in this case. (J.A. 419, 910-916.) He did not say why or how much less.

Significantly, there was ***no evidence*** of the workshare split between FBC and WWS.[4] In fact, FBC's executive testified that FBC and WWS had

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[3] Navar proved that revenues under the prime contract are "closer to $1 million" – but the "exact number . . . between $700,000 and $900,000." (J.A. 414.) Nevertheless, this Court should take the evidence most favorable to the FBC and WWS. Accordingly, this request for relief relies on FBC's and WWS' $2 million figure despite the fact that it is incorrect.

[4] Notably, Appellees also failed to offer any evidence that the full $2 million in revenues was under or equal to the 49% of the prime contract workshare to which they maintain entitlement. The verdict assumes that both Appellees were entitled to all of the $2 million in revenues, even if that exceeded the demanded 49% workshare.

not agreed on a workshare split. (J.A. 379.) Moreover, the Trial Court later ruled that the 49% workshare split between Navar, on the one hand, and FBC and WWS, on the other, was ***unenforceable***. (J.A. 3128.)

The jury awarded FBC $500,000 for Count I and WWS $500,000 for Count I. The jury necessarily needed to know the workshare split between FBC and WWS to arrive at any damages figure. It did not have one. The jury necessarily relied on the 49% workshare split between Navar and FBC/WWS, but, after the jury was discharged, the Trial Court concluded that the 49% workshare split was unenforceable. Thus, the jury's verdict was given without the critical knowledge of a workshare split between the plaintiffs, and improperly with an assumed 49% workshare split between Navar and the plaintiffs. (J.A. 3128.)

In any event, these damages awards are impossible under the evidence viewed must favorable to the FBC and WWS. While the jury could have possibly awarded FBC $340,000 (equivalent to 17% of the full $2 million in revenues), that award would necessarily require that the jury award $0 to WWS because FBC's $340,000 award assumes that all $2 million in revenues would have gone to FBC. There is no way that a $500,000 verdict in favor of FBC can stand on the evidence.

Even more perplexing is the jury's calculation that WWS suffered $500,000 in damages. WWS admits that it generally only made about a 10% profit for similar work. (J.A. 370.) Given that testimony, WWS would have had to receive revenues of $5 million directly to achieve a $500,000 damages award. FBC and WWS never offered evidence to show that WWS would have received $5 million.

Basic mathematics conclusively establishes that both FBC and WWS could not receive the $500,000 jury verdicts on the evidence presented at trial. FBC and WWS admitted that they did not agree to a workshare split, so it is impossible to calculate the damages that should be awarded to each of them. The jury's damages calculations are further flawed because they were premised on the 49% workshare split, which the Trial Court later found unenforceable. As such, FBC and WWS have failed to prove their damages with reasonable certainty – or any certainty at all.

C. <u>This Court Should Vacate the Judgment Entered Against Navar For Count VII.</u>

FBC and WWS assert a claim for violation of the Virginia Uniform Trade Secrets Act ("VUTSA" or the "Act") against Navar. For Count VII, the jury returned a verdict of an additional $250,000 for FBC against Navar. (J.A. 2043.)

VUTSA makes it unlawful to misappropriate or misuse confidential information constituting trade secrets. *See* Code § 59.1-336-343. The primary purpose of trade secret protection is to encourage innovation and development; thus, the law will not be used to restrict legitimate competition. *See Microstrategy Inc. v. Li*, 268 Va. 249, 263 (2004) (quoting *Kewanee Oil Co. v. Bicron Corp*, 416 U.S. 470, 475 (1974)). To establish that Navar violated VUTSA, FBC was required to prove two statutory elements by a preponderance of the evidence: (1) the existence of a "trade secret" and (2) the "misappropriation" of such trade secret(s) by the defendant. *See* Code § 59.1-336; *see also Young Design, Inc. v. Teletronics Int'l, Inc.*, 38 F. App'x 994, 997 (4th Cir. 2002). If a plaintiff fails to prove either required element, it is not entitled to relief under the Act. *See* Code §§ 59.1-336 thru -338; *see also MicroStrategy Inc. v. Li*, 268 Va. 249, 263 (2004). In addition, a plaintiff must prove damages caused by the misappropriation. *See* Code § 59.1-338.

This Court should vacate the Trial Court's judgment because (1) FBC did not offer any evidence that Navar misappropriated or misused any trade secrets; and (2) the jury award of *an additional* $250,000 is completely unsubstantiated by the evidence presented at trial.

i. FBC Did Not Admit Any Evidence That Navar Misappropriated Or Misused Any Of Its Trade Secrets.

FBC did not admit any evidence that Navar misappropriated FBC's trade secrets. Specifically, FBC did not identify or describe any trade secrets that Navar misappropriated. Nor did FBC present any evidence that Navar actually misappropriated any of FBC's intellectual property.

Virginia Code Section 59.1-336 defines "trade secret" as

> [I]nformation . . . that (1) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and (2) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

Code § 59.1-336. Here, FBC did not identify what trade secrets Navar misappropriated. While FBC listed items that it considers to be "Confidential Information" which Navar allegedly disclosed to DTRA, (J.A. 148-549), it did not present *any* evidence of any independent economic value for the information, nor did it articulate what efforts FBC undertook to secure that information. (J.A. 304-383.) Indeed, none of the information identified by FBC qualifies for "trade secret" protection under VUTSA.

In addition, FBC did not present any evidence that Navar misappropriated FBC's trade secrets for Navar's own use. In order to prove a "misappropriation" of trade secrets, FBC must have established

"(1) that [Navar] disclosed or used trade secrets developed by [FBC] without [FBC's] express or implied consent; and (2) that [Navar] knew or had reason to know that their knowledge of the trade secrets was either acquired under circumstances giving rise to a duty to maintain their secrecy, or derived through a person who owed such a duty to [FBC]." *See* Code § 59.1-336; *see also Microstrategy Inc. v. Li*, 268 Va. 249, 263 (2004). FBC did not, and cannot, identify the means by which Navar obtained the "trade secret" information or how Navar improperly used those trade secrets.

Finally, FBC simply cannot circumvent the requirement that any use of trade secret information was "without [FBC's] express or implied consent." *See* Code § 59.1-336; *Microstrategy Inc. v. Li*, 268 Va. 249, 263 (2004). As discussed *supra* in Section I. B. ii, FBC and WWS both testified that ***they voluntarily disclosed*** their own information to the government during the procurement process in the same meeting with the government attended by Navar. (J.A. 336-337, 845-846.) FBC did not admit any evidence that Navar misappropriated or misused any of its trade secret information. Instead, FBC and WWS admit that they are unaware of any secretive use of their confidential information by Navar. (J.A. 367-369, 375.) After providing such express consent, or, at the very least, implied

consent, at the time of the presentation, FBC should not be able to retroactively characterize such disclosure and use as misappropriation.

FBC did not identify any trade secrets subject to protection, nor did it admit any evidence that Navar misappropriated any trade secrets when any alleged disclosure was made to DTRA while presenting alongside FBC.

This Court should vacate the judgment on Count VII because FBC's evidence establishes that Navar did not violate the VUTSA. *See Massie*, 134 Va. at 462.

ii. FBC Failed To Offer Any Evidence To Support The Jury Award Of An Additional $250,000.

Following the conclusion of Navar's case in chief, this Court instructed the jury that FBC "is entitled to recover damages for misappropriation[,]" including

> both the actual loss caused by the misappropriation and the unjust enrichment caused by the misappropriation that is not taken into account in computing loss. If a Plaintiff is unable to prove a greater amount of damages by other methods of measurement, the damages caused by misappropriation could be measured exclusively by imposition of liability for a reasonable royalty for a misappropriator's unauthorized disclosure or use of a trade secret.

(J.A. 355); *see also* Code § 59.1-338. FBC failed to offer evidence of any of these three types of damages.

First, FBC failed to prove any actual loss sustained as a direct result of to Navar's purported misappropriation of their trade secrets. *See supra* Section I. B. iii, iv.

Second, FBC failed to admit any evidence of unjust enrichment. FBC and WWS claim they *jointly* incurred $243,000 "bringing in the work[,]" (J.A. 426), however, any unjust enrichment in this case cannot be the labor they exerted in putting a proposal together for the government. Rather, it would be the value of the trade secrets themselves. *See* Code § 59.1-338. Although FBC claims its presentation material had "independent economic value," (J.A. 405), FBC failed to offer *any* evidence of the actual value of the alleged trade secrets.

The amount of the labor associated with assembling the bid (an inappropriate measure of damages) offered into evidence by FBC was not $250,000. To the contrary, FBC claims that it only incurred $148,000 in assisting Navar with the proposal to the government. FBC failed to provide evidence supporting the additional $250,000 damages award for unjust enrichment.

Third, FBC failed to provide any evidence of the value of a reasonable royalty. It did not offer any lay or expert testimony of any

estimate or calculation of reasonable royalty attributable to Navar's use of FBC's purported trade secrets.

FBC did not present any evidence of any actual loss, any unjust enrichment of a trade secret, or any reasonably royalty. Accordingly, FBC's proof of damages on this issue is patently insufficient to support the verdict and judgment for Count VII.

II. THE TRIAL COURT ERRED WHEN IT FAILED TO GRANT NAVAR'S MOTION FOR REMITTITUR (Navar Assignment of Error 2).

If this Court does vacate the judgment for FBC and WWS on Counts I and VII, then it should reduce the awards. A trial court should require a plaintiff to remit part of his or her recovery if (1) it finds that the verdict was excessive; (2) it explains its action demonstrating that it is based on factors in evidence relevant to a reasoned evaluation of damages; and (3) the amount of recovery after remittitur bears a reasonable relation to the damages disclosed by the evidence. *See Poulston v. Rock*, 251 Va. 254, 259 (1996); *see also Bassett Furniture Indus., Inc. v. McReynolds*, 216 Va. 897, 912 (1976). Each of these requirements is satisfied in the instant case. Therefore, as more fully explained below, this Court should reduce the verdicts in Count I to $170,000 (total for FBC) and $100,000 (total for WWS), and the verdict for FBC in Count VII to $148,000.

A. Standard of Review.

This Court reviews a trial court's remittitur decision of compensatory damages awards under an abuse of discretion standard. *See Baldwin v. McConnell*, 273 Va. 650, 656 (2007) ("Setting aside a verdict as excessive . . . is an exercise of the inherent discretion of the trial court, and, on appeal, the standard of review is whether the trial court abused its discretion."). This Court judges abuse of discretion on a remittitur claim by focusing on whether the recovery "bears a reasonable relation to the damages disclosed by the evidence." *See Poulston v. Rock*, 251 Va. 254, 268 (1996) (citations omitted); *see also Shepard v. Capitol Foundry of Va., Inc.*, 262 Va. 715, 721 ("[W]e must ascertain whether the amount of recovery after remittitur bears a reasonable relation to the damages disclosed by the evidence.") (2001) (quotations and citations omitted).

B. The Trial Court Should Have Reduced The Jury's Award On Count I.

The jury awarded FBC $500,000, and WWS $500,000, for Count I. (J.A. 2043.) The evidence does not support either of these figures.

The $500,000 verdict in favor of FBC is clearly excessive. FBC admitted evidence that it generally makes about a 17% profit on similar work. (J.A. 390-391.) If FBC received 50% of the $2 million in revenues

under the prime contract,[5] FBC's total award could be no greater than a total of $170,000 for Count I. This Court should reduce FBC's jury verdict for Count I to $170,000 if it does not vacate the judgment.

The $500,000 verdict in favor of WWS is even more excessive. WWS testified that it generally makes about a 10% profit on similar work. (J.A. 361.) Assuming that WWS received the other 50% of the $2 million in revenues, WWS's total award can be no greater than $100,000 for Count I. This Court should reduce WWS's jury verdict for Count I to $100,000 if it does not vacate the judgment on Count I for WWS.

C. The Verdict on Count VII Should Be Reduced If This Court Does Not Vacate The Judgment.

Finally, this Court should reduce the jury verdicts and judgment in favor of FBC on Count VII to $243,000. Damages for a VUTSA violation can be calculated by either the actual loss, unjust enrichment, or a reasonable royalty. *See* Code § 59.1-338; *Collelo v. Geographic Servs., Inc.*, 283 Va. 56, 80 (2012). As noted above, FBC and WWS did not offer or admit any evidence of an actual loss or a reasonable royalty. *See supra* I. C. ii. Instead of offering evidence of a royalty, FBC claimed that they

[5] This assumption – not supported by the evidence – underscores why the jury verdict is legally unsupportable in this case, and why this Court should not enter judgment for Navar on all counts because of FBC's and WWS' failure to admit evidence that could support a calculation of damages with any reasonable certainty.

incurred $148,000 in labor costs associated with helping Navar draft the proposal to the government. (J.A. 426.) At the very least, the unjust enrichment award to FBC for Count VII can only be $148,000, and not $250,000.

III. THE TRIAL COURT CORRECTLY ENTERED JUDGMENT FOR NAVAR NOTWITHSTANDING THE VERDICT FOR COUNT II AND FOUND THE TEAMING AGREEMENT UNFORCEABLE AS A MATTER OF LAW (Appellees' Assignment of Cross-Error).

In Count II (breach of Teaming Agreement), the jury returned a verdict of $500,000 for each Appellee against Navar. The Trial Court correctly granted Navar's motion for reconsideration of Navar's motion to strike and entered judgment notwithstanding the verdict for Navar because (1) the Teaming Agreement provisions upon which FBC and WWS base their claim are unenforceable as a matter of law, and (2) FBC and WWS did not prove their damages with any reasonable certainty.

A. Standard of Review.

On appeal, when reviewing a trial court's denial of a motion to strike or to set aside a verdict, this Court considers "whether the evidence presented, taken in the light most favorable to the plaintiff, was sufficient to support the jury verdict in favor of the plaintiff." *See Isle of Wight County v. Nogiec*, 281 Va. 140, 147 (2011) (citation omitted).

B. <u>Argument.</u>

The Trial Court did not err in entering judgment for Navar on Count II because the teaming agreement provisions upon which Appellees rely are unenforceable "agreements to agree." Further, Appellees failed to prove their damages for Count II with any reasonable certainty.

i. The Law Of Enforceability Of "Good Faith Negotiation" Provisions In Teaming Agreements In Virginia.

This Court has held that "it is the duty of the court, and not the jury, to determine whether an enforceable contract exists." *See W.J. Schafer Associates, Inc. v. Cordant, Inc.*, 254 Va. 514, 519 (1997) (citing *Pierce v. Plogger*, 223 Va. 116, 120 (1982)). A court may not "search for [an agreement's] meaning beyond the instrument itself . . . because the writing is the repository of the final agreement of the parties." *See Berry v. Klinger*, 225 Va. 201, 208 (1983).

This Court's guidance is clear: "there must be a mutual assent of the contracting parties to terms reasonably certain" for a contract to be enforceable under Virginia law." *See Schafer*, 254 Va. at 519 (quoting *Allen v. Aetna Casualty & Surety Co.*, 222 Va. 361, 364 (1981) (holding a teaming agreement between prime federal contractor and proposed subcontractor unenforceable as a matter of Virginia law)). Mere

"agreements to agree" are "too vague and indefinite to be enforced." *Id.* at 519. An agreement to "negotiate open issues in good faith" to reach a "contractual objective within [an] agreed framework" will be construed as an agreement to agree rather than a valid contract under Virginia law. *See Virginia Power Energy Mktg., Inc. v. EQT Energy, LLC*, No. 3:11-cv-630, 2012 (U.S. Dist. LEXIS 98553, 2012 WL 2905110, at *4 (E.D. Va. July 16, 2012) (citations omitted); *Beazer Homes Corp. v. VMIF/Anden Southbridge Venture*, 235 F. Supp. 2d 485, 490 (E.D. Va. 2002) (citing *Schafer* for the proposition that "it is well-settled under Virginia law that agreements to negotiate at some point in the future are unenforceable); *Marketplace Holdings, Inc. v. Camellia Food Stores, Inc.*, 64 Va. Cir. 144, 145 (Va. Cir. Ct. 2004) ("By its very nature, an agreement to negotiate in good faith shows that the parties have not mutually assented to reasonably certain terms of a contract.").[6]

Two Virginia cases should guide this Court's enforceability analysis. This Court's holding in *W.J. Schafer Associates Inc. v. Cordant, Inc.* sets forth the legal test to determine the unenforceability of a teaming

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[6] Virginia law on the enforceability of "agreements to agree" is consistent with the law of other states. *See Dual, Inc. v. Symbionics, Inc.*, 1997 U.S. App. LEXIS 23959 (4th Cir. 1997) (holding similar "good faith negotiation" provisions in federal contractor/proposed subcontractor teaming agreements unenforceable under New York and California law).

agreement provision under Virginia law. 254 Va. 514 (1997). That legal test controls in this case. The U.S. District Court for the Eastern District of Virginia (Alexandria) recently applied the *Schafer* test to a nearly-identical teaming agreement in *Cyberlock Consulting, Inc. v. Info Experts, Inc.* 939 F. Supp. 2d 572 (E.D. Va. 2013) *aff'd*, 549 F. App'x 211 (4th Cir. 2014). As discussed below, the *Schafer* and *Cyberlock* courts held that the subcontract negotiation provisions were unenforceable under Virginia law. So, too, should this Court confirm that the Teaming Agreement between FBC and WWS, on the one hand, and Navar, on the other, is unenforceable.

1. The Controlling Legal Framework: *W.J. Schafer Associates Inc. v. Cordant, Inc.*

This Court's reasoning and decision in *W.J. Schafer Associates Inc. v. Cordant, Inc.* squarely controls this case. *See* 254 Va. at 514. In *Schafer*, this Court analyzed whether a similar teaming agreement between a federal prime contractor and a potential subcontractor was enforceable under Virginia law. *Id.* at 516. In that case, the U.S. Air Force sought bids for a contract to convert personnel files into a computerized database. *Id.* at 516-517. The bidder and its proposed subcontractor, a supplier of computerized goods, entered into a teaming agreement to secure the work

from the Air Force. *Id.* at 517. The teaming agreement contained the following legally significant provisions:

- A provision in which the prime contractor identified the subcontractor as its "exclusive" subcontractor in its bid proposal;
- A provision that, if the government awarded the prime contractor the contract, the parties "would negotiate in good faith in a timely manner a Subcontract Agreement";
- An integration clause stating that the teaming agreement contained the entire agreement between the parties; and
- A provision permitting the prime contractor to replace the subcontractor if the subcontractor's computerized goods was not available by a certain date.

Id. The Air Force awarded the contract to the bidder, but the proposed subcontractor was unable to supply the computerized goods that would have been the subject of the subcontract, so the parties never executed a subcontract. *Id.* The prime contractor sued the subcontractor for breach of the teaming agreement's subcontract provisions, and a jury found in favor of the prime contractor. *Id.*

This Court reversed the trial court's judgment for the prime contractor enforcing the teaming agreement and entered final judgment in favor of the proposed subcontractor/supplier. *See id.* at 520. It reasoned:

> the Teaming Agreement shows by its express terms that it was not an enforceable contract for the sale of digitizers. There was no mutual commitment by the parties, no obligation on the part of [the proposed subcontractor] to sell the digitizers or on the part of [prime contractor]

> to purchase them, no agreed purchase price for the product, and, indeed, no assurance that the product would be available when needed.

Id. at 520. Based on this analysis, this Court held that the post-award subcontract negotiation provisions in the teaming agreement were an unenforceable "agreement to agree," and therefore the prime contractor could not recover for any deficient post-award work. *See id.* at 519-20.

2. A Factually Indistinguishable Case: *Cyberlock Consulting, Inc. v. Info. Experts, Inc.*

The U.S. District Court in Alexandria and the U.S. Court of Appeals for the Fourth Circuit recently analyzed this exact issue under Virginia law and arrived at the same conclusion: post-award "good faith negotiation" provisions in teaming agreements between federal contractors and proposed subcontractors are unenforceable as a matter of law. *See Cyberlock*, 939 F. Supp. 2d at 578-82. In *Cyberlock*, a prime contractor and subcontractor entered into a teaming agreement with the following legally significant provisions:

- An integration clause stating that the teaming agreement contained the entire agreement between the parties;
- A provision that each party would "exert reasonable efforts to obtain [a] prime contract for the Program and to negotiate a subcontract for the Program in accordance with Exhibit A";
- A provision stating that the "subcontract will contain provisions passing down those terms and conditions of the prime contract

which must be passed down to [the subcontractor] in order to comply with the prime contract";

- An Exhibit A that the subcontractor would perform 49% of the prime contract work; and

- A termination provision that specified that the teaming agreement would be terminated if there was a "failure of the parties to reach agreement on a subcontract after a reasonable period of good faith negotiations."

See 939 F. Supp. 2d. at 575. Significantly, the court also noted that the parties did not attach a subcontract as an exhibit to the teaming agreement. *See id.* at 575-76.

After a lengthy analysis, the federal court held that the "good faith negotiation" provisions of the teaming agreement were unenforceable under Virginia law. *See id.* at 580. It opined that a "writing in which the terms of a future transaction or later, more formal agreement are set out is presumed to be an agreement to agree rather than a binding contract." *Id.* (citations omitted). Indeed, the federal court even commented that "calling an agreement something other than a contract or subcontract, such as a teaming agreement . . . implies that the parties intended it to be a nonbinding expression in contemplation of a future contract." *See id.* The *Cyberlock* court further reasoned:

> even if the parties are fully agreed on the terms of their [sub]contract, the circumstances that the parties do intend a formal contract to be

> drawn up is strong evidence to show that they did not intend the previous negotiations to amount to an agreement which is binding.

See id. (quotations omitted). Based on this reasoning, the court held that "the breach of contract claim, therefore, fails as a matter of law for lack of an enforceable contract" and dismissed the case. *See id.* at 582.

The Fourth Circuit Court of Appeals affirmed the Eastern District's decision in January 2014. *See Cyberlock v. Info. Experts*, 2014 U.S. App. LEXIS 322, at 2. Relying on this Court's opinion in *Schafer*, the federal appellate court reasoned:

> Virginia courts have uniformly refused to enforce agreements to agree at a future date . . . and that is exactly what we have at hand in this case with respect to the contractual provisions sought to be enforced by [the subcontractor].

Id. (citations omitted).[7]

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[7] The Eastern District of Virginia also applied the *Schafer* test to a substantially similar teaming agreement in *Weldon v. Innovative Mgmt. Concepts, Inc.*, Civil Action No. 03-363-A (E.D. Va. Dec. 19, 2003). In dismissing the case, the *Weldon* court also concluded that an agreement to negotiate the award of a subcontract is an unenforceable agreement to agree. The Fourth Circuit affirmed in an unpublished *per curium* decision, agreeing that the teaming agreement was "merely an agreement to negotiate." *See Weldon v. Innovative Mgmt. Concepts, Inc.*, 113 Fed. Appx. 517, at *3 (4th Cir. 2004).

ii. The Subcontract Negotiation Provisions In The Teaming Agreement Are Indistinguishable From The Unenforceable Agreements To Agree In *Schafer* and *Cyberlock.*

The Teaming Agreement in this case – which forms the basis for Count II – is unenforceable under the *Schafer* and *Cyberlock* cases. First, like *Schafer* and *Cyberlock* teaming agreements, the Teaming Agreement contemplates that the parties would simply *negotiate* a subcontract in good faith. (J.A. 553-566.) The Teaming Agreement uses "good faith negotiation" language in Paragraph 5 that is substantively identical to the *Schafer* and *Cyberlock* language. (J.A. 554, 561.) That language, by itself, is enough to indicate that the Teaming Agreement is simply an unenforceable agreement to negotiate a future contract. *See Schafer*, 254 Va. at 514; *Cyberlock*, 939 F. Supp. 2d at 575, 576; *see also Weldon*, 113 Fed. Appx. At *2-3.

Second, like the *Schafer* and *Cyberlock* agreements, the Teaming Agreement includes an integration clause that "contains the entire agreement between the Parties" and states that "no agreements or understanding varying or extending" the agreement "shall be binding upon any of the parties hereto unless in writing, signed by a duly authorized representative thereof." (J.A. 556, 563.) This integration clause is legally significant because it establishes that all agreed terms are included in the

Teaming Agreement – and those terms that are not included were not agreed. *See Cyberlock*, 939 F. Supp. 2d at 580.

Third, like the *Cyberlock* teaming agreement, the Teaming Agreement in this case does not guarantee that the parties will agree to the terms of a subcontract. *See* 939 F. Supp. 2d at 576. Here, the Teaming Agreement expressly states that the Teaming Agreement will expire upon the "[i]nability of the Prime and Subcontractor negotiating in good faith to reach agreement on the terms of a subcontract[.]" (J.A. 554, 567.)

Fourth, like the teaming agreement in *Cyberlock*, the Teaming Agreement in this case does not include reasonably certain terms for the potential subcontract's scope of work and pricing, but instead includes language directing the parties to negotiate the material terms of a subcontract in good faith after the prime contract award. (J.A. 554, 567.) *See* 939 F. Supp. 2d at 575; *see also Weldon*, 113 Fed. Appx. At *2-3 (subcontract negotiation provisions unenforceable because they do not specify any scope of work, price or duration for any subcontract). Specifically, the parties did not agree to a workshare split, but rather the simple minimum that Navar would perform at least 51% of the work. (J.A. 558, 565.) The parties specifically deferred negotiation of "prices, terms and conditions mutually acceptable to the parties" until a later date. (J.A.

554, 567.) In other words, the parties did not agree to scope of work, workshare, prices, or any other material terms. Instead, the parties contemplated that the entire subcontract negotiation would occur after prime contract award.

Fifth, like the *Cyberlock* agreement, the Teaming Agreement specifically states that the future subcontract would contain terms that depend on the terms of the awarded prime contract. *See* 939 F. Supp. 2d at 575. In other words, the parties acknowledged that they did not even know all of the terms that would be incorporated into a subcontract.

Sixth, like the *Cyberlock* teaming agreement, the Teaming Agreement does not attach any proposed or draft subcontract that would establish reasonable certainty of the subcontract terms. (J.A. 553-566.) *See* 939 F. Supp. 2d at 575.

In short, the provisions upon which the *Schafer* and *Cyberlock* courts relied in concluding that the teaming agreement language was unenforceable are all included in the Teaming Agreement. There is no legally significant difference between the *Schafer* and *Cyberlock* teaming agreements, on the one hand, and the Teaming Agreement in the present case, on the other.

In *Schafer*, this Court intended to prevent lawsuits alleging bad faith negotiations of subcontracts vaguely outlined in a teaming agreement. Count II of the instant lawsuit is exactly that – an attempt to enforce a subcontract that the Teaming Agreement unambiguously indicates on its face is not negotiated. *Schafer* and *Cyberlock* both hold that "good faith negotiation" provisions in teaming agreements are patently unenforceable under Virginia law. Here, the teaming agreement provisions upon which FBC and WWS rely are unenforceable "agreements to agree."

iii. Appellees Failed to Prove Damages Under Count II With a Reasonable Certainty.

The jury awarded each Appellee $500,000 for Count II. (J.A. 2028-2031.) This award is duplicative of the award for Count I because the jury intended to award WWS a total of $500,000 and FBC a total of $750,000 (which includes the duplicative $500,000 award for Counts I and II plus the $250,000 award for Count VII). (J.A. 2028-2031.) For the reasons stated *supra* in Sections I. B. iii. and iv., neither $500,000 verdict is grounded in the evidence, and FBC and WWS failed to prove their damages for Count II with any reasonable certainty. They failed to meet their burden of proof under Virginia law. *See Hale*, 214 Va. at 585; *Barnes*, 204 Va. 414, 418 (1963).

For these reasons, the Trial Court did not err in granting Navar's motion for reconsideration of its motion to strike, and entering judgment notwithstanding the verdict for Navar on Count II.

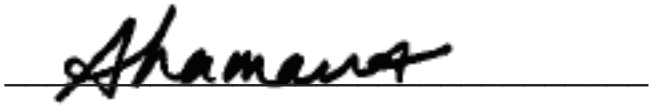
CONCLUSION

Appellant Navar, Inc. respectfully requests that this Court (1) vacate the judgment of the Trial Court on Counts I and VII and enter final judgment on Counts I and VII for Navar, Inc., ***or***, in the alternative, (2) vacate the judgment of the Trial Court on Counts I and VII and remand the case for a new trial for those counts only ***or***, in the alternative, (3) reduce the judgment of the Trial Court to reflect a judgment for FBC for $318,000 total, and $100,000 for WWS total. In addition, Navar respectfully requests that this Court affirm the Trial Court's entry of judgment for Navar notwithstanding the verdict on Count II.

Dated: December 9, 2015

Respectfully submitted,

NAVAR, INC.



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CERTIFICATE

The undersigned hereby certifies that the foregoing Opening Brief of Appellant complies with Rule 5:26(h) and Rule 5:27, and further certifies as follows:

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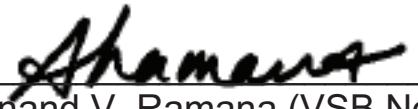
(5) On this 9th day of December, 2015:

a) An electronic copy of the foregoing Opening Brief of Appellant and an electronic copy of the Appendix were filed electronically with the Virginia Appellate Courts eBriefs Systems (VACES) pursuant to Rule 5:26(e).

b) Ten copies of the foregoing Opening Brief of Appellant and three copies of the Joint Appendix will be hand-filed with the Clerk's Office of the Supreme Court of Virginia pursuant to Rule 5:26(e) and Rule 5:32(a)(3).

c) An electronic copy of the foregoing Opening Brief of Appellant was served via electronic mail, and an electronic copy of the Brief of Appellant Joint Appendix on CD was served, via UPS Ground Transportation, to Counsel for the Appellee.



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