In The

Supreme Court of Virginia

RECORD NO. 150522

NAVAR, INC.,

Appellant,

v.

FEDERAL BUSINESS COUNCIL and WORLDWIDE SOLUTIONS, INC.,

Appellees.

BRIEF OF APPELLEES

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Appellees/Cross Appellants Worldwide Solutions, Inc. ("WWS") and Federal Business Council, Inc. ("FBC") created a joint business opportunity for themselves and Appellant/Cross Appellee Navar, Inc. ("Navar"). Navar, however, took the opportunity for itself, by using FBC's trade secrets and luring it and WWS into a series of contracts which Navar breached. A Fairfax County jury heard the evidence, found the facts, and enforced the contracts and trade secrets law precisely as written. Navar now asks this Court to overturn the jury's factual findings based on arguments unrelated to the facts presented to the jury and trial court.

COUNTER-STATEMENT OF THE CASE

FBC and WWS brought Navar a very lucrative deal for a government contract to provide event and conference support to the United States Defense Threat Reduction Agency ("DTRA"). Navar knew nothing of the contract prior to WWS and FBC's introduction, and had no ability to obtain the work without WWS and FBC's skills and experience. FBC and WWS involved Navar solely because of its status as an Indian owned business which DTRA included as a deal specification.

FBC and WWS entered into two agreements with Navar. The first, a confidentiality agreement, is the subject of Navar's appeal. The second, a teaming agreement, is the subject of WWS and FBC's cross appeal.

FBC and WWS contended that Navar breached both agreements and misused Appellee FBC's trade secrets. The jury heard the facts and agreed.

With respect to the confidentiality agreement and trade secret abuses, the evidence showed that Navar schemed to obtain from and use Appellees' confidential and trade secret information to win the DTRA event and conference support contract for itself. Appellees provided this information to Navar for its use *solely for the award of a contract to benefit all three companies: Navar*, *WWS*, *and FBC*. It is this aspect of the agreement which Navar breached and it is this trade secret abuse in which it engaged. Simply put, it took information which it received only for the purpose of a joint contract, and used it to win a unilateral contract. As explained below, the evidence showed that Navar knew its duties, knew it acted improperly, and created a web of deceit to cover up its breaches.

Navar's appeal, however, focuses on parts of the same confidentiality agreement and trade secret statutes which concern disclosure to a third party, but which were not at issue in the trial below. Navar's contentions are straw men arguments, and prove only that it has no arguments with respect to the actual issues presented to the jury.

WWS and FBC sued in a seven count complaint. Appellees nonsuited the specific performance count, which was for the court and not the jury, after

the trial. The remaining counts were submitted to the jury under instructions that two counts were alternatives to two others. The jury returned a verdict in the amount of $500,000 for WWS and $750,000 for FBC.

The Circuit Court agreed with the jury on most issues and entered judgment on the jury verdict. With respect to Count II, however, which addressed Navar's breaches of a teaming agreement, after first denying Navar's motion to strike with respect to this matter, the trial court granted a motion for reconsideration several months after trial and entered judgment notwithstanding the verdict with respect to Count II. The Trial Court held that the teaming agreement was "an agreement to negotiate" and therefore, unenforceable as only an "agreement to agree." JA 3128, 3130. In reaching this conclusion, the trial court incorrectly concluded that, if any part of the teaming agreement is an agreement to agree, no part of the teaming agreement is enforceable. The trial court also incorrectly determined Virginia law concerning teaming agreement enforceability based on a Federal court decision that misinterpreted that law.

Navar's statement of the "Nature of the Case and Material Proceedings Below" (Appellant's Brief at 4-9) focuses on matters irrelevant to the jury verdict and, in any event, is at odds with the record.

First, the nondisclosure agreement clearly states that "each Party hereto desires to disclose to the other certain information relating to teaming discussions for research and development enterprise event and conference support, 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." JA 548. *See also* JA 549 (disclosed information shall not be "used by the recipient for any purpose inconsistent with the intentions of the parties as stated herein"; "the recipient shall not use and shall not permit any others to use such information … in any other manner detrimental to the disclosing party, such as the development of any product or service for itself…").

Second, the teaming agreement clearly provided that if Navar "is awarded a contract or contracts for the work … then [Navar] agrees to offer a subcontract to" WWS and FBC. JA 554, 561.

Third, Navar presented both it and Appellees' "capabilities to the government" and did so on its behalf and Appellees' behalf (Appellant's Brief at 5). *See* JA 370, 1494, 2229-2230, 2071.

Fourth, Navar "disclosed" Appellees' confidential information, and used Appellee's information in "performance of its own contractual

obligations," and "otherwise misappropriated Appellee's trade secrets" (Appellant's Brief at 5). *See* JA 375-376.

Fifth, the parties' negotiations were successful and the parties did not agree to "end[] their business relationship" (Appellant's Brief at 5-6), but, rather, Navar took the "gold mine" contract for itself, refused to communicate with Appellees, and came up with a series of misrepresentations to hide its actions. *See* JA 2080, 2083, 2089-2090, 701, 710, 711.

Sixth, only two counts were dismissed or nonsuited prior to entry of judgment by the Court.

Seventh, the Trial Court did not "express[] concern over the sufficiency of evidence on Counts I…and VII" (Appellant's Brief at 6). *See* JA 3127-3128.

Eighth, Appellees "articulate[ed] how the damages… are…related to the [voluminous] evidence…." (Appellant's Brief at 7). *E.g.*, JA 3126.

Ninth, the damages awarded for breach of the nondisclosure agreement are independent of the teaming agreement, as the jury found. *See* JA 2028-2031.

COUNTER-STATEMENT OF THE FACTS

A. Information Correcting and Amplifying Appellant's Facts

In 2011, DTRA was seeking a contractor to provide event planning and related conference work. DTRA wanted to award this work to a Tribal

(Indian owned) organization because, under Federal procurement procedures, it could direct such an award with limited or no competition. JA 2703. Navar had no idea of the existence of this opportunity and no experience in event planning or related matters as of 2011. JA 2138-2139, 2710-2711, 2717-2718, 2230, 2232, 2699-2708.

WWS, however, had been marketing this opportunity for quite some time. JA 2697-2700. WWS is not a Tribal organization, but it is common in the federal marketplace for entities such as WWS to find opportunities and then join with other entities to provide services that any one of them could not provide alone. JA 1033, 2702, 2704.

In this regard, the Federal Acquisition Regulation ("FAR") controls all federal procurement. *See* 48 C.F.R. § 1.101. FAR provides that "Contractor team arrangements may be desirable from both a Government and industry standpoint in order to enable the companies involved to (1) complement each other's unique capabilities and (2) offer the Government the best combination of performance, cost, and delivery for the system or product being acquired." 48 C.F.R. § 9.602. A teaming arrangement exists when a "potential prime contractor agrees with one or more other companies to have them act as its subcontractors under a specified Government contract or acquisition program." 48 C.F.R. § 9.601.

Understanding this mechanism, WWS approached FBC because, though WWS has event planning/conference experience, JA 2701, FBC has specialized Federal sector event planning/conference experience. JA 311, 1692. WWS and FBC then approached Navar. JA 2705-2706. Navar had no event planning/conference experience, but was a Tribal organization. JA 2706. WWS then introduced Navar to DTRA as the Tribal organization for the contract. JA 1765, 2708-2709.

After assembling the team, Appellees entered into a confidentiality agreement with Navar, which is the subject of Navar's appeal. The parties then entered into a teaming agreement, which is the subject of the cross appeal.

With respect to the confidentiality agreement, in a most magnificent spin of the evidence, Navar claims Appellees "testified at trial that Navar never passed any of [Appellees'] information on to the government, or even used their information in its performance of the DTRA contract." Appellant's Brief at 11. Neither Appellees nor Navar testified that Navar did not "pass" the information to the government; everyone agreed Navar passed it. JA 2825, 2071, 2229-2230. Furthermore, the jury heard evidence that Navar used the information for "performance of the DTRA contract." JA 2844-2845.

But, what is truly crucial is that neither of these arguments is relevant to this case in any way. Rather, the *issue here – the one presented to the jury -- is whether Navar used the information to win the DTRA contract for itself as opposed to a joint contract for Navar and WWS and FBC.* And, on that matter, as discussed below and as the jury concluded, the evidence was overwhelming that Navar did precisely what it agreed it would not do.

With respect to the teaming agreement, that contract provided that "if [Navar] is awarded a contract…for the work…then [Navar] agrees to offer a subcontract to the Subcontractor covering such work in accordance with Subcontractor proposal for this procurement." JA 554, 561. In this case, WWS and FBC provided overwhelming evidence that Navar breached this agreement because it NEVER offered a subcontract to Appellees. JA 2135, 2153, 2818-2819. In fact, Navar spins the evidence to contend that, on award, "the parties in good faith began negotiating their respective subcontracts." Appellant's Brief at 11. The facts shows that Navar not only never offered a contract, it never attempted to negotiate a subcontract in good faith and rather jettisoned FBC and WWS, took all the work for itself, and then lied to Appellees and engaged in a cover up about the matter. JA 701, 709, 710, 711, 2080, 2083, 2089-2090, 2135, 2153, 2818-2819.

B. Information Necessary to Correct Appellant's Evidence Presentation

Navar's bullet point evidentiary rendition is contradicted by the record. Navar eschews an actual presentation of the trial evidence, and instead sets out bullets of brief misstatements of the evidence. This tactic is critically insufficient because the trial below was before jury, which heard the facts, and concluded that Navar's bullets were NOT the evidence presented.

In this regard, the first four "evidence" bullets (Appellant's Brief at 12) are immaterial, but suggest that Appellees, not Navar, made the presentations to DTRA. The evidence was *unequivocal*, however, that both Appellees and Navar made the presentations to win a contract for the joint team. *See* JA 370, 2229-2230, 2071.

Navar's fifth bullet point (Appellant's Brief at 12) is immaterial and wrong. The issue in this case is Navar's use of the information to *win* the contract for itself, not use of the information to perform the contract after award. Moreover, there is substantial evidence that Navar used the information to perform the contract, in any event. *See* JA 375-376.

Navar's sixth bullet point (Appellant's Brief at 12-13) is inaccurate, spun with the word "conducted." The evidence showed that 90% of the *substance* of the presentation was from Appellees, because Appellees had all of the substance and Navar had none. JA 370. But, as noted, the

presentation was *conducted* by all the participants, includijng Navar. *See* JA 370, 2229-2230, 2071.

Navar's seventh bullet point (Appellant's Brief at 13) misstates the evidence. The referenced record states explicitly that "when I look at the labor categories and the personnel they used and the things that they're doing compared to the fact that they had no conference management experience at all, I can see evidence of them using the information that we shared…." JA 375-376.

Navar's final bullet point (Appellant's Brief at 13) is both a spin and misstatement. The disclosure to DTRA was confidential under law and practice. 48 C.F.R. § 24.202; JA 2197, 2131-2133. The purpose of the disclosure was to win the Navar/WWS/FBC *joint* contract, and Navar contracted with WWS and FBC to use the information for winning a Navar/WWS/FBC *joint* contract. Navar breached its contract, however, by using the information to win a contract *solely* for Navar, as the very transcript cited by Navar makes clear: "it's not correct to say we gave it to Navar or gave it to DTRA. We presented it as our capabilities as a part of this team to win this procurement." JA 396.

Navar's citation to "opposition to the Motion" (whatever that means) accuses Appellees of contradicting their own evidence. Appellant's Brief at

13. But, we are not told the nature of the contradiction. Again, as above, Navar spins the "use [of] the information in its performance of the federal contract," *id.*, which is unrelated to this case, with the use of the information to *win* the federal contract *solely for Navar*, which is the issue here.

Navar also contends that there was no "lay or expert" evidence of damages. Appellant's Brief at 14. That statement is inaccurate, and indeed Navar itself in the next two paragraphs of its Brief focuses on the very evidence it says does not exist. Appellant's Brief at 14-15.

Navar's contentions about damages seem to be that there was *too much* of it; that is, the damages shown were more than the jury awarded. *Id.* Navar fails to indicate how this argument supports its Appeal.

The issue here is whether there was evidence presented to the jury that Navar's breach of the confidentiality agreement by its use of the Appellees' information for a purpose other than to win a joint contract for Navar, FBC, and WWS proximately caused Appellees' damage. Given that Appellees' damage was the money they lost when Navar used the information to win a contract for itself and not for all three companies, the breach clearly is the proximate cause of the damages which WWS and FBC incurred. That is, WWS and FBC are entitled to the value of the promised FBC/WWS/Navar contract and the profits they lost as a result of

Navar's misuse of the Appellees' information to obtain the contract solely for Navar.

In this case, the jury was instructed, without objection, that, "if you find your verdict for [the plaintiffs], then [each plaintiff is] entitled to recover as damages all of the losses [it] sustained, including gains prevented, that are a natural and ordinary result of the breach and that [it] has proved by the greater weight of the evidence." JA 2487. Furthermore, the trial court instructed the jury without objection that Appellees "are not required to prove the exact amount of each of their damage claims but must show sufficient facts and circumstances to permit you to make a reasonable estimate of the damages each suffered...." *Id*.

Here, the jury had, among other things, the following evidence:

First, the total value of the contract which Navar won as a result of its use of Appellees' confidential information in breach of the confidentiality agreement was $55 million. JA 910, 2142.

Second, the task orders already issued to Navar under the contract totaled $18,604,839. JA 1784-1881.

Third, the parties, including Navar, agreed that Appellees would have as close to 49% of the contract as possible. JA 2233, 2238, 2794, 2851.

Fourth, Appellee WWS' profit margin was a *minimum* of 10%. JA 2780.

Firth, Appellee FBC's profit margin was in excess of 17% and more usually, around 25%. JA 1783, 2158, 2193-2194.

Sixth, Appellees agreed to split their share of the work between them. JA 2136. The jury assessed the damages based primarily on WWS' low profit margin as opposed to FBC's higher margin, which is as conservative as Appellant can demand.

Seventh, 49% of $18,604,839 is $9,116,711. At a 10% profit margin which is the lowest margin which the jury had evidence, that would be $911,000 in lost profits. At a 17% profit margin, that would total $1.54 million in profits. And, the jury knew that the total contract value was $55 million, so it knew that the $18.6 million was only a piece of the value and resulted in only a piece of the lost profits.

Based on this evidence alone, Appellees showed sufficient facts and circumstances to permit the jury to make a reasonable estimate of the damages the Appellees suffered. And, the jury did so, awarding $500,000 to each Appellee, which reflects the probable and inferential proof which the Court must accept on a jury verdict.

C. The Actual Evidence of Liability Presented to the Jury

Navar's claim that no evidence supported the confidentiality agreement breach claim is based on two premises, neither of which is a

proper basis of an appeal: (1) Navar's interpretation of the confidentiality agreement which the jury rejected; and (2) Navar's determination to ignore the evidence which the jury accepted.

In this regard, Navar asserts that (a) WWS and FBC disclosed the information at issue to DTRA, and (b) Navar did not "use[] any confidential information in any way" to "perform [the contract] work." Appellant's Brief at 12. But, not only are these misstatements of the evidence as explained above, they are irrelevant to the issues before the jury.

The confidentiality agreement states that the confidential information is not only not to be "disclosed by the recipients to any third parties not intended" but also may not be "otherwise *used* by the recipient inconsistent with the intention of the parties stated herein." JA 549. The "intention of the parties stated" was stated explicitly as follows: "Each Party hereto desires to disclose to the other certain information relating to teaming discussions for research and development enterprise event and conference support, 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." JA 548. The agreement further emphasized that "the recipient shall not use… such information…in any other manner detrimental to the disclosing party, such

as the development of any product or service for itself or any other person." *See* JA 549.

Given that the confidentiality agreement was admitted into evidence, the jury had the right to draw two conclusions. First, the confidentiality agreement is breached by the recipient's *use* of the information for a proscribed purpose, whether or not there also is a proscribed disclosure. Second, the proscribed purpose in the confidentiality agreement was not to "perform [the contract] work," but rather was for any purpose other than for entering into and completing the DTRA contract for the Navar/FBC/WWS team. In fact, that is precisely what the parties testified to the jury:

> "Q ... what was the purpose - when you gave them information under this agreement .....
> A. to qualify and win this award" for the "team" and not "so Navar can win the award on its own."

JA 2720-2721. *See also* JA 2813-2815, 2818, 2133. And, Navar agreed without equivocation. JA 2232 (Navar corporate designee assumes that Navar only had permission to include WWS and FBC information if "WWS and NAVAR were going to be a team member").

The evidence is undisputed that Navar used the WWS and FBC confidential information to win the award of this "gold mine" project for itself, and not for the team. JA 701. In fact, Navar's own project manager testified that Navar management directed that she not communicate with

WWS and FBC after award, and was told that Navar would do no business with WWS and FBC - period. JA 2080, 2083, 2089-2090, 711. Navar did not even mention FBC and WWS as Navar's teammates in Navar's formal proposal after it was tapped for the sole source award. JA 2313.

As to the teaming agreement, it came into evidence and it provided that "if Prime is awarded a contract ... for the work .... then Prime agrees to offer a subcontract to the Subcontractor covering such work in accordance with Subcontractor proposal for this procurement." JA 554, 561. The evidence was overwhelming that no such offer was made because Navar decided to take virtually all or, if it could all, the work for itself. JA 701, 702, 704, 705, 709, 710, 711, 908, 2080, 2083, 2089-2090.

The teaming agreement's imposition of an obligation to offer a subcontract is just as definite as any other requirement of any contract demanding that one party provide something to another party. Here, the jury heard evidence that Navar refused to offer a subcontract to Appellees, and instead went silent. JA 2153, 2080, 2083, 2202, 624, 711. It then tried to come up with falsehoods as to why it was cutting out WWS and FBC. JA 710, 2835-2837. Navar did all this because it wanted to bring the work of this "gold mine" project in-house for itself. JA 701, 2843-2844.

As to the amount of the work, the parties agreed that Appellees would have as close to 49% of the ultimate contract as possible. JA 2233, 2238, 2794, 2851. The only reason the “minimum” 51% for Navar language was used in the formal teaming agreement was because of regulatory requirements which industry standards interpret as meaning as close to 49% as possible goes to the subcontractors. JA 2849, 2859-2860, 2105-2106, 2180. The jury was instructed to interpret a contract based on its subject matter, the situation of the parties, and the surrounding circumstances, to interpret it against its drafter (Navar), and consistent with the custom and usage of the trade. JA 2483-2484. All of this evidence was before the jury, and it did its job appropriately.

As to the trade secrets information, the jury was instructed, without objection, that “misappropriation is defined as ... use of a trade secret of another without the expressed or implied consent of a party who, A. used improper means to acquire knowledge of the trade secret or, B. at the time of the disclosure or use knew or had reason to know that his knowledge of the trade secret was . . . acquired under certain circumstances or given rise to a duty to maintain its secrecy or [limit its] use, ... or acquired by accident or mistake.” JA 2013, 2490. In this case, the evidence showed that Navar obtained FBC’s trade secrets under a promise of limiting their use to

obtaining a contract for the Navar/FBC/WWS team and therefore should have limited the use to that purpose. Instead, Navar used the trade secrets to get a $55 million contract for itself and only itself. JA 709, 910, 2142. The misappropriation is clear.

And, as to the damages from the trade secrets violation, the jury was instructed without objection that "damages can include 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." JA 2491. The actual loss evidence is the same evidence as discussed above, and greatly exceeds $250,000. The unjust enrichment evidence is the value of the benefit unjustly conferred on Navar, as the trial court instructed the jury. JA 2489. The evidence showed that Navar had a 5.5% profit margin, JA 2363, 2393. Given that it used the misappropriated trade secrets to take a $55 million contract on which it already received more than $18 million in orders, the jury's $250,000 award is plainly proper.

ASSIGNMENT OF CROSS ERROR

> The Trial Court erred when it granted Navar, Inc. ("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. This error is preserved on pages 22-25 of the 2/20/2015 hearing transcript and associated order. JA 3120-3123, 3135

ARGUMENT

A. Assignment of Error 1: Navar's Motion to Strike was Properly Denied as the Issue was for the Jury

1. Standard of Review Concerning Assignment 1

Courts closely guard the sanctity of jury verdicts. *Zedd v. Jenkins*, 194 Va. 704 (1953). The power to set aside a jury verdict can only be exercised where the verdict has *no credible evidence* to support it. If there is a conflict in the testimony, or if reasonable persons may differ in their conclusions of fact to be drawn from the evidence, or if the conclusion is dependent on the weight to be given the testimony, this Court cannot substitute its conclusions for the jury's. *Hadeed v. Medic-24. Ltd.*, 237 Va. 277 (1989).

Navar's reference to *Massie v. Firmstone*, 134 Va. 450 (1922) (Appellant's Brief at 17), is unrelated to the standard of review, and Navar's description of *Massie* is wrong. As this Court has explained, *Massie* provides that if "'a litigant unequivocally testifies to facts within his knowledge and upon which his case turns, he is bound thereby.'" *VEPCO v. Mabin*, 203 Va. 490, 498 (1962). So, for *Massie* to apply, the evidence must meet three criteria: it must be within the knowledge of the party, the testimony must be unequivocal, and it must be evidence on which the case turns.

Furthermore, *Massie* is "subject to a qualification, so that a litigant with a meritorious claim or defense will not be cast out of court because of some

single, isolated statement which, when taken out of context and pointed to in the cold, printed record on appeal, appears to be conclusive against him." *VEPCO*, 203 Va. at 493-94. So, if a litigant's testimony "'in its entirety does not unequivocally show that his case is without merit or if reasonable men may differ as to its effect, the [factfinder] must be permitted to pass upon the testimony and the effect thereof, taken together with all the other evidence in the case.'" *Olsten of Richmond v. Leftwich*, 230 Va. 317, 320 (1985).

Moreover, *Massie* does not preclude a jury from considering evidence other than the claimant's direct testimony simply because that testimony equivocates in some way. *Leftwich*, *supra*, 230 Va. at 320-21. In *Leftwich*, for example, the Court explained that *Massie* did not prohibit consideration of evidence of injury, even though the claimant's testimony alone failed to precisely establish such an injury. *Id.* at 320-21.

2. Appellant's Primary Argument that the Confidentiality Agreement is Unenforceable as Too Vague was Not Raised Below and is Waived

Rule 5:25 is clear that "no ruling of the trial court … before which the case was initially heard will be considered as a basis for reversal unless an objection was stated with reasonable certainty at the time of the ruling…." The purposes of this rule "is to afford the trial judge a fair opportunity to rule intelligently on objections while there is still an opportunity to correct errors in

the trial court,…. and to protect the trial court from litigants asserting error on appeal that had not been raised at trial." *Vasquez v. Mabini*, 269 Va. 155, 163 (2005). An appellate court can only "determine whether or not the rulings and judgment of the court below ... were correct." *Scialdone v. Com.*, 279 Va. 422, 437 (2010). Thus, if "opportunity [to address an issue] is not presented to the trial court, there is no ruling by the trial court on the issue, and thus no basis for review or action by this Court on appeal." *Id.*

Navar's primary argument on Assignment 1 – that the confidentiality agreement is unenforceable as too vague – is raised for the first time on appeal. Indeed, it wasn't even raised in the Petition for Appeal; it is raised for the first time in the Appellant's Brief. Having never presented this argument to the trial court, it cannot do so now in its Appellant's Brief.

3. Appellant's Primary Argument that the Confidentiality Agreement is Unenforceable as too Vague is Without Merit

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. *Progressive Const. Co. v. Thumm*, 209 Va. 24, 30-31 (1968). In *Progressive Construction*, the primary case on which Appellant relies, the lawsuit was brought based on a "telephone conversation" which was alleged to have "constituted the oral contract," concerning which the parties did not agree on

the contents. *Progressive Const. Co. v. Thumm*, 209 Va. 24, 26 (1968).

Here, in contrast to *Progressive*, we have a detailed, fully executed, written agreement. JA 548-552. It states that information disclosed under it may not be "used by the recipient inconsistent with the intention of the parties stated herein." JA 549. The "intention of the parties stated" in the confidentiality agreement was stated explicitly as follows: "Each Party hereto desires to disclose to the other certain information relating to teaming discussions for research and development enterprise event and conference support, 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." JA 548. The agreement further provides that the "the recipient shall not use and shall not permit any others to use such information … in any other manner detrimental to the disclosing party, such as the development of any product or service for itself or any other person." JA 549.

There is nothing vague or indefinite in this carefully drafted document, which the jury had no problem applying. This is a garden variety confidentiality agreement, entered into every day by businesses. These agreements commonly provide that information not be disclosed to others, and only be used for its intended purpose. *E.g.*, *Reed Elsevier, Inc. v.*

Inherent.com, Inc., No. CIV A 05-4048 JLL, 2006 WL 3827414, at *2 (D.N.J. Dec. 27, 2006). These are similar to protective orders issued by courts every day, limiting use of discovery to the case and precluding outside disclosure.

Thus, the jury was instructed that "a contract must be both complete and reasonably certain. It is complete if it included all reasonable terms. It is reasonably certain if all the essential terms are expressed in a clear and reasonable way." JA 2483. The jury heard the evidence, and found the confidentiality agreement complete and reasonably certain. No basis exists for this Court to overturn this jury's determination.

4. Credible Evidence Supports the Claim for Breach of the Confidentiality Agreement, and There is no "Admission" that Navar Did Not Disclose or Use Confidential Information

Navar's "no breach" contention is based on Navar's strained interpretation of the confidentiality agreement which the jury rejected, and Navar's determination to ignore the evidence which the jury accepted.

In this regard, Navar says Appellees "voluntarily disclosed" the information at issue to the Government, and Navar did not "use[] any confidential information in any way" which Navar says means "use" to win an unrelated contract. Appellant's Brief at 22.

The issue here, however, is neither the disclosure of the information to the government or Navar's use of the information to obtain an unrelated

contract. The issue here is that Navar used the information to get a contract solely for Navar when it had the information solely to win a joint contract for Navar, WWS, and FBC. The confidentiality agreement prohibited Navar's conduct, and it is this conduct which breached that agreement.

The confidentiality agreement states clearly, not "vaguely" as Navar says, that the confidential information is not only not to be "disclosed," but also may not be "*used* by the recipient inconsistent with the intention of the parties stated herein." JA 549. The "intention of the parties stated" in the Confidentiality Agreement was explicit: "Each Party hereto desires to disclose to the other certain information relating to teaming discussions for research and development enterprise event and conference support, 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." JA 548. The confidentiality agreement reiterates: "the recipient shall not use…such information…in any other manner detrimental to the disclosing party, such as the development of any product or service for itself …." JA 549.

The trial court instructed the jury that "the contract should be considered as a whole. No part of it should be ignored. The contract should be interpreted to give effect to each of the provisions in it…." JA 2482.

Furthermore, the trial court instructed that the "Interpretation of a contract is primarily a determination of what the parties intended. In determining their intent, you should consider the words they used. The words should be given their plain and ordinary meaning unless an obviously different meaning is apparent. You may also consider the subject matter of the contract, the situation of the parties, the purpose of the parties in making the contract and the surrounding circumstances." JA 2482-2483.

This jury read the contract; listened to the evidence of its subject matter, the parties' situation, and purpose; and correctly concluded that the confidentiality agreement is breached by the recipient's *use* of the information for a proscribed purpose, whether or not there also is a proscribed disclosure, which is explicitly what the contract states. Moreover, the proscribed purpose in the confidentiality agreement was not to "perform[] [the contract] work" but rather was for any purpose other than entering into and completing a joint Navar/FBC/WWS contract. In fact, that is precisely what Appellees testified to the jury. JA 2720-2721 ("Q…what was the purpose - when you gave them information under this agreement…. A…. to qualify and win this award" for the "team" and not "so Navar can win the award on its own.") *See also* JA 2813-2815, 2818, 2133. And, Navar agreed. JA 2232 (Navar only had permission to include WWS and FBC

information if "WWS and NAVAR were going to be a team member").[1]

The evidence is undisputed that Navar used the Appellee's confidential information to win the award for itself, and not Navar/WWS/FBC. In fact, NAVAR did not even mention Appellees in Navar's formal proposal after it was tapped for the sole source award. JA 2313. And, Navar's own project manager testified that Navar management directed that she not communicate with WWS and FBC so as to hide the award of this "gold mine" project from Appellees. JA 701, 711, 2080, 2083, 2089-2090, 2201.

Furthermore, and in any event, Appellees presented evidence to the jury that Navar "disclosed" the confidential information to DTRA, and "used" the information to "perform[] [the contract] work." *See* JA 2825, 2071, 2229-2230, 2844-2845. Thus, even if Navar's interpretation of the legal requirements is correct, and it's not, its rendition of the evidence is incorrect.

"Armed with a jury verdict approved by the trial court, [Appellees] stand[] in 'the most favored position known to the law.' [They are] entitled to have the evidence, and all inferences that may reasonably be drawn from it, viewed in the light most favorable to [them]." *Bitar v. Rahman*, 272

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[1] This testimony based on personal knowledge is binding on Navar under *Massie v. Firmstone*, 134 Va. 450 (1922).

Va. 130, 137 (2006) (internal citations omitted).[2]

5. Credible Evidence Proved that Navar's Confidentiality Agreement Breach Damaged Appellees

WWS and FBC provided evidence to the jury that Navar's breach of the confidentiality agreement by its use of the WWS/FBC information for a purpose other than to win a joint Navar/FBC/WWS contract proximately caused Appellees' damage. Given that Appellees' damage was the money they lost when Navar used the information to win a contract solely for itself, the breach clearly is the proximate cause of the damages incurred. "Direct damages are those which flow naturally or ordinarily from the contract breach…If damages are direct, they are compensable." *Long v. Abbruzzetti*, 254 Va. 122, 126-27 (1997).

Navar argues that its use of the information to win its own contract is not a cause of damages for WWS/FBC because Navar would not have received the contact if it had not used the information improperly. Appellant's Brief at 25. We cannot decipher this obtuse argument; nor could the jury.

6. Appellees' Proof of Damages for the Confidentiality Agreement Breach Was Overwhelming

It is well settled that Appellees are entitled to the profits they lost as a

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[2] Appellant's belief that the trial court "seemed to agree" with Navar because it asked a question, Appellant's Brief at 23, exceeds the bounds of credulity. If a trial judge asks a question and, after hearing the answer, rejects Navar's position, there is no agreement with Navar.

result of Navar's misuse of the WWS/FBC information to obtain the contract solely for Navar. *Worrie v. Boze*, 198 Va. 533, 536 (1956). That lost profits are sometimes not calculable with precision is immaterial to the right of a jury to award the loss. *Advanced Marine Enters v. PRC, Inc.*, 256 Va. 106 (1998).

"In applying the rule against recovery of uncertain damages, it is the uncertainty as to their nature, and not as to their measure or extent that is meant. While the actual amount of damages from the breach of a contract may not be susceptible of exact proof, the law does not permit one whose act has resulted in loss to another to escape liability on this account. The manner of measuring the damages having been ascertained, impossibilities in proving same are not required, but only that the best evidence be adduced of which the nature of the case is capable; in other words, the degree of certainty of the proof is dependent upon the character of the proceeding. Why should greater certainty be required as to proof of the amount of damages than in respect to any other part of a case? All that can be expected in any case is that the relevant facts tending to show the extent of the damages be placed before the jury to enable it to make such an intelligent estimate of the same as the circumstances of the case will admit." *Kiser v. Amalgamated Clothing Workers of America*, 169 Va. 574 (1938). *See also United Virginia Bank of Fairfax v. Dick Herriman Ford,*

Inc., 215 Va. 373, 210 SE. 2d 158 (1974) ("A litigant is not required to prove his damages with precision, particularly where the violator of the contract has made it impossible for him to do so, provided the evidence permits an intelligent and reasonable estimate of the damages."); *Anchor Co. v. Adams*, 139 Va. 388 (1924) ("where the damages are of such a character that no precise and definite estimate can be made, juries are allowed to act upon probable and inferential proof as well as that which is direct and positive. One who is clearly liable for some damages cannot defeat a recovery merely because it is impossible to demonstrate the damages with precision.").

In this case, the jury was instructed, without objection, that "if you find your verdict for [the plaintiffs], then [each plaintiff is] entitled to recover as damages all of the losses [it] sustained, including gains prevented, that are a natural and ordinary result of the breach and that [it] has proved by the greater weight of the evidence." JA 2487. Furthermore, the jury was instructed, without objection, that WWS and FBC "are not required to prove the exact amount of each of their damage claims but must show sufficient facts and circumstances to permit you to make a reasonable estimate of the damages each suffered…." *Id.*

Here, as noted above, the jury had substantial damages evidence.

The jury knew that the total value of the contract which Navar won as a result of its use of Appellees' confidential information in breach of the confidentiality agreement was $55 million. JA 910, 2142. It also knew that the task orders already issued to Navar under the contract totaled $18,604,839. JA 1784-1881.[3]

Further, the parties, including Navar, agreed that Appellees would have as close to 49% of the ultimate contract as possible. JA 2233, 2238, 2794, 2851.[4] WWS' profit margin was a *minimum* of 10%. JA 2780. FBC's profit margin was in excess of 17% and more usually around 25%. JA 1783, 2158, 2193-2194.

Moreover, the jury heard that Appellees agreed to split their share of the work between them. JA 2136. While the precise split was not in evidence as Navar's breach preempted that agreement, an agreement 'to split" the work means, "in the absence of qualification, an agreement to split

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[3] Navar's contention that there is only $2 million in revenues at issue, Appellant's Brief at 26, takes a piece of the evidence and ignores all other evidence. The jury, of course, can assess all the evidence presented to it. It had evidence of the more than $18 million in task orders, and credited that evidence properly. This Court cannot reverse a jury's factual conclusions on the basis of Navar's wishful argument.

[4] The trial court did not rule that the 49% workshare split was unenforceable, as Appellant contends. Appellant's Brief at 27. Navar cites JA 3128 for this contention, but it is nowhere to be found there. What the court ruled is that the teaming agreement requirement that the parties negotiate a subcontract was unenforceable. JA 3130,

equally." *Dyer v. Sterett*, 248 S.W.2d 234, 236 (Tex. Civ. App. 1952) (split profits, means equal split unless qualified). See *Bucholtz v. Computer Based Sys., Inc.*, 255 Va. 349, 353 (1998) ("in the absence of an agreement, express or implied, between partners in respect to their shares in the profits and losses of the business, they are to share equally'"); *Legum Furniture Corp. v. Levine*, 217 Va. 782, 787 (1977) (a business split is equal if not explicitly stated otherwise). In fact, if one Googles "split definition" the first response is: "break or cause to break forcibly into parts, especially into halves…."

Furthermore, the jury assessed the damages based primarily on WWS' low profit margin as opposed to FBC's higher margin, which is as conservative as Appellant can demand. Forty nine percent of $18,604,839 is $9,116,711. At a 10% profit margin which is the lowest margin which the jury had evidence, that would be $911,000 in lost profits. At a 17% profit margin, that would be $1.54 million in profits. And, the jury knew that the total contract value was $55 million, it knew that the $18.6 million was only a piece of the value and resulted in only a piece of the lost profits. "A litigant is not required to prove his damages with precision, particularly where the violator of the contract has made it impossible for him to do so, provided the evidence permits an intelligent and reasonable estimate of the

damages." *United Virginia Bank of Fairfax v. Dick Herriman Ford, Inc.*, 215 Va. 373, 375 (1974).

Based on this evidence, Appellees showed sufficient facts and circumstances to permit the jury to make a reasonable estimate of the damages the Appellees suffered. And, the jury did so, awarding a $500,000 to each Appellee, which reflects the probable and inferential proof which the court must accept on a jury verdict. "The law does not permit one whose act has resulted in loss to another to escape liability" because of the inability to add up the damages to the precise penny. *Kiser v. Amalgamated Clothing Workers of America*, *supra.*

7. The Evidence of Trade Secret Misappropriation and Misuse was Overwhelming

Navar claims that that FBC never presented "*any* evidence of any independent economic value for the information, not did it articulate what efforts FBC undertook to secure that information." Appellant's Brief at 30.

Navar's argument misstates the record. FBC presented direct evidence of independent economic value to the jury. *E.g.*, JA 2123-2125, 2132-2133. Indeed, knowledge of this information allowed Navar to win a $55 million contract, which even Navar must admit is "value." And, FBC provided substantial evidence explaining the maintenance of confidentiality with respect to this information. JA 2197, 2131-2133.

Navar also says that FBC did not present any evidence of misappropriation by Navar, or that the misappropriation by Navar was without consent. Appellant's Brief at 30-31. But, this argument is based on the same inaccurate argument Navar repeats *ad nauseam* – that it could properly use the information to win a contract solely for itself.

In this case, the jury was instructed, without objection and quite correctly, that "misappropriation is defined as…use of a trade secret of another without the expressed or implied consent" when the defendant "used improper means to acquire knowledge of the trade secret or, B. at the time of the disclosure or use knew or had reason to know that his knowledge of the trade secret was…acquired under certain circumstances or given rise to a duty to maintain its secrecy or [limit its] use..." JA 2013, 2490. The evidence showed that Navar obtained FBC's trade secrets under a promise of limiting their use to obtaining a joint contract for Navar, FBC, and WWS. But, after getting the trade secrets, it used them to get a $55 million contract *for only itself*. JA 709, 910, 2142. Navar's actions are the *quintessential* trade secret misappropriation: a party promises "if you tell me a secret, I will use it only for "y" purpose;" and, then, after the information is disclosed, uses it for "z" purpose. The misappropriation is clear as the jury found, and this Court has no basis to overturn the jury.

8. FBC Proved Its Trade Secrets Misappropriation Damages

The jury was instructed that "damages can include both the actual loss caused by the misappropriation and the unjust enrichment caused by the misappropriation…." JA 2491. The actual loss evidence is the evidence discussed above, and greatly exceeds the $250,000 the jury awarded to FBC. That alone is sufficient evidence to reject Navar's arguments.

The unjust enrichment evidence is the value of the benefit unjustly conferred on Navar, *i.e.*, Navar's profits. JA 2489. *Medical Staffing Network, Inc. v. Ridgway*, 194 N.C. App. 649, 670 S.E.2d 321 (2009) ("a more reasonably certain measure of the economic loss or the unjust enrichment proximately caused by" Trinity's misappropriation "would be the profit that Trinity gained from the ten nurses that Trinity acquired"); *Hamilton-Ryker Group, LLC v. Keymon*, 30 I.E.R. Cas. (BNA) 375, 2010 WL 323057 (Tenn. Ct. App. 2010) (awarding plaintiff the amount by which defendant was unjustly enriched for the work she obtained by virtue of the trade secret information she misappropriated). While Navar tells this Court that "FBC failed to admit any evidence of unjust enrichment," Appellant's Brief at 33, the evidence here was overwhelming that Navar had a 5.5% profit margin, JA 2363, 2393, and used the Trade Secrets it misappropriated to take a $55 million contract on which it already received

more than $18 million in orders. The jury's award is plainly proper under this evidence.

B. Assignment of Error 2: Remittitur is Inappropriate

1. Standard of Review

The issue of remittitur "is initially within the sound discretion of the circuit court and, on appeal, the standard of review is whether the circuit court abused its discretion." *Norfolk Beverage Co. v. Cho*, 259 Va. 348 (2000).

With respect to a trial judge's discretion, the judge may not substitute his opinion for that of the jury, and should not do so on the issue of damages unless he finds the damages awarded so excessive as to shock the conscience of the court or to compel the conclusion that the verdict was the product of passion or prejudice or some misunderstanding of the facts or the law. *Robinson v. Old Dominion Freight Line, Inc.*, 236 Va. 125, 129 (1988). Of course, in making any determination, a trial judge is required to consider the evidence in the light most favorable to the party that received the jury verdict, in this case the Appellees. If there is evidence when viewed in that light, to sustain the jury verdict, then remitting the verdict is error. *Shepard v. Capitol Foundry of Va.*, 262 Va. 715, 721 (2001).

2. No Reduction in the Verdicts Is Proper

As shown above, all of the verdicts are well supported by the evidence, consistent with the jury instructions, and should not shock anyone. Nor is there any contention of passion, or prejudice, or misunderstanding.

Instead, as described above in detail, the jury conservatively based the damages on Appellees' profit margin, applied to the evidence of $9,116,711 in revenue which Appellees lost because of Navar's breach. Navar's contention that the jury should have used only $2 million as the revenue number is a nice argument to a jury, Appellant's Brief at 35-36, but the jury rejected the argument and used the $9,116,711 number. The jury had every right to do so. Navar's contention that the jury should have used either a $243,000 or a $148,000 number for the trade secrets award, Appellant's Brief at 36-37, is also a nice argument to a jury. But, the jury rejected it too.

Neither a trial judge nor this Court may substitute its opinion for that of the jury except under circumstances which Navar does not argue here. Navar argues only that its calculation of damages is smarter than the jury's calculation. But, as there is evidence to support the jury's calculation, and as a litigant is not required to prove his damages with precision, particularly where the violator of the contract has made it impossible for him to do so, there is no basis to reduce the award in this case.

C. Assignment of Cross Error

The Trial Court erred when it granted Navar, Inc. ("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. This error is preserved on the hearing transcript and associated order. JA 3120-3123, 3135.

D. Standard of Review for Cross Error

"The standard of review applicable to cases where the trial court has set aside a jury verdict for the plaintiff is well established: the jury verdict must be reinstated and judgment entered on the verdict if there is any credible evidence in the record to support the jury verdict. As [this Court] review[s] the evidence, [the party who won the jury verdict] is entitled to the benefit of all substantial conflicts in the evidence and all reasonable inferences which may be drawn from the facts in evidence." *Wooldridge v. Echelon Serv. Co.*, 243 Va. 458, 461 (1992).

E. Summary: The Teaming Agreement is Enforceable

For a contract to be enforceable, "there must be mutual assent of the contracting parties to terms reasonably certain under the circumstances." *Allen v. Aetna Casualty & Sur. Co.*, 222 Va. 361, 364 (1981). If there is a

question as to whether the agreement is merely an agreement to agree, a court should look at the applicable agreement and also at the conduct of the parties and the surrounding circumstances to see if extrinsic evidence evinces the parties intent to be bound by the agreement. *John M. Floyd & Assoc. v. First Bank*, 2004 U.S. Dist. Lexis 31793, *12-13 (W.D. Va. 2004). *See also Boisseau v. Fuller*, 96 Va. 45, 48-49 (1898) (even where a written contract had been executed, a court looks to extrinsic evidence, including conversations between the parties, to determine whether the parties' intent was to be bound by the agreement). Further, where an underlying agreement is argued to be void for indefiniteness or vagueness, the court must look at the intent of the parties as evidenced by the situation of the parties, the subject matter of the agreement, and the object which the parties intended to accomplish. *High Knob. v. Allen*, 205 Va. 503, 508 (1964).

In this case, the jury was presented with a teaming agreement made under Federal law. Under that law, a "contractor team arrangement" is defined to include when "a potential prime contractor agrees with one or more other companies to have them act as its subcontractors under a specified Government contract or acquisition program." 48 C.F.R. § 9.601.

The part of the teaming agreement at issue in this case, which Appellees want to enforce and which the trial court held to be

unenforceable, is that provision that states that "If PRIME is awarded a contract or contracts for the work described in Paragraph 2 of this Agreement, which include(s) the work covered by the attached Exhibit A, then PRIME agrees to offer a subcontract to the SUBCONTRACTOR covering such work, in accordance with SUBCONTRACTOR proposal for this procurement." JA 554, 561. The trial court held that this clause was unenforceable because "it is nothing more…tha[n] an agreement to negotiate open issues in good faith within a framework. And I look at that agreement and the four corners of that agreement, I cannot conclude that it is anything other than" an agreement to agree. JA 3130.

The problems with the trial court's analysis are two-fold, and either error is sufficient grounds to reverse the trial court's ruling.

First, the trial court confused the part of the teaming agreement which required Navar to offer a subcontract to Appellees, with the part of the teaming agreement that involved the terms of the subcontract which ultimately the parties might negotiate. The first provision states, as noted, "if PRIME is awarded a contract or contracts...then PRIME agrees to offer a subcontract to the SUBCONTRACTOR….." JA 554, 561. The second provision states that "the parties agree to promptly negotiate in good faith and, upon arriving at prices, terms and conditions acceptable to the parties,

to enter into equitable subcontracts containing provisions consistent with the requirements of the prime contract, the technical and cost support provided by the SUBCONTRACTOR, schedules, and terms and conditions which PRIME is required by applicable regulations or by statute to impose upon its subcontractor, and such other terms and conditions as may be mutually acceptable." *Id.*

The trial court ruled that the first provision is unenforceable because the second provision is unenforceable. But, the Court should not have reached this conclusion because the teaming agreement also provides that "if any part, term, or provision of this Agreement shall be held void, illegal, unenforceable, or in conflict with any law of a Federal, State, or Local Government having jurisdiction over this Agreement, the validity of the remaining provisions shall not be affected thereby." JA 556. This type of severability provision is enforced in Virginia and a court "must give these expansive phrases their ordinary meaning." *Schuiling v. Harris*, 286 Va. 187, 194 (2013) (interpreting virtually identical severability clause).

Second, even with respect to the negotiation issue in the second part of the clause, the law in Virginia, as discussed below, does not create a hard and fast rule that an obligation to negotiate in good faith is unenforceable as a matter of law. If evidence shows, as it did here, that

one party never negotiated at all but simply decided to not subcontract under any terms, then the good faith provision can be enforced by a breach of contract action.

1. The Teaming Agreement's Severable Requirement that Navar Offer a Subcontract to WWS/FBC is Enforceable

In this case, this teaming agreement provided that "if Prime is awarded a contract…for the work…then Prime agrees to offer a subcontract to the Subcontractor covering such work in accordance with Subcontractor proposal for this procurement." JA 554, 561. The evidence was overwhelming that no such offer was made because Navar decided to take the work of this "gold mine" project for itself. JA 2818-2819, 701, 709, 710, 711, 2080, 2083, 2089-2090. This evidence should be all that is necessary to reverse the trial court's grant of the motion for reconsideration because there was credible evidence in the record to support the jury verdict.

The obligation to offer a subcontract is definite. *E.g.*, *EG&G, Inc. v. Cube Corp.*, 63 Va. Cir. 634, 636, 645-50 (19th Jud. Cir. 2002) (under similar teaming agreement, trial court found "an affirmative obligation on the part of [the Prime] to subcontract those portions of the [work] it promised"). But, the trial court in our case stated that, because the teaming agreement requires a subcontract to be negotiated, the teaming agreement

is just an agreement to agree. The trial court erred in this regard because the two parts of the contract are severable, JA 556, and the intent to be bound by the obligation to offer a subcontract is not diminished by a provision concerning negotiation of various terms of the subcontract.

Stated in other words, if no contract is offered, there is a breach of a clear, enforceable term of the teaming agreement regardless of any other term of the agreement. *C.f. Agostini v. Consolvo,* 154 Va. 203 (1930) (prime contractor's attempt to impose terms in a subcontract inconsistent with the terms of the parties' teaming agreement is a breach even though other terms of the subcontract still needed to be negotiated by the parties).

This case is, indeed, similar to *Agostini*. There, the intended prime contractor agreed, in a series of letters, to hire the subcontractor to perform hauling and granite work if the prime was awarded a government contract. One letter provided that "[a]s soon as the contract is awarded to us we will enter into a contract with you, in a more detailed form, for the prosecution of the work." 254 Va. at 206-08. After the prime was awarded the government contract, it told the subcontractor that it would only be entitled to do the hauling/granite work if it also did additional masonry work never contemplated by the parties' letters. *Id.* at 208-09. The subcontractor refused to enter into such a subcontract and sued for breach of contract.

The prime contractor argued that a binding contract was not created by the letters because there was never a meeting of the minds on all terms and conditions to be embodied in a formal contract. This Court affirmed the lower court's ruling in favor of the subcontractor, however, finding that a need to negotiate a more detailed contract did not obviate the prime contractor's obligation to offer the subcontract required by the initial agreement. *Id.* at 213.

Here, the agreement and extrinsic evidence established that the parties intended Navar to offer WWS/FBC a subcontract if Navar received a Prime Contract. Navar received a prime contract, but never offered a subcontract to Appellees. For this reason alone, the trial court erred in granting a motion to strike and demanding that the jury ignore this evidence.

2. The Teaming Agreement's Requirement that Navar Negotiate in Good Faith is Enforceable

Aside from Navar's breach of the obligation to offer a subcontract, it was obligated to negotiate in good faith, and that obligation is enforceable in and of itself. To be sure, a naked agreement to agree cannot be enforced. But, an exchange of promises, supported by consideration, to be a team, and as a team submit a bid to DTRA, and if a contract is awarded to Navar, to require good faith negotiations over a subcontract is an

enforceable contract. Unlike a naked agreement to agree, an agreement to use best efforts to achieve a common objective is a closed, discrete, and actionable proposition. *Channel Home Centers v. Grossman*, 795 F.2d 291, 299 (3d Cir.1986); *Cable & Computer Tech. Inc. v. Lockheed Sanders, Inc.*, 214 F.3d 1030, 1035 (9th Cir. 2000).

Under Virginia law, the test for enforceability of an agreement is whether both parties have manifested an intention to be bound by its terms and whether the terms are sufficiently definite to be specifically enforced. *Allen v. Aetna Casualty & Sur. Co.*, 222 Va. 361, 364 (1981). An agreement to negotiate in good faith may meet these conditions, and can be an enforceable contract. *See*, *e.g.*, *Thompson v. Liquichimica of America, Inc.*, 481 F. Supp. 365, 366 (E.D.N.Y. 1979); ("unlike an agreement to agree, which does not constitute a closed proposition, an agreement to use best efforts [or to negotiate in good faith] is a closed proposition, discrete and actionable."). *Accord Pepsico, Inc. v. W. R. Grace & Co.*, 307 F. Supp. 713 (S.D.N.Y. 1969); *Burbach Broad. Co. v. Elkins Radio Corp*, 278 F.3d 401 (4th Cir. 2002); *Chase v. Consol. Foods Corp.*, 744 F.2d 566 (7th Cir. 1984); *Arnold Palmer Golf Co. v. Fuqua Ind., Inc.*, 541 F.2d 584 (6th Cir. 1976); *Itek Corp. v. Chicago Aerial Ind., Inc.*, 248 A.2d 625 (Del. 1968); *ATACS Corp. v. Trans World Commc'ns, Inc.*, 155 F.3d 659 (3d Cir. 1998);

Operations Mgmt. Int'l, Inc. v. Tengasco, Inc., 35 F. Supp. 2d 1052 (E.D. Tenn. 1999).

"Such an agreement does not require that the agreement sought be achieved, but does require that the parties work to achieve it actively and in good faith." *Liquichimica of Am., Inc.*, *supra*, 481 F. Supp. at 366. In other words, "parties may contract to create the obligation to negotiate in good faith with one another, so long as the obligation does not go so far as to require an agreement on a subsequent contract." *Dual, Inc. v. Symvionics, Inc.*, 122 F.3d 1060 (4th Cir. 1997) (explaining California law).

In this case, the teaming agreement (JA 553-566) had all requisite terms to form a contract under Virginia law. The nature and scope of the work was "Enterprise Event and Conference Support." TA at ¶1. The compensation would be "the prices" which WWS and Navar each "set forth in its proposal for this procurement." TA at ¶3d. The place of performance would be "DTRA". TA at ¶2. The duration would be one year. TA at ¶6(k). And, as to the terms generally, they would be "consistent with the requirements of the prime contract, the technical and cost support provided by the SUBCONTRACTOR, schedules and terms and conditions which PRIME is required by applicable regulations or by statute to impose upon its subcontractor." TA at ¶5. *See also* TA at Exhibit A ("the terms and

conditions of the subcontract will be generally consistent with the terms and conditions of the prime contract").

Navar had the obligation to negotiate in good faith concerning these matters. The evidence here is unequivocal that Navar never attempted to negotiate a subcontract and rather jettisoned FBC and WWS, refused to talk to them at all, took all the work for itself, and then lied to Appellees about the matter, so that Navar could take this "gold mine" for itself. JA 2818-2819, 701, 709, 710, 711, 2080, 2083, 2089-2090.

Navar relies on two cases to support its position: *W.J. Schafer Associates, Inc. v. Cordant, Inc.*, 254 Va. 514 (1997) and *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).[5] Cyberlock relied on *Schafer* for its understanding of Virginia law, so the reality is whether *Schafer* sets out a law that mandates the unenforceability of a teaming agreement provision requiring good faith negotiations. It clearly does not, and *Cyberlock* failed to understand actual Virginia law.

In *Schafer*, defendant Schafer had been developing image scanning

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[5] Navar also cites *Weldon v. Innovative Mgmt. Concepts, Inc.*, 113 F. App'x 517, 518 (4th Cir. 2004). But that case did not concern a teaming agreement. It concerned "an agreement calling for cooperation in the pursuit of business opportunities with the United States government (the Agreement)." The Westlaw version of this unpublished case provides no further information which would make *Weldon* relevant here.

equipment known as "digitizers." Plaintiff Cordant believed that having access to Schafer's digitizer would enhance its chances of securing the Air Force contract. Based on this belief, defendant's affiliate (Ogden) and Cordant signed a "Teaming Agreement" which provided that Cordant would "propose" Ogden to the Air Force as "an exclusive Subcontractor" for the products and services set forth and priced in Exhibit A to the Agreement. *Id.*, 254 Va. at 517.

When Cordant submitted a bid to the Air Force for the ARMS project, it knew that the Schafer digitizer was not yet fully developed or commercially available. *Id.*, 254 Va. at 514. The parties in fact agreed explicitly that it if the digitizer is unavailable at contract award, Cordant could replace Schafer's non-existent product with another product. *Id.*, 254 Va. at 515.

When Schafer could not supply the digitizer because it had not yet been developed, Cordant sued for breach of contract. The Court ruled that the teaming agreement contract in that case was unenforceable. It explained that "in the present case, the Teaming Agreement provided that '[f]or all items identified in Exhibit A, [Ogden] shall supply pricing.' However, no price for the digitizers was set forth in the Agreement, and the Agreement shows that the parties knew that the digitizers might not be

available for use if the ARMS contract were awarded to Cordant. In that regard, the Agreement states that, by July 31, 1991, Cordant 'shall make a determination, through consultations with [Ogden's] representative, on the probability of [the digitizer's] availability by contract award' and that, "[i]f sufficient and satisfactory progress has not been made in order to make the [digitizer] available by contract award, [Cordant] reserves the right, in its sole discretion, to pursue a replacement product.' Clearly, therefore, 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 Ogden to sell the digitizers or on the part of Cordant to purchase them, no agreed purchase price for the product, and, indeed, no assurance that the product would be available when needed. It follows, therefore, that, if the Teaming Agreement was not enforceable against Ogden as a contract for the sale of goods, it also was not enforceable against Schafer under the claim that Schafer was Ogden's delegate …." *Id.*, 254 Va. at 519-20.

Schafer has nothing to do with the issue of enforceability of teaming agreement provisions requiring good faith negotiations. *Cyberlock* simply misconstrued *Schafer*, and this Court should not continue this misunderstanding. Stated simply, *Cyberlock* inaccurately interpreted *Schafer*

as overruling *Agostini v. Consolvo*, *supra*, and the many Virginia judicial decisions permitting parties to enforce good faith contract obligations. *E.g.*, *Levine v. Selective Ins. Co. of Am.*, 250 Va. 282, 286 (1995).

This Court should clarify this issue, and should follow the often-cited 1987 decision by Judge Leval in *Teachers Insurance & Annuity Ass'n of America v. Tribune Co.*, 670 F. Supp. 491, 497 (S.D.N.Y. 1987), which reflects the modern trend of the law. *See Burbach Broad. Co. of Delaware v. Elkins Radio Corp.*, 278 F.3d 401, 407 (4th Cir. 2002).

As the Fourth Circuit in *Burbach* explained, quoting Judge Leval, "[w]hile bare-boned 'agreements to agree' are not binding, courts have recognized two kinds of preliminary agreements that are binding and enforceable. Judge Leval, in his well-reasoned and often cited decision, *Teachers Insurance and Annuity Assoc. of America v. Tribune Co.*, 670 F. Supp. 491 (S.D.N.Y. 1987), recognized the importance of enforcing and preserving agreements that were intended as binding, despite a need for further documentation or further negotiation. *Id.* at 498. A Type I agreement, the "fully binding preliminary agreement," occurs when parties have reached a complete agreement (including the agreement to be bound) on all issues perceived to require negotiation. *Id.* Such an agreement is preliminary only in form-only in the sense that the parties

desire a more elaborate formalization of the agreement. *Id.* "The second stage is not necessary; it is merely considered desirable." *Id.* Judge Leval referred to the second type of binding preliminary agreement as a "binding preliminary commitment." *Id.* The binding obligations attached to a Type II preliminary agreement are different from those that arise out of the first type of agreement. Type I agreements bind parties to their ultimate contractual objective in recognition that a contract was reached, despite the anticipation of further formalities. *Id.* Type II agreements do not commit the parties to their ultimate contractual objective. Rather, they commit the parties to negotiate the open issues in good faith in an attempt to reach the contractual objective within the agreed framework.[1] *Id.* Under this duty to negotiate in good faith, a party is barred from renouncing the deal, abandoning the negotiations, or insisting on conditions that do not conform to the preliminary agreement." *Id.*

This Court should assure that *Cyberlock* is no longer used to argue that Virginia law is inconsistent with the modern view of teaming agreements.

CONCLUSION AND STATEMENT OF THE PRECISE RELIEF SOUGHT

WWS and FBC request that the Court affirm the verdict below but, at the very least, reverse the trial court's entry of judgment notwithstanding the verdict and reinstate the jury's verdict on Count II of the Complaint.

Respectfully submitted,
Appellees Federal Business Council, Inc. and WorldWide Solutions, Inc., by Counsel

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CERTIFICATE OF SERVICE

I do hereby certify, in compliance with Rule 5:26(h), that on this 4th day of January 2016, an electronic copy of the foregoing Brief of Appellees was filed electronically via, VACES and ten copies of the same were hand-filed with the Clerk of this Court. An electronic copy of the foregoing Brief of Appellees was served, via electronic mail, to the following:

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