IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WESTERN NORTH CAROLINA
ASHEVILLE DIVISION

NEXUS TECHNOLOGIES, INC., DANIEL CONTI and BENJAMIN BOMER,

Plaintiffs,

vs.

UNLIMITED POWER, LTD., and CHRISTOPHER J. PETRELLA,

Defendants,

UNLIMITED POWER, LTD., and CHRISTOPHER J. PETRELLA,

Counterclaim-Plaintiffs,

vs.

NEXUS TECHNOLOGIES, INC., DANIEL CONTI, BENJAMIN BOMER, and EDWARD PRATHER,

Counterclaim-Defendants.

Case No: 1:19-cv-00009-MR

MEMORANDUM IN SUPPORT OF DEFENDANTS' RENEWED MOTIONS FOR JUDGMENT AS A MATTER OF LAW UNDER RULE 50(b) AND DEFENDANTS' MOTION FOR A NEW TRIAL UNDER RULE 59

I. STATEMENT OF FACTS – PLAINTIFFS' CLAIMS, VERDICT SHEET, JURY'S VERDICT, AND COURT'S JUDGMENT

Plaintiffs Nexus Technologies, Inc. ("Nexus"), Daniel Conti and Benjamin Bomer brought this action for correction of inventorship of U.S.

Patent Nos. 9,865,903 (“the ’903 Patent”), 10,084,213 (“the ‘213 Patent) (‘903 and ’213 Patents collectively referred to as “the Utility Patents”), D807,806 (“the ‘806 Patent) and D815,030 (“the ‘030 Patent”) (‘806 and ‘030 Patents collectively referred to as “the Design Patents”). They further claimed that Defendants Unlimited Power, LTD. (“ULP”) and Christopher J. Petrella had violated N.C. General Statute §75.1-1 by engaging in unfair methods of competition and unfair and deceptive trade practices against Plaintiffs (“Chapter 75 Claim”).[1] [Doc.[2] 1 at 10-12 (¶¶ 32-59) & 12-13 (¶¶] 60-65)]

Prior to the pretrial conference, the parties agreed on a verdict form that, on the question of inventorship of the Utility Patents, asked the jury whether Mr. Conti had made “a contribution to the conception or reduction to practice of one or more claims of the” Utility Patents and whether Mr. Conti “alone conceive[d] of every claim of the” Utility Patents. [Doc. 71 (Nexus’s Proposed Verdict Sheet), at 2 (¶¶ 1-4) & Doc. 74 (Defendant’s Non-Objection to Nexus’s Proposed Verdict Sheet), at 1] At the pretrial conference, the

[1] Plaintiffs also brought claims for conversion and unjust enrichment/quantum meruit. [Doc. 1 at 13-14 (¶¶ 66-77)] The jury did not return a verdict on those issues and the Court did not enter judgment on them. As such, a separate joint motion to amend is being filed to dispose of those claims so that a final, and appealable judgment, can be entered.

[2] The Court’s document entries are referred to in short form as “Doc.”

Court noted the agreement as to the verdict form but indicated that it "might tweak the language a little bit." [PTr.[3] 34/21 – PTr. 35/1] A discussion then ensued between the Court and counsel regarding the verdict form questions related to the Chapter 75 Claim, but the questions related to inventorship were never discussed. [PTr. 35/ 2 – PTr. 36/11]

During trial, after close of the evidence and just prior to closing arguments, the Court distributed drafts of the verdict sheet and the jury charge and allowed counsel ten minutes to review both before discussing the sheet and charge. [TTr.[4] 596/23 – TTr. 597/5] Defendants raised an objection to the inventorship verdict sheet and the jury charge based on the lack of a question and instruction on the requirement of corroboration for joint inventorship. [TTr. 597/ 20-25] The Court dealt with the objection to the verdict sheet, both parties stated that they had nothing further with respect to the verdict sheet, and then the discussion turned to the jury charge. [TTr. 598/ 1-23] The draft verdict sheet distributed to counsel for review was identical to the one that was actually sent to the jury after closing, with the

[3] The transcript for the pretrial conference on December 15, 2020, will be referred to herein as "PTr." with page and line numbers denoted as pg #/line #.

[4] The transcript for the trial will be referred to herein as "TTr." with page and line numbers denoted as pg #/line #.

exception of correcting typographical errors as to one of the patent numbers.

According to the verdict sheet that was submitted to and returned by the jury, Mr. Conti was determined to be the sole inventor of the "device ***described*** in" the Utility Patents.[5] [Doc. 111, at 2 (¶¶ 1-4) (emphasis added)] In addition, the jury determined that the Defendants had:

1) Convinced Plaintiffs to develop and disclose to Defendants certain ideas "under the auspices that Defendants would then hire the Plaintiffs and pay them to design and manufacture an improved" device for Defendants;
2) Surreptitiously filed patent applications embodying those ideas and named Mr. Petrella as the sole inventor on those applications;
3) Aided a third party by the name of Ravensafe in suing Plaintiffs for infringing the patents that issued from the aforesaid patent applications; and
4) Used those patents as leverage to dissuade potential investors and customers from doing business with Nexus.

Id. at 4-5 (¶¶ 9A-9D). The jury also determined that the Defendants' conduct was in commerce or affected commerce and was the proximate cause of any

[5] The jury also determined Mr. Bomer to be sole inventor of the Design Patents, but that issue is not raised by this motion. [Doc. 111, at 3 (¶¶ 1-4)]

injury to Plaintiffs. *Id.* at 6 (¶¶ 10-11). Finally, the jury determined that Plaintiffs had sustained damages in the amount of $10,650,000 as a result of Defendants' conduct. *Id.* (¶ 12).

Based on the "facts as found by the jury," the Court:

1) Concluded "as a matter of law" that Mr. Conti is the sole inventor of the Utility Patents; and
2) Concluded that the conduct found by the jury in issues 9A-9D "constitutes unfair and deceptive trade practices within the prohibitions of N.C. Gen. Stat. § 75-1.1 et seq." ("Chapter 75")."[6]

[Doc. 113, at 5] The Court, *inter alia*, ordered that the inventorship of the Utility Patents be corrected to reflect that Mr. Conti was sole inventor and that Mr. Petrella was not an inventor of either the Utility Patents or the Design Patents and that the patent assignees of Mr. Petrella receive nothing by way of those assignments. *Id.* at 8. The Court also trebled the jury's damages award and awarded a sum of $31,950,00, with prejudgment interest, jointly

[6] The Court also granted judgment as a matter of law to Nexus, Mr. Conti, and Edward Prather on Defendants' Chapter 75 counterclaim and noted that it had previously granted summary judgment in favor of the Plaintiffs on Defendants' counterclaims for breach of contract, unjust enrichment, and conversion; granted summary judgment in favor of Plaintiff Mr. Bomer on Defendants' Chapter 75 counterclaim against him; and granted dismissal of Defendants' claims against Plaintiffs for negligent misrepresentation, constructive fraud, and civil conspiracy. [Doc. 113, at 5-7] However, those claims are not at issue in this Motion.

and severally, to Plaintiffs. *Id.*

II. SUMMARY OF ARGUMENT

A new trial for inventorship of the Utility Patents should be granted because the verdict sheet sent to the jury contained an error of law that affected the jury's verdict. In particular, the verdict sheet that was ultimately sent to the jury, which was not the one agreed upon by the parties prior to trial, incorrectly asked the jury whether Mr. Conti was an inventor of the device "***described***" in the Utility Patents instead of whether he was an inventor of the device "***claimed***" in the Utility Patents. Only individuals who conceive of claimed inventions in a patent are entitled to be named as inventors. Having the jury determine only whether Mr. Conti was an inventor of devices that may have been ***described*** in the patents, but not necessarily ***claimed*** by the patents, is an insufficient factual finding upon which to base a judgment of inventorship. A new trial is required in order to have the jury address the proper factual findings of inventorship.

Judgment as a matter of law or, in the alternative, a new trial is warranted with respect to the Court's entry of judgment against Defendants on Plaintiff's Chapter 75 Claim because the conduct found by the jury to exist is not "in or affecting commerce" as required by the North Carolina statute and is not an activity between "market participants." In particular, "commerce" is defined in Chapter 75 as meaning "business activities" that are conducted as day-to-day activities, that those in which the business "regularly engages," that are those in which the business interacts with other "market participants," and those for which the business was "organized." Internal operations of a single business (or in this case a single proposed joint venture) such as raising capital, are not "business activities" within the meaning of Chapter 75. None of the jury's findings relate to the actual business in which the Defendants, or any of the Plaintiffs, regularly engage or for which they were organized. There is no question that the Plaintiffs do not have a product, such as the one that is a subject of this litigation, for sale and have never been in the market, so they are not market participants. The Chapter 75 Claim is based entirely on the argument that the Defendants' conduct kept them out of the market and prevented them from raising capital. There was no evidence indicating that either Nexus or ULP was ready to engage in day-to-day sales activities in the market and, therefore, the jury's verdict that the conduct of the Defendants was "in commerce" or "affected commerce" is not supportable as a matter of law. Accordingly, judgment as a matter of law should be granted in favor of Defendants on the Chapter 75 Claim. In the alternative, a new trial should be ordered to allow Plaintiffs to make the proof necessary to show that the alleged conduct is the type of activity regularly engaged in, day-to-day, and is the activity for which the businesses were organized.

If judgment as a matter of law is not granted or a new trial is not ordered on the Chapter 75 Claim, then the jury's damages award should be reduced, as a matter of law, to no more than $260,456.68 (Nexus's attorneys' fees incurred in the Ravensafe lawsuit),[7] which is the only provable amount of damages that the jury could have found. North Carolina law makes clear that, where damages are based on ***future*** lost profits for a new business or business opportunity not having a record of profitability, a damages award for a Chapter 75 Claim requires "strict scrutiny" and cannot be "speculative." There is simply no evidence here that Plaintiffs would have made sales of a product but for the alleged deceptive practice of Defendants. In fact, the testimony from Nexus itself is that its damages request was based on ***future*** projections and lost ***future*** profits, not for profits that it had already lost. There is simply no evidence supporting a "reasonable certainty" that a jury could have calculated lost profits of over $10,000,000 and Nexus's estimation of its damage is based on assumptions that are purely

[7] If the Chapter 75 liability remains, but a new trial is ordered on the issue of inventorship of the Utility Patents and if, at that new trial, Mr. Conti is not found to be an inventor, then the damages award should be reduced to zero because aiding Ravensafe in a patent infringement action against a non-inventor/non-owner cannot be an unfair or deceptive trade practice.

speculative in nature. In fact, Mr. Conti admitted that his revenue and lost profits projections were ***speculation*** based on his hope. Thus, judgment as a matter of law should be granted to reduce the damages to no more than the amount of attorneys' fees incurred for the Ravensafe infringement case because the award is based on pure speculation.

III. ARGUMENT

A. STATEMENT OF THE LAW

1. Applicability of Fourth Circuit and Federal Circuit Law

In patent cases, the law of the regional circuit, in this case the Fourth Circuit, applies to nonpatent issues. *Institut Pasteur v. Cambridge Biotech Corp. (In re Cambridge Biotech Corp.)*, 186 F.3d 1356, 1368 (Fed. Cir. 1999). The nonpatent issues relevant here are the standards for a motion for judgment as a matter of law under Rule 50(b) and a motion for a new trial under Rule 59, both of which are governed by Fourth Circuit law. *LendingTree, LLC v. Zillow, Inc.*, 54 F. Supp. 3d 444, 450 (W.D.N.C. 2014). However, the law of the Federal Circuit governs "issues of substantive patent law". *In re Spalding Sports Worldwide*, 203 F.3d 800, 803 (Fed. Cir. 2000). Inventorship is an issue of "federal patent law" and is, thus, governed by Federal Circuit law requiring proof by clear and convincing evidence. *BJ Servs. Co. v. Halliburton Energy Servs.*, 338 F.3d 1368, 1373 (Fed. Cir.

2003).

2. New Trial Standard – Discretion to Prevent an Unfair Trial

Rule 59(a)(1)(A) states that a district court "may, on motion, grant a new trial on all or some of the issues—and to any party . . . for any reason for which a new trial has heretofore been granted in an action at law in federal court." Fed.R.Civ.P. 59(a)(1)(A). In the Fourth Circuit, a new trial will be granted under Rule 59(a) if "(1) the verdict is against the clear weight of the evidence, or (2) is based upon evidence which is false, or (3) will result in a miscarriage of justice, even though there may be substantial evidence which would prevent the direction of a verdict." *Cline v. Wal-Mart Stores, Inc.*, 144 F.3d 294, 301 (4th Cir.1998) (quoting *Atlas Food Sys. & Servs., Inc. v. Crane Nat'l Vendors, Inc.*, 99 F.3d 587, 594 (4th Cir.1996)). While the decision to grant or deny a new trial rests within the sound discretion of the district court, *Johnson v. Wal-Mart Stores, Inc.*, No. 98-2087, 1999 U.S. App. LEXIS 9511, *9 (4th Cir. May 19, 1999), a trial court "should not hesitate to set aside their verdict and grant a new trial in any case where the ends of justice so require." *Aetna Cas. & Sur. Co. v. Yeatts*, 122 F.2d 350, 354 (4th Cir. 1941). Ultimately, the "crucial inquiry is 'whether an error occurred in the conduct of the trial that was so grievous as to have rendered the trial unfair.'" *Bristol Steel & Iron Works v. Bethlehem Steel Corp.*, 41 F.3d 182, 186 (4th Cir.

1994) (quoting *DMI, Inc. v. Deere & Co.*, 802 F.2d 421, 427 (Fed. Cir. 1986)).

3. Judgment as a Matter of Law Standard – Lack of a Legally Sufficient Evidentiary Basis

Pursuant to Fed. R. Civ. P. 50, a district court may grant judgment as a matter of law when it finds that "a reasonable jury would not have a legally sufficient evidentiary basis to find for the non-moving party." FRCP 50(a); *Dotson v. Pfizer, Inc.*, 558 F.3d 284, 292 (4th Cir. 2009). In determining the question of sufficient evidentiary basis, "[t]he question is not whether there is literally no evidence supporting the party against whom the motion is directed, but whether there is evidence upon which the jury properly could find a verdict for that party." 9A Wright & Miller, Federal Practice & Procedure § 2524 (3d ed. 1995). A district court may enter judgment as a matter of law if "it concludes, after consideration of the record as a whole in the light most favorable to the non-movant, that the evidence presented supports only one reasonable verdict, in favor of the moving party." *Dotson*, 558 F.3d at 292 (internal quotation marks and citations omitted).

B. NEW TRIAL FOR INVENTORSHIP IS WARRANTED

A new trial for inventorship of the Utility Patents should be granted because the verdict sheet sent to the jury contained a clear error of law that affected the jury's verdict. An error of law in the verdict sheet, by definition, is an abuse of discretion if not rectified by the trial court. The verdict sheet's reference to the device "***described***" in, instead of the device "***claimed***" in, the Utility Patents is legally incorrect and warrants a new trial.

Determining inventorship requires finding the inventor of the invention ***claimed*** in the Utility Patents and not the inventor of the invention that is merely ***described*** in the Utility Patents. The caselaw from the Federal Circuit is clear that "[d]etermining 'inventorship' is nothing more than determining who conceived the subject matter at issue [that] is recited in a ***claim*** in [a patent or patent] application. *Sewall v. Walters*, 21 F.3d 411, 415 (1994) (emphasis added). "Conception must include every feature or limitation of the ***claimed invention***." *Slip Track Sys. v. Metal-Lite, Inc.*, 304 F.3d 1256, 1263 (Fed. Cir. 2002) (emphasis added). Furthermore, "[i]t is axiomatic that the ***claims define the metes and bounds of [a patented] invention***." *Boesen v. Garmin Int'l, Inc.*, 455 F. App'x 974, 975 (Fed. Cir. 2011) (emphasis added).

Inventorship has never been based on what is merely described in a patent because patents include more than just claims that define the invention. In fact, 37 CFR §1.77(b) indicates that a patent's "specification should include" several sections, including a statement regarding prior disclosures by the inventor, a background of the invention, and a detailed description of the invention, in addition to one or more claims. The Patent

Office's own rules, codified in the Manual of Patent Examining Procedure ("MPEP"), specify that, in addition to the claims, a patent should set forth a Background of the Invention section. MPEP §608.01(a), ¶6.01(g) (copies of cited MPEP sections attached as Exhibit 1). The Background of the Invention section may include a description of the related art, which describes "the state of the prior art" and other information known to the inventor. MPEP §608.01(c). The description of the related art may also include an explanation of "the problems involved in the prior art or other information disclosed which are solved by the applicant's invention." *Id.*

"Prior art" and "related art" are not part of the "claimed invention." In fact, it has long been held that a patent claim must "be patentable over the prior art." *Caterpillar Tractor Co. v. Berco, S.P.A.*, 714 F.2d 1110, 1115 (Fed. Cir. 1983) (indicating that remarks made to the U.S. Patent Office did not make the "***claims*** [at issue] ***patentable over the prior art***"). Mr. Conti may have invented the device or devices ***described*** in the Utility Patents, but that jury determination is not enough to support the Court's legal judgment that Mr. Conti is the sole inventor, or even an inventor, of the claimed invention of the Utility Patents. The verdict form[8] asked the jury a question that is

[8] As explained earlier, the verdict sheet used by the Court was not the one that the parties had agreed to prior to trial but was the one proposed by the Court just prior to closing arguments. *Supra* at 2-3. While the prior agreed-

incorrect as a matter of law to support the Court's judgment.

In the Fourth Circuit, an error of law in a verdict sheet is, by definition, an abuse of discretion and justifies a new trial. Although a district court's jury instructions and verdict form will be reviewed for an abuse of discretion by the Fourth Circuit on appeal,[9] *see United States v. Perry*, 335 F.3d 316, 322 n. 10 (4th Cir. 2003), they will be "review[ed] *de novo* [as to] whether [they] correctly state the law." *BMG Rts. Mgmt. (US) LLC v. Cox Commc'ns, Inc.*, 881 F.3d 293, 305 (4th Cir. 2018). "'[B]y definition[, a trial court] abuses its discretion when it makes an error of law'" and, therefore, a verdict will be set

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to verdict sheet correctly referred to the "claims" of the Utility Patents, it was also legally incorrect because it referred to "reduction to practice," which is irrelevant to a determination of inventorship. However, because that verdict sheet was not used, that issue is moot. If a new trial is granted, Defendants will propose new jury questions that are legally correct.

[9] Even though Defendants objected to the verdict sheet questions regarding inventorship [TTr. 597/ 20-25], Plaintiffs may argue that the objection was not properly preserved because it was not based on the "described" vs. "claimed" distinction. However, the agreed form of the verdict sheet is available in a potential record on appeal [Doc. 71, 74, 94], thus preserving the ability to review. However, where a party does not object to a verdict sheet, a new trial may be granted because of the plain error associated with the incorrect verdict question because it affected Mr. Petrella's substantial right of inventorship. *See Perry*, 335 F.3d at 321 n. 10 (noting that if Defendant had not "properly object[ed] to the instructions or verdict sheet" the Fourth Circuit would review for "plain error"); *Gentry v. E. W. Partners Club Mgmt. Co. Inc.*, 816 F.3d 228, 237 (4th Cir. 2016); *see also* FRCP 51(d)(2) (allowing a court to consider a "plain error . . . that has not been preserved . . . if the error affects substantial rights").

aside if "'there is a reasonable probability' that the erroneous instruction 'affected the jury's verdict.'" *Id.* Like the jury charges in *BMG*, the verdict sheet here reflected a standard that was "too low" for the resulting finding. *Id.* Being an inventor of a device ***described*** in a patent does not mean that one is an inventor of a device ***claimed*** in a patent. As in *BMG*, where the jury charge reflected a standard that was "too low," the verdict sheet used here reflected a standard that was "too low" and was, therefore, incorrect as a matter of law. *See id.* Accordingly, the Defendants should be granted a new trial on the inventorship issue. *Cf. Andree v. Briskie*, 1988 U.S. App. LEXIS 20487, at *4 (4th Cir. Nov. 10, 1988) (vacating and remanding for a new trial where an error existed in the verdict form).

C. JUDGMENT AS A MATTER OF LAW OR, IN THE ALTERNATIVE, A NEW TRIAL, IS WARRANTED FOR THE CHAPTER 75 CLAIM BECAUSE PLAINTIFFS FAILED TO PROVE CONDUCT VIOLATING CHAPTER 75

Judgment as a matter of law or, in the alternative, a new trial is warranted with respect to the Chapter 75 Claim because the conduct found by the jury to exist is not "in or affecting commerce" as required by the North Carolina statute. This is a threshold inquiry because "[b]efore a practice can be declared unfair or deceptive, it must first be determined that the practice or conduct which is complained of takes place within the context of the statute's language pertaining to trade or commerce." *Johnson v. Phx. Mut.*

Life Ins. Co., 300 N.C. 247, 261, 266 S.E.2d 610, 620 (1980). An examination of the record here shows that there was insufficient evidence to support the jury's determination that Defendants' conduct was in or affecting commerce. Consequently, Defendants are entitled to judgment as a matter of law on these claims.

The North Carolina Supreme Court addressed the limits of Chapter 75 liability and whether certain activities that businesses from time to time undertake, such as raising capital, in contrast to their regular activities such as buying and selling goods, fall within the "commerce" requirement of Chapter 75. *See HAJMM Co. v. House of Raeford Farms, Inc.*, 328 N.C. 578, 403 S.E.2d 483 (1991). The *HAJMM* court concluded that business interactions outside of day-to-day activities, such as ones undertaken for purposes of raising or retaining capital,[10] fall outside of the legislative intent of Chapter 75 and, therefore, are not subject to its remedies. *Id.* at 595, 403 S.E.2d at 493. In reaching its conclusion, the *HAJMM* court explained that "business activities," which are included within the "commerce" definition of Chapter 75, refers to the "manner in which businesses conduct their regular,

[10] The court in *HAJMM* concluded that the revolving fund certificate securities that defendants refused to redeem, which was the basis of the alleged unfair and deceptive conduct, were in fact "capital-raising" devices. *See HAJMM*, 328 N.C. at 595, 403 S.E.2d at 493.

day-to-day activities, or affairs, such as the purchase and sale of goods, or whatever other activities the business regularly engages in and for which it is organized." *Id.* at 594, 403 S.E.2d at 493.

Defendants' activities here that were alleged to have been unfair and deceptive all relate, like the activities in *HAJMM*, to the raising of capital by Plaintiffs. For example, Mr. Conti testified that the purpose of developing, in conjunction with ULP, a "pitch deck" investor presentation for the product was to "raise" money. [TTr. 194/2 – 195/11] Mr. Conti explained that later, as he was continuing his attempt to put together a business venture with ULP and "building a different type of investor deck," he was "deceived" by Defendants. [TTr. 182/15 – 183/7] He said that the alleged "deception" was occurring as momentum and interest were building from investors and brokerage houses. [TTr. 183/3-7] Ultimately, Mr. Conti explained that the Defendants damaged Nexus by keeping Nexus "from raising any money to help finish the product and get it to market." [TTr. 223/11 – 224/ 12] All of Plaintiffs' allegations of unfair and deceptive conduct, which were the ones that the jury determined to exist, related to the raising of capital for a joint venture with Nexus to make a product.

Twenty years after *HAJMM*, the North Carolina Supreme Court reiterated its limitations on Chapter 75 conduct and explained that "raising capital, and internal operations of a single business" are "extraordinary events" that "are not business activities within the General Assembly's intended meaning of the term." *White v. Thompson*, 364 N.C. 47, 52, 691 S.E.2d 676, 679 (2010). The court further observed that the history of Chapter 75 indicates that it was targeting "unfair and deceptive interactions between ***market participants***." *Id.* (emphasis added).

The interaction between Nexus and ULP at the time, and the conduct about which Nexus complains, is related entirely to the proposed joint venture between the companies, the raising of capital, and the joint future design, development, and manufacture of a product, and is not about interaction between two companies that are actively participating in a market. The interactions between Plaintiffs and Defendants did not involve the regular purchase and sale of goods and services, or the manufacture of an existing or comparable product line, such as occurred when Nexus was regularly engaged with its customers, all of which might have been actionable under Chapter 75. The parties here were considering entry into a new foray of new products, potentially protected by patents or other intellectual property, none of which have yet been shown to be producible.

The *White* court noted that the North Carolina Supreme Court had previously examined, in *Dalton v. Camp,* 353 N.C. 647, 548 S.E.2d 704

(2001), the situation where a defendant, who was employed by the plaintiff at the time of the alleged deceptive conduct, formed a competing venture. As explained by the *White* court, the *Dalton* court had determined that "potential unfairness . . . which was confined to within a single business" is not actionable under Chapter 75. *White*, 364 N.C. at 47, 691 S.E.2d at 679. Here, in effect, the allegedly deceptive and unfair conduct related to the formation of a single joint venture entity between Plaintiffs and Defendants, which is a "single business" instead of a business activity involving two market participants. As such, the Defendants alleged deceptive conduct is not actionable under Chapter 75.

Moreover, as admitted by Mr. Conti, Nexus is still not in the market with a product because there are "final things that need to happen to bring [the Kilowatts Advanced Delivery ("KWAD") product] to market." [TTr. 222/12-21] Nexus and ULP were not market participants at the time of their interaction when ULP is alleged to have unfairly and deceptively acted. Simply put, neither party had a product in the market then, neither party has a product in the market today, neither company has ever been a ***market participant*** and, accordingly, pursuant to North Carolina law, there can be no Chapter 75 liability. *See White*, 364 N.C. at 47, 691 S.E.2d at 679.

Capital raising efforts are not commerce. Efforts to create a joint venture are not commerce. Attempting to develop prototypes is not commerce. All of these steps involve seeking funding or research and development activities, well before products enter into the market through a commercial stream. The parties were not evaluating day-to-day business activities, such as fine tuning a supply contract for an existing line of goods, but rather were considering a profound new line of business. There was no evidence indicating that either Nexus or ULP was ready to engage in day-to-day sales activities in the market. None of the jury's findings relate to the actual business in which the Defendants, or any of the Plaintiffs, regularly engage or for which they were organized. As such, this is not a situation where Chapter 75 liability can be found, and judgment as a matter of law should be granted in favor of the Defendants on this issue.

In the alternative, a new trial should be ordered to invite the Plaintiffs to make the proof necessary under North Carolina law to show that the alleged misconduct is the type of business activity regularly engaged in, day-to-day, and is the activity for which the businesses were organized.

D. JUDGMENT AS A MATTER OF LAW OR, IN THE ALTERNATIVE, A NEW TRIAL IS WARRANTED FOR DAMAGES AWARDED

If judgment as a matter of law is not granted to Defendants on Plaintiffs' Chapter 75 Claim based on the parties' activities being outside the scope of "commerce," Defendants would then be entitled to judgment as a matter of law on that claim because Plaintiffs failed to prove the $10,650,000 damages award and it is not supported by the evidence. Plaintiffs' evidence of damages was admittedly "***<u>speculation</u>***" and they failed to satisfy the standards for proving lost ***<u>future</u>*** profits. Consequently, if the Chapter 75 judgment stands, the damages award should be reduced, as a matter of law, to no more than $260,456.68, which is the amount of Nexus's attorneys' fees incurred in the Ravensafe lawsuit and the only provable amount of past damages that the jury could have found.

It is a well-established principle of law that proof of damages must be made with reasonable certainty. *Olivetti Corp. v. Ames Business Sys., Inc.*, 319 N.C. 534, 546, 356 S.E.2d 578, 585-86 (1987). In *Olivetti*, the trial court had awarded $5,200 in lost past profits, plus $401,000 in lost future profits, for a total damages award of $406,200 on a lost business opportunity Chapter 75 claim. While the North Carolina Supreme Court affirmed that a material misrepresentation had occurred, it concluded that the burden of showing damage was not met. *Id.* at 549, 356 S.E.2d at 587. Critical to the Court's analysis was consideration as to how damages could be proven for a new business opportunity. The Court reaffirmed the principle from *Lawrence v. Stroupe*, 263 N.C. 618, 139 S.E.2d 885 (1965), that future damages claims require "strict scrutiny" and that "speculative damages" are always prohibited. *Id.* at 546, 356 S.E.2d at 585. The Court observed that lost ***future*** profits are difficult for a new business to calculate and prove, but that there is "no per se rule against the award of such damages where they may be shown with the ***requisite degree of certainty***." *Id.* (emphasis added).

In *Olivetti*, the counterclaimant had not shown with ***reasonable certainty*** that it would have made the profits that it was awarded. 319 N.C. at 547-548, 356 S.E.2d at 586. The evidence was speculative as to future lost profits and could not support the damages award. *Id.* at 548-549, 356 S.E.2d at 587.

In *Iron Steamer, Ltd., v. Trinity Restaurant, Inc.*, 110 N.C. App. 843, 431 S.E.2d 767 (1993), the North Carolina Court of Appeals considered whether future lost profits could be awarded. Citing *Olivetti*, the court recognized that evidence of lost profits is to be evaluated on a case-by-case basis to determine whether damages have been proven with reasonable certainty. *Id.* at 847, 431 S.E.2d at 770. The evidence that the court reviewed proved insufficient to support an award of damages because the projections of lost profits were based on a witness's "brief experience" in the market of less than two years. *Id.* at 849, 431 S.E.2d at 771. The estimation of lost profits was found to be based "on assumptions that are purely speculative in nature." *Id.* at 849, 431 S.E.2d at 771.

Likewise, in *Castle McCulloch, Inc., v. Freedman*, 169 N.C. App. 497, 502, 610 S.E.2d 416, 420-21 (2005), *aff'd per curiam*, 360 N.C. 57, 620 S.E.2d 674 (2005), Judge Wynn, writing for the court and citing *Olivetti* and *Iron Steamer*, concluded that evidence relating to customers that "would have attended" an event, was insufficient to support an award. 169 N.C. App. at 502, 610 S.E.2d at 420-421. Consequently, the unwarranted assumptions about ***future*** business performance were insufficient to support a Chapter 75 damages award.

Even evidence of an operating business with an established product line in place may be insufficient to satisfy the burden of showing lost ***future*** profits. *See McNamara v. Wilmington Mall Realty Corp.*, 121 N.C. App. 400, 466 S.E.2d 324 (1996) *disc. rev. denied*, 343 N.C. 307, 471 S.E.2d 72 (1996) (vacating an award of $110,000 for lost ***future*** profits). There, the plaintiff did not have an established history of profits to reasonably support a forecast of future lost business. The plaintiff's evidence of damages consisted entirely of testimony of an expert whose testimony was found deficient, *Id.* at 409, 466 S.E.2d at 330.

Defendants here are clearly entitled to judgment as a matter of law with regard to the amount of damages awarded. As in *Olivetti,* Plaintiffs' evidence here is insufficient to present a reasonably probable forecast of lost ***future*** profits on a new line of products where Plaintiffs are unable to support the joint venture. Plaintiffs' showing here is even less adequate than those in the cases discussed above. Plaintiffs invested in the product on their own account. [TTr. 241/9 – 242/1] The product has never been shown to be producible at all, much less in volume. Plaintiffs here lacked the financial wherewithal to support production and lacked a firm contract for any production or development. Indeed, Mr. Conti admitted at trial that revenue estimates were "***projections***" into the future, and that it was "***speculation***" that Nexus was "hoping" to get money. [TTr. 228/19-22, 557/11-22, 242/10 – 243/1]

While Defendants do not contest using the attorneys' fees incurred by Plaintiffs to defend the patent infringement suit brought by Ravensafe on the Utility Patents – $260,456.88 – as the amount of provable past damages, those damages are clearly tied to the jury's finding regarding aiding Ravensafe in suing Plaintiffs. *See* Doc. 111, at 5 (¶ 9D). If Chapter 75 liability is upheld but Mr. Conti is determined, after a new trial, to be an inventor of the Utility Patents, then aiding Ravensafe in a patent infringement action against a non-inventor/non-owner would not be an unfair or deceptive trade practice. Accordingly, in that case, there are no awardable past damages for the Chapter 75 Claim and the award should be reduced to zero.

Because Plaintiffs' evidence of lost profits was inadequate, the damages award must be vacated and judgment as a matter of law awarded to Defendants. In the alternative, a new trial should be ordered so that Plaintiff is required to put on non-speculative damages for its Chapter 75 Claim.

THIS the 26th of April, 2021.

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CERTIFICATE OF SERVICE

This is to certify that the foregoing **MEMORANDUM IN SUPPORT OF DEFENDANTS' RENEWED MOTIONS FOR JUDGMENT AS A MATTER OF LAW UNDER RULE 50(b) AND DEFENDANTS' MOTION FOR A NEW TRIAL UNDER RULE 59** was served upon the parties in this action in accordance with the provisions of Rule 5 of the Federal Rules of Civil Procedure via the ECF system, addressed to their counsel of record, in cases in which they appear, as follows:

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