SUPREME COURT OF ARIZONA

ROY MCALISTER, KATHLEEN MCALISTER and MCALISTER TECHNOLOGIES, an Arizona corporation, Petitioners, v. LOEB & LOEB LLP, a California limited liability partnership, Respondent/Cross-Petitioner.	Arizona Supreme Court No. CV-24-0048 Arizona Court of Appeals, Division One No. 1 CA-CV 23-0212 Maricopa County Superior Court No. CV2018-012158

RESPONDENT/CROSS-PETITIONER'S SUPPLEMENTAL BRIEF

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I. Introduction

In *Gilmore v. Cohen*, 95 Ariz. 34 (1963), this Court confirmed that an established business may only recover lost-profit damages if such damages are proved with "reasonable certainty." Two decades later, in *Rancho Pescado, Inc. v. Northwestern Mutual Life Insurance Company*, 140 Ariz. 174 (App. 1984), the Court of Appeals held that lost-profit damages also may be recovered by a new or unestablished business but reiterated the "reasonable certainty" requirement.

Although one virtue of Arizona's "reasonable certainty" requirement for new businesses is that it is flexible enough to account for the myriad of factual scenarios in which lost-profit claims may arise—as noted in *Rancho Pescado*, "[t]he evidence required to prove loss of future profits depends on the individual circumstances of each case," 140 Ariz. at 184—it is not toothless. Indeed, "it is substantially more difficult for a new business than for an experienced business to prove lost profits damages with reasonable certainty," and courts must "carefully scrutinize a new business's claim that, but for the conduct of the defendant, it would have gained substantial profit in a venture in which it had no experience." *Larry Schwarz & N.J. 322, LLC v. Menas*, 279 A.3d 436, 448 (N.J. 2022). *See also AlphaMed Pharms. Corp. v. Arriva Pharms., Inc.*, 432 F. Supp. 2d 1319, 1340 (S.D. Fla. 2006) ("The rationale for applying heightened skepticism to new businesses' claims of lost profits is clear: the commercial success of a new venture should be determined in the marketplace, not in the courtroom. An

endorsement of the alternative would permit start-up corporations to reap unearned profits without bearing the costs and risks that every other entrepreneur must shoulder."). To that end, Arizona courts—as well as courts outside Arizona applying the same "reasonable certainty" requirement—have identified two fundamental showings that a plaintiff must make when, as here, alleging that the defendant's challenged conduct interfered with the plaintiff's ability to enter into an agreement to pursue a new business venture, thereby resulting in lost profits: *first*, the plaintiff must establish a reasonable certainty that the plaintiff and a third party would have entered into an agreement to pursue that new business venture, which at a minimum requires evidence of agreement as to all material terms; and *second*, the plaintiff must establish to a reasonable certainty that the resulting business venture would have been profitable.

The McAlister Parties did not come close to making either of those showings. Beginning with the first requirement, although O'Flynn testified during his deposition that he "would have" agreed to a license agreement that included, among other things, a $5 million upfront payment, McAlister testified that he had no intention of entering into a licensing agreement, with O'Flynn or anyone else, unless it provided for a $20 million upfront payment payable upon execution. Although O'Flynn and McAlister also failed to reach a meeting of the minds as to several other key aspects of their contemplated business arrangement, their dramatic—and undisputed—disagreement over the size of the required upfront payment is alone sufficient to foreclose any claim

for lost-profit damages. In concluding otherwise, the Court of Appeals effectively authorized an award of damages based on Loeb & Loeb LLP's ("Loeb") alleged interference with a hypothetical agreement whose terms McAlister himself was unwilling to accept. This is the antithesis of reasonable certainty.

The McAlister Parties also failed to make the required showing as to the second requirement. In an earlier portion of its decision, the Court of Appeals correctly explained why Plaintiffs' "evidence was inadequate to permit a non-speculative finding of lost profits with respect to royalty payments." It reasoned that the McAlister Parties' expert, Epperson, had "speculated about critical facts (particularly regarding the minimum-royalty payments), inexplicably ignored expenses, and without adequate explanation used an algorithm that assumed profitability based on (speculative) revenue alone." Nevertheless, in the later portion of its decision addressing the claim for $5 million in lost-profit damages based on O'Flynn's testimony, the Court of Appeals disregarded the very same flaws and ignored the "reasonable certainty" requirement, instead applying only the "scintilla" test for surviving summary judgment established in *Orme School v. Reeves*, 166 Ariz. 301 (1990).

The Court of Appeals erred in this regard. The McAlister Parties' claim for $5 million in damages based on O'Flynn's testimony is still, at its core, a *lost-profits* claim. As such, it remains subject to the "reasonable certainty" standard applied to all lost-profits claims. For the same reasons that the McAlister Parties failed to establish that a

reasonable certainty of any lost profits resulting from the alleged lost licensing deals with O'Flynn, Haver, Karl, and Burns, they also failed to establish a reasonable certainty of any lost profits arising from the $5 million initial payment by O'Flynn. The Court of Appeals assumed that the $5 million payment, if made, would have been pure profit to the McAlister Parties, but this assumption ignored the undisputed evidence, as well as the realities of how any business operates.

Finally, the Court of Appeals erred by dramatically expanding trespass to chattels claims, which have long required interference with physical property, to include electronic touching of intangible property. Any such expansion should instead be considered, analyzed, and then enacted pursuant to the legislative process.

II. Analysis

A. The Court Of Appeals Erred By Partially Reversing The Superior Court's Grant Of Summary Judgment In Loeb's Favor.

The Court of Appeals concluded that summary judgment was improper because "the plaintiffs were entitled to have the factfinder assess whether there is credible evidence that O'Flynn would have made an initial payment of $5 million with no specified contingencies." Mem Dispo ¶ 37. This analysis was flawed for two independent reasons. First, no reasonable certainty existed with respect to whether O'Flynn and McAlister would have executed a licensing agreement, including a $5 million upfront payment, in light of the undisputed evidence that McAlister himself would not have agreed to such an arrangement. McAlister testified that he would have

insisted on a minimum upfront payment of $20 million and there was evidence of other disagreements between O'Flynn and McAlister over additional material terms. Second, the Court of Appeals also improperly assumed—despite the undisputed evidence in the record—that the $5 million payment would have been pure profit for the McAlister Parties. Because this Court's review addresses the sufficiency of the evidence at the summary judgment stage, this brief first addresses the relevant evidence and then the applicable case law.

1. Plaintiffs Did Not Meet Their Evidentiary Burden.

a. O'Flynn And McAlister Never Resolved Their Fundamental Disagreements Over The Payment Terms Of The Contemplated License Agreement.

The Court of Appeals relied on O'Flynn's deposition testimony—that he would have agreed to a license agreement that included, among other things, a $5 million payment upfront—to hold that the Superior Court erred by granting summary judgment as to this aspect of the McAlister Parties' lost-profits claim. Mem Dispo ¶¶ 36-37. In reaching this conclusion, the Court of Appeals ignored the deposition testimony establishing that O'Flynn and McAlister did not reach an agreement on the payment for a license agreement.

Specifically, O'Flynn testified that he would have agreed to a $5 million upfront payment in a potential license agreement, but he was adamant that he would not have agreed to pay $15 or $20 million annual royalty payments until after commercialization, construction, and revenue generation:

Q: And was that range -- what was that range at that time?
A: ***I think it was -- as I said, I think it was between -- whether it was five for the initial upfront and between 15 and -- and 20 for the ongoing royalty fee post-construction I think it was. So the facility obviously had to be built, revenue generated instead of paying ongoing royalty fee in the construction phase, which would have been -- would have been, obviously, unattainable, from my perspective.***
Q: Okay. And when you say five upfront, was that 5 million upfront to Roy McAlister?
A: To McAlister Technologies, yeah.
Q: Okay. And was that a number that you were still negotiating or was that the highest you were willing to consider?
A: No, that was fine. It was more the -- it was more the -- the post-construction royalty fee that -- that we were negotiating on.
Q: And so in your mind, it would have been 5 million upfront, and then further fees would come once the business was revenue-generating; correct?
A: Post-construction, yeah.
Q: And when you say "post-construction," does that also mean post-commercialization?
A: Operating.
Q: The business would be operating?
A: Correct.
Q: And when you say the business would be operating, does it also mean revenues coming in?
A: That's correct.

IOR.363 at 197-98 (O'Flynn's Depo. Tr., 81:20-82:25) (emphasis added).

In contrast, McAlister testified that he would only enter into a licensing agreement providing for a $20 million payment, due at execution of the agreement:

Q: And did you do your very best to ensure the documents you re-created were -- had the same financial terms as the documents you claim to have been negotiating with the damage witnesses in 2015?
A: Well, let's go down the list. ***My universal agreement always required the licensee to pay $20 million at the beginning of the agreement.***

IOR.363 at 66 (McAlister Depo. Tr., 77:11-18) (emphasis added).

McAlister also testified—contrary to O'Flynn's expectations as set forth above—that he would require a licensee to pay $20 million every year after signing the agreement regardless of when commercialization, construction, and generation of revenue began:

> Q: That language does not require a $20 million payment upon signing, does it?
> A: Yes.
> Q: Where does it say that?
> A: And every year thereafter that they continue.
> Q: Where does it say 20 million on signing?
> A: ***Well, that is the successive year from the signing on at the beginning of this, whatever this date of starting is, the $20 million, and then every year after that they elect to continue the license, that's $20 million.***
> Q: Okay. Well, I see it says, "At the beginning of each successive year." Do you see that?
> A: I do. That's what it means.
> Q: Where does it say "at the beginning" or "on signing," where does it say that?
> A: Well, that's the deal that I made.
> Q: So you think there's typos in this?
> A: No. Look, these are sophisticated people. They're not going to sublicense something that they don't have a license to. Number two, they're not going to build anything, any factory without a license. And I wouldn't give a license without them paying at the beginning of the license.

IOR.363 at 67 (McAlister Depo. Tr., 117:1-25) (emphasis added).

O'Flynn's and McAlister's testimony shows that they had fundamental disagreements about the size of the initial payment (McAlister demanded $20 million while O'Flynn was only willing to pay up to $5 million) and the timing of the subsequent payments (McAlister demanded $20 million every year of the agreement while O'Flynn was only willing to begin making subsequent payments after

McAlister's business succeeded in developing a product and generating revenue).[1] It is speculative, to put it mildly, that McAlister and O'Flynn would have somehow found a way to reach common ground on these unresolved issues and then execute an agreement involving an upfront $5 million payment—a deal point that, according to McAlister's own testimony, was unacceptable.[2]

b. There Is No Evidence That The $5 Million Payment Would Have Been Pure Profit.

Much of the litigation at the trial-court level concerned the inadequacy of the McAlister Parties' expert, Epperson, in calculating their overall lost profits. In affirming the trial court's exclusion of Epperson's damages opinions, the Court of Appeals found, among other things, that Epperson "inexplicably ignored expenses, and

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[1] In their response to Loeb's cross-petition, the McAlister Parties identify certain emails as purported evidence that O'Flynn and McAlister had reached an agreement as to the material terms of the licensing agreement. This argument rests on a mischaracterization of the emails in question, which have nothing to do with the size of the upfront payment or the timing of the subsequent payments. The response also contains various factual assertions that are simply incorrect, such as that "O'Flynn personally invested $3.8 million to license technology from Petitioners." Resp. to Cross-Petition at 4. In fact, distributors, like O'Flynn, entered into distributorship agreements with AGT, a separate company that went bankrupt after spending over $100 million in an attempt to commercialize some of McAlister's patents, to become an exclusive distributor of a to-be-commercialized product in a particular territory. IOR.363 at 137; IOR.539 at 30-67.

[2] The disagreement over the timing of the $20 million royalty payments was no small matter. O'Flynn estimated that it would take at least four years before the new business venture would generate any revenue. IOR 317 at 128. As noted, O'Flynn testified that he was only willing to begin making $20 million royalty payments after that benchmark was achieved. In contrast, under McAlister's required deal structure, O'Flynn would have been required to pay $80 million in royalties before a single dollar of revenue arrived.

without adequate explanation used an algorithm that assumed profitability based on (speculative) revenue alone." Mem Dispo ¶ 32.

The McAlister Parties did not shore up any of these deficiencies with respect to their claim for $5 million in lost-profit damages arising from O'Flynn's testimony. They ignore Epperson's testimony that McAlister would have borne the expenses necessary to produce a commercialized product, which had not yet occurred. IOR.317 at 89-90. They improperly rely on McAlister's self-serving affidavit that he would have just received a check for $5 million without a corresponding obligation to incur expenses. Nonetheless, the Court of Appeals improperly assumed that the $5 million payment from O'Flynn would have been pure profit for the McAlister Parties.

2. The Court Of Appeals Did Not Utilize The Correct Standard For Lost Profits.

Although the Court of Appeals noted, at the outset of its analysis of the admissibility of Epperson's testimony, that *Rancho Pescado* requires a showing of reasonable certainty with respect to lost profits, Mem Dispo ¶ 17, it did not follow or even mention that standard when analyzing the McAlister Parties' claim for $5 million in lost profits arising from the O'Flynn licensing fee. Instead, in that portion of the decision, the Court of Appeals applied *Orme School*'s "scintilla of evidence" standard, holding that O'Flynn's testimony (although "sparce") was sufficient to preclude summary judgment. Mem. Disp. ¶¶ 34-37. This approach was erroneous. *See, e.g.*, *Powers Steel & Wire Prods. v. Powers*, No. 1-CA-CV-22-0469, 2023 WL 5567896, at

*4 ¶¶ 19-20 (Ariz. App. Aug. 29, 2023) (concluding that "summary judgment was appropriate [on a misappropriation of trade secrets claim] because Powers Steel did not show with reasonable certainty that it lost profits because of Suncoast Defendants' alleged conduct" where Powers Steel's expert report on damages consisted of "mere speculation" and where "self-serving assertions did not create a genuine factual dispute about damages"); *S. Union Co. v. Sw. Gas Corp.*, 180 F. Supp. 2d 1021, 1051-52 (D. Ariz. 2002) (granting summary judgment on lost-profit damages because there was not an agreement on the stock share price: "[t]he indeterminacy concerning this basic merger term illustrates that Southern Union's claim for lost profit damages is too speculative to support recovery").

The "reasonable certainty" requirement arises from *Gilmore*, where the Court addressed lost-profit damages stemming from a contract in which Cohen agreed to sell Gilmore thirteen parcels of land but terminated the contract after selling six of the parcels. 95 Ariz. at 35. Although *Gilmore* did not involve a new business, it is still instructive. There, a developer sought the future profits he would have received after purchasing, developing, and then selling the additional seven parcels. *Id.* The Court held that the plaintiff had the burden to establish their lost profits with "reasonable certainty." *Id.* at 36. The Court recognized that "certainty in the amount of damages is not essential to recovery when the *fact* of damage is proven" but that a plaintiff must still "provide some basis for estimating [] loss." *Id.* (cleaned up). Importantly,

"conjecture or speculation cannot provide the basis for an award of damages[.]" *Id.* The Court further held that lost future profits are "capable of proof more closely approximating mathematical precision" and that a "plaintiff in every case should supply some reasonable basis for computing the amount of damage and must do so with such precision as, from the nature of his claim and the available evidence, is possible." *Id.* The Court concluded that the plaintiff failed to meet its burden because, among other things, it did not introduce evidence establishing the profit it made, if any, from the sale of the first six parcels (which made it impossible to conclude that the plaintiff would have generated profits from the remaining seven parcels). *Id.* at 36-37.

In *Rancho Pescado*, the Court of Appeals court addressed lost-profit damages for a breach-of-contract claim in the context of a new business. *Rancho Pescado* involved an individual (hereafter "Catfish Farmer") who attempted to establish a commercial catfish farm in a canal, even though 95% of all fish farmers utilized pond farming. 140 Ariz. at 185. In December 1973, the Catfish Farmer and Northwestern Mutual Life Insurance Company ("Northwestern"), the owner of the canal where the Catfish Farmer wanted to establish its farm, entered into a five-year exclusive license agreement. *Id.* at 178. A year later, Northwestern terminated the agreement because the continuous water flow needed for the catfish farm was interfering with the operations of Northwestern's ranch located next to the canal. *Id.* The Catfish Farmer

sued for lost profits from the catfish sales he claimed he would have made had Northwestern not terminated the agreement. *Id.*

Although Arizona law did not allow a new business to seek lost-profit damages because of their speculative nature, *Rancho Pescado* reversed course and held that a plaintiff may seek lost-profit damages for a new business if such damages are established with reasonable certainty. *Id.* at 184-85. *Rancho Pescado* also provided examples where a plaintiff met the reasonable certainty standard, such as by introducing evidence of a profit history for a similar business operated by the same party at a different location or the profit history of the particular business if it was successfully operated by a someone else. *Id.* at 184. The court recognized that neither of those circumstances applied but that, "as is the case with an established business, reasonable certainty may be provided when the plaintiff devises some reasonable method of computing [] net loss." *Id.* at 184 (citation omitted). The court required the Catfish Farmer to prove "with reasonable certainty the fact that it could raise catfish in the canal and that it could thereafter market them at a profit as well as proving with reasonable certainty how much profit it would have realized." *Id.* at 184-85. The court recognized that "various experts testified that catfish farming is an extremely risky business" with a 95% failure rate, that an additional expert believed more development was needed to determine if canal farming could be successful, and that the sole piece of evidence regarding marketability was a letter from a fish distributor, Frosty Fish, who represented

that it would purchase the Catfish Farmer's entire production of eight million pounds of catfish, amounting to 11.42 percent of the entire crop of catfish harvested. *Id.* at 185. According to *Rancho Pescado*, the most successful catfish farmer in the United States had only raised catfish in a pond and sold 400,000 pounds of catfish in his best year. *Id.* Frosty Fish had never distributed this volume of catfish and went bankrupt between the termination of the agreement and the trial. *Id.* The court held that the Catfish Farmer did not establish lost profits with reasonable certainty:

> In conclusion, we view the evidence as a whole as amounting to nothing more than conjecture and speculation. The picture which emerges is one of an intelligent and enterprising individual who had an ambitious idea to take advantage of existing waterways to raise and sell catfish. However, the evidence is insufficient to prove that he would have succeeded in this highly risky industry. Although he had apparently done quite a bit of research into the catfish industry in general, his experiments on behalf of Rancho Pescado were woefully inadequate. Perhaps most damaging to Rancho Pescado's case is the lack of any conclusive evidence that it could have successfully marketed such large quantities of catfish.

Id. at 186.

Following *Rancho Pescado*, Arizona courts have had a number of occasions to analyze lost-profit claims in connection with new businesses. When—unlike here—a plaintiff provides sufficient evidence of profits for an identifiable product in an identifiable market, courts have held that such a plaintiff may recover lost profits. For example, in *Great Western Bank v. LJC Development, LLC*, 238 Ariz. 470, 473-74 (App. 2015), a developer filed a contract claim against a lender who failed to fund a loan pursuant to a construction loan agreement. The developer sought the profits it

would have generated had it been able to construct homes in Flagstaff and then sell them. *Id.* at 474. As evidence, the developer provided evidence of profit projections, revised profit projections, and market reports for the Flagstaff housing market, which the court held sufficient to establish lost profits. *Id.* at 481-82. *See also U.S. Fidelity Guar. Co. v. Davis*, 3 Ariz. App. 259, 260 (1966) (concluding that evidence of how much each head of cattle would have grown and then sold for in the marketplace based on a per-pound value, had the cattle had the opportunity to grow and be sold as originally contemplated, was sufficient evidence for lost profit damages); *Short v. Riley*, 150 Ariz. 583, 584-86 (App. 1986) (finding that evidence that the plaintiff had previously run the same restaurant profitably was sufficient to meet reasonable certainty standard); *Yakima v. County of La Paz*, 224 Ariz. 590, 607-08 (App. 2010) (finding reasonable certainty of lost future profits from executed contracts that the plaintiff had with the cities of Los Angeles and Orange County, where those cities were already performing under their contracts).

In contrast, courts have held that reasonable certainty is lacking where—as here—a party introduces only vague allegations of lost profits. In *Weiner v. Ash*, 157 Ariz. 232, 235 (App. 1988), the plaintiff requested lost profits ranging from $9.75 million to over $19 million from property the plaintiff claimed could not be purchased while the plaintiff was recovering from an accident caused by the defendant. The *Weiner* court described the lost profit evidence: "Essentially the proof was that plaintiffs

had made several advantageous real estate transactions before the shooting, that several other people had made advantageous transactions in the months after the shooting, and that plaintiffs had the resources to have made similar transactions had they been disposed to do so." *Id.* The appellate court held that "this is sheer speculation and insufficient to support any award of damages" and that "not all land transactions are profitable." *Id.* Notably, just as there was no agreement on material terms with O'Flynn and McAlister, *Weiner* also did not address a contemplated contract to purchase any particular piece of property at the time of the injury. *Id. See also Earle M. Jorgensen Co. v. Tesmer Mfg. Co.*, 10 Ariz. App. 445, 451–52 (1969) ("Here we are involved with not only a new business, but also with the marketing of a new product. There was no history of prior sales by the defendant nor is there any history of prior sales of this identical product by a predecessor or even by a competitor. On its counterclaim defendant had the burden of proving the amount of its damages with reasonable certainty. All we have in this regard is an estimate made by defendant's president (who had no prior experience in selling agricultural equipment) based upon a few conferences with dealers who were not even willing to give defendant a single advance order." (citations omitted)).

Throughout these proceedings, the McAlister Parties have relied heavily on *Felder v. Physiotherapy Associates*, 215 Ariz. 154 (App. 2007), to claim they met their burden of establishing lost profits with reasonable certainty. Felder had been a

successful minor league player, moving up the divisions and earning a few hundred thousand dollars, when he sustained an injury. *Id.* at 158. During his rehabilitation process, Felder sustained a separate career-ending eye injury. *Id.* at 158-59. Felder subsequently brought a negligence claim against the rehabilitation facility and requested lost future earnings. *Id.* at 159. The *Felder* court clarified that it was applying a more flexible standard for damages because the case involved claims for lost *earnings* in a personal injury action, not a lost-profits claim. *Id.* at 163-64. Because *Felder* involved lost earnings, not lost profits, it is inapplicable.

3. Reasonable Certainty Requires At Least An Agreement On Material Terms.[3]

The McAlister Parties seek to recover the profits they would have earned from a purported licensing agreement with O'Flynn. But as discussed, McAlister and O'Flynn did not have an executed agreement and did not reach agreement as to several material payment terms. This is insufficient to establish reasonable certainty.

Courts routinely reject claims for lost-profit damages arising out of an unexecuted contract and/or uncertain terms. For example, in *Formosa Plastics Corp. USA v. Presidio Engineers & Contractors, Inc*., 960 S.W. 2d 41, 43-44 (Tex. 1998), a contractor sued a project owner for fraudulent inducement after the project owner made misrepresentations that induced the contractor to bid for and enter into a contract for a

[3] To avoid duplication, the cases in this section are in in addition to those cited in Loeb's Cross-Petition for Review.

construction project. The contractor was awarded damages representing the monetary amount the contractor would have made on the project had he known the truth and submitted a higher bid. *Id.* at 49. The court, however, vacated the lost-profit award, concluding that the contractor was awarded "expected lost profits on a bargain that was never made." *Id.* The court noted that a party may not recover "loss of profits on a bid not made, and a profit never realized, in a hypothetical bargain never struck." *Id.* at 49-50. Moreover, there was no evidence that the project owner would have even awarded the contract to the contractor had he submitted a higher bid. *Id.* at 50. The court noted that the damages award was thus speculative and that the contractor could not recover lost profit damages for a contract that "was never struck and would not have been consummated." *Id. See also Copeland v. Baskin Robbins USA*, 96 Cal. App. 4th 1251, 1254 (2002) ("The plaintiff cannot recover for lost expectations (profits) because there is no way of knowing what the ultimate terms of the agreement would have been or even if there would have been an ultimate agreement."); *Brown v. United States*, 207 Ct. Cl. 768, 784 (1975) ("We find, however, it improper for this court to award plaintiff lost profits since the contract under which plaintiff would have made such profits never actually came into existence." (quotations omitted)).

As another example, in *CGI Federal Inc. v. FCi Federal, Inc.*, 295 Va. 506, 510 (2018), a contractor and subcontractor entered into a teaming agreement under which they agreed to prepare a proposal/bid for a contract. The teaming agreement provided a

framework for the parties to negotiate a subcontract if their proposal resulted in contract award to the contractor. *Id.* at 510-11. The contractor was awarded the contract, but the parties never successfully negotiated the subcontract. *Id.* at 512-13. The subcontractor sued for fraudulent inducement, seeking lost-profits. *Id.* at 518. The court concluded that the teaming agreement's provisions providing a framework for the subcontract "did not create an enforceable obligation for [the contractor] to extend a subcontract to [the subcontractor] with these terms." *Id.* Because "[t]he final terms of the subcontract . . . were uncertain, . . . any award of lost profits was uncertain." *Id.* The court noted that the subcontractor could not "recover profits based on a bargain for a subcontract it never struck." *Id.*

Here, the McAlister Parties are seeking lost profits in connection with an unexecuted agreement as to which McAlister and O'Flynn were in disagreement as to key payment terms. To rely upon such an unexecuted agreement as the basis for a lost profits claim, in these circumstances, is the very definition of speculative. *Cf. Al-Saud v. Youtoo Media, L.P.*, 754 Fed. App'x 246, 254-55 (5th Cir. Oct. 22, 2018) (rejecting lost-profit claim because "[i]t was a new venture with no history of profitability" and "had few signed agreements" and thus its "damages estimates had to rely in large part on *hoped for* partnerships, and speculation about the profits those agreements would generate").

B. The Court of Appeals Erred By Expanding Trespass To Chattels To Include "Electronic Touching" Of An Intangible Object.

In recognizing a claim for trespass to chattels based on "electronic touching" of an intangible thing, the Court of Appeals effectively created a new tort for "data intermeddling." This is inconsistent with the Restatement (Second) of Torts, which requires "intentionally bringing about a *physical contact* with [a] chattel" for a claim of trespass to chattels. Restatement (Second) of Torts § 217 cmt. e (emphasis added). It is also inconsistent with principles of separation of powers and judicial restraint, which the Court embraces in the tort context. *See, e.g.*, *Torres v. JAI Dining Servs. (Phoenix), Inc.*, 256 Ariz. 212, 217-218 ¶ 15 (2023) ("The constitution gives the legislature plenary authority to develop the laws of this state, including tort law, subject only to constitutional constraints."); *Quiroz v. ALCOA Inc.*, 243 Ariz. 560, 566 ¶ 19 (2018) (acknowledging the Court "exercise[s] great restraint" when application of tort law involves "declaring public policy").

If Arizona is to recognize what effectively is a claim for "data intermeddling," consistent with principles of separation of powers and judicial restraint, that public policy decision should come from the Legislature and not the judiciary.[4] A contrary

[4] Deference to the legislature is particularly appropriate for public policy determinations affecting computer technology, in which innovations and advancements occur at a dizzying pace. Indeed, under Moore's Law, the number of transistors that can be placed on an integrated circuit—essentially the driving force behind computing—doubles every two years. *Moore's Law*, INTEL (Sept. 18, 2023),

outcome would "wrest control over emerging tort law from the legislature." *Torres*, 256 Ariz. at 217-218 ¶ 15.

III. Conclusion

The Court should vacate the portion of the Court of Appeals' decision reversing the grant of summary judgment for Loeb, and affirm the judgment entered by the Superior Court in Loeb's favor.

DATED this 20th day of December, 2024.

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