

813.98 MISAPPROPRIATION OF TRADE SECRET—ISSUE OF DAMAGES.

The (*state number*) issue reads:

“In what amount has the plaintiff been damaged by the misappropriation of the plaintiff's trade secret?”

If you have answered all the preceding issues in favor of the plaintiff, the plaintiff is entitled to recover actual damages in the amount proved.

On this issue the burden of proof is on the plaintiff. This means that the plaintiff must prove, by the greater weight of the evidence, the amount of actual damages sustained as a result of the misappropriation of the plaintiff's trade secret.

The plaintiff may recover actual damages in the amount of [the plaintiff's economic loss] [the amount by which the defendant was unjustly enriched by the misappropriation] (whichever is greater).<sup>1</sup>

[Economic loss may include:

[any loss in net revenues suffered (or to be suffered) by the plaintiff;]

[any loss in the value of the plaintiff's business as a going concern;]

[and]

[the value of the plaintiff's business as a going concern just before it was destroyed. That is, the amount a willing buyer would pay for the business, and a willing seller would accept, neither being in need of an immediate purchase or sale]; [and]

[*state any other measure of economic loss supported by the evidence*].]

[Unjust enrichment may include:

[any net revenues realized (or to be realized) by the defendant from the trade secret;]

[any increase in the value of the defendant's business as a going concern resulting from the trade secret;] [and]

[the value of any benefit from the trade secret received and retained by the defendant;] [and]

*[state any other measure of unjust enrichment supported by the evidence].]*

The plaintiff's actual damages are to be reasonably determined from the evidence presented in the case. The plaintiff is not required to prove with mathematical certainty the extent of [the plaintiff's economic loss] [the defendant's unjust enrichment] in order to recover actual damages. Thus, the plaintiff should not be denied actual damages simply because they cannot be calculated with exactness or a high degree of mathematical certainty. An award of actual damages must be based on evidence which shows the amount of the plaintiff's actual damages with reasonable certainty.<sup>2</sup> However, you may not award any actual damages based upon mere speculation or conjecture.<sup>3</sup>

Finally, as to this issue on which the plaintiff has the burden of proof, when you find by the greater weight of the evidence the amount of actual damages sustained by the plaintiff by reason of [the plaintiff's economic loss] [the defendant's unjust enrichment], then it will be your duty to write [that amount] [the greater of those two amounts] in the blank space provided.

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1. N.C. Gen. Stat. § 66-154(b) provides that "actual damages may be recovered, measured by the economic loss or the unjust enrichment caused by misappropriation of a trade secret, *whichever is greater*" (emphasis added). In addition, N.C. Gen. Stat. § 66-154(c) provides that "[i]f willful and malicious misappropriation exists, the trier of fact also

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may award punitive damages in its discretion.” Since this provision was adopted in 1981, its application is now governed by the provisions of N.C. Gen. Stat. § 1D-1 (Punitive Damages) which became effective January 1, 1996. In particular, if the court instructs the jury on punitive damages arising out of misappropriation of a trade secret, the burden of proving the misappropriation was “willful and malicious” is by clear, strong and convincing evidence. N.C. Gen. Stat. § 1D-15(b).

2. *Medical Staffing Network, Inc. v. Ridgway*, 194 N.C. App. 649, 660, 670 S.E.2d 321, 330 (2009) (holding that the amount of damages for misappropriation of trade secret must be proven with reasonable certainty).

3. The “party seeking damages must show that the amount of damages is based upon a standard that will allow the finder of fact to calculate the amount of damages with reasonable certainty,” *Olivetti v. Ames Business Sys.*, 319 N.C. 534, 547–48, 356 S.E.2d 578, 586 (1987), and “[d]amages for lost profits will not be awarded upon hypothetical or speculative forecasts of losses.” *Castle McCulloch v. Freedman*, 169 N.C. App. 497, 501, 610 S.E.2d 416, 420 (2005), *aff’d per curiam*, 360 N.C. 57, 620 S.E.2d 674 (2005)); *see also Medical Staffing Network*, 194 N.C. App. at 660-61, 670 S.E.2d at 330 (holding that use of the defendant’s total revenue as the basis for calculating the plaintiff’s lost profits allegedly suffered by defendant hiring ten nurses previously employed by plaintiff was too speculative to constitute a proper measure of damages). However, “[w]hile difficult to determine, damages may be established with the aid of expert testimony, economic and financial data, market surveys and analysis, and business records of similar enterprises,” *Iron Steamer v. Trinity Restaurant*, 110 N.C. App. 843, 849, 431 S.E.2d 767, 771 (1993) (citations omitted). “Sales figures from businesses which are similar in size, location and type of product sold are important sources of” such evidence. *McNamara v. Wilmington Mall Realty Corp.*, 121 N.C. App. 400, 411, 466 S.E.2d 324, 331 (1996).

