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IN THE SUPREME COURT OF THE STATE OF IDAHO

AMERICAN SEMICONDUCTOR., INC.,
an Idaho Corporation,

Plaintiff/Appellant,

vs.

SAGE SILICON SOLUTIONS, LLC, an
Idaho corporation; ZILOG, INC., a
Delaware corporation; DAVID ROBERTS;
GYLE YEARSLEY; WILLIAM TIFFANY; and
Defendants DOES 1-X,

Defendants/Respondents

SUPREME COURT
DOCKET NO. 43011-2015

Ada County District Court Case No.
CV-OC-2011-23344

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RELATED COUNTER ACTIONS

APPELLANT AMERICAN SEMICONDUCTOR, INC.'S OPENING BRIEF

Appeal from the District Court of the Fourth Judicial District for Ada County
Honorable Thomas J. Neville, Presiding

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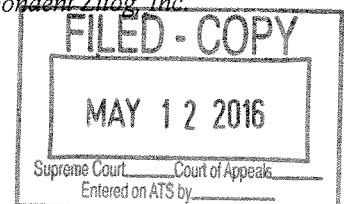


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I. STATEMENT OF THE CASE

A. NATURE OF THE CASE

Appellant-Plaintiff American Semiconductor, Inc. (“ASI”) appeals various rulings that unduly prejudiced its pursuit of applicable breach of contract, breach of fiduciary duty, intentional interference with contract and tortious interference with prospective business advantage claims against Respondents-Defendants David Roberts (“Roberts”), Gyle Yearsley (“Yearsley”), William Tiffany (“Tiffany”), Sage Silicon Solutions, LLC (“Sage”) and Zilog, Inc. (“Zilog”). This lawsuit arose out of the unauthorized and concealed “moonlighting” activities by ASI’s then employees Roberts, Yearsley, Tiffany (and two others) who, through their undisclosed entity, Sage, provided engineering services that were unlawfully solicited by Zilog. (Roberts, Yearsley, Tiffany and Sage are sometimes jointly referred to as the “Sage Defendants.”)

At trial, ASI established that Roberts, Yearsley and Tiffany breached their contractual and fiduciary duties to ASI and, along with Sage, interfered with ASI’s reasonable expectation of providing design engineering services to Zilog through its employment of Roberts, Yearsley, and Tiffany. ASI sought to prove that Zilog interfered with non-compete provisions of agreements between ASI and its employees, induced breaches of those agreements, and that Zilog interfered with ASI’s prospective economic expectancy by depriving ASI of the opportunity to earn income from the services of its employees. The District Court erroneously precluded ASI from submitting the latter claim to the jury and from presenting relevant evidence pertaining to damages. The District Court further made erroneous prevailing party determinations concerning Zilog and the Sage Defendants, determinations that followed, in part, from the underlying errors.

B. STATEMENT OF FACTS

ASI is a Boise-based semiconductor company founded in 2001. (Tr. 735:9–21.)¹ ASI is focused on developing technology that would keep American semiconductor technology relevant and promote extended use of onshore resources for semiconductor production.² (Tr. 738:1–10.)

Zilog is a company that designs microcontrollers and manufactures integrated circuits and is a wholly owned subsidiary of IXYS, Inc. (“IXYS”), having been acquired as of early 2010. (Tr. 1519:16–1520:2; 1513:19–22; 2217:14–19.)

Roberts, Yearsley and Tiffany are design engineers who worked for Zilog until they were laid off in early 2009, and who subsequently became employees of ASI. (Tr. 1786:24–1787:3; 1937:7–15; 1973:16–20; 743:10–22.)

Sage was organized in 2010 by Roberts, Yearsley, Tiffany, Russell Lloyd (“Lloyd”), Evelyn Perryman (“Perryman”) and Joshua Nekl. (Tr. 1836:20–1827:4; R. 173.) Lloyd, a design engineer, and Perryman, a layout designer, were laid off from Zilog in early 2009, (Tr. 1826:20–1827:4; R. 172–73 (Response to Interrogatory No. 9)), and later became employees of ASI. (Tr. 749:12–750:23; 832:5–13; 1722:18–19.) (Roberts, Yearsley, Tiffany and Lloyd are sometimes jointly referred to as the “Engineers.”) Sage was a direct competitor of ASI. (Tr. 1080:6-12.)

¹ “Tr.” refers to the 3038-page transcript of various proceedings as reported by Ms. Wolf.

² ASI has served a variety of high-profile customers including the Department of Energy, NASA, the Department of Defense, the Jet Propulsion Laboratory, the Boeing Company and Ames Research Lab, among others. (Tr. 738:13–19.) ASI has been the recipient of several industry recognitions including: the Boeing Company’s 2007 Supplier of the Year Award; the Idaho Innovation Award in 2007; first place finish in the LOPEC Conference Business Case Award in Munich, Germany; and the 2013 FlexTech Alliance Award for Innovation. (Tr. 741:5–23.) ASI was also recognized as a Boeing Performance Excellence Award recipient in 2015

1. Zilog Layoffs and Subsequent Hiring Freeze

Prior to 2009, the Engineers and Perryman were part of Zilog's Idaho-based design teams. (Tr. 2215:6–2216:7.) By the mid-1990s, Zilog had a significant presence in the Treasure Valley with about 600 employees locally. (Tr. 737:18–21.) As of mid-2005, however, that number had dwindled to about 30. (Tr. 1366:5–13.)

Zilog continued to shed its Idaho-based workforce, resulting in further layoffs in 2009 when the Engineers and Perryman were laid off. (Tr. 2215:1–2216:7.) After the 2009 layoffs, Zilog was left with no design engineers in Idaho. (Tr. 2216:12–15; 2235:5–11; 1556:9–18.) As of November 2010, none of the engineers at IXYS (which had by then acquired Zilog) had any experience with Zilog designs. (Tr. 1556:19–1557:7; 2226:10–19.) Companywide, Zilog was left with two individuals who considered themselves to be design engineers, but who actually played other managerial roles within the company. (Tr. 2216:16–2217:4, 2235:5–14.)

The design engineers that IXYS was left with at another of its subsidiaries, Clare, were less experienced, more expensive and less efficient than the Engineers. (Tr. 1988:7–1989:8; 2217:20–2218:1; 2251:19–2252:12.) In January 2011, after Zilog laid off all of its design teams, IXYS instituted a group-wide hiring freeze. (Tr. 2237:25–2238:15.)

2. ASI Hires the Engineers and Perryman as Employees

After Roberts was laid off from Zilog, ASI learned that he was looking for local employment opportunities and subsequently engaged him as a consultant in April 2009. (Tr. 743:10–13; 747:4–9.) ASI also learned that the other Engineers and Perryman had likewise been laid off from Zilog and were searching for local employment opportunities. (Tr. 743:14–744:17.)

ASI recognized that the Engineers were skilled design engineers who needed work, with Lloyd having lost his house as a result of his job loss. (Tr. 748:14–18; 749:12–19.)

ASI explored ways to grow its business so as to keep the Engineers working locally, including the preparation and submission of proposals for new work. (Tr. 748:19–24.) ASI desired to create a synergistic outcome whereby the Engineers would get work opportunities while ASI would grow as a business with expanded ability to provide design services. (Tr. 749:20–750:7.) Thus, as of 2009, ASI was actively working to create employment opportunities for the Engineers. (*Id.*)

Offers of Design Engineering Services to Zilog. In June 2009, Roberts sent David Staab, his former direct supervisor at Zilog and a Zilog vice-president, an e-mail where he informed Mr. Staab that he was working with ASI on an ARPA-E³ proposal for an extreme low power microcontroller and that ASI hoped to get the contract. (Tr. 1830:11–1832:9.) Mr. Staab acknowledged the e-mail and thanked Roberts for the update. (Tr. 1832:11–1832:13.) ASI considered Zilog to be a potential customer at this point in time given that (i) ASI had provided design services to Zilog in 2003 and (ii) Zilog had laid off its design engineering team and would thus need to use outside design resources for any design work. (Tr. 802:14–804:6.)

In further response to Roberts, two days later, Mr. Staab stated that Zilog was looking at developing a new microcontroller. (Tr. 1832:14–1833:4.) Roberts shared Zilog’s plans with Doug

³ The Advanced Research Projects – Energy (ARPA-E) is a U.S. government agency tasked with promoting and funding research and development of high-potential, high-impact energy technologies. See <http://arpa-e.energy.gov/?q=arpa-e-site-page/about> (last accessed, Mar. 30, 2016.)

Hackler, ASI's CEO; Rich Chaney, ASI's General Manager; and Dale Wilson, ASI's Director of Design and Test. (Tr. 1833:5–1833:18; 806:20–810:7; 1242:20–1244:20.) Roberts undertook to let Zilog know of ASI's capabilities in providing outsourced engineering services, and committed to get Mr. Chaney involved immediately if Zilog was interested. (Tr. 1834:2–1835:19.) Roberts followed up and spoke with Mr. Staab about ASI's interest. (1835:20–1835:22.) ASI never advised Roberts or Zilog that it was no longer interested in the potential Zilog opportunity. (1835:17–1835:19.)

SBIR Proposal Leading to Part-Time Employment. ASI submitted an SBIR⁴ proposal that was subsequently awarded in late 2009. (Tr. 748:25–751:3.) Roberts worked on that SBIR proposal as part of an ASI team. (Tr. 751:4–23; 1232:3–14.) Viewing the success of the SBIR proposal as a hopeful sign, ASI hired Roberts on a part-time basis as a design manager in December 2009, around the same time it hired the other Engineers on a part-time basis as design engineers. (Tr. 752:18–753:6.) ASI offered the Engineers part-time employment with the expectation of conversion to full-time as new contracts resulting in additional work were secured. (Tr. 763:10–767:23; 769:11–770:5; 770:9–773:5.) As a result, on or around December 9, 2009, the Engineers each executed a separate employee confidentiality agreement (“ECA”). (Tr. 775:11–779:3.)

Paragraph 7 of the ECAs prohibited the Engineers and, later, Perryman from providing services to or assisting in any business in competition with ASI's current or planned business:

⁴ The Small Business Innovation Research (SBIR) is a highly competitive U.S. government program that encourages domestic small businesses to engage in research and development that has the potential for commercialization. See <https://www.sbir.gov/about/about-sbir#sbir-program> (last accessed, Mar. 30, 2016.)

7. **Duty Not to Compete.** Employee understands that his/her employment requires his/her undivided attention and effort during normal business hours. While employed, Employee will not, without Employer's express written consent, provide services to, or assist in any manner, any business or third party which competes with the current or planned business of Employer.

(Plaintiff's Exs. 4; 13; 14, at ¶ 7.)

SAIC Contract Leading to Full-Time Employment. In the meantime, ASI had at least one other business development proposal in the works with SAIC, an American company, that resulted in a contract for design work in January 2010. (Tr. 754:12–756:14.) The SAIC contract, valued at over \$1 million, provided additional work opportunities that made it possible for ASI to convert the Engineers from part-time to full-time employees on or around January 18, 2010. (*See, e.g.*, Tr. 756:1–757:9; 790:19–793:21.) ASI hired Perryman as a part-time employee in April 2010; she never became a full-time employee of ASI. (Tr. 832:5–16; 1728:17–1729:4.)

As a design manager, Roberts had direct supervisory responsibility over the other Engineers and Perryman, and he reported to Mr. Wilson. (Tr. 753:7–22.) Because the Engineers' design experience at Zilog had been with dated or otherwise old technologies as compared to ASI's state-of-the-art technologies, ASI immediately began investing in them so as to update their skills after the Engineers and Perryman became its employees. (Tr. 750:10–23.)

Having brought the Engineers on board as employees to expand design capabilities, ASI had expectations, as of January 2010, that these employees would bolster its prospects of obtaining new design projects, including work from Zilog. (Tr. 817:2–820:3.) ASI had expectations about the prospects of obtaining Zilog's outsourced design work in the future based on (i) exchanges Mr.

Hackler had with Roberts following an inquiry to Roberts from Zilog, (ii) Roberts' undertaking to follow-up on that inquiry on ASI's behalf, (iii) Zilog's lack of design engineering expertise, (iv) the Engineers' prior experience with Zilog and expertise with Zilog technology and designs, and (v) previous outsourcing work conducted by ASI on behalf of Zilog. (*Id.*)

3. ASI Advises Zilog of its New Hires and Solicits Design Work

Mr. Hackler, ASI's CEO, ran into Rick White, then vice-president of worldwide operations for Zilog, at the Boise Airport in early 2010. (Tr. 836:19–838:11.) Mr. Hackler recalled informing Mr. White that the Engineers had found permanent employment at ASI and that ASI had the capability to meet Zilog's future needs for design services. (Tr. 838:12–839:19.) Mr. Hackler understood that Mr. White would inform Zilog's main office of ASI's recent hires and its enhanced capabilities. (*See* Tr. 839:22–25.)

Mr. Hackler ran into Mr. White once again at the Boise Airport a month or two later. (Tr. 840:8–25.) Mr. Hackler inquired as to whether Mr. White had checked with the main office and testified that Mr. White reported having discussed the matter with Mr. Staab who advised that Zilog was not designing new products at the time, but that Zilog was glad to know that ASI had the capability to offer design services in the future. (Tr. 840:15–841:9.)

4. The Engineers and Perryman Organize Sage in Late January 2010

After the Engineers had become full-time employees of ASI, they formally organized Sage. (Tr. 1664:12–17.) The paperwork formally creating Sage was filed on January 28, 2010. (Tr. 1826:23–1827:4.) At no point did the Engineers or Perryman disclose to ASI that they had organized Sage. (Tr. 801:19–802:4.)

5. Zilog Seeks to Create New Products But Lacks Design Engineers

Later in 2010, Zilog sought to develop a low power microcontroller as part of the “6482 Project.” (Tr. 2218:17–2219:18.) The 6482 Project was based on a chip or core that Yearsley designed when he worked for Zilog. (Tr. 2219:23–2220:14.) Mr. Staab was the project lead and total projected expense was estimated at over \$4 million. (Tr. 2220:21–22; 2234:16–20.)

As of November 2010, Zilog had divested from two products lines and was left with a single product line that had not developed a new product in four years. (Tr. 2223:19–2224:10.) Thus, according to Mr. Staab and internal Zilog documents, it was “critical” for Zilog to develop new products in order to re-establish itself as a player in the semiconductor industry. (Tr. 2224:11–18; Plaintiff’s Ex. 42, at Z011597.)

On November 1, 2010, when the Engineers were nearly a year into their full-time employment with ASI, Mr. Staab informed Roberts – then ASI’s design manager – that Zilog anticipated having design work available. (Tr. 1843:13–1844:14.) Despite his earlier commitment to inform ASI of any such opportunities, Roberts did not do so. (Tr. 1844:17–1844:21.) Instead, Roberts responded that Sage was interested and arranged with Mr. Staab to have Zilog contract with Sage instead of ASI. (Tr. 1844:22–1845:17; 1850:7–1850:18.)

In view of their experience, the Engineers were better suited than any other contractors available to Zilog to perform the outsourced design services. (Tr. 836:9–17; 1857:17–22.) The Engineers were able to get up to speed faster than less experienced contractors. (Tr. 1857:23–1858:6.) In fact, Zilog did not consider any option other than the Engineers. (Tr. 2239:23–2240:4.)

In January 2011, Roberts executed, on behalf of Sage, a non-disclosure agreement with Zilog. (Tr. 1851:14–17.) Roberts also participated in negotiations with Mr. Staab concerning rates to be charged to Zilog for the anticipated outsourced microcontroller design work. (Tr. 1851:18–1852:18.) On February 15, 2011, Roberts, on behalf of Sage, executed Zilog’s Independent Contractor Services Agreement (the “Sage-Zilog Agreement”). (Tr. 1819:21–1820:8.) This agreement prohibited Sage from competing with Zilog by stating, in relevant part, that “during contractor’s engagement with Zilog, contractor will not without . . . Zilog’s express written consent, engage in any business, or investment in, or assist in any manner any business which directly or indirectly competes with the business or future plans of Zilog.” (Tr. 1822:13–1823:8.)

This non-compete provision was reflective of Zilog’s policy of preventing conflicts of interest as they relate to employees and contractors – a common and standard industry practice. (Tr. 2287:9–2288:22.) Zilog considered it to be unethical and a conflict of interest for an employee to “moonlight” or simultaneously work for a competitor. (Tr. 1530:5–1531:24.) Roberts understood this provision to be similar to the one he signed as part of his ECA with ASI. (Tr. 1823:12–1823:15.)

6. Tools and Licenses were “Key Challenges” to the 6482 Project

One key expense involved in design engineering of the sort involved in the 6482 Project is associated with securing licenses for use of certain software—or “tools”—used to complete the engineering tasks. (Tr. 1140:19–1142:21.) As of November 22, 2010, Zilog’s own business records indicated that the issue of tools and licenses to be used on the 6482 Project was “a key

challenge.” (Tr. 2228:7–16; Plaintiff’s Ex. 42, at Z011605 (listing “*Tools suites and licensing cross divisions and locations*” as one of the “Key Challenges”) (emphasis added).)

According to Mr. Staab, the licensing agreements relating to the tools to be used on the 6482 Project “weren’t all complete” as of November 2010. (Tr. 2229:3–7.) Mr. Staab then attempted to downplay these “key challenges” by claiming that what was pending as of November 2010 was the “completion” or “ratification” of a licensing agreement with Synopsys, Inc. (the “Synopsys License”). (Tr. 2229:8–15.) Further seeking to minimize these “key challenges,” Mr. Staab also suggested that Zilog easily overcame the challenges by testifying that the tools issue turned out “not to be as difficult as [Zilog] first envisioned.”⁵ (Tr. 2228:21–23.)

7. The Engineers and Perryman Secretly Work with Zilog

The Engineers and Perryman began working on the 6482 Project as Sage in March 2011. (Tr. 1523:11–1524:6; 2273:14–19; 1676:11–14.) At no point did any of them request permission from ASI to do outside work, including work for Zilog. (Tr. 800:17–802:4.) Nor did any of them receive any express written consent from ASI. (*Id.*; Tr. 1849:6–19.)

Indeed, according to Lloyd, the Engineers had discussions as to whether the outsourced work that they performed through Sage could have been done by them through ASI, their employer; they agreed that it could have been. (Tr. 1680:5–1681:18.) The Engineers resolved, however, to keep the work secret and never disclosed to their employer, ASI, that they were providing outsourced design services to Zilog. (*Id.*; 1681:19–1683:10; 1966:22–1967:1.)

⁵ However, as discussed further below, the District Court erroneously precluded ASI from obtaining a copy of, or even inquiring into, the Synopsys License.

Over the course of the next several months, while employed by ASI, the Engineers and Perryman invoiced Zilog for approximately 1,900 hours of undisclosed design engineering and related services in connection with the 6482 Project. (Tr. 1136:15–1137:10; 1149:18–1150:16.)

The Engineers and Perryman worked for Zilog, at various times, during ASI's normal business hours, including taking telephone calls and exchanging e-mail communications using ASI computers. (*See, e.g.*, Tr. 1962:6–1964:3.) Mr. Staab was in regular communication by telephone and e-mail with the Engineers as part of regular weekly status meetings during ASI's normal business hours – initially at 10:00 a.m. and, later, at 4:30 p.m. (Tr. 2276:17–2277:5; 2273:20–2276:1.) The Engineers (under Roberts' supervision) even snuck out of ASI on a weekday morning to take a Zilog call from one of their pickup trucks. (Tr. 1961:21–1962:5.)

8. ASI Terminates Roberts, Yearsley and Tiffany

ASI did not discover that the Engineers and Perryman were involved in the 6482 Project until a former colleague of Mr. Hackler at Zilog, Mr. Doug Smith, disclosed their involvement to Mr. Hackler on September 23, 2011. (Tr. 848:7–849:23.) According to Mr. Hackler, Mr. Smith indicated that Zilog was happy with the work performed by the Engineers. (Tr. 849:1–3.)

Surprised at what he had just learned, Mr. Hackler then inquired of Mr. Wilson who, likewise, was unaware of the work the Engineers and Perryman were doing for Zilog. (Tr. 849:11–850:11.) Mr. Hackler and Mr. Wilson then launched an investigation and interviewed the Engineers. (Tr. 850:13–24.) Unlike the other Engineers, Lloyd recognized the wrongfulness of his conduct and apologized. (Tr. 855:10–856:10.) ASI discovered the existence of Sage, a direct competitor, and its connection with its employees at that time. (*See* Tr. 847:11–16.)

Following the interviews, Mr. Hackler and Mr. Wilson unsuccessfully attempted to reach Mr. Staab at Zilog on the afternoon of September 23, 2011. (Tr. 851:14–18.) Mr. Hackler and Mr. Wilson also called Mr. Alan Shaw at Zilog’s Nampa facility and advised him that ASI had discovered that its employees were working for Zilog. (Tr. 851:19–852:15.) Mr. Shaw deferred to Mr. Staab in California. (Tr. 852:9–15.) Mr. Hackler and Mr. Wilson reached Mr. Staab the following day. (Tr. 852:16–19.) Mr. Hackler and Mr. Wilson advised Mr. Staab that ASI had discovered that the Engineers were doing work for Zilog and demanded that Zilog immediately cease using ASI employees as part of its design team. (Tr. 857:2–23.)

ASI terminated Roberts, Yearsley and Tiffany on September 27, 2011. (Tr. 858:21–859:19; 1130:21–1131:2.) Lloyd was not terminated but now works elsewhere. (Tr. 859:10–19; 1649:21–24.)

9. Zilog Discontinues the Engineers’ Work on the 6482 Project

As of September 2011, there was still a significant amount of work pending on the 6482 project. (Tr. 2312:21–25.) In response to ASI’s demand, made on or around September 23, 2011, that Zilog cease using the Engineers on the 6482 Project, Zilog discontinued their services around September 25, 2011. (See Tr. 2314:5–20; 2323:15–2324:6; 1993:12–1994:5.) The loss of the Engineers was a major setback for Zilog on the 6482 Project. (Tr. 2314:5–20.)

C. COURSE OF RELEVANT PROCEEDINGS

1. Pre-Trial

On July 2, 2013, ASI filed the operative second amended complaint (the “Second Amended Complaint”) in which it asserted claims against the Sage Defendants variously for breach of

contract, breach of fiduciary duty, breach of implied covenant of good faith and fair dealing, intentional interference with economic advantage and contract, misappropriation of trade secrets, improper appropriation of ASI's name, unjust enrichment, Idaho Consumer Protection Act violations and for declaratory and injunctive relief. ASI asserted claims against Zilog for misappropriation of trade secrets, intentional interference with prospective economic advantage and contract, and for declaratory and injunctive relief.⁶ (R. 433–454.)

The Sage Defendants asserted counterclaims against ASI for fraud, tortious interference with contract, quantum meruit, and unjust enrichment. (R. 88–118.)

2. Trial

a. Claims Tried to the Jury

ASI tried the following claims against the Sage Defendants: (i) breach of the non-compete provision of the ECAs against Roberts, Yearsley and Tiffany; (ii) breach of the implied covenants of good faith and fair dealing against Roberts, Yearsley and Tiffany; (iii) breach of the fiduciary duty of loyalty against Roberts, Yearsley and Tiffany; and (iv) intentional interference with prospective business advantage against Roberts, Yearsley, Tiffany and Sage.

ASI tried the following claims against Zilog: (i) intentional interference with the ECAs signed by the Engineers; and (ii) intentional interference with ASI's prospective economic advantage in its employment relationships with the Engineers.

⁶ On August 19, 2014, ASI withdrew its claims against all defendants for misappropriation of trade secrets and for injunctive relief, and against the Sage Defendants for misappropriation of ASI's name and for Idaho Consumer Protection Act violations. (R. 981–986.) These claims and the related proceedings are not at issue and have no bearing on the present appeal.

The Sage Defendants tried the following claims against ASI: (i) intentional interference with the Sage-Zilog Agreement; (ii) quantum meruit with regard to ASI's alleged use of a 16-bit timer purportedly belonging to Sage; and (iii) unjust enrichment with regard to the same timer.⁷

b. Claims Submitted to the Jury

This matter was submitted to the jury on January 15, 2015 after the District Court ruled on the parties' respective motions for directed verdict.⁸

The following claims asserted by ASI against the Sage Defendants were submitted: (i) breach of the non-compete provision of the ECAs against Roberts, Yearsley and Tiffany (R. 1601–1603); (ii) breach of the fiduciary duty of loyalty against Roberts, Yearsley and Tiffany (R. 1607–1608); and (iii) intentional interference with ASI's prospective economic expectancy of contracting with Zilog against Roberts, Yearsley, Tiffany and Sage (R. 1609–1612).

ASI's claim against Zilog for intentional interference with prospective economic expectancy in its employment relationships with Roberts, Yearsley, and Tiffany was dismissed on a directed verdict. (Tr. 2668:8–2669:9.) That decision is a subject of this appeal. ASI's claim for intentional interference with contract against Zilog was submitted. (R. 1617.)

⁷ At trial, the Sage Defendants dismissed their fraud claim and any quantum meruit and unjust enrichment theories based on pre-employment proposal writing. (Tr. 2207:15–2208:25.)

⁸ The Sage Defendants initially moved for directed verdict on all of ASI's claims on January 13, 2015. (Tr. 2364:24–2373:6) The Sage Defendants later withdrew their motion as to ASI's claim for breach of the fiduciary duty of loyalty. (2394:6–14.) On the same day, Zilog moved for directed verdict on the two interference claims. (Tr. 2401:22–2408:7.) For its part, ASI moved for directed verdict on all of the Sage Defendants' counterclaims on January 14, 2015. (Tr. 2594:10–2601:14.)

The Sage Defendants' counterclaims against ASI for intentional interference with the Sage-Zilog Agreement, (R. 1620), and unjust enrichment in relation to ASI's alleged use of a 16-bit timer purportedly belonging to Sage, (R. 1621–22),⁹ were likewise submitted.

c. Jury Instructions

On January 15, 2015, the District Court instructed the jury on the claims submitted. (R. 1593–1631.) Among other instructions, and over ASI's objections, the District Court instructed the jury concerning double recovery. (R. 1624; Tr. 2662:1–2663:25). In light of the jury's apparent confusion regarding this instruction and the District Court's reliance on that confusion in making a prevailing party determination, this jury instruction is a subject of this appeal.

d. Special Jury Verdict

The jury found Roberts, Yearsley and Tiffany liable to ASI for breaches of the non-compete provision of the ECAs and for breaches of their fiduciary duties of loyalty, and appears to have determined the amount of damages from those breaches to be "\$195,175," only to later cross out that entry and write in "\$0." (R. 1634.) The jury found the Sage Defendants liable to ASI for interference with prospective economic advantage and determined the resulting damages to be "\$195,175." (*Id.*)

The jury also found that Zilog did not "intentionally interfere" with ASI's contracts with the individual Sage Defendants. (*Id.*)

⁹ During a jury instruction conference, the Sage Defendants withdrew their quantum meruit claim as to ASI's alleged use of the 16-bit timer. (Tr. 2634:3–2635:23.)

Finally, as to the Sage Defendants' claims against ASI, the jury found that ASI "intentionally interfere[d]" with Sage's contract with Zilog, but that the interference resulted in no damages, (R. 1634–35), and that ASI was not unjustly enriched from its alleged use of the 16-bit timer. (R. 1635.)

3. Post-Trial

a. Prevailing Party Determinations

On February 4, 2015, following the jury verdict, ASI, the Sage Defendants and Zilog all moved for attorneys' fees and costs, and the motions were heard by the District Court on February 19, 2015. (R. 2114–2134 (the "Attorney Fee Order").) Because the jury returned a verdict in Zilog's favor on the sole claim against it, the intentional interference with contract claim, the District Court found Zilog to be the prevailing party and awarded it \$39,051.44 in prevailing party costs. (R. 2116.) As between ASI and the Sage Defendants, the District Court found that neither party prevailed. (R. 2130–2131.)

b. Amended Judgment

Following the District Court's entry of the Attorney Fee Order, it issued an Amended Judgment on February 25, 2015. (R. 2135–2137.) Paragraphs 1, 2 and 4 of the Amended Judgment, are at issue in this appeal, and provide that:

1. Plaintiff American Semiconductor, Inc. shall recover the amount of **\$195,175.00** on its claim for tortious interference with prospective economic expectancy against defendants David Roberts, Gyle Yearsley, William Tiffany and Sage Silicon Solutions, LLC, plus post-judgment interest at the rate of 5.125% per annum;

2. Plaintiff American Semiconductor, Inc. shall recover nothing on its claims against defendant Zilog, Inc.;

4. Defendant Zilog, Inc. shall recover **\$39,051.44**, as costs, against plaintiff American Semiconductor, Inc., plus post-judgment interest at the rate of 5.125% per annum;

(R. 2135–2136 (emphasis in original).)

c. Notice of Appeal

ASI timely filed its Notice of Appeal on February 27, 2015. (R. 2138–2156.) Neither Zilog nor the Sage Defendants cross-appealed.

II. ISSUES PRESENTED ON APPEAL

(1) Whether the District Court erred in finding that the Synopsys License was not relevant and, thus, not discoverable based upon an in camera inspection with no input from ASI.

(2) Whether the District Court erred in precluding ASI from examining witnesses or presenting evidence at trial concerning the undisclosed Synopsys License and related matters.

(3) Whether the District Court erred in its sua sponte grant of a motion for directed verdict dismissing ASI's claim against Zilog for intentional interference with prospective economic advantage in view of the substantial evidence presented at trial.

(4) Whether the District Court erred in finding that: (i) ASI was not the prevailing party with regard to the claims asserted against, and the counterclaims asserted by, the Sage Defendants; and (ii) Zilog was the prevailing party as to claims asserted against it by ASI.

(5) Whether ASI is entitled to an award of attorneys' fees on appeal against Roberts, Yearsley and Tiffany.

III. ARGUMENT

A. THE DISTRICT COURT ERRED IN PRECLUDING DISCLOSURE OF, AND EXCLUDING EVIDENCE CONCERNING, THE SYNOPSIS LICENSE ON RELEVANCE GROUNDS

1. Standard of Review

“Relevant Evidence” means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. I.R.E. 401. All relevant evidence is admissible except as otherwise provided by the rules of evidence or by other rules applicable in the courts of Idaho – evidence which is not relevant is not admissible. I.R.E. 402.

Control of discovery is generally within the discretion of the trial court. *McCann v. McCann*, 152 Idaho 809, 821 (2012) (internal quotation marks omitted). Ordinarily, this Court reviews a trial court's decision granting or denying a motion to compel for abuse of discretion. *Villa Highlands, LLC v. W. Cmty. Ins. Co.*, 148 Idaho 598, 609 (2010).

However, it is well-settled that rulings involving relevancy are not discretionary matters, and as such, are reviewed de novo on appeal. *Gunter v. Murphy's Lounge, LLC*, 141 Idaho 16, 25 (2005); *Lubcke v. Boise City/Ada Cnty. Hous. Auth.*, 124 Idaho 450, 466 (1993) (“The question of relevancy is not a discretionary matter as there is no issue of credibility or finding of fact for the trial court to resolve prior to deciding to admit or reject the evidence.”). Thus, where a trial court refuses to compel the production or permit the introduction of a document based entirely on its view that the subject matter is *irrelevant*, this Court reviews such rulings de novo. *Gunter*, 141 Idaho at 25. Likewise, where a trial court excludes testimony based on its view that the subject

matter is *irrelevant*, this Court reviews such rulings de novo. See *Perception Const. Mgmt., Inc. v. Bell*, 151 Idaho 250, 253–55 (2011) (acknowledging that while the district court’s decision whether to admit or exclude relevant evidence is reviewed for an abuse of discretion, a district court’s ruling that evidence is irrelevant is reviewed de novo). See also *State v. Rothwell*, 154 Idaho 125, 130 (Ct. App. 2013) (“Whether evidence is relevant under Rule 401 is an issue of law that we review de novo, while the decision to exclude relevant evidence under Rule 403 is reviewed for an abuse of discretion.”).

A trial court’s improper exclusion of evidence will be overturned on appeal if it affects a party’s substantial rights. *Perception Const. Mgmt.*, 151 Idaho at 253.

2. Background

a. ASI’s Motion to Compel Production of Licenses

On April 18, 2014, ASI filed a motion seeking to compel Zilog to produce certain licensing agreements governing the use of design tools that Zilog claimed to have had during the relevant time frame, including the Synopsys License. (R. 666–669 (Motion); 788–804 (Memorandum in Support).) Zilog opposed the motion, arguing that the Synopsys License was not relevant and that it was governed by a confidentiality provision. (R. 869–887.) Without reviewing any documents at issue, the District Court denied the motion, stating it was “not convinced,” at that time, that the requests were reasonably calculated to lead to admissible evidence. (Tr. 201:14–202:13.)

b. ASI’s Motion in Limine Concerning Undisclosed Licenses

Having previously argued to the District Court that the licensing agreements at issue had no conceivable relevance to any claim or defense in this action as a means of resisting discovery,

Zilog and the Sage Defendants signaled their intent to invoke or rely upon information from the withheld records in furtherance of their defenses at trial. (*See* R. 1315–1317.)

For example, in a sworn pre-trial declaration, Mr. Staab contended that Zilog negotiated and obtained the Synopsys License which specifically permitted the Engineers and Perryman to use the Synopsys software at no additional cost:

Zilog’s parent company, IXYS Corporation (“IXYS”), negotiated and obtained a license specifically permitting Dave Roberts, Russell Lloyd, Evelyn Perryman, William Tiffany and Gyle Yearsley, to use the Synopsys CAD software, and Synopsys did not require any additional cost for the inclusion of those individuals in the license.

(R. 1316 (quoting Mr. Staab).) In reliance on this and related contentions, Zilog and the Sage Defendants argued that Zilog already had a software license through Synopsys, permitting use by the Engineers, for which ASI would have charged it. (R. 1316 (citing Mr. Staab).)

Further, defense damages expert, Mr. Dennis Reinstein, provided deposition testimony in which he made outcome determinative assumptions with regard to design tools, underscoring the relevance of the licensing agreements. Mr. Reinstein testified about a conversation he supposedly had with Mr. Staab and/or Mr. Monte Dalrymple (another defense expert) concerning design tools and whether Zilog would have had to incur additional costs to make those tools available for the 6482 Project. (R. 5043–5045 at 5:13–10:22). Mr. Reinstein *assumed* that Zilog would not have had to incur any additional licensing costs because the Sage Defendants were lawfully *authorized* to use them. (R. 5044 at 7:6–8:1).

Faced with these disclosures, made on the eve of trial, ASI was left with no option but to file Plaintiff’s Motion in Limine No. 11 re: Zilog’s Undisclosed Licenses (the “Motion in Limine”)

seeking to preclude Zilog and the Sage Defendants from relying upon testimony regarding the very licensing agreements that Zilog had refused to disclose in discovery based on the contention that those licenses were irrelevant. (R. 1255–1268; 1313–1320 (Reply in Further Support).)

The District Court held a hearing on the Motion in Limine on December 9, 2014. (Tr. 471:9–503:3.) During the course of the hearing, Zilog lodged, for “in camera review,” what it represented as being a copy of the Synopsys License it repeatedly argued governed the *time period and design work* at issue (Tr. 485:21–25 (“[W]e actually have available to this Court, should this Court be inclined to view for the Court’s in camera review, *the [Synopsys] license agreement we’re talking about*, should this Court wish to test Zilog’s theories.”) (emphasis added); 489:24–490:19.) The Court took ASI’s Motion in Limine under advisement. (Tr. 503:3; 1282:24–1283:3.) At no point was ASI granted access to the Synopsys License.

c. Zilog’s Opening Statement Alluding to the Synopsys License

As ASI anticipated, Zilog laid the groundwork for its economic infeasibility defense right from the get-go at trial when, in his opening statement, Zilog’s lead counsel told the jury (in clear reliance on the undisclosed Synopsys License) that Zilog would not have been interested in sourcing design services from ASI because ASI “was simply *too expensive*” given that “Zilog *had the tools it needed*, and didn’t want to pay ASI for those tools.” (Tr. 733:2–12 (emphasis added).)

d. The District Court’s Denial of ASI’s Motion in Limine

The District Court took up the Motion in Limine once again on the morning of the fourth day of trial, on January 8, 2015, and denied the Motion. (Tr. 1282:24–1309:25.) In so doing, the District Court reasoned that:

I – I am simply not persuaded that the total charges or fees, whatever that total figure is that’s in the – the document before me, is – is relevant because *IXYS had paid that* – for that, and not contractors, not consultants, and *they had paid that bill, whatever it was*. And I don’t – *the Court doesn’t see any real possibility or likelihood that, frankly, a subsidiary, an authorized subsidiary of IXYS, would pay any contractor or consultant for tools it already had*. I – I just don’t see how this is relevant still.

(Tr. 1307:15–24 (emphasis added).)

In effect, the District Court concluded that the Synopsys License was *not relevant* because, in its view, that agreement actually *supported* Zilog’s economic infeasibility defense. Ironically, in denying ASI’s motion in limine, the District Court permitted Zilog to present testimony regarding subject matter it had just concluded was irrelevant. Whether the Synopsys License supported Zilog’s economic infeasibility defense or not, the District Court’s holding necessarily involved credibility determinations based on an in camera inspection of an undisclosed document. In so doing, the District Court purported to find that (i) IXYS had paid the necessary licensing fees for the tools that the Sage Defendants used on the 6482 Project, (ii) IXYS had paid the relevant licensing fees before the Sage Defendants started work on the 6482 Project, and (iii) there is no “real possibility or likelihood” that Zilog would have incurred any additional tool costs. (*See id.*)

e. The District Court’s Limited Disclosures from the Synopsys License

Later, the District Court disclosed limited information it gleaned from the license. Interestingly, it noted that “another reason” precluding disclosure of the license was that it was “not sure that [the lodged license was] applicable to the time frame we’re talking about here.” (Tr. 1469:19–24.)

According to the District Court, a purchase agreement was signed on September 28, 2011 and took effect the next day, September 29, 2011, as an addendum to an original agreement (that was apparently not produced for the in camera inspection). These dates fall in the time-frame after ASI demanded that Zilog cease working with its employees. Further, the purchase agreement incorporated a schedule of payments “starting *in October 2011*, and going into *July of 2014*.” (Tr. 1469:25–1470:14 (emphasis added).) The District Court went on to add:

It’s – it’s not for the period of time when the work, as I understand it, that’s alleged to have been done by the Sage defendants was being done. My understanding is that was being done for approximately a six-month period from March of 2011, ending at the time of termination, which is just a day or two before this new agreement’s starting out.

In other words, this appears to be for the time frame after. And I don’t have any idea if these prices were – would – or were the same, I wouldn’t know. But I – I don’t think it’s directly relevant, because it’s not the same time frame. It’s the – what may be the next whatever it’s called here again, the, quote, Agreement Year, close quote, the one following this one.

(Tr. 1470:15–1471:4 (emphasis added).)

3. The Demonstrated Relevance of the Synopsys License at Trial

a. Existence and Terms of the Synopsys License were Key Issues at Trial

Consistent with its position pretrial position, Zilog contended from the outset of trial that ASI’s intentional interference claim was unviable because any prices ASI would have quoted would have been “too expensive” given that ASI would have supposedly charged Zilog for tools Zilog had paid for. (Tr. 732:20–733:12.) Accordingly, Zilog’s invocation of the undisclosed

Synopsys License in contending that it had already paid for the design tools required for the 6482 Project as of March 2011 was a primary defense as to both liability and damages at trial.

As to liability, Zilog argued that ASI had no economic expectancy in its employment relationship with the Engineers because Zilog would not have contracted with ASI. Zilog invoked the license in repeatedly contending that it had paid for the appropriate design tools, thus allowing the Sage Defendants proper access to the design tools at issue between March 2011 and early September 2011. (*See, e.g.*, Tr. 2319:1–23; 2356:22–2358:22.) Thus, while Zilog’s own business records identified the procurement of appropriate design tools and the negotiation of governing licensing agreements as “a key challenge” as of November 2010, Mr. Staab suggested to the jury that Zilog easily overcame that challenge by executing the Synopsys License. (Tr. 2228:7–2229:15; Plaintiff’s Ex. 42, at Z011605.) The Sage Defendants, for their part, sought to buttress that contention by, for example, offering testimony from Tiffany to the effect that Zilog provided all the appropriate design tools and that Zilog permitted the Sage Defendants to use those tools through standard licensing procedures. (Tr. 1951:25–1952:7.)

On damages, Mr. Reinstein’s rebuttal opinions relied upon assumptions that were grounded in the undisclosed Synopsys License. Mr. Reinstein assumed that Zilog would not have needed to incur any additional licensing costs because not only did Zilog have the appropriate tools paid for but the Sage Defendants had proper access to the tools. (R. 5044 at 7:6–8:1. Tr. 2140:20–2142:13; 2165:23–2167:7.) Indeed, the Sage Defendants underscored the relevance of the Synopsys License to the claimed damages in this case when they identified and described tool costs as a key issue in calculating damages. (R. 1882 (arguing, in post-trial submissions, that “ASI was awarded

\$195,175 for the tortious interference claim, which did not include tool costs that ASI claimed was the most substantial cost in calculating damages. Thus, the Sage Defendants prevailed on the key issue in calculating damages.”)) The Synopsys License addresses tool costs. (Tr. 1470:5–8.)

In short, having invoked, and sought to rely upon, the terms of the undisclosed Synopsys License, Zilog and the Sage Defendants placed those very terms at issue at trial, and thereby made the license relevant. Under I.R.E. 401, relevant evidence is evidence “having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Here, whether the Sage Defendants had proper or paid-for access to the tools needed for the 6482 project during the time they worked on the project is a fact of consequence. The Synopsys License has the tendency to make the foregoing fact more probable or less probable than it would be without the license. In fact, the Synopsys License is the best and most objective evidence concerning that fact.

b. The District Court’s Limited Disclosures Contradict Zilog’s Theories

The notion that Zilog had fully paid for the Sage Defendants’ licensed access to certain Synopsys design tools as of March 2011 was a key plank of Zilog’s economic infeasibility defense. However, the District Court’s limited disclosures cast doubt as to the viability of that defense.

In fact, Judge Neville disclosed (over Zilog’s objections or failures to voluntarily acquiesce) that the document Zilog lodged on December 9, 2015 showed an agreement signed *on September 28, 2011* and that took effect the next day, *September 29, 2011* – several days after ASI alerted Zilog of the unauthorized activities and well after Zilog began surreptitiously contracting

with the Sage Defendants. Further, the schedule of payments called for payments to be made between October 2011 and July 2014, well after Zilog kicked the Sage Defendants off the project.

In sum, according to the District Court's limited disclosures, the lodged document did not cover the relevant time period (despite Zilog having suggested that it did). Based on the present record, there is no corroborating evidence whatsoever in support of Mr. Staab's contention that Zilog "negotiated and obtained" a license specifically permitting the Sage Defendants access to Synopsys software during the relevant timeframe – March to September 2011.

In a further puzzling turn, after the District Court showed through its limited disclosures that Zilog failed to lodge a license that covered the relevant time frame, (*see e.g.* Tr. 1470:22–23 (disclosing that "[the lodged license] appears to be for the time frame after"), it proceeded to scold counsel for ASI for daring to inquire as to whether Zilog did, in reality, have such a proper license. (*See e.g.* Tr. 2334:25–2335:2 (chiding counsel by stating, in part, "-- you're making -- well, it's based on accusations and suspicions, and no evidence or -- or no good faith basis for believing.")))

Given the centrality of this issue to Zilog's and the Sage Defendants' defenses, these apparent inconsistencies between Zilog's contentions and the District Court disclosures comprised, at a minimum, an area in which ASI could (i) impeach defense witnesses with regard to assumptions and testimony underpinning the economic infeasibility defense; and (ii) confirm that licenses were, in point of fact, amongst the "key challenges" to the 6482 Project.

4. Zilog Attempted to Frustrate Review of the Relevance Determinations by Unjustifiably Refusing to Augment the Record with the Synopsys License

As this Court is now aware, Zilog, as the only party to this action with access to the Synopsys License, refused to make that document available for appellate review. ASI was left with no option but to file a motion, on March 31, 2016, seeking an order from this Court mandating Zilog to augment the appellate record with that key document. Undoubtedly hoping to restrict this Court's complete review of this critical evidentiary issue to ASI's further prejudice, Zilog submitted an "objection" to ASI's meritorious motion where it advanced a series of increasingly misplaced arguments. In an order dated April 28, 2016, this Court granted ASI's motion thereby ordering Zilog to augment the appellate record by submitting the Synopsys License as a confidential sealed exhibit within 14 days. Accordingly, this Court should now have the benefit of access to the Synopsys License in evaluating the District Court's rulings.

5. The District Court Erred in Precluding Discovery of the Synopsys License on Relevance Grounds

The scope of discovery is clear and broad. I.R.C.P. 26(b)(1) permits broad discovery of unprivileged matters in civil litigation relating to any claim or defense at issue. I.R.C.P. 26(b)(1) is functionally equivalent to F.R.C.P. 26(b)(1), from which it was derived. F.R.C.P. 26 is intended to provide broad discovery:

The key phrase in this definition – 'relevant to the subject matter involved in the pending action' – has been construed broadly to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case. *See Hickman v. Taylor*, 329 U.S. 495, 501 (1947). Consistently with the notice-pleading system established by the Rules, discovery is not limited to issues raised by the pleadings, for discovery itself is designed to help define and clarify the issues. *Id.* at 500–501. Nor

is discovery limited to the merits of a case, for a variety of fact-oriented issues may arise during litigation that are not related to the merits.

Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 351 (1978). Accordingly, “the question of relevancy ‘is to be more loosely construed at the discovery stage than at the trial.’” *Kerr v. U.S. District Ct. for N. D. Cal.*, 511 F.2d 192, 196 (9th Cir. 1975).

Generally, “[t]he purpose of our discovery rules is to facilitate fair and expedient pretrial fact gathering. It follows, therefore, that discovery rules are not intended to encourage or reward those whose conduct is inconsistent with that purpose” and, thus, this Court does not look favorably upon decisions by trial courts where such decisions “encourage or reward stonewalling.” *Edmunds v. Kraner*, 142 Idaho 867, 873 (2006) (internal quotation marks omitted) (*quoting Priest v. Landon*, 135 Idaho 898, 901 (Ct.App.2001)). *See also Sanders v. Ayrhart*, 89 Idaho 302, 309 (1965) (“The purpose of the discovery rules is to take the surprise out of trials of cases so that all relevant facts and information pertaining to the action may be ascertained in advance of trial.”).

a. The District Court Erred in Denying ASI’s Motion to Compel the Disclosure of the Synopsys License

As demonstrated above, the Synopsys License directly relates to a number of critical issues that were raised by *both sides* at trial. The District Court’s denial of ASI’s motion to compel Zilog’s disclosure of the Synopsys License purely on inapplicable relevance grounds is manifestly untenable and is thus reversible error.

b. The District Court Compounded its Error by Resorting to an Unfair Ex Parte Process

The District Court’s determination concerning the relevance of the Synopsys License was the product of an opaque in camera process that deprived ASI of an opportunity to be properly heard on a key issue at trial with far-reaching implications. Simply stated, the District Court’s in camera review of the Synopsys License raises important fairness concerns that implicate ASI’s right to due process in this civil legal proceeding.

In conducting an ex parte relevance examination of the non-privileged Synopsys License, the District Court exposed itself to undue influence from arguments advanced by Zilog, but which could not be properly evaluated, tested or challenged by ASI.¹⁰ Thus, ASI was prevented from refuting or otherwise challenging any misleading or mistaken arguments that Zilog may have presented to the District Court as unassailable fact. In sum, the District Court’s in camera review of the Synopsys License was, at a minimum, unfair and prejudicial to ASI.¹¹

¹⁰ As an example, counsel for Zilog told the District Court as part of Zilog’s opposition to ASI’s motion to compel that the supposedly paid-for Synopsys License allowed for “remote use” of the pertinent design tools and that the Engineers “would go to an authorized location at Zilog’s facility in Meridian.” (Tr. 103:20–23.) Even though this assertion – one that District Court may have relied upon, at least in part, in its erroneous relevance determination – was shown at trial to be misleading, (*see* Tr. 1683:16–1684:8 (Lloyd claiming to have never worked from the Meridian facility but to have remotely worked from elsewhere); 1742:5–17 (same as to Perryman); 1919:23–1920:2 (Roberts claiming to have worked remotely for Zilog from home); 1964:9–13 (same as to Tiffany)), Zilog made no effort to correct the record.

¹¹ To the extent that Zilog had any *legitimate* confidentiality concerns with regard to the Synopsys License, the District Court had already entered a protective order governing the disclosure of highly sensitive information in this case. (R. 292–309.) If, according to Zilog, the confidentiality order failed to address all of its well-founded confidentiality concerns, the District Court could (and should) have modified it as needed. However, Zilog did not request such relief.

c. The District Court Further Compounded its Error by Relying Upon Impermissible Credibility Findings

While the District Court conceded that it is “no expert in – high tech,” (Tr. 1286:1), it nevertheless proceeded to make threshold findings as to the credibility of the parties’ competing positions relative to a contract for specialized services in the semiconductor industry. *See Lubcke*, 124 Idaho at 466 (“The question of relevancy is not a discretionary matter as there is no issue of credibility or finding of fact for the trial court to resolve prior to deciding to admit or reject the evidence.”)

For example, the District Court grounded its relevance determination on its “strong impression” that Zilog’s parent company, IXYS, had paid the necessary licensing fees for the design tools uses by the Sage Defendants on the 6482 Project during the relevant time period:

So, maybe, if – if plaintiffs are saying, in your bid we would have taken that price and made a bid to Zilog that if we were to buy those tools, and then allocate some portion of that purchase price into the contract price, that Zilog would have entertained that.

I don’t understand – I mean, good luck selling that one. I don’t know. I don’t – there – there – there’s a strong impression I have that Zilog would be foolish to consider paying someone, as – as part of a contract situation, to reimburse them in part for tools that they, the contractor, purchased, which you already own. It doesn’t make sense to me.

(Tr. 1287:8–19.)

I – I am simply not persuaded that the total charges or fees, whatever that total figure is that’s in the – the document before me, is – is relevant because IXYS had paid that – for that, and not contractors,

The responsibility for seeking modification of the protective order lay squarely with Zilog as the only party to this action with access to the Synopsis License.

not consultants, and they had paid that bill, whatever it was. And I don't – the Court doesn't see any real possibility or likelihood that, frankly, a subsidiary, an authorized subsidiary of IXYS, would pay any contractor or consultant for tools it already had. I – I just don't see how this is relevant still.

(Tr. 1307:15–24.)

However, whether Zilog actually paid the requisite licensing fees for the design tools at or during the time that the Sage Defendants were working on the 6482 Project is a *disputed* and *highly relevant* factual issue. Even if the District Court were entirely correct about what the Synopsys License showed, the license would be no less relevant. Whether and when Zilog actually paid for licenses, and the inferences to be drawn therefrom, are factual issues that are ordinarily within the province of the jury as opposed to issues that are amenable for resolution by the District Court as part of a relevance inquiry.

6. The District Court Erred in Excluding Testimony Concerning the Synopsys License, or Licenses Generally, as Inadmissible on Relevance Grounds

Here, the Synopsys License is relevant and relates to key issues presented at trial, thus making the license and its terms generally admissible at trial under I.R.E. 402. Therefore, the District Court's rulings precluding ASI from eliciting any evidence that may be pertinent to licensing terms, generally, and the Synopsys License, in particular, based *exclusively* upon an untenable relevance determination amount to reversible errors.

The District Court precluded ASI from examining various witnesses on matters that may relate to licensing terms. (*See, e.g.*, Tr. 2024:25–2027:17 (precluding ASI's industry expert from opining as to tools costs); 2035:9–17 (same); 2054:6–23 (precluding ASI from cross-examining

Mr. Staab with regard to how much Zilog paid for tools given that the Synopsys License was executed after the Sage Defendants were taken off the 6482 Project); 2358:20–2359:3 (precluding ASI from cross-examining Mr. Staab with regard to how much Zilog paid for tools); 1220:8–1221:11 (because it may relate to licensing terms, precluding ASI from eliciting testimony from its CFO, Mrs. Lorelli Hackler, that sought to explain the difference between the \$124,000 charged by the Sage Defendants on part of the 6482 Project and the \$454,000 ASI would have charged for that same work.) As discussed above, because the Synopsys License and its terms were relevant, the District Court erred in refusing to permit the examination or cross-examination of witnesses as to the foregoing and logically related topics.

7. The District Court’s Errors Affected ASI’s Substantial Rights

A district court’s improper exclusion of evidence will be overturned on appeal if it affects a party’s substantial rights. *Perception Const. Mgmt.*, 151 Idaho 250 at 253. ASI’s substantial rights were affected by the District Court’s relevance determination and its reliance on that determination in excluding evidence concerning licensing agreements, particularly the Synopsys License. ASI was affected in at least two ways.

First, ASI was precluded from presenting evidence to the jury that tended to show that Zilog did not have the relevant licensing agreements in place prior to or at the time the Sage Defendants worked on the 6482 Project, thus providing a plausible basis for the jury to find that ASI’s bid for the same work would have been, competitive as opposed to being “too expensive.” ASI was also precluded from presenting evidence to the jury from which it could fully evaluate its damages expert’s opinions concerning the harm caused by Zilog and the Sage Defendants.

Second, ASI was precluded from impeaching defense witnesses, specifically Mr. Staab and Mr. Reinstein. In view of the District Court's own limited disclosures, ASI was deprived an opportunity to impeach Mr. Staab with regard to whether Zilog did, in point of fact, have the tools and licenses in place as of March 2011 when the Sage Defendants commenced work on the 6482 Project. Likewise, also in view of the District Court's limited disclosures, ASI was prevented from highlighting the improper assumptions relied upon by Mr. Reinstein in formulating his opinions concerning damages (tool costs, in particular) in rebuttal to ASI's damages expert's opinions.

8. The Money Judgment Against the Sage Defendants Should Be Vacated and This Matter Remanded for a New Trial on Damages

Because ASI's substantial rights in the full presentation of its damages case were materially affected by the District Court's reversible errors flowing from its erroneous relevance determinations, the damages portion of the Amended Judgment against the Sage Defendants in the amount of \$195,175 should be vacated and this matter remanded for a new trial on damages. After all, the Sage Defendants eagerly benefitted from the District Court's erroneous evidentiary ruling and clearly recognized that the license/tools issue was a material factor in the parties' damages theories. (*See* R. 1882 (arguing in post-trial submissions that ASI was awarded \$195,175 which did not include tools costs that ASI claimed were a substantial cost in calculating damages).)

The liability case against the Sage Defendants has already been determined by the jury in ASI's favor and the Sage Defendants did not cross-appeal. Accordingly, all that will be left for the jury is its determination of the appropriate amount of damages after the parties are afforded an opportunity to fairly present all relevant evidence pertaining to that issue.

B. THE DISTRICT COURT ERRED IN GRANTING DIRECTED VERDICT ON THE INTERFERENCE WITH ECONOMIC ADVANTAGE CLAIM AGAINST ZILOG

1. Standard of Review

In reviewing a district court's decision to grant a motion for a directed verdict, this Court applies the same standard that should have been applied below, conducts an independent review of the evidence, and does not defer to the district court's findings. *Waterman v. Nationwide Mut. Ins. Co.*, 146 Idaho 667, 672 (2009). The Court "must determine whether, admitting the truth of the adverse evidence and drawing every legitimate inference most favorably to the opposing party, there exists substantial evidence to justify submitting the case to the jury." *Id.*

Substantial evidence is evidence of "sufficient quantity and probative value that reasonable minds could conclude that a verdict in favor of the party against whom the motion is made is proper." *Id.* "Because the moving party admits the truth of the adverse evidence, this Court, in determining whether there is substantial evidence to submit the case to the jury, will examine the evidence in favor of the plaintiff and will not consider any conflicting evidence presented by the defendants." *Curtis v. DeAtley*, 104 Idaho 787, 789 (1983). Thus, even where there is conflicting evidence, a motion for a directed verdict should be denied if "there is substantial competent evidence tending to establish plaintiff's case, or where reasonable minds may differ as to the conclusion to be reached from the evidence." *Shields & Co. v. Green*, 100 Idaho 879, 882 (1980).

Because a motion for a directed verdict must "state the specific grounds therefor," I.R.C.P. 50(a), a directed verdict is evaluated on appeal by focusing exclusively on the specific grounds advanced by the moving party below. See *Hartwell Corp. v. Smith*, 107 Idaho 134, 139 (Ct. App. 1984); *Gen. Auto Parts Co. v. Genuine Parts Co.*, 132 Idaho 849, 856 (1999) (*citing approvingly*

and attributing to *Hartwell Corp.*, the proposition that “scope of review on appeal is restricted to the specific grounds stated at trial by moving party for motion for directed verdict”).

2. Background

a. ASI’s Claim for Intentional Interference with Prospective Economic Advantage against Zilog

The elements of intentional interference with prospective economic advantage are:

(1) the existence of a valid economic expectancy, (2) knowledge of the expectancy on the part of the interferer, (3) intentional interference inducing termination of the expectancy, (4) the interference was wrongful by some measure beyond the fact of the interference itself, and (5) resulting damage to the plaintiff whose expectancy has been disrupted.

Cantwell v. City of Boise, 146 Idaho 127, 137–38 (2008).

Throughout the litigation below, ASI has been consistent with regard to the nature of its claim against Zilog for intentional interference with prospective economic advantage. As set out in ASI’s Second Amended Complaint, ASI alleged that “by soliciting or accepting services from the Individuals and Sage [ASI’s employees], Zilog tortiously interfered with American Semiconductor’s prospective economic advantage, including depriving American Semiconductor of the opportunities to earn income from the Individuals’ design services.” (R. 446, ¶ 90.)

Thus, ASI endeavored to establish, and did present substantial evidence showing, that Zilog intentionally interfered with the economic expectancy ASI had with its own employees when Zilog contracted with these Engineers through Sage. In so doing, ASI presented evidence at trial showing that (i) ASI hired the Engineers with the reasonable expectation of receiving outsourced design engineering work, including from Zilog; (ii) Zilog recognized that, given their extensive

experience, the Engineers were the most effective option for that design work; (iii) Zilog was aware that the Engineers were employed by ASI and that such employment prevented the Engineers from moonlighting for Zilog; and (iv) Zilog nevertheless chose to surreptitiously and wrongfully bypass ASI and engage the services of the Engineers through Sage. By secretly co-opting the services of the Engineers, Zilog deprived ASI of design work on the 6482 project that, in light of Zilog's obvious interest in the services of the Engineers, should properly have been routed through ASI as their known employer.

b. Zilog's Improper Characterization of ASI's Claim

ASI has consistently and clearly asserted that Zilog intentionally interfered with its prospective economic advantage *with its employees* – the Engineers and, later, Perryman. (*See e.g.* R. 446, ¶ 90 (Second Amended Complaint); R. 3785 (ASI's Memo. in Opp. to Summ. J.) (“ASI's tortious interference with prospective economic advantage claim concerns the economic expectancy ASI had for Roberts, Yearsley, Tiffany, Lloyd, and Perryman's continued employment and loyalty and, as such, is not based upon ASI's prospective relationship with Zilog”).)

Indeed, as of the time the parties submitted proposed jury instructions about one week prior to trial, Zilog itself had an accurate general understanding as to the nature of ASI's claim at issue. (R. 1461 (Zilog's Proposed Jury Instruction No. 4) (“Plaintiff also claims that Defendant Zilog knowingly and intentionally interfered with Plaintiff's prospective economic expectancy by depriving Plaintiff of the opportunity to earn income from the design services of Defendants David Roberts, Gyle Yearsley and William Tiffany.”).)

Nevertheless, Zilog elected to unfairly and improperly mischaracterize ASI's claim at trial. Zilog did so by arguing, without reference to the Second Amended Complaint or its own proposed jury instructions, that ASI's claim alleged that Zilog interfered with ASI's relationship *with Zilog*. (Tr. 2405:4–13.) Though ASI's counsel repeatedly contested and corrected that mischaracterization (*see, e.g.*, Tr. 2409:13–20; 2647:4–12; 2649:24–2650:3; 2652:4–7; 2653:1–13), the District Court appears to have erroneously adopted it. (Tr. 2422:24–2423:1 (stating that “[a]s the court understands it, ASI is alleging that Zilog interfered with ASI's economic expectancy with – with Zilog”); 2649:12–2651:10 (claiming that question no. six on the special verdict form – mischaracterizing ASI's claim in the manner just noted – correctly characterized ASI's claim).)

This Court has endorsed the view that where a plaintiff alleges wrongful interference with the relationship between it and its at-will employees, the appropriate claim is for tortious interference with prospective economic advantage. *Idaho First Nat. Bank v. Bliss Valley Foods, Inc.*, 121 Idaho 266, 286 (1991). *See also Wesco Autobody Supply, Inc. v. Ernest*, 149 Idaho 881, 893 (2010) (considering a claim that the defendant tortiously interfered with the economic expectancy in the plaintiff's relationship with its employees). ASI properly sought to take just such a claim to the jury, a claim that was and is supported by substantial evidence here.

c. Zilog's Motion for Directed Verdict

On January 13, 2015, Zilog moved for directed verdict as to ASI's claims for intentional interference with prospective economic advantage and intentional interference with contract. In so doing, Zilog relied on two central arguments. (Tr. 2403:22–2408:7; 2415:8–2418:6.)

First, as to ASI’s intentional interference with economic advantage claim, Zilog argued that ASI failed to provide substantial evidence of a valid economic expectancy. (Tr. 2405:4–21.) Invoking and relying upon its mischaracterization of ASI’s claim, Zilog argued that it would not have contracted with ASI on the 6482 Project even if Zilog had not engaged the Engineers through Sage. (*Id.* See also Tr. 2415:18–2418:6.) As a result, Zilog argued that ASI had failed to establish a valid economic expectancy with respect to its claim for intentional interference with economic advantage. (Tr. 2405:4–13). For the same reason, according to Zilog, ASI failed to establish any damages with respect to its claims for intentional interference with contract and with economic expectancy. (Tr. 2415:18–2418:6.)

Second, Zilog weakly invoked an argument that rested on an overblown risk of double recovery. According to Zilog, ASI’s claims for intentional interference with prospective economic advantage and for intentional interference with contract involved the same damages. (Tr. 2406:16–2408:7.) The District Court assisted Zilog in refining this flailing argument when it observed: “. . . the Court let them [ASI’s two claims] go forward, that there’s the potential for not knowing what damages relate to what theory, and – and that they might be double counted or something.” (Tr. 2407:19–25.) According to counsel for Zilog, the District Court “articulat[ed] [the argument] much better than” counsel. (Tr. 2408:5–7.)

d. The District Court’s Rulings on Zilog’s Motion for Directed Verdict

The District Court initially denied both of Zilog’s motions. The District Court’s denial of Zilog’s motion as to ASI’s claim for intentional interference with contract was brief, noting only that the evidence was conflicting but sufficient to go to the jury. (Tr. 2422:14–22.)

As to ASI's claim for intentional interference with prospective economic advantage, the District Court stated that it was a "closer question," but ultimately ruled that this claim should go to the jury as well. (Tr. 2422:23–2424:21.) The District Court then expressed concern regarding double recovery and noted that the concern would have to be addressed at a later date. (Tr. 2425:4–24.) Leaning on ASI to drop that properly articulated claim, the District Court added that it would "respect" ASI's counsel if ASI voluntarily dismissed the intentional interference with prospective economic advantage claim. (Tr. 2425:9–10.) ASI declined that invitation.

In a conference on the following day to discuss jury instructions and the special verdict form, counsel attempted, with the District Court's assistance, to arrive at a mutually agreeable special verdict form. As part of this process, Zilog proposed a special verdict question (question six in a draft special verdict form) addressed to ASI's claim for intentional interference with prospective economic advantage. Relying upon Zilog's mischaracterization of ASI's claim, this question read: "Did Zilog intentionally interfere with American Semiconductor's economic expectancy in contracting *with Zilog*?" (Tr. 2649:18–21 (emphasis added).) ASI objected to that proposed question as mischaracterizing its claim, noting that ASI claimed that Zilog intentionally interfered with the relationship *between ASI and its employees*, not that Zilog intentionally interfered with a relationship between itself and Zilog. (Tr. 2647:4–12; 2649:24–2650:3; 2652:4–7; 2653:1–13).

The District Court responded by putting ASI to the choice, then and there, between "drop[ping] this claim" or accepting a clear mischaracterization of the claim. (Tr. 2654:6–9.) In effect, the District Court demanded that ASI either abandon its properly articulated claim or adopt

an entirely different claim that was neither litigated nor tried to the jury. ASI respectfully declined to do so, noting, again, that Zilog's proposed question six of the draft special verdict form simply did not reflect its claim. (Tr. 2666:10–15.)

Without additional briefing or argument, the District Court then “reconsider[ed]” its earlier denial of Zilog's motion for a directed verdict and granted that motion as to the intentional interference with prospective economic advantage claim. (Tr. 2668:8–2669:9.)

Having held only the day before that there was substantial evidence to support ASI's claim for intentional interference with prospective economic advantage, the District Court merely stated that “I – I just think there's – there's no evidence. There's not only not substantial evidence, there's no evidence” to support that claim. (Tr. 2669:6–8.) But for stating that the argument offered by Zilog's counsel in support of its motion for a directed verdict was somehow “a terribly strong one,” the District Court did not identify the argument that it took to be strong, articulate the strength of the argument, or identify any reasons or grounds for granting a directed verdict. (Tr. 2669:2–8.) In fact, the District Court did not even identify the element or elements of ASI's claim, as properly articulated, not supported by substantial evidence. As a result, the District Court's sudden sua sponte change of heart is not comprehensible.

3. The District Court Erred in Light of the Substantial Evidence Presented

On appellate review of an order granting a directed verdict, the scope of review “is restricted to the specific grounds stated at trial by [the] moving party.” *Gen. Auto Parts Co.*, 132 Idaho at 856 (*citing approvingly and attributing to Hartwell Corp.*, 107 Idaho at 139). Because Zilog argued only that ASI failed to provide adequate evidence of an economic expectancy – based

on the contention that Zilog would not have contracted with ASI even if it had not engaged the Engineers through Sage – this Court’s scope of review is limited to that first element of ASI’s intentional interference with prospective economic advantage claim against Zilog.

Accordingly, because Zilog did not place the remaining elements of the claim at issue by not raising them as part of “specific grounds” in support of the motion for directed verdict, such arguments should be deemed waived and are not properly before this Court on appeal. *See id.* In any event, if this Court were to review the remaining elements of the claim, there is, as discussed further below, substantial evidence with regard to those elements to support sending the intentional interference with economic advantage claim against Zilog to the jury.

a. There is Substantial Evidence of ASI’s Economic Expectancy in its Employment Relationships with the Engineers

Selected Evidence Establishing ASI’s Economic Expectancy. The evidence shows that ASI set out to hire the Engineers with the reasonable expectation that these engineers would attract outsourced design work from, among others, Zilog. When ASI learned that the Engineers were laid off from Zilog and were looking for employment, ASI worked to create positions for them, investing significantly in them in the process. (Tr. 749:8–750:23.) ASI hired the Engineers with the reasonable expectation that these employees would make ASI an attractive option for outsourced design work. (Tr. 817:20–820:4.)

In particular, but not exclusively, ASI considered Zilog a likely source of such work. *Id.* Mr. Staab and Stephen Darrough, Zilog’s vice president of marketing, testified that Zilog was concerned, as of 2010, because of its failures to bring new products to market within the previous

four years. (Tr. 1590:3–1592:4; 2222:7–2226:25.) A product proposal written by Mr. Staab in November 2010 stated that it was “critical for the company to be seen as not falling behind in new product designs,” and so critical for Zilog to bring new products to market. (Plaintiff’s Ex. 42 at Z011597; Tr. 2222:7–2226:25.) Zilog then set itself the task of developing a new silicon product for the first time in four years, in an attempt to “keep[] Zilog relevant in the market.” (Plaintiff’s Ex. 42 at Z011591; Tr. 2222:7–2226:25.)

At the same time, according to Mr. Darrough, Zilog had no design team remaining after the departure of Roberts, Yearsley, and Tiffany. (Tr. 1590:3–1591:18). In light of a hiring freeze at Zilog, (Tr. 2237:12–2238:20), Mr. Staab acknowledged it was necessary for Zilog to outsource design engineering in order to bring new products to market. (Tr. 2235:22–2236:18.) While IXYS, Zilog’s parent company, has another subsidiary – Clare – that provides some design engineering services, Mr. Staab testified that that option was unattractive because Clare engineers were unfamiliar with Zilog technology and had limited expertise. (Tr. 2241:6–23.)

The Engineers, in contrast, were uniquely suited for such outsourced work precisely because they had years of experience with Zilog technology and an established relationship with Zilog. (Tr. 836:9–17; 1857:17–22; 2220:4–20; 2241:20–23.) Yearsley, in fact, designed the “core” on which the 6482 project was based. (Tr. 2220:4–20.) When Mr. Staab eventually recommended outsourcing the work to Sage, the Engineers’ experience with Zilog along with their technical expertise and efficiency were central considerations. (Tr. 2241:6–23; 2252:8–12; 2283:12–18.)

The Engineers were all full-time employees at ASI when they were approached by and began moonlighting for Zilog. (Tr. 1843:23–1844:16; 1976:17–22; 1945:12–16.) According to Lloyd, ASI could easily have performed the work done by Sage. (Tr. 1677:5–1678:22.)

The prospect of doing such work was precisely the reason that ASI invested in the Engineers in the first place. In effect, by sending work to the Engineers, Zilog did exactly what ASI reasonably expected that Zilog would do when ASI hired them. Unfortunately for ASI, Zilog elected to do so by circumventing ASI and inducing the Engineers to violate their fiduciary duties and their employment confidentiality agreements.

A reasonable juror could conclude from this testimony that ASI had an economic expectancy in its employment relationship with the Engineers, and that damages associated with that expectancy were profits from design work that would have been outsourced to ASI from Zilog, among others. In particular, Zilog engaged these very engineers on the 6482 Project. Although Mr. Staab testified that Zilog would not have contracted with ASI for design services because ASI charged more for those services than Zilog was willing to spend, (Tr. 2356:22–2358:22), that testimony is merely conflicting evidence that is disregarded for purposes of evaluating the District Court’s order granting a directed verdict.¹² *See Curtis*, 104 Idaho at 789 (1983) (holding that, on

¹² Besides, as previously established, ASI was erroneously precluded from attempting to impeach Mr. Staab on this issue in view of the District Court’s ruling concerning relevance of the Synopsys License. To the extent that the District Court relied on Zilog’s economic infeasibility defense and Mr. Staab’s testimony that Zilog would not have contracted with ASI, the District Court’s determination is error not only because it weighed conflicting evidence on a motion for a directed verdict, but because it erroneously excluded evidence relevant to a defense.

review of an order dismissing a claim on directed verdict, this Court “will not consider any conflicting evidence presented by the defendants”).

Jury Verdict Establishing ASI's Economic Expectancy. In addition, the jury has already found that ASI had a reasonable expectation of receiving outsourced design work from Zilog on the 6482 Project. ASI pursued a claim for intentional interference with prospective economic advantage against the Sage Defendants, arguing that they interfered with ASI’s economic expectancy in providing design services to Zilog. (R. 445 (Second Amended Complaint, ¶ 83).)

That claim went to the jury, which returned a verdict for ASI. (R. 1633 (Special Verdict).) That is, the jury determined that the Sage Defendants interfered with ASI’s economic expectancy in providing design services *to Zilog*. (*Id.*) Because the Sage Defendants could have interfered with such an expectancy only where one existed, the jury’s verdict entails the conclusive factual finding that there was indeed such an expectancy.

b. There is Substantial Evidence that Zilog Knew, or had Reason to Know, of ASI’s Economic Expectancy

To establish that Zilog knew of ASI’s economic expectancy in its employees, ASI need only show that Zilog had “knowledge of facts which would lead a reasonable person to believe that such interest exists.” *Wesco Autobody Supply, Inc. v. Ernest*, 149 Idaho 881, 894 (2010) (internal quotation marks and emphasis omitted) (*quoting Highland Enterprises, Inc. v. Barker*, 133 Idaho 330, 338–39 (1999)). There is substantial evidence that Zilog knew of facts that would lead a reasonable person to believe that the Engineers were ASI employees and that ASI expected to benefit from their services as employees.

First, ASI presented evidence that Zilog not only knew that the Engineers were employed at ASI, but that their services were available through ASI for the design work that Zilog improperly routed through Sage. For example, as part of the conversations between Mr. Hackler and Mr. White, then a Zilog executive, regarding ASI's hiring of the Engineers, Mr. Hackler suggested that ASI was eager for outsourced design work and could assist Zilog with any work that it had available. (Tr. 837:4–841:9.) According to Mr. Hackler, Mr. White stated that this information was passed along to Mr. Staab. (Tr. 841:3–4.) In addition, Lloyd testified that Roberts discussed with Mr. Staab the possibility of bringing Zilog's work to ASI, work that ASI was able and eager to take, but that Zilog stated that it would rather work through Sage. (Tr. 1680:5–1681:4.) Zilog's preference was understandable, if unethical, if the services at issue could be secured more cheaply through Sage because overhead and administrative costs were shifted onto ASI as their employer. (See Tr. 2356:22–2358:19.)

Second, there is ample evidence that Zilog executives knew that the Engineers were working at ASI while they were “moonlighting” for Zilog. Mr. Staab testified that he knew the Engineers were at least independent contractors at ASI. (Tr. 2255:6–23; 2260:3–18.) Beginning in 2009, Mr. Staab exchanged a series of emails with Roberts in which Roberts mentioned working with ASI, some of which were sent to Staab by Roberts from an ASI email address. (Tr. 2255:17–2266:20.) Further, Mr. Staab testified that Tiffany sent him an email from an ASI address in which Tiffany mentioned taking vacation time from ASI. (Tr. 2294:9–18.) Tellingly, according to Mr. Staab, an individual solely doing contract work for Zilog, for instance, would not receive vacation time. (Tr. 2296:18–23.) In addition, Mr. Staab apparently attempted to take measures to see that

the Engineers could work for Zilog without interfering with their work at ASI. For instance, Mr. Staab moved a weekly meeting time from 11:00 a.m. to 4:30 p.m. (local time) because it was “more convenient for them,” and provided VPN (virtual private network) access to Zilog’s network so that the Engineers could work remotely. (Tr. 2275:11–2276:13.)

Third, various other employees at Zilog also knew or had reason to know that the Engineers were employed at ASI. The Engineers had been employed for many years at Zilog and had continuing relationships with co-workers who remained Zilog employees. Shortly before they were approached by Zilog and while working for ASI, the Engineers attended a lunch in which they reunited with former Zilog co-workers who were still working for Zilog at the time – Mr. Wilson, Roberts’ direct supervisor at ASI, was also in attendance. (Tr. 1945:14–1947:1; 1671:19–1673:3.) After having been laid off from Zilog, a jury could reasonably conclude that the Engineers discussed their current employment situations with these former co-workers, given that Lloyd testified that the topic “probably came up.” (Tr. 1672:24–1673:3.) Moreover, a Zilog employee who attended this meeting, Sean Beck, repeatedly e-mailed with Lloyd using Lloyd’s ASI address to ask technical questions regarding work Mr. Beck was doing for *Zilog*. (Tr. 1673:19–1674:23.) Mr. Wilson further testified that he also advised Mr. Beck in a telephone conversation that the Engineers were full-time ASI employees. (Tr. 1482:9–21.)

c. There is Substantial Evidence that Zilog Intentionally Interfered with ASI’s Economic Expectancy

To establish that Zilog intentionally interfered with ASI’s economic expectancy, ASI must show that Zilog knew or was substantially certain that the interference would occur as a result of

its actions. *Highland Enterprises, Inc. v. Barker*, 133 Idaho 330, 340 (1999) (internal quotation marks omitted). “Intent can be shown even if the interference is incidental to the actor’s intended purpose and desire but known to him to be a necessary consequence of his action.” *Id.* (internal quotation marks omitted).

As shown above, Zilog knew that the Engineers were employed by ASI and that ASI was attempting to secure Zilog’s outsourced design work. Even if Zilog’s intended purpose in improperly contracting with Sage was to save money by shifting overhead and administrative costs onto ASI, that purpose had the necessary effect of ensuring that Zilog would not properly employ ASI’s Engineers through ASI. Zilog thereby necessarily interfered with the reasonable expectation ASI had in attracting this design work through the employment of the Engineers.

d. There is Substantial Evidence that Zilog’s Interference was Wrongful

“[I]nterference may be shown to be wrongful by proof that . . . the means used by the interferer to cause injury to the prospective advantage were wrongful by reason of a statute, regulation, recognized common law rule, or an established standard of a trade or profession.” *Syringa Networks, LLC v. Idaho Dept. of Admin.*, 155 Idaho 55, 65 (2013).

Zilog’s conduct was wrongful because Zilog knew, or had reason to know, that the Engineers were employed by ASI and it was standard in the industry for design engineers to work subject to a non-compete provision and/or common law fiduciary duties precluding them from unauthorized moonlighting in their employers’ fields of endeavor. Indeed, according to Mr. Staab, Zilog requires all of its employees and contractors to sign agreements that, among other things, prohibit them from working for entities that compete, either directly or indirectly, with Zilog.

(Tr. 2293:1–2294:8.) Mr. Staab testified that such agreements are standard in the industry. (Tr. 2287:15–2288:13.) Likewise, Tiffany testified that the non-compete provision in the ECA he signed with ASI was standard in the industry. (Tr. 1968:23–1969:1.) Further, according to Mr. Darrough, a Zilog executive, it would be a violation of such industry standards to moonlight for a competitor, in addition to being unethical. (Tr. 1531:2–24.)

Thus, by outsourcing work to Sage, knowing that the Engineers comprising Sage were ASI employees, Zilog violated industry standards by encouraging and facilitating the Engineers' violations of the contractual and fiduciary duties towards ASI.

e. There is Substantial Evidence that Zilog's Interference Harmed ASI

“Compensatory damages for lost profits and future earnings must be shown with a reasonable certainty. Reasonable certainty requires neither absolute assurance nor mathematical exactitude; rather, the evidence need only be sufficient to remove the existence of damages from the realm of speculation.” *Todd v. Sullivan Const. LLC*, 146 Idaho 118, 122 (2008) (internal citations and quotation marks omitted). “The mere fact that it is difficult to arrive at [an] exact amount of damages, where it is shown that damages resulted, does not mean that damages may not be awarded; it is for the trier-of-fact to fix the amount.” *Trilogy Network Sys., Inc. v. Johnson*, 144 Idaho 844, 846 (2007) (internal quotation marks omitted).

Here, ASI presented extensive testimony from its damages expert, Richard Hoffman, who testified as to the profits ASI would have realized from contracting with Zilog on the project. (Tr. 2060:1–2132:4. *See also* Plaintiff's Exs. 119–123, 127). Defendants presented their own damages expert testimony. (Tr. 2132:13–2179:11.) While these experts disagreed as to damages, that

disagreement was for the jury to resolve. *Trilogy*, 144 Idaho at 846. Further, Zilog has never argued that damages cannot be fixed with reasonable certainty, but it has focused exclusively on its argument, addressed above, that Zilog would not have contracted with ASI at all – an argument that the jury has already rejected. Notably, the jury returned a verdict against the Sage Defendants for intentional interference with ASI’s prospective economic advantage in contracting with Zilog. In doing so, the jury was clearly able to arrive at an amount of damages for the single injury at issue here (albeit understated in view of the District Court’s evidentiary errors).

4. The District Court Erred to the Extent that it Relied on Inapposite Double Recovery Concerns

Besides improperly mischaracterizing ASI’s claim, Zilog further argued that a directed verdict should be granted because ASI’s claims for intentional interference with prospective economic advantage and intentional interference with contract involved the same damages, giving rise to double recovery concerns. (Tr. 2406:16–2408:17; 2415:18–2416:1.) The District Court appears to have erroneously bought that argument. (Tr. 2408:11–17 (expressing concern that if “both those theories go forward,” it would be difficult “to prevent double recovery”).)

A plaintiff may plead and attempt to prove multiple, alternative theories of recovery for the same relief. I.R.C.P. 8(a)(1). If a risk of double recovery was a sufficient reason to grant a directed verdict as to one of two alternative theories of relief, then a plaintiff could never take alternative theories to the jury. That is not the law in Idaho. See *Burton v. Atomic Workers Fed. Credit Union*, 119 Idaho 17, 20–22 (1990) (noting that an alternative theory of recovery for the same relief was properly submitted to the jury and it was error for the district court not to instruct the jury as to

that theory); *Nalen v. Jenkins*, 113 Idaho 79, 81 (Ct. App. 1987) (recognizing the common “practice of advancing multiple theories, which may only represent different ways to obtain one specific recovery—a single claim. Clearly, several theories may draw upon a common nucleus of facts which give rise to a single claim. Here, for example, the [plaintiffs] maintained four theories of recovery for a single claim against [defendants].”).

Moreover, a directed verdict is appropriate only where there is no substantial evidence to support the claim. *Shields*, 100 Idaho at 882. Concerns about double recovery are irrelevant. The District Court overstepped its bounds by usurping the jury’s role when it eliminated what it took to be the weaker of ASI’s claims. (Tr. 2668:12–15 (claiming that it was doing ASI a “favor” in granting Zilog’s motion for a directed verdict.)) The District Court is not authorized to do so, particularly where, as here, ASI sought to mitigate any risk of a double recovery through proposing appropriate stipulations. (See Tr. 2408:20–2409:6; 2414:25–2415:5; 2662:18–2663:5.)

C. THE DISTRICT COURT ERRED IN ITS PREVAILING PARTY RULINGS

1. Standard of Review

A prevailing party determination is a discretionary finding that will not be disturbed on appeal absent an abuse of discretion. *Bream v. Bencoter*, 139 Idaho 364, 368 (2003). To determine whether an abuse of discretion has occurred, this Court considers:

- (1) whether the trial court correctly perceived the issue as one of discretion;
- (2) whether the trial court acted within the boundaries of this discretion and consistent with the legal standards applicable to the specific choices available to it; and
- (3) whether the trial court reached its decision by an exercise of reason.

Id.

2. Background

a. Prevailing Party Determination Concerning Zilog

In seeking discretionary and non-discretionary prevailing costs against ASI, Zilog argued it was the prevailing party. (R. 2116.) In finding that Zilog was the prevailing party, the District Court reasoned, in relevant part:

When the instant matter was submitted to the jury for deliberation, ASI was pursuing one cause of action against Zilog, Tortious Interference with Contract. The jury found in Special Verdict Question 6 that Zilog did not “intentionally interfere with American Semiconductor, Inc.’s contracts with the individual Sage defendants.” Thus, Zilog was found not liable to ASI on any claim in any amount.

(Id.)

b. Prevailing Party Determination Concerning the Sage Defendants

As of the close of trial, ASI had three claims against the Sage Defendants: (i) a claim for breach of fiduciary duty, (ii) a claim for breach of the non-compete provision of their contracts, and (iii) a claim for intentional interference with prospective economic advantage. Each of these three claims was an alternative theory of relief directed to precisely the same wrongful conduct and involving the same damages. With respect to each, ASI attempted to show that the Sage Defendants wrongfully contracted or worked with Zilog while employed with ASI and that damages were the lost profits ASI would have realized from the outsourced design work.

Because these claims against the Sage Defendants were alternate theories of relief for the same harm, the District Court correctly recognized a risk of double recovery. In a bid to mitigate that risk, it proposed Jury Instruction No. 28, “intended to address double recovery.” (Tr. 2662:8–

10. *See also* Tr. 2636:22–24 (“28 is intended to be a – a no double recovery type of – you – you can’t recovery twice for the same injury.”.) That instruction provides: “If you determine that a party is entitled to recover under two claims for the same injury, you should not award more than is required to adequately compensate the party for that one injury.” (R. 1624.)

Given that “the damages [on ASI’s claims against the Sage Defendants] are the same,” ASI objected to this instruction as likely to confuse the jury should it find liability on more than one of ASI’s alternative claims for relief.¹³ (Tr. 2662:11–2663:5 (counsel explaining that “[a]rguably, all the – the injury is the same here for all claims. And so, if they were to find for us on – on – on three claims, I think there might be confusion because the damages are the same.”.) ASI was concerned that the jury would not know whether it should arrive at an amount sufficient to compensate ASI for its single injury and then (i) divide that amount amongst the separate causes of action, (ii) write that same amount for each cause of action, or (iii) write that one amount as the damages for just one cause of action and enter no damages for the other causes of action.

ASI did not merely object, it proposed an alternative of addressing legitimate double recovery concerns that did not rely on a potentially confusing jury instruction:

Now, we don’t hope or expect to get a judgment in excess of the total damages. I think we – we would – we could stipulate to cap any judgment at that amount, so they don’t – they don’t get to add it

¹³ The risk of confusion engendered by the proposed jury instruction was compounded by the fact that ASI’s claims against the Sage Defendants for breach of the non-compete provision and for breach of fiduciary duty shared a question regarding the extent of damages on the Special Verdict Form, while another question was addressed to the extent of damages with respect to ASI’s claim for intentional interference with prospective economic advantage, despite the fact that the same damages were alleged for all three claims. (R. 1632–1634 (Special Verdict).)

cumulatively against any party. That might be another way to address this.

(Tr. 2662:23–2663:3.) ASI’s proposal was firmly rooted in the principle that the District Court may reduce a judgment to a single recovery, if it believes that the jury awarded more than once for the same injury. *Gunter*, 141 Idaho at 31 (citing *McCandless v. Kramer*, 76 Idaho 516, 519 (1955).) In *McCandless*, this Court concluded that the trial court’s remedying of a double recovery problem by reducing the judgment to a single recovery was in accord with accepted legal principles. *McCandless*, 76 Idaho at 519. Ultimately, at the Sage Defendants’ urging, the District Court decided to “leave [Jury Instruction No.] 28 as is.” (Tr. 2663:8–10; 2663:22–23.)

The jury returned a verdict on January 16, 2015, finding the Sage Defendants liable on all three of ASI’s alternative claims for relief. (R. 1632–1634.) Just as ASI feared, the jury appears to have been confused regarding how to award damages on ASI’s alternate claims. In answer to the single question addressing damages for ASI’s claims for breach of fiduciary duty and breach of the non-compete provision, the jury wrote “195,175,” only to cross that number out and write “0.” (R. 1633.) Then, as to the question regarding damages associated with ASI’s intentional interference with prospective economic advantage claim, the jury wrote “195,175.” (R. 1634.)

Following the verdict, ASI moved for costs and attorney fees pursuant to I.R.C.P. 54(d)(1) and Idaho Code § 12-120(3), arguing that it was the prevailing party as against the Sage Defendants. (R. 1803–1824.) The District Court nevertheless concluded that ASI was not the prevailing party as to the Sage Defendants by reasoning, in pertinent part, that:

ASI recovered damages on one of its three claims against the Sage Defendants, and recovered 19% of the total damages it sought.

Because ASI succeeded on only one of its three claims against the Sage Defendants, recovering only 19% of its claimed damages, the Court, in a thoroughly considered decision and in a careful exercise of its discretion, finds there is no prevailing party in this matter as between ASI and the Sage Defendants.

(R. 2130–2131 (emphasis added).) In sum, the District Court’s determination appears to have hinged on its view that ASI succeeded on only one of its three claims against the Sage Defendants, and that \$195,175 (or approximately 19% of claimed damages) was somehow a nominal award.

3. The District Court’s Prior Erroneous Rulings Warrant Reversal of its Prevailing Party Determinations

In awarding Zilog its prevailing party costs in the amount of \$39,051.44, the jury’s verdict in Zilog’s favor on the sole claim submitted against it, the intentional interference with contract claim, was critical to the District Court’s prevailing party analysis. (R. 2116.) However, should the Court reverse the District Court’s grant of Zilog’s motion for directed verdict on ASI’s claim for intentional interference with prospective economic advantage claim, the prevailing party determination becomes untenable and should be reversed pending final resolution of all claims.

In addition, because ASI’s substantial rights in presenting a complete damages case to the jury were curtailed by the erroneous relevance determination concerning the Synopsys License, a reversal of the prevailing party determination as to the Sage Defendants is likewise warranted. *Todd*, 146 Idaho at 126 (“Because we are vacating the damages portion of the judgment and remanding this case for a new trial on damages, we also vacate the order denying . . . an award of court costs and attorney fees” and further stating that “[t]he issue of prevailing party will have to be decided anew after the final resolution of [the] remaining claims.”) (citations omitted).

4. The District Court Erred in Not Finding that ASI is the Prevailing Party in Relation to the Sage Defendants

a. The Claims Submitted Involved a Single Injury and Shared the Same Purpose

Under I.R.C.P. 54(d)(1)(B), a trial court must look to “the final judgment or result of the action in relation to the relief sought by the respective parties” when determining which party prevailed. While the District Court purported to do so here, it looked instead to a factor that, in the context of Jury Instruction No. 28, is wholly irrelevant. “A single cause of action may be set forth in several different counts where the plaintiff has two or more distinct and separate reasons for the right to the relief he seeks. However, there can be but one award of damages for a single injury.” *McCandless*, 76 Idaho at 519. There is no dispute that a single injury was at issue on the three alternative claims for relief against the Sage Defendants. (*See, e.g.*, Tr. 2662:20–22.)

Given the District Court’s clear instructions not to provide multiple awards for the same injury, the jury did precisely what one would expect it to do: it found liability on each those claims and made a single award of \$195,175.00, the amount it viewed as necessary to “adequately compensate [ASI] for that one injury” under the evidence presented. (R. 1624.) In light of Jury Instruction No. 28, the Special Verdict Form does not support the District Court’s view that ASI was unsuccessful on its claims for breach of fiduciary duty and breach of contract. To the contrary, the Special Verdict Form demonstrates that ASI was successful on all three submitted claims because the jury found the Sage Defendants were liable on each and awarded an amount adequate to compensate ASI for the one injury common to them all.

Moreover, although this appears to be an issue first impression in Idaho, at least one other sister state Supreme Court has grappled with it. In *Dennis I. Spencer Contractor, Inc. v. City of Aurora*, 884 P.2d 326 (Colo. 1994), the Colorado Supreme Court addressed a challenge to a trial court's discretionary prevailing party determination. The appellant there brought claims for breach of a construction contract and breach of a settlement agreement. *Id.* at 327–38. The jury determined that respondent was liable on both claims, but awarded damages only on the breach of contract claim. *Id.* The trial court then determined that the appellant had not succeeded on its claim for breach of the settlement agreement and was, therefore, not the prevailing party. *Id.* The Colorado Supreme Court reversed, relying on its review and analysis of the impact of a jury instruction that is virtually identical to Jury Instruction No. 28 here. *Id.* at 333–34. It held that, in light of that jury instruction, “the special verdict for damages in the breach of the construction contract implicitly includes damages attributable to the breach of the settlement agreement.” *Id.* at 334. As a result, the appellant there was the prevailing party. *Id.*

Likewise, in light of Jury Instruction No. 28, the only reasonable view is that the single damage award that the jury made in ASI's favor constitutes the damage award for all three claims upon which ASI prevailed. That view is further supported by the fact that the jury even wrote that same award in answer to the Special Verdict Form's question regarding damages for ASI's other two claims, only to then cross it out (presumably based on its application of Jury Instruction No. 28). (R. 1633.) Even without an analogously telling circumstance, the Colorado Supreme Court in *Spencer* had no difficulty determining the only plausible conclusion as to the jury's intent.

Further, even given the view that the Special Verdict Form could reasonably be taken as evidence that ASI did not recover on its claims for breach of fiduciary duty and breach of the non-compete provisions (a view that is logically untenable), that failure to recover should not have played the significant factor that it did in the District Court’s determination. In the context of prevailing party determinations, Idaho appellate courts have recognized the importance of the distinction between alternative theories requesting the same relief or damages, on the one hand, and distinct claims requesting different relief or damages, on the other.

“[U]nder modern pleading practice, a plaintiff may advance alternative theories relating to an alleged set of facts.” *Burns v. Cty. of Boundary*, 120 Idaho 623, 626 (Ct. App. 1990). “Individual theories should not be seen as isolated parts of the case, framed by their own encapsulated facts, but as different ways to obtain one specific recovery—a single claim.” *Id.* Where there are multiple theories based on the same facts and addressed to the same relief, courts should look to the success of claims, and not theories, in determining the propriety of fees. *Id.*

The importance of this distinction is consistent with this Court’s view that the prevailing party inquiry should focus on the *primary purpose, issue, or objective* of the litigation. *See Idaho Military Historical Soc’y, Inc. v. Maslen*, 156 Idaho 624, 630–31 (2014) (looking to the “action as a whole” and the “primary objective” in the action in affirming a district court’s prevailing party determination); *Advanced Med. Diagnostics, LLC v. Imaging Ctr. of Idaho, LLC*, 154 Idaho 812, 815 (2013) (noting that the “correct legal standard” requires the court to determine which is the primary issue in the litigation). As between ASI and the Sage Defendants, the primary issue was not whether ASI recovered on one rather than another of its alternative theories of relief, but

whether some or all of these defendants breached their contractual and common law obligations to ASI when they moonlighted for Zilog while employed by ASI and, thereby, intentionally interfered with ASI's prospective economic advantage. That primary issue was resolved unambiguously in favor of ASI.

Although the prevailing party determination is left to the discretion of trial courts, that discretion is not unbounded and must be guided by the demonstrated facts and applicable legal standards. Here, the District Court merely paid lip service to both and thus abused its discretion

b. The District Court Ignored ASI's Overall Victory

In addition, as this Court has emphasized, “[in] determining which party prevailed in an action where there are claims and counterclaims between opposing parties, the court determines who prevailed ‘in the action.’ That is, the prevailing party question is examined and determined from an overall view, not a claim-by-claim analysis.” *Eighteen Mile Ranch, LLC v. Nord Excavating & Paving, Inc.*, 141 Idaho 716, 719 (2005).

In *Eighteen Mile Ranch*, this Court reversed a trial court's prevailing party determination where the district court “focused too much attention on the Company's less than tremendous success on its counterclaim and seemingly ignored the fact that the Company avoided all liability as a defendant. The district court improperly undervalued the Company's successful defense.” *Id.* This Court went on to further state that “[in] this case, logic suggests that a verdict in [the Company's] favor and a victory on its counterclaim (albeit, a relatively small one), by definition, makes it a prevailing party.” *Id.*

Eighteen Mile Ranch is instructive, if not controlling. There, the prevailing party defeated the claims against it, and received a modest verdict on its own claims of approximately 8.8% of the total it had requested. *Id.* at 718. Here, ASI entirely defeated the counterclaims asserted by the Sage Defendants, and received a substantial verdict – approximately 19% of the amounts claimed – on the alternate claims it asserted against the Sage Defendants (notwithstanding the challenged evidentiary rulings affecting damages).

As in *Eighteen Mile Ranch*, the District Court seems to have focused its attention on its perception of ASI’s “less than tremendous” success on its claims but in doing so entirely ignored the fact that ASI achieved a “significant benefit” when it avoided liability on the Sage Defendants’ counterclaims. Thus, as with the prevailing party in *Eighteen Mile Ranch*, a verdict in ASI’s favor on the counterclaims and “a victory on [its claims] (albeit, a relatively small one), by definition, makes [it] a prevailing party.”¹⁴ *Id.* at 719 (emphasis added). *See also Brooks v. Gigray Ranches, Inc.*, 128 Idaho 72 (1996) (affirming a prevailing party determination where a party defeated the claim asserted against it and recovered 3% of its requested amount on the claim it asserted).

In sum, where, as here, a party defeats the claims asserted against it and achieves significant success in its own claims, it is properly the prevailing party from an “overall” case perspective. *Eighteen Mile Ranch*, 141 Idaho at 719.

¹⁴ It is well-settled that that mere dismissal of a claim without trial does not necessarily mean that the party against whom the claim was stated is a prevailing party. *Eighteen Mile Ranch*, 141 Idaho at 719. Accordingly, the mere fact that ASI dismissed certain claims prior to submission to the jury does not mean that the Sage Defendants prevailed on those claims. To the extent that the District Court adopted such a view, as championed by the Sage Defendants in post-trial proceedings (*see, e.g.*, R. 1881), it erred.

D. ASI IS ENTITLED TO ATTORNEY’S FEES ON APPEAL AGAINST ROBERTS, YEARSLEY AND TIFFANY

1. Attorney’s Fees Are Warranted under the Terms of the ECAs

Contractual provisions for payment of attorney’s fees and costs are enforceable in Idaho. *Indian Springs LLC v. Indian Springs Land Inv., LLC*, 147 Idaho 737, 751 (2009). Here, the ECAs provide for attorney’s fees to the prevailing party in any action to enforce its terms: “The prevailing party in any action to enforce this Agreement shall be reimbursed or paid by the other party for its reasonable attorney’s fees and all costs incurred in connection with such enforcement.” (Plaintiff’s Exs. 4, 13, 14 at ¶ 6(c); *see also* ¶ 13.) ASI is prosecuting this appeal to enforce the ECAs.

2. Attorney’s Fees are Warranted under I.C. § 12-120(3)

I.C. § 12-120(3) mandates that, in any civil action to recover on a contract for services and in any “commercial transaction,” “the prevailing party shall be allowed a reasonable attorney’s fee to be set by the court, to be taxed and collected as costs.” I.C. § 12-120(3); *see also Oakes*, 152 Idaho at 546 (emphasizing that I.C. § 12-120’s attorney fee provisions are “mandatory” and apply to appellate proceedings) (quoting *Eighteen Mile Ranch*, 141 Idaho at 721). “The term ‘commercial transaction’ is defined to mean all transactions except transactions for personal or household purposes.” I.C. § 12-120(3). This Court has established that “an employment contract constitutes a contract for the purchase or sale of services under that statute.” *See e.g. Jenkins v. Boise Cascade Corp.*, 141 Idaho 233, 244 (2005). This action arises out of ASI’s at will employment of Roberts, Yearsley, and Tiffany and is based upon their breaches of obligations not to compete with ASI during their employment.

IV. CONCLUSION

The District Court's refusal to compel production of the Synopsys License along with its underlying determination concerning its relevance and related subject matter were erroneous. This Court should reverse the challenged rulings, vacate the \$195,175 damages award against the Sage Defendants, and vacate the District Court's prevailing party determination concerning the Sage Defendants. Ultimately, this Court should remand this matter for trial on damages.

The District Court's grant of Zilog's motion for directed verdict on ASI's intentional interference with prospective economic advantage claim was erroneous. This Court should reverse the District Court's order, vacate the provision in the Amended Judgment stating that ASI shall recover nothing against Zilog, and vacate the prevailing party award of costs in favor of Zilog. Ultimately, this Court should remand this matter for trial on that claim.

The District Court's determination that ASI was not the prevailing party with regard to the Sage Defendants was erroneous and should be reversed. This Court should declare ASI to be the prevailing party and remand this matter to the District Court for entry of an appropriate order.

Finally, ASI is entitled to its attorney's fees on appeal against Roberts, Yearsley and Tiffany under the terms of the ECAs and/or pursuant to I.C. § 12-120(3).

DATED this 11th day of May, 2016

PARSONS BEHLE & LATIMER

By 

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 12th day of May, 2016, I caused to be served a true copy of the foregoing document, by the method indicated below, and addressed to each of the following:

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