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# American Semiconductor v. Sage Silicon Respondent's Brief 2 Dckt. 43011

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IN THE SUPREME COURT OF THE STATE OF IDAHO

AMERICAN SEMICONDUCTOR, INC., an  
Idaho corporation,

Plaintiff-Counterdefendant-Appellant,

vs.

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

Defendants-Respondents.

AND RELATED COUNTER ACTIONS

Supreme Court Docket No. 43011-2015  
Ada County No. CV-2011-23344

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**RESPONDENT ZILOG, INC.'S BRIEF**

Appeal from the District Court of the Fourth Judicial District of the State of Idaho  
in and for the County of Ada

Honorable Thomas J. Neville, District Judge, presiding

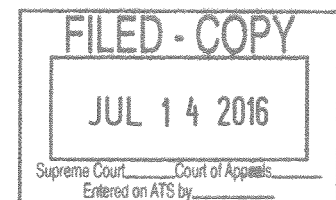
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## I. STATEMENT OF THE CASE

### A. Nature of the Case.

This appeal relates to certain causes of action pled by plaintiff/appellant American Semiconductor, Inc. (“ASI”) against defendants/respondents Zilog, Inc. (“Zilog”), Sage Silicon Solutions, LLC (“Sage”), and David Roberts, Gyle Yearsley and William Tiffany (the “Individual Defendants”), arising from Zilog’s retention of Sage to provide engineering services (including design verification, design and layout services) to Zilog on a Zilog microcontroller project called Z8F6482 or Z82 (the “Z82 Project”).

ASI’s case against Zilog began primarily as a misappropriation of trade secrets claim. When ASI could not demonstrate the existence of any trade secret, it dismissed its trade secret claim against all defendants. *See* § I.B., *infra*. ASI then switched its focus to the tortious interference claims arising from Zilog’s retention of Sage as an independent contractor to provide engineering services on the Z82 Project instead of ASI.

ASI tried its case on two theories against Zilog: tortious interference with contract (“TIWK”) and tortious interference with prospective economic advantage (“TIWPEA”). At trial, the *only* evidence of damages ASI presented under either theory concerned alleged lost profits it claimed it would have made from contracting with Zilog on the Z82 Project. In addition, rather than contracting with a third party, ASI never bid on the Z82 Project, either at the outset of that project or after ASI forced Sage off the project. Instead, as ASI admits, its alleged lost profits were based on a “quote” that ASI created during litigation, after suit was filed. *See* § I.C.5, *infra*. According to that after-the-fact quote, ASI would have charged Zilog approximately \$238 per

hour for the same work that was performed by the same individuals (the Individual Defendants) through Sage for \$65 per hour.

On the eve of jury deliberations, Judge Neville granted a partial directed verdict to Zilog, dismissing ASI's TIWPEA claim because ASI failed to introduce any evidence of damages, other than damages resulting from ASI's alleged loss of the opportunity to contract with Zilog on the Z82 Project. *See* § III.A.2, *infra*.<sup>1</sup> ASI appeals from Judge Neville's decision on the partial directed verdict, contending that "ASI has consistently and clearly asserted that Zilog intentionally interfered with its prospective economic advantage *with its employees*," Appellant ASI's Opening Brief ("ASI Op. Brief") at 36 (emphasis in original). This argument is nothing more than semantics. Although ASI may have had an expectation of earning profits from the outsourced design services of its employees separate and apart from work outsourced to Zilog, the only "profit" ASI introduced at trial concerned lost profit from "design work that *would have been outsourced to ASI from Zilog*." ASI Op. Brief at 43; *see also id.* at 48 (ASI's damages were "the profits ASI would have realized from contracting with Zilog on the project."). ASI's claim fails as a matter of law because Zilog was the only economic source of ASI's alleged lost profits and it was not a third party to ASI's alleged economic expectancy. *See* § III.A.3, *infra*. Separately, even if ASI's economic expectancy were not premised on contracting with Zilog, ASI's claim would fail because ASI did not introduce evidence of any contractual opportunity or

---

<sup>1</sup> Judge Neville did submit to the jury ASI's TIWK claim against Zilog, *i.e.*, whether Zilog intentionally interfered with the noncompetition provisions of ASI's employment contracts with the Individual Defendants who performed the engineering work. The jury returned a unanimous verdict in favor of Zilog, finding that Zilog did *not* interfere with ASI's employment contracts with the Individual Defendants. R 1632–1636, at 1634. ASI did not appeal the jury's verdict in favor of Zilog on this TIWK claim.



lost profit it expected to receive but for Zilog's alleged interference, and therefore failed to establish a *prima facie* claim of TIWPEA. *See* § III.A.4, *infra*.

As to the remaining defendants, the jury returned a verdict in favor of ASI finding that Sage and the Individual Defendants intentionally interfered with ASI's economic expectancy in contracting with Zilog. ASI asked the jury to award ASI approximately \$1.2 million in lost profits, but the jury awarded ASI only \$195,175 in lost profits. The major difference between the amount of damages awarded to ASI and the amount of damages sought by ASI concerned ASI's alleged lost profits related to charges for the use of ASI's (alleged) computer assisted design ("CAD") tools ("Design Tools"). *See* § I.C.5, *infra*.

On appeal, ASI seeks entry of an order vacating the \$195,175 lost profit award against Sage and the Individual Defendants and remanding the case for a new trial on damages (only) against all defendants, including Zilog. ASI's request for a new trial on damages primarily involves a discovery-related issue based on ASI's argument that Judge Neville erred in denying ASI's motion to compel Zilog to produce its software license agreement with nonparty Synopsys, Inc. ("Synopsys") for Design Tools used on the Z82 Project. ASI contends that the denial of its motion to compel affected ASI's substantial rights at trial by precluding ASI from presenting evidence that Zilog (allegedly) did not have the Synopsys tools and license in place as of March 2011. ASI Op. Brief at 32. ASI also contends that the denial of its motion to compel production of the Synopsys license affected ASI's substantial rights in that "ASI was deprived of 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." *Id.* at 33.

ASI's contentions on appeal are devoid of merit. As a preliminary matter, ASI did not have a license with Synopsys, the supplier of the principal Design Tools selected by Zilog on the Z82 Project. *See* § I.C.6, *infra*. ASI could have included the cost of obtaining a Synopsys license as part of its damages model at trial, but chose not to do so. Instead, ASI attempted to recover "lost profit" for its use of Synopsys Design Tools that ASI admittedly did not have, and the jury correctly rejected ASI's improper attempt to recover lost profits related to Design Tools that ASI did not have.

In addition, ASI's contention—that disclosure of the Synopsys license would have supported ASI's theory that Zilog did not have a license with Synopsys in or about March 2011—is without merit. In ASI's testimony and briefing before the District Court, ASI admitted that Design Tools are a necessary component of designing a microcontroller, meaning that Sage could not have performed its work on the Z82 Project without using Synopsys Design Tools. In this case, as the District Court advised ASI, the Synopsys license reviewed by the District Court, *in camera*, is an addendum to a master license agreement with IXYS dating back to 2004. *See* § I.C.2, *infra*.

Moreover, ASI is fully aware that Synopsys objected to the production of its license agreement with Zilog. Prior to trial, ASI served Synopsys with a third-party subpoena seeking production of the license agreement. Synopsys expressly objected to ASI's attempt to obtain its proprietary and confidential license agreement. *See* § III.B.2 and 3, *infra*. Specifically, Synopsys objected to disclosure because the agreement was irrelevant and contained "confidential information belonging to Synopsys and its customers subject to third party confidentiality agreements." *See* § III. B.2 and 3, *infra*. ASI made no attempt to enforce the

third-party subpoena. Instead, ASI sought an order from the District Court compelling Zilog to produce the agreement over Synopsys' Objections and without Synopsys' input. Then, when Zilog said it would produce the license agreement if ASI would obtain Synopsys' written consent to disclosure of the license agreement, ASI made no effort to obtain such consent.

Separately, ASI's contention—that the District Court erred in compelling Zilog to produce a copy of the Synopsys license over the objections of Synopsys—is hypocritical. ASI refused to produce any of its own licensing agreements despite claiming ASI had such agreements “in place prior to or at the time the Sage Defendants worked on the 6482 Project.” ASI argued that its agreements were *irrelevant* and that disclosure would result in a “*breach by ASI of an obligation to a third-party to maintain such information as confidential.*” See § III.B.6, *infra*. ASI is judicially estopped from advancing an argument on appeal that the District Court abused its discretion in holding that Zilog's license agreements were irrelevant, because ASI took the exact same position when asked to produce its own license agreements and thereby avoided production of those agreements.

Finally, by failing to present any evidence of its own Synopsys license, ASI rendered Zilog's Synopsys license irrelevant, thereby further legitimizing Judge Neville's decision to deny ASI's motion to compel. Since ASI did not have a license to use Synopsys tools, ASI could not recover damages in the form of “lost profits” against the defendants for charges associated with the use of Synopsys Design Tools. Therefore, even if this Court were to reverse Judge Neville's discovery orders and remand for a new trial on damages, ASI would still be unable to prove its entitlement to “lost profits” related to Design Tools.

**B. Proceedings Below.**

Zilog disagrees with the substance of ASI's contentions on appeal with regard to the dismissal of ASI's claims against Zilog for misappropriation of trade secrets and the District Court's prevailing party determination. A detailed background of the procedural history concerning the disposition of ASI's claims against Zilog for misappropriation of trade secrets can be found in the Memorandum Decision and Order Re: Attorney Fees and Costs (R 2114-2134), entered by the District Court on February 23, 2015.

**C. Statement of the Facts.**

Zilog is an integrated circuit manufacturer engaged in the design and manufacture of microcontrollers. Tr p. 1519, L. 16 – p. 1520, L. 2. In early 2010, Zilog was acquired by IXYS Corporation ("IXYS"). Tr p. 2217, LL. 14-19. At that time, Zilog became a wholly owned subsidiary of IXYS. Tr p. 2217, L. 24 – p. 2218, L. 1; *id.* p. 1513, LL. 19-22. Zilog's sister company, Clare, is also a subsidiary of IXYS, with design engineers. Tr p. 2217, L. 20 – p. 2218, L. 7.

The Individual Defendants are former Zilog design engineers who worked at Zilog's facility in Meridian, Idaho, until 2009. David Roberts worked for Zilog as a Design Manager III. Tr p. 1785, LL. 18-23. Prior to his layoff, Roberts reported to David Staab, Zilog's Vice President of R&D and MCU (microprocessor) Architecture, who worked at Zilog's headquarters in Milpitas, California. Tr p. 1830, LL. 11-25; *id.* p. 2211, LL. 7-9. After Roberts left Zilog, he kept in contact with Staab. Tr p. 1830, L. 13 – p. 1831, L. 7; *id.* p. 2255, L. 24 – p. 2256, L. 8.

In June 2009, Zilog began considering development of a low power microcontroller. Tr p. 2218, L. 17 – p. 2219, L. 22. Staab was team leader of the new microcontroller project.

Tr p. 2220, L. 23 – p. 2221, L. 12. Around that same time, Staab discussed Zilog’s microcontroller project with Roberts. Tr p. 1832, L. 14 – p. 1833, L. 4. On October 21, 2009, Roberts sent a follow-up e-mail to Staab notifying him that Roberts, and the other Individual Defendants, were forming their own company, Sage, and were available through Sage to perform design work for Zilog. See Trial Exhibit (“Ex.”) 2-G. Specifically, Roberts represented:

Just wanted to let you know we are up and running and looking for design work. ***Gyle, Bill, Russ and myself have started Sage Silicon Solutions and can help you when you need design work.*** We have a test chip going out in December with American Semiconductor and hope to offer ultra low power IP and design services using their Flexfet technology. ***We are not limited to using American Semiconductor***, but [t]hey are being very helpful and I hope it turns into a very lucrative relationship. No money involved yet but that will come.

***Let me know if there is any design work you would like us to quote.***

*Id.* (emphasis added).

Staab replied that he would keep Roberts informed when design work came up. *Id.* By the end of 2010, the exact type of microcontroller Zilog wanted to develop had been defined and a business case for what was to become the Z82 Project was opened. The Z82 Project was based on an existing Zilog microchip (identified as the EZ8 Core). Tr p. 2219, L. 23 – p. 2220, L. 10.

Thereafter, Zilog investigated options on how to best staff the project. Tr p. 2235, L. 5 – p. 2237, L. 1. One of the options Zilog considered was doing the work completely in-house using just Staab and Theo Verhoeven, two Zilog engineers experienced in microcontroller design, combined with engineers and designers from Clare. Zilog also considered combining the use of Zilog and Clare engineers with external contract help. Tr p. 2238, L. 18 – p. 2239, L. 4; *id.* p. 2241, LL. 6-14.

Ultimately, Zilog decided to use internal resources to staff the project and to augment the team by bringing on Sage. Tr p. 2239, L. 15 – p. 2240, L. 10. Because Sage was made up of a team of former Zilog engineers, the Individual Defendants started with experience in microcontroller design (Tr p. 2241, LL. 20-23) and, of course, familiarity with Zilog products and personnel. With the availability of Sage as an independent contractor on the Z82 project, Zilog did not need to consider other outside resources. *Id.* p. 2239, L. 15 – p. 2240, L. 10.

**1. In February 2011 Zilog retained Sage to augment the team on the Z82 Project.**

In February 2011, Zilog retained Sage as an independent contractor on the Z82 Project. Tr p. 2301, LL. 19-24; Ex. 2-FF at Z000036. Sage agreed to provide design and logic/circuit simulation services on the Z82 Project at the rate of \$65 per hour and full custom layout design and verification services at the rate of \$45 per hour. R 5004–5022; Ex. 118. In providing services in connection with the Z82 Project, Sage did not provide or charge Zilog for the use of any Design Tools.. Tr p. 1951, L. 25 – p. 1952, L. 3; Ex. 118.

**2. Zilog possessed the Design Tools necessary for the work on the Z82 Project.**

The primary Design Tools used by Sage on the Z82 project was licensed to Zilog by Synopsys. R 5004–5022, at 5007. As Judge Neville advised ASI, IXYS obtained a Purchase Agreement from Synopsys, which was an addendum to an End User Software License and Maintenance Agreement dating back to 2004 for the use of Synopsys Design Tools. Tr p. 1468. Thus, Zilog possessed the Design Tools necessary for work on the Z82 Project when Sage’s work on the project began. R 5004–5022, at 5007; Tr p. 1951, L. 11 – p. 1952, L. 7. Sage worked on the Z82 Project for approximately seven months, from March 2011 through the end of

September 2011. Zilog, having paid its own license fees for its Design Tools with Synopsys, would not receive any benefit by paying for duplicate tools. R 5004–5022, at 5007. Paying for duplicate or even comparable tools would have been an unnecessary double expense to Zilog. *Id.* This is especially true where, as here, ASI sought to charge Zilog approximately \$810,000 for Design Tools.

**3. ASI did not advise Staab of its hope of contracting with Zilog for outsourced design work.**

At the time Zilog made the decision to hire Sage, Staab (the Z82 team leader and individual at Zilog responsible for outsourcing design work) was unaware that ASI had an expectancy of performing work on the Z82 Project. Tr p. 2342, LL. 7-9.

In 2003, about eight years before the Z82 Project, Zilog had outsourced design work to ASI on a single occasion (the “2003 Project”). Tr p. 2320, L. 19 – p. 2321, L. 12; *id.* p. 868, L. 16 – p. 869, L. 8. On that occasion, Staab contacted ASI’s President, Doug Hackler, via e-mail to perform some layout work for Zilog. Tr p. 2342, LL. 11-20. ASI performed that layout design work for Zilog. Tr p. 1129, LL. 8-12; *id.* p. 803, LL. 4-7. ASI’s billables to Zilog for the 2003 Project were approximately \$26,000. Ex. 1-TT; Tr p. 1190, LL. 3-12; *id.* p. 1191, L. 25 – p. 1192, L. 24. ASI did not use its own Design Tools to perform its services on the 2003 Project. Instead, ASI performed its services at Zilog’s site using Zilog’s Design Tools. *Id.* Thus, Zilog had never obtained Design Tools from ASI.

After the 2003 Project concluded, Doug Hackler never followed up with Staab regarding Zilog’s need for outsourced work. Tr p. 2342, L. 15 – p. 2343, L. 12. Although Staab’s e-mail address at Zilog was the same in 2011 as it was in 2003, Hackler made no effort to contact Staab by e-mail or phone at any time during the eight years since ASI performed work on the 2003

Project. *Id.* Moreover, Hackler testified that ASI maintains a sales funnel relative to its marketing efforts and that Zilog was not listed or identified as a potential customer in 2009, 2010 or 2011. Tr p. 869, L. 12 – p. 870, L. 9. Instead, according to Hackler, he had a chance encounter at an airport with Rick White in 2010, who was then Zilog’s vice-president of worldwide operations. Tr p. 837, LL. 2-23. According to Hackler, he informed White that ASI had hired the Individual Defendants and that ASI was interested in performing outsourced work for Zilog. Tr p. 837, L. 14 – p. 839, L. 25. According to Hackler, he got “the impression” that White would convey this information to others at Zilog. *Id.*

White remembered the conversation very differently. *See* Tr p. 1644, L. 18 – p. 1646,

L. 3. White testified:

Q. Did Mr. Hackler, during that conversation or at any other time, tell you that he or his company had -- ASI had hired or was employing Dave Roberts, Gyle Yearsley, Bill Tiffany, Russell Lloyd, or Evelyn Perryman?

A. No.

...

Q. Do [sic] he ever indicate to you that ASI wanted to provide design services to Zilog?

A. No.

Tr p. 1644, L. 22 – p. 1645, L. 11. Moreover, White testified that he never told Staab that ASI wished to provide design services to Zilog:

Q. Did Mr. Hackler -- did you ever convey any message from Mr. Hackler to David Staab regarding ASI’s desire to provides design services to Zilog?

A. No, sir.

Q. And I mean at any time did you convey that to --

A. No, sir.



Q. Did you ever tell Mr. Hackler that you would tell David Staab about ASI's capabilities to provide design services to Zilog?

A. I didn't.

Tr p. 1645, L. 22 – p. 1646, L. 7. Thus, prior to late-September 2011, Staab (Zilog's Z82 Project lead) was unaware that ASI had an expectancy of doing the work that Sage performed for Zilog, Tr p. 2342, LL. 1-6, and could not have intentionally interfered with any such expectancy.

**4. ASI demands that Zilog terminate Sage from the Z82 Project.**

On or about September 24, 2011, ASI contacted Staab at his office in Milpitas, California, informed him that the Individual Defendants were employed at ASI and should not be working for Zilog, and demanded that Zilog terminate its contract with Sage. Tr p. 856, L. 21 – p. 857, L. 23. Although ASI claims that it had an expectation of doing the work that Sage was performing, ASI made no representation to Staab during the telephone call that ASI expected to use the Individual Defendants to work on the Z82 Project. Tr p. 2342, LL. 1-10 (D. Staab Trial Testimony). *See also* Tr p. 1475, L. 12 – p. 1478, L. 10 (ASI's Director of Design and Test Dale Wilson's Trial Testimony). Pursuant to ASI's demand, Zilog terminated Sage from the Z82 Project on or about September 27, 2011. Ex. 1-FFFF; Tr p. 2361, LL. 3-19; *id.* p. 2362, LL. 7-23. Zilog then completed the Z82 Project on its own, using internal resources, including engineers employed by Zilog and its sister company, Clare. Tr p. 2239, LL. 5-10; *id.* p. 2248, LL. 2-13. Zilog completed the tape-out of the Z82 Project in late December 2012 or early January 2013. Tr p. 2313, LL. 7-9. (Tape out is the milestone when the design is complete enough to send to the master vendor to develop the plates for the microcontroller. Tr p. 1994, LL. 8-16.)

**5. ASI never submitted a bid or worked on the Z82 Project.**

ASI never submitted a bid to Zilog or worked on the Z82 Project. *See* Tr p. 2317, L. 25 – p. 2318, L. 10 (D. Staab Trial Testimony) (“[Zilog] didn’t receive this quote as a business proposition.”). Instead, ASI prepared a quote for litigation purposes, indicating that ASI would have performed the work on the Z82 Project at a rate of \$238 per hour. Tr p. 1134, LL. 10-13 (ASI’s Chief Financial Officer Lorelli Hackler’s Trial Testimony) (“Exhibit 101 is a quote that we prepared, in hindsight, basically. We were asked to say what we would have done this work for Zilog; if we – if we had bid the work, how – what would we have bid.”). Staab, Zilog’s team leader on the Z82 Project, testified that the rate of \$238 per hour was too high to be acceptable to Zilog and that Zilog would not have retained ASI to work on the Z82 Project at that rate. Tr p. 2317, L. 22 – p. 2319, L. 23; Ex. 101. *See also* R 5004–5022, at 5009.

**6. ASI did not have a Synopsys license or the tools necessary to perform design services on the Z82 Project.**

Design Tools are a necessary component of performing design work on a microcontroller project like the Z82 Project. As ASI’s General Manager, Richard Chaney, testified at trial:

Q. As you understand it when ASI bid on projects like this one did someone have to provide the tools to do the work?

A. Well, yeah. *You always have to have tools to do design work. So they’re gonna be provided somehow.*

Q. And did someone have to incur the cost of providing those tools?

A. I’ve never known any of the tool vendors to give anything away for free, so my assumption would be yes.

Tr. p. 1354, L. 17 – p. 1355, L. 1 (emphasis added). *See also id.* p. 1316, LL. 11-13 (“Anybody that does [microcontroller design] has to have design tools. You can’t just draw it; you have to

use these advanced design tools.”)<sup>2</sup> ASI did not have a license with Synopsys, the primary tool vendor chosen by Zilog with respect to the Z82 Project. As ASI’s General Manager Richard Cheney testified:

Q. All right. Between 2009 and September of 2011, when my clients were terminated, did ASI ever have a Synopsys license?

A. Not that I’m aware. We chose Cadence and – and Silvaco [sic] tool sets over Synopsys.

Tr p. 1336, L. 22 – p. 1337, L. 1. In fact, the testimony at trial from the Individual Defendants (who were the *only* persons with actual knowledge of the Design Tools used by Zilog on the Z82 Project and the Design Tools used by ASI) uniformly confirmed that *ASI did not have the tools necessary to perform the Z82 Project*. Tr p. 2000, LL. 1-8 (G. Yearsley’s Trial Testimony); Tr p. 1925, LL. 18-25 (D. Roberts’ Trial Testimony); *id.* p. 1971, LL. 10-19 (W. Tiffany’s Trial Testimony).

According to the trial testimony of ASI’s own damages expert, Richard Hoffman, if ASI had to acquire tools for the Z82 Project, the purchase price (for the necessary software licenses) would *not* be a “*profit*,” but a “*cost*” that must be subtracted from ASI’s *lost profits*:

Q. Well, let’s -- let’s look at tools. Tools is the largest item here?

A. That’s true.

Q. Okay. So, let’s -- let’s just talk about tools themselves. If -- what your assumption is, is that ASI had the tools to the -- do the job, and they wouldn’t have to acquire any additional tools?

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<sup>2</sup> See also R 1262 (ASI’s Memorandum In Support of Plaintiff’s Motion in Limine No. 11 Re: Zilog’s Undisclosed Licenses) (ASI states: “Third party tools were undoubtedly used in connection with the project at issue. They necessarily would have been purchased by Zilog or Sage to do the work that was done, and they were surely a component of the cost incurred on the project.”).

A. The way that this is calculated, that's true. That this -- this assumes that ASI's tools could be used to do the job; that's right.

Q. So, if we were to use a different assumption, that assumption being that ASI would have to acquire new and different tools, at a cost, then that would be a cost that would have to be subtracted?

A. Yeah. If -- if the assumption is that ASI has to pay for something that it didn't -- that it didn't own, then down -- down here I would add a line item that said, purchase whatever tool you just told me that -- to assume, and I'd put that in there.

Tr p. 2111, L. 22 – p. 2112, L. 15.

ASI never introduced any evidence at trial regarding what ASI would have been required to pay Synopsys to obtain the tools necessary for ASI to bid for or do the work on the Z82 Project. Thus, ASI failed to meet its burden of establishing the profit, if any, that ASI allegedly could have made by providing Synopsys tools on the Z82 Project.

## II. ADDITIONAL ISSUES PRESENTED ON APPEAL

Zilog requests attorney's fees and costs on appeal pursuant to Idaho Appellate Rules 11.2, 40 and 41, and Idaho Code Section 12-121. "Under I.C. § 12-121, a party is entitled to attorney's fees if the appeal merely invites the appellate court to second guess the trial court on the weight of evidence." *Doble v. Interstate Amusements, Inc.*, No. 42744, 2016 WL 1757440, at \*3 (Idaho May 3, 2016) (citing *Kelley v. Yadon*, 150 Idaho 334, 338, 247 P.3d 199, 203 (2011)).

In addition, as detailed in Zilog's Motion to Augment filed this date, Sage and the Individual Defendants have already paid the \$195,175 lost profit damage award to ASI and ASI has recovered the full amount of its damages under the jury's verdict and the District Court's judgments. Thus, ASI's appeal of the District Court's directed verdict on ASI's TIWPEA claim against Zilog is moot and nonjusticiable—unless ASI can prevail on appeal on its argument that

the District Court's denial of ASI's motion to compel and related motion in limine prevented ASI from giving a "full representation of its damages case" to the jury. *See Bob Rice Ford, Inc. v. Donnelly*, 98 Idaho 313, 315, 563 P.2d 37, 39 (1977) (holding that issues raised by appellant on appeal were moot and dismissing appeal because respondent paid final judgment prior to oral argument); *Walker v. Budzianowski*, 103 Idaho 244, 245, 646 P.2d 1015, 1016 (1982) (holding that questions presented by plaintiff-appellant on appeal were rendered moot by defendant-respondent's offer to pay the full amount of judgment); *Houpt v. Wells Fargo Bank, N.A.*, 160 Idaho 181, \_\_\_, 370 P.3d 384, 392 (2016) (2016 WL 937694) ("Mootness applies when a favorable judicial decision would not result in any relief. This Court may only review cases in which a judicial determination will have a practical effect on the outcome.").

### III. ARGUMENT

#### A. The District Court Did Not Err in Granting a Directed Verdict Dismissing ASI's TIWPEA Claim Against Zilog.

##### 1. Standard of review re: directed verdict.

Idaho Rule of Civil Procedure 50(a) allows a party to move for a directed verdict at the close of the opposing party's case. "When reviewing a decision to grant or deny a motion for a directed verdict, this Court applies the same standard the trial court applied when originally ruling on the motion." *April Beguesse, Inc. v. Rammell*, 156 Idaho 500, 508–09, 328 P.3d 480, 488–89 (2014) (citation and internal quotation marks omitted). As this Court stated:

The Court determines whether there was sufficient evidence to justify submitting the claim to the jury, viewing as true all adverse evidence and drawing every legitimate inference in favor of the party opposing the motion for a directed verdict. This test does not require the evidence be uncontradicted, but only that it be 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. Where a non-moving party produces sufficient evidence from which

reasonable minds could find in its favor, a motion for directed verdict should be denied.

156 Idaho at 509, 328 P.3d at 489 (quotation marks omitted); *see also Quick v. Crane*, 111 Idaho 759, 764, 727 P.2d 1187, 1192 (1986) (“Whether a verdict should be directed . . . is a pure question of law and on those questions, the parties are entitled to a full review by the appellate court without special deference to the views of the trial court.” *Id.* (citing WRIGHT & MILLER, 9 FEDERAL PRACTICE AND PROCEDURE § 2536 at 595 (1971 & Supp. 1985). Wright & Miller § 2536 states: “[T]he reviewing court may affirm a grant of judgment as a matter of law on any grounds supported in the record.” *Id.* at 595.

ASI cites two cases as authority for its position that Zilog, in seeking to uphold the District Court’s directed verdict in Zilog’s favor, is limited to raising arguments raised below: *Hartwell Corp. v. Smith*, 107 Idaho 134, 686 P.2d 79 (Ct. App. 1984), and *Gen. Auto Parts Co. v. Genuine Parts Co.*, 132 Idaho 849, 856, 979 P.2d 1207, 1214 (1999). Neither case conflicts with Wright & Miller’s statement or Zilog’s position that this Court may affirm on any grounds supported by the record, because in each of the cases cited by ASI, the appellant was challenging the trial court’s *denial* of a motion for directed verdict.<sup>3</sup>

## 2. Proceedings re: ASI’s claim for TIWPEA.

On appeal, ASI contends that it “has been consistent with regard to the nature of its claim against Zilog for intentional interference with prospective economic advantage.” ASI Op. Brief

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<sup>3</sup> See *Hartwell Corp. v. Smith*, 107 Idaho 134, 139, 686 P.2d 79, 84 (Ct. App. 1984) (“Issues two and three are also framed in terms of the *denial* of the Corporation’s motion for a directed verdict.”) (emphasis added); *Gen. Auto Parts Co. v. Genuine Parts Co.*, 132 Idaho 849, 855, 979 P.2d 1207, 1213 (1999) (“GPC cross appealed the district court’s decision *denying* its motion for directed verdict on General’s breach of contract claim.”) (emphasis added).

at 35. This statement is untrue. In ASI's Fifth Cause of Action, ASI alleged that Zilog tortiously interfered with ASI's prospective economic advantage in providing services to *third parties, not*

*Zilog*. As it related to ASI's claim for TIWPEA, ASI pled in pertinent part:

90. In addition, by soliciting or accepting services from the Individuals and Sage, 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.

91. Zilog was aware that American Semiconductor had, in the past, *sought to provide services to third parties, and would, in the future, continue to seek to provide such services.*

92. In addition, Zilog was necessarily aware that *its solicitation or acceptance of the services of the Individuals and Sage would, and did, interfere with American Semiconductor's provision of services to third parties.*

R 433–454, at 445–446 (emphasis added).

On August 29, 2014, Zilog moved for summary judgment against ASI (R 1009-1014; R 3017–3047), arguing that Zilog was entitled to summary judgment dismissing ASI's TIWPEA claim because a defendant cannot interfere with a plaintiff's prospective economic relationship with that same defendant, *i.e.*, with itself. R 3034–3035, citing *BECO Constr. v. J-U-B Eng'rs*, 145 Idaho 719, 724, 184 P.3d 844, 849 (2008); *Cantwell v. City of Boise*, 146 Idaho 127, 138, 191 P.3d 205, 216 (2008).

ASI opposed Zilog's motion for summary judgment on ASI's TIWPEA claim on the grounds that ASI's claim was not based upon the theory that Zilog interfered with an opportunity between ASI *and Zilog*. R 3768–3808, at 3785 (ASI argued: “**ASI IS NOT ASSERTING TORTIOUS INTERFERENCE BASED UPON ZILOG'S INTERFERENCE AS TO AN OPPORTUNITY AS BETWEEN ASI AND ZILOG**”) (capitalization and emphasis in original). According to ASI, Zilog interfered in two ways that were allegedly unconnected to

Zilog projects: (1) Zilog interfered with ASI's economic expectancy in providing the Individual Defendants' services to its customers and potential customers; and (2) Zilog's wrongful interference caused ASI to lose three of its senior design engineers, Roberts, Yearsley, and Tiffany, upon whom ASI was depending in order to continue with and grow its design engineering services business. According to ASI's summary judgment opposition papers, "[a]s a result of Zilog's wrongful interference, ASI had to expend \$75,491.91 for recruiting and training the new replacement engineers." *Id.* at 3806 (citations omitted). Based on these representations, the trial court denied Zilog's motion for summary judgment on ASI's TIWPEA claim.

Prior to trial, Zilog filed a motion in limine (R 1235–1238) and supporting memorandum (R 1239–1246), arguing that ASI should be judicially estopped from advancing an argument at trial that ASI's economic expectancy was actually based on ASI's prospective relationship *with Zilog*. *Id.* at 1244–1245. ASI opposed the motion (R 1303–1308). At the hearing on Zilog's motion, counsel for ASI made the following representations to the Court:

In reaching its conclusions, following a hearing on September 26th, the Court noted ASI's characterization of its tortious interference with prospective economic advantage claim against Zilog as being premised on, quote, the economic expectancy ASI had for Roberts, Yearsley, Tiffany, Lloyd, and Perryman's continued employment loyalty, ***and is not based on ASI's prospective relationship with Zilog.***

Nothing has changed, Your Honor. That is still the case, and those are still the facts.

What is being confused here is that, in effect, the ***anticipated benefits of the work that these individuals would have done for ASI, but for their breaches of their Employee Confidentiality Agreements, depend in part on -- on a measure of lost profits based on what they derived and ASI might have derived from Zilog.***

Tr p. 332, L. 17 – p. 333, L. 8 (emphasis added).



At trial, ASI did not introduce evidence of its alleged \$75,491.91 in replacement costs. Nor did ASI identify at trial any lost business opportunities with which Zilog allegedly interfered. Rather, the only damages ASI sought to recover at trial concerned *alleged profits ASI would have realized from contracting with Zilog*. Tr p. 2063, LL. 11-16; R 4085–4372, at 4089 and 4094. At the close of ASI’s case in chief, Zilog moved for directed verdict as to ASI’s TIWPEA claim, and the District Court denied Zilog’s motion at that time.

At the close of all the evidence, the parties conferred with the Court to finalize special jury instructions. Given that: (1) ASI had failed to offer evidence of any third parties with which ASI claimed Zilog’s “solicitation or acceptance of the services of the Individuals and Sage” interfered; (2) the only damages ASI sought concerned lost profits related to the Z82 Project; and (3) the Court’s initial unwillingness to dismiss the claim on the basis that Zilog was not a third party to ASI’s alleged expectancy, Zilog submitted proposed jury instruction No. 6 containing the question:

Did Zilog intentionally interfere with American Semiconductor’s economic expectancy of contracting with Zilog?

Tr p. 2649, LL. 18-20.

ASI objected to the jury instruction on the grounds that its claim was “expectancy of future pecuniary gain from its relationships with its employees, separate and apart, distinct from [its claim for TIWK].” Judge Neville expressed that he was surprised by ASI’s claim:

THE COURT: There’s no evidence about others, other than Zilog. The – the only thing this could apply to would be Zilog.

I – I think you have two choices here; you can ask to drop this claim, or you can have it go forward in its current version on the – on the Special Verdict Form. . . .

Tr p. 2654, LL. 3-9. After deliberation, ASI admitted that its claim could not go forward as worded because Zilog was not a third party to the expectancy:

MR. ZARIAN: Your Honor, with respect to Question 6 on the Special Verdict Form, *I do not think we can proceed to try this claim, as -- as it's been worded, to the jury, in light of Instruction No. 16, which requires that the expectation of entry into a business relationship be with a third party. So, I think -- I think, as framed, this claim would be precluded, and we would not be able to proceed on it.*

Tr p. 2665, L. 24 -- p. 2666, L. 6 (emphasis added). Despite this acknowledgement, ASI refused to drop its TIWPEA claim against Zilog.

THE COURT: Well, I -- I didn't think it was a winner, that's for sure, and I -- I'm not surprised by your decision. So, you want to withdraw that claim?

MR. ZARIAN: No, Your Honor.

For the record, I don't think it's our claim. I -- I, respectfully, as articulated in paragraph 90 of our -- of our complaint, I understand the Court is -- is making some rulings, and -- and we will obviously respect and honor that, but we're not withdrawing it, Your Honor.

THE COURT: You're not withdrawing it. So, you want it to say: Did Zilog tortiously interfere with American Semiconductor, Inc.'s prospective economic advantage?

MR. ZARIAN: Expect -- expectancy, yes, with -- with its employees, Your Honor.

THE COURT: Well, you -- well, I'm looking at last night's, from Mr. Luvai, simply says, did Zilog -- you would have me say tortiously interfere with American Semiconductor's prospective economic advantage, period. That's where you stop.

MR. ZARIAN: Yes, Your Honor. That -- that would -- that would also be -- that -- that's a claim we could -- we could -- we could argue.

THE COURT: *But that doesn't help the jury know what that claim is, it doesn't even tell -- it's just -- it's just out there. It's not specific enough to frame the issue, I don't think.*

Tr p. 2666, L. 7 – p. 2267, L. 8. Ultimately, Judge Neville granted Zilog a partial directed verdict, dismissing ASI's TIWPEA claim because ASI had introduced no evidence of any damages or expectancy, aside from those related to the Zilog Z82 Project:

THE COURT: I -- I -- I think -- I don't see how this claim can go forward. It's too vague as requested. I don't know that I understand the claim, I don't know how the jury would.

I -- the Court possibly should revisit its motion for directed verdict and simply take this one out. And -- and, frankly, I think I'm doing your client a favor by focusing on the stronger -- this one is so weak, it's -- it's sinking of it's own -- I mean, it's -- if this were a ship, it's got more holes than it does integrity of the hull.

...

THE COURT: -- I'm -- *I'm going to reconsider and grant the directed verdict motion against the claim for economic expectancy, by ASI, against Zilog, for -- for basically no evidence, not -- not even close to substantial evidence.*

And I -- I thought Mr. Husch's argument the other day was a terribly strong one. Judges tend to be very cautious about granting directed verdict motions; it's no secret. But I think that this -- this is -- this doesn't make sense. I -- *I just think there's -- there's no evidence. There's not only not substantial evidence, there's no evidence.*

Tr p. 2668, L. 8 – p. 2669, L. 8 (emphasis added).

Although the District Court granted Zilog's motion for directed verdict as to ASI's TIWPEA claim against Zilog, ASI was still able to present its claim for intentional interference with ASI's employment contracts with the Individual Defendants to the jury, and the jury returned a unanimous verdict in favor of Zilog. *See* Special Verdict Form:

**QUESTION NO. 6:** Did Zilog, Inc. intentionally interfere with American Semiconductor, Inc.'s contracts with the individual Sage defendants?

YES \_\_\_\_\_ NO X

R 1632–1636, at 1634.

3. **ASI's claim against Zilog for TIWPEA fails as a matter of law because Zilog was not a third party to ASI's alleged economic expectancy.**

To establish its TIWPEA claim against Zilog, ASI was required to show (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, 138, 191 P.3d 205, 216 (2008).

ASI's contention on appeal—that its TIWPEA claim has remained consistent—is unsupported by the record. In its Second Amended Complaint, ASI pled that Zilog's "solicitation or acceptance of the services of the Individuals and Sage would, and did, interfere with American Semiconductor's provision of services to *third parties*." R 433–454, at 445–446 (emphasis added). ASI acknowledged that if ASI's claim were based on its economic expectancy of contracting with Zilog, that claim could not go forward. See Tr p. 2665, L. 24 – p. 2666, L. 10.

Although ASI may have had an expectation of earning profits from the outsourced design services of its employees separate and apart from work outsourced to ASI from Zilog, the only evidence of "profit" ASI introduced at trial concerned lost profit from "design work that *would have been outsourced to ASI from Zilog*." ASI Op. Brief at 43.<sup>4</sup>

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<sup>4</sup> See also ASI Op. Brief at 36 ("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."); ASI Op. Brief at 48 ("ASI presented extensive testimony from its damages expert, Richard Hoffman, who testified *as to the profits ASI would have realized from contracting with*

In fact, in both his report (R 4085-4119) and testimony at trial, ASI's damages expert Hoffman admitted that his damages calculation—the only evidence of damages presented at trial—related solely to damages resulting from Zilog's retention of Sage rather than ASI. In his report, Hoffman stated that he had “been asked to calculate the amount of Lost Profits that ASI suffered *as a result of Zilog's engagement of Sage instead of ASI.*” R 4089 (emphasis added). In his trial testimony, Hoffman stated:

Q. What were you asked to do in in this matter.

A. I was asked to measure damage -- measure the damage calculations for this case, what ASI has suffered if the jury determines that they would have otherwise gotten the project that's at issue in this case.

Tr. p. 2063, LL. 11-16. Hoffman's admissions are consistent with Judge Neville's characterization of ASI's claim, contrary to ASI's argument on appeal. *See* ASI Op. Brief at 36-37, 39-40.

As presented at trial, ASI's TIWPEA claim against Zilog failed as a matter of law. Although ASI argued that Zilog interfered with its economic advantage of receiving “profit” from the outsourced design services of its employees, the only evidence of such alleged “profit” ASI introduced at trial was lost profit from the Z82 Project. Thus, ASI's entire claim is dependent upon a prospective contract between ASI and Zilog.

ASI's TIWPEA claim against Zilog must fail under Idaho law because Zilog was not a true third party—or “stranger”—to the economic expectancy at issue. In *BECO Construction Co. v. J-U-B Engineers, Inc.*, this Court set forth the general rule that “[s]ince a party cannot

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*Zilog on the project.*”) (emphasis added); *id.* at 43 (“damages associated with that expectancy [ASI's employment relationship with the Engineers] were profits from design work that would have been outsourced to ASI from Zilog, among others.”).

interfere with its own contract, it follows that an action for intentional interference with contract can only lie against a third party.” 145 Idaho 719, 724, citing *Ostrander v. Farm Bureau Mut. Ins. Co. of Idaho*, 123 Idaho 650, 654, 851 P.2d 946, 950 (1993). In so holding, this Court relied upon 44B AM. JUR. 2D *Interference* § 7, which contains a line of cases holding that all parties to an interwoven contractual arrangement are not liable for tortious interference with any of the contracts or business relationships. *Id.*, 145 Idaho 719, 724, 184 P.3d 844, 849 (2008).

Specifically, the article from American Jurisprudence (Second) provides in pertinent part:

A person must be a stranger to a contract to tortiously interfere with it. A claim for tortious interference with contractual relations requires proof that the defendant is a stranger to the contract with which the defendant allegedly interfered and to the business relationship giving rise to the contract. One contracting party does not have a cause of action in interference against the other contracting party for tortious interference. A party cannot interfere with its own contracts, so the tort can be committed only by a third party. Similarly, to be liable for tortious interference with business relations, one must be a stranger to the business relationship giving rise to and underpinning the contract.

....

All parties to an interwoven contractual arrangement are not liable for tortious interference with any of the contracts or business relationships.

***The applicability of the “stranger doctrine” is the same for tortious interference with a business relationship as for tortious interference with a contractual relationship.***

44B AM. JUR. 2D *Interference* § 7 (emphasis added), citing *Benefit Support, Inc. v. Hall Cnty.*, 281 Ga. App. 825, 830, 637 S.E.2d 763, 769 (2006) (“*To be liable for tortious interference with business relations, one must be a stranger to the business relationship giving rise to and underpinning the contract.* But, where a defendant had a legitimate interest in either the contract

or a party to the contract, he is not a stranger to the contract itself or to the business relationship giving rise thereto and underpinning the contract.”) (emphasis in original; citation omitted).<sup>5</sup>

Less than three months after issuing its decision in *BECO*, this Court held that the “stranger doctrine” applied equally to TIWPEA claims because, among other things, “the torts of intentional interference with prospective economic advantage and intentional interference with contract are similar” and “cases and commentary addressing the two torts often apply interchangeably for proving the common elements.” *Cantwell v. City of Boise*, 146 Idaho 127, 138 n.5, 191 P.3d 205, 216 n.5 (2008). In *Cantwell*, the plaintiff, a former employee of the City of Boise, sued his former supervisors for TIWPEA on the theory that they had “significantly impaired his prospective ability to enforce his right to maintain employment with the City.” 146 Idaho at 137, 191 P.3d at 215. This Court rejected plaintiff’s theory, holding that Cantwell failed to state a claim for TIWPEA because *Cantwell failed to establish that a third party had interfered with his prospective economic relationship with the City*. 146 Idaho at 137-38, 191 P.3d at 215-16 (emphasis added).

The same result applies here. The only expectancy as to which ASI presented any evidence was its expectancy of using its employees to perform work on Zilog’s Z82 Project. Zilog was a necessary party to ASI’s claimed expectancy between ASI and its employees, not a

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<sup>5</sup> See also *MAC East, LLC v. Shoney’s*, 535 F.3d 1293, 1297 (11th Cir. 2008) (“A defendant is not a stranger to a contract or business relationship when ‘(1) the defendant is an essential entity to the purported injured relations; (2) **the allegedly injured relations are inextricably a part of or dependent upon the defendant’s contractual or business relations**; (3) the defendant would benefit economically from the alleged injured relations; or (4) **both the defendant and the plaintiff are parties to a comprehensive interwoven set of contract relations.**”) (internal citations omitted) (emphasis added); *N. Jackson Pharmacy, Inc. v. McKesson Corp.*, No. 5:14-CV-02371-SGC, 2015 WL 5011346, at \*4 (N.D. Ala. Aug. 24, 2015) (“[a]n entity is not a stranger if it is a ‘participant’ in a relationship”).

third party or “stranger” to such expectancy, because Zilog, as the source of payment on the Z82 Project, was the sole source of ASI’s alleged economic expectancy. Zilog cannot be liable for tortious interference with its own contracts or with business opportunities it provides.

4. **Even if ASI’s TIWPEA claim were not premised on ASI’s prospective relationship with Zilog, ASI’s claim still fails because ASI failed to introduce evidence of any damage resulting from any other expectancy.**

If, as ASI belatedly states in its brief, its TIWPEA claim were not in fact premised on ASI’s prospective contractual relationship with Zilog, then ASI’s claim must fail because ASI did not introduce evidence of any damages resulting from the loss of any business expectancy *other than* its alleged expectancy of contracting with Zilog on the Z82 Project. In order to make a *prima facie* TIWPEA claim against Zilog, ASI had the burden of proving “resulting damage to the plaintiff whose expectancy has been disrupted.” *Cantwell v. City of Boise*, 146 Idaho 127, 138, 191 P.3d 205, 216. Although ASI contends that its employment relationships with the Individual Defendants were damaged as a result of Zilog’s alleged tortious interference, ASI failed to introduce any evidence at trial of any damages resulting from any other lost business opportunity.

5. **Insofar as ASI’s claim of TIWPEA is based on the theory that Zilog interfered with ASI’s expectancy of profiting from its employee’s services, that claim fails as a matter of law because that claim was based upon ASI’s expectancy of continuing its existing noncompetition agreements with its employees and could only have been brought as a claim for TIWK.**

ASI’s TIWPEA claim that Zilog tortiously interfered with ASI’s expectancy of profiting from the services of the Individual Defendants is not viable because it is based upon the



continuance of existing contractual relationships, *i.e.*, the noncompetition of ASI's employment contracts with the Individual Defendants, and must be brought as a TIWK claim.<sup>6</sup>

ASI relies on *Idaho First National Bank v. Bliss Valley Foods, Inc.*, 121 Idaho 266, 286, 824 P.2d 841, 841 (1991), which states that the proper cause of action is for TIWPEA, not TIWK, where the parties' relationship is simply an at-will relationship that may be terminated by either party without liability for breach of contract. This language from *Bliss Valley Foods* does not apply to the case at bar because ASI and the Individual Defendants were not simply parties to an at-will employment relationship that could be terminated without liability. Instead, they were parties to complex Employee Confidentiality Agreements (*see, e.g.*, Ex. 4), with noncompetition provisions (as well as confidentiality, trade secret and intellectual property provisions), the breach of which could result in liability for the Individual Defendants.

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<sup>6</sup> *See D'Andrea v. Rafla-Demetrious*, 3 F. Supp. 2d 239, 250 (E.D.N.Y. 1996), *aff'd*, 146 F.3d 63 (2nd Cir. 1998) (granting summary judgment against plaintiff radiologist on his TIWPEA claim against defendants based on their interference with plaintiff's relationship with the American Board of Radiology, because plaintiff had an existing contract with the board and made no allegation of interference with a future relationship that had not already been formed between himself and the board); *Stomper v. Chicago Transit Auth.*, 1997 WL 177844 (N.D. Ill. 1997) (where employee's relationship with employer was governed by an existing employment contract, employee "must allege 'tortious interference with [the] contract rather than a prospective business advantage'" (citation omitted); *Dresser Indus., Inc. v. Pyrrahus AG*, 936 F.2d 921, 934 (7th Cir. 1991) (plaintiff alleged interference with its "reasonable expectation of *continuing* a valid business relationship," and court held that "[s]ince this Court alleges an already existing relationship, it is a claim for tortious interference with a contract rather than a prospective business advantage") (emphasis added by court); *Sabre Int'l Sec. v. Torres Advanced Enter. Solutions*, 820 F. Supp. 2d 62 (D.D.C. 2011) ("To survive a motion to dismiss [a claim of tortious interference with prospective economic advantage], 'a plaintiff must allege business expectancies not grounded in present contractual relationships . . .'" (citation omitted); *Egrets Pointe Townhouses Prop. Owners Ass'n, Inc. v. Fairfield Cmty., Inc.*, 870 F. Supp. 110 (D.S.C. 1994) (existence of valid contract "precludes any recovery on a claim for interference with prospective contractual relations").

ASI tried its TIWK claim against Zilog. The jury returned a unanimous verdict in favor of Zilog finding that Zilog did not tortiously interfere with ASI's noncompetes with its employees. ASI did not appeal the jury verdict in favor of Zilog. ASI is precluded on appeal from continuing to advance arguments that Zilog induced the Individual Defendants to violate their duties not to compete with ASI.

**B. The District Court Did Not Abuse Its Discretion in Denying ASI's Motion to Compel Zilog to Produce Its Licensing Agreement with Synopsys, Inc.**

**1. Standard of review re: evidentiary rulings.**

Judge Neville's denial of ASI's motion to compel and subsequent denial of ASI's motion in limine are to be reviewed for "clear abuse of discretion." *See, e.g., Ketterling v. Burger King Corp.*, 152 Idaho 555, 561-562, 272 P.3d 527, 533-534 (2012) (district court's denial of plaintiff's motion to compel disclosure of franchise agreement with third party, after reviewing document *in camera* and finding it *not relevant* under Rule 26, was reviewed for clear abuse of discretion); *Gunter v. Murphy's Lounge, LLC*, 141 Idaho 16, 25, 105 P.3d 676, 685 (2005), citing *Sun Valley Potato Growers, Inc. v. Texas Refinery Corp.*, 139 Idaho 761, 767, 86 P.3d 475, 481 (2004) ("This Court reviews the trial court's decision to grant or deny a motion in limine under an abuse of discretion standard.").

"The burden of showing the trial court abused its discretion rests with the appellant." *Taylor v. AIA Servs. Corp.*, 151 Idaho 552, 559, 261 P.3d 829, 836 (2011) (citations omitted). "[W]hen appealing from an evidentiary ruling reviewed for abuse of discretion, the appellant must demonstrate both the trial court's abuse of discretion and that the error affected a substantial right." *Hurtado v. Land O'Lakes, Inc.*, 153 Idaho 13, 18, 278 P.3d 415, 420 (2012) (internal citations omitted); *see also Taylor v. AIA Servs. Corp.*, 151 Idaho 552, 559, 261 P.3d

829, 836 (2011). Even ASI concedes in brief that the allegedly erroneous discovery ruling must affect a “substantial right.” *See* ASI Op. Brief at 19. ASI’s contention that a *de novo* standard of review applies and ignores the foregoing authority, especially *Ketterling*.<sup>7</sup>

**2. Background re third-party licenses.**

**a. Synopsys expressly objects to the disclosure of its confidential license agreements.**

On March 20, 2014, ASI served a Notice of Subpoena Duces Tecum to Synopsys (R 664–665; R 783–786), seeking production of all (1) agreements containing provisions in which Synopsys grants Zilog a license to make use of Synopsys’ software or software-related tools, (2) agreements that reflect, constitute or contain restrictions or limitations as to authorized sites or locations wherein Zilog may make use of the software or software-related tools; and (3) agreements containing provisions limiting, restricting or regulating the disclosure of confidential or commercially sensitive information. R 783–785.

Synopsys objected to ASI’s subpoena and did not produce any records. R 900–903, 905 (“Synopsys’ Objections”). Thereafter, in a letter to ASI’s counsel dated April 28, 2014, Synopsys explained its prior objections in pertinent part as follows:

We respond to your letter dated April 16, 2014 regarding Synopsys’ objections to ASI’s Subpoena. \*\*\*

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<sup>7</sup> *See also* I.R.E. 103(a) (“[e]rror may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected.”); I.R.C.P. 61 (“[a]t every stage of the proceeding, the court must disregard all errors or defects that do not affect any party’s substantial rights.”); *Myers v. Workmen’s Auto Ins. Co.*, 140 Idaho 495, 504, 95 P.3d 977, 986 (2004) (“This Court will not reverse the trial court if an alleged error is harmless . . . . [I]f an error did not affect a party’s substantial rights or the error did not affect the result of the trial, the error is harmless and not grounds for reversal.”).

*There is nothing apparent from the information you provided that leads us to believe that “the use of Synopsys-provided tools and the licenses agreements governing use of such tools are issues that were injected into [your] lawsuit.”*

...

The fact that a completely unrelated third party, also located in California, responded to a similar subpoena makes no difference. ASI is not entitled to discovery from Synopsys unless it can establish that the discovery it seeks meets the Rule 26(b)(1) standard. The deposition transcript excerpts you provided fail to demonstrate any relevance of the requested information to ASI’s case. *At best, they demonstrate that Synopsys tools were mentioned during two depositions in your case. The mere mention of a Synopsys tool, however, does not automatically render any discovery regarding Synopsys’ confidential agreements or any other Synopsys documentation relevant to your action.*

R 939–940 (emphasis added).

**b. ASI moved to compel Zilog to produce third-party license agreements over the objections of Zilog’s third-party vendor.**

Having failed to obtain the license agreements from Synopsys, ASI moved the District Court for entry of an order compelling Zilog to turn over the same agreements. R 666–669; 788–804. Zilog objected to the disclosure of the third-party license agreements on the basis that the agreements contained confidentiality provisions that prohibited their disclosure. R 869–887. In pertinent part, Zilog counsel advised ASI counsel:

The appropriate procedural process to obtain this information is via third party discovery, a process that ASI admits it has instituted. Third party discovery would permit parties to the license agreements, whose rights may be effected [sic] by disclosure to ASI, to participate in the dispute. This is especially important in this case. Zilog’s license agreements with all three (3) third parties -- Synopsys, Cadence and CAST -- contain language that prohibits Zilog from disclosing the license agreements to ASI.

R at 874 (Zilog’s Memo in Opposition to ASI’s Motion to Compel).

On May 2, 2014, Judge Neville heard oral argument on ASI’s motion to compel Zilog to produce its third-party agreements. At the hearing, Zilog reiterated that ASI should be required

to first get Synopsys' approval, and represented further that if ASI would *first* obtain the third parties' consent to disclosure of the license agreements, Zilog would produce them to ASI:

***[If ASI would go to these parties and obtain their written consent to disclosure of these agreements, we would have no objection to disclosing them.*** But to require us to produce them, in light of these confidentiality provisions, is improper. And ASI, in its own papers, has objected to producing agreements between ASI and third parties, on the grounds that they're protected by confidentiality provisions that prohibit ASI from disclosing those documents.

So, I think what's good for the goose is good for the gander, Your Honor. And we should hear from Cast [sic], Cadence, and Synopsis [sic], and -- have their consent to production of these documents, or their explanation to the Court as to what their interests are that warrant the prohibition of the production of the documents.

Tr p. 195, L. 18 – p. 196, L. 8 (emphasis added).

At the May 2 hearing Judge Neville denied ASI's motion to compel, citing to *Jen-Rath Co. v. Kit Mfg. Co.*, 137 Idaho 330, 336, 48 P.3d 659, 665 (2002). Tr p. 200, L. 11 – p. 202, L. 19. Specifically, the District Court held as follows:

Cast [sic], Cadence, and Synopsis [sic] are not parties to this action. Zilog claims that the third-party software vendors consider their licensing agreements confidential.

The Court is not convinced, at this point, that the requests for the software -- the software licensing agreements between Zilog and its vendors is reasonably calculated to lead to the discovery of admissible evidence. Rather, it seems, to the Court at least, to be pointed at proving or disproving Zilog's claim that it cannot provide ASI with software for purposes of this litigation, which is an issue about whether ASI can review certain documents [in electronic form previously produced in discovery] and not about the discoverability of documents.

It seems to me that this portion of the motion to compel should be denied.

Tr p. 201, L. 23 – p. 202, L. 13.

Thereafter, ASI did not move to reconsider Judge Neville's adverse discovery ruling at any time prior to trial. Neither did ASI move to compel production pursuant to the third-party

subpoena served on Synopsys or seek to obtain Synopsys' written consent to disclosure of its licensing agreements.

**c. ASI files a motion in limine on the eve of trial.**

Instead, five months after Judge Neville's discovery ruling, ASI filed a motion in limine (R 1255–1257) and supporting memorandum (R 1248–1269), seeking to preclude Zilog from introducing any evidence at trial that Zilog had the Design Tools necessary to complete the Z82 Project. In response to ASI's motion in limine, Zilog lodged the subject document with the District Court for its review, *in camera*. On December 9, 2014, Judge Neville denied ASI's motion in limine and refused to order disclosure of the document, stating in pertinent part:

THE COURT: I think it's a novel argument to say that the Court should grant a motion in limine because Counsel moving for that was earlier unsuccessful on their motion to compel. And that, therefore, they're trying to enforce the motion to compel.

It -- it seems like an extreme remedy to a motion made long ago and never revisited, never sought to be reconsidered.

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.

*And I don't see the prejudice here to -- to plaintiff. It's -- it's the law of the case. Plaintiff knows what it would have cost plaintiff to acquire these same tools from these same providers. And so, it's not precluded from putting together a bid, and knowing what its costs would have been, and how it might have allocated those costs to a bid, if it had had an opportunity to make one.*

Tr p. 1307, L. 7 – p. 1308, L. 17 (emphasis added).

Although Judge Neville denied ASI's motion in limine, ASI was not precluded from examining defendants or their witnesses about what Design Tools Zilog used on the Z82 Project.

Similarly, ASI was not precluded from introducing testimony about what Design Tools ASI had.

See Tr p. 2325, L. 10 – p. 2326, L. 11. Specifically, the Court explained to ASI at trial:

THE COURT: Okay.

Well, I mean, I -- I've given you fair leeway to inquire about what tools whoever had and what tools they needed. And to go into licensing agreements, that's water under the bridge as there's not been a statement of -- that I can figure -- or I can figure out how that's relevant. It's been the subject of a -- of this Non-Disclosure -- it's been -- it's been the subject of . . . multiple motions and a confidentiality agreement between the vendor and Zilog.

And I -- this is all a matter of record; the cost and -- and all of that. ***But what tools ASI had, what tools Zilog had, based on their 2004 license, what tools other vendors that might be considered had, whether or not Zilog wanted to hire a contractor with their own tools or not, all those things are -- are fair game,*** but licensing is the only area that I'm -- that I've Counsel to stay on, based on the substantial law of the case and history here.

Tr p. 2326, L. 24 – p. 2327, L. 17 (emphasis added).

**3. Judge Neville did not abuse his discretion in denying ASI's motion to compel.**

ASI's contentions on appeal—that Judge Neville erred in denying ASI's motion to compel production of the Synopsys license and improperly engaged in an *ex parte* process and made credibility determinations—not only lack merit but also contain a spurious attack on the ethics of the District Court. ASI was neither a party to nor a third-party beneficiary of the Synopsys license. On appeal, however, ASI takes the position that Judge Neville's discovery ruling hindered ASI's ability to prove that if ASI had submitted a bid on the Z82 Project its bid would have been competitive rather than too expensive. This contention also lacks merit.

During trial ASI admitted that ASI did not even have a contractual relationship with Synopsys that would have enabled ASI to use Synopsys Design Tools during the relevant time period. Tr p. 1336, L. 22 – p. 1337, L. 1. Separately, there is no evidence in the record that

ASI ever obtained a bid from Synopsys regarding the cost of obtaining Synopsys Design Tools. Despite these facts, ASI filed a motion on April 18, 2014, to compel Zilog to produce a copy of Zilog's license agreements with its third-party Design Tool vendors, including Synopsys. (R 666-669; R 788-804 at 797-798). Prior to filing the motion to compel ASI served Synopsys with a third-party subpoena seeking to compel the very license agreements at issue. R 783-785. ASI was aware as of April 18, 2014, that Synopsys objected to disclosure of its license agreements because the agreements were "irrelevant" and contained "***confidential information belonging to Synopsys and its customers subject to third party confidentiality agreements.***" Synopsys, Inc.'s Response to American Semiconductor, Inc.'s Subpoena Duces Tecum to Synopsys, Inc. (R 900-903, 905) (emphasis added) ("Synopsys' Objections"). In a follow-up letter to ASI's counsel, Synopsys reiterated its objections and expressly rejected ASI's contention that the terms and conditions of its license agreement with Zilog were "injected" into the lawsuit simply because Synopsys tools were mentioned in connection with the Z82 Project. R 939-940.

Despite this knowledge, ASI engaged in an *ex parte* process wherein ASI sought an order from Judge Neville compelling Zilog to produce the Synopsys license without notice to Synopsys. In addition, in its moving papers, ASI did not disclose Synopsys' Objections to the District Court. Zilog defended the motion to compel, in large part, on the basis that Synopsys considered its agreement confidential and objected to the disclosure. Although Zilog objected to the motion to compel, Zilog's counsel represented at the hearing on the motion to compel that if ASI would simply obtain Synopsys' written consent to disclosure, Zilog would not object to



disclosing the license. Tr p. 195, L. 18 – p. 196, L. 8. Judge Neville denied ASI’s motion to compel. Tr p. 201, L. 23 – p. 202, L. 13.<sup>8</sup>

**4. Judge Neville properly exercised his discretion in denying ASI’s motion in limine.**

The hearing on ASI’s motion to compel occurred on May 2, 2014. Zilog is not aware of *any* effort taken by ASI after that date either to obtain Synopsys’ written consent to the disclosure of the license agreements or to enforce ASI’s third-party subpoena. Instead, on the eve of trial, ASI filed a motion in limine (R 1255–1257) and supporting memorandum (R 1258–1269), seeking to preclude Zilog from introducing any evidence that Zilog had the Design Tools necessary to complete the Z82 Project. Judge Neville denied ASI’s motion in limine opining that it is a “novel argument to say that the Court should grant a motion in limine because Counsel moving for that was earlier unsuccessful on their motion to compel. And that, therefore, they’re trying to enforce the motion to compel. It -- *it seems like an extreme remedy to a motion made long ago and never revisited, never sought to be reconsidered.*” Tr p. 1307, L. 7 – p. 1308, L. 16 (emphasis added).

Although Judge Neville denied ASI’s motion in limine, he correctly noted that ASI did not need the Synopsys agreement in order to identify what it would have cost ASI to acquire Synopsys tools. See Tr p. 1307, L. 7 – p. 1308, L. 16 (“[ASI] knows what it would have cost plaintiff to acquire these same tools from these same providers. And so, it’s not precluded from putting together a bid, and knowing what its costs would have been, and how it might have

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<sup>8</sup> For these reasons, and the reasons set forth in Section IV.A through C of the Sage Defendants’ Brief, which Zilog incorporates herein by reference, it is clear that the District Court did not err in its ruling on ASI’s motion to compel or motion in limine or the evidentiary rulings regarding license agreements and the terms of the licenses.

allocated those costs to a bid, if it had had an opportunity to make one.”) Thus, ASI had other means to address its evidentiary burden of proof, but chose not to do so. Instead, ASI chose not to put on any evidence at trial of what it would have cost ASI to obtain a Synopsys license and proceeded to trial with a damages model that “assumed” Zilog would agree to use different Design Tools. Thus, no substantial right of ASI was harmed by the District Court’s ruling on ASI’s motion in limine.

**5. Judge Neville did not resort to an unfair *ex parte* process.**

According to ASI, Judge Neville’s review of the Synopsys agreement *in camera* “raises important fairness concerns that implicate ASI’s right to due process in this civil legal proceeding.” ASI Op. Brief at 29. ASI cites no authority as to why the District Court’s *in camera* inspection of the license agreement constituted an unfair process that was prejudicial to ASI, and ASI’s argument should therefore be rejected. *See Liponis v. Bach*, 149 Idaho 372, 374, 234 P.3d 696 (2010) (this Court will not consider an issue that is not supported by argument and authority in the opening brief).

The issue whether a trial court errs in denying a motion to compel after reviewing the subject document *in camera* has been recently addressed by this Court. *See Ketterling v. Burger King Corp.*, 152 Idaho 555, 561-62, 272 P.3d 527, 533-34 (2012). In that case, the trial court reviewed *in camera* a franchise agreement between the defendant and a third party, determined that the agreement did not contain information relevant to the plaintiff’s action and denied plaintiff’s motion to compel disclosure of the agreement. *Id.* The plaintiff appealed the trial court’s order, arguing that the “district court’s decision was in error because it did not make any finding that the agreement contained privileged information and because [plaintiff] did not

have a chance to evaluate the agreement's relevance." *Id.* at 561, 272 P.3d at 533. This Court affirmed the trial court's order and held that the trial court did not abuse its discretion in denying plaintiff's motion to compel. *Id.* at 562, 272 P.3d at 534. This Court's decision in *Kettering* compels the conclusion that the District Court in the case at bar did not abuse its discretion in reviewing the Synopsys license agreement *in camera*. Furthermore, ASI's alleged fairness concerns are especially ironic given that ASI sought to compel production of Synopsys' confidential license agreement using an *ex parte* process and with actual knowledge that Synopsys objected to its disclosure.

**6. Any error committed by the District Court in not compelling disclosure of the third-party license agreement was harmless.**

"[W]hen appealing from an evidentiary ruling reviewed for abuse of discretion, the appellant must demonstrate both the trial court's abuse of discretion and that the error affected a substantial right." *Hurtado v. Land O'Lakes, Inc.*, 153 Idaho 13, 18, 278 P.3d 415, 420 (2012) (internal citations omitted). According to ASI, its "substantial rights" were affected by Judge Neville's discovery rulings in 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 Op. Brief at 32. Second, ASI contends that it was precluded from impeaching defense witnesses "with regard to whether Zilog did, in point of fact, have the tools and license in place as of March 2011 when the Sage Defendants commenced work on the 6482 Project." *Id.* at 33.

- a. **ASI lacks a good faith basis for contending that Zilog did not have a Synopsys license in place prior to or at the time Sage and the Individual Defendants worked on the Z82 Project.**

It is axiomatic that Zilog had to have Design Tools for Sage to do its work on the Z82 Project and for Zilog to complete that work using its own internal resources after Sage left the project. Although ASI never submitted a bid to Zilog to work on the Z82 Project, the District Court permitted ASI to submit a damages model to the jury wherein ASI contended that it would have charged Zilog \$1.2 million dollars over the course of the Z82 Project. Of that amount, about \$810,000 related directly to Design Tool costs. ASI admittedly did not have a Synopsys license, the primary Design Tool used by Zilog and Sage on the Z82 Project, or Synopsys Design Tools. ASI could not have charged Zilog for the use of tools that ASI admitted it did not have, without recognizing the cost of obtaining those tools.

ASI is aware, from the District Court's disclosure of terms of the license, that the Synopsys license agreement in the Court's possession is an addendum to a master license going back to 2004. More importantly, although Synopsys has objected to disclosure of its license agreement, Synopsys never denied that Zilog lacked the requisite license in the first place. Instead, consistent with Judge Neville's ruling, Synopsys refused to turn over its confidential agreements, because ASI failed to establish that the discovery it sought met the Rule 26(b)(1) standard. R 939–940.

Finally, Judge Neville's discovery ruling did not preclude ASI from examining defendants or their witnesses about what Design Tools were used on the Z82 Project. Similarly, the District Court did not preclude ASI from introducing testimony about what Design Tools ASI had or would have needed to purchase. *See* Tr p. 2325, L. 10 – p. 2326, L. 11; Tr p. 2326, L. 24

– p. 2327, L. 19. Put simply, ASI lacks a Rule 11.2 basis to continue to advance its argument on appeal that Zilog did not in fact have a license with Synopsys as of February or March 2011.

**b. ASI should be judicially estopped from asserting on appeal that disclosure of license agreements is “critical” to establishing that a party had Design Tools.**

Separately, ASI should be estopped from taking the position that Judge Neville erred in failing to compel production of the Synopsys license and that disclosure of the Synopsys license is dispositive as to whether Zilog actually had a license with Synopsys in February 2011. “Judicial estoppel precludes a party from advantageously taking one position, then subsequently seeking a second position that is incompatible with the first.” *McCallister v. Dixon*, 154 Idaho 891, 894, 303 P.3d 578, 581 (2013) (citation omitted). The policy behind judicial estoppel is to preserve “the integrity of the judicial system, by protecting the orderly administration of justice and having regard for the dignity of the judicial proceeding.” *Id.* (quotation marks omitted). “Broadly accepted, it is intended to prevent parties from playing fast and loose with the legal system.” *Id.*

ASI had the burden of proving damages at trial with a reasonable degree of certainty. Yet during trial, ASI failed to introduce its third-party license agreements with its Design Tool vendors in support of its contention that it had Design Tool licenses as of February 2011. Rather, ASI refused to produce its license agreements to Zilog on the basis that its licenses were “*irrelevant*” to the lawsuit and that disclosure may result in a “*breach by ASI of an obligation to a third-party to maintain such information as confidential.*” See R 4977–4982, at 4981. ASI, having chosen to take the position that license agreements were “irrelevant” and thereby avoiding production of those agreements, is estopped from now arguing not only

that license agreements are relevant but also that the disclosure or nondisclosure affects a party's substantial rights.

**c. The inability to impeach witnesses is not a basis for reversal of a discovery ruling.**

In ASI's second assignment of error, ASI contends that "ASI was precluded from impeaching defense witnesses, specifically Mr. Staab and Mr. Reinstein" because the District Court refused to order production of the Synopsys license. This Court has held that a trial court's error in excluding impeachment evidence "is harmless under I.R.C.P. 61 *because failure to impeach is not inconsistent with substantial justice and does not affect a substantial right of the party.*" *Navarro v. Yonkers*, 144 Idaho 882, 887, 173 P.3d 1141, 1146 (2007) (emphasis added).

Moreover, ASI's contention that defendants' rebuttal damages expert, Dennis Reinstein, made "outcome determinative assumptions with regard to design tools, underscoring the relevance of the licensing agreements" (ASI Op. Brief at 20) misstates the record and Reinstein's testimony (*id.* at 24). Contrary to ASI's contention, Reinstein testified that he was never provided and never reviewed Zilog's third-party licenses. R 5044. Reinstein further testified that he did not recall having a conversation with either Dalrymple or Staab on the subjects of allocating any license cost for tools, industry practices or any convention in the industry concerning the proper cost allocation of licenses for such tools, or whether the Individual Defendants had a lawful right to use any tools licensed by Zilog in connection with their work on the Z82 Project. *Id.* A review of the transcript reveals that it was ASI—not Zilog—that attempted to inject the terms and conditions of Zilog's license agreements into the lawsuit. *See* R 5044 (Reinstein rough draft deposition excerpts, p. 6, L. 23 – p. 7, L. 14).

**d. ASI lacks standing to challenge the terms and conditions of Zilog's license with Synopsys.**

Separately, ASI lacked standing to challenge the terms and conditions of Zilog's use of its license with Synopsys because ASI was not a party to or a third-party beneficiary of the Synopsys licensing agreement. The rules governing the admissibility of evidence have no application to the issue of standing. *Fenwick v. Idaho Dep't of Lands*, 144 Idaho 318, 324, 160 P.3d 757, 763 (2007). It is well settled Idaho law that one must have standing in order to enforce the terms of a contract and that one who is neither a party to nor a third-party beneficiary of the contract lacks standing to enforce its terms. *See Campbell v. Parkway Surgery Ctr., LLC*, 158 Idaho 957, 963, 354 P.3d 1172, 1178 (2015).

**7. Any error committed by the District Court in not compelling disclosure of the third-party license agreement was invited by ASI.**

“It has long been the law in Idaho that one may not successfully complain of errors one has acquiesced in or invited. Errors consented to, acquiesced in, or invited are not reversible.” *Taylor v. McNichols*, 149 Idaho 826, 833, 243 P.3d 642, 649 (2010) (quoting *State v. Owsley*, 105 Idaho 836, 838, 673 P.2d 436, 438 (1983) (internal citation omitted)). At the time the District Court denied ASI's motion to compel in May 2014, ASI had served a third-party subpoena on Synopsys. ASI knew that Zilog would not oppose disclosure of the Synopsys license if ASI could obtain Synopsys' consent to disclosure, yet ASI apparently made no effort to enforce the third-party subpoena or to obtain Synopsys' consent. Nor did ASI seek reconsideration of its motion to compel. Instead ASI waited until trial to file its motion in limine. ASI, having failed to lift a finger to utilize the proper avenue for production of the third-party agreement, can hardly predicate reversible error on the District Court's order.

**C. The District Court Did Not Err in Holding That Zilog Was the Prevailing Party.**

On February 23, 2015, the District Court entered its Memorandum Decision and Order Re: Attorney Fees and Costs (R 2114–2134). Pursuant to Rule 54(d)(1)(B) of the Idaho Rules of Civil Procedure, Judge Neville properly exercised his discretion in determining that Zilog was the prevailing party. R 2114–2134, at 2116, citing *Oakes v. Boise Heart Clinic Physicians, PLLC*, 152 Idaho 540, 545, 272 P.3d 512, 517 (2012); *Eighteen Mile Ranch, LLC v. Nord Excavating & Paving, Inc.*, 141 Idaho 716, 719, 117 P.3d 130, 133 (2005). Judge Neville’s prevailing party determination is well-supported by the record.

ASI’s case against Zilog began primarily as a misappropriation of trade secrets claim. In the Second Amended Complaint, ASI alleged five separate causes of action against Zilog. Three of those five claims related to ASI’s contention that Zilog misappropriated ASI’s trade secrets. Prior to trial, ASI withdrew its trade secret claims when it became beyond obvious that ASI could not identify any such trade secret. At trial, Judge Neville dismissed ASI’s claim for TIWPEA because ASI had failed to introduce evidence supporting its theory that it expected to earn profit from the design services of its engineers *apart from Zilog*. The issue whether Zilog tortiously interfered with ASI’s employment contracts with its employees was submitted to the jury. The jury returned a unanimous verdict in favor of Zilog. Thereafter, Judge Neville entered an order finding that “ASI pursued its trade secret claims without foundation from May 23, 2014 through August 19, 2014.” Based on the overall result, Judge Neville exercised his discretion in determining that Zilog was the prevailing party. This holding is well supported by the facts and the law.

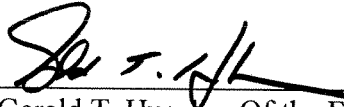


IV. CONCLUSION

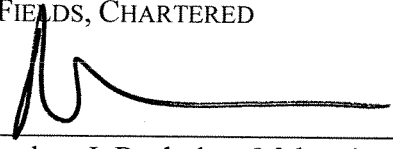
For the foregoing reasons, Zilog respectfully requests that this Court affirm the District Court's holdings and award Zilog its reasonable costs and attorney fees on appeal.

DATED this 14th day of July, 2016.

MOFFATT, THOMAS, BARRETT, ROCK  
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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 14th day of July, 2016, I caused a true and correct copy of the foregoing **RESPONDENT ZILOG INC.'S BRIEF** to be served by the method indicated below, and addressed to the following:

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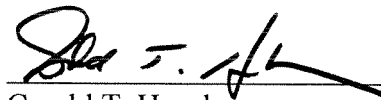
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