

87555-3

FILED
JUL 10 2012
CLERK OF THE SUPREME COURT
STATE OF WASHINGTON

No. _____

SUPREME COURT
OF THE STATE OF WASHINGTON

No. 64505-6-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2012 JUN -4 PM 4:22

CORBIS CORPORATION, a Nevada corporation,

Petitioner,

v.

STEVE A. STONE, d/b/a "InfoFlows" and "Stone Consulting,"
an individual; and INFOFLOWS CORPORATION,
a Washington corporation,

Respondents.

PETITION FOR REVIEW

SMITH GOODFRIEND, P.S.

By: Howard M. Goodfriend
WSBA No. 14355
Catherine W. Smith
WSBA No. 9542

1109 First Avenue, Suite 500
Seattle, WA 98101
(206) 624-0974

Attorneys for Petitioner

TABLE OF CONTENTS

I.	IDENTITY OF PETITIONER.....	1
II.	ISSUES PRESENTED FOR REVIEW.....	1
III.	STATEMENT OF THE CASE.....	2
	A. Corbis Entered Into A Fully Integrated Agreement With InfoFlows To Develop A Digital License Management System For \$3 Million.....	2
	B. Corbis Terminated The Development Agreement And Never Used Any Of InfoFlows' Work Product Or Implemented The Digital License Management System.....	4
	C. The Court Of Appeals Let Stand InfoFlows' \$9 Million Fraudulent Misrepresentation Award That Was Duplicative Of The Jury's Award Of Damages For Breach Of Contract.	5
IV.	GROUND FOR ACCEPTANCE OF REVIEW.	7
	A. A Contracting Party Can Not Assert A Claim In Tort For A Misrepresentation That Pre-Dates And Is Inconsistent With Its Integrated Agreement.	7
	B. The Court of Appeals Erred In Allowing A Contracting Party Recover Twice For The Benefit Of The Same Bargain.	12
	C. The Court of Appeals Erred In Allowing An Award of Lost Profits Based On The Speculative Projected Profits Of A Defendant That Is Not In The Same Business As Plaintiff.....	16
V.	CONCLUSION.....	20

TABLE OF AUHORITIES

CASES

<i>Affiliated FM Ins. Co. v. LTK Consulting Services, Inc.</i> , 170 Wn.2d 442, 243 P.3d 521 (2010).....	12-14
<i>Alejandro v. Bull</i> , 159 Wn.2d 674, 153 P.3d 864 (2007).....	7, 13
<i>Berg v. Hudesman</i> , 115 Wn.2d 657, 801 P.2d 222 (1990).....	10
<i>Cornerstone Equipment Leasing, Inc. v. MacLeod</i> , 159 Wn. App. 899, 247 P.3d 790 (2011).....	8
<i>Eastwood v. Horse Harbor Foundation, Inc.</i> , 170 Wn.2d 380, 241 P.3d 1256 (2010).....	13-14
<i>Elcon Const., Inc. v. Eastern Washington University</i> , __ Wn.2d __, 273 P.3d 965 (2012).....	7, 13
<i>ESCA Corp. v. KPMG Peat Marwick</i> , 86 Wn. App. 628, 939 P.2d 1228 (1997), <i>aff'd</i> , 135 Wn.2d 820, 959 P.2d 651 (1998).....	17
<i>Farm Crop Energy, Inc. v. Old National Bank of Washington</i> , 109 Wn.2d 923, 750 P.2d 231 (1988).....	16-17
<i>Kammerer v. Western Gear Corp.</i> , 27 Wn. App. 512, 618 P.2d 1330 (1980), <i>aff'd</i> , 96 Wn.2d 416, 635 P.2d 708 (1981).....	12
<i>Larsen v. Walton Plywood Co.</i> , 65 Wn.2d 1, 390 P.2d 677, 396 P.2d 879 (1964).....	16-17
<i>Nyquist v. Foster</i> , 44 Wn.2d 465, 268 P.2d 442 (1954).....	7

Poulsbo Group, LLC v. Talon Development, LLC, 155 Wn. App. 339, 229 P.3d 906 (2010)..... 8

Public Employees Mutual Ins. Co. v. Kelly, 60 Wn. App. 610, 805 P.2d 822, *rev. denied*, 116 Wn.2d 1031 (1991)..... 15

U.S. Life Credit Life Ins. Co. v. Williams, 129 Wn.2d 565, 919 P.2d 594 (1996)..... 10

STATUTES

RCW 64.12.020..... 14

RULES AND REGULATIONS

RAP 13.4..... 8, 12, 15

OTHER AUTHORITIES

Restatement (Second) Torts § 549(2)..... 17

I. Identity Of Petitioner.

Corbis Corporation asks the Court to accept review of that portion of the Court of Appeals March 26, 2012 decision affirming the judgment entered on a verdict of \$9.28 million on InfoFlows' claim for fraudulent misrepresentation. (Appendix A) The Court of Appeals denied Corbis' timely Motion for Reconsideration and To Publish on May 4, 2012. (Appendix B)

II. Issues Presented For Review.

A. Whether a party to a contract may assert claims that the other party both breached the contract and misrepresented the terms of their commercial relationship in a manner that is inconsistent with the express terms of their integrated agreement?

B. Whether awards of "benefit of the bargain" damages for both breach of contract and for misrepresenting the terms of the parties' contract constitute an impermissible double recovery for the same wrong?

C. Whether a plaintiff that had no customers other than defendant may support an award of lost profits solely with evidence of the defendant's projections of defendant's potential profits if the contract were fully performed where the parties are in different businesses?

III. Statement Of The Case.

A. Corbis Entered Into A Fully Integrated Agreement With InfoFlows To Develop A Digital License Management System For \$3 Million.

Petitioner Corbis Corporation owns over 100 million images that it licenses for editorial and commercial use to a wide variety of customers, including newspapers, advertising agencies, publishers, and web designers. Corbis delivers images to its customers digitally over the internet. (RP 472-76, 770-72)

Corbis sought to develop a digital license management system to identify and police piracy and to provide Corbis customers a way to quickly and easily determine their license rights in images and, if necessary, to bring their licenses current. Beginning in 2004, Corbis consulted with respondents Steve Stone and his corporation InfoFlows on a method to embed in its images digital "handles," a type of "smart media" object, for the purpose of managing Corbis' online licensing of digital images. (Op. 3-5)

The parties entered into a series of consulting agreements (Exs. 2, 10), and then signed a fully integrated Development Agreement in June 2006, following several months of negotiations in which both parties were represented by experienced counsel. (Ex. 121; RP 827, 1790-93) Their contract was Exhibit 43 at trial.

The Development Agreement “constitute[d] the entire agreement between the Parties. . . supersed[ing] any and all prior and contemporaneous agreements or communications with respect to such subject matter.” (Ex. 43 § 14(m)) The parties agreed that Corbis would own the work product created by InfoFlows, including all intellectual property rights, and agreed that Corbis had the exclusive right to patent the resulting license management system. (Ex. 43 § 6(a)) The parties negotiated a single exception to Corbis’ ownership of InfoFlows’ work product. Corbis agreed not to claim any ownership in technology known as “Jazz Service” developed by InfoFlows to insert and search for handles on digital files. (Ex. 43 § 6(a))

Corbis agreed to pay InfoFlows a total of \$3.95 million upon Corbis’ acceptance of a fully operational digital license management system. (Ex. 43 § 7) Corbis also paid InfoFlows a refundable \$500,000 advance against potential fees if Corbis chose to implement the license management system that used InfoFlows’ Jazz Service. (Ex. 43 § 9) However, Corbis had no contractual obligation to use Jazz Service in the digital license management system that it was paying InfoFlows to develop, and Corbis had no obligation to pay additional compensation to InfoFlows if it chose

not to do so. (CP 102-05) Had Corbis entered into an exclusive licensing arrangement for Jazz Service following acceptance of the digital license management system, InfoFlows could have earned total revenue of \$7 million. (Ex. 43 § 9)

B. Corbis Terminated The Development Agreement And Never Used Any Of InfoFlows' Work Product Or Implemented The Digital License Management System.

The parties agreed that Corbis had the right to accept or reject InfoFlows' work product in Corbis' sole discretion. (Ex. 43 §§ 2(b), 13(b)) Corbis also could terminate the Development Agreement at any time, without cause, on 30 days notice. (Ex. 43 § 13(c)) Corbis terminated the Development Agreement for cause on October 12, 2006, alleging that InfoFlows failed to deliver a working "alpha" demonstration of the license management system that Corbis had hired it to create. (RP 853-57, 862-65; Ex. 122)

Corbis made no further use of any of InfoFlows' work product. Corbis never implemented any form of the digital license management system contemplated by the Development Agreement. The parties never entered into an agreement to license Jazz Service. (RP 628, 762, 1194-95)

C. The Court Of Appeals Let Stand InfoFlows' \$9 Million Fraudulent Misrepresentation Award That Was Duplicative Of The Jury's Award Of Damages For Breach of Contract.

Both Corbis and InfoFlows sued. The actions were consolidated and went to jury trial in August 2009. (CP 21-22) After denying Corbis' CR 50 motion to dismiss InfoFlows' conversion, trade secrets, and fraud claims (CP 100, 457), the trial court allowed the jury to determine both whether Corbis had fraudulently misrepresented that Corbis and InfoFlows would "jointly patent" the license management system design, and whether Corbis had fraudulently induced InfoFlows to enter into the Development Agreement by concealing that Corbis had already filed a patent application for a license management system design before the parties negotiated and signed the Development Agreement. (CP 541)

The jury awarded InfoFlows \$7 million for fraudulent inducement, \$9.28 million for fraudulent misrepresentation, \$3.25 million for breach of contract, \$16.6 million for conversion, and \$25,000 for unjust enrichment. (CP 525-29) The trial court granted Corbis judgment as a matter of law on the conversion claim, but otherwise denied Corbis' motions under CR 50, for remittitur, or for

a new trial, and entered judgment against Corbis for \$19,055,000, plus prejudgment interest and fees and costs, for a total judgment of \$20,013,593.86. (CP 1474-85, 1810-16)

On appeal, Division One reversed the \$7 million fraudulent inducement award, holding that the award of “damages for lost opportunities [InfoFlows] would have had, had it not signed the contract with Corbis” was inconsistent with the award of \$3.25 million in damages for breach of contract and \$9.28 million for misrepresentation. (Op. at 19-20 & n.2) Corbis does not challenge that decision in this petition for review. Corbis petitions for review of that portion of the decision that affirms the award for misrepresentation. Having recognized that InfoFlows’ claims were based on its expectation of profits under the Development Agreement, the Court of Appeals should not then have let stand an award for both breach of contract and misrepresentation because the parties’ integrated Development Agreement clearly and unambiguously defined their rights in a manner that was inconsistent with InfoFlows’ claimed reliance on alleged pre-agreement representations of “patent coordination.”

IV. Grounds For Acceptance Of Review.

A. A Contracting Party Can Not Assert A Claim In Tort For A Misrepresentation That Pre-Dates And Is Inconsistent With Its Integrated Agreement.

A party to a commercial contract can have no claim for fraudulent misrepresentation of a term that is addressed in the parties' integrated agreement. "[W]ere the rule otherwise, any breach of contract would amount to fraud[.]" *Nyquist v. Foster*, 44 Wn.2d 465, 470, 268 P.2d 442 (1954). InfoFlows and Corbis thoroughly and comprehensively allocated their rights and responsibilities with respect to patenting their intellectual property in their Development Agreement. This Court should accept review and hold that a party to an integrated contract may not recover for both breach of contract and for fraudulently misrepresenting the terms of that contract.

This Court has consistently rejected claims for fraudulent misrepresentation that are inconsistent with the parties' allocation of rights and responsibilities in their written agreement. *Elcon Const., Inc. v. Eastern Washington University*, __ Wn.2d __, 273 P.3d 965 (2012) (no right to rely on other party's expert report when bidding documents required contracting party to perform independent investigation); *Alejandro v. Bull*, 159 Wn.2d 674, 681-

82, ¶ 13, 153 P.3d 864 (2007) (no right to rely on seller's representations regarding septic system that were inconsistent with disclosures in inspection report mandated by purchase and sale agreement). A party has no right to rely on promises of future performance that conflict with the terms of an integrated contract. See **Cornerstone Equipment Leasing, Inc. v. MacLeod**, 159 Wn. App. 899, 902, ¶ 1, 247 P.3d 790 (2011) (maker of promissory note "had no right to rely on the alleged oral assurance [that note was for "internal purposes" and would not be enforced] that contradicted the written obligation"); **Poulsbo Group, LLC v. Talon Development, LLC**, 155 Wn. App. 339, 346-47, ¶ 14, 229 P.3d 906 (2010) (developer's representation prior to closing that development would not be subject to utility's contractual "latecomer charge" not actionable as fraud). This Court should accept review because the Court of Appeals decision in this case contravenes this established precedent. RAP 13.4(b)(1), (2).

The Court of Appeals decision also presents an issue of substantial concern to Washington businesses, the lawyers who advise them and the courts called upon to settle their disputes. RAP 13.4(b)(4). Contracting parties expect the terms of their commercial transactions to be memorialized in a document that

fully expresses their intent. If a party believes that the document does not accurately reflect the parties' representations and expectations, a party can continue negotiating, or refuse to sign the contract. But where, as here, sophisticated businesses represented by experienced counsel negotiate for several months and agree that their contract "constitutes the entire agreement between the Parties. . . [and] supersedes any and all prior and contemporaneous agreements or communications" (Ex. 43 § 14(m)), allowing one party to then sue for a prior representation that is inconsistent with the terms of their contract undermines certainty and stability in commercial transactions.

InfoFlows' claim for fraudulent misrepresentation was premised on its assertion that in negotiating the Development Agreement, Corbis promised to coordinate with InfoFlows to "patent the systems to protect both Corbis and InfoFlows investments and strategic interests." (Ex. 232; RP 2587-88, 2840-42, 3009-10) But the Development Agreement comprehensively defined the parties' respective intellectual property rights. The jury awarded InfoFlows \$3.25 million in damages for breach of the Development Agreement. (CP 526) An award of an additional \$9.28 million in damages for claimed representations concerning the parties'

intellectual property rights cannot be reconciled with the fully integrated Development Agreement.

The Development Agreement was the final expression of the parties' intent on all matters relating to their intellectual property rights in the digital license management system, including the parties' respective patent rights. (Op. 8; see Ex. 43 § 14(m)) This integrated contract could not be modified by prior inconsistent verbal agreements. ***U.S. Life Credit Life Ins. Co. v. Williams***, 129 Wn.2d 565, 571, 919 P.2d 594 (1996) (extrinsic evidence could not "emasculate the written expression of [the contracting parties'] intent."); ***Berg v. Hudesman***, 115 Wn.2d 657, 670-71, 801 P.2d 222 (1990).

The integrated Development Agreement allocated the parties' rights and responsibilities in a manner that is wholly inconsistent with InfoFlows' fraud claim. The parties agreed that Corbis, not InfoFlows, would have the exclusive right to apply for a patent for the digital license management system that Corbis was paying InfoFlows to develop on its behalf. InfoFlows "irrevocably and unconditionally waived" any rights it had in Corbis' digital license management system. (Ex. 43 § 6(a)) InfoFlows agreed that it "will not file any such [patent] applications on InfoFlows' own

behalf” related to the system it was paid by Corbis to create. InfoFlows agreed to “cooperate with Corbis in filing and prosecution of any” such patent applications. (Ex. 43 § 6(b)) InfoFlows retained proprietary rights in Jazz Service (Ex. 43 § 6(a)), but nothing in the Development Agreement obligated Corbis to file for patents on InfoFlows’ behalf. (See App. Br. 37-39)

The Development Agreement should have precluded InfoFlows’ claim that Corbis fraudulently misrepresented that it would coordinate with InfoFlows on patent applications.¹ (RP 3009-10) That alleged promise dates from February 2006, over two months before the parties signed the integrated Development Agreement, which was negotiated by experienced intellectual property counsel who exchanged no fewer than twelve drafts, each of which confirm that Corbis had the exclusive right to patent the license management system. (RP 827, 1790-93; Exs. 40-47, 121)

Common law tort duties may impose obligations on contracting parties independent of those they agree to assume. But where, as here, the parties have contractually allocated the rights, duties, and attendant risks of a commercial relationship, their

¹ As the Court of Appeals noted, Corbis preserved its argument that InfoFlows’ fraudulent misrepresentation claim was inconsistent with the terms of the integrated Development Agreement. (Op. 11-12)

remedies are limited to those provided by their contract. “If aggrieved parties to a contract could bring tort claims whenever a contract dispute arose, certainty and predictability in allocating risk would decrease and impede future business activity.” ***Affiliated FM Ins. Co. v. LTK Consulting Services, Inc.***, 170 Wn.2d 442, 452, ¶ 15, 243 P.3d 521 (2010) (quotation omitted).

Allowing parties to recover for both breach of an integrated contract and for a prior representation of the terms of that contract conflicts with this Court’s decisions, engenders uncertainty in commercial transactions and promotes litigation. RAP 13.4(b)(1),(4). This Court should accept review and confirm that a contracting party may not assert a claim in tort for misrepresentations that pre-date and are inconsistent with the parties’ fully integrated agreement.

B. The Court of Appeals Erred In Allowing A Contracting Party To Recover Twice For The Benefit Of The Same Bargain.

“A party cannot recover twice for the same injury simply because he has two legal theories.” ***Kammerer v. Western Gear Corp.***, 27 Wn. App. 512, 527, 618 P.2d 1330 (1980), *aff’d*, 96 Wn.2d 416, 635 P.2d 708 (1981). The Court of Appeals correctly held that InfoFlows could not recover both the benefit of its bargain

for breach of a contract *and* “damages for lost opportunities had the contract not been signed” under a claim of fraudulent inducement. (Op. 20 & n. 2) But it erred in then failing to recognize that recovery of “benefit of the bargain” damages for misrepresentation was also duplicative of recovery of “benefit of the bargain” damages for breach of contract. This Court should accept review and reverse the award for fraudulent misrepresentation because the courts below allowed InfoFlows to recover twice for the lost benefit of its bargain with Corbis.

In the past five years this Court has explored the interplay between contract and tort damages in several cases, beginning with *Alejandro v. Bull*, 159 Wn.2d 674, 153 P.3d 864 (2007).² In these cases the Court has never retreated from the established principle that the law provides only one award of damages for a single wrong. In limiting the “economic loss rule,” this Court held that the Seattle Monorail’s operator could recover its losses against an engineering firm for its negligent design even though the engineering firm contracted with the Monorail’s owner, and not the

² See *Affiliated FM Ins. Co. v. LTK Consulting Services, Inc.*, 170 Wn.2d 442, 243 P.3d 521 (2010); *Eastwood v. Horse Harbor Foundation, Inc.*, 170 Wn.2d 380, 241 P.3d 1256 (2010); *Elcon Const., Inc. v. Eastern Washington University*, ___ Wn.2d ___, 273 P.3d 965 (March 29, 2012).

operator, because the firm had a “duty of care independent of LTK’s contract with the City” in ***Affiliated***, 170 Wn.2d at 451, ¶ 15. And in ***Eastwood***, this Court held that a lessor could recover damages for the cost of restoring real property from both the tenant under the lease and from the tenant’s non-signatory principals, based upon the “independent duty” not to commit waste under RCW 64.12.020. 170 Wn.2d at 399, ¶ 38.

These cases confirm that all parties, whether or not they have signed a contract, may have “independent duties” to their contracting partner or to third parties established by the common law or by statute. However, that a party to a contract may also be liable for breach of an independent duty does not mean that the plaintiff may recover twice for the same injury, as the Court of Appeals sanctioned here. The lessor in ***Eastwood***, for instance, could only recover once for the cost of restoring its property, regardless whether that recovery was against the tenant for breach of the lease, or against the tenant’s principals, who were jointly and severally liable with the tenant for the tort of waste.

Here, the jury awarded \$3.25 million for Corbis’ breach of the Development Agreement pursuant to an instruction to award InfoFlows “the sum of money that will put InfoFlows in as good a

position as it would have been in if both parties had performed all of their promises under the” Development Agreement. (CP 526, 554) The jury then awarded InfoFlows an additional \$9.28 million pursuant to an instruction to award the “benefit of its bargain” – the difference between what InfoFlows received and what it would have received “if there had been no misrepresentation.” (CP 526, 570) The contract and fraudulent misrepresentation instructions thus both directed the jury to award InfoFlows its expectation interest in a successful commercial relationship with Corbis.

“[I]t is a basic principle of damages – tort and contract – that there shall be no double recovery for the same injury.” **Public Employees Mutual Ins. Co. v. Kelly**, 60 Wn. App. 610, 618, 805 P.2d 822, *rev. denied*, 116 Wn.2d 1031 (1991). The Court of Appeals decision failed to follow this established precedent and authorized an impermissible double recovery. RAP 13.4(b)(1), (2). This Court should accept review and reverse the jury’s award of \$3.25 million for breach of contract and an additional \$9.28 million for fraudulently representing the terms of that contract.

C. The Court of Appeals Erred In Allowing An Award of Lost Profits Based On The Speculative Projected Profits Of A Defendant That Is Not In The Same Business As Plaintiff.

Finally, this Court should also accept review because the Court of Appeals' decision resulted in total damages of \$12.53 million even though the maximum revenue to InfoFlows from any source was \$7 million. "Benefit of the bargain" damages, whether in contract or tort, must be limited to the most a party could receive had the defendant not breached the contract or committed a tort. The Court of Appeals decision instead affirmed the jury's award based on the amount of revenue that *Corbis*, not InfoFlows, projected it might earn, contravening established precedent that the plaintiff's own losses must provide a basis for an award of lost profits.

This Court has long held that in order to recover lost profits, a new business with no established profit history must, at a minimum, present "factual data [sufficient to] furnish a basis for computation of probable losses." *Larsen v. Walton Plywood Co.*, 65 Wn.2d 1, 17, 390 P.2d 677, 396 P.2d 879 (1964) (quotation omitted); *Farm Crop Energy, Inc. v. Old National Bank of Washington*, 109 Wn.2d 923, 928, 750 P.2d 231 (1988). In *Farm*

Crop, this Court reversed a verdict for claimed lost profits when defendant Bank breached a contract to provide financing for an ethanol plant. The plaintiff could not rely on an expert's pro forma projections that assumed the ethanol plant would have produced one million gallons in the first year of production but failed to consider the profitability of any similarly situated businesses to sustain the award. **Farm Crop**, 109 Wn.2d at 931.

Similar standards of proof apply to the recovery of revenue lost to fraud. Division One cited **Larsen** in rejecting as entirely “speculative and self-serving at best” a damage award based upon an expert’s testimony that the overstatement of plaintiff’s net worth by the defendant auditor caused plaintiff to incur over \$1 million in unnecessary employee expenses in **ESCA Corp. v. KPMG Peat Marwick**, 86 Wn. App. 628, 639 n. 15, 939 P.2d 1228 (1997), *aff’d*, 135 Wn.2d 820, 959 P.2d 651 (1998). *See also Restatement (Second) Torts* § 549(2) and comment g (noting that where a fraud claim is based upon a bargain that was never fully performed, damages become entirely conjectural “and ordinary rules of the law of damages preclude the award.”)

Here, InfoFlows was a new business with no established profit history, no other customers, and no other prospects than

Corbis for its "Jazz Service," patented or not. (RP 2663) The trial court instructed the jury to award InfoFlows "the difference between the actual value of that which InfoFlows received and the value which it would have had if there had been no misrepresentation." (CP 570) But there was no evidence of the value of Jazz Service to Corbis, to InfoFlows, or to anyone else, except as a licensed part of Corbis' digital license management system.

The Court of Appeals erred in holding that Corbis' estimates of the value of a fully functional digital license management system to *Corbis* provided an appropriate measure of *InfoFlows*' damages for fraud. In affirming the fraud award of \$9.28 million, the Court of Appeals reasoned that "the jury may have reasonably concluded that, as Corbis' partner, InfoFlows would have received a share of" Corbis' revenues had Corbis implemented a digital license management system using InfoFlows' technology. (Op. 22) Because that "share of revenues" was limited to \$7 million,³ the court erred in affirming the \$9.28 million award based on evidence that "*Corbis* placed a value of somewhere between \$18 and \$25

³ The parties agreed that "the combined fees and costs owed by Corbis to InfoFlows under this Development Agreement and the Jazz Service Agreement for exclusive use of the Jazz Service through calendar year 2008 will not exceed the sum of Seven Million Dollars (\$7,000,000)." (Ex. 43 § 9)

million on its revenues over a two-year period.” (Op. 22) (emphasis added)

InfoFlows’ damages must be based on InfoFlows’ lost profits, not Corbis’. Corbis, not InfoFlows, possesses the valuable repository of more than 100 million digital images for licensing from which it hoped to generate its projected revenue. Corbis, not InfoFlows, could have expected to earn additional revenue from the efficiencies offered by a fully operational digital license management system. InfoFlows negotiated for a licensing fee, but only if Corbis implemented a system using InfoFlows’ handle technology. InfoFlows had no expectation to share in the \$18 to \$25 million that *Corbis* projected it could earn if it had a fully operational digital license management system.

Had both parties fully performed the contract, InfoFlows could have grossed no more than \$7 million from its relationship with Corbis – the combined value of a fully performed Development Agreement *and* any subsequent licensing agreement, whether or not the parties “coordinated” on their respective patent applications. (Ex. 43 § 9)⁴ The Court of Appeals correctly recognized that

⁴ After incurring the cost of performing its obligations under the Development Agreement InfoFlows’ lost profits would have necessarily been less than \$7 million.

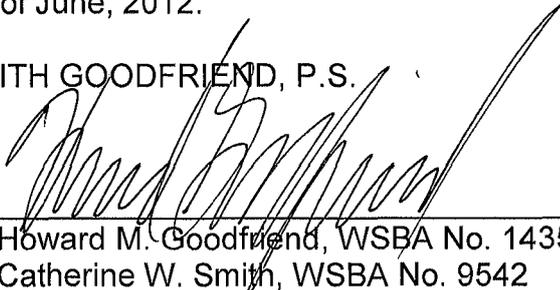
InfoFlows had no evidence of damages in the nature of lost business opportunities, or being the “first to market.” (Op. 22-23) “[I]n the absence of any evidence that any other entity had expressed such an interest in investing in the company, or in what amount, the extent of any claimed loss is unquantifiable and based on nothing more than speculation.” (Op. 22-23) The Court of Appeals’ refusal to limit InfoFlows’ damages award to InfoFlows’ maximum potential profit under its Development Agreement with Corbis contravenes this Court’s established standards for recovery of lost profits.

V. Conclusion.

This Court should accept review and reverse the Court of Appeals decision authorizing InfoFlows’ separate recovery of \$3.25 million for breach of contract and \$9.28 million for fraud.

DATED this 4th day of June, 2012.

SMITH GOODFRIEND, P.S.

By: 

Howard M. Goodfriend, WSBA No. 14355
Catherine W. Smith, WSBA No. 9542

Attorneys for Petitioner

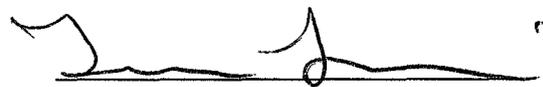
DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on June 4, 2012, I arranged for service of the foregoing Petition for Review, to the clerk to the court and to the parties to this action as follows:

Office of Clerk Court of Appeals - Division I One Union Square 600 University Street Seattle, WA 98101	<input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail
William Brewer Riddell Williams, P.S. 1001 4 th Avenue, Suite 4500 Seattle WA 98154	<input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail
Stephen C. Willey Savitt & Bruce LLP 1425 4th Ave, Suite 800 Seattle WA 98101-2272	<input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail

DATED at Seattle, Washington this 4th day of June, 2012.


Tara D. Friesen

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON

2012 MAR 26 AM 9:18

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

CORBIS CORPORATION, a Nevada corporation,)	No. 64505-6-I
)	
Appellant/Cross-Respondent,)	DIVISION ONE
)	
v.)	
)	UNPUBLISHED OPINION
STEVE A. STONE, d/b/a INFOFLOWS and STONE CONSULTING, an individual; and INFOFLOWS CORPORATION, a Washington corporation,)	
)	
<u>Respondents/Cross-Appellants.</u>)	FILED: <u>March 26, 2012</u>

SPEARMAN, J. — Corbis Corporation (“Corbis”) and Steve Stone, through his company InfoFlows Corporation (“InfoFlows”), entered into an agreement whereby InfoFlows was to assist Corbis in developing a system to track and manage the licensed and unlicensed use of Corbis’ repository of digital images. According to InfoFlows, at the same time Corbis was promising Stone that the parties would cooperate on patents, Corbis obtained a secret patent that covered some of InfoFlows’ proprietary information. Corbis terminated the agreement, and the parties sued each other.

The trial court granted summary judgment in favor of Corbis on a claim for money Corbis advanced to InfoFlows, but at trial, the jury found in favor of InfoFlows and

against Corbis on all of their respective claims. The jury awarded InfoFlows over \$36 million in damages. After the trial court granted Corbis' post-trial motion for judgment as a matter of law on InfoFlows' conversion claim, it entered judgment of just over \$20 million on InfoFlows' remaining claims. Among other issues, Corbis appeals the award of damages as duplicative, and InfoFlows cross appeals summary judgment in favor of Corbis on the monetary advance and the order setting aside the verdict on its conversion claim.

We reject Corbis' argument that the awards for fraudulent misrepresentation and breach of contract amount to a double recovery because the court's instructions to the jury were designed to address different types of damages claimed by InfoFlows. However, we agree with Corbis that the award for fraudulent inducement was inconsistent with the breach of contract and fraudulent misrepresentation awards and that in any event, the evidence was insufficient to support it. We therefore reverse the award for damages as to that claim. Additionally, because questions of fact remain as to whether InfoFlows failure to repay the monetary advance was caused by Corbis' breach, we reverse the pre-trial grant of summary judgment in favor of Corbis. We otherwise affirm. Reversed and remanded for further proceedings.

FACTS

Parties. Corbis was founded by Bill Gates in 1989, and has an inventory of over 100 million images available for licensed editorial and commercial use. Corbis customers license images from Corbis' web site. Corbis delivers images to its

customers almost exclusively as digital files, and as such, Corbis has explored various technologies to identify and police both intentional and unintentional unlicensed use of their images by non-customers and by customers who exceed the scope or duration of their licenses. In 2004, Corbis began exploring the concept of a "smart media object" to embed "intelligence" in a digital image to aid identification, using a type of numeric tag. According to Corbis, it sought to implement that concept in a workable business model to systematically monitor its digital licenses across a wide range of uses. Corbis called this confidential business model "Project Baker."

InfoFlows is a start-up software and services company founded by Steve Stone after he left Microsoft in 2004. Stone had been developing a system of proprietary technology focused on identifying, tracking, and managing control of digital objects on the Internet. This system is now called "Fedmark" and was earlier known as "Jazz Service" or "Object Management Service."

Background. Corbis hired Steve Stone as an independent contractor on Project Baker shortly after Stone left Microsoft in April 2004. Under Stone's June 2004 contract with Corbis, which was amended by "statements of work" negotiated in 2004 and 2005, the parties agreed that Corbis was the owner of all 'Proprietary Materials,' including "all products, devices, computer programs, techniques, know-how, algorithms, procedures, discoveries or inventions, . . . and all materials, text drawings, specifications, source code, data and other recorded information, in preliminary or final form and on any media whatsoever" generated by Stone's work. Stone assigned to Corbis "all right, title and

interest that [he] may now or hereafter have in the Proprietary Materials,” except for any “invention” developed on Stone’s own time and not using Corbis’ materials or trade secret information, “unless the invention results from any work performed by [Stone] for Corbis.”

According to Stone, Project Baker ended in April 2005. During the summer of 2005, Stone, through InfoFlows, continued his work on the Object Management Service, including development of a working demonstration and prototype. In September 2005, Corbis in-house attorney David Weiskopf, who was manager of Corbis’ anti-piracy team, contacted Stone about a collaboration, and the two had lunch. Stone testified that he explained to Weiskopf a concept for a digital image license management system using the Object Management Service, and when Weiskopf didn’t understand, he drew his ideas on a placemat for Weiskopf. About two weeks later, Weiskopf emailed Corbis general counsel Jim Mitchell, claiming he had been “doing a lot of thinking” and had “developed a very realistic solution” to digital rights management after “conversations and proposals with vendors[.]” The email included PowerPoint slides. At trial, Stone testified the diagrams on Weiskopf’s PowerPoint slides were “very similar” to what he drew on the placemat for Weiskopf.

In November 2005, Corbis and InfoFlows entered into a consulting agreement (via a third “statement of work”) for the development of a demonstration of a license management system. The purpose of this third statement of work was to use the demonstration to obtain approval and funding from Corbis decision-makers Bill Gates

and Steve Davis to move forward with a fully functional, working system. Corbis called development of this working system the "Boulder Ridge" project. The third statement of work contains a provision stating "Corbis does not assert ownership over the handle system or the handle injection and resolution technology, or any inventions, methods, or systems in the public domain." Stone testified that he understood this to mean that InfoFlows would continue to own its product (the Object Management Service) while Corbis would own any final application developed at some later point. He further testified that Weiskopf affirmed his understanding by saying "We both understand what it means, don't we?"

InfoFlows maintains, however, that despite this understanding, Corbis began sending (without Stone's knowledge) Stone's materials, including his drawings, to John Branch, an outside patent attorney. On January 18, 2006, Corbis filed a non-public patent application for the Boulder Ridge system. InfoFlows implies this patent application covered InfoFlows Object Management System technology. The only named inventors on the patent application were Weiskopf and Erling Aspelund of Corbis. Corbis never told Stone about this patent application. In fact, Stone testified that when he pitched use of InfoFlows' Object Management System as part of the Boulder Ridge system to various people at Corbis, none of them mentioned the non-public patent.

In early 2006, around the same time Stone was giving demonstrations to Corbis executives, Stone and Corbis began discussions about the development of fully

functional applications for Corbis that would operate on InfoFlows' platform. On February 2, 2006, Stone met with Jim Mitchell to discuss these issues. Stone understood from this meeting that Corbis and InfoFlows agreed to work together to obtain patents for both Corbis' applications and for InfoFlows' Object Management System technology. Mitchell never mentioned that Corbis had already filed a patent application. Corbis argues this is not surprising because the material covered by the patent application had nothing to do with the Object Management System.

Development Agreement. In June 2006, InfoFlows and Corbis entered into a Development Agreement. The purpose of the Agreement was that InfoFlows would build the "completely operational" version of a license management system for Corbis. (Recitals). This "completely operational" product would be designed to "operate on" InfoFlows "Jazz Service" (formerly Object Management Service), and Corbis would pay an ongoing fee to InfoFlows for use of Jazz Service:

InfoFlows is, on its own initiative and at its own expense, building the Jazz Service. The "Jazz Service" means the "Handle Injection and Resolution Technology" as such technology is defined in SOW No.3, which SOW is incorporated into this Development Agreement by this reference. For purposes of clarity only, the Parties agree that Jazz Service refers to: (i) those sets of technologies which enable the injection and removal of handles into Digital Objects; (ii) those necessary technologies to manage these handles to insure their persistence and quality; and (iii) the necessary technologies, which when added to a web crawler, search for and find handelized Digital Objects. "Digital Object" means any information package including desktop documents, email, web pages, music, video, images, database records, DNS records and medical records. The Jazz Service will be designed and built in a manner that both Phase 1 and Phase 2 of the System will operate on the Jazz Service. Corbis and InfoFlows hereby agree to negotiate in good faith a definitive agreement pursuant to which InfoFlows will operate and host both Phase 1 and Phase 2 of the System using the Jazz Service (the "Jazz

Service Agreement"). In anticipation of the Parties reaching agreement on the Jazz Service Agreement, Corbis is willing to advance to InfoFlows the sum of Five Hundred Thousand Dollars (the "Jazz Service Fee Advance") upon execution of this Development Agreement, as a deposit on the service fees that will become due and owing under the Jazz Service Agreement as set forth in the following paragraph. The Jazz Service Fee Advance will be fully refunded either in the event that (a) this Development Agreement is terminated by Corbis pursuant to Section 13(b); or (b) the Parties do not enter into a Jazz Service Agreement on or before August 1, 2006.

Corbis agrees and acknowledges that nothing in this Development Agreement grants Corbis ownership of or rights to the Jazz Service. While the Jazz Service Agreement will set forth the definitive amount of fees to be paid by Corbis for the Jazz Service, the Parties agree that such fees for non-exclusive use of the Jazz Service will not exceed the sum of \$800,000 for 2007 (against which amount, the above referenced Jazz Service Fee Advance will be applied), and \$1.3 million for 2008, such that the combined fees and costs owed by Corbis to InfoFlows under this Development Agreement and the Jazz Service Agreement for the Jazz Service through 2008, will not exceed the sum of Six Million Fifty Thousand Dollars (\$6,050,000). If Corbis desires exclusive use of the Jazz Service (that is, exclusive within the "Exclusive Field of Use" as such term is defined in the System License Agreement attached hereto as Exhibit G), the pricing set forth above will be adjusted accordingly, provided, however, that the combined fees and costs owed by Corbis to InfoFlows under this Development Agreement and the Jazz Service Agreement for exclusive use of the Jazz Service through calendar year 2008 will not exceed the sum of Seven Million Dollars (\$7,000,000). InfoFlows further agrees, that at all times during the Jazz Service Agreement, the fees charged Corbis for the Jazz Service will not exceed \$2 million per year, and that in any event such fees at all times will be no more than the lowest amount charged by InfoFlows to any other third party customer of InfoFlows, based upon a similar volume of data management and factoring in exclusivity rights.

While InfoFlows was to retain ownership of the Jazz Service, Corbis would own the final, completely operational "Work Product":

(a) Ownership. InfoFlows agrees that Work Product has been specially ordered or commissioned by Corbis and shall be considered "works made for hire" (as such term is defined under U.S. copyright law) with Corbis being the author thereof. To the extent the Work Product includes material subject to copyright, mask work, patent, trademark, trade secret, or any other proprietary rights protection and such materials do not qualify as a "work made for here" under applicable law, InfoFlows hereby irrevocably and unconditionally assigns to Corbis its successors, and assigns, all rights (including

without limitation sublicensing rights), title, and interest in and to all such Work Product. Accordingly, without limiting the generality of the foregoing, Corbis shall be deemed to own, without any restrictions or limitations whatsoever, the sole and exclusive rights to prepare derivative works based on the Work Product and to reproduce, adapt, distribute, publicly perform and display, and otherwise exploit the Materials and such derivative works, by any and all means and in any and all media now or hereafter known, through the world and in perpetuity. To the extent any of InfoFlows' rights in the Work Product (including without limitation any moral rights) are not capable of assignment under applicable law, InfoFlows hereby irrevocably and unconditionally waives all enforcement of such rights to the maximum extent permitted under applicable law.

Additionally, the Development Agreement was a fully integrated document, and "constitute[d] the entire agreement between the Parties . . . supersed[ing] any and all prior and contemporaneous agreements or communications with respect to such subject matter."

The Development Agreement required InfoFlows to first produce a specification of each phase of the system, then build and deliver an "alpha" version of the system, and then a final version of the system, all subject to Corbis' approval. Corbis had the right to accept or reject InfoFlows' delivered product at Corbis' sole discretion. If Corbis rejected a delivered product, it could terminate the Development Agreement for cause or require that InfoFlows correct and resubmit. According to Corbis, it "rejected InfoFlows first delivery of functional specifications because it had failed to meet Development Agreement milestones." Corbis then gave InfoFlows an opportunity to "correct the problems," but InfoFlows "failed to deliver a working 'alpha' demonstration of the system[,]" and as such Corbis terminated the Development Agreement on October 12, 2006.

At trial, however, Tanya Miksys (a Corbis-hired consultant) testified that InfoFlows had, in fact, met the alpha delivery date. Counsel for InfoFlows introduced a September 20, 2006 email from Miksys to Weiskopf and others. That email attached a Boulder Ridge "status report". The report states, "InfoFlows met the [A]lpha delivery due date and a review meeting was held. All deliverables were acceptable, although the Corbis Technical Lead will continue to review the deliverables in detail to validate that the project is on track." Given Corbis terminated the Development Agreement, Corbis and InfoFlows never entered into a Jazz Services Agreement.

Lawsuits. In January 2007, InfoFlows announced the "Fedmark" license management system on its website. Corbis believed that Fedmark went beyond the scope of the Jazz Services clause in the Development Agreement, and that InfoFlows had taken Boulder Ridge license management design documents, re-labeled them, and was offering a product to the public based on work product generated while InfoFlows was working with Corbis.

Corbis and InfoFlows sued each other on January 22, 2007. Corbis alleged misappropriation of trade secrets, breach of contract, and unfair business practices. InfoFlows alleged misappropriation of trade secrets, conversion, breach of contract, breach of the duty of good faith and fair dealing, unjust enrichment, and fraud. The cases were consolidated. The trial court granted Corbis' motion for partial summary judgment seeking return of the \$500,000 Jazz Service advance fee. The court also

granted Corbis' motion for partial summary judgment as to the "unambiguous" definition of "Jazz Service" in the Development Agreement. That order reads in pertinent part:

(2) The definition of "Jazz Service" is not ambiguous and can be determined by the Court from the Development Agreement between the parties; and

(3) Under the Development Agreement "Jazz Service" refers to (i) those sets of technologies which enable the injection and removal of handles into Digital Objects; (ii) those necessary technologies to manage these handles to insure their persistence and quality; and (iii) the necessary technologies, which, when added to a web crawler, search for and find handleized Digital Objects.

Beginning August 3, 2009, the claims were tried to a jury before a different trial judge. On August 18, the parties and the court discussed jury instructions. Counsel for Corbis objected to InfoFlows' proposed damages instructions on grounds that they could possibly permit the jury to award Corbis more than once for the same injury. At the close of evidence on August 20, Corbis moved orally for judgment as a matter of law under CR 50(a) on InfoFlows' claims for fraud, conversion, and misappropriation of trade secrets. The trial court denied these motions. Additionally, InfoFlows moved to dismiss several of Corbis' claims. The court granted the motion in part, dismissing Corbis' Consumer Protection Act (CPA) and breach of contract claims. The court declined, however, to dismiss Corbis' trade secret claim.

The jury found in favor of InfoFlows on all claims. Specifically, it found: (1) that Corbis fraudulently induced InfoFlows to enter into the Development Agreement, awarding \$7 million for that claim; (2) Corbis committed fraudulent misrepresentation, awarding \$9.28 million for that claim; (3) Corbis breached the Development Agreement

and the duties of good faith and fair dealing contained therein, awarding \$3.25 million for those claims; (4) Corbis misappropriated InfoFlows trade secrets (InfoFlows sought only injunctive relief, exemplary damages and attorney fees on this claim); (5) Corbis converted InfoFlows' property, awarding \$16.6 million for that claim; and (6) Corbis was unjustly enriched, awarding \$25,000 for that claim. The jury rejected all of Corbis' claims against InfoFlows.

Corbis moved for judgment as a matter of law on InfoFlows' fraud and conversion claims, and for a remittitur or new trial. On November 6, 2009, the trial court granted Corbis judgment as a matter of law on InfoFlows' conversion claim, but denied Corbis' motions for judgment as a matter of law, remittitur, or a new trial. The trial court entered judgment against Corbis on February 9, 2010 in the principal amount of \$19,055,000, plus prejudgment interest of \$209,438.54, and fees and costs totaling \$749,155.32, for a total judgment of \$20,013,593.86.

Corbis appeals. InfoFlows cross-appeals.

DISCUSSION

A. Waiver.

As a preliminary matter we first address InfoFlows' contention that Corbis waived various arguments it makes on appeal by failing to raise them below. We address, in turn, the waiver issue for each of Corbis' arguments.

Integration clause. To the extent InfoFlows contends Corbis waived its argument that the integration clause in the Development Agreement precludes the fraudulent

misrepresentation claim, InfoFlows is simply mistaken. This exact argument was raised by counsel in both Corbis' trial brief and in the CR 50(a) motion for judgment as a matter of law.

Sufficiency of the evidence of fraud. To the extent InfoFlows contends Corbis has waived its argument that InfoFlows failed to prove damages for fraud, InfoFlows is mistaken. This argument was raised by counsel in Corbis' trial brief, although it was not argued as part of the oral CR 50(a) motion for judgment as a matter of law.

Additionally, the trial court addressed the issue in its letter ruling wherein it denied Corbis' CR 50(b) motion on the issue of sufficiency. As such, Corbis did not waive this argument below.

Double recovery for inducement and breach of contract and Limitation on Breach of Contract Damages.

In one of its three CR 50(b) motions, the motion titled "Motion for Judgment as a Matter of Law, Remittitur or New Trial Regarding Damage Awards", Corbis argued that the jury award of damages for both fraudulent inducement and for breach of contract amounts to an impermissible double recovery. Corbis also contended that even if it was in breach, the contract limited InfoFlows' damages to \$1 million. InfoFlows contends Corbis waived these arguments, and they were not properly before the court in a CR 50(b) motion. The trial court agreed with InfoFlows in its letter ruling denying the CR 50(b) motion on this issue:

Corbis moves pursuant to CR 50 to reduce the damage award to \$1 million; alternatively, Corbis moves for a new trial under CR 59, unless InfoFlows consents to remit the verdict to \$1 million.

Essentially, Corbis relies on section 13(c) of the Development Agreement that sets forth how InfoFlows would be paid in the event Corbis terminated the contract without cause.

The difficulty with Corbis' CR 50 argument is that it was not made prior to instructing the jury – indeed, its \$1 million theory was never argued; Corbis did not except to the jury instructions on this basis; Corbis actually proposed “benefit of the bargain” fraud damage instructions, and proposed a verdict form with separate lines for contract and fraud damages.

We respectfully disagree with the trial court on this issue. As is described above, Corbis did, in fact, raise these concerns before the jury was instructed. Not only that, but InfoFlows indicated it understood Corbis' concerns, and suggested that the trial court handle any discrepancy *after* the jury verdict:

Mr. Quackenbush: I delivered this – deliverables that you should have accepted them, and pay me what I was owed. In other words, I should have gotten the benefit of the bargain. There were also – it also seems to me like what we're setting up here is a potential for double recovery, because you can't have both. **You can't have the damages for accepting the contract and performing under it and then say, well, but I wouldn't have accepted the contract, and I would have had other contracts or I would have had better business deals, et cetera. Those two are mutually exclusive. It seems like what we're setting up here is potential for double recovery.** I don't see how you could avoid that.

If you say the value of business opportunities lost, right? **What if the jury says, yes, Corbis breached the contract, and InfoFlows is owed a million dollars.** Then there is no business opportunity lost. The business opportunity is realized, right?

The Court: Right.

Mr. Quackenbush: Would it be for [t]he Court to cancel those two out?

The Court: That's kind of what I was thinking about. What do you think?

Mr. Willey: I have two thoughts, Your Honor. It depends entirely on what the verdict is, but I think that you need to recognize that we need to recognize that the fraud elements are guideposts. They are not saying that the jury must, if they find a fraud, award element X which happens to [be] a measure of contract damages also. They're

actually different claims, and **to the extent that there is any issue in the duplication, it strikes me that the Court should address that post verdict.**

(Emphasis added.) In other words, Corbis *did* raise these issues before the jury was instructed, and InfoFlows suggested any problem should be corrected post-verdict. Corbis did not waive the issue.

Economic loss doctrine. To the extent InfoFlows contends Corbis has waived its economic loss rule (now called the “independent duty doctrine”) argument, we agree. An appellate court may “refuse to review any claim of error which was not raised in the trial court” and “will not vacate a verdict . . . for errors of law if the party seeking a new trial failed to object to or invited the error.” RAP 2.5(a). Here, Corbis never argued at any time in the trial court that InfoFlows’ fraud claims were barred by the economic loss rule. This argument did not appear in Corbis’ motion for summary judgment, its trial brief, its argument during instructions, its CR 50(a) motion, or even in its post-verdict CR 50(b) motion. Instead, Corbis first argued the economic loss rule in its Opening Brief here on appeal. As such, we decline to hear Corbis’ argument that the doctrine bars InfoFlows’ fraud claims.

B. Award of duplicative damages.

“A party cannot recover twice for the same injury simply because he has two legal theories.” Kammerer v. Western Gear Corp., 27 Wn. App. 512, 527, 618 P.2d 1330 (1980) (overruled on other grounds, Barr v. Interbay Citizens Bank of Tampa, Fla., 96 Wn.2d 692, 635 P.2d 441 (1981)). As such, where two or more remedies exist that

are inconsistent with each other, a party is limited to only one of those remedies. Melby v. Hawkins Pontiac, Inc., 13 Wn. App. 745, 749, 537 P.2d 807 (1975). “Two modes of redress are inconsistent if the assertion of one involves the negation or repudiation of the other, as where one of them admits a state of facts and the other denies the same facts.” Batcheller v. Welden, 9 Wn.2d 392, 404, 115 P.2d 696 (1941). “Affirmance of the contract and a demand for damages has been held inconsistent with a disaffirmance of the contract and a prayer for rescission.” Melby, 13 Wn. App. at 749.

Corbis argues the trial court's instructions permitted the jury to award InfoFlows multiple recoveries for the same injury. Specifically, Corbis contends the jury awarded InfoFlows “benefit of the bargain” damages twice: for the breach of contract and fraudulent misrepresentation claim. Corbis also argues these awards were inconsistent with the award of lost business opportunity revenue for fraudulent inducement. InfoFlows responds generally that each award was for a different harm, and as such there was no double recovery. In the sections below, we first describe InfoFlows' theories of recovery, as well as the jury instructions on damages, because the merits of Corbis' arguments depend heavily upon that information. We then address whether the trial court erroneously permitted the jury to award duplicative damages.

1. InfoFlows' theories of recovery.

InfoFlows sought recovery of damages under three causes of action relevant to this appeal: (1) fraudulent inducement; (2) fraudulent misrepresentation; and (3) breach of contract. Regarding the fraudulent inducement claim, InfoFlows argued that Corbis

induced Stone into signing the Development Agreement only by concealing the existence of the secret, non-public patent. Stone testified he would not have entered into the agreement had he known about that patent. As for the misrepresentation claim, InfoFlows argued that Corbis fraudulently misrepresented facts when Jim Mitchell told Stone that Corbis and InfoFlows would work together to obtain patents for both Corbis applications and for InfoFlows Object Management System technology. Finally, regarding the breach of contract claim, InfoFlows argued that Corbis breached the Development Agreement. Specifically, section 2 of the Agreement, regarding "Phase I Development Obligations and Process" requires that Corbis not "unreasonably withhold its acceptance" of InfoFlows' Phase I product. Likewise, section 7 requires that Corbis pay InfoFlows for product deliveries. According to InfoFlows, Corbis unreasonably withheld acceptance and failed to pay InfoFlows.

2. Court's instructions to the jury on damages for InfoFlows' claims

Instruction 33 governed the jury's consideration of InfoFlows' fraudulent inducement claim. That instruction provides:

If you find for InfoFlows on its claim of fraudulent inducement by concealment, then you should award all such damages as naturally and proximately resulted from the fraud.

In determining damages, you may consider the following factors:

1. the value the parties placed on the Development Agreement, keeping in mind that the price in the contract is not necessarily determinative of its value;
2. the value the parties place on the possible licensing and use of the Jazz Service and the likelihood the parties would have entered into the Jazz Service Agreement; and

3. the likelihood that InfoFlows would have secured other business opportunities had it not entered into the Development Agreement.

In the trial court's letter ruling denying Corbis' CR 50(b) motion renewing the motion to vacate, it described how the purpose of this instruction was to permit the jury to determine InfoFlows' "opportunity cost" for passing up other business opportunities:

Under [Instruction 33], the jury was given a list of factors it "may" consider in calculating damages for fraudulent inducement. The point of this instruction was to allow the jury to determine an amount that would reflect InfoFlows' "opportunity cost" for its choice to enter into a contract with Corbis rather than pursue other business opportunities. The jury could well have taken into account evidence about the value of being "first to market" with a license management system; it could have considered the value of the Jazz Service Agreement in considering how another company might have valued a relationship with InfoFlows.

Instruction 38 governed the jury's consideration of InfoFlows' fraudulent misrepresentation claim. That instruction provides:

If you find that InfoFlows is entitled to a verdict against Corbis for fraud by affirmative misrepresentation, you must then award InfoFlows damages in an amount that will reasonably compensate for all the loss suffered by InfoFlows and proximately caused by the fraud upon which you base your finding of liability.

The amount of such award shall be the difference between the actual value of that which InfoFlows received and the value which it would have had if there had been no misrepresentation. This is sometimes referred to as the "benefit of the bargain."

Also in the letter ruling denying Corbis' CR 50(b) motion renewing the motion to vacate, the trial court described what the "benefit of the bargain" would be in the context of the facts of this case: "Here, however, the benefit of the bargain would have been for Corbis and InfoFlows to have coordinated on patent applications."

Instruction 22 governed the jury's consideration of InfoFlows' breach of contract claim. In relevant part, that instruction provides:

In order to recover actual damages, InfoFlows has the burden of proving that Corbis breached a contract with InfoFlows, and that InfoFlows incurred actual damages as a result of Corbis' breach, and the amount of those damages.

If you find that InfoFlows has proved that it incurred actual damages and the amount of those actual damages, then you shall award actual damages to InfoFlows.

Actual damages are those losses that were reasonably foreseeable, at the time the contract was made, as a probable result of a breach. A loss may be foreseeable as a probable result of a breach because it follows from the breach either:

- (a) in the ordinary course of events, or
- (b) as a result of special circumstances, beyond the ordinary course of events, that the party in breach had reason to know.

In calculating InfoFlows' actual damages, you should determine the sum of money that will put InfoFlows in as good a position as it would have been in if both parties had performed all of their promises under the contract. . . .

3. The fraudulent inducement instruction, in conjunction with the breach of contract instruction, permitted the jury to award inconsistent damages: damages for both breach of the Development Agreement and for lost business opportunities had there been no agreement

The jury awarded InfoFlows \$7 million for its fraudulent inducement claim. The instruction for this claim makes it clear that the award may have been premised on the jury finding that InfoFlows would have received \$7 million in other business opportunities, had it not entered into the Development Agreement. Again, the instruction told the jury it "may" consider "the value the parties place on the possible licensing and use of the Jazz Service" and "the likelihood that InfoFlows would have secured other business opportunities had it not entered into the Development

Agreement[.]” The trial court confirmed this in its letter ruling denying Corbis’ CR 50(b) motion renewing the motion to vacate: “The point of this instruction was to allow the jury to determine an amount that would reflect InfoFlows’ ‘opportunity cost’ for its choice to enter into a contract with Corbis rather than pursue other business opportunities.”¹

The jury also awarded InfoFlows, however, \$3.25 million for breach of the Development Agreement. This award is inconsistent with the award for fraudulent inducement. As is described above, where two or more remedies exist that are inconsistent with each other, a party is limited to only one of those remedies. Melby, 13 Wn. App. at 749. Remedies are inconsistent if “one of them admits a state of facts and the other denies the same facts.” Batcheller, 9 Wn.2d at 404. Moreover, “[a]ffirmance of the contract and a demand for damages has been held inconsistent with a disaffirmance of the contract and a prayer for rescission.” Melby, 13 Wn. App. at 749; Salter v. Heiser, 39 Wn.2d 826, 831, 239 P.2d 327 (1951).

In Salter, the plaintiff induced the defendant into signing a lease by telling him he could obtain a liquor license for a tavern, when, in fact, the plaintiff could not obtain the license. The plaintiff did not repudiate the contract, but instead continued on with the lease agreement and sought damages. The Court noted that the plaintiff was not entitled to both damages, and repayment of rent: “[h]aving elected to affirm the lease by continuing in possession and bringing action for damages after discovery of the fraud,

¹ Although InfoFlows now argues it “never claimed” it should be awarded damages for “lost profits”, or for lost opportunities, counsel did argue during closing that the jury could award damages for lost business opportunities on the inducement claim.

plaintiffs are not entitled to recover the \$2,800 they have paid as rental for seven months. . . .” Salter, 39 Wn.2d at 833.

Here, although InfoFlows did not seek to rescind the contract, it did seek and it obtained damages for lost opportunities it would have had, had it not signed the contract with Corbis. Yet it also received actual damages for losses that occurred as a result of Corbis’ breach of the Development Agreement. One of these remedies “admits” the existence of the contract, while the other “denies” the existence of the contract and seeks damages for lost opportunities had the contract not been signed. Batcheller, 9 Wn.2d at 404. Thus, the two awards are “inconsistent” and amount to a double recovery.² Melby, 13 Wn. App. at 749.

C. Sufficiency of the evidence supporting the jury’s damage awards.

Corbis also makes several arguments regarding the jury’s award of damages that boil down to challenges to the sufficiency of the evidence supporting the awards. Corbis’ challenge to the amounts of the award was made in its CR 50(b) motion for remittitur or a new trial. The denial of a new trial or remittitur is reviewed for abuse of discretion. Locke v. City of Seattle, 162 Wn.2d 474, 486, 172 P.3d 705 (2007). It is

² Corbis’ argument that damages award for fraudulent misrepresentation is inconsistent with the award for fraudulent inducement is also well taken. The instructions permitted the jury to award InfoFlows damages for fraudulent inducement to compensate InfoFlows other business opportunities it would have had had it not entered into the Development Agreement with Corbis. But the jury also awarded InfoFlows damages for the value of the company had Corbis and InfoFlows coordinated on patent applications, including patents for the Jazz Service. The award for misrepresentation “admits” the existence of Jim Mitchell’s promise to work together on patents, while the award for fraudulent inducement “denies” the existence of the promise, given Stone testified he would not have entered into an agreement with Corbis had he known about the secret patent. See Batcheller, 9 Wn.2d at 404. Thus, these two awards are also “inconsistent” and amount to a double recovery. Melby, 13 Wn. App. at 749.

“strongly presume[d] the jury’s verdict is correct.” Bunch v. King County Dep’t of Youth Servs., 155 Wn.2d 165, 179, 116 P.3d 381 (2005).

Juries have considerable latitude in assessing damages, and as such, a damage award will not be lightly overturned. Palmer v. Jensen, 132 Wn.2d 193, 197, 937 P.2d 597 (1997); Washington State Physicians Ins. Exch. & Ass’n v. Fisons Corp., 122 Wn.2d 299, 329-30, 858 P.2d 1054 (1993). Although courts have discretion to grant a motion for a new trial if a damage award is contrary to the evidence, the motion must be denied if the verdict is within the range of the evidence. Herriman v. May, 142 Wn. App. 226, 232, 174 P.3d 156 (2007); Woolridge v. Woolett, 96 Wn.2d 659, 668, 638 P.2d 566 (1981). In reviewing a court’s exercise of discretion on such motions, this court views the evidence in a light most favorable to the verdict. See Palmer, 132 Wn.2d at 197–98. Additionally, the trial court is in a better position than this court to determine whether a verdict is the product of passion or prejudice, or is within the range of the evidence. See Fisons, 122 Wn.2d at 329–30.

1. The evidence supports the jury’s award for the fraudulent misrepresentation, but not for fraudulent inducement.

Corbis argues that “the jury’s award of fraud damages is based entirely on the speculation that had InfoFlows not entered into the Development Agreement with Corbis, it could have made over \$16 million in profits in a new business with no profit history, and no evidence of any lost business opportunities.” Although, Corbis overstates the case, the argument has some merit.

Regarding the fraudulent misrepresentation claim, the instructions permitted the jury to award InfoFlows for any damages relating to Corbis' failure to coordinate on patent applications. At trial, the evidence showed that Corbis placed a value of somewhere between \$18 and \$25 million on its revenues over a two-year period should it work together and coordinate patents with InfoFlows. The jury may have reasonably concluded that, as Corbis' partner, InfoFlows would have received a share of those revenues. As such, the jury's award of \$9.28 million on this claim (approximately 50% of the lower estimate) was well within the range of evidence, and the trial court did not err in declining to remit.

We agree, however, that the evidence is insufficient to support the jury's damages award for fraudulent inducement. Regarding this claim, the jury was instructed to award damages based on its consideration of "the value the parties place on the possible licensing and use of the Jazz Service" and "the likelihood that InfoFlows would have secured other business opportunities had it not entered into the Development Agreement[.]" But because InfoFlows concedes, it "did not have 'claimed lost business opportunities'" there is no evidence to support the jury's award on this claim. InfoFlows argues, and the trial court agreed, that evidence of the value of being "first to market" with a license management system or, given the value Corbis placed on the Jazz Service Agreement, how another company might have also valued a relationship with InfoFlows could support the jury's award. But in the absence of any evidence that any other entity had expressed such an interest in investing in the

company, or in what amount, the extent of any claimed loss is unquantifiable and based on nothing more than speculation. InfoFlows also argues that the jury may have relied on Stone's testimony that if he had not entered into the agreement with Corbis, InfoFlows would have been funded by a venture capitalist group. But again InfoFlows offered no evidence of any such group. In short, InfoFlows contends but for Corbis' fraud, it undoubtedly would have secured an agreement with some other unidentified entity and in some undetermined amount.³ But evidence of lost business opportunities must be based on tangible evidence rather than speculation and hypothetical situations. Farm Crop Energy v. Old National Bank, 109 Wn.2d 923, 928, 750 P.2d 231 (1988).

³ Stone's deposition testimony regarding InfoFlows' damages for its lost business opportunities was read to the jury as follows:

Q: I asked you a question a line four, 'Have any of the misrepresentations you told me, told me about this afternoon, caused money damages to InfoFlows?'

There's an objection by Mr. Willey.

And you say, 'If I – had I known that Corbis had filed a patent, I would have terminated the relationship. I would have gone a different direction. Instead of a relationship with Corbis funding the jazz service, I would have probably gone the investment route. I would have developed or InfoFlows would have developed a company. In that fashion it's hard to project where we'll be two and a half years later, this being mid 2008, us terminating the relationship in early 2006.

"So I believe we would be materially further ahead. Where on that plan we would be right now, it's hard for me to gauge"

I say, 'All right [sic], can you quantify this, where the difference between where you are now and where you would have been if you'd never entered into the development agreement in money and dollars?' There's another objection.

You say, 'I haven't done that analysis yet. I could probably quantify it, but I don't have a number right now.'

I ask you, 'How would you go about it?'

'I would need to think about how I would go about it, so I don't want to know right off – I don't know right off the top of my head.'

'So had you not continued the relationship with Corbis, you think you would have been funded by one of the venture groups that you visited with?'

Answer: 'I believe so, yes.'

'Which one?' There's another objection.

'It's unknown to me which one, I don't know.'"

The trial court erred in failing to grant Corbis' motion for judgment as a matter of law on this claim.

2. The evidence supports the jury's award for the breach of contract/breach of good faith and fair dealing claim.

Corbis also argues the evidence does not support the jury's award of \$3.25 million for InfoFlows' claims for breach of contract. According to Corbis, InfoFlows should receive at most \$1 million, given InfoFlows delivered only a portion of the Phase I milestones for which Corbis failed to pay. We reject this argument. The jury found not only that Corbis breached the portion of the contract regarding Phase I deliverables, but also that Corbis breached its duty of good faith and fair dealing in the Development Agreement. The jury instruction on this claim, to which Corbis did not object, directed the jury to "determine the sum of money that will put InfoFlows in as good a position as it would have been in if both parties had performed all of their promises under the contract." Given \$3.25 million represents the total amount InfoFlows could have expected to have earned had both sides performed the contract in good faith, the jury's award was within the range of evidence, and the trial court did not err in declining to remit.

D. Duty to disclose the non-public patent.

Corbis next argues that the trial court erred by giving an Instruction 32, that permitted the jury to find Corbis had a duty to disclose the non-public patent to InfoFlows. That instruction read in pertinent part:

[A] party has a duty to disclose before the transaction is complete if:

[T]hat party knows facts that are basic to the transaction and that party knows that the other party is about to enter into the transaction under a mistake as to those basic facts and that the other party, because of the relationship between the parties, the customs of the trade or other objective circumstances, would reasonably expect a disclosure of those facts, such as when facts are peculiarly within the knowledge of one party and could not be readily obtained by the other.

According to Corbis, this is a faulty statement of the law, and the trial court should have instead given Corbis' proposed instruction, which indicated that, absent a special relationship such as a fiduciary relationship, "parties engaged in an arm's length transaction do not have a duty to disclose."

We disagree with Corbis because the trial court's instruction properly stated the law. Contrary to Corbis' argument, the duty to disclose does not arise solely within fiduciary duty relationships. Corbis correctly notes that under Colonial Imports, Inc. v. Carlton Northwest, Inc., 121 Wn.2d 726, 732, 853 P.2d 913 (1993), "[s]ome type of special relationship must exist before the duty will arise." But a fiduciary relationship is only one of the circumstances leading to a duty to disclose:

The duty to disclose in a business transaction arises if imposed by a fiduciary relationship or other similar relationship of trust or confidence **or if necessary to prevent a partial or ambiguous statement of facts from being misleading.**

Van Dinter v. Orr, 157 Wn.2d 329, 334, 138 P.3d 608 (2006) (citing Colonial Imports, 121 Wash.2d at 731) (emphasis added). The Court in Van Dinter went on to explain that the duty to disclose can arise when one party has facts difficult for the other party to obtain:

In Colonial Imports this court endorsed the notion that the duty arises when the facts are peculiarly within the knowledge of one person and could not be readily obtained by the other; or where, by the lack of business experience of one of the parties, the other takes advantage of the situation by remaining silent. Id. at 732, 853 P.2d 913. And the court quoted with approval from a Court of Appeals decision suggesting that the duty to disclose arises where there is a quasi-fiduciary relationship, where a special relationship of confidence and trust had developed between the parties, where a party relies on the specialized and superior knowledge of the other party, where a party has a statutory duty to disclose, **or where a seller knows a material fact that is not easily discoverable by the buyer.** Id.

Van Dinter v. Orr, 157 Wn.2d at 334 (emphasis added). Given the trial court's instruction mirrored this language (duty to disclose "when facts are peculiarly within the knowledge of one party and could not be readily obtained by the other"), we reject Corbis' argument on this issue, and hold that the trial court did not err in giving instruction 32.

E. Testimony regarding the parties' understanding of the terms of the Development Agreement.

Corbis also claims the trial court erred by permitting Steve Stone to testify as to his subjective understanding of the terms of the Development Agreement, specifically the definition of Jazz Service, which the judge hearing pre-trial motions previously ruled was unambiguously defined in the Agreement. But the two citations to the transcript given in support of this argument do not show the trial court permitted such testimony. Indeed, a review of all of Stone's testimony shows the trial court scrupulously made sure Stone did not so testify. In fact, at one point when counsel appeared to be leading Stone toward such testimony, counsel for Corbis objected, and in a sidebar, the trial court directed counsel to cease that line of questioning and it did not progress further. Moreover, even if Stone made a comment as to his understanding of the definition of

Jazz Service, it is difficult to see how it caused any prejudice; the jury was instructed on the definition of Jazz Service, and the instruction reflected exactly the definition in the contract and in the pre-trial ruling:

“Jazz Service,” as referred to in the Development Agreement, means: (i) those sets of technologies which enable the injection and removal of handles into Digital Objects; (ii) those necessary technologies to manage these handles to insure their persistence and quality; and (iii) the necessary technologies, which, when added to a web crawler, search for and find handleized Digital Objects.

We find no error on this issue.

F. Alleged adverse inferences from Corbis' assertion of the attorney-client privilege.

Corbis also argues that InfoFlows' counsel “repeatedly encouraged the jury to speculate about the content of communications for which Corbis had properly asserted the attorney-client privilege, and the reasons the privilege had been asserted.” We disagree. Corbis cites to five passages in the record on this issue, but none of them shows counsel encouraging the jury to speculate about the content of privileged communications.

For two of the examples, it is clear from reading the transcript that counsel for InfoFlows simply sought to elicit testimony explaining that the jury does not get to see what is blacked out in the partially redacted exhibits he was using. In the third example, one of Corbis' witnesses was cross-examined as to why he sent Stone's materials to an outside patent attorney. The fourth example is nothing more than questions to Weiskopf about a non-privileged email from Corbis' counsel to Stone. And, the fifth example is simply to a passage in InfoFlows' closing argument, but nowhere in that

passage does counsel discuss the content of privileged communications. We reject this argument.

G. Award of attorney fees to InfoFlows.

Corbis argues the award of attorney fees to InfoFlows must be reversed. Corbis' argument on this issue, however, is premised on this court reversing the judgment for breach of contract. We did not do so, however. As such, we reject this argument and affirm the award of fees, depending, of course, on InfoFlows' choice of remedies on remand.

H. Dismissal of InfoFlows' conversion claim under CR 50(b).

In its cross-appeal, InfoFlows challenges the trial court's dismissal of the conversion claim under CR 50(b). "Conversion is the unjustified, willful interference with a chattel which deprives a person entitled to the property of possession." In the Matter of Langham and Kolde, 153 Wn.2d 553, 565-66, 106 P.3d 212 (2005) (quoting Meyers Way Dev. Ltd. P'ship v. Univ. Sav. Bank, 80 Wn. App. 655, 674-75, 910 P.2d 1308 (1996)). The trial court dismissed the claim because even if Corbis had received a copy of InfoFlows' code, InfoFlows was never deprived possession of the code.

InfoFlows points to Langham, arguing the Supreme Court rejected the "older approach" to conversion in that case. But in Langham, one of the parties did, in fact, deprive the other party of possession of stock options by exercising them:

Stock may be converted when it is sold, but stock options, as a right to purchase stock, disappear when the owner exercises the options and purchases the stock. Once the owner exercises the options, he has irrevocably exchanged one kind of property (stock options) for

another kind of property (stock), and has lost the ability to enter the stock markets at the time of his choosing.

Langham, 153 Wn.2d at 555-56. Langham is thus of no help to InfoFlows on the issue of whether deprivation is required. Indeed, several years after Langham, our Supreme Court has continued to include deprivation as an element of a conversion claim. See, e.g., Potter v. Washington State Patrol, 165 Wn.2d 67, 78, 196 P.3d 691 (2008).

InfoFlows argues that the “modern view” to conversion requires only that a defendant’s acts cause results such as “uncertainty as to title” or a limited ability to “obtain investment.” InfoFlows acknowledges there is no Washington case law on this issue, but cites only a single federal district court case in support of what it calls a “trend.”⁴ By contrast, Corbis identified numerous cases holding that possession of a copy does not deprive the owner of use of the property. See, e.g., FMC Corp. v. Capital Cities/ABC, Inc., 915 F.2d 300, 303-04 (7th Cir. 1990) (“In cases where the alleged converter has only a copy of the owner’s property and the owner still possesses the property itself, the owner is in no way being deprived of the use of his property”); accord Monarch Fire Protection Dist. of St. Louis County, Missouri v. Freedom Consulting & Auditing Services, Inc., 678 F.Supp.2d 927, 944 (E.D. Mo. 2009) (“The overwhelming weight of authority holds that a copy of a document cannot be converted because the owner has not been deprived of possession”); Calence, LLC v. Dimension Data Holdings, 2007 WL 1526349 *7 (W.D. Wash., May 23, 2007); Internet Archive v. Shell,

⁴ See Response Brief at 47 (citing All v. Fastners for Retail, Inc., 544 F.Supp.2d 1064 (E.D. CA 2008)).

505 F.Supp.2d 755, 762-63 (D. Colo. 2007); Furash & Co., Inc. v. McClave, 130 F.Supp.2d 48, 58-59 (D. D.C. 2001); Harper & Row Publishers, Inc. v. Nation Enterprises, 723 F.2d 195, 201 (2nd Cir. 1983), reversed on other grounds, 471 U.S. 539, 105 S.Ct. 2218, 85 L.Ed.2d 588 (1985).

We decline to adopt InfoFlows' analysis. The trial court did not err in granting the CR 50(b) motion to dismiss the conversion claim.

I. Summary judgment on Jazz Services advance.

In its cross-appeal, InfoFlows argues the trial court erred in granting Corbis' motion for summary judgment seeking return of the Jazz Service advance. In reviewing a grant of summary judgment, this court conducts a *de novo* review, and views the facts and reasonable inferences therefrom in a light most favorable to the non-moving party. Our Lady of Lourdes Hosp. v. Franklin County, 120 Wn.2d 439, 452, 842 P.2d 956 (1993).

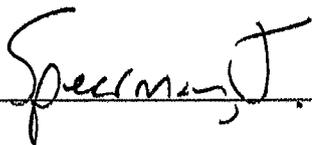
Corbis argues the Development Agreement unambiguously provided that InfoFlows was required to return the \$500,000 deposit if "the Parties do not enter into a Jazz Service agreement on or before August 1, 2006." Given it was undisputed the parties never entered into a Jazz Services agreement, Corbis contends the trial court properly granted summary judgment.

We disagree because questions of fact remain as to whether InfoFlows failure to repay the \$500,000 was caused by Corbis' breach. "One of the parties to a contract cannot avail himself of nonperformance where the nonperformance is occasioned by his

acts. That is, a party may not benefit by his wrongful acts." Wolk v. Bonthius, 13 Wn.2d 217, 219, 124 P.2d 553 (1942). Here, InfoFlows argued the reason the parties did not enter into a Jazz Service agreement was because Corbis did not attempt to do so in good faith. InfoFlows supported this with the declaration of Steve Stone, who related his story as is described in the facts section above. Stone testified about how Corbis' eventual rejection of InfoFlows' deliveries and eventual cancelation of the Development Agreement was "unreasonable" and "illogical", and how Corbis secretly obtained a patent while simultaneously representing to Stone Corbis would be working together with InfoFlows on patents. Viewed in a light most favorable to InfoFlows, this evidence raised a question of fact as to whether the reason the parties did not enter into a Jazz Service agreement was because Corbis did not attempt to do so in good faith.

As such, the trial court should not have granted summary judgment on this issue, and we reverse.

Reversed and remanded for further proceedings consistent with this opinion.



WE CONCUR:





IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

CORBIS CORPORATION, a Nevada corporation,
Appellant/Cross-Respondent,
v.
STEVE A. STONE, d/b/a INFOFLOWS and STONE CONSULTING, an individual; and INFOFLOWS CORPORATION, a Washington corporation,
Respondents/Cross-Appellants.

No. 64505-6-1

ORDER DENYING MOTION FOR RECONSIDERATION AND MOTION TO PUBLISH

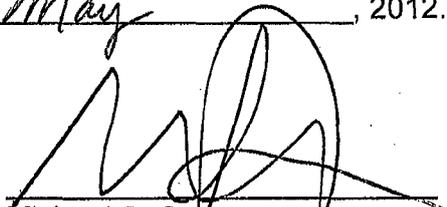
Appellant Corbis Corporation filed a motion for reconsideration and a motion to publish the opinion filed in the above matter on March 26, 2012.

A majority of the panel has determined the appellant's motion for reconsideration and the motion to publish should be denied.

Now, therefore, it is hereby

ORDERED that the appellant's motion for reconsideration and motion to publish is denied.

DATED this 4th day of May, 2012.


Michael S. Spearman
Acting Presiding Judge

FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
2012 MAY -4 PM 2:10