

No. 64505-6-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

CORBIS CORPORATION, a Nevada corporation,

Appellant,

v.

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

Respondents.

APPEAL FROM THE SUPERIOR COURT
FOR KING COUNTY
THE HONORABLE SUSAN J. CRAIGHEAD

BRIEF OF APPELLANT

EDWARDS, SIEH, SMITH
& GOODFRIEND, P.S.

RIDDELL WILLIAMS, P.S.

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

By: Karl J. Quackenbush
WSBA No. 9602

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

1001 Fourth Avenue, Suite 4500
Seattle WA 98154
(206) 624-3600

Attorneys for Appellant

FILED
COURT OF APPEALS
STATE OF WASHINGTON
2010 SEP 20 AM 10:23

TABLE OF CONTENTS

| | | |
|------|---|----|
| I. | INTRODUCTION | 1 |
| II. | ASSIGNMENTS OF ERROR | 2 |
| III. | ISSUES RELATED TO ASSIGNMENTS OF ERROR | 4 |
| IV. | STATEMENT OF FACTS | 5 |
| | A. | |
| | Corbis, Which Licenses Digital Images Over The Internet, Had Long Devoted Significant Resources To Managing Its Licenses And Combating Piracy. | 5 |
| | B. | |
| | Corbis Engaged Stone As An Independent Contractor To Advise Corbis On “Handle” Technologies In 2004..... | 7 |
| | C. | |
| | Corbis Filed A Patent Application For Its Design Of A Digital License Management System In 2006 And Engaged InfoFlows To Build It. | 9 |
| | D. | |
| | With the Assistance of Counsel And Over Many Months, InfoFlows And Corbis Negotiated An Integrated Agreement For InfoFlows To Develop An Operational Version Of A License Management System That Corbis Would Own. | 11 |
| | E. | |
| | Corbis Terminated InfoFlows For Cause After Rejecting InfoFlows’ Work On The First Phase Of The License Management System In October 2006..... | 18 |
| | F. | |
| | Corbis And InfoFlows Sued Each Other On The Same Day In January 2007. The Trial Court Entered A \$20,000,000 Judgment Against Corbis After A 3-Week Trial..... | 20 |

| | | |
|----|---|----|
| V. | ARGUMENT | 24 |
| A. | The Trial Court Erred In Authorizing The Recovery Of Duplicative Damages For The Same Legal Harm And In The Absence Of Any Evidence Of InfoFlows’ Lost Profits or Revenues. | 24 |
| 1. | InfoFlows Is Entitled To A Single Recovery For Its Economic Loss. | 24 |
| a. | “A Party Cannot Recover Twice For The Same Injury Simply Because He Has Two Legal Theories.” | 25 |
| b. | The Trial Court Awarded InfoFlows Multiple Damages For A Single Legal Wrong. | 27 |
| c. | InfoFlows Could Not Recover Damages Premised On Both The Breach And The Repudiation Of The Parties’ Contract..... | 28 |
| 2. | The \$16 Million Fraud Judgment Must Be Vacated Absent Any Evidence That InfoFlows’ New Business Suffered Any Lost Profits Or Opportunities..... | 30 |
| 3. | InfoFlows Could Not Recover In Tort For Injury Arising Out Of The Integrated Development Agreement. | 35 |
| 4. | InfoFlows’ Contract Damages Must Be Limited To What It Would Have Been Paid Had Corbis Not Terminated The Development Agreement Without Cause. | 40 |
| B. | The Trial Court Erred In Refusing To Instruct The Jury That Parties Negotiating An Arm’s Length Business Transaction Have No Duty of Disclosure In The Absence Of A Fiduciary Relationship..... | 43 |

| | | |
|---------|--|----|
| C. | The Trial Court Erroneously Allowed The Jury To Impose Liability Based On One Party’s Unilateral Subjective Intent And Speculation About The Adverse Inferences To Be Drawn From The Other Party’s Privileged Communications. | 46 |
| 1. | The Jury Based Its Verdict On Stone’s Subjective Understanding Of InfoFlows’ Rights Under The Development Agreement..... | 46 |
| 2. | The Jury Was Encouraged To Draw Adverse Inferences From Corbis’ Proper Assertion Of The Attorney-Client Privilege. | 48 |
| D. | Corbis, Not InfoFlows, Is Entitled To Its Attorney Fees Under The Development Agreement..... | 50 |
| VI. | CONCLUSION..... | 50 |
| App. A: | Judgment Against Corbis Corporation, Including Declaratory Judgment and Permanent Injunction. (CP 1810-17) | |
| App. B: | Trial Court’s November 6, 2009 Letter Ruling. (CP 1481-85) | |
| App. C: | Verdict Form (CP 525-29); Instructions Nos. 31-35 (CP 563-67); Instruction No. 38 (CP 570) | |
| App. D: | Corbis Proposed Instruction No. 35 (CP 297); Proposed Cautionary Instruction Regarding Attorney Client Privilege. (CP 367-68) | |
| App. E: | Development Agreement. (Exhibit 43) | |
| App. F: | Order Granting Corbis’ Motion For Partial Summary Judgment Regarding Contract Provision Defining Jazz Service. (CP 108-109) | |
| App. G: | Draft Development Agreement Comparison (partial). (Exhibit 121) | |

TABLE OF AUTHORITIES

FEDERAL CASES

| | |
|---|----|
| <i>All Line, Inc. v. Rabar Corp.</i> , 919 F.2d 475 (7th Cir. 1990) | 41 |
| <i>Ostano Commerzanstalt v. Telewide Systems, Inc.</i> , 880 F.2d 642 (2nd Cir. 1989)..... | 30 |
| <i>University of Colorado Foundation, Inc. v. American Cyanamid Co.</i> , 216 F. Supp.2d 1188 (D. Col. 2002), <i>aff'd</i> , 342 F.3d 1298 (10 th Cir. 2003), <i>cert. denied</i> , 541 U.S. 988 (2004)..... | 30 |

STATE CASES

| | |
|---|--------|
| <i>Alejandro v. Bull</i> , 159 Wn.2d 674, 153 P.3d 864 (2007)..... | 36, 37 |
| <i>Bell Atlantic Network Services, Inc. v P.M. Video Corp.</i> , 322 N.J. Super 74, 730 A.2d 406 (1999) | 34 |
| <i>Boonstra v. Stevens-Norton, Inc.</i> , 64 Wn.2d 621, 393 P.2d 287 (1964)..... | 45 |
| <i>Borish v. Russell</i> , 155 Wn. App. 892, 230 P.3d 646 (2010)..... | 36 |
| <i>Carlile v. Harbour Homes, Inc.</i> , 147 Wn. App. 193, 194 P.3d 280 (2008), <i>rev. granted in part, case dismissed</i> , 166 Wn.2d 1015 (2009). | 36 |
| <i>Colonial Imports, Inc. v. Carlton Northwest, Inc.</i> , 121 Wn.2d 726, 853 P.2d 913 (1993)..... | 44, 45 |
| <i>Cottman v. State</i> , 51 Md. App. 380, 443 A.2d 638 (1982) | 42 |
| <i>Cox v. O'Brien</i> , 150 Wn. App. 24, 206 P.3d 682, <i>rev. denied</i> , 167 Wn.2d 1006 (2009)..... | 36 |
| <i>Dalton Properties, Inc. v. Jones</i> , 100 Nev. 422, 683 P.2d 30 (1984)..... | 41 |

| | |
|--|------------|
| <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)..... | 30, 33, 34 |
| <i>Farm Crop Energy, Inc. v. Old National Bank</i> , 109 Wn.2d 923, 750 P.2d 231 (1988)..... | 33, 34 |
| <i>Ford v. Trendwest Resorts, Inc.</i> , 146 Wn.2d 146, 43 P.3d 1223 (2002)..... | 41 |
| <i>Formosa Plastics Corp. USA v. Presidio Eng'rs & Contractors, Inc.</i> , 960 S.W.2d 41 (Tex.1998)..... | 36 |
| <i>Giabattista v. Nat'l Bank of Commerce</i> , 21 Wn. App. 723, 586 P.2d 1180 (1978), <i>rev. denied</i> , 92 Wn.2d 1015 (1979)..... | 26 |
| <i>HTP, Ltd. v. Lineas Aereas Costarricenses, S.A.</i> , 685 So.2d 1238 (Fla.1996)..... | 37 |
| <i>Hearst Communications, Inc. v. Seattle Times Co.</i> , 154 Wn.2d 493, 115 P.2d 262 (2005)..... | 47 |
| <i>Hercules & Co., Ltd. v. Shama Restaurant Corp.</i> , 613 A.2d 916 (D.C. 1992)..... | 38 |
| <i>Kammerer v. Western Gear Corp.</i> , 27 Wn. App. 512, 618 P.2d 1330, <i>aff'd</i> , 96 Wn.2d 416, 635 P.2d 708 (1981)..... | 25, 26, 29 |
| <i>Larsen v. Walton Plywood Co.</i> , 65 Wn.2d 1, 390 P.2d 677, 396 P.2d 879 (1964)..... | 33 |
| <i>Liebergesell v. Evans</i> , 93 Wn.2d 881, 613 P.2d 1170 (1980)..... | 45 |
| <i>Marine Enterprises, Inc. v. Security Pacific Trading Corp.</i> , 50 Wn. App. 768, 750 P.2d 1290 (1988)..... | 50 |
| <i>Melby v. Hawkins Pontiac, Inc.</i> , 13 Wn. App. 745, 537 P.2d 807 (1975)..... | 29 |

| | |
|---|----|
| <i>Oates v. Taylor</i> , 31 Wn.2d 898, 199 P.2d 924 (1948)..... | 45 |
| <i>Public Employees Mutual Ins. Co. v. Kelly</i> , 60 Wn. App. 610, 805 P.2d 822, <i>rev. denied</i> , 116 Wn.2d 1031 (1991)..... | 26 |
| <i>Regan v. Garfield Ridge Trust and Sav. Bank</i> , 220 Ill. App. 3d 1078, 581 N.E.2d 759 (1991)..... | 49 |
| <i>Salter v. Heiser</i> , 39 Wn.2d 826, 239 P.2d 327 (1951) | 29 |
| <i>Saluteen-Maschersky v. Countrywide Funding Corp.</i> , 105 Wn. App. 846, 22 P.3d 804 (2001) | 47 |
| <i>Stanger v. Gordon</i> , 309 Minn. 215, 244 N.W.2d 628 (1976)..... | 49 |
| <i>State v. Charlton</i> , 90 Wn.2d 657, 585 P.2d 142 (1978)..... | 48 |
| <i>Sumpter v. National Grocery Co.</i> , 194 Wash. 598, 78 P.2d 1087 (1938)..... | 48 |
| <i>Trident Steel Corp. v. Wiser Oil Co.</i> , 223 S.W.3d 520 (Tex.App 2006)..... | 36 |
| <i>Wilkinson v. Smith</i> , 31 Wn. App. 1, 639 P.2d 768, <i>rev.</i> <i>denied</i> , 97 Wn.2d 1023 (1982)..... | 29 |

RULES AND REGULATIONS

| | |
|---------------|-----------|
| CR 42 | 20 |
| CR 50 | 3, 22, 39 |
| RAP 18.1..... | 50 |

OTHER AUTHORITIES

| | |
|---|--------|
| 37 C.J.S. Fraud § 113 (1939 & 2010 Supp.)..... | 29 |
| <i>Restatement (Second) Contracts</i> § 347 | 43 |
| <i>Restatement (Second) Torts</i> § 549 | 31, 32 |

I. INTRODUCTION

A party may recover as damages the benefit of its bargain for breach of contract, or it may recover its losses for being fraudulently induced to enter into a contract, but it may not recover both. Here, the trial court awarded respondent InfoFlows Corporation \$3.25 million for breach of contract – plus \$7 million for inducing InfoFlows to enter into the contract without disclosing appellant Corbis Corporation’s previous patent application for the design of a system to track and manage the licensed and unlicensed use of Corbis’ repository of digital images, and another \$9.28 million for Corbis’ alleged misrepresentation that it would cooperate with InfoFlows in patenting the license management system that Corbis was paying InfoFlows to build. The trial court awarded these damages, totalling almost \$20 million, even though the parties’ integrated contract, which was extensively negotiated over several months by the parties and their lawyers, gave Corbis the exclusive ownership and rights to patent the license management system it hired InfoFlows to build, and would have earned InfoFlows no more than \$1 million for the work it actually performed.

As a result of this extraordinary judgment, InfoFlows received far more than the benefit of its bargain under a contract that was terminable by Corbis at any time, without cause. In addition, InfoFlows recovered as

damages its alleged economic loss had it never entered into the contract. InfoFlows was not entitled to both. And because InfoFlows was a new business, and Corbis its only customer, no evidence that InfoFlows lost any profits or business opportunities supports the amount of the judgment based on InfoFlows' claimed "lost profits."

This court should reverse, vacate the damages for fraud, and remit the contract damages to \$1 million – the most InfoFlows could have been paid had Corbis terminated the agreement without cause. This court should, additionally, grant a new trial because the jury's verdict was tainted by improper instructions, inadmissible evidence of one party's unilateral subjective understanding of the meaning of unambiguous contract language, and an impermissible adverse inference from Corbis' proper assertion of the attorney-client privilege.

II. ASSIGNMENTS OF ERROR

A. The trial court erred in entering its Judgment Against Corbis Corporation (CP 1810-17 (Appendix A)), including its award of prevailing party attorney fees under the parties' contract. (CP 1793-1809)

B. The trial court erred in entering its Order Denying Corbis' Motion For Judgment as a Matter of Law, Remittitur, Or New Trial Regarding Damage Awards. (CP 1474-75)

C. The trial court erred in entering its Order Denying Corbis' Motion For Judgment as a Matter of Law on InfoFlows' Fraudulent Misrepresentation Claim. (CP 1476-77)

D. The trial court erred in entering its Letter Ruling of November 6, 2009. (CP 1481-85 (Appendix B))

E. The trial court erred in entering its Order denying Corbis' CR 50 motions to dismiss. (CP 457)

F. The trial court erred in instructing the jury under theories of fraud by misrepresentation and fraudulent concealment in Instructions Nos. 31-35 and 38, and in submitting those theories to the jury in its special Verdict Form.¹ (CP 525-29, 563-67, 570 (Appendix C))

G. The trial court erred in refusing to give Corbis' proposed Instruction No. 35. (CP 297 (Appendix D); RP 2945)

H. The trial court erred in allowing respondent Stone to testify to his subjective understanding of the parties' fully integrated contract, contrary to a key provision previously held to be unambiguous. (RP 2575-76, 2580-81, 2602-12)

I. The trial court erred in allowing respondents' counsel to speculate about the content of attorney-client privileged communications

¹ Corbis objected to submitting the case to the jury under any theory of fraud, and to the potential of a double recovery, and thus preserved its objection to these instructions. (RP 2731, 2930, 2945; CP 369-85, 415-21, 1946)

and Corbis' reasons for asserting the privilege (RP 927, 996-97, 1289-96, 1371-74, 1430-33, 1462-64, 1776-82, 3016-17), and in refusing to give Corbis' proposed cautionary instruction regarding assertion of the privilege. (CP 367-68 (Appendix D), 386-90, RP 2441, 2947)

III. ISSUES RELATED TO ASSIGNMENTS OF ERROR

A. Whether plaintiff could receive damages premised both on breach of contract and in tort for the economic loss plaintiff claims it suffered because it was fraudulently induced to enter into the contract?

B. Whether plaintiff, a new business with no established profit history and no customers other than defendant, having identified no business opportunities lost as a result of defendant's actions, was entitled to damages for lost profits?

C. Whether the economic loss doctrine prohibits any recovery in tort for damages plaintiff claims it suffered for alleged representations that were inconsistent with the terms of the parties' subsequent integrated contract, which was negotiated with the benefit of experienced counsel and addressed the very subject matter of the alleged representations?

D. Whether plaintiff's contract damages must be limited to the amount it would have been paid under the parties' agreement had defendant terminated the contract without cause?

E. Whether in the absence of a fiduciary or other special relationship, sophisticated parties that were represented by counsel in negotiating an arm's length business transaction can have any affirmative duty to disclose actions taken in pursuit of legitimate business interests that are addressed in the parties' written and fully integrated contract?

F. Whether a new trial is warranted where the trial court allowed one party to testify to his subjective understanding of the meaning of the parties' fully integrated contract, and allowed the jury to draw adverse inferences from the other party's assertion of the attorney-client privilege regarding confidential communications with counsel negotiating the contract?

IV. STATEMENT OF FACTS

A. Corbis, Which Licenses Digital Images Over The Internet, Had Long Devoted Significant Resources To Managing Its Licenses And Combating Piracy.

Appellant Corbis Corporation, which was founded by Bill Gates in 1989, has an inventory of over 100 million images available for licensed editorial and commercial use. (RP 770-72) Corbis customers, which include newspapers, advertising agencies, publishers, and web designers, license images, typically for limited purposes, from Corbis' web site, www.corbis.com. (RP 475-76, 770)

Corbis delivers images to its customers almost exclusively as digital files. Unauthorized use of licensed digital images is widespread. Both intentional unlicensed use (“piracy”) and unintentional use by customers who exceed the scope or duration of their licenses has long concerned Corbis and others in the industry. Through the years Corbis has explored various technologies to identify and police piracy, and to provide legitimate customers a way to quickly and easily determine their license rights in images, and to bring their licenses current if necessary. (RP 477, 773-76, 789-92)

Since its founding, Corbis has pursued several different technological solutions to unlicensed use of its images. In the 1990’s, Corbis developed and patented technology to identify unlicensed images by injecting digital identifiers (“Digimarc”) into image files. (RP 477-79) Early in this century, Corbis’ anti-piracy team worked with vendors to use visual comparison technology that compared Corbis content to images on the internet and issued reports of suspected infringement. (RP 477-78, 545-46, 780) In 2004, an in-house Corbis R&D team began exploring the concept of a smart media object (“CoSMO”) to embed more “intelligence” in a digital image to aid identification, using some sort of numeric “tag.” (Ex. 5; RP 484-85, 2114) Corbis 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 highly confidential business model “Project Baker.” (RP 491-96)

B. Corbis Engaged Stone As An Independent Contractor To Advise Corbis On “Handle” Technologies In 2004.

Corbis engaged respondent Steve Stone as an independent contractor on Project Baker shortly after Stone left Microsoft in April 2004. (Ex. 2; RP 2458, 2680) Stone had no experience in image licensing, but as an employee of Microsoft he had had some exposure to the “Handle System,” a well-known means of digital object identification. (RP 2118-19, 2458, 2675-77) The Handle System is a sort of digital Dewey Decimal system that uses “handles” or “tags” to point back to a registry of information such as ownership, location, or license rights about tagged objects, including images. (Ex. 15 p.8, Ex. 126) The Handle System (www.handle.net) is maintained by the non-profit Corporation for National Research Initiatives, which licenses its technology and patent rights to the public for a nominal fee. (RP 554-55, 2673-74; Ex. 126)

Under Stone’s June 2004 contract with Corbis, which was amended by subsequent “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, with the sole exception of the Handle System itself, and the software that injects, reads and searches the internet to detect handles. (Ex. 2 § G.1; Ex. 10 pp. 1, 2) 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.” (Ex. 2 § G.4; Ex. 10 p. 1)

Corbis was Stone’s primary consulting client, and his only source of revenue. (RP 2663) In September 2005, Stone met for lunch with Corbis in-house attorney David Weiskopf, who as manager of Corbis’ anti-piracy team had been exploring alternative approaches to policing intentional unauthorized use of Corbis images on the internet. (RP 1023-24, 1326) Stone testified that he explained to Weiskopf a concept for a digital image license management system using the Handle System instead of Digimarc. (RP 2537-44; Ex. 175) Stone described drawing a diagram of the handle concept for Weiskopf on a placemat during their lunch. (RP 2542-46)

On September 18, 2005, Weiskopf emailed a proposal for a digital license management system that would address both piracy and unauthorized customer use of Corbis images to his supervisor, Corbis' general counsel Jim Mitchell. The proposal contemplated a system specifically designed for Corbis' digital image licensing business that employed both handles and other technologies already used by Corbis, such as visual comparison and web crawling technologies, to more readily identify images on the internet. (Ex. 13)

C. Corbis Filed A Patent Application For Its Design Of A Digital License Management System In 2006 And Engaged InfoFlows To Build It.

Corbis began work on "Boulder Ridge," a project to implement its design for a digital license management system, in late 2005. (RP 532-33) The first phase of the Boulder Ridge license management system would identify and generate a report of unauthorized uses of Corbis images using a combination of digital handles and visual comparison technology detectable by a web crawler in a search of the internet. This component was intended for use by the Corbis anti-piracy team. The second phase of Boulder Ridge envisioned a web-based tool that would allow Corbis customers to verify license rights by dragging a thumbnail of an image from a computer desktop to the verification tool. This customer-based tool would then scan the image, tell the customer whether the image was

licensed from Corbis and what license rights the customer had, identify similar images that Corbis owned and could license to the customer, and allow the customer to easily obtain necessary license rights online. (RP 537-40; Ex. 31)

In November 2005, Stone assigned his September 2005 consulting contract with Corbis to InfoFlows, a Washington corporation Stone had incorporated in October 2005 in order to pursue his business relationship with Corbis.² (Ex. 220; RP 2686-87) Stone agreed in this amendment that the “Corbis License Management System and Service” and all related information was “the sole property” of Corbis, disclaiming any interest in the “System” just as he had in his previous consulting contract. (Ex. 10 p.2, Ex. 220)

No available license management system provided all the functionality conceived for Boulder Ridge. (RP 536, 543) Corbis intended to build the Boulder Ridge license management system for its own purposes, and for license to other companies. Corbis filed a patent application covering the overall design structure of its license management system in January 2006 listing Weiskopf and another Corbis employee, Erling Aspelund, as inventors, and Corbis as their assignee. (Ex. 222)

² InfoFlows had no other customers besides Corbis for handle technology. (RP 2386) Stone testified that he viewed his relationship with Corbis as “the opportunity to get a customer.” (RP 2662)

The patent application made no claim to ownership or invention of the component parts of the design, such as the Handle System or visual comparison technologies. This provisional application was replaced with a utility patent application in January 2007, published in July 2007. (Ex. 56, 99) As of the time of trial, the Patent Office had taken no action on Corbis' patent application. (RP 741, 2804)

The Corbis Boulder Ridge team, along with Stone, presented its proposal to build the Boulder Ridge license management system to Corbis senior management in January 2006, and then to Bill Gates in February 2006. (RP 559-64) None of the documents used in those meetings, which Stone had assisted in preparing, suggests that Stone or InfoFlows would have any ownership interest in the Boulder Ridge digital license management system. Instead, the documents reflected that Corbis would secure any patents in the Boulder Ridge license management system. (Ex. 26 (“patent portfolio securing Corbis’ ownership”), Ex. 27 p. 11, Ex. 31 § 4.4, Ex. 33 p. 11, Ex. 131 § 4.4; RP 603-05, 2765-66)

D. With the Assistance of Counsel And Over Many Months, InfoFlows And Corbis Negotiated An Integrated Agreement For InfoFlows To Develop An Operational Version Of A License Management System That Corbis Would Own.

InfoFlows and Corbis began negotiating the terms of an agreement for InfoFlows to develop and deliver to Corbis the Boulder Ridge license

management system in February 2006. Stone initially sought a direct investment in InfoFlows. (RP 581; Ex. 30) On February 6, 2006, Stone e-mailed Corbis' general counsel Mitchell suggesting that Corbis invest \$6 million in return for 20% of InfoFlows stock. (Ex. 232) Stone's email also stated that the parties had agreed to "[p]atent the system to protect both Corbis and InfoFlows investments and strategic interests." Stone claimed he would "detail this some more in another email." (Ex. 232) But no other emails, nor any other communication between the parties, mention this concept. As reflected in each of the drafts proposed by both parties in their ensuing negotiations over the terms of a Development Agreement, Corbis rejected both investing in InfoFlows and the concept of joint ownership because it wanted a product for its licensing business, not a partner. (RP 831, 1807-08; Ex. 121)

As the parties' contract negotiations progressed, Corbis hired K&L Gates attorney Marty Smith and Stone retained Beacon Law attorney Van Katzman. (RP 827, 1790-93) The parties exchanged a dozen drafts of a comprehensive agreement that would govern InfoFlows' work on the Boulder Ridge license management system. (Ex. 121) In May 2006, after four months of negotiations in which both sides were represented by highly skilled legal counsel, the parties executed Exhibit 43, the Development Agreement that governed their rights and responsibilities in

the development of the Boulder Ridge license management system. A copy of the Development Agreement is Appendix E to this brief.

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.” (Ex. 43 § 14(m)) InfoFlows agreed to develop “a completely operational version” of the Boulder Ridge license management system “for Corbis in a two phase developmental process.” (Ex. 43 p.1) In Phase One, InfoFlows would develop and deliver an “anti-piracy” enforcement system. In Phase Two, InfoFlows would develop and deliver a customer-based system. (Ex. 43 p.2)

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. (Ex. 43 §§ 2-3) Phase One and Phase Two had a combined total of seven milestone deadlines for acceptable “computer code . . . , documentation and other related items to be developed and delivered by InfoFlows to Corbis,” (Ex. 43 pp. 2-3), with payments of between \$500,000 and \$550,000 due InfoFlows upon Corbis’ acceptance of each of the milestones. (Ex. 43 § 7) The payments upon acceptance of all Phase One deliverables, including a final working system, totalled \$1.5

million. InfoFlows could earn an additional \$2.2 million upon Corbis' acceptance of the four Phase Two deliverables. (Ex. 43 § 7) The Development Agreement contemplated that Phase One would be completed and publicly launched by December 4, 2006 (Ex. A to Ex. 43), and that Phase Two would be publicly launched by December 1, 2007. (Ex. D to Ex. 43)

Under the Development Agreement, just as under the earlier consulting agreements with Stone and InfoFlows, Corbis owned the work product created by InfoFlows, including all intellectual property rights, and Corbis had the exclusive right to patent the resulting license management system:

(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 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.

(Ex. 43 § 6(a)) (emphasis added) InfoFlows further agreed that it would not “challenge, oppose or interfere” in patent applications made by Corbis, and that InfoFlows would “not file any such applications on InfoFlows’ own behalf related to the Work Product.” (Ex. 43 § 6(b))

The parties negotiated a single exception to Corbis’ ownership, which related to the handle technologies that might be used as a component in the finished Boulder Ridge license management system. As it had in Stone’s consulting agreement (Ex. 10 p. 2), Corbis agreed not to claim any ownership in technologies developed by InfoFlows to insert and search for handles on digital image files. (Ex. 43 § 6(a)) These technologies were narrowly defined in the Development Agreement as “Jazz Service:”

InfoFlows is, on its own initiative and its own expense, building 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 handleized Digital Objects.

(Ex. 43 § 9) (emphasis added)

The trial court confirmed the unambiguous nature of the Jazz Service exclusion in a partial summary judgment entered May 2008:

(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.

(CP 109) (Appendix F)

This definition of Jazz Service in the Development Agreement was the focus of extensive negotiations between the parties and their attorneys. (RP 1809-14) Corbis consistently rejected Stone's and InfoFlows' proposals to expansively define Jazz Service and the handle technology in which InfoFlows and Stone were retaining rights. (RP 1813-14; Exs. 44-50, 121) The parties eventually settled on the unambiguous definition in the Development Agreement. The portion of Exhibit 121 setting out the drafting history of the Jazz Service clause in the Development Agreement is attached as Appendix G to this brief.

The Development Agreement provided that InfoFlows could offer Jazz Service handle technologies, to Corbis or to others, and anticipated that Corbis and InfoFlows could enter into a “Jazz Service Agreement” under which InfoFlows would supply handle services for use on a completed Boulder Ridge license management system. (Ex. 43 § 9) Corbis gave InfoFlows a refundable \$500,000 advance against potential future handle service fees if it chose to license handle services from InfoFlows. (Ex. 43 § 9) However, as confirmed by another partial summary judgment order, Corbis had no contractual obligation to implement the handle system, or to pay any additional compensation to InfoFlows if it chose not to do so. (Ex. 43 § 9; CP 102-05)

InfoFlows also wanted to use the completed Boulder Ridge license management system in its own business. (RP 1811-12) As part of the Development Agreement, the parties negotiated a licensing agreement that would allow InfoFlows to use the Boulder Ridge license management system, outside the stock image industry, in exchange for a royalty payment to Corbis at a rate to be negotiated. (Ex. G to Ex. 43)

On June 2, 2006, InfoFlows signed the Development Agreement and received the initial contract payment of \$250,000 and the refundable \$500,000 Jazz Service advance. (RP 1017)

E. Corbis Terminated InfoFlows For Cause After Rejecting InfoFlows' Work On The First Phase Of The License Management System In October 2006.

Corbis had the right to accept or reject InfoFlows' deliverables in Corbis' sole discretion. (Ex. 43 §2(b)) If it rejected a deliverable as unacceptable, Corbis could terminate the Development Agreement for cause or require that InfoFlows correct and resubmit the deliverable. (Ex. 43 § 2(e)) If Corbis elected to terminate the Development Agreement, it would owe InfoFlows no further milestone payments. (Ex. 43 § 13(b)) The parties also agreed that Corbis could terminate the Development Agreement at any time, without cause, on 30 days notice. If the Development Agreement was terminated without cause, InfoFlows would be entitled to milestone payments for all accepted deliverables, as well as a pro-rata payment for any work that InfoFlows had performed but had not yet delivered to Corbis. (Ex. 43 § 13(c))

In August 2006, the Corbis team working on the Boulder Ridge license management project recommended to Corbis executives that InfoFlows be terminated because it had failed to meet Development Agreement milestones. (RP 1460, 1606, 1718-22) Corbis rejected InfoFlows' first delivery of functional specifications and called an August 22 meeting to give InfoFlows the opportunity to correct the problems. (RP 852-57, 1718-20) After InfoFlows failed to deliver a working "alpha"

demonstration of the system – the second milestone of Phase One – Corbis terminated the Development Agreement on October 12, 2006. (RP 853-57, 862-65; Ex. 122) Corbis made no use of any of the computer code that InfoFlows had “delivered” by posting it to a “SharePoint” site (RP 1194-95, 1508, 1589-92, 1767), and did not pay InfoFlows’ \$1 million invoice for the first two Phase One milestones. (Ex. 332; RP 2647-48) The parties’ working relationship was terminated, they never entered into an agreement to license Jazz Service, and InfoFlows never provided handle services to Corbis. (RP 628, 762)

In January 2007, InfoFlows announced the “Fedmark” license management system on its website. InfoFlows described the Fedmark System as a tool for owners of stock images and others to track and monitor the use of digital objects. InfoFlows claimed that Fedmark included most or all of the features that Corbis had planned for the Boulder Ridge license management system, using both handles and visual comparison technologies to identify, track, and report digital images on the internet. (RP 2395-97, 2803, 2805-14)

It appeared to Corbis that FedMark went far beyond the handle injection and resolution technologies that were reserved to InfoFlows as the Jazz Service under the Development Agreement. It appeared that InfoFlows had taken the Boulder Ridge license management design

documents, re-labeled them, and was offering a license management system to the general public using work product produced for, and while under contract with, Corbis. (CP 6-7, 15) InfoFlows later filed a patent application on its Fedmark system on August 3, 2007. (RP 2368; Ex. 100) InfoFlows' application was still pending at the time of trial. (RP 2804)

F. Corbis And InfoFlows Sued Each Other On The Same Day In January 2007. The Trial Court Entered A \$20,000,000 Judgment Against Corbis After A 3-Week Trial.

On January 22, 2007, Corbis sued Stone and InfoFlows for trade secret misappropriation, breach of contract, and unfair business practices in King County Superior Court. (CP 5) Later that day, InfoFlows sued Corbis for trade secret misappropriation, conversion, breach of contract, breach of the duty of good faith and fair dealing, unjust enrichment, and fraud. (CP 900-917) The actions were consolidated pursuant to CR 42(a) on February 21, 2007. (CP 21-22) The case was assigned to King County Superior Court Judge Nicole MacInnes, who denied both parties' requests for temporary injunctions on May 10, 2007. (CP 28-35) In a partial summary judgment entered on October 18, 2007, the court held that InfoFlows was obligated to return the \$500,000 Jazz Service advance (CP 104), but denied Corbis' motion seeking dismissal on summary judgment of InfoFlows' claims for fraud and breach of the duty of good faith. (CP 100, 1946) In May 2008, the court granted Corbis' motion for partial summary

judgment establishing the unambiguous definition of Jazz Service in the Development Agreement. (CP 109) (Appendix F)

Beginning August 3, 2009, the remaining claims were tried to a 12-person jury before a new judge, the Hon. Susan Craighead (“the trial court”). InfoFlows sought damages for trade secret misappropriation, conversion, breach of contract, breach of duty of good faith and fair dealing, unjust enrichment and fraud. InfoFlows’ theory was that Corbis had “stolen” Stone’s idea for a license management system, and that Corbis had an obligation under the contract and in tort to inform InfoFlows that it had already filed a patent application for its license management system design in the months before the parties negotiated and signed the Development Agreement. Stone also claimed that Corbis fraudulently induced InfoFlows to enter into the Development Agreement by representing that Corbis and InfoFlows would jointly patent the Boulder Ridge license management system design. (CP 321-27, 541)

Corbis’ motion in limine to preclude testimony contradicting the Development Agreement’s definition of Jazz Service, and consequently of rights retained by InfoFlows under the agreement, had been granted before trial. (CP 341, 365) Nevertheless, over Corbis’ objection, Stone was allowed to testify to his “understanding” of what rights InfoFlows retained, and what “Jazz Service” meant, contrary to the unambiguous

terms of the Development Agreement, the partial summary judgment, and the rulings on motions in limine. (CP 109, 341, 365; RP 2575-77, 2602-12, 2616-22) Corbis also objected after InfoFlows' counsel encouraged the jury to speculate as to the content of communications for which the attorney-client privilege had been properly asserted, suggesting that assertion of the privilege suggested wrongdoing. (e.g., RP 927, 997, 1289-90) The trial court rejected Corbis' proposed cautionary instruction that the jury should draw no adverse inference from Corbis' assertion of the privilege. (RP 2441; CP 367-68, 386-90)

Corbis did not use any of InfoFlows' technology created under the Development Agreement. (RP 1194-95, 1508, 1589-92, 1767; CP 588-99) InfoFlows presented no evidence that it had been damaged by Corbis' termination of the Development Agreement, nor that it lost any profits or business opportunities as a result of Corbis' actions. (RP 2402-03) The trial court rejected Corbis' motions that InfoFlows' fraud claims were prohibited by the terms of the parties' Development Agreement, and denied Corbis' motion to dismiss InfoFlows' conversion, trade secrets, and fraud claims pursuant to CR 50. (CP 100, 457)

In a special verdict, the jury found that Corbis had fraudulently induced InfoFlows to enter into the Development Agreement by failing to reveal that Corbis had applied for a patent on its design for the Boulder

Ridge license management system, that Corbis had committed fraud by misrepresenting prior to negotiating the Development Agreement that it would cooperate with InfoFlows in future patent applications, that Corbis had breached its duty of good faith and fair dealing and had breached the Development Agreement, and that Corbis had misappropriated InfoFlows' trade secrets and had been unjustly enriched. The jury awarded damages of \$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. The jury rejected Corbis' claim that Stone or InfoFlows had misappropriated Corbis' trade secrets. (CP 525-29)

Post-trial, Corbis moved for judgment as a matter of law on InfoFlows' fraud and conversion claims, and for a remittitur or new trial. (CP 689, 700, 714) 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. (CP 1474-85) 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. (CP 1810-16)³

Corbis appeals. InfoFlows cross-appeals.

V. ARGUMENT

A. **The Trial Court Erred In Authorizing The Recovery Of Duplicative Damages For The Same Legal Harm And In The Absence Of Any Evidence Of InfoFlows' Lost Profits or Revenues.**

1. **InfoFlows Is Entitled To A Single Recovery For Its Economic Loss.**

InfoFlows is limited to one recovery for any economic loss arising from its contractual relationship with Corbis. Here, the trial court allowed InfoFlows to recover not once, but three times, for a single legal injury, awarding \$3.25 million for breach of the Development Agreement, \$7 million for fraudulently inducing InfoFlows to enter into the Development Agreement without disclosing that Corbis had applied for a patent on its design for a license management system, and an additional \$9.28 million for fraudulently misrepresenting that Corbis would cooperate with InfoFlows on patent applications. (CP 526) These remedies were both duplicative and fundamentally inconsistent, as the trial court allowed

³ The court also entered an injunction prohibiting the use of “trade secret and proprietary information and materials regarding the Jazz Service.” (CP 1741) As Corbis does not possess, and never intended to “use” Jazz Service after terminating the Development Agreement, it does not further address this order in this briefing.

InfoFlows to affirm the contract and recover what it could have grossed had the contract been fully performed, while at the same time disavowing the contract and recovering what it allegedly could have earned from other (unproven) opportunities.

a. “A Party Cannot Recover Twice For The Same Injury Simply Because He Has Two Legal Theories.”

“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, *aff’d*, 96 Wn.2d 416, 635 P.2d 708 (1981). In *Kammerer*, the defendant had sold machines that the jury found were covered by the plaintiffs’ patents. A jury found the defendant liable both for failing to pay royalties under an agreement to manufacture and sell machinery upon which the plaintiff held patents, and for fraudulently inducing the plaintiffs to enter into that agreement. Because “[a]n award of damages for both fraud and breach of contract would be an improper duplication of remedies,” 27 Wn. App. at 526-27, this court affirmed the trial court’s refusal to enter judgment on both the breach of contract and fraud claims:

A claim that the defendant fraudulently induced plaintiffs to enter into a contract which the defendant had no intention of performing, together with a claim that the defendant breached the contract, involves a single wrong or injury.

Kammerer, 27 Wn. App. at 526. See also *Public Employees Mutual Ins. Co. v. Kelly*, 60 Wn. App. 610, 618, 805 P.2d 822 (“it is a basic principle of damages – tort and contract – that there shall be no double recovery for the same injury.”), *rev. denied*, 116 Wn.2d 1031 (1991); *Giabattista v. Nat’l Bank of Commerce*, 21 Wn. App. 723, 736, 586 P.2d 1180 (1978) (“it is, of course, axiomatic that a person cannot have a multiple recovery for a single wrong.”), *rev. denied*, 92 Wn.2d 1015 (1979).

As did the plaintiff in *Kammerer*, InfoFlows claimed that Corbis both “fraudulently induced InfoFlows to enter into the Development Agreement,” and that Corbis “breached the Development Agreement.” (CP 541) In addition, InfoFlows asserted that Corbis committed fraud by claiming prior to negotiation and execution of the Development Agreement that it would cooperate in filing patent applications. (CP 541, 1091) Each of these claims alleged the same legal injury – that Corbis enticed InfoFlows to enter into a contract that it had no intent to perform in order to obtain InfoFlows’ intellectual property. (RP 3009-10) InfoFlows could obtain no more than one recovery for this injury, not the three awarded by the trial court.

b. The Trial Court Awarded InfoFlows Multiple Damages For A Single Legal Wrong.

The trial court's instructions illustrate how the jury was permitted to award multiple damages for this same legal wrong. Instruction No. 22 instructed the jury 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 554) The jury awarded \$3.25 million to InfoFlows for Corbis' breach of the Development Agreement. (CP 526)

On its claim for fraudulent misrepresentation of Corbis' intent to cooperate in patent applications, Instruction No. 38 told 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," which the court characterized as "the benefit of the bargain." (CP 570) The jury under this instruction awarded InfoFlows an additional \$9.28 million in "benefit of the bargain" damages. (CP 526)

While the contract and fraudulent misrepresentation instructions both allowed the jury to award InfoFlows the benefit of its bargain under the Development Agreement, Instruction No. 33, the trial court's fraud in the inducement instruction, inconsistently allowed InfoFlows to recover

the lost revenue that Stone claimed InfoFlows would have earned had Stone known that Corbis had already applied for a patent on the Boulder Ridge licensing management system and, as a consequence, never entered into the Development Agreement:

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.

(CP 565) The jury awarded InfoFlows another \$7 million under this fraudulent inducement theory. (CP 526)

c. InfoFlows Could Not Recover Damages Premised On Both The Breach And The Repudiation Of The Parties' Contract.

InfoFlows' three theories of recovery, which gave InfoFlows both the benefit of the bargain *and* its claimed lost business opportunities had there been no bargain at all, are fundamentally inconsistent and mutually

exclusive, resulting in multiple recoveries for the same legal harm. Washington adheres to the generally accepted principle that one who claims to have been injured by a fraud in entering into a contract may “accept the situation and recover his or her damages or . . . may repudiate the transaction and seek to be placed in status quo, but he or she may not do both.” 37 C.J.S. Fraud § 113 (1939 & 2010 Supp.); see *Salter v. Heiser*, 39 Wn.2d 826, 833, 239 P.2d 327 (1951) (tenant suing landlord for misrepresenting that leased resort could obtain liquor license may not recover both reduced value of lease as well as damages for lost opportunities, having “elected to affirm the lease by continuing in possession”); *Wilkinson v. Smith*, 31 Wn. App. 1, 13, 639 P.2d 768 (“Affirmance of the contract and a demand for damages has been held inconsistent with a disaffirmance of the contract and a prayer for rescission.” (quoting *Melby v. Hawkins Pontiac, Inc.*, 13 Wn. App. 745, 749, 537 P.2d 807 (1975)), rev. denied, 97 Wn.2d 1023 (1982)).

An award of damages for both breach of contract and for being fraudulently induced to enter into the contract is both logically and legally duplicative – either InfoFlows would have benefited from its commercial relationship with Corbis under the Development Agreement, or it would have profited from entering into a commercial relationship with others. But it could not have done both. As in *Kammerer*, InfoFlows was entitled

to only one recovery for a single wrong. InfoFlows cannot, as a matter of law, be entitled to \$3.25 million for breach of contract, \$7 million for being fraudulently induced to enter into the Development Agreement, and \$9.28 million for fraudulent misrepresentation of the terms of the Development Agreement. The trial court erred in authorizing this duplicative recovery and refusing to remit the verdict.

2. The \$16 Million Fraud Judgment Must Be Vacated Absent Any Evidence That InfoFlows' New Business Suffered Any Lost Profits Or Opportunities.

While in the proper case an aggrieved party to a contract can elect the greater of duplicative damages awards,⁴ 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 with no evidence of any lost business opportunities. Damages for fraud must be established with reasonable certainty and supported by sufficient competent evidence, so as to "not subject the trier of fact to mere speculation or conjecture." *ESCA Corp. v. KPMG Peat Marwick*, 86 Wn. App. 628, 639, 939 P.2d 1228 (1997), *aff'd*, 135 Wn.2d 820, 959 P.2d 651

⁴ See, e.g., *Ostano Commerzanstalt v. Telewide Systems, Inc.*, 880 F.2d 642, 648-49 (2nd Cir. 1989); *University of Colorado Foundation, Inc. v. American Cyanamid Co.*, 216 F. Supp.2d 1188, 1204-05 (D. Col. 2002), *aff'd*, 342 F.3d 1298 (10th Cir. 2003), *cert. denied*, 541 U.S. 988 (2004).

(1998). *See Restatement (Second) Torts* § 549(2). Here, the damages awarded for fraud lack any support in the record and must be vacated as a matter of law.

InfoFlows argued that but for Corbis' fraudulent concealment of its existing patent application and the misrepresentation it would cooperate with InfoFlows on a future patent application, it would not have entered into the Development Agreement and would have reaped profits from other opportunities. InfoFlows argued that the "jury's award [of \$7 million for fraudulent concealment] could have been to remedy InfoFlows' loss of other business" (CP 1121), and that the fraudulent misrepresentation damages of \$9.28 million remedied InfoFlows' loss of patent protection. (CP 1122) But InfoFlows, which viewed its relationship with Corbis as "an opportunity to get a customer," (RP 2663), was a new business, with no profit history and no source of revenue but Corbis. InfoFlows failed to identify a single business opportunity lost as a result of entering into the Development Agreement.

InfoFlows presented no evidence whatsoever that it was unable to patent Jazz Service (or Fedmark), or that Corbis, which had rejected InfoFlows' Phase One deliverable as inadequate, derived any economic benefit from InfoFlows' intellectual property, let alone a quantifiable loss that was established with reasonable certainty. Corbis terminated the

Development Agreement without even downloading InfoFlows' source code, Corbis never made commercial use of any of InfoFlows' intellectual property, Corbis had not patented a license management system based upon InfoFlows' Jazz Service, and Corbis had abandoned any effort to create the Boulder Ridge license management system. (RP 1194-95, 1508, 1589-92, 1767-69, 2914) InfoFlows' own patent application was still pending at the time of trial (RP 2365, 2803-04, 2811; Ex. 100), and the patentability of its Fedmark/Jazz Service will be a matter of federal patent law over which Corbis undisputedly has no control.

Where a fraud claim is based upon a bargain that was never fully performed, damages become entirely conjectural:

[T]here are many cases in which the value that the plaintiff would have received if the bargain made with him had been performed cannot be proved with any satisfactory degree of certainty, because it must necessarily turn upon the estimated value of something non-existent and never in fact received. In this case the benefit-of-the-bargain harm to the plaintiff becomes mere speculation, and ordinary rules of the law of damages preclude the award.

Restatement (Second) Torts § 549, comment g. Here, InfoFlows' attempt to recover for business opportunities lost as a result of entering into a Development Agreement with Corbis that was terminated before it was fully performed is similarly speculative and devoid of any evidentiary support.

Washington, like most states, limits the ability of a new business with no established profit history to recover lost profits, requiring at a minimum “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); see *Farm Crop Energy, Inc. v. Old National Bank*, 109 Wn.2d 923, 750 P.2d 231 (1988). In *Farm Crop*, our Supreme Court reversed a jury’s verdict for claimed lost profits when defendant Bank breached a contract to provide financing for an ethanol plant. The plaintiff relied 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. The Court noted “the criteria identified in *Larsen* as justifying a departure from the new business rule” arise only where a reasonable estimation of damages can be made through analysis of “market conditions and profits showing of identical similar business in the vicinity, operating under substantially the same conditions.” *Farm Crop*, 109 Wn.2d at 931.

Similar standards of proof apply to the recovery of lost revenue for fraud. In *ESCA*, this court 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, its auditor, caused plaintiff to incur over \$1 million in unnecessary employee expenses. *ESCA*, 86 Wn. App. at 639. *See also Bell Atlantic Network Services, Inc. v P.M. Video Corp.*, 322 N.J. Super 74, 730 A.2d 406, 421 (1999) (rejecting lost profits as damages for fraud in a case involving “new, highly innovative products whose reception by the public was doubtful, to say the least . . . [and that required] multiple business relationships . . . for successful marketing”).

Here, InfoFlows lacked even the sort of speculative expert evidence rejected by this court in *ESCA*, relying instead solely on Stone’s self-serving conjecture that InfoFlows would have obtained venture capital financing and patented a profitable system for the management of intellectual property licenses had it not entered into the Development Agreement. InfoFlows did not even rely on its own pro forma business projections, of the sort rejected by the Supreme Court in *Farm Crop*, citing instead to *Corbis*’ speculative pro forma projections estimating the value of a license management system to Corbis based on licensing fees derived from Corbis’ sales of Corbis’ vast collection of digital images and Corbis’ enforcement of Corbis’ rights against those engaged in piracy of Corbis’ images. (CP 1116) But InfoFlows was not in the stock image business and owned no images to license; it was starting a new business of creating software for the injection and tracking of digital handles – a

business that InfoFlows recognized in the Development Agreement would require it to license Corbis' license management system if it sought to earn money from others outside of Corbis' core business of stock image licensing. (Ex. G to Ex. 43) In the absence of any competent evidence supporting damages for lost business opportunities or profits, this court should vacate the judgments of \$7 million for fraudulent inducement and \$9.28 million for fraudulent concealment as a matter of law.

3. InfoFlows Could Not Recover In Tort For Injury Arising Out Of The Integrated Development Agreement.

InfoFlows' speculative "lost profits" damages in tort must be vacated for the independent alternative reason that they arise out of a commercial relationship between sophisticated parties that was defined in the fully integrated Development Agreement. Under the economic loss rule, parties to a contract are prohibited from recovering "economic losses" in a tort action arising out of the contract, because "tort law is not intended to compensate parties for losses suffered as a result of a breach of duties assumed only by agreement:"

[T]he purpose of the economic loss rule is to bar recovery for alleged breach of tort duties where a contractual relationship exists and the losses are economic losses. If the economic loss rule applies, the party will be held to contract remedies, regardless of how the plaintiff characterizes the claims. . . . If the claimed loss is an economic loss and

no exception applies to the economic loss rule, then the parties will be limited to contractual remedies.

Alejandre v. Bull, 159 Wn.2d 674, 683-84 ¶ 16, 153 P.3d 864 (2007) (citations omitted).

Thus, the plaintiff could not maintain a tort action for claimed misrepresentations about a defective septic system because the parties had a purchase and sale agreement governing their rights in *Alejandre*, 159 Wn.2d at 685 ¶ 20. See also *Borish v. Russell*, 155 Wn. App. 892, 902 ¶ 19, 230 P.3d 646 (2010) (barring misrepresentation claim against party to contract); *Cox v. O'Brien*, 150 Wn. App. 24, 35 ¶ 26, 206 P.3d 682 (applying economic loss rule to preclude tort claims for misrepresentation because the parties had a contract), *rev. denied*, 167 Wn.2d 1006 (2009); *Carlile v. Harbour Homes, Inc.*, 147 Wn. App. 193, 206 ¶ 26, 194 P.3d 280 (2008) (affirming dismissal of misrepresentation claims based on economic loss rule), *rev. granted in part, case dismissed*, 166 Wn.2d 1015 (2009).

Some courts create an exception to the economic loss rule for claims that the party was fraudulently induced to enter into the contract, but only if the plaintiff elects to recover in tort rather than contract. See, e.g., *Formosa Plastics Corp. USA v. Presidio Eng'rs & Contractors, Inc.*, 960 S.W.2d 41, 45-47 (Tex.1998) (discussed in *Trident Steel Corp.*

v. Wiser Oil Co., 223 S.W.3d 520, 529 (Tex.App 2006) (while “a plaintiff may recover tort damages for fraudulent inducement to enter a contract even when the plaintiff has suffered only an economic loss recoverable under a breach of contract claim,” plaintiff may not “recover the same damages under both theories.”)). This exception generally applies only if the claimed fraud is extraneous to the contract; the economic loss rule continues to bar claims related to the breaching party’s performance of the contract. See *HTP, Ltd. v. Lineas Aereas Costarricenses, S.A.*, 685 So.2d 1238, 1239 (Fla.1996); *Alejandre*, 159 Wn.2d at 690 n.6.

Regardless whether the Washington Supreme Court would apply the “fraudulent inducement” exception to the economic loss rule (an issue reserved in *Alejandre*, 159 Wn.2d at 690 n.6), InfoFlows could under no circumstances assert a claim based upon Corbis’ alleged failure to reveal that it had applied for a patent on its license management system, because InfoFlows’ claims were not based on alleged representations extraneous to the parties’ contract, but on the parties’ respective patent rights—an issue that was specifically negotiated and addressed in the Development Agreement. InfoFlows’ rights and remedies are limited to those negotiated between the parties in the Development Agreement itself:

[T]he parties in the present case, each concededly represented by competent counsel, engaged in arm's length negotiations before reaching agreement. *Each side*

presumably had the opportunity to make a variety of representations, promises, and offers. The parties ended up with a contract which did not include the representations which [plaintiff] now says [defendant] made. If [plaintiff] considered these assurances important enough to induce it to agree to the contract . . . , it could have conditioned its agreement on the explicit inclusion of those representations in the contract. If [defendant] refused to go along, [plaintiff] could have walked away from the deal. Since [plaintiff] did none of these things, but instead signed the contract . . . , it is bound by the terms of the instrument to which it affixed its name, and cannot now be heard to complain that it was “browbeaten” or fraudulently induced into agreeing . . .

Hercules & Co., Ltd. v. Shama Restaurant Corp., 613 A.2d 916, 932-33 (D.C. 1992) (emphasis added).

Similarly, here, the allegedly fraudulent representation that the parties would jointly “patent the systems to protect both” their interests (Ex. 232), cannot be reconciled with the fully integrated Development Agreement negotiated with the assistance of counsel and executed months after this representation was allegedly made. The Development Agreement contains no obligation on Corbis to jointly patent the Boulder Ridge digital license management system with InfoFlows, or to disclose Corbis’ own patent applications. To the contrary, the parties and their counsel extensively negotiated a comprehensive agreement that expressly grants Corbis the exclusive right to patent any work product created under the Development Agreement, with no obligation whatsoever to patent

InfoFlows' rights in the Jazz Service. (Ex. 43 § 6) If a sophisticated party to an integrated agreement can assert fraud in these circumstances, Washington citizens can have no expectation that they can ever define their commercial relationships and order their affairs through written contracts.

The trial court's letter opinion denying Corbis' post-trial CR 50 motion reflects its fundamental failure to grasp the import of the parties' Development Agreement to InfoFlows' claimed damages for fraud. In rejecting Corbis' argument that damages for fraudulent misrepresentation must be limited to what InfoFlows could reasonably expect to earn under the Development Agreement, the trial court stated that "the benefit of the bargain would have been for Corbis and InfoFlows to have coordinated on patent applications," and that "the value of the exclusive rights in InfoFlows service that patent protection would provide could have been \$9.28 million." (CP 1485) But under the Development Agreement, Corbis *owned* "the value of InfoFlows services" in return for payments of up to \$3.95 million, and had no further obligation to enter into any subsequent licensing deal with InfoFlows. (Ex. 43 § 6; *see* Arg. § A.4, *infra*) Moreover, in the absence of any agreement obligating Corbis to "protect both Corbis and InfoFlows investments and strategic interests," which Stone in a unilateral proposal claimed only that he would "detail . . .

some more in another email” (Ex. 232), Corbis could have no duty, in tort or otherwise, to procure a patent for InfoFlows. Under the economic loss rule, InfoFlows’ remedies are limited to those available under the Development Agreement.

4. InfoFlows’ Contract Damages Must Be Limited To What It Would Have Been Paid Had Corbis Not Terminated The Development Agreement Without Cause.

While the fraud damages fail as a matter of law (Arg. §§ A.2-3, *supra*), the jury’s award of \$3.25 million for breach of contract damages must be reduced because it gave InfoFlows far more than the benefit of its bargain. Any award of benefit of the bargain damages must be limited to what InfoFlows would have earned had Corbis not terminated the contract for cause, and not what InfoFlows could have earned had both parties successfully completed a commercial relationship that Corbis was under no contractual obligation to undertake or maintain.

Those damages could not have exceeded \$1 million, the most that Corbis could owe InfoFlows had it successfully fulfilled the first two milestones under Phase One of the Development Agreement. It was undisputed that InfoFlows never delivered a final version of Phase One, or any of the Phase Two milestones that would have triggered Corbis’ obligation to pay an additional \$2.2 million. (RP 1131-32) Because

Corbis had the right to terminate the Development Agreement without any cause at all, the jury's award of \$3.25 million far exceeded the benefit of InfoFlows' bargain and required Corbis to pay for services that it never received.

Damages for the wrongful termination of a contract may not exceed the amount a party would have earned during the remainder of the contract term. This is because "a contract confers no greater rights on a party than it bargains for." *Ford v. Trendwest Resorts, Inc.*, 146 Wn.2d 146, 156, 43 P.3d 1223 (2002). In *Ford*, the Supreme Court held that an at-will employee could not recover lost future earnings because he could be terminated at any time, for any reason, with or without cause: "By its very nature, at-will employment precludes an expectation of future earnings." 146 Wn.2d at 157.

The Supreme Court in *Ford* applied a well-established principle of contract law: A plaintiff may not obtain an award of damages for future lost earnings or profits under an agreement that gives the defendant the right to terminate the agreement at any time without cause. *See, e.g., All Line, Inc. v. Rabar Corp.*, 919 F.2d 475, 480-81 (7th Cir. 1990) (plaintiff alleging breach of distributorship agreement denied future lost profits where "either party could have terminated the agreement at any time."); *Dalton Properties, Inc. v. Jones*, 100 Nev. 422, 683 P.2d 30, 31 (1984)

“where a contract provides that either party may terminate the agreement at will, the party so terminated may not recover damages for those profits that he purportedly could have gained over the maximum life of the contract.”); *Cottman v. State*, 51 Md. App. 380, 443 A.2d 638, 640 (1982) (limiting tenant to nominal damages for landlord’s breach of lease terminable by either party upon 30 days notice).

Here, Corbis had the right to terminate the Development Agreement for any reason on 30 days notice. (Ex. 43 § 13(c)) The Development Agreement expressly limited InfoFlows’ expectation interest to a pro-rata payment for any work that had been performed but not yet delivered in the event of a termination without cause. (Ex. 43 § 13(c)) InfoFlows delivered a portion of the first milestone – the Phase One specifications – and tendered the alpha version source code as the second Phase One milestone, which Corbis rejected.⁵ InfoFlows never produced or tendered the third Phase One milestone – “the final release version of Phase I” – or any of the four Phase Two milestones. (Ex. 43 § 7; RP 1131-32) InfoFlows was entitled at most to the \$1 million payment, which it

⁵ InfoFlows did not deliver a working alpha version of the anti-piracy software it had contracted to build for Corbis, but only a portion of the underlying code, with no user interface. (RP 1589-90, 2041, 2128, 2901; *see* Ex. 329 (Stone’s email: “there is not much to see other than blinking lights.”))

invoiced Corbis for the first two Phase One milestones, as damages for Corbis' breach of the Development Agreement. (RP 2647; Ex. 332)

Further, InfoFlows' expected additional revenues under the Development Agreement should have been reduced by its expected costs of performance. *See Restatement (Second) Contracts* § 347, comment d. Instead, the trial court's contract damage award gave InfoFlows its gross revenues under an agreement that could have been terminated at any time and that could only have been performed by InfoFlows at considerable expense for labor, material and overhead. (*See* RP 2898 (Stone estimated costs of \$1 million on first two milestones))

The jury's award of \$3.25 million gave InfoFlows significantly more than the benefit of its bargain under a contract that was terminable without cause on 30 days notice. This court should reduce the judgment to \$1 million or remand for a new trial limited to InfoFlows' legitimate expectation damages under Section 13 of the Development Agreement.

B. The Trial Court Erred In Refusing To Instruct The Jury That Parties Negotiating An Arm's Length Business Transaction Have No Duty of Disclosure In The Absence Of A Fiduciary Relationship.

The jury's verdict for fraudulent concealment and breach of the duty of good faith is fatally flawed for the additional reason that Corbis had no affirmative obligation to notify InfoFlows of its patent application

for the design of the Boulder Ridge license management system, or of any other facts, in the absence of a fiduciary or other confidential relationship. The trial court erred in instead giving Instruction No. 32, which imposed a duty of disclosure in an arms' length commercial transaction between sophisticated parties if the jury found that it was "reasonable" that one party would expect disclosure:

[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 know 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.

(CP 564) (Appendix C)

The trial court erroneously failed to inform the jury of the rule that actually governs a contracting party's duty to disclose, stated in Corbis' proposed Instruction No. 35, that "[f]or failure to speak to be fraudulent, there must be a fiduciary duty or similar relationship of trust and confidence existing between the parties. Absent such a special relationship, parties engaged in an arm's length transaction do not have a duty to disclose." (CP 297) (Appendix D) *See Colonial Imports, Inc. v. Carlton*

Northwest, Inc., 121 Wn.2d 726, 732, 853 P.2d 913 (1993) (“Some type of special relationship must exist before the duty will arise.”).

Washington courts have consistently held that some type of special relationship between the parties is necessary before a duty of disclosure arises. As a consequence, the Court reversed a judgment for negligent misrepresentation against a wholesale seller of automobiles who had failed to disclose to a buyer its broker’s precarious financial condition, because the parties were “experienced and independent businesspersons” who had no “pre-existing special relationship” in *Colonial Imports*, 121 Wn.2d at 733. See also *Oates v. Taylor*, 31 Wn.2d 898, 904, 199 P.2d 924 (1948) (reversing judgment for fraud based on claimed failure to tell plaintiff that corporation’s financial circumstances were “precarious”). Compare, *Liebergessell v. Evans*, 93 Wn.2d 881, 613 P.2d 1170 (1980) (inexperienced widow relying on borrower for financial advice); *Boonstra v. Stevens-Norton, Inc.*, 64 Wn.2d 621, 393 P.2d 287 (1964) (inexperienced investor relying on broker in selecting investments).

Both Corbis and InfoFlows were sophisticated parties, represented by skilled legal counsel. Corbis had no duty to disclose during negotiations that it had filed its confidential patent application covering its Boulder Ridge license management system, which was clearly and unambiguously the sole property of Corbis under Stones’ consulting

contracts and each draft of the Development Agreement. The trial court wrongly substituted a “reasonable person” standard for the special relationship our courts have consistently required before imposing upon a party a duty to disclose facts material to a contract.

C. The Trial Court Erroneously Allowed The Jury To Impose Liability Based On One Party’s Unilateral Subjective Intent And Speculation About The Adverse Inferences To Be Drawn From The Other Party’s Privileged Communications.

The jury’s verdict was further tainted by the trial court’s refusal to prohibit Stone from testifying to his own subjective understanding of the terms of the Development Agreement and by allowing the jury to draw adverse inferences from Corbis’ assertion of the attorney-client privilege. These prejudicial errors contributed to the jury’s excessive verdict and mandate reversal, and this court should direct that they not be repeated on remand.

1. The Jury Based Its Verdict On Stone’s Subjective Understanding Of InfoFlows’ Rights Under The Development Agreement.

Over Corbis’ objection, the trial court improperly allowed Stone to testify to his own unexpressed and unilateral understanding of the meaning of specific terms in the Development Agreement, including terms the court had held were unambiguous. (*See, e.g.*, RP 2575-77, 2602-12, 2616-25) Stone repeatedly testified that he “understood” the definition of “Jazz

Service” to encompass not just the handle injection and search technology that was unambiguously defined in the Development Agreement and confirmed by the court’s partial summary judgment (CP 109), but the entire license management “platform” that InfoFlows had agreed to develop for Corbis. (*See, e.g.*, RP 2886, 2891)

Washington follows the objective manifestation rule of contract interpretation. *See Hearst Communications, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 503-04, 115 P.2d 262 (2005). While a party’s words or actions may shed light on what the parties’ agreement means, one party’s unilateral understanding of the meaning of a contract is irrelevant and inadmissible:

In determining the mutual intention of contracting parties, the unexpressed, subjective intentions of the parties are irrelevant; the mutual assent of the parties must be gleaned from their outward manifestations.

Saluteen-Maschersky v. Countrywide Funding Corp., 105 Wn. App. 846, 854, 22 P.3d 804 (2001).

The trial court’s refusal to adhere to this principle allowed the jury to base its verdict on Stone’s subjective belief that the Jazz Service was not the handle technology that, as defined in the parties’ Development Agreement, was a component of Corbis’ system, but instead comprised the underlying “platform” for the entire Boulder Ridge license management

system that was plainly defined as Corbis' proprietary information under both the Development Agreement and the previous independent contractor agreements. (Ex. 2 § G, Ex. 10 p. 1, Ex. 43 § 6)

2. The Jury Was Encouraged To Draw Adverse Inferences From Corbis' Proper Assertion Of The Attorney-Client Privilege.

Over Corbis' objection, InfoFlows' counsel also 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. (*e.g.*, RP 997: "And the privileged material redacted means whatever is being said by you and these folks . . . that's being blocked out, we don't see that, right?") The trial court refused to give Corbis' proposed cautionary instruction that no adverse inferences can be drawn from assertion of the privilege. (CP 367-68, 386-90; *see* RP 1289-96, 1462-64, 2441, 2947)

Our Supreme Court has held that it is improper "to permit counsel to comment on the exercise" of statutory privileges because it would "incite the jury to draw inferences adverse to the protection afforded by the" privilege. *Sumpter v. National Grocery Co.*, 194 Wash. 598, 602, 78 P.2d 1087 (1938) (physician-patient privilege); *see also State v. Charlton*, 90 Wn.2d 657, 663, 585 P.2d 142 (1978) (marital privilege). Particularly where, as here, the nature of the parties' negotiations through their legal

counsel was critical to both InfoFlows' claims of fraud and Corbis' contractual defense, the parties are entitled to a jury that is not encouraged to draw adverse inferences from the assertion of the attorney-client privilege. See *Regan v. Garfield Ridge Trust and Sav. Bank*, 220 Ill. App. 3d 1078, 581 N.E.2d 759, 768 (1991) ("Allowing such an inference to be drawn could inhibit communications between attorney and client especially with respect to contractual transactions where there is often a possibility that the attorney will be called upon to testify if there is a contractual breach and litigation ensues."); *Stanger v. Gordon*, 309 Minn. 215, 244 N.W.2d 628, 631-32 (1976) ("Permitting adverse comment on the proper assertion of privilege in the presence of the jury is improper and potentially prejudicial . . .").

The jury's \$20 million verdict was tainted by speculation that the redaction of privileged material from Corbis' emails with its lawyers supported InfoFlows' claim that they were abetting Corbis' alleged scheme to "steal" Stone's idea by entering into the Development Agreement with no intent of performing. This court should remand for a new trial in which the jury is not allowed to base its verdict on Stone's subjective understanding of contract language or upon adverse inferences drawn from Corbis' proper assertion of the attorney-client privilege.

D. Corbis, Not InfoFlows, Is Entitled To Its Attorney Fees Under The Development Agreement.

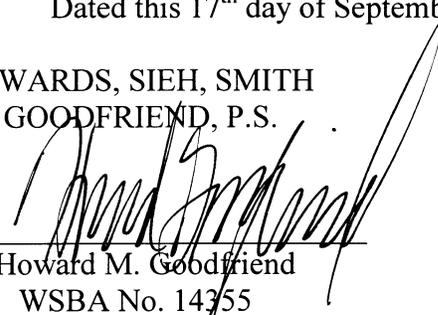
The parties agreed that the prevailing party in any suit “to enforce any right or remedy under this Development Agreement” is entitled to attorney fees. (Ex. 43 § 14(e)). Upon reversal of the judgment for breach of contract, InfoFlows’ fee award of \$784,393.32 (CP 1828) should also be reversed and Corbis awarded its fees on appeal as the prevailing party. RAP 18.1; *see Marine Enterprises, Inc. v. Security Pacific Trading Corp.*, 50 Wn. App. 768, 774, 750 P.2d 1290 (1988).

VI. CONCLUSION

InfoFlows’ damages for breach of the Development Agreement must be limited to the \$1 million it could have hoped to earn had it fulfilled its obligations under the parties’ contract. This court must reverse the judgment for twenty times that amount and remand for a new trial.

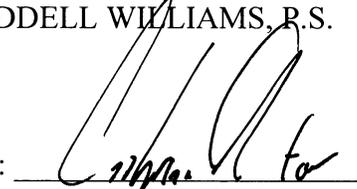
Dated this 17th day of September, 2010.

EDWARDS, SIEH, SMITH
& GOODFRIEND, P.S.

By: 

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

RIDDELL WILLIAMS, P.S.

By: 

Karl J. Quackenbush
WSBA No. 9602

Attorneys for Appellant

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 September 17, 2010, I arranged for service of the Brief of Appellant, 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 type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail |
| Karl J. Quackenbush Riddell Williams, P.S. 1001 4 th Avenue, Suite 4500 Seattle WA 98154 | <input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> E-Mail |
| Stephen C. Willey Savitt & Bruce LLP 1425 4th Ave, Suite 800 Seattle WA 98101-2272 | <input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> E-Mail |
| Charles Wiggins Wiggins & Masters, P.L.L.C. 241 Madison Avenue N Bainbridge Island, WA 98110-1811 | <input type="checkbox"/> E-Mail <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> E-Mail |

DATED at Seattle, Washington this 17th day of September, 2010.



 Tara D. Friesen

FILED
 COURT OF APPEALS DIVISION I
 STATE OF WASHINGTON
 2010 SEP 20 AM 10:23

APPENDICES

| | | |
|---------|---|----------------------------------|
| App. A: | Judgment Against Corbis Corporation, Including Declaratory Judgment and Permanent Injunction | CP 1810-17 |
| App. B: | Trial Court's November 6, 2009 Letter Ruling | CP 1481-85 |
| App. C: | Verdict Form Instructions Nos. 31-35 Instruction No. 38 | CP 525-29 CP 563-67 CP 570 |
| App. D: | Corbis Proposed Instruction No. 35 Proposed Cautionary Instruction Regarding Attorney Client Privilege | CP 297 CP 367-68 |
| App. E: | Development Agreement | Ex. 43 |
| App. F: | Order Granting Corbis' Motion For Partial Summary Judgment Regarding Contract Provision Defining Jazz Service | CP 108-09 |
| App. G: | Draft Development Agreement Comparison (partial) | Ex. 121 |

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27

SUPERIOR COURT FOR THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

CORBIS CORPORATION, a Nevada
corporation,

Plaintiff,

v.

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

Defendants.

- and -

INFOFLOWS CORPORATION, a Washington
corporation,

Plaintiff,

v.

CORBIS CORPORATION, a Nevada
corporation,

Defendant.

NO. 07-2-03244-4 SEA

~~[AMENDED PROPOSED]~~ *SIC*
JUDGMENT AGAINST CORBIS
CORPORATION, INCLUDING
DECLARATORY JUDGMENT
AND PERMANENT INJUNCTION

[CLERK'S ACTION REQUIRED]

602

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27

I. JUDGMENT SUMMARY

Pursuant to RCW 4.64.030, the following information should be entered in the Clerk's Execution Docket:

- 1. Judgment Creditor: InfoFlows Corporation
- 2. Attorneys for Judgment Creditor: Stephen C. Willey and Michele L. Stephen Savitt Bruce & Willey LLP
- 3. Judgment Debtor: Corbis Corporation
- 4. Principal Judgment Amount: \$19,055,000.00¹
- 5. Prejudgment Interest (to 2/9/10) \$209,438.54²
- 6. Attorneys' Fees: \$663,036.80 (*see* § III, ¶ 9 *infra.*)³
- 7. Costs and other recovery amounts: \$86,118.52 (*see* § III, ¶ 9 *infra.*)
- 8. **Total Judgment:** **\$20,013,593.86**

II. FACTUAL BACKGROUND

The Court, being fully advised, finds as follows:

1. Corbis Corporation ("Corbis") filed a complaint on January 22, 2007 (No. 07-2-03244-4 SEA), which asserted claims for breach of contract, trade secret misappropriation (violation of RCW 19.108 *et seq.*), and unfair competition (violation of RCW 19.86 *et seq.*), and sought damages and injunctive relief against (a) InfoFlows Corporation ("InfoFlows"), and (b) Steve Stone ("Stone"). *See* Sub No. 1

2. InfoFlows filed a complaint on January 22, 2007 (No. 07-2-03266-5 SEA), which asserted claims for fraudulent inducement and promissory fraud, breach of contract, breach of the duty of good faith and fair dealing, unjust enrichment and conversion, and sought

¹ \$36,155,000.00 less \$16,600,000 less \$500,000.00. *See* § II, ¶¶ 5, 8, 10; § III, ¶¶ 5, 7.
² \$409,205.56 prejudgment interest (at 12% per annum pursuant to RCW 19.52.010) on \$1,000,000 of InfoFlows' contract claim from September 13, 2006 to February 9, 2010. \$199,767.02 prejudgment interest (at 12% per annum pursuant to RCW 19.52.010) on Corbis' \$500,000 contract claim from October 12, 2006 to February 9, 2010. The net prejudgment interest in InfoFlows' favor is the amount of \$209,438.54.
³ The listed amount is the net fee award due InfoFlows – *i.e.*, [InfoFlows' award of attorneys' fees in the amount of \$697,735.80] less [Corbis' award of \$34,699] = \$663,036.80. Costs and other expenses awarded to InfoFlows are noted separately.

1 damages, injunctive relief and declaratory judgment against Corbis. *See* Sub No. 1A for Case
2 No. 07-2-03266-5.

3
4 3. On February 21, 2007, the Court granted InfoFlows' motion to consolidate and
5 the two lawsuits were consolidated under No. 07-2-03244-4 SEA. *See* Sub No. 41

6 4. InfoFlows filed an amended complaint on June 15, 2007, which asserted claims
7 for fraudulent inducement and promissory fraud, breach of contract, breach of the duty of good
8 faith and fair dealing, unjust enrichment, conversion, and trade secret misappropriation
9 (violation of RCW 19.108 *et seq.*), and sought damages, injunctive relief and declaratory
10 judgment against Corbis. *See* Sub No. 73.

11 5. By Order dated October 18, 2007, and pursuant to CR 56 and LR 56, this Court
12 (the Honorable Nicole MacInnes presiding) granted Corbis' Motion for Partial Summary
13 Judgment on its claim against InfoFlows for breach of contract regarding the Jazz Service
14 advance license fee, with damages in the amount of \$500,000.00. *See* Sub No. 126.

15 6. This matter was tried by a jury of 12 from August 3 to August 20, 2009, the
16 Honorable Susan J. Craighead presiding. InfoFlows and Stone appeared through its attorneys
17 of record, Stephen C. Willey and Michele L. Stephen of Savitt Bruce & Willey LLP (then
18 known as Savitt & Bruce LLP). Corbis appeared through its attorneys of record, Karl J.
19 Quackenbush and William P. Brewer of Riddell Williams, P.S.

20 7. By Order dated August 20, 2009, the Court granted InfoFlows' motion for
21 judgment as a matter of law pursuant to CR 50(a) and dismissed Corbis' claim of unfair
22 competition (violation of RCW 19.86 *et seq.*). By the same Order, the Court granted
23 InfoFlows' motion for judgment as a matter of law pursuant to CR 50(a) and dismissed Corbis'
24 contract claims, except insofar as the jury might be presented special verdict questions to
25 inform the Court with regard to requests for injunctive and declaratory relief.

1
2 8. The parties presented 12 days of evidence and testimony to the jury, and on
3 August 24, 2009, the jury returned a verdict in favor of InfoFlows and Stone, with damages on
4 all claims in the total amount of \$36,155,000.00. *See* Sub No. 502.

5 9. By Orders dated November 6, 2009, this Court denied (a) Corbis' Motion for
6 Judgment as a Matter of Law Notwithstanding the Verdict on InfoFlows' Fraudulent
7 Misrepresentation Claim, and (b) Corbis' Motion for Judgment as a Matter of Law, Remittitur
8 or New Trial Regarding Damage Awards. *See* Sub Nos. 558, 557.

9 10. By Order dated November 6, 2009, this Court granted Corbis' Motion for
10 Judgment as a Matter of Law on InfoFlows' Conversion Claim and Verdict Regarding
11 Functional Specifications. *See* Sub No. 559. The jury had awarded InfoFlows \$16,600,000 on
12 its conversion claim against Corbis. *See* Sub No. 502 (at Question No. 12).

13 11. On January 22, 2010, this Court entered an Order, including Findings of Fact
14 and Conclusions of Law, which granted InfoFlows and Stone's Motion in support of Injunctive
15 Relief. *See* Sub No. 591.

16 12. On January 22, 2010, this Court entered an Order, including Findings of Fact
17 and Conclusions of Law, which granted Corbis' Petition for Award of Attorneys' Fees and
18 Costs. *See* Sub No. 593.

19 13. On February 9, 2010, this Court entered an Amended Order, including
20 Findings of Fact and Conclusions of Law, which granted in part and denied in part InfoFlows
21 and Stone's Application for Attorneys' Fees and Cost. *See* Sub No. ____.

22 III. JUDGMENT

23 Based on the foregoing, pursuant to CR 54 and consistent with the jury's verdict in this
24 action and with the Court's rulings prior to trial, during trial and post-trial, the Court hereby
25 enters Judgment as follows:

26 1. In favor of InfoFlows on its claims against Corbis for: (a) fraudulent inducement
27 (fraud by concealment), (b) promissory fraud, (c) breach of contract, (d) breach of the duty of

1 good faith and fair dealing, (e) unjust enrichment, and (f) trade secret misappropriation
2 (violation of RCW 19.108 *et seq.*).

3 2. In favor of InfoFlows on its claim for declaratory judgment, *i.e.*, pursuant to
4 RCW 7.24.010 *et seq.*, the Court hereby declares:

5 (a) that InfoFlows' Fedmark system and services do not breach the
6 Development Agreement by and between InfoFlows and Corbis as entered into on or about
7 June 2, 2006 (the "Development Agreement"),

8 (b) that Fedmark incorporates trade secrets belonging to InfoFlows, and

9 (c) the following source code and related documentation or specifications
10 are not and do not constitute "Work Product" under the Development Agreement: (i) "Crawler
11 Service," (ii) "DNS Service," (iii) "Image Search Service," (iv) "Lead Consolidator Service,"
12 (v) "Seed Service," and (vi) "URI Queue Service".

13 3. Pursuant to the Court's order granting InfoFlows and Stone's Motion in support
14 of Injunctive Relief (*see* Sub No. 591), Corbis, its officers, agents, servants, employees and
15 attorneys, and those persons in active concert or participation with them who receive actual
16 notice of this judgment by personal service or otherwise, are hereby permanently enjoined
17 from:

18 (a) asserting any ownership to InfoFlows' Fedmark system (*f/k/a* Jazz
19 Service) and Fedmark services,

20 (b) making any use, direct or indirect, of or disclosing in any way
21 InfoFlows' trade secret and proprietary information and materials regarding the Jazz Service,
22 including but not limited to:

23 (1) the source code and related documentation known as (A)
24 "Crawler Service," (B) "DNS Service," (C) "Image Search Service," (D) "Lead Consolidator
25 Service," (E) "Seed Service," and (F) "URI Queue Service";

1
2 (2) the source files "Jazz Platform.zip" and/or "Platform.zip", and
3 any of their contents, as well as related design and programming documentation, including
4 without limitation: "Platform.chm" and "Lilltek.chm";

5 (3) the source file "JazzSpider.zip" and any of its contents, as well as
6 related design and programming documentation, including without limitation:
7 "JazzSpider.chm";

8 (4) any summary, digest, narrative description or any other material
9 that Corbis, its officers, agents, servants, employees, attorneys, and/or those persons or entities
10 in concert or participation with them, created based in any part on, or derived in any way from,
11 InfoFlows' code and/or its design and programming documentation described in subparagraphs
12 3(b)(1) through 3(b)(3) above; and

13 (5) Fedmark (f/k/a Jazz Service) system architecture design and
14 implementation (*e.g.*, as set forth in Trial Exhibit 354).

15 (c) developing any "license management system" or other software system
16 or application that in any way relies upon or is derived from InfoFlows' trade secret and
17 proprietary information and materials regarding the Jazz Service.

18 4. Corbis is hereby ordered to return to InfoFlows, within ten (10) days of the entry
19 of this Judgment, InfoFlows' trade secret and proprietary information and materials regarding
20 the Jazz Service, including but not limited to all source code, source files, and related
21 programming, design, architecture and implementation documentation, as described in part in
22 Paragraph 3 above, as well as any material that Corbis, its officers, agents, servants, employees,
23 attorneys, and/or those persons or entities in concert or participation with them, created based
24 in any part on, or derived in any way from, InfoFlows' code and/or its design and programming
25 documentation described in part in Paragraph 3 above.

26 5. Pursuant to the Court's November 6, 2009 order granting Corbis' Motion for
27 Judgment as a Matter of Law on InfoFlows' Conversion Claim and Verdict Regarding

1 Functional Specifications, in favor of Corbis on InfoFlows' claim against it for conversion
2 notwithstanding the verdict. Accordingly, InfoFlows' claim against Corbis for conversion is
3 dismissed with prejudice.

4 6. Pursuant to the Court's November 6, 2009 order granting Corbis' Motion for
5 Judgment as a Matter of Law on InfoFlows' Conversion Claim and Verdict Regarding
6 Functional Specifications, and the Court's letter of the same date, in favor of Corbis with
7 respect to whether "Functional Specifications" constitute "Work Product" under the
8 Development Agreement notwithstanding the verdict.

9 7. Pursuant to the Court's October 18, 2007 order granting summary judgment, in
10 favor of Corbis on its claim against InfoFlows for breach of contract regarding the Jazz Service
11 advance license fee in the amount of \$500,000.00, to be set-off against the total damages
12 awarded to InfoFlows by the jury's verdict (as modified by this Court's post-trial rulings).

13 8. The remaining claims asserted by Corbis against InfoFlows and/or Stone, for
14 breach of contract, trade secret misappropriation (violation of RCW 19.108 *et seq.*), and unfair
15 competition (violation of RCW 19.86 *et seq.*), are dismissed with prejudice.

16 9. Pursuant to the Court's amended order granting in part and denying in part
17 InfoFlows and Stone's Application for Attorneys' Fees and Costs, Corbis shall pay InfoFlows
18 and Stone the amount of \$784,393.32 in fees and costs. *See* Amended Order at § II, ¶ 20. This
19 amount shall be reduced by a set-off in the amount of \$34,699 pursuant to the Court's order
20 granting Corbis' petition for award of attorneys' fees and costs. *See* Order at § IV, ¶ 6.

21 **IT IS SO ORDERED.**

22 DATED this 9 day of February, 2010.

23
24
25 
26 _____
27 Honorable Susan J. Craighead

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27

Presented by:

SAVITT BRUCE & WILLEY LLP

By: 
Stephen C. Wiley, WSBA #24409
Michele L. Stephen, WSBA #39458

Attorneys for InfoFlows Corporation and Steve Stone

FILED
KING COUNTY, WASHINGTON

NOV 06 2009

SUPERIOR COURT CLERK
BY LEANNE SYMONS
DEPUTY

IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

Corbis

Plaintiff/Petitioner,

vs.

Info Flows & Steve Stone

Defendant/Respondent.

NO. 07-2-03244-4

SEA
 KNT

Letter Regarding Corbis Corporation's Motions is attached.
for judgment as a matter of law.

Superior Court of the State of Washington
For the County of King

SUSAN J. CRAIGHEAD
Judge

(206) 296-9211
King County Courthouse
Seattle, Washington 98104-2312
E-mail: susan.craighead@kingcounty.gov

7 November 6, 2009

| | | | |
|------------------------|------------------------|------------------------|------------------------|
| Karl J Quackenbush | William Patrick Brewer | Stephen Charles Willey | Michele Lynn Stephen |
| Riddell Williams PS | Riddell Williams PS | Savitt & Bruce LLP | Savitt & Bruce LLP |
| 1001 4th Ave Ste 4500 | 1001 4th Ave Ste 4500 | 1325 4th Ave Ste | 1325 4th Ave Ste |
| Seattle, WA 98154-1065 | Seattle, WA 98154-1065 | Seattle, WA 98101-2505 | Seattle, WA 98101-2505 |

Corbis v. InfoFlows and Steve Stone, No. 07-2-03244-4

Re: Corbis Corporation's Motions for Judgment as a Matter of Law

Counsel,

Before me are a series of motions for judgment at a matter of law notwithstanding the verdict regarding the following issues: (1) the conversion claim; (2) verdict as to functional specifications; (3) fraudulent misrepresentation; and (4) motion for remittitur or new trial regarding damage awards. I will address each of them in turn.

Conversion:

Conversion is "the unjustified, willful interference with a chattel which deprives a person entitled to the property of possession." Potter v. Washington State Patrol, 165 Wn. 2d 67, 78 (2008). The conversion claim in this case related to source code that InfoFlows made available to Corbis through its Sharepoint website as part of the "Alpha Deliverables." The jury allocated the various "Alpha deliverables" to the parties pursuant to a special verdict question. The jury determined that Corbis had converted InfoFlows' source code and awarded InfoFlows damages of \$16.6 million. At the conclusion of InfoFlows' case, Corbis moved to dismiss the conversion claim pursuant to CR 50(a). I denied the motion, reasoning that since there was no law in Washington regarding the applicability of the tort of conversion to intangible property, it was better to allow the jury to reach a verdict on this question so that in the event I dismissed the claim post-trial and was later reversed, there would be no need for a new trial on this issue. I further observed that it appeared to me that the modern trend in the law appears to apply the tort of conversion to intangible property, although this remains unsettled in Washington. Although Corbis argues that there was no evidence it ever accessed the source code in the Alpha deliverables, in fact the evidence showed that at least some Corbis employees did access it. Whether it was further utilized by Corbis in its continuing effort to develop a license management system is unknown because the court precluded discovery on this point.

Post-trial, Corbis renews its CR 50 motion, arguing that because *copies* of the source code were placed on the Sharepoint site and InfoFlows continued to be able to use its copies of the source code even after the contractual relationship between the parties fell apart, InfoFlows failed to prove the element of "deprivation." It further argues that federal copyright law pre-empts any claim of conversion of source

code. Corbis did not raise copyright in its CR 50(a) motion. No Washington law addresses these issues and the parties cite to a relatively limited set of federal cases. Although it does not appear to me that the tort of conversion is necessarily pre-empted by copyright law, I am specifically declining to reach that issue because it was not raised by Corbis as part of its CR 50(a) motion.¹

After reviewing case law cited by Corbis, however, it appears to me that InfoFlows failed to establish that it was deprived of its source code by virtue of making copies of it available to Corbis on the Sharepoint site, even assuming that the copies were downloaded and retained by Corbis. See e.g. Calence, LLC v. Dimension Data Holdings, 2007 WL 1526349 (W.D. Wash. 2007); Internet Archive V. Shell, 505 F. Supp. 2d 755 (D. Colo. 2007); Furash & Company, Inc. v. McClave, 130 F. Supp. 2d 48 (D.D.C. 2001). InfoFlows fails to persuade me that proof of deprivation is not required. Accordingly, by separate order I will enter judgment as a matter of law notwithstanding the verdict dismissing the conversion claim.

Functional Specifications:

As noted above, the jury was asked to determine for which party various items constituted Work Product under the Development Agreement, including the Functional Specifications. The jury determined that the Functional Specifications constituted InfoFlows' Work Product. Corbis argues that the jury's finding on this point was not supported by the evidence or the language of the Development Agreement. The Court notes that in closing argument, InfoFlows specifically told the jury that the Functional Specifications belonged to Corbis. I agree with Corbis that neither the evidence nor the Development Agreement supports the jury's finding. By separate order I will enter judgment for Corbis on this issue.

Fraud by Misrepresentation:

Corbis moves for judgment as a matter of law notwithstanding the verdict on InfoFlows' claim of fraudulent misrepresentation. It moved to dismiss this claim pursuant to CR 50(a) on the grounds that the subject matter of the alleged misrepresentation (collaboration on future patents) was addressed in the Development Agreement and the Development Agreement included an integration clause. Post-trial, Corbis supplements this argument with the contention that insufficient evidence supported the finding of fraudulent misrepresentation. Although it is not clear that it is proper to allow a party to renew its CR 50 motion on such a basis, when it was not argued previously, I will nonetheless address both arguments.

I have reviewed the cases upon which Corbis relies (Goel v. Jain, 159 F.Supp.2d 1128 (W.D. Wash. 2003); One-O-One Enterprises, Inc. v. Caruso, 668 F. Supp. 693 (D.C. Cir. 1987)). While I see Corbis' argument, it is not an argument I can accept in light of the jury's resolution of the issues. Only if one accepts Corbis' theory of the case could the integration clause defeat InfoFlows' fraudulent misrepresentation claim. But in analyzing this motion, I must consider all of the evidence and inferences from the evidence in InfoFlows' favor. Corbis' motion is denied on this ground.

¹ I recognize that the argument regarding conversion pursuant to CR 50(a) focused more on whether the tort applies to intangible objects, rather than on deprivation. The law in this area is sparse and the issues nebulous; I am reluctant to interpret CR 50 so narrowly as to preclude argument regarding one element of conversion in this setting and not on another.

Similarly, I must also conclude that substantial evidence supports the jury's verdict on the fraudulent misrepresentation claim, viewing the evidence most in the light most favorable to InfoFlows. Corbis plucks from a three week trial a few fragments of evidence to argue that the nine elements of fraud are not proven here. I must consider the broad sweep of the evidence as the jury heard it, however. The jury could have, and probably did, believe Steve Stone's testimony that he believed that he and Corbis had an understanding about how they would co-operate to patent technologies that could arguably belong to both companies. The jury could have found Corbis' witnesses not credible concerning their recollections of conversations with Stone. The jury could also have concluded that Corbis never had any intention of honoring that promise since, after all, it had secretly filed a patent application on InfoFlows' technology. Taking into account all of the evidence at trial, and the inferences the jury could reasonably have drawn from it, legally sufficient evidence supports the jury's verdict as to fraud by misrepresentation. Corbis' motion for judgment as a matter of law notwithstanding the verdict is denied.

Damages/Remittitur

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. Under this provision, if Corbis terminated the contract without cause, it was required to pay InfoFlows for any milestones reached and accepted by Corbis at the date of termination, as well as a pro-rata share of the next milestone payment due. In making its CR 50 argument, Corbis takes the position that the jury instructions allowed the jury to award duplicative damages – for breach of contract, fraud in the inducement, and fraud by misrepresentation;² Corbis asserts that the jury was erroneously instructed to award “benefit of the bargain” damages for each category, and that the jury should have been instructed that it could award contract damages or fraud damages, but not both.

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. I do not agree with Corbis' characterization of the instructions or the evidence that supported the jury's determination of these issues, but regardless I am compelled to deny Corbis' CR 50 motion because none of these arguments were made prior to instructing the jury. Corbis never made a CR 50(a) motion as to any of these issues, so it cannot “renew” its motion post-trial.

In the alternative, Corbis moves for remittitur or new trial under RCW 4.76.030 and CR 59(a) (5), (6), (7), and (9). The court may order a new trial under these provisions only when it finds the damages awarded to have be so excessive as unmistakably to indicate that the verdict “must have been the result of passion or prejudice.” CR 59(a)(5). Corbis also relies heavily on CR 59(a)(7), which applies where there is no evidence or reasonable inference from the evidence to justify the verdict. The case law and the statute make clear that the presumption is that a jury's verdict is correct; especially in light of Washington's constitutional right to a jury trial, the trial court must not substitute its own views for those of the jury. Bunch v. King County Department of Youth Services, 155 Wn.2d 165, 174 (2005). This court wants to emphasize that it has considered this issue very thoroughly. Although it may be unusual

² I am not reaching Corbis' arguments concerning damages for conversion, as this claim is to be dismissed on other grounds.

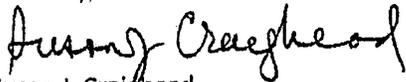
for a jury to act under the influence of passion and prejudice in a business case, I must acknowledge that this jury may have been angry with Corbis and witnesses they plainly did not believe. And the jury was aware that Corbis is owned by Bill Gates.

Turning first to the contract damages: \$3.25 million. Corbis argues that at most the evidence and the law support a verdict of \$1 million under the Development Agreement's termination clause. But \$3.25 million represents the total amount InfoFlows could have expected to have earned had both side performed under the contract in good faith. The jury determined that Corbis breached its duty of good faith and fair dealing; the evidence suggested that Corbis either had little intention of performing its obligations under the contract or had insufficient technical support to work with InfoFlows on the joint development of a license management system. Either way, the jury could justifiably conclude that InfoFlows would have performed in good faith and assume that if Corbis had been willing and able to have done so, InfoFlows would have earned the \$3.25 million. The motion for a new trial is denied as to the contract damages.

Corbis next attacks the Corbis argues that the \$7 million award for fraudulent inducement because it represents the sum of the maximum revenues InfoFlows could have received if InfoFlows had completely performed on the Development Agreement and the parties had entered into the Jazz Service Agreement, without any reduction for InfoFlows' costs in performing on these contracts. Corbis misconstrues the court's instruction on damages for fraudulent inducement, Instruction No. 33. Under this instruction, 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. In short, there was ample evidence upon which the jury could award \$7 million in damages for fraudulent inducement, and this court is not willing to disturb the jury's award on this claim. In light of this evidence, I cannot conclude that the award was the result of passion or prejudice.

Corbis next argues for a new trial on the issue of damages for fraudulent misrepresentation (\$9.28 million). It argues that "benefit of the bargain" damages should have been co-extensive with contract damages. Here, however, the benefit of the bargain would have been for Corbis and InfoFlows to have coordinated on patent applications. The evidence showed that Stone valued InfoFlows' service at \$30 million and Corbis valued it at ranging from \$3 million to \$20 million per year. There was evidence before the jury to support its determination that the value of the exclusive rights in InfoFlows service that patent protection would provide could have been \$9.28 million. I cannot conclude that their award was the result of passion or prejudice. I am not willing to disturb the jury's award on this claim.

Sincerely,



Susan J. Craighead
Judge

The Honorable Susan Craighead

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

CORBIS CORPORATION, a Nevada
corporation,

Plaintiff,

v.

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

Defendants,

INFOFLOWS CORPORATION, a
Washington corporation,

Plaintiff,

CORBIS CORPORATION, a Nevada
corporation.

Defendant.

No. 07-2-03244-4 SEA

VERDICT FORM

We, the jury, make the following answers to the questions submitted by the Court:

QUESTION NO. 1: Do you find by clear, cogent, and convincing evidence that
Corbis fraudulently induced InfoFlows to enter into the Development Agreement?

Answer: YES (Yes or No)

1 If you answered "Yes" to Question No. 1, please state the amount of
2 InfoFlows' damages for Corbis' fraudulent inducement against InfoFlows.
3 Otherwise, please skip this question and go on to Question No. 2.

4 Amount: \$ 7 MILLION

5 QUESTION NO. 2: Do you find by clear, cogent, and convincing evidence that
6 Corbis committed fraud by misrepresentation against InfoFlows?

7 Answer: YES (Yes or No)

8 If you answered "Yes" to Question No. 2, please state the amount of
9 InfoFlows' damages for Corbis' fraud by misrepresentation against InfoFlows.
10 Otherwise, please skip this question and go on to Question No. 3.

11 Amount: \$ 9.28 MILLION

12 QUESTION NO. 3: Do you find that Corbis breached its duty of good faith and
13 fair dealing under the Development Agreement?

14 Answer: YES (Yes or No)

15 Proceed to Question No. 4.

16 QUESTION NO. 4: Do you find by a preponderance of the evidence that Corbis
17 breached the Development Agreement (Exhibit 43)?

18 Answer: YES (Yes or No)

19 If you answered "Yes" to Question 3 or 4, please state the amount of
20 InfoFlows' damages for Corbis' breach. Otherwise, please skip this question and go
21 on to Question No. 5.

22 Amount: \$ 3.25 MILLION

23 QUESTION NO. 5: Which of the following source code (Ex. 77) or specifications
24 constituted Work Product under the Development Agreement?

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

| | Work Product | Not Work Product |
|--------------------------------------|--------------|------------------|
| Analysis Engine | ✓ | |
| Boulder Ridge Database | ✓ | |
| Boulder Ridge Middle Tier | ✓ | |
| Exhibit A Generator | ✓ | |
| Corbis Image Importer | ✓ | |
| Boulder Ridge Alpha Operational Spec | ✓ | |
| Crawler Service | | ✓ |
| DNS Service | | ✓ |
| Image Search Service | | ✓ |
| Lead Consolidator Service | | ✓ |
| Seed Service | | ✓ |
| URI Queue Service | | ✓ |
| Business Requirements Document | ✓ | |
| Functional Specifications | | ✓ |
| Phase 1 Acceptance Criteria | ✓ | |

Proceed to Question No. 6.

QUESTION NO. 6: Do you find by a preponderance of the evidence that Steve Stone misappropriated trade secrets of Corbis?

Answer: NO (Yes or No)

Proceed to Question No. 7.

QUESTION NO. 7: Do you find by a preponderance of the evidence that InfoFlows misappropriated trade secrets of Corbis?

Answer: NO (Yes or No)

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

Proceed to Question No. 8.

QUESTION NO. 8: Do you find by a preponderance of the evidence that InfoFlows' "Fedmark" system breaches the Development Agreement?

Answer: NO (Yes or No)

Proceed to Question No. 9.

QUESTION NO. 9: Does "Fedmark" incorporate trade secrets?

Answer: YES (Yes or No)

If your answer to Question No. 9 is yes, go on to Question 10; if your answer is no, then skip to Question 11.

QUESTION NO. 10: If your answer to Question 9 was yes, to which party do the trade secrets belong?

 Corbis InfoFlows Both

QUESTION NO. 11: Do you find by a preponderance of the evidence that Corbis misappropriated trade secrets of InfoFlows?

Answer: YES (Yes or No)

Proceed to Question No. 12.

QUESTION NO. 12: Do you find by a preponderance of the evidence that Corbis converted property belonging to InfoFlows?

Answer: YES (Yes or No)

If you answered "Yes" to Question No. 12, please state the amount of value of money or goods belonging to InfoFlows that was converted by Corbis. Otherwise, please skip this question and go on to Question No. 13.

Amount: \$ 16.6 MILLION

QUESTION NO. 13: Do you find by a preponderance of the evidence that Corbis was unjustly enriched?

Answer: YES (Yes or No)

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

If you answered "Yes" to Question No. 13, please state the amount Corbis was unjustly enriched. If you answered "No" to Question No. 13, then you have completed the verdict form.

Amount: \$ 25,000⁰⁰

You have completed this verdict form. Please sign the verdict form and return it to the bailiff.

Dated: August 24, 2009

George Tunkell
Foreperson

INSTRUCTION NO. 3

1
2 You shall find for InfoFlows on its claim for fraudulent inducement by concealment if
3 you determine that Corbis intentionally remained silent when it had a duty to disclose a
4 material fact.
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27

INSTRUCTION NO. 32

2 In the context of a business transaction, a party has a duty to disclose before the
3 transaction is complete if:

4 1. that party knows something that that party knows to be necessary to prevent that
5 party's partial or ambiguous statement of the facts from being misleading regarding a subject
6 that he has reason to know the other party will regard as important in determining his course of
7 action; or

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

INSTRUCTION NO. 33

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

3 In determining damages, you may consider the following factors:

- 4 1. the value the parties placed on the Development Agreement, keeping in mind
5 that the price in the contract is not necessarily determinative of its value;
 - 6 2. the value the parties place on the possible licensing and use of the Jazz Service
7 and the likelihood the parties would have entered into the Jazz Service Agreement; and
 - 8 3. the likelihood that InfoFlows would have secured other business opportunities
9 had it not entered into the Development Agreement.
- 10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

INSTRUCTION NO. 34

There are nine essential elements of fraud by affirmative misrepresentation. Each element of fraud must be established by clear, cogent, and convincing evidence. The nine elements of fraud are:

- (1) Representation of an existing fact;
- (2) Materiality of the representation;
- (3) Falsity of the representation;
- (4) The speaker's knowledge of its falsity;
- (5) The speaker's intent that it be acted upon by the InfoFlows;
- (6) InfoFlows' ignorance of the falsity;
- (7) InfoFlows' reliance on the truth of the representation;
- (8) InfoFlows' right to rely upon it; and
- (9) Resulting damages.

To satisfy the reliance element of fraud, a representation must have been of such a nature and degree and have been made in such circumstances that the injured party had a right to rely on it and that reliance is justifiable.

INSTRUCTION NO. 35

A promise of future performance is not a representation of an existing fact and will not support an action for fraud or intentional misrepresentation. However, a promise made with no intention of being kept is a misrepresentation of an existing fact and may be the basis of an action for fraud if all other elements are proven.

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25
- 26

INSTRUCTION NO. 38

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."

570

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

INSTRUCTION NO. 35

Fraudulent Concealment

Absent an affirmative duty to disclose material facts, a parties silence does not constitute fraudulent concealment. For failure to speak to be fraudulent, there must be a fiduciary duty or similar relationship of trust and confidence existing between the parties. Absent such a special relationship, parties engaged in an arm's length transaction do not have a duty to disclose.

Crisman v. Crisman, 85 Wash. App. 15, 22 (1997); *Reyes v. Atlantic Richfield*, 12 F.3d 1464, 1472 (9th Cir. 1993); *Williams v. Joslin*, 65 Wn.2d 696, 698 (1965); *One-O-One Enterprises, Inc. v. Caruso*, 848 F.2d 1283, 1286-87 (D.C. Cir. 1988)

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

The Honorable Susan J. Craighead

FILED
KING COUNTY, WASHINGTON

AUG 10 2009

SUPERIOR COURT OF THE STATE OF WASHINGTON
IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING
CLERK

CORBIS CORPORATION, a Nevada corporation,

Plaintiff,

v.

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

Defendants,

INFOFLOWS CORPORATION, a Washington corporation,

Plaintiff,

CORBIS CORPORATION, a Nevada corporation,

Defendant.

No. 07-2-03244-4 SEA

CORBIS' PROPOSED CAUTIONARY INSTRUCTION REGARDING ATTORNEY CLIENT PRIVILEGE

The law protects the confidentiality of communications made by a client to his attorney, or the attorney's advice given thereon in the course of professional employment.

This is called the attorney-client privilege. The assertion of attorney client privilege by

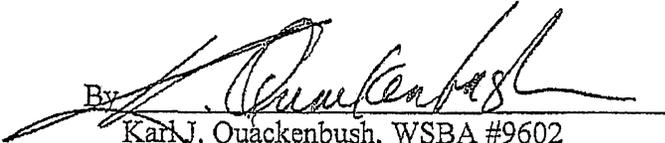
CORBIS' PROPOSED CAUTIONARY INSTRUCTION
RE: ATTORNEY CLIENT PRIVILEGE
4813-2087-4242.01
081009/0731/63480.00001

Riddell Williams P.S.
1001 FOURTH AVENUE
SUITE 4500
SEATTLE, WA 98154-1192
206.624.3600

1 any party regarding attorney client communications, or the withholding of documents or
2 portions of documents on that basis, is not evidence in this case and you should not draw
3 any inference based on the assertion of attorney client privilege by any party.
4

5
6 DATED this 10th day of August, 2009.

7 RIDDELL WILLIAMS P.S.

8
9 By 

10 Karl J. Quackenbush, WSBA #9602

11 William P. Brewer, WSBA #37055

12 Attorneys for

13 CORBIS CORPORATION
14
15
16
17
18
19
20
21
22
23
24
25
26

CORBIS' PROPOSED CAUTIONARY INSTRUCTION
RE: ATTORNEY CLIENT PRIVILEGE
4813-2087-4242.01
081009/0731/63480.00001

Riddell Williams P.S.
1001 FOURTH AVENUE
SUITE 4500
SEATTLE, WA 98154-1192
206 624.3600

Development Agreement

This Development Agreement (the "Development Agreement") is entered into by and between Corbis Corporation ("Corbis"), a Washington corporation located at 710 Second Avenue, Seattle Washington 98104, and InfoFlows Corporation ("InfoFlows"), a Washington corporation located at 1903 205th Place NE, Sammamish Washington 98074, and is effective as of April 28, 2006 (the "Effective Date"). In this Development Agreement Corbis and InfoFlows may be referred to individually as a "Party" and collectively as the "Parties"

Recitals

Whereas, on June 21, 2004 the Parties entered into a Corbis Corporation Independent Contractor Agreement ("ICA"), pursuant to which the Parties executed three Statements of Work (collectively, the "SOWs"), under which InfoFlows, in part, developed for Corbis under the code names "Project Baker" and "Boulder Ridge", various models and working demonstrations of a Corbis License Management System (the "System", as defined below);

Whereas, the Parties now desire to enter into this Development Agreement pursuant to which InfoFlows will develop a completely operational version of the System for Corbis in a two phase development process, all as set forth herein;

Whereas, upon Corbis' acceptance of all of the deliverables for both phases of the System, Corbis is willing to grant pursuant to a separate agreement attached hereto, certain license rights in the System to InfoFlows for exploitation by InfoFlows in certain specified markets on the terms and conditions set forth therein; and

Now Therefore, in consideration of the mutual promises and covenants herein, and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Parties agree as follows:

Agreement

1. Definitions. As used in this Development Agreement (whether in the singular or plural), the following capitalized terms have the following meanings

"Claims" has the meaning ascribed to it in Section 12(a).

"Corbis Materials" means any documents, materials, computer code, suggestions, drawings, and/or other input provided by or on behalf of Corbis to InfoFlows for use in connection with the provision of the Services

"Deliverables" refers collectively to the Phase 1 Deliverables and the Phase 2 Deliverables.

"Error" means, with respect to any Deliverable: (i) any deviation from or non-conformity with any requirement of the Phase 1 Specifications or the Phase 2 Specifications (as applicable); (ii) any failure to perform in accordance with the Phase 1 Acceptance Criteria or the Phase 2 Acceptance Criteria (as applicable); or (iii) any other error or bug that adversely affects the operation or performance of the Deliverable

"ICA" has the meaning ascribed to it in the first Recital

EXHIBIT
Exhibit 43

App. E

Approved by Corbis Legal
By: DAW
Date: 5-30-06

EXHIBIT G

12 (1-43)
Ex: 23002
Wit: 4-11-07
Date: 4-11-07
MILLS & LESSARD
(206) 292-9063

12.1

"Indemnified Party" has the meaning ascribed to it in Section 12(a)

"Intellectual Property Rights" means all present and future patents (including patent applications, reissues, divisions, continuations, and extensions), utility models, copyrights, trade secrets, mask work rights, moral rights and any other form of intellectual property rights protection and other proprietary rights afforded by law to inventions, works of authorship, technical information and the like, including applications for any of the foregoing.

"Jazz Service" has the meaning ascribed to it in Section 9

"Jazz Service Agreement" has the meaning ascribed to it in Section 9

"Jazz Service Fee Advance" has the meaning ascribed to it in Section 9

"NDA" has the meaning ascribed to it in Section 10(a)

"Object Code" means machine-executable computer software code in binary form

"Open Source License" means any license that requires as a condition of use, modification and/or distribution of software, that such software or other software combined and/or distributed with such software be (a) disclosed or distributed in Source Code form; (b) licensed for the purpose of making derivative works; or (c) redistributable at no charge

"Phase 1" means the portion of the System to be used internally by Corbis, primarily in managing compliance, enforcement and anti-piracy activities with respect to Corbis' database of images and other digital content. The complete features, functions and specifications of Phase 1 are set forth in the Phase 1 Specifications. InfoFlows shall deliver a working deployment of Phase 1 of the System, as soon as reasonable practicable, but not later than December 1, 2006, for use by the Business and Legal Affairs department ("BLA"), and other internal business units within Corbis (e.g., by Corbis' marketing unit) ("Other Business Units"). In the event it is not possible for InfoFlows to enable Phase 1 usage by the Other Business Units, such capability will be enabled by InfoFlows as part of Phase 2.

"Phase 2" means the portion of the System to be used by Corbis' licensees in monitoring and managing their use of Corbis images and other Corbis digital content. The basic features and functions of Phase 2 are set forth in the attached Exhibit C to this Development Agreement. The complete features, functions and specifications of Phase 2 will be set forth in the Phase 2 Specification to be developed by InfoFlows and accepted by Corbis as set forth in Section 3(b)

"Phase 1 Acceptance Criteria" means the capabilities, features, and performance standards that Phase 1 of the System as developed and delivered by InfoFlows must have and/or meet in order for Corbis to be obligated accept the Phase 1 Deliverables.

"Phase 2 Acceptance Criteria" means the capabilities, features, and performance standards that Phase 2 of the System as developed and delivered by InfoFlows must have and/or meet in order for Corbis to be obligated accept the Phase 2 Deliverables.

"Phase 1 Deliverables" means the computer code (in both Source Code and Object Code forms), documentation and other related items required to be developed and delivered by

InfoFlows to Corbis in connection with InfoFlows' performance of the Phase 1 Services. The Phase 1 Deliverables are set forth in the attached Exhibit B.

"Phase 2 Deliverables" means the computer code (in both Source Code and Object Code forms), documentation and other related items required to be developed and delivered by InfoFlows to Corbis in connection with InfoFlows' performance of the Phase 2 Services. A listing of the Phase 2 Deliverables will be developed by InfoFlows pursuant to Section 3(a) and accepted by Corbis pursuant to Section 3(b).

"Phase 1 Schedule" means the schedule for the provision of the Phase 1 Services and delivery of the Phase 1 Deliverables. The Phase 1 Schedule is attached hereto as Exhibit A.

"Phase 2 Schedule" means the schedule for the provision of the Phase 2 Services and delivery of the Phase 2 Deliverables. A preliminary Phase 2 Schedule is attached as Exhibit D. The final Phase 2 Schedule will be developed by InfoFlows as set forth in Section 3(a) and accepted by Corbis as set forth in Section 3(b).

"Phase 1 Specifications" means the detailed specifications for the operational version of Phase 1 of the System, which specifications will include, at a minimum, the elements described in Section 2(a).

"Phase 2 Specifications" means the detailed specifications for the operational version of Phase 2 of the System, which specifications will include, at a minimum, the elements described in Section 3(a).

"Services" means all activities necessary for InfoFlows to write the Specifications, to design, develop and deliver the Deliverables, and (if required) to correct the Deliverables and to create Upgrades, regardless of whether or not any individual activity is specifically described in this Development Agreement. The "Phase 1 Services" refers to the Services applicable to Phase 1 and the "Phase 2 Services" refers to the Services applicable to Phase 2.

"Source Code" means computer software code in human-readable, high-level language form which, when compiled or assembled, becomes the Object Code of a software program. Source Code includes all logic diagrams, flow charts, and developer comments concerning the relevant software code.

"SOWs" has the meaning ascribed to it in the first Recital.

"Specifications" refers to both the Phase 1 Specifications and the Phase 2 Specifications.

"System" means the Corbis License Management System as such system has been defined and agreed to by the Parties under SOW #3, and the other SOWs as applicable.

"Third Party Fingerprinting Technology" means the software code described in Exhibit E, which software code will be provided by a third party and which software code is necessary for the System to operate as contemplated by the Parties.

"Third Party Materials" means the Third Party Watermarking Technology and the Third Party Fingerprinting Technology.

"Third Party Watermarking Technology" means the software code described in Exhibit F, which software code will be provided by a third party and which software code is necessary for the System to operate as contemplated by the Parties

"Upgrades" has the meaning ascribed to it in Section 5(e)

"Work Product" means all results and proceeds of the Services, including without limitation the Phase 1 Specifications, the Phase 1 Deliverables, the Phase 2 Specifications, the Phase 2 Deliverables, Error corrections and any other specifications, schematics, designs, prototypes, software code, documentation, reports, memoranda, studies or plans developed by or for InfoFlows in connection with its performance of the Services. The Work Product specifically excludes, however, the Third Party Materials

2. Phase 1 Development Obligations and Process.

(a) InfoFlows' Creation of the Phase 1 Specifications and the Phase 1 Acceptance Criteria. InfoFlows will develop for Corbis' review and acceptance, the Phase 1 Specifications and the Phase 1 Acceptance Criteria. InfoFlows will work collaboratively with Corbis during its development of the foregoing items in order to ensure that such items meet Corbis' requirements. With respect to the Phase 1 Specifications, they will be in a form sufficient to enable any third party in the business to build, modify, service and maintain Phase 1 of the System and will include the following elements:

(i) Business Requirements: A general, narrative description of what Phase 1 of the System will accomplish. This portion of the Phase 1 Specifications will include: (1) high-level workflows that show the relationships among the various business processes addressed by Phase 1 of the System; (2) process models that illustrate the details of those business processes pertinent to the goals for Phase 1; and (3) use cases that present process details for Phase 1 as appropriate.

(ii) Functional Specifications: A detailed description of all user and Phase 1 System triggered events. At a minimum, there will be one detailed functional specification per application contained in Phase 1 of the System. Complicated functionality and data relationships will be clearly set forth with a visual representation of the problem domain using standard analysis and software design modeling notation, such as UML.

(iii) Data Specifications: A detailed description of data migration and/or conversion requirements. The data migration portion of the Phase 1 Specifications will describe the rules for importing data from one system to another. This includes details for maintaining synchronization between databases, if necessary. The data conversion portion of the Phase 1 Specifications will describe the data transformation and data replication events governing movement of information from system-to-system.

(iv) Required Hardware: A detailed description of the computer hardware required to have Phase 1 of the System function in accordance with the Phase 1 Specifications.

(v) User Interface: A detailed description of the layout and design of the user interfaces for Phase 1 of the System.

With respect to the Phase 1 Acceptance Criteria, such Acceptance Criteria will include the set of measurable objectives by which each Phase 1 Deliverable will be tested for purposes of acceptance (e.g., compliance with the relevant portions of the Phase 1 Specifications, the data processing capabilities and task times for such Phase 1 Deliverable, etc.) InfoFlows will use its commercially reasonable best efforts to complete the Phase 1 Specifications and the Phase 1 Acceptance Criteria and to deliver them to Corbis for its acceptance no later than July 1, 2006.

(b) **Corbis' Acceptance of the Phase 1 Specifications and the Phase 1 Acceptance Criteria.** Corbis will have ten (10) days after receipt of the Phase 1 Specifications and the Phase 1 Acceptance Criteria to review and accept or reject the same by giving written notice to InfoFlows. Corbis' acceptance of the Phase 1 Specifications and the Phase 1 Acceptance Criteria shall be in Corbis' sole discretion, provided that Corbis agrees not to unreasonably withhold its acceptance. In the event Corbis rejects the Phase 1 Specifications and/or the Phase 1 Acceptance Criteria, Corbis will give InfoFlows a written report detailing the reasons for its rejection and InfoFlows will have ten (10) days to revise the rejected item and to deliver another version to Corbis for its acceptance. Corbis will have ten (10) days following receipt of a revised item to review and accept the same. If Corbis rejects the revised item, then Corbis in its discretion may either extend the correction period or terminate this Development Agreement effective upon Corbis' giving written notice to InfoFlows.

(c) **InfoFlows' Development and Delivery of the Phase 1 Deliverables.** Promptly following Corbis' written acceptance of the Phase 1 Specifications and the Phase 1 Acceptance Criteria, InfoFlows will develop and deliver the Phase 1 Deliverables to Corbis, all in accordance with the Phase 1 Specifications and the Phase 1 Schedule.

(d) **Phase 1 Change Orders.** InfoFlows agrees that at any time during InfoFlows' performance of the Phase 1 Services, Corbis may require changes to such Phase 1 Specifications. Within ten (10) days of Corbis' request for any such change, InfoFlows will provide Corbis with a written response setting forth the details of InfoFlows' reasonable, good faith, best estimate of any change to the Phase 1 Schedule that would be required to accomplish such change to the Phase 1 Specifications, the effect such change would have on the performance of any of the Phase 1 Deliverables and any corresponding required change to the Phase 1 Acceptance Criteria, as well as InfoFlows' good faith estimate of any increase (or decrease) in the cost and/or time of development resulting from such change. Corbis may accept InfoFlows' estimates or may in good faith propose its own estimate of any of the foregoing, and the Parties will work together in good faith to agree in writing upon any appropriate adjustments to the Phase 1 Specifications, the Phase 1 Schedule, the Phase 1 Acceptance Criteria and the payments to be made by Corbis as set forth in Section 7(a).

(e) **Corbis' Evaluation and Acceptance of the Phase 1 Deliverables.** After InfoFlows' delivery to Corbis of a Phase 1 Deliverable, Corbis will have fifteen (15) days to test and evaluate each such Phase 1 Deliverable for errors. Within such time period, Corbis will notify InfoFlows in writing of Corbis' acceptance or rejection of the Phase 1 Deliverable. If Corbis does not notify InfoFlows in writing of Corbis' acceptance or rejection of a Phase 1 Deliverable within such period, the Phase 1 Deliverable will be deemed rejected. If Corbis rejects a Phase 1 Deliverable, Corbis will inform InfoFlows in writing of the errors identified by Corbis, and InfoFlows will have ten (10) days to correct such errors and deliver a corrected Phase 1 Deliverable to Corbis. Corbis will then evaluate and accept or reject such corrected Phase 1 Deliverable pursuant to the process described above. If Corbis rejects the corrected Phase 1 Deliverable, then Corbis in its discretion may either extend the correction period or terminate this Development Agreement effective upon Corbis' giving written notice to InfoFlows.

(f) **Post Acceptance Correction of Errors.** If at any time within two years after Corbis' acceptance of the final Phase 1 Deliverable, Corbis identifies an Error in any Phase 1 Deliverable, then upon Corbis' request, InfoFlows will fix such Error as promptly as reasonably possible and at no charge to Corbis. If InfoFlows becomes aware of any Error in any Phase 1 Deliverable, InfoFlows will promptly notify Corbis of the nature and details of the Error.

3. Phase 2 Development Obligations and Process.

(a) **InfoFlows' Creation of the Phase 2 Specifications, a listing of the Phase 2 Deliverables, the Phase 2 Schedule and the Phase 2 Acceptance Criteria.** InfoFlows will develop for Corbis' review and acceptance: (1) the Phase 2 Specifications; (2) a listing of the Phase 2 Deliverables; (3) the Phase 2 Schedule; and (4) the Phase 2 Acceptance Criteria. InfoFlows will work collaboratively with Corbis during its development of the foregoing items in order to ensure that such items meet Corbis' requirements. With respect to the Phase 2 Specifications, they will be in a form sufficient to enable any third party in the business to build, modify, service and maintain Phase 2 of the System and will include the following elements:

(i) **Business Requirements:** A general, narrative description of what Phase 2 of the System will accomplish. This portion of the Phase 2 Specifications will include: (1) high-level workflows that show the relationships among the various business processes addressed by Phase 2 of the System; (2) process models that illustrate the details of those business processes pertinent to the goals for Phase 2; and (3) use cases that present process details for Phase 2 as appropriate.

(ii) **Functional Specifications:** A detailed description of all user and Phase 2 System triggered events. At a minimum, there will be one detailed functional specification per application contained in Phase 2 of the System. Complicated functionality and data relationships will be clearly set forth with a visual representation of the problem domain using standard analysis and software design modeling notation, such as UML.

(iii) **Data Specifications:** A detailed description of data migration and/or conversion requirements. The data migration portion of the Phase 2 Specifications will describe the rules for importing data from one system to another. This includes details for maintaining synchronization between databases, if necessary. The data conversion portion of the Phase 2 Specifications will describe the data transformation and data replication events governing movement of information from system-to-system.

(iv) **Required Hardware:** A detailed description of the computer hardware required to have Phase 2 of the System function in accordance with the Phase 2 Specifications.

(v) **User Interface:** A detailed description of the layout and design of the user interfaces for Phase 2 of the System.

With respect to the listing of the Phase 2 Deliverables, such list will include a complete listing of each Phase 2 Deliverable to be delivered by InfoFlows to Corbis as part of the Phase 2 Services. With respect to the Phase 2 Schedule, such Schedule will set forth the definitive schedule for the Phase 2 Services and the definitive dates for the delivery of each of the Phase 2 Deliverables, such schedule to be substantially in accordance with the preliminary Phase 2 Schedule attached.

hereto as Exhibit D. With respect to the Phase 2 Acceptance Criteria, such Acceptance Criteria will include the set of measurable objectives by which each Phase 2 Deliverable will be tested for purposes of acceptance (e.g., compliance with the relevant portions of the Phase 2 Specifications, the data processing capabilities and task times for such Phase 2 Deliverable, etc.) InfoFlows will use its commercially reasonable best efforts to complete the Phase 2 Specifications, the listing of the Phase 2 Deliverables, the Phase 2 Schedule and the Phase 2 Acceptance Criteria and to deliver them to Corbis for its acceptance no later than November 1, 2006.

(b) **Corbis' Acceptance of the Phase 2 Specifications, the Listing of the Phase 2 Deliverables, the Phase 2 Schedule and the Phase 2 Acceptance Criteria.** Corbis will have ten (10) days after receipt of the Phase 2 Specifications, the listing of the Phase 2 Deliverables, the Phase 2 Schedule and the Phase 2 Acceptance Criteria to review and accept or reject the same by giving written notice to InfoFlows. Corbis' acceptance of the Phase 2 Specifications, the listing of the Phase 2 Deliverables, the Phase 2 Schedule and the Phase 2 Acceptance Criteria shall be in Corbis' sole discretion, provided that Corbis agrees not to unreasonably withhold its acceptance. In the event Corbis rejects the Phase 2 Specifications, the Phase 2 Acceptance Criteria and/or the listing of the Phase 2 Deliverables, Corbis will give InfoFlows a written report detailing the reasons for its rejection and InfoFlows will have ten (10) days to revise the rejected item and to deliver another version to Corbis for its acceptance. Corbis will have ten (10) days following receipt of a revised item to review and accept the same. If Corbis rejects the revised item, then Corbis in its discretion may either extend the correction period or terminate this Development Agreement effective upon Corbis' giving written notice to InfoFlows.

(c) **InfoFlows' Development and Delivery of the Phase 2 Deliverables.** Promptly following Corbis' written acceptance of the Phase 2 Specifications, the listing of the Phase 2 Deliverables, the Phase 2 Schedule and the Phase 2 Acceptance Criteria, InfoFlows will develop and deliver the Phase 2 Deliverables to Corbis, all in accordance with the Phase 2 Specifications and the Phase 2 Schedule.

(d) **Phase 2 Change Orders.** InfoFlows agrees that at any time during InfoFlows' performance of the Phase 2 Services, Corbis may require changes to such Phase 2 Specifications. Within ten (10) days of Corbis' request for any such change, InfoFlows will provide Corbis with a written response setting forth the details of InfoFlows' reasonable, good faith, best estimate of any change to the Phase 2 Schedule that would be required to accomplish such change to the Phase 2 Specifications, the effect such change would have on the performance of any of the Phase 2 Deliverables and any corresponding required change to the Phase 2 Acceptance Criteria, as well as InfoFlows' good faith estimate of any increase (or decrease) in the cost and/or time of development resulting from such change. Corbis may accept InfoFlows' estimates or may in good faith propose its own estimate of any of the foregoing, and the Parties will work together in good faith to agree in writing upon any appropriate adjustments to the Phase 2 Specifications, the Phase 2 Schedule, the Phase 2 Acceptance Criteria and the payments to be made by Corbis as set forth in Section 7(a).

(e) **Corbis' Evaluation and Acceptance of the Phase 2 Deliverables.** After InfoFlows' delivery to Corbis of a Phase 2 Deliverable, Corbis will have fifteen (15) days to test and evaluate each such Phase 2 Deliverable for Errors. Within such period, Corbis will notify InfoFlows in writing of Corbis' acceptance or rejection of the Phase 2 Deliverable. If Corbis does not notify InfoFlows in writing of Corbis' acceptance or rejection of a Phase 2 Deliverable within such period, the Phase 2 Deliverable will be deemed rejected. If Corbis rejects a Phase 2 Deliverable, Corbis will inform InfoFlows in writing of the Errors identified by Corbis, and InfoFlows will have ten (10) days to correct such Errors and deliver a corrected Phase 2 Deliverable to Corbis.

Corbis will then evaluate and accept or reject such corrected Phase 2 Deliverable pursuant to the process described above. If Corbis rejects the corrected Phase 2 Deliverable, then Corbis in its discretion may either extend the correction period or terminate this Development Agreement effective upon Corbis' giving written notice to InfoFlows.

(f) **Post Acceptance Correction of Errors.** If at any time within two years after Corbis' acceptance of the final Phase 2 Deliverable, Corbis identifies an Error in any Phase 2 Deliverable, then upon Corbis' request, InfoFlows will fix such Error as promptly as reasonably possible and at no charge to Corbis. If InfoFlows becomes aware of any Error in any Phase 2 Deliverable, InfoFlows will promptly notify Corbis of the nature and details of the Error.

(g) **InfoFlows' Provision of Certain Hardware.** In consideration of Corbis' entering into this Development Agreement, and subject to the terms and conditions herein, InfoFlows agrees to obtain for Corbis, at InfoFlows' expense, all hardware and software necessary for Corbis to install at Corbis' premises in order to enable complete production deployment of the System (e.g. servers, software, etc.), up to a cost of \$56,500. Corbis must approve in writing all such hardware and software prior to purchase. Title to such hardware and software shall be in Corbis' name and InfoFlows agrees to take all necessary steps to have such title be in Corbis' name and to deliver such hardware and software to Corbis.

4. Third Party Materials.

(a) **General.** With the sole exception of the Third Party Materials, the Work Product, including the Phase 1 Deliverables and the Phase 2 Deliverables, will not include any third party materials unless InfoFlows' has received Corbis' prior written consent, which consent may be withheld by Corbis in its sole discretion.

(b) **Third Party Watermarking Technology.** The Parties acknowledge and agree that in order to be fully operational, Phase 2 will require watermarking technology and that Corbis and InfoFlows will cooperate with respect to the Parties' obtaining for Corbis the rights to use the Third Party Watermarking Technology as part of the System and, if possible, for InfoFlows to be able to use the Third Party Watermarking Technology as part of the System when licensed to third parties by InfoFlows in accordance with the System License Agreement referenced in Section 8(b) of this Development Agreement. The Parties will work in good faith to reach an equitable allocation between them of the license fees to be paid for such Third Party Watermarking Technology. Unless Corbis otherwise agrees in writing, the provider of the Third Party Watermarking Technology will be Microsoft or Digimarc.

(c) **Third Party Fingerprinting Technology.** The Parties acknowledge and agree that to be fully operational, Phase 1 will require fingerprinting technology and that Corbis and InfoFlows will cooperate with respect to the Parties' obtaining for Corbis the rights to use the Third Party Fingerprinting Technology as part of the System and, if possible, for InfoFlows to be able to use the Third Party Fingerprinting Technology as part of the System when licensed to third parties by InfoFlows in accordance with the System License Agreement referenced in Section 8(b) of this Development Agreement. The Parties will work in good faith to reach an equitable allocation between them of the license fees to be paid for such Third Party Fingerprinting Technology. Unless Corbis otherwise agrees in writing, the provider of the Third Party Fingerprinting Technology will be LTU, Intellivision, or Microsoft.

5. Other Terms of the Services.

(a) **Subcontracting.** InfoFlows will not subcontract any portion of the Services without having received Corbis' prior written consent. If such consent is granted, InfoFlows agrees to: (i) remain solely responsible for, and to guarantee the subcontractor's full and timely performance of, InfoFlows' obligations under this Development Agreement; (ii) make any and all payments due to subcontractor(s) for Services performed; and (iii) indemnify and hold Corbis harmless from any and all damages and/or costs of any kind directly or indirectly incurred by Corbis as a result of InfoFlows' subcontracting the performance of Services

(b) **Effect of Corbis Reviews, Approvals, Consents and Acceptance.** Pursuant to this Development Agreement, Corbis is entitled to certain reviews, approvals, consents and acceptance rights. However, neither Corbis' exercise of, nor failure to exercise, any of the foregoing rights will in any way constitute a waiver of any of InfoFlows' obligations, including its obligations to perform the Services and develop the Deliverables in accordance with the Specifications and deliver the Deliverables in accordance with the Phase 1 Schedule or the Phase 2 Schedule, as applicable

(c) **Insurance.** At all times from the Effective Date until two (2) years after Corbis' final acceptance of Deliverables under this Development Agreement (or in the event this Development Agreement is terminated pursuant to Section 13(b) or 13(c), then until two (2) years following such termination), InfoFlows will, at its own expense, maintain in force policies of insurance with reputable insurers sufficient in coverage and amounts to secure its obligations and potential liabilities under this Development Agreement. All premiums, and any deductibles and/or retentions associated with such insurance will be solely the responsibility of InfoFlows. All such insurance will be primary and not contributory to any insurance or program of self-insurance maintained by Corbis. At Corbis' request, InfoFlows will provide Corbis with certificates of insurance evidencing such insurance coverage. Failure by Corbis to request or by InfoFlows to furnish certificates of insurance will not constitute a waiver by Corbis of these insurance requirements. InfoFlows will provide Corbis with thirty (30) days prior written notice of any policy cancellation or a material change in the terms or provisions of such policies. The insurance requirements set forth in this Section 5(c) will not in any way limit the liability of InfoFlows under this Development Agreement.

(d) **Continuing to Perform.** InfoFlows expressly further agrees that during the pendency of any dispute of any nature in connection with this Development Agreement, InfoFlows will, unless directed otherwise by Corbis in writing, diligently continue to carry out and fulfill all its obligations under this Development Agreement, unless InfoFlows' obligations to continue work is part of the subject of the dispute. Corbis expressly agrees that during the pendency of any dispute of any nature in connection with this Development Agreement, Corbis will pay any amounts payable by Corbis to InfoFlows under this Development Agreement and not subject to any good faith dispute

(e) **Maintenance and Upgrades to the Development Work.** InfoFlows agrees that in the event Corbis at any time during the five (5) year period following the Effective Date requests InfoFlows to make additions, corrections, modifications or improvements to the Work Product (collectively "Upgrades") InfoFlows will promptly perform the services necessary to provide such Upgrades to Corbis. Corbis will compensate InfoFlows for its provision of Upgrades on a time and materials basis, at the most favorable rates InfoFlows then charges its other customers. All Upgrades will be delivered to Corbis in both Source Code and Object Code forms and shall upon creation be deemed to be Work Product, owned by Corbis pursuant to Section 6 and subject

to the license rights granted InfoFlows in the System License Agreement referenced in Section 8(b) of this Development Agreement

(f) **Source Code Walk-Through.** Upon Corbis' acceptance of the final Phase 1 Deliverable, InfoFlows shall provide Corbis' technical staff (at no charge to Corbis) with a detailed walk-through of the Source Code for the Phase 1 Deliverables, with the goal of getting Corbis' technical staff in a position, if Corbis so elects, to maintain and improve the Phase 1 Deliverables on its own. Similarly, upon Corbis' acceptance of the final Phase 2 Deliverable, InfoFlows shall provide Corbis' technical staff (at no charge to Corbis) with a detailed walk-through of the Source Code for the Phase 2 Deliverables, with the goal of getting Corbis' technical staff in a position, if Corbis so elects, to maintain and improve the Phase 2 Deliverables on its own

(g) **Status Meetings.** Throughout the time period InfoFlows is performing the Services, InfoFlows will arrange for one or more of its senior management team to meet with Corbis on an every other week basis to provide Corbis with a status report of the Services and in order for the Parties to discuss any issues or concerns Corbis has with respect to the Services. In the event InfoFlows is experiencing (or anticipates experiencing) any difficulties in with respect to the Services, such difficulties shall be promptly disclosed to Corbis as part of such every other week meetings

(h) **Competing Systems.** Subject to the terms and conditions in this Agreement, InfoFlows agrees that, as between Corbis and InfoFlows, for the three (3) year period following Effective Date, it will not create for use by any entity a system that is competitive with the System. Subject to the terms and conditions of this Agreement, and the Parties' rights hereunder, if Corbis terminates this Development Agreement for any reason, then the non-compete obligations set forth in this paragraph between Corbis and InfoFlows shall be deemed null and void. Subject to the terms and conditions herein, nothing in this paragraph shall prohibit InfoFlows from creating for itself or any other entity any system not competitive with the System.

6. Ownership of the Work Product.

(a) **Ownership.** InfoFlows agrees that the 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 hire" under applicable law, InfoFlows hereby irrevocably and unconditionally assigns to Corbis its successors, and assigns, all right, (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, throughout 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.

12-101

Any other ownership relationships besides those regarding the Work Product are defined and shall be as set forth and agreed to in the ICA and SOW No. 3. For the avoidance of doubt, and simply to confirm the Parties' agreement on ownership in the ICA and SOW No. 3, the Parties acknowledge: (i) InfoFlows owns or has licensed components of the Jazz Service (formerly referred to in part as the "Handle Injection and Resolution Technology"), and Corbis shall not contest such ownership, nor does it claim ownership of the components of the Jazz Service as described in SOW No. 3; (ii) InfoFlows shall either develop, create and/or license from third parties all necessary components to enable and deliver the Jazz Service to Corbis such that it enables Phase 1 and Phase 2 of the System and all fees for any such third party licenses (except for the Third Party Watermarking Technology and Third Party Fingerprinting Technology) are already accounted for in the costs identified in Sections 7 and 9 below; and (iii) Corbis owns (and InfoFlows shall not contest such ownership) all other elements, technologies, expressions, modifications and uses of the System. The Parties acknowledge that InfoFlows may use the Jazz Service in other implementations which do not infringe Corbis' rights in the System.

(b) **Further Assurances.** At Corbis' expense, InfoFlows will execute and deliver documents and take action as requested by Corbis to evidence, perfect or protect Corbis' rights in the Work Product. InfoFlows will cooperate with Corbis in the filing and prosecution of any Intellectual Property Rights applications that Corbis may elect to file on the Work Product or inventions and designs relating to the Work Product. InfoFlows hereby appoints Corbis as InfoFlows' attorney-in-fact (this appointment is irrevocable and coupled with an interest) to execute such documents on InfoFlows' behalf. InfoFlows will not challenge, oppose or interfere with such applications and will not file any such applications on InfoFlows' own behalf related to the Work Product.

7. Fees and Payments.

(a) **Payment for Services.** As full and final compensation for the Services and for the Work Product, Corbis will pay InfoFlows as follows:

| Date/Event | Payment Amount |
|--|----------------|
| May 26, 2006 | \$250,000 |
| Corbis' acceptance of the Phase 1 Specifications and the Phase 1 Acceptance Criteria | \$500,000 |
| Corbis' acceptance of the Alpha version demonstration of Phase 1 | \$500,000 |
| Corbis' acceptance of the final release version of Phase 1 | \$500,000 |
| Corbis' acceptance of the Phase 2 Specifications and the Phase 2 Acceptance Criteria | \$550,000 |
| Corbis' acceptance of a milestone to be mutually agreed upon. | \$550,000 |
| Corbis' acceptance of a milestone to be mutually agreed upon. | \$550,000 |
| Corbis' acceptance of a milestone to be mutually agreed upon. | \$550,000 |

The payments set forth above are inclusive of any and all direct, indirect, and ancillary charges and costs of any nature, including non-recurring engineering costs, taxes, shipping, freight, insurance, etc., and Corbis will not bear any responsibility for any expenses InfoFlows incurs in connection with the performance of the Services.

(b) **Invoices, Payment Terms and Payment Method.** InfoFlows may invoice Corbis upon date or event set forth in Section 7(a) above. Upon receipt of a correct invoice from

12-11

InfoFlows, Corbis will pay such invoice net thirty (30) days from the date of Corbis' receipt of the invoice. Corbis will make payments according to Corbis' then-current payment methods, which may include payment via ACH electronic payment to InfoFlows' financial institution pursuant to instructions supplied to Corbis by InfoFlows on Corbis' ACH electronic payment form. Corbis may withhold any amounts subject to a bona fide dispute.

(c) **No Partial Payments, No Waiver.** Corbis will have no obligation to pay for any Deliverable that has been partially completed. Payment by Corbis will not be deemed approval or acceptance by Corbis of any Services or Deliverables, or a waiver by Corbis of any claim or right. Corbis may dispute any payable amount by notice to InfoFlows and Corbis may withhold any amounts reasonably disputed in good faith as not rightfully due to InfoFlows under this Development Agreement's terms.

(d) **No Benefits; Responsibility for Taxes.** InfoFlows hereby acknowledges that (i) Corbis has no obligation to provide InfoFlows (or any employee of InfoFlows, if applicable) with disability insurance, worker's compensation or other such insurance; (ii) InfoFlows should provide, at InfoFlows' expense, such insurance as InfoFlows may deem desirable and prudent; and (iii) InfoFlows (and any employee of InfoFlows, if applicable) will have no right to participate in Corbis' medical insurance or other employee benefit plans. InfoFlows understands that, as an independent contractor, InfoFlows should make payments against estimated income taxes due to the Internal Revenue Service and all relevant State agencies. If InfoFlows' status as an independent contractor should be attacked or re-characterized, InfoFlows agrees to bear any and all expenses, including legal and other professional fees, increased taxes, penalties, and interest that Corbis and/or InfoFlows may incur in connection with any such attack or attempted re-characterization. InfoFlows hereby releases Corbis from any liability incurred or threatened, including interest and penalties, and the costs of defending administratively or judicially, and, if necessary, of settling any proceedings attempting to re-characterize InfoFlows' status or to collect any amounts, including interest and penalties, alleged to be due from Corbis.

8. License Grants to InfoFlows.

(a) **To the Corbis Materials.** Corbis hereby grants InfoFlows a royalty-free, fully paid-up, personal and non-transferable license (with no right to sublicense) to internally use the Corbis Materials solely for the purposes of performing the Services for Corbis in accordance with this Development Agreement. Corbis expressly retains all right, title and interest, including all Intellectual Property Rights, in and to the Corbis Materials.

(b) **To the System.** Contemporaneous with the Parties' execution of this Development Agreement, the Parties will execute the System License Agreement attached hereto as Exhibit G, pursuant to which System License Agreement Corbis will grant InfoFlows, effective upon Corbis' acceptance of all of the Deliverables, a limited license to reproduce, distribute and sublicense the System in Object Code form to third parties for use in the limited field of use defined therein.

9. **Jazz Service; Hosting and Service Agreement.** 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 the 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 "Digital Objects" 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

10. Confidentiality and Public Statements.

(a) **Confidentiality.** The Parties acknowledge that the specific terms of this Development Agreement, and the Parties' disclosures and activities in connection with this Development Agreement, are Confidential Information that is subject to the provisions of the Mutual Non-Disclosure Agreement between Corbis and InfoFlows dated November 20, 2005 (the "NDA")

(b) **Press Releases and Public Statements.** InfoFlows may not issue any press release or make any public announcement or statement regarding this Development Agreement or any aspect of the business relationship between InfoFlows and Corbis without Corbis' prior written approval Notwithstanding the foregoing and provided Corbis has accepted and is using the System in commercial production, Corbis agrees to: (i) allow Infoflows to list Corbis as a customer on its website; and (ii) serve as a reference customer for Infoflows, upon terms to be mutually agreed upon by the Parties

12-13

11. Representations and Warranties.

(a) InfoFlows. InfoFlows represents and warrants that:

(i) InfoFlows has the full power and all necessary rights to enter into and perform its obligations under this Development Agreement and to grant the rights granted to Corbis in this Development Agreement

(ii) All Work Product, including the Deliverables will be created by: (i) employees of InfoFlows within the scope of their employment and/or (ii) third party contractors of InfoFlows approved by Corbis pursuant to Section 5(a), and each of the foregoing will be under written agreements: (x) containing obligations of confidentiality consistent with this Development Agreement; and (y) assigning all rights, including all Intellectual Property Rights, in the Work Product, including the Deliverables to InfoFlows.

(iii) The Deliverables will conform to the Specifications and the Services will be performed in a professional and workmanlike manner consistent with all applicable industry standards.

(iv) Upon delivery to Corbis, the Work Product and all portions thereof will not include any software or other technology that is, in whole or in part, governed by or subject to an Open Source License.

(v) The Work Product will not include any materials owned or controlled by a third party other than those elements comprising the Third Party Materials and that no third party materials (other than the Jazz Service and/or the underlying computer hardware and operating systems described in Exhibit H to this Agreement) will be required to operate the Work Product in accordance with the Specifications .

(vi) All software Deliverables will be delivered in both Source Code and Object Code form and all Source Code will be properly commented and documented in accordance with standard industry practice

(vii) The Work Product, including the Deliverables, do not and will not infringe the Intellectual Property Rights of any third party and do not and will not contain any time-bombs, viruses, worms or other technologies or features not expressly set forth in the Specifications

(viii) Except as specifically provided above, INFOFLOWS (i) EXPRESSLY PROVIDES THE SYSTEM, SERVICES AND ANY OTHER INFORMATION AND MATERIALS OF ANY NATURE UNDER THIS DEVELOPMENT AGREEMENT "AS IS," WITHOUT ANY WARRANTY OF ANY KIND; AND (ii) DISCLAIMS ALL OTHER WARRANTIES, EXPRESS, IMPLIED, AND STATUTORY, INCLUDING ANY IMPLIED WARRANTIES, DUTIES, OR CONDITIONS OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE WITH RESPECT TO THE SYSTEM, SERVICES AND ANY OTHER INFORMATION AND MATERIALS PROVIDED UNDER THIS DEVELOPMENT AGREEMENT

12-14

(b) Corbis. Corbis represents and warrants that Corbis has the full power to enter into and perform all its obligations under this Development Agreement, and to grant the rights expressly granted by Corbis to InfoFlows under this Development Agreement

12. Indemnity.

(a) Indemnification by Infoflows. InfoFlows will, at its expense and Corbis' request, defend, indemnify and hold harmless Corbis, and its directors, officers, employees, agents, affiliates, contract manufacturers, distributors and customers (each of the foregoing, an "Indemnified Party") from and against any and all claims, actions, demands, legal proceedings, liabilities, damages, losses, judgments, settlements, costs and expenses, including reasonable attorney's fees, that are threatened, asserted or filed against any Indemnified Party (collectively, "Claims") arising out of or in connection with any actual or alleged: (i) infringement or misappropriation by InfoFlows, any Services, the Work Product and/or any Deliverable, of any Intellectual Property Right or other proprietary right of any third party; (ii) breach of any of InfoFlows' representations or warranties; (iii) claim that any Deliverable caused bodily harm, death or property damage; (iv) violation by InfoFlows of, or failure of any Deliverable to comply with, any applicable law or regulation; or (v) any claim by any supplier, employee, subcontractor or agent of InfoFlows. However, as to any Claim, InfoFlows' obligations to indemnify and hold the Indemnified Parties harmless under this Section 12(a) will be reduced to the extent that such Claim results from the Indemnified Party's intentional, wrongful acts.

(b) Procedures. Corbis will give InfoFlows reasonably prompt notice after Corbis becomes aware of any Claim subject to the indemnification provisions of Section 12(a) (however, failure to provide such notice will not release Infoflows from any of its indemnity obligations except to the extent that such failure materially increases InfoFlows' indemnity obligation). Corbis will provide InfoFlows, at InfoFlows' expense, with reasonable cooperation in the defense of the Claim Unless the Claim or the defense thereof could give rise to criminal liability, Corbis will not settle the Claim without InfoFlows' prior written consent (not to be unreasonably withheld or delayed). InfoFlows will not settle the Claim without Corbis' prior written consent (not to be unreasonably withheld or delayed). Corbis will have the right to approve the counsel selected by InfoFlows to defend any such Claim (such approval not to be unreasonably withheld) and will also have the right to have its own counsel participate in the defense of any such Claim at Corbis' own expense. Notwithstanding the foregoing, Corbis will be entitled (using its own counsel and without the consent of InfoFlows) to control the defense of, and settle, any Claim if InfoFlows does not, upon Corbis' demand, acknowledge in writing full responsibility to indemnify Corbis or any Indemnified Party against the Claim In the event Corbis and InfoFlows agree to settle a Claim, InfoFlows agrees not to publicize the settlement without first obtaining Corbis' written permission

(c) Duty to Correct Infringement. In addition to InfoFlows' indemnity obligations, if any infringement or misappropriation Claim is made or is likely to be made regarding the Work Product, InfoFlows will promptly, at Corbis' option and InfoFlows' sole risk and expense: (i) procure for Corbis and the Indemnified Party(ies) the right to freely, directly and indirectly use, sell, offer for sale, import, distribute, and otherwise dispose of the Work Product; (ii) replace such Work Product with a non-infringing version; or (iii) modify such Work Product so that it becomes non-infringing, provided that such replacement or modification meets the Specifications and otherwise complies with the requirements of this Development Agreement.

13. Term and Termination.

(a) **Term.** This Development Agreement will be effective as of the Effective Date, and, unless earlier terminated as provided in Section 13(b) or 13(c) will continue in effect until the later of: (i) Corbis' acceptance of the last Phase 2 Deliverable required to be delivered by InfoFlows to Corbis; or (ii) three (3) years after the Effective Date

(b) **Termination for Cause.** Corbis may terminate this Development Agreement for cause upon notice to InfoFlows: (i) if InfoFlows is in material breach or default of any representation, warranty, covenant, obligation or agreement hereunder, or fails to continue to perform any of its obligations as required under this Development Agreement (including timely delivery of Deliverables), and such breach or default is not cured within thirty (30) days of notice from Corbis; (ii) pursuant to Section 2(b), Section 2(e), Section 3(b) or Section 3(e); (iii) if InfoFlows becomes insolvent; (iv) if InfoFlows becomes the subject of any proceeding under any bankruptcy, insolvency or liquidation law, whether domestic or foreign and whether voluntary or involuntary, which is not resolved favorably to InfoFlows within sixty (60) days of commencement thereof; or (v) InfoFlows becomes subject to property attachment, court injunction or court order which has a material adverse effect on its ability to perform under this Development Agreement. In the event of a termination of this Agreement by Corbis pursuant to this Section 13(b), Corbis, in addition to any other rights and remedies it has at law or under this Agreement (including specific performance), shall be entitled to immediate refund of the Jazz Service Fee Advance, unless InfoFlows has begun to provide the Jazz Service to Corbis under the provisions of the Jazz Service Agreement. InfoFlows may terminate this Development Agreement for cause upon notice to Corbis if Corbis becomes the subject of any proceeding under any bankruptcy, insolvency or liquidation law, whether domestic or foreign and whether voluntary or involuntary, which is not resolved favorably to Corbis within sixty (60) days of commencement thereof

(c) **Termination Without Cause by Corbis.** Corbis may terminate this Development Agreement without cause, effective upon thirty (30) days prior notice to InfoFlows. In the event Corbis terminates this Development Agreement without cause, Corbis agrees to pay InfoFlows for any milestones reached to date of termination and accepted by Corbis, as well as a pro-rata amount of the next milestone payment due, such pro-rata amount to be equal to the percentage of the next milestone completed by InfoFlows as of the date of termination (for example, if InfoFlows' has completed 50% of the work on the Alpha version of Phase 1 as of the date of termination, Corbis would pay InfoFlows 50% of the milestone payment due had Corbis accepted the Alpha version). The foregoing payments shall be InfoFlows' total compensation for performing the Services up to the date of such termination

(d) **Delivery of Current Work Product; Hourly Consulting.** Immediately following termination of this Agreement (either pursuant to Section 13(b) or 13(c)), InfoFlows agrees to promptly provide Corbis: (i) two (2) copies of the Work Product as it exists on the date of termination (with all computer code being provided in both Source Code and Object Code forms); and (ii) a reasonable amount, up to 200 hours of hourly consulting in order to assist Corbis in understanding such Work Product and to be able to continue the development thereof on its own or with a third party, such consulting to be on InfoFlows' then current most favorable rate charged to any third party.

(d) **Survival.** The following Sections of this Development Agreement will survive the termination (for any reason) of this Development Agreement: 1, 2(f), 3(f), 5(b), (c) and (e), 6,

12-16

7(c) and (d), 9 (sentence beginning "The Jazz Service Fee Advance will be fully refunded . . ."),
10, 11, 12, 13, and 14

14. General.

(a) **Communications.** The following list sets forth each Party's designated points of contact for communication and documentation of routine notices and business and/or technical correspondence regarding this Development Agreement. A Party may update its list of designated contacts upon notice to the other Party.

| | Corbis | InfoFlows |
|---------------------------|--------|---------------------------|
| <u>Technical Contact:</u> | | |
| Name | | Steve Stone |
| Email | | Steve.stone@infoflows.com |
| <u>Business Contact:</u> | | |
| Name | | Steve Stone |
| Email | | Steve.stone@infoflows.com |
| <u>Executive Contact:</u> | | |
| Name | | Steve Stone |
| Email | | Steve.stone@infoflows.com |

(b) **Legal Notices and Other Documents.** All legal notices given under this Development Agreement (e.g., notice of a dispute relating to this Development Agreement, notice alleging a breach of this Development Agreement, notice of termination of this Development Agreement, notice of an indemnified claim, etc.), and any other legal document (e.g., waiver of rights under this Development Agreement, amendment of this Development Agreement, etc.) in connection with this Development Agreement, must be written in the English language and signed by an authorized representative of the Party (or Parties) in a non-electronic form, and will be deemed given as of the day received by the addressee Party via messenger courier delivery service, or certified or registered U.S. mail, return receipt requested, and addressed as follows or to such other address as a Party may give notice of:

To Corbis:

Corbis Corporation
710 Second Avenue
Seattle, WA 98104 U.S.A.
Attention: James D. Mitchell
Title: Senior Vice President and General Counsel

To InfoFlows:

Infoflows Corporation
1903 205th Place NE
Sammamish, WA 98074
Attention: Steve Stone
Title: President & CEO

(c) **Interpretation.** This Development Agreement has been fully negotiated by the Parties and will be interpreted according to the plain meaning of its terms without any

12-17

presumption that it should be construed either for or against either Party. Unless otherwise expressly provided in this Development Agreement, when used in this Development Agreement the words "include," "includes," and "including" will be deemed to be followed by the words "without limitation"; references to "Sections" refer to Sections of this Development Agreement; references to "days" refer to consecutive calendar days including Saturdays, Sundays and holidays; references to "written", "in writing" or "signed" refer to a non-electronic, English language, written record; references to dollar amounts and all uses of the term "dollars" and/or the symbol "\$" refer to United States dollars. The Section headings used in this Development Agreement are for ease of reference only

(d) Severability. If any provision of this Development Agreement is determined by a court of competent jurisdiction to be invalid or unenforceable under any applicable law, then such provision will be deemed modified to the extent necessary in order to render such provision valid and enforceable; if such provision may not be so saved, it will be severed and the remainder of this Development Agreement will remain in full force and effect

(e) Governing Law; Venue; Attorneys' Fees. This Development Agreement will be governed by the laws of the State of Washington, U.S.A., excluding conflict of laws provisions, and the United Nations Convention on Contracts for the International Sale of Goods will not apply to this Development Agreement. InfoFlows hereby irrevocably consents to the exclusive jurisdiction and venue of the federal courts sitting in Seattle, Washington unless no federal subject matter jurisdiction exists, in which case InfoFlows consents to exclusive jurisdiction and venue in the Superior Court of King County, Washington. InfoFlows waives all defenses of lack of personal jurisdiction and forum non-conveniens. In any action or suit to enforce any right or remedy under this Development Agreement or to interpret any provision of this Development Agreement, the prevailing Party will be entitled to recover its costs, including reasonable attorneys' fees

(f) Rights and Remedies Cumulative; Waiver. Except as expressly provided otherwise, all rights and remedies under this Development Agreement are cumulative and not exclusive, and any reference in this Development Agreement to, and/or the exercise of, a particular right or remedy will not exclude or constitute a waiver of any other rights or remedies available under this Development Agreement, at law or in equity. No waiver of any breach of any provision of this Development Agreement will constitute a waiver of any prior, concurrent or subsequent breach of the same or any other provisions hereof, and no waiver will be effective unless made in a non-electronic writing signed by an authorized representative of the waiving Party.

(g) Assignment. This Development Agreement may not be assigned by InfoFlows in whole or in part, by contract or operation of law, without the written consent of Corbis, and any attempted assignment without Corbis' consent will be null and void; provided, however, that such consent by Corbis shall not be unreasonably withheld. Corbis may assign this Development Agreement to any affiliate or subsidiary (direct or indirect) or in connection with a sale or assignment of the line of business in which the Work Product is used. For purposes of this Development Agreement, an assignment includes (1) a merger of the assigning Party with another entity, regardless of whether the assigning Party is the surviving party, (2) the sale or transfer of all or substantially all of the assigning Party's assets, (3) an acquisition of thirty percent (30%) or more of the assigning Party's voting stock or other voting interests by a third party, and (4) change in beneficial ownership of thirty percent (30%) or more of the assigning Party's ownership equity. Any attempted assignment in violation of this Section will be void. If such an attempted assignment occurs, the non-assigning Party will have the right to terminate this

12-18

Development Agreement upon written notice to the assigning Party. Subject to the foregoing, this Development Agreement will be binding upon, enforceable by, and inure to the benefit of the Parties and their respective successors and permitted assignees.

(h) **Independent Contractors.** The Parties are independent contractors, and nothing in this Development Agreement will be construed as creating an employer-employee relationship, a partnership, or a joint venture between the Parties. Neither Party has any authority to assume or create obligations or liability of any kind on behalf of the other.

(i) **Remove/Replace Employees or Subcontractors.** Corbis may require the immediate replacement of any InfoFlows employee or permitted subcontractor who behaves in a manner that is unlawful or inconsistent with any Corbis policy, or that is otherwise deemed unacceptable to Corbis. InfoFlows' employees will, while on Corbis property or conducting any Corbis related business, comply with all Corbis policies and applicable local, state and federal laws, including specifically all laws prohibiting harassment of any kind in the workplace. InfoFlows assumes all responsibility for providing to its employees any training that may be required to insure compliance with such laws. InfoFlows will ensure that Steve Stone, Jeff Lill and all other current InfoFlows' employees are the individuals primarily responsible for all work performed.

(j) **Compliance with Law; Government Approvals.** Each Party will, in all of its activities relating to this Development Agreement, comply with all requirements of applicable law, including all applicable health, safety and environmental regulations. InfoFlows will ensure that the Deliverables comply with, all applicable laws and regulations.

(k) **Taxes.** Corbis will not be liable for any taxes that InfoFlows is legally obligated to pay which are incurred or arise in connection with or related to this Development Agreement, and all such taxes (including to net income or gross receipts taxes, franchise taxes, and/or property taxes) will be solely the financial responsibility of InfoFlows. Corbis will pay to InfoFlows any sales or use taxes that are owed by Corbis solely as a result of Corbis' purchase of Services or Deliverables under this Development Agreement and which are required to be collected from Corbis by InfoFlows under applicable law. Corbis may provide to InfoFlows a valid exemption certificate in which case InfoFlows will not collect the taxes covered by such certificate.

(l) **No Obligation.** Notwithstanding any other provision of this Development Agreement, Corbis will have no any obligation to use the Work Product or include the Work Product as part of any Corbis product or service. Nothing in this Development Agreement will be construed as restricting Corbis' rights to lawfully acquire, license, develop, manufacture or distribute for itself, or have others acquire, license, develop, manufacture or distribute for Corbis, other services similar to the Services or the Jazz Service and/or other products performing the same or similar functions as the Work Product, or to market and distribute such similar products in addition to, or in lieu of, the Work Product.

(m) **Entire Agreement; Modification.** This Development Agreement (including the NDA) constitutes the entire agreement between the Parties regarding the Services and the Deliverables and supersedes any and all prior and contemporaneous agreements or communications with respect to such subject matter. This Development Agreement does not, however, amend or supersede the License Agreement, the Jazz Service Agreement (when executed by both Parties), the ICA, or the SOWs with respect to the subject matter addressed by those documents and those documents shall remain in full force and effect. This Development Agreement may not be modified except by a non-electronic written agreement dated subsequent

to the date of this Development Agreement and signed on behalf of InfoFlows and Corbis by their
respective duly authorized representatives

[Remainder of page intentionally left blank]

1
12.20

AGREED:

CORBIS CORPORATION

By: Susan K. McDonald
Susan K. McDonald

Name: _____

Title: COO, CFU

6-2-06

INFOFLOWS CORPORATION

By: Steve Stape

Name: Steve Stape

Title: CEO

Approved by Corbis Legal

By: D/W

Date: 5-30-06

12/21

Exhibit A
Phase 1 Schedule

| <u>Milestone</u> | <u>Date</u> |
|---|--------------------|
| 1. Specifications and Acceptance Criteria delivered to Corbis for Evaluation and Acceptance | July 1, 2006 |
| 2. Alpha version delivered to Corbis for Evaluation and Acceptance | September 11, 2006 |
| 3. Beta version delivered to Corbis for Evaluation and Acceptance | November 1, 2006 |
| 4. Public launch to end users | December 4, 2006 |

12-22

Exhibit B
Phase 1 Deliverables

1. Ability to create visual fingerprints of images in the Corbis collection. The number of images to be mutually agreed upon.
2. Ability to crawl the Internet for target images. The extent of the crawl and the format of the target images to be mutually agreed upon.
3. Ability to create visual fingerprints of the target images
4. Ability to compare the fingerprints of the target images with fingerprints of the images in the Corbis collection
5. Creation of a user-friendly Web application for Corbis staff to interactively query reports about the results of the fingerprint comparison and related information. For additional information about mutually agreed upon scope and functionality see *Business Requirements Boulder Ridge Phase 1. Corbis Rights Enforcement & Anti-Piracy Department Application, Tanya Miksys, April 12, 2006*

12/23

Exhibit C
Phase 2 Description

1. The Phase 2 system will give Corbis the ability to invisibly watermark images with unique identifiers as part of its normal image production workflow
2. The unique identifiers will in turn give Corbis the ability to match each instance of an image with its license
3. The Phase 2 system will also include a self-service Web application as described in *Boulder Ridge: Proposal for a Corbis Licensing Management System and Service*, David Weiskopf, February 10, 2006, and in the presentation titled *Proposal for License Management System*, February 16, 2006
4. Phase 2 will augment the Phase 1 system to take advantage of unique identifiers when searching for target images on the Internet and reporting on the results of those searches

12.24

Exhibit D
Preliminary Phase 2 Schedule

| <u>Milestone</u> | <u>Date</u> |
|--|----------------------------|
| 1 Business Requirements Document and Target Schedule delivered to Corbis for Evaluation and Acceptance | September 1, 2006 |
| 2. Functional Specifications and Commitment Schedule delivered to Corbis for Evaluation and Acceptance | November 1, 2006 |
| 3 Beta version delivered to Corbis for Evaluation and Acceptance (depends on schedule of ERP project) | November 1, 2007 or sooner |
| 4 Public launch to end users (depends on schedule of ERP project) | December 1, 2007 or sooner |

12/25

Exhibit E
Third Party Fingerprinting Technology

Image Fingerprinting Technology refers to application software that indexes, recognizes, and describes digital images according to their visual characteristics. Typically, the technology identifies images by creating an abstract (fingerprint) of an original image and comparing that to a reference database of fingerprints. Third party solutions can currently be expected to recognize images in three different ways: by finding direct matches to the original; by finding modified versions of the original; or by finding images that have similar visual characteristics to the original, either in color, shape or texture.

12.26

Exhibit F
Third Party Watermarking Technology

Digital watermarking is a technique that enables the addition of hidden copyright notices or other verification messages to digital audio, video, or image signals and documents. The hidden message is typically a group of bits describing information pertaining to the signal or to the author of the signal (name, place, license number, etc.). The technique takes its name from watermarking of paper or money as a security measure.

While the addition of the hidden message to the signal does not restrict that signal's use, it provides a mechanism to track the signal to the original owner.

A watermark can be classified into two sub-types: visible and invisible. Visible watermarks change the signal altogether such that the watermarked signal is totally different from the actual signal, e.g., adding an image as a watermark to another image. Stock photography agencies often add a watermark in the shape of a copyright symbol ("©") to previews of their images, so that the previews do not substitute for high-quality copies of the product included with a license.

Invisible watermarks do not change the signal to a perceptually great extent, i.e., there are only minor variations in the output signal. Usually, the degree to which the watermark is visible is tied to how resistant to destruction it is using normal image manipulation techniques—such as cropping, rotating or resizing. In other words, the greater the persistence of the watermark, the greater the effect on image quality. Most third party solutions allow customers to vary the degree of persistence.

12.27

Exhibit G
System Software License Agreement

Attached

1
1228

System License Agreement

This System License Agreement (the "License Agreement") is entered into by and between Corbis Corporation ("Corbis"), a Washington corporation located at 710 Second Avenue, Seattle Washington 98104, and InfoFlows Corporation ("InfoFlows"), a Washington corporation located at 1903 205th Place NE, Sammamish Washington 98074, and is effective as of April 28, 2006 (the "Effective Date") In this License Agreement Corbis and InfoFlows may be referred to individually as a "Party" and collectively as the "Parties"

Recitals

Whereas, as of the Effective Date the Parties have entered into a Development Agreement ("Development Agreement"), under which InfoFlows will develop a completely operational version of a Corbis License Management System, all as set forth in the Development Agreement;

Whereas, the Development Agreement provides that, upon Corbis' acceptance of all of the deliverables InfoFlows is to produce under the Development Agreement, Corbis would grant certain license rights in those deliverables to InfoFlows for exploitation by InfoFlows in certain specified markets; and

Whereas, the Parties now desire to enter into this License Agreement to provide for that license grant on the terms and conditions set forth herein;

Now, Therefore, in consideration of the mutual promises and covenants herein, and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Parties agree as follows:

Agreement

1. Definitions. As used in this License Agreement (whether in the singular or plural), the following capitalized terms have the following meanings.

"Exclusive Field Of Use" means: (a) primary market image licensing (e.g., Getty, Corbis, Jupiter Images); (b) secondary market image licensing (e.g., Reuters, Sports Illustrated); and (c) corporate image market (e.g., Leo Burnett, Omnicom Group, General Motors, Microsoft)

"InfoFlows Taxes" means any and all sales, use, excise, import, export, value added and other taxes and duties assessed, incurred or required to be collected or paid for any reason in connection with any InfoFlows' advertisement, distribution, licensing, and/or other disposition of the Licensed System, or otherwise in connection with any action, inaction or omission of InfoFlows or its employees, agents, contractors or representatives with respect to this License Agreement

"Intellectual Property Rights" means all present and future patents (including patent applications, reissues, divisions, continuations, and extensions), utility models, copyrights, trade secrets, mask work rights, moral rights and any other form of intellectual property rights protection and other proprietary rights afforded by law to inventions, works of authorship, technical information and the like, including applications for any of the foregoing.

12.29

"Jazz Service" means the "Handle Injection and Resolution Technology", as such technology is defined in that certain SOW No 3 executed pursuant to the Corbis Corporation Independent Contractor Agreement entered into by the Parties on June 21, 2004, which SOW is incorporated into this License Agreement by this reference for the purpose of defining the Jazz Service. For purposes of clarity only, the Parties agree the 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. "Digital Objects" means any information package including desktop documents, email, web pages music, video, images, database records, DNS records, medical records.

"Licensed System" means: (a) the computer code and supporting documentation developed and delivered by InfoFlows to Corbis under the Development Agreement, as accepted by Corbis pursuant to the Development Agreement; and (b) additions, corrections, modifications or improvements to such computer code and supporting documentation that are developed and delivered by InfoFlows to Corbis under the Development Agreement. Any software components included in the "Licensed System" are included in Object Code form only. InfoFlows has no rights to Source Code under this License Agreement.

"Net Revenues" means all sums actually received by InfoFlows directly or indirectly from (i) InfoFlows' distribution or licensing of the Licensed System to third parties, or (ii) InfoFlows' offering the Licensed System as a service to third parties (whether alone or in combination with the Jazz Service), less any applicable taxes charged to and collected from such third party.

"NDA" has the meaning ascribed to it in Section 6(a)

"Object Code" means machine-executable computer software code in binary form

"Source Code" means computer software code in human-readable, high-level language form which, when compiled or assembled, becomes the Object Code of a software program. Source Code includes all logic diagrams, flow charts, and developer comments concerning the relevant software code.

2. License Grant. Subject to InfoFlows' compliance with all of this License Agreement's terms and conditions, and effective only after Corbis' acceptance (if any) of all of the Licensed System pursuant to the Development Agreement, Corbis grants InfoFlows an exclusive, limited, personal, non-sublicensable, non-transferable, non-assignable, perpetual (subject to termination of this License Agreement as provided herein), worldwide license to reproduce, distribute and sublicense the Licensed System to third parties for their use in all areas other than the Exclusive Field of Use, either on a stand-alone basis or as an integral part of their use of the Jazz Service. InfoFlows' has no rights to reproduce, distribute or sublicense the Licensed System for use in the Exclusive Field of Use.

3. Obligations and Limitations.

(a) Third Party Materials. InfoFlows acknowledges and agrees that in order to be fully operational, the Licensed System will require certain third party fingerprinting and watermarking software code, which is not licensed under this License Agreement. Corbis has no obligation

12130

under this License Agreement to provide or make any such third party software code available to InfoFlows or any third party

(b) **Other Limitations and Obligations.** InfoFlows agrees that it will not (i) rent, lease, sell, sublicense (except as expressly stated in Section 2), or otherwise transfer the Licensed System; (ii) modify, translate or prepare derivative works of the Licensed System, except and solely to the extent that such activity is expressly permitted by the Development Agreement or by the prior written agreement of the Parties; or (iii) remove, obscure, or alter copyright notices, trademarks, or other proprietary rights notices (if any) that are placed on the Licensed System by Corbis or at its direction. InfoFlows will not (directly or indirectly) use Corbis' name, logos, trade dress, designs, or other trademarks in communications to third parties with respect to InfoFlows' distribution and sublicensing of the Licensed System (including in any advertising, packaging, presentations, or the like); provided, however, that during the Term (i) InfoFlows may list Corbis as a customer on its website, and (ii) Corbis shall agree to serve as a reference customer for InfoFlows, upon terms to the mutually agreed upon by the Parties.

(c) **Reservation.** Corbis owns the title and all Intellectual Property Rights in the Licensed System. Corbis reserves all rights in the Licensed System not expressly granted to InfoFlows in this License Agreement, including the exclusive right to bring suit for infringement and otherwise enforce Corbis' Intellectual Property Rights in the Licensed System and to file and prosecute patent applications with respect to such Intellectual Property Rights. Except as expressly stated in Section 2, this License Agreement will not be deemed to grant InfoFlows any right to any of Corbis' Intellectual Property Rights, including by implication, estoppel, waiver, or otherwise.

(d) **Jazz Service.** Nothing in this Section 3 or this License Agreement is intended to limit or restrict InfoFlows' ownership of the Jazz Service and any Intellectual Property Rights therein

(e) **Modifications to the Licensed System.** In the event InfoFlows has good reason to seek to modify or improve the code to meet the needs of its existing or new customers, Corbis agrees to discuss granting such modification rights to InfoFlows on terms to be agreed upon, and Corbis shall not unreasonably withhold its consent to such requests

4. **No Support.** This License Agreement does not create any obligation for Corbis to provide any support or assistance to InfoFlows or anyone else concerning the Licensed System

5. **Royalties; Reporting.**

(a) **Royalty Amount.** On a calendar quarter basis, InfoFlows will pay Corbis [TBD] percent (TBD%) of InfoFlows' Net Revenues. If InfoFlows receives payment in a currency other than U.S. Dollars, such amounts will be converted to U.S. Dollars at the end of the calendar quarter in which the amounts were received. The conversion will be made using the appropriate currency exchange rate quoted in the Wall Street Journal as of 3 p.m. EST for currency trading among banks in amounts of US\$1,000,000 or more on the last business day the calendar quarter

(b) **Payment.** InfoFlows will pay the royalties required under Section 5(a) not later than thirty (30) days after the end of each quarter during the term of this Agreement. InfoFlows will pay interest, at the lesser of one and one-half percent (1.5%) per month or the highest interest rate permissible under applicable law, on any royalties that are past due. InfoFlows will make payments according to Corbis' then-current payment procedures, which may include payment via

ACH electronic payment to Corbis' financial institution pursuant to instructions supplied by Corbis to InfoFlows on Corbis' ACH electronic payment form

(c) **Reporting; Record Keeping.** In connection with each payment made by InfoFlows under Section 5(b), InfoFlows will furnish Corbis with a written report detailing its calculation of Net Revenues for that quarter, such report to provide Corbis with sufficient information to determine the accuracy of the payment and the report. InfoFlows will provide such a report for each calendar year during the Term, regardless of whether InfoFlows had any Net Revenues for that quarter.

(d) **Audits.** During the Term and for three (3) years thereafter, InfoFlows agrees to keep all usual and proper books and records relating to its distribution and licensing of the Licensed System. To verify InfoFlows' compliance with this License Agreement, Corbis may, at its own expense, during the Term and for three (3) years thereafter, audit InfoFlows' books and records to the extent they are relevant to InfoFlows' compliance with this License Agreement and the payment of royalties under this Section 5. Any audit under this Section 5(d) will be conducted during regular business hours at InfoFlows' facilities, following at least five (5) days' written notice by Corbis, and in a manner that does not unreasonably interfere with InfoFlows' operations. Any audit will be conducted by personnel of Corbis and/or an independent certified public accountant selected by Corbis. InfoFlows agrees to provide Corbis' designated audit team prompt and reasonable access to all relevant books, records, procedures, and facilities. In addition, if any audit conducted under this Section 5(d) reveals that InfoFlows has materially under-reported Net Revenues, InfoFlows will pay the cost of such audit (in addition to unpaid royalties and interest pursuant to Section 5(b)). For purposes of this Section 5(d), "materially" means that InfoFlows' actual Net Revenue for a given quarter, as disclosed by an audit, are more than five percent (5%) higher than the amount on which InfoFlows has paid royalties for that quarter.

(e) **Responsibility for Taxes.** As between InfoFlows and Corbis, InfoFlows is responsible for the billing, collecting and remitting of all InfoFlows Taxes. Corbis is not liable for any InfoFlows Taxes (including any penalties or interest thereon). InfoFlows is not liable for any income taxes that Corbis is legally obligated to pay with respect to any amounts paid to Corbis by InfoFlows under this License Agreement. All amounts payable under this License Agreement exclude any InfoFlows Taxes. InfoFlows will pay to Corbis any applicable taxes that are owed by InfoFlows solely as a result of entering into this License Agreement and which are permitted to be collected from InfoFlows by Corbis under applicable law, except to the extent that InfoFlows provides to Corbis a valid exemption certificate for such taxes. If, after a determination by foreign tax authorities, any taxes are required to be withheld on payments made by InfoFlows to Corbis, InfoFlows may deduct such taxes from the amount owed Corbis and pay them to the appropriate taxing authority; provided however, that InfoFlows will promptly secure and deliver to Corbis an official receipt for any such taxes withheld or other documents necessary to enable Corbis to claim a U.S. Foreign Tax Credit. InfoFlows will make certain that any taxes withheld are minimized to the extent possible under applicable law.

6. Confidentiality and Public Statements.

(a) **Confidentiality.** The Parties acknowledge that the specific terms of this License Agreement, and the Parties' disclosures and activities in connection with this License Agreement, are Confidential Information that is subject to the provisions of the Mutual Non-Disclosure Agreement between Corbis and InfoFlows dated November 20, 2005 (the "NDA").

12/32

(b) **Press Releases and Public Statements.** InfoFlows may not issue any press release or make any public announcement or statement regarding this License Agreement or any aspect of the business relationship between InfoFlows and Corbis without Corbis' prior written approval, except as provided in Section 3(b) above

7. Representations and Warranties.

(a) **By InfoFlows.** InfoFlows represents and warrants that InfoFlows will comply with applicable law in exercising its license rights with respect to the Licensed System

(b) **DISCLAIMER.** CORBIS (i) EXPRESSLY PROVIDES THE LICENSED SYSTEM AND ANY OTHER INFORMATION AND MATERIALS OF ANY NATURE UNDER THIS LICENSE AGREEMENT "AS IS," WITHOUT ANY WARRANTY OF ANY KIND; AND (ii) DISCLAIMS ALL OTHER WARRANTIES, EXPRESS, IMPLIED, AND STATUTORY, INCLUDING ANY IMPLIED WARRANTIES, DUTIES, OR CONDITIONS OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, RELIABILITY OR AVAILABILITY, ACCURACY OR COMPLETENESS OF RESPONSES, RESULTS, WORKMANLIKE EFFORT, LACK OF VIRUSES, LACK OF NEGLIGENCE, TITLE, QUIET ENJOYMENT, QUIET POSSESSION, CORRESPONDENCE TO DESCRIPTION, AND NONINFRINGEMENT, WITH RESPECT TO THE LICENSED SYSTEM AND ANY OTHER INFORMATION AND MATERIALS OF ANY NATURE UNDER THIS LICENSE AGREEMENT

8. LIMITATION OF LIABILITY. CORBIS WILL NOT BE LIABLE FOR ANY SPECIAL, PUNITIVE, INCIDENTAL, INDIRECT, OR CONSEQUENTIAL DAMAGES (INCLUDING DAMAGES FOR LOST PROFITS, INFORMATION, AND/OR PRIVACY; BUSINESS INTERRUPTION; PERSONAL INJURY, AND ANY OTHER LOSS WHATSOEVER) ARISING OUT OF OR RELATED TO, IN ANY WAY, THE DELIVERABLES OR THIS LICENSE AGREEMENT. THIS SECTION 8 WILL APPLY EVEN IN THE EVENT OF THE FAULT, TORT (INCLUDING NEGLIGENCE), MISREPRESENTATION, STRICT LIABILITY, AND/OR BREACH OF CONTRACT AND/OR WARRANTY OF CORBIS OR ANY SUPPLIER, AND EVEN IF CORBIS HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. NOTWITHSTANDING ANY DAMAGES THAT INFOFLOWS MAY INCUR FOR ANY REASON WHATSOEVER, CORBIS' ENTIRE LIABILITY, AND INFOFLOWS' EXCLUSIVE REMEDY HEREUNDER, WILL BE LIMITED TO THE CUMULATIVE AMOUNTS INFOFLOWS PAID TO CORBIS DURING THE TWELVE (12) MONTH PERIOD PRECEDING THE LAST EVENT THAT GAVE RISE TO SUCH LIABILITY. THE FOREGOING LIMITATIONS, EXCLUSIONS, AND DISCLAIMERS WILL APPLY TO THE MAXIMUM EXTENT PERMITTED BY APPLICABLE LAW, EVEN IF ANY REMEDY FAILS OF ITS ESSENTIAL PURPOSE

9. Indemnity.

(a) **Indemnification.** InfoFlows will, at its expense and Corbis' request, defend, indemnify and hold harmless Corbis, and its directors, officers, employees, agents, affiliates, contract manufacturers, distributors and customers (each of the foregoing, an "Indemnified Party") from and against any and all claims, actions, demands, legal proceedings, liabilities, damages, losses, judgments, settlements, costs and expenses, including reasonable attorney's fees, that are threatened, asserted or filed against any Indemnified Party (collectively, "Claims") arising out of or in connection with InfoFlows' distribution, licensing, and/or other disposition (directly or indirectly) of the Licensed System under this License Agreement. However, as to any

12.33

Claim, InfoFlows' obligations to indemnify and hold the Indemnified Parties harmless under this Section 9(a) will be reduced to the extent that such Claim results from the Indemnified Party's intentional, wrongful acts

(b) **Procedures.** Corbis will give InfoFlows reasonably prompt notice after Corbis becomes aware of any Claim subject to the indemnification provisions of Section 9(a). (However, failure to provide such notice will not release InfoFlows from any of its indemnity obligations except to the extent that such failure materially increases InfoFlows' indemnity obligation.) Corbis will provide InfoFlows, at InfoFlows' expense, with reasonable cooperation in the defense of the Claim. Unless the Claim or the defense thereof could give rise to criminal liability, Corbis will not settle the Claim without InfoFlows' prior written consent (not to be unreasonably withheld or delayed). InfoFlows will not settle the Claim without Corbis' prior written consent (not to be unreasonably withheld or delayed). Corbis will have the right to approve the counsel selected by InfoFlows to defend any such Claim (such approval not to be unreasonably withheld) and will also have the right to have its own counsel participate in the defense of any such Claim at Corbis' own expense. Notwithstanding the foregoing, Corbis will be entitled (using its own counsel and without the consent of InfoFlows) to control the defense of, and settle, any Claim if InfoFlows does not, upon Corbis' demand, acknowledge in writing full responsibility to indemnify Corbis or any Indemnified Party against the Claim. In the event Corbis and InfoFlows agree to settle a Claim, InfoFlows agrees not to publicize the settlement without first obtaining Corbis' written permission.

10. Term and Termination.

(a) **Term.** This License Agreement will be effective during the "Term," which commences as of the Effective Date, and, unless earlier terminated as provided in this License Agreement, will continue thereafter until the earlier of: (i) such time as InfoFlows ceases to actively promote and license the Licensed System; or (ii) such time as all of the Intellectual Property Rights comprising the Licensed System cease to exist or fall into the public domain.

(b) **Termination for Cause.** Corbis may terminate this License Agreement for cause upon notice to InfoFlows: (i) if InfoFlows is in material breach or default of any representation, warranty, covenant, obligation or agreement hereunder, or fails to continue to perform any of its obligations as required under this License Agreement, and such breach or default is not cured within thirty (30) days of notice from Corbis; (ii) if InfoFlows at any time ceases to actively market and exploit its rights granted herein to the Licensed System for a period of three (3) months; (iii) if InfoFlows becomes insolvent; (iv) if InfoFlows becomes the subject of any proceeding under any bankruptcy, insolvency or liquidation law, whether domestic or foreign and whether voluntary or involuntary, which is not resolved favorably to InfoFlows within sixty (60) days of commencement thereof; or (v) if InfoFlows becomes subject to property attachment, court injunction or court order which has a material adverse effect on its ability to perform under this License Agreement. InfoFlows may terminate this License Agreement for cause upon thirty (30) days notice to Corbis if Corbis becomes the subject of any proceeding under any bankruptcy, insolvency or liquidation law, whether domestic or foreign and whether voluntary or involuntary, which is not resolved favorably to Corbis within sixty (60) days of commencement thereof.

(c) **Cross-Termination.** This License Agreement will terminate automatically and without notice upon termination of the Development Agreement (for any reason) before the completion of the term of the Development Agreement as stated in Section 13(a) of the Development Agreement.

(d) Survival. The following Sections of this License Agreement will survive the termination (for any reason) of this License Agreement: 1, 3(c), 4, 5 (as to amounts incurred before such termination), 6, 7(b), 8, 9, 10(d), and 11.

11. General.

(a) Notices. All notices given under this License Agreement and any other legal document (e.g., waiver of rights under this License Agreement, amendment of this License Agreement, etc.) in connection with this License Agreement, must be written in the English language and signed by an authorized representative of the Party (or Parties) in a non-electronic form, and will be deemed given as of the day received by the addressee Party via messenger courier delivery service, or certified or registered U.S. mail, return receipt requested, and addressed as follows or to such other address as a Party may give notice of:

To Corbis:

Corbis Corporation
710 Second Avenue
Seattle, WA 98104 U.S.A.
Attention: James D. Mitchell
Title: Senior Vice President and General Counsel

To InfoFlows:

InfoFlows Corporation
1903 205th Place NE
Sammamish, WA 98074
Attention: Steve Stone
Title: President & CEO

(b) Interpretation. This License Agreement has been fully negotiated by the Parties and will be interpreted according to the plain meaning of its terms without any presumption that it should be construed either for or against either Party. Unless otherwise expressly provided in this License Agreement, when used in this License Agreement the words "include," "includes," and "including" will be deemed to be followed by the words "without limitation"; references to "Sections" refer to Sections of this License Agreement; references to "days" refer to consecutive calendar days including Saturdays, Sundays and holidays; references to "written," "in writing" or "signed" refer to a non-electronic, English language, written record; references to dollar amounts and all uses of the term "dollars" and/or the symbol "\$" refer to United States dollars. The Section headings used in this License Agreement are for ease of reference only.

(c) Severability. If any provision of this License Agreement is determined by a court of competent jurisdiction to be invalid or unenforceable under any applicable law, then such provision will be deemed modified to the extent necessary in order to render such provision valid and enforceable; if such provision may not be so saved, it will be severed and the remainder of this License Agreement will remain in full force and effect.

(d) Governing Law; Venue; Attorneys' Fees. This License Agreement will be governed by the laws of the State of Washington, U.S.A., excluding conflict of laws provisions, and the United Nations Convention on Contracts for the International Sale of Goods will not apply to this License Agreement. InfoFlows hereby irrevocably consents to the exclusive jurisdiction and venue of the federal courts sitting in Seattle, Washington unless no federal subject matter jurisdiction exists, in which case InfoFlows consents to exclusive jurisdiction and

venue in the Superior Court of King County, Washington. InfoFlows waives all defenses of lack of personal jurisdiction and forum non-conveniens. In any action or suit to enforce any right or remedy under this License Agreement or to interpret any provision of this License Agreement, the prevailing Party will be entitled to recover its costs, including reasonable attorneys' fees.

(e) *Rights and Remedies Cumulative.* Except as expressly provided otherwise, all rights and remedies under this License Agreement are cumulative and not exclusive, and any reference in this License Agreement to, and/or the exercise of, a particular right or remedy will not exclude or constitute a waiver of any other rights or remedies available under this License Agreement, at law or in equity.

(f) *Assignment.* This License Agreement may not be assigned by InfoFlows in whole or in part, by contract or operation of law, without the written consent of Corbis, which shall not be unreasonably withheld, and any attempted assignment without Corbis' consent will be null and void. Corbis may assign this License Agreement to any affiliate or subsidiary (direct or indirect) or in connection with a sale or assignment of the line of business in which the Licensed System is used. For purposes of this License Agreement, an assignment includes (i) a merger of the assigning Party with another entity, regardless of whether the assigning Party is the surviving party, (ii) the sale or transfer of all or substantially all of the assigning Party's assets, (iii) an acquisition of thirty percent (30%) or more of the assigning Party's voting stock or other voting interests by a third party, and (iv) a change in beneficial ownership of thirty percent (30%) or more of the assigning Party's ownership equity. Any attempted assignment in violation of this Section 11(f) will be void. If such an attempted assignment occurs, the non-assigning Party will have the right to terminate this License Agreement upon written notice to the assigning Party. Subject to the foregoing, this License Agreement will be binding upon, enforceable by, and inure to the benefit of the Parties and their respective successors and permitted assignees.

(g) *Independent Contractors.* The Parties are independent contractors, and nothing in this License Agreement will be construed as creating an employer-employee relationship, a partnership, or a joint venture between the Parties. Neither Party has any authority to assume or create obligations or liability of any kind on behalf of the other.

(h) *Compliance with Law; Government Approvals.* Each Party will, in all of its activities relating to this License Agreement, comply with all requirements of applicable law, including all applicable health, safety and environmental regulations.

(i) *No Obligation.* Nothing in this License Agreement will be construed as restricting either Party's rights to lawfully acquire, license, develop, manufacture or distribute for itself, or have others acquire, license, develop, manufacture or distribute for itself, other products performing the same or similar functions as the Licensed System, or to market and distribute such similar products in addition to, or in lieu of, the Licensed System.

(j) *Entire Agreement; Modification and Waiver.* This License Agreement (including the NDA) constitutes the entire agreement between the Parties regarding the Licensed System and supersedes any and all prior and contemporaneous agreements or communications with respect to such subject matter. This License Agreement does not, however, amend or supersede the Development Agreement or the Jazz Service Agreement (as that latter term is defined in the Development Agreement) with respect to the subject matter addressed by those agreements and those agreements shall remain in full force and effect. This License Agreement may not be modified except by a non-electronic written agreement dated subsequent to the date of

12.36

this License Agreement and signed on behalf of InfoFlows and Corbis by their respective duly authorized representatives

[Remainder of page intentionally left blank]

12.37

AGREED:

CORBIS CORPORATION

INFOFLOWS CORPORATION

By: Susan K. McDonald

By: Steve Jare

Name: Susan K. McDonald

Name: Steve Jare

Title: COO, CFU
6-2-06

Title: CEO

Approved by Corbis Legal
By: D.V.W.
Date: 5-30-06

12.38

Exhibit H
Underlying Computer Hardware And Operating Systems

12-39

Attachment A

MUTUAL NONDISCLOSURE AGREEMENT

This Nondisclosure Agreement ("Agreement") is made and entered into on the 20th day of November, 2008 ("Effective Date"), by and between Corbis Corporation, a Washington corporation, having its principal place of business at 710 Second Avenue, Suite 200, Seattle, WA 98104 and InfoFlows Corporation ("InfoFlows"), a Washington corporation, having its principal place of business at 1903 205th Pl NE. In consideration of the mutual covenants and promises contained in this Agreement and for other good and valuable consideration, the receipt of which is hereby acknowledged, the parties agree as follows:

- 1. Confidential Information.** Each undersigned party understands that the other party (each a "Receiving Party" or a "Disclosing Party," depending on whom is disclosing) may disclose information relating to the Services to be performed by InfoFlows under Statement of Work No. 3 ("SOW No. 3") to the Independent Contractor Agreement between Corbis Corporation and InfoFlows dated June 21, 2004 ("Contractor Agreement") or to the Disclosing Party's business (including, without limitation, computer programs, technical drawings, algorithms, know-how, formulas, processes, ideas, inventions (whether patentable or not), schematics and other technical, business, financial, customer and product development plans, forecasts, strategies and information), which to the extent previously, presently, or subsequently disclosed to the Receiving Party is hereinafter referred to as "Proprietary Information" of the Disclosing Party. Notwithstanding the foregoing, nothing will be considered "Proprietary Information" of the Disclosing Party unless either (a) it is or was disclosed in tangible form and is conspicuously marked "Confidential," "Proprietary" or the like or (b) it disclosed orally or in another non-tangible form is related to or derived from information disclosed in a tangible form and marked as required in part (a). InfoFlows acknowledges and agrees that all information relating to the Corbis License Management System and Service as generally described in the presentations entitled "License Management Solution: Next Generation", and "Project Baker: Scenarios using Digital Object Technologies for New Businesses at Corbis" (collectively "Presentations"), and all information disclosed to or discovered by InfoFlows or its authorized subcontractors in the course of or in connection with the Services under SOW No. 3 or any discussions relating to the Presentations or SOW No. 3 and in all deliverables, work product and inventions created, discovered or reduced to practice by Corbis or InfoFlows, alone or jointly with others, relating to any of the above is the sole property of and constitutes Corbis Proprietary Information.
- 2. Disclosure and Use of Confidential Information.** The Receiving Party agrees: (a) to hold the Disclosing Party's Proprietary Information in confidence and to take reasonable precautions to protect such Proprietary Information (including, without limitation, all precautions the Receiving Party employs with respect to its confidential materials), (b) not to divulge any such Proprietary Information or any information derived therefrom to any third person, (c) not to make any use whatsoever at any time of such Proprietary Information except to evaluate internally its relationship with the Disclosing Party, (d) not to copy or reverse engineer any such Proprietary Information, and (e) not to export or reexport (within the meaning of U.S. or other export control laws or regulations) any such Proprietary Information or product thereof.
- 3. Disclosures to Approved Third Parties.** Corbis and InfoFlows understand that during the term of this Agreement it may be necessary for the parties to engage in joint discussions with third parties involving subjects related to those covered by this Agreement. In order to meet this need and to protect each party's Proprietary Information from unauthorized use or disclosure, the parties agree to proceed as follows: (a) the parties shall mutually agree on the identity of third party ("Approved Third Party") and the subject matter to be discussed, as set forth in a schedule to this Agreement; (b) the parties shall confirm that the Approved Third Party is subject to a mutual nondisclosure agreement covering both Corbis and InfoFlows Proprietary Information; and (c) all discussions regarding the Disclosing Party's Proprietary Information (as referenced in the above referenced schedule) shall be conducted in the Disclosing Party's presence. Corbis and InfoFlows each agree that, provided all such steps have been taken, the Receiving Party may participate in discussions about the Disclosing Party's Proprietary Information with the Approved Third Party without violating this Agreement. The parties agree that all information derived

from Proprietary Information disclosed to an Approved Third Party shall be subject to the terms of this Agreement and SOW No. 3

4. Limitations on Confidential Information. Without granting any right or license:

a. As to any Receiving Party, the Disclosing Party agrees that the non-disclosure obligations set forth above shall not apply with respect to any information that such Receiving Party can document (i) is or becomes (through no improper action or inaction by the Receiving Party or any affiliate, agent, consultant or employee) generally available to the public, or (ii) was in its possession or known by it without restriction prior to receipt from the Disclosing Party, provided the Receiving Party complies with restrictions imposed thereon by third parties, or (iii) was rightfully disclosed to it by a third party without restriction, provided the Receiving Party complies with restrictions imposed thereon by third parties, or (iv) was independently developed without use of any Proprietary Information of the Disclosing Party by employees of the Receiving Party who have had no access to such information. The Receiving Party may make disclosures required by law or court order provided the Receiving Party uses diligent reasonable efforts to limit disclosure and to obtain confidential treatment or a protective order and has allowed the Disclosing Party to participate in the proceeding; and

b. This Agreement applies only to disclosures made before the first anniversary of this Agreement and shall not apply with respect to any information after five (5) years following the disclosure thereof; provided, however, that any limitations on the use of Proprietary Information imposed by patent, copyright, trademark or trade secret law shall survive termination of this Agreement to the fullest extent permitted by law.

5. Return of Confidential Information. Immediately upon a request by the Disclosing Party at any time each Receiving Party will turn over to the Disclosing Party all Proprietary Information of the Disclosing Party and all documents or media containing any such Proprietary Information and any and all copies or extracts thereof.

6. No Obligation to Disclose. The Receiving Party understands that nothing herein requires the disclosure of any Proprietary Information of the Disclosing Party to the Receiving Party.

7. No Commitment. The Receiving Party understands that nothing herein requires the Disclosing Party to proceed with any transaction or relationship.

8. No Solicitation. Each party agrees that it shall not, for a period of twelve (12) months from the date hereof, solicit the employment of or employ any of the other's employees or contractors who are employed by other party or its subsidiaries as of the date hereof or at any time during such twelve month period.

9. Remedies. The Receiving Party acknowledges and agrees that due to the unique nature of the Disclosing Party's Proprietary Information, there can be no adequate remedy at law for any breach of its obligations hereunder, which breach may result in irreparable harm to the Disclosing Party, and therefore, that upon any such breach or any threat thereof, the Disclosing Party shall be entitled to appropriate equitable relief, without the requirement of posting a bond, in addition to whatever remedies it might have at law. The prevailing party in any action to enforce this Agreement shall be entitled to costs and attorneys' fees.

10. Severability. In the event that any of the provisions of this Agreement shall be held by a court or other tribunal of competent jurisdiction to be illegal, invalid or unenforceable, such provisions shall be limited or eliminated to the minimum extent necessary so that this Agreement shall otherwise remain in full force and effect.

11. Governing Law. This Agreement shall be governed by the law of the State of Washington without regard to the conflicts of law provisions thereof.

12-41

12. Entire Agreement. This Agreement is effective as of the date set forth below and covers all information disclosed between the parties in connection with Statement of Work No. 3 to the Agreement and/or the Presentations and any technologies, methods or concepts contained in or derived therefrom. No waiver or modification of this Agreement will be binding upon a party unless made in writing and signed by a duly authorized representative of such party and no failure or delay in enforcing any right will be deemed a waiver.

Dated: November 29th, 2006

Agreed to:

InfoFlows Corporation

Corbis Corporation

Stew A. Stove
By: Stew A. Stove
Title: CEO

By: _____
Title: _____

12.42

Schedule 1

Disclosure to Approved Third Party

Approved Third Party:

Subject to be discussed and materials to be disclosed (if any):

Participants:

Date:

Disclosure to Approved Third Party

Approved Third Party:

Subject to be discussed and materials to be disclosed (if any):

Participants:

Date:

Disclosure to Approved Third Party

Approved Third Party:

Subject to be discussed and materials to be disclosed (if any):

Participants:

Date:

Disclosure to Approved Third Party

Approved Third Party:

Subject to be discussed and materials to be disclosed (if any):

Participants:

Date:

12-4-13

RECEIVED

2008 MAY -9 AM 10:55

The Honorable Nicole MacInnes

KING COUNTY
SUPERIOR COURT CLERK
SEATTLE, WA

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

CORBIS CORPORATION, a Nevada
corporation,

Plaintiff,

v.

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

Defendants,

INFOFLOWS CORPORATION, a
Washington corporation,

Plaintiff,

CORBIS CORPORATION, a Nevada
corporation,

Defendant.

No. 07-2-03244-4 SEA

~~PROPOSED~~

ORDER GRANTING CORBIS'
MOTION TO FOR PARTIAL
SUMMARY JUDGMENT
REGARDING CONTRACT
PROVISION DEFINING JAZZ
SERVICE

CLERK'S ACTION REQUIRED

THIS MATTER having come before the Court on Plaintiff Corbis Corporation's
Motion for Partial Summary Judgment Regarding Contract Provision Defining Jazz
Service, and the Court having considered:

[PROPOSED] ORDER GRANTING CORBIS' MOTION FOR PARTIAL
SUMMARY JUDGMENT RE: JAZZ SERVICE - 1
4835-8945-5362.01

App. F
CP 108

Riddell Williams P.S.
1001 FOURTH AVENUE
SUITE 4500
SEATTLE, WA 98154-1192
206.624.3600

222

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

Presented by:

RIDDELL WILLIAMS P.S.

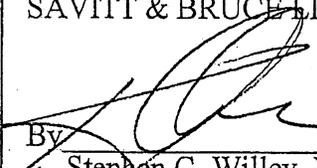
By

Karl J. Quackenbush, WSBA # 9602
William P. Brewer, WSBA # 30755
Attorneys for Plaintiff
CORBIS CORPORATION

Approved as to Form; Notice of Presentation Waive:

SAVITT & BRUCE LLP

By


Stephen C. Willey, WSBA # 24499
Attorneys for Defendants
STEVE A. STONE and
INFOFLOWS CORPORATION

1 1. Declaration of Karl J. Quackenbush in Support of Corbis' Motion for Partial
2 Summary Judgment Regarding Contract Provision Defining Jazz Service with exhibits
3 attached thereto;

4 2. Defendants' Opposition to Corbis' Motion for Partial Summary Judgment
5 Regarding Contract Provision Defining Jazz Service and the supporting Declarations of
6 Steve Stone with exhibits attached thereto and Jeff Lill; and

7 3. Corbis' Reply to Defendants' Opposition to Corbis' Motion for Partial
8 Summary Judgment Regarding Contract Provision Defining Jazz Service,
9 and being familiar with the files and pleadings in this matter, it is therefore, ORDERED

10 that:

11 (1) Corbis' Motion for Partial Summary Judgment Regarding Contract
12 Provision Defining Jazz Service is GRANTED;

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

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

20 IT IS SO ORDERED.

21 DATED this 9th day of May, 2008.

22
23 

24 Judge Nicole MacInnes
25 King County Superior Court Judge
26

9. Hosting and Service Agreement

4/21/06 from Corbis to IF

9. Hosting and Service Agreement. InfoFlows is, on its own initiative and at its own expense, building out a hosting service and handle insertion and management system, which service and system is described in Exhibit H to this Agreement (such services and system previously defined and identified as the "Handle Injection and Resolution Technology," in SOW #3 and now being called, the "Jazz Service"). 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 host both Phase 1 and Phase 2 of the System on 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") as a deposit on the service fees that will become due and owing under the Jazz Service Agreement. 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 _____, 2006. 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 will not exceed the sum of Two Million Dollars (\$2,000,000) per year and will in any event, be no more than the lowest fees charged to any other third party customer of.

4/25/06 from IF to Corbis

9. Hosting and Service Agreement. InfoFlows is, on its own initiative and at its own expense, building out a hosted service that enables the identification, resolution and persistence of information objects that exist on the surface or deep web, as more fully described in Exhibit H to this Agreement (the "Jazz Service"). The Jazz Service provides the necessary object database creation and management services, the internet crawl services, object indexing and search services, the local and global handle resolution services, the object finger printing services, the object handle injection services, all of which are necessary to associate an object with an owner. The definition of "object" as used above, applies to any information package including but not limited to desktop documents, email, web pages, music, video, images, database records, DNS records, medical records, etc. 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. It is the Parties express intent that in conjunction with the successful completion of each Phase of the System under this Development Agreement, Corbis shall enter into a hosting and service agreement with InfoFlows, 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"). Corbis and InfoFlows hereby agree to use their commercially reasonable best efforts to negotiate and enter into the Jazz Service Agreement, consistent with the terms of this Section 9 and Exhibit H. 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. 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 February, 2007 due to a failure by InfoFlows to meet the Deliverables set forth hereunder.

(a) Acknowledgement. The Parties understand and acknowledge that InfoFlows will be developing the Jazz Service in part, in reliance upon Corbis' commitment to enter into the Jazz Service Agreement, as set forth herein, and that such commitment represents a material part of the consideration under this Development Agreement. Provided InfoFlows meets the Specifications and Corbis accepts the Deliverables, as provided hereunder, Corbis shall be obligated and required to enter into the Jazz Service Agreement.

(b) Ownership. Corbis agrees and acknowledges that the Jazz Service and all Intellectual Property Rights related thereto shall be owned exclusively by InfoFlows, and Corbis shall not attempt to assert any rights or claims of ownership to the Jazz Service. Except as expressly set forth herein, nothing in this Development Agreement is intended to prevent or restrict InfoFlows' ability to develop applications based upon or related to the Jazz Service.

(c) Other Terms of Jazz Service Agreement. At a minimum, the Jazz service Agreement shall contain the following terms and conditions:

| | |
|---------------------------|---|
| | <p>1. Term. The terms shall be for a minimum of three (3) years.</p> <p>2. Fees, Timing of Payment. At the completion of Phase I of the System, Corbis will enter into the Jazz Service Agreement to have InfoFlows host and operate Phase I of the System for an annual service and license fee of \$1.2M per year, payable on a quarterly basis. The Jazz Service Advance Fee shall be applied against this service and license fee. Upon the completion of Phase II of the System, Corbis and InfoFlows will amend the Jazz Service Agreement to have InfoFlows host and operate Phase I and Phase II of the System for an annual service and license fee of \$2.0M, payable on a quarterly basis. The Parties agree that the annual service and license fee shall not, in any case, exceed \$2.0M, based on the service specifications set forth in Exhibit H, and will not exceed the lowest service and license fee being charged by InfoFlows to any other third party customer, based upon the same service specifications and the same or similar exclusivity rights as enjoyed by Corbis.</p> <p>3. Standard provisions for license and service agreements of this nature, including limitations of liability, representations and warranties, and indemnities, similar to those set forth in the System License Agreement.</p> |
| 4/26/06 from Corbis to IF | <p>9. Hosting and Service Agreement. 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 the purpose of defining the JazzService. For purposes of clarity only, the Parties agree the 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. "Digital Objects" means any information package including desktop documents, email, web pages music, video, images, database records, DNS records, 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. 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.</p> <p>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 will not exceed the sum of Two Million Dollars (\$2,000,000) per year for both Phase 1 and Phase 2, and that in any event such fees will be no more than the lowest amount charged by InfoFlows to any other third party customer of InfoFlows.</p> |
| 5/3/06 from IF to Corbis | <p>9. Jazz Service; Hosting and Service Agreement. InfoFlows is, on its own initiative and at its own expense, building the Jazz Service. For the purposes of this Agreement, the "Jazz Service" (which was formerly referred to in part as the "Handle Injection and Resolution Technology" under SOW No.3), shall be defined to mean a system made up of (i) the necessary technologies which enable Digital Object database creation and management; (ii) the necessary technologies that enable the injection and removal of handles into Digital Objects; (iii) the necessary technologies to manage these handles to insure their persistence and quality; and (iv) the necessary technologies that enable searching for and finding Digital Objects on the internet and in the deep web. "Digital Objects" means any information package including but not limited to 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</p> |

| | |
|---------------------------|--|
| | <p>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. 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 November 1, 2006.</p> <p>Corbis agrees and acknowledges that nothing in this Development Agreement grants Corbis ownership of or rights to the Jazz Service and that the Jazz Service and all Intellectual property Rights related thereto shall be owned by InfoFlows. 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 will not exceed the sum of Two Million Dollars (\$2,000,000) per year for both Phase 1 and Phase 2, based on the service specifications previously discussed by the Parties, and that in any event such fees will be no more than the lowest amount charged by InfoFlows to any other third party customer of InfoFlows, based upon the same service specifications and the same or similar exclusivity rights as enjoyed by Corbis.</p> |
| 5/11/06 from Corbis to IF | <p>9. Jazz Service; Hosting and Service Agreement. 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 the purpose of defining the Jazz Service. For purposes of clarity only, the Parties agree the 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. "Digital Objects" 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. 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.</p> <p>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 will not exceed the sum of <u>OPEN</u> Dollars (\$ <u>OPEN</u>) per year for both Phase 1 and Phase 2, and that in any event such fees will be no more than the lowest amount charged by InfoFlows to any other third party customer of InfoFlows.</p> |
| 5/16/06 from IF to Corbis | <p>9. Jazz Service; Hosting and Service Agreement. 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 the purpose of defining the Jazz Service. For purposes of clarity only, the Parties agree the 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. "Digital Objects" 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</p> |

| | |
|----------------------------------|---|
| | <p>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. 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.</p> <p>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 will not exceed the sum of \$500,000 for 2006, \$800,000 for 2007, and \$1.3 million for 2008, based on a non-exclusive arrangement. If Corbis desires exclusivity, the pricing set forth above will be adjusted accordingly, provided however that the total license fee per year will not exceed \$2 million per year for both Phase 1 and Phase 2, and that in any event such fees 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.</p> |
| <p>5/21/06 from Corbis to IF</p> | <p>9. Jazz Service; Hosting and Service Agreement. 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 the 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. "Digital Objects" 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.</p> <p>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, 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 Six Million Seven Hundred Fifty Thousand Dollars (\$6,750,000). 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.</p> |
| <p>5/22/06 from IF to Corbis</p> | <p>9. Jazz Service; Hosting and Service Agreement. 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 the 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</p> |

their persistence and quality; and (iii) the necessary technologies, which, when added to a web crawler, search for and find handleized Digital Objects. "Digital Objects" 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, 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 Six Million Seven Hundred Fifty Thousand Dollars (\$6,750,000). 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.

5/25/06 from Corbis to IF

9. Jazz Service; Hosting and Service Agreement. 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 the 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. "Digital Objects" 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

| | |
|----------------------------------|---|
| | <p>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 Six Million Seven Hundred Fifty Thousand 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.</p> |
| <p>5/26/06 from IF to Corbis</p> | <p>9. Jazz Service; Hosting and Service Agreement. 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 the 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. "Digital Objects" 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.</p> <p>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.</p> |
| <p>6/2/06 from Corbis to IF</p> | <p>9. Jazz Service; Hosting and Service Agreement. 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 the 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. "Digital Objects" means any information</p> |

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.