AMERICAN ARBITRATION ASSOCIATION
EMPLOYMENT ARBITRATION TRIBUNAL

Bridgewater Associates, LP Claimant v. Lawrence Minicone and Zachary Squire Respondents	No. 01-17-0006-7329 Final Award

We, the Undersigned Arbitrators, having been designated in accordance with the Arbitration provisions in Respondents' Employment Agreements dated respectively as of August 3, 2011 and January 29, 2013, and having duly heard the proofs and allegations of the parties, and Bridgewater Associates, LP, Claimant, being represented by Robert J. Gunther, Esq., John Pierce, Esq., and Margaret Artz, Esq. of Wilmer Cutler Pickering Hale and Dorr, LLP, James Pooley, Esq. of James Pooley, PLC and Faith Gay, Esq., Jennifer Selendy, Esq., Thad Eagles, Esq., and Altumash Mufti, Esq. of Selendy & Gay PLLC, and Lawrence Minicone and Zachary Squire, Respondents, being represented by Aaron Zeisler, Esq., Meghan Sullivan, Esq., and Sumana Wolf, Esq. of Zeisler, PLLC, and having previously rendered an Interim Award dated January 24, 2020, hereby AWARD as follows:

I. Basis of Arbitrators' Authority

Claimant Bridgewater Associates, LP ("Claimant" or "Bridgewater") is a hedge fund with assets under management of approximately $160 billion. Respondent Lawrence Minicone ("Minicone") became an employee of Bridgewater in 2008 and Respondent Zachary Squire ("Squire") became an employee of Bridgewater in 2010, pursuant to employment agreements (last updated respectively as above) that include extensive confidentiality provisions and a two-year noncompete provision on termination of employment at Bridgewater.

The agreements further provide that Connecticut law governs, have identical provisions for submission of claims by Respondents to binding arbitration under the National Rules for the Resolution of Employment Disputes of the American Arbitration Association ("AAA") and give Bridgewater the option of choosing whether to submit claims to binding arbitration under those AAA rules or commence action in a court of law. Bridgewater chose to initiate its claims against Respondents under the said AAA rules.

The governing contracts also provide that in the event of arbitration, each party shall bear its own costs and attorneys' fees. In that regard, Claimant did not initially request fees in its Demand. But in responding to Respondents' request for fees in their Counterclaim, Claimant did not seek to invoke the contractual provision on fees as a defense to Respondents' request. Later, during prehearing briefing—and again in posthearing briefing—when both parties requested an award of fees, neither invoked the contract provision as a defense. Accordingly, as there is nothing in the contracts between the parties that would make the fee provision self-executing, but rather just a protection to be invoked if desired, the request by both parties establishes a waiver of that provision here. We also note that Connecticut law seeks to deter bringing misappropriation claims in bad faith by providing that the prevailing party is entitled to recover attorneys' fees of suit incurred in defending against such bad faith claims, thus authorizing its courts to grant attorneys' fees in such cases. (*See* Connecticut Uniform Trade Secret Act, "CUTSA", C.G.S.A. Sec. 35-54 and Connecticut Unfair Trade Practices Act, C.G.S.A. Sec. 42-110a-b .) AAA Employment Rule 1 provides that in the event of a conflict between AAA rules and arbitration contract rules, the AAA rules govern. AAA Employment Rules 39(d) and 45 authorize granting attorneys' fees and costs to the extent a court would have authority to do so.

II. Background

This case is before us on Claimant Bridgewater's claims of misappropriation of trade secrets in violation of the Connecticut Uniform Trade Secret Act ("CUTSA"), unfair competition in violation of the Connecticut Unfair Trade Practices Act ("CUTPA"), and failure to notify Claimant of a new employer and use or disclosure of confidential information in breach of Respondents' contractual obligations. Respondents have denied Claimant's allegations, alleged bad faith on the part of Claimant in bringing this action, and requested attorneys' fees and costs related to the litigation, damages pursuant to the CUTPA, and damages for Claimant's tortious interference with business expectations and contract.

Respondents Minicone and Squire joined Bridgewater when they were, respectively, 25 and 24 years old. Each signed an employment agreement with extensive definitions of confidential information (including nonpublic information concerning Claimant's finances, strategic or financial plans, trade secrets, intellectual property, methods, techniques) not to be used or disclosed and a two-year noncompete provision. The non-compete required each Respondent, during the noncompete period, to give Bridgewater notice of any job offer he wished to accept and required Bridgewater's approval for acceptance. Minicone also signed a Trade Secret Agreement ("TSA") relating to his work on Bridgewater's Statistics-Based Growth Estimator ("SBGE") project.

Prior to joining Bridgewater, Minicone worked for FactSet Research Systems, a data provider focusing on equity firms, and Squire worked for two years at D.E. Shaw, a multi-strategy hedge fund. Bridgewater's witnesses conceded that Squire's prior experience at D.E. Shaw could have informed his approach to financial modeling or portfolio construction. (Jensen, Tr. 273:4-15). Bridgewater's own expert witness, Lawrence Leibowitz ("Leibowitz"), confirmed that "Mr. Squire brought in a level of understanding of portfolio construction and risk management because of his experience at D.E. Shaw." (Leibowitz, Tr. 765:19-24.) Minicone testified that one of his main roles at FactSet was to build financial models using publicly available data – skills he later used in developing investment technologies for Tekmerion ("TCM"), a competing fund Squire, Minicone and a third investor launched on February 1, 2017. (Minicone, Tr. 1897:11-1898:15; *id*. 1900:15-1901:3.)

In mid-2013, Respondents, voluntarily and separately, ended their employment at Bridgewater. After Bridgewater's objection to Squire accepting several job offers, it approved his moving to a job in London with HBK Europe Management LLP ("HBK"). Bridgewater approved Minicone moving to a job at Castleton Commodities International ("Castleton"), based in the U.S. Bridgewater attached no conditions to or limitations on Respondents' work for these firms.

Respondents worked, respectively, at HBK and Castleton for about three years. Squire testified that working at HBK was the first time he "owned a trade, end to end" (Tr. 1445) and that "shortly before my non-compete was actually set to expire…I started thinking about, you know, what are my options." (Squire, Tr. 1448.) He described contacting a childhood friend who was involved in different businesses, who had previously formed a company. The friend suggested they build a fund using an entity he had formed previously, which became Tekmerion ("TCM"). (Squire, Tr. 1449-50.) Squire contacted Minicone late in 2015, and the two began building investment models, working nights and weekends until TCM's launch on February 1, 2017. Respondents were principals and, with a third investor, owners of TCM. It was clear Respondents regarded the project as going to work for themselves.

Claimant may have known Respondents launched TCM on February 1, 2017, but in any event, it knew no later than February 3, 2017. At 4:25 p.m. on February 3, 2017, under the subject heading "New Competitor," a Bridgewater Senior Client Advisor wrote, "One of our clients shared this pitch book with me in confidence. Another ex-Bridgewater employee is setting up a systematic macro hedge fund. I'm forwarding along in case it wasn't on your radar." The email apparently included in-house counsel, as the content of further messages in the chain is redacted on the grounds of attorney client privilege. The email chain reflects the message was sent to additional employees including Kevin Brennan ("Brennan") and Greg Jensen ("Jensen"), at 4:41 p.m. At 7:10 p.m. Jensen forwarded a message to others including Ray Dalio ("Dalio"), CEO of Bridgewater, and Dalio responded at 7:25 p.m. (R-20.)

A month later, on March 3, 2017, Bridgewater, through its employee Bob Elliott ("Elliott"), contacted Squire requesting a phone conversation "about what you are up to and the strategy of the fund." (CX 75.) Squire testified the contact was "concerning" (Squire, Tr. 1505:3), and he regarded reference to "working together to get comfortable or the process becomes much more onerous" as a threat. (Squire, Tr. 1508:15-25-1509:2-18.) Elliott requested that TCM make a few small changes in the wording of the description of Squire's work at Bridgewater in TCM's pitch book (sometimes called a "deck"), which TCM made.

Squire testified that he and Minicone were aware of their confidentiality obligations to Bridgewater and were careful not to use anything that might constitute its confidential information. They developed their methodologies based on academic articles, books and publicly available information. (*See*, e.g. Tr. 1498:5-23.) It is not clear whether or how much detail they provided to Elliot, but their confidence that they had used nothing belonging to Bridgewater was demonstrated by their suggestion that both parties permit a neutral third-party expert to compare TCM's and Bridgewater's models to confirm that no Bridgewater confidential information had been misused. (Squire, Tr. 1532:15-1533:9 and Ex. R-57.) TCM was also willing to consider having a retired Bridgewater employee review the TCM models and methodologies Bridgewater was concerned about.

At a face-to-face meeting on June 9, 2017, attended by Elliot, Brennan, Squire and Minicone (Squire, Tr. 1529:19-20), the Bridgewater team insisted that its current employees be given access to all of TCM's models and investment methodologies. (CX 72 at 2; *see also* Jensen, Tr. 224:11-16; Squire, Tr. 1532:5-1534:8.) Bridgewater's position was that it needed "the right to expand the scope of review based upon information [Bridgewater] discover[ed] as [it] continue[d] to review Tekmerion's materials"; in other words, it demanded "unfettered access" to all of TCM's materials to "explore" whatever it wanted. (*See* CX 72 at 2; Brennan, Tr. 2396:20 – 2398:2.)

After talking with TCM's seed investor, Squire wrote to Elliott on July 9, 2017 (R-27):

> While we appreciate your acknowledgment that you don't have any reason to believe that Lawrence and I took any models or other confidential materials out of Bridgewater, your statements that Bridgewater nevertheless doesn't like the "touch and feel" of what Tekmerion is doing make it highly unlikely that Bridgewater would be able to evaluate objectively its own allegations that we've taken your IP if we unilaterally expose our models to you, as you've suggested. We think it's a highly unusual request to have your own staff come and study our models, and we believe that the much more standard approach of relying on a third-party expert is likely to lead to a more accurate evaluation, which I think we can both agree is the goal. Accordingly, we'd like to reiterate our offer to have an objective third party evaluate your models and ours in order to determine whether we've taken any of Bridgewater's confidential information.

Negotiations continued through September 13, 2017. (CX 72.) Squire testified that he thought negotiations were still continuing when Claimant filed its Demand for Arbitration on November 7, 2017. (Squire, Tr. 1550:18-19.) At no time before, during or after the June 9, 2017 meeting and prior to filing its Demand for Arbitration, other than an early (spurious) reference to a third-party report of "replication" of Bridgewater's Signal methodology (Squire, Tr. 1506:10-1508:13), did Claimant identify any trade secrets or articulate any specific methodologies it was concerned about.

III. Demand for Arbitration; Answer and Counterclaims; Discovery

In its Demand for Arbitration, Claimant alleged, "(o)n information and belief" that Respondents had misappropriated "certain confidential and proprietary trade secret material owned, developed and used by Bridgewater to understand and predict the movement of markets, construct high-quality portfolios, control risk in investments and provide effective investment advice to clients" and alleged that they (Respondents) "are now improperly using such material at TCM" in violation of the Connecticut Uniform Trade Secrets Act ("CUTSA"). Claimant also alleged Respondents violated their employment agreements, that Minicone violated his TSA, and that both Respondents engaged in unfair competition in violation of Connecticut's Unfair Trade Practices Act ("CUTPA") C.G.S. Sections 42-110a-b.

The Demand for Arbitration, for the first time, identified five trade secrets Claimant alleged Respondents misappropriated as follows: Slack Measure Process ("Slack"), SBGE, Signal Construction methodologies ("Signals"), Portfolio Construction and Risk Control ("Risk Control") and a Short-Rate Trading system ("Short-Rate").

In their Answer, Respondents denied Bridgewater's claims, alleged Claimant's filing was a sham, and filed counterclaims for violation of CUTPA and tortious interference with "business expectancies" and contract. In support of their denial of misappropriation claims, Respondents noted:

> As is widely-recognized, Bridgewater's offices are extremely secure facilities, requiring employees such as Squire and Minicone to place their cell-phones into signal-proof lockers upon entry, recording all employee movements by video, recording phone calls and internet communication, logging all computer access, requiring any files or attachments sent externally via email to be explicitly approved on a case-by-case basis, and maintaining restricted zones within Bridgewater's offices. In short, if Squire or Minicone had actually 'misappropriated' any trade secrets, Bridgewater would have evidence of it.

Respondents characterize Claimant's claims as "specious." They note the filing of the arbitration would cause "immediate and significant harm" to Respondents and TCM because the claims had to be reported to TCM's current investors and, so long as the litigation continued, disclosed to prospective investors. They accuse Claimant of attempting to derail Respondents' careers "through the prosecution of knowingly meritless claims," stating that "Bridgewater initiated this arbitration proceeding for the sole purpose of preventing or hindering Squire and Minicone's participation in a new fund," and characterizing the proceeding as "a thinly-veiled attempt to interfere directly with the business of a competitor."

Bridgewater and TCM each regard their models, algorithms, and related intellectual property as proprietary, and potentially valuable to the other. Accordingly, in anticipation that discovery would require disclosure of proprietary information and in order to protect it, an elaborate and detailed Confidentiality Agreement was negotiated by the parties, including some negotiations in the presence of the Tribunal. The Confidentiality Agreement included provisions for identifying the trade secrets Respondents allegedly misappropriated, which Respondents would be permitted to see, and separately marking related or subsequent versions of those trade secrets, which would be made available only to outside counsel and experts for purposes of comparing methodologies used by Claimant and TCM.

The discovery process was highly contentious. From the outset and at the joint request of the parties, issues relating to the Confidentiality Agreement and all discovery issues as well as pre-hearing motions were resolved by the full Tribunal, which issued a total of nineteen (19) pre-hearing orders.

In response to Respondents' request and subject to review with limitations on where it could be viewed, copying and requiring any notes they made to remain with their outside counsel (Prehearing Order #2), Claimant provided a Bill of Particulars purportedly describing the trade secrets at issue. Respondents claimed that the descriptions were vague and insufficient to enable an expert to determine the technical details of implementation as to how each of the alleged trade secrets actually worked. The Tribunal agreed, and ordered both parties to produce models, algorithms, formulas, spreadsheets, detailed component parts, equations and plain English descriptions ("PEDs") ("Models, etc.") of each alleged trade secret. (Prehearing Orders 6, 11, 17, 18 and 19.)

Despite the protections of the detailed protective order of confidentiality, including a form of confidentiality agreement the parties' respective experts signed, and despite being repeatedly ordered to provide Models, etc., Claimant never produced documents providing the degree of specificity that was required to define the trade secrets allegedly misappropriated.

IV. Required Proofs

Proof of misappropriation of a trade secret requires proof by a preponderance of the evidence that the alleged misappropriator had access to the trade secret and is using it in violation of a commitment to maintain its secrecy. (C.G.S.A. Sec. 35-51(b).) The statute further provides, at C.G.S.A. Sec. 35-54, that where a claim of misappropriation is brought in bad faith, the court may award reasonable attorney's fees to the prevailing party.

Proof of violation of CUTPA requires a finding that the claimant suffered an "ascertainable loss of money or property". (G.S.A. Sec. 42-110g(a).)

Proof of tortious interference with business also requires proof of interference and loss from the alleged interference.

V. Hearings: Testimony; Witness Credibility

Claimant withdrew its misappropriation claim with regard to Signals as a trade secret ten days before commencement of the hearings, ostensibly because it was unwilling to produce an unredacted version of the PED describing it but, in its opening statement, said that it was preserving the claim as to unfair competition. (Gunther, Tr. 4:7-6:25.)

As part of its opening statement, Respondents complained that in its prehearing brief, Claimant appeared to have withdrawn its trade secret claims and would be pursuing only claims of unfair competition, and was now attempting to reassert all of its claims. (Zeisler, Tr. 57:3-64:25.) In any event, the hearings proceeded as if the trade secret claims had not been withdrawn.

Claimant alleged that Minicone's failure to give Bridgewater notice that he was working for TCM constituted a breach of contract and gave rise to a suspicion that he had misappropriated trade secrets and was using or disclosing confidential information. Bridgewater regards the notice provision as obligating a former employee to "provide notice of anything in the world that they may do with respect to trading or investing….for the rest of one's career." (Brennan, Tr. 2388:11-89:3.).

There is some question as to whether, under the facts of this case, such notice was required. We need not decide that issue for two reasons.

First, there was no harm – Claimant knew about TCM within two days of its launch and was able to have conversations as contemplated by the TSA notice provisions. (Brennan, Tr. 2386:13-2389:3.)

Second, Claimant was emphatic that its *only basis* for alleging misappropriation of its trade secrets was its review of TCM's marketing materials ("deck"). Jensen stated, "I don't have any other evidence. I don't need any other evidence." (*See* R-171, Dep. Tr. 195:9-196:16, and Leibowitz, Tr. 877:4-6.) Jensen admitted allegations of misappropriation and disclosure of confidential information were based on a guess, "…without seeing the literal code, obviously just an educated guess that it was a process that he had exposure to here." (Jensen, Tr. 195:16-19.) Brennan also admitted that Bridgewater brought this action based only on its review of TCM's deck. (R-171, Brennan, Tr. 2357:2-3; Tr. 2362:14-21.)

Respondents submitted into evidence decks from unrelated third-party funds that looked similar to TCM's deck. Bridgewater refused to produce a copy of its marketing materials – its deck – but Jensen testified that TCM's deck was "generally not the same" as Bridgewater's. (Jensen, Tr. 326:9-25.)

As noted above, Claimant had and has an elaborate system for protecting its intellectual property, including having employees enter and exit their offices through designated doors, and requiring employees to store cell phones and personal computers in digital-access-blocking lockers. Access to confidential information is limited to employees on a "need-to-know" basis, and enforced by providing digital access to designated "NT Groups". (Jensen, Tr. 108:17.) It is corporate policy to require employees to sign separate trade secret agreements for each project involving a trade secret, even when there is some question as whether a TSA is necessary. (Karniol-Tambor, Tr. 1886:20-25, 1889:4-1890:15.) Brennan, the person responsible for the security of Claimant's intellectual property in connection with departing employees, testified that he knew at least as early in February, 2017 that Squire did not have access to the five alleged trade secrets. (Brennan, Tr. 2401:18-2403:22.) Bridgewater's own internal records showed Squire had zero exposure to trade secrets, and showed Minicone's exposure as 2%. (CX 114:10, R-174.)

The only evidence Claimant presented in support of Respondents' access to trade secrets were lists created for purposes of the litigation by a Bridgewater employee who was hired two years after Respondents left the company, and he did not testify. Respondents' counsel challenged the accuracy of the lists, pointing out that they included persons listed as having access during the period of Respondents' employment who were not employed at Bridgewater during that period and excluded persons who did have access. (See R-23, R-147, R-171, Jensen Dep. Tr. At 106:4-107:6; 109:15-111:14, 110:19-21.) The errors and inaccuracies rendered the lists not credible as evidence.

At a minimum, the allegations of misappropriation against Squire were made in reckless disregard of Bridgewater's own internal records and the knowledge of responsible employees. The allegations of misappropriation against Minicone regarding at least four of the five alleged trade secrets were also made in reckless disregard of Bridgewater's own internal records and the knowledge of responsible employees.

Other than the fact that Minicone signed a trade secret agreement regarding Claimant's statistics-based growth estimator ("SBGE"), Claimant presented no credible evidence that Respondents had access to the alleged trade secrets.

Claimant's fact witnesses testified at length about the importance of ideas. Jensen, one of Bridgewater's three co-chief investment officers (Jensen, Tr. 85:23-24), described Bridgewater as "a community of people…who care…about what's going on in the world (to) build out Bridgewater's understanding" about how to invest and make money. (Jensen Tr. 96:18-97:18.) Jensen testified that "taking the intuitive understanding, backing that up with rigorous analysis and systemizing those things, that's what Bridgewater does." (Jensen, Tr. 171:12-16.) Other descriptions of Bridgewater's alleged trade secrets and confidential information were similarly vague; on cross-examination, Jensen admitted others have a similar approach. (Jensen, Tr. 269:14.)

Jason Rotenberg ("Rotenberg"), Minicone's immediate supervisor, also testified about the importance of ideas and described a process of having a theory, testing it with a crude model, and then "if the logic is good…harden(ing) it so that we can use it in trade….The most important thing is concepts." (Rotenberg, Tr. 352:24.)

Based on the testimony of both Claimant's and Respondents' experts, the testimony of Claimant's fact witnesses attempting to establish a unique "Bridgewater logic" or "Bridgewater approach" described a well-known and widely used process in economics and other disciplines. Their testimony avoided articulating the specifics of any of the trade secrets or confidential information that was allegedly disclosed or used. Its primary effect was to prolong the hearings without providing the specificity required to establish the alleged causes of action.

Both Jensen's and Rotenberg's testimony conveyed a sense that Bridgewater expects employees at Respondents' level to remain with Bridgewater for their entire careers and regards leaving as a betrayal. Rotenberg's demeanor indicated an undercurrent of anger that one or both Respondents had left Bridgewater; his answers to straightforward questions on cross-examination were lengthy and evasive regarding specifics. (S*ee e.g.,* Rotenberg, Tr. 467:9-474:9.)

As Claimant provided no information regarding its use of the rough model on which Minicone worked, Claimant itself foreclosed its ability to prove Minicone disclosed or was using a trade secret or confidential information relating to SBGE, a necessary element of both trade secret misappropriation and breach of contractual obligations of confidentiality.

With regard to Claimant's experts, Leibowitz acknowledged conferring with Claimant's employees in order to understand "how these models worked" and "about the concepts to make sure I understood how everything fit together." (Leibowitz, Tr. 2488:8-14; 2521:15-18.) Information and conclusions informed by those conversations were not subject to challenge by Respondents' experts or counsel, making it difficult for the Tribunal to determine what portions of his report and direct testimony were guided by and reflected unsupported conclusions reached by Bridgewater employees.

Both Leibowitz and Claimant's second expert, Peter Knez ("Knez") relied on Claimant's counsel to reach "factual" conclusions in their report. During cross-examination of Leibowitz, Respondents' counsel ("Zeisler") asked if Leibowitz had cut and pasted materials that WilmerHale (Claimant's counsel) sent him into his report, and Leibowitz responded, "Absolutely not." Zeisler then pointed out that both of Claimant's experts' reports have identically worded sections titled "Background: Relevant Law and Facts," at which point Claimant's counsel ("Gunther") interjected, "I'll make a representation to the extent he's talking about the legal section, we provided the legal section to both experts. We provided the law to the experts to apply." (Leibowitz, Tr. 925:16-926:17; 927:23-928:2.) The section, however, contains not just alleged applicable law (some of which Zeisler argued was inaccurate), but also "facts" set forth as if grounded on experts' examination of materials made available through discovery, but actually supplied by Claimant's counsel. In other words, Claimant's experts relied on Claimant's outside counsel to reach at least some "factual" conclusions on the basis of law and facts provided by Claimant's counsel. (Leibowitz, 929:8-932:6.)

Some of the "facts" Claimant's counsel provided were not supported by the evidence presented. For example, Claimant's counsel provided as fact that Minicone "was able to create a model that matched Bridgewater's existing Slack process almost exactly." (Leibowitz Report, para. 37, Knez Report para. 28.) Neither Leibowitz nor Knez was provided with Bridgewater's existing Slack process or a model of that process as it existed in 2011-13. The conclusion in paragraph 28 of Knez's Report and paragraph 37 of Leibowitz's report that Minicone "was able to create a model that matched Bridgewater's existing Slack Measure Process almost exactly" came from Bridgewater's counsel, not its experts.

Claimant's counsel thus provided Claimant's experts with (alleged) facts that were shown to be unsupported by the evidence adduced during the hearing. By doing so, it guided Claimant's experts to Bridgewater's desired conclusions, thus leaving them vulnerable to a withering cross-examination that compelled them to repudiate fundamental elements of Claimant's case that their reports and testimony were designed to support.

Ultimately, Claimant's own experts acknowledged they had no evidence, from the materials examined, that Respondents had misappropriated any material that could be characterized as a trade secret. Leibowitz, testified: (i) there was no misappropriation of Signals by Respondents (Leibowitz, Tr. 2249:17-22); (ii) regarding the Statistics-Based Growth Estimator in connection with which Minicone signed a Trade Secret Agreement, what Bridgewater claimed as proprietary was "widely published" (*see* Tr. 2499:23-2500:16; 2501:21-25); (iii) that there was nothing specific about the output gap ("Slack") that he thought was allegedly Bridgewater's trade secret (*see* Tr. 2522:11-25); (iv) that the components of Bridgewater's Risk Control process (defined in documents and for purposes of hearing testimony as the "Portfolio Construction and Risk Control" process) were in fact publicly available or readily ascertainable to industry participants (*see* Tr. 2535:24-2536:6); and (v) the concepts were "well known". (Tr. 2492:8-13.) Knez testified that he read and relied on Leibowitz' Report (Knez, Tr. 1158:13) and confirmed he did not conclude that Respondents misappropriated any trade secrets. (Knez, Tr. 1179:4:12.) Thus, neither expert provided either a reliable basis or credible support for Claimant's allegations.

Squire testified Respondents were aware of their obligations and careful not to use even Bridgewater's approach, relying instead on academic articles and books, including "Expected Returns: An Investor's Guide to Harvesting Market Rewards," (R-104, which Squire identified specifically as one he used. (R-106, Squire, Tr. 1455:5-1456:6.) Respondents' expert, James Lewis ("Lewis") described the book as an industry standard reference work and recognized it as the basis for TCM's model underlying its risk control portfolio construction model. (Lewis, Tr. 2178:14-2179:5.) Respondents' expert Richard D. Bateson ("Bateson") testified that TCM's models and spreadsheets appeared to be based on academic literature and copied publicly available information, thus corroborating Squire's testimony. (Bateson, Tr. 1268:20:24.)

Respondents' experts analyzed each of the alleged trade secrets and found no evidence that any of them, as described, constituted non-public information or information not known to professionals in the industry. Bateson described Leibowitz's description of Bridgewater's "investment pipeline" as "very generic. All systematic funds will do this process." (Bateson, Tr. 1194:17-25.) Bateson also noted that Bridgewater's SBGE (as described) is more highly correlated to a third-party estimate whose methodology is publicly available – Goldman Sachs' – than to TCM's growth measure. (Bateson, Tr. 1242:16-124:15.) Bridgewater's own employee acknowledged that Goldman Sachs' statistics-based growth estimating methodology is very different from Bridgewater's SBGE. (Rotenberg Dep. Tr. At 212:6-123-24; Tr. 423:2-424:8.) Lewis testified regarding Claimant's Short-Rate technology, that he was unable to identify anything "unique or even unusual" and characterized Bridgewater's claim regarding Signals as "frivolous" (Lewis, Tr. 2204:17.)

In contrast to Claimant's experts, Respondents' experts were neutral in their approach, they did not consult with Respondents or Respondents' counsel to reach their conclusions, and their analyses and conclusions were independent, impressively detailed and completely credible.

To summarize, Claimant failed to provide credible evidence that Respondents had access to the alleged trade secrets and failed to articulate the alleged trade secrets with sufficient specificity to distinguish them from publicly available information or information generally known to professionals in the industry. Its failure made it impossible for Respondents, experts or the Tribunal to identify them, despite numerous requests and Tribunal orders to provide the required specificity regarding the information. Claimant produced no evidence that its alleged trade secrets, as described, were protectable. Expert testimony of both Claimant's and Respondents' experts confirmed that the concepts expressed by the labels given to the trade secrets are well-known and that the descriptions of alleged trade secrets Bridgewater provided were either too vague to identify them or did not distinguish them from publicly available information or methodologies known to professionals in the industry.

As noted above, Respondents were so confident that their portfolio construction and trading methodologies were different from Claimant's and used none of Claimant's proprietary methodologies that they suggested, even before litigation, that an outside expert, even possibly a retired Bridgewater employee, be allowed to compare them.

Claimant argued that its economic success as a hedge fund supported its assertions that it had and has valuable trade secrets, but presented no evidence that it derived independent economic value from the information described as trade secret not being generally known (since it was and is), and presented no evidence that it suffered any economic injury relating to its claims - a requirement for proving violation of CUTPA.

Claimant produced no evidence of a "methodology" (as distinct from a trade secret) defined sufficiently to constitute confidential information that Respondents were contractually obligated not to disclose or use. Nor did Claimant produce descriptions of specific confidential information Respondents allegedly used or disclosed.

Claimant knew, from the outset, that in order to prevail in its action it would be required to provide specific details of its alleged trade secrets and that descriptions of publicly available information would not suffice to prove its case. When Jensen admitted allegations of misappropriation and disclosure of confidential information were based on a guess, he also stated, "…without seeing the literal code, obviously just an educated guess that it was a process that he had exposure to here." (Jensen, Tr. 195:16-19.) By so stating, Jensen effectively admitted that it was necessary to see the literal code to make a determination as to whether there had been a misappropriation. Bridgewater's insistence, pre-filing, that it be given "unfettered access" to TCM's systems also evidenced its awareness that proof of its misappropriation claims would require sufficient disclosure of the details of its alleged trade secrets to enable experts to compare them with the systems Respondents created for TCM. Finally, Bridgewater's hard-fought negotiations regarding the provisions of the Confidentiality Agreement indicated it expected to and would provide the information required to prove its case.

In an article written by members of Claimant's counsel's firm and published in the New York Law Journal, the authors wrote, "a plaintiff can reasonably anticipate that the defendant will insist that it be appraised of considerable detail describing the trade secret." The authors also warned that specific definitions of the alleged trade secrets prior to commencement of discovery were essential because "it (is) easy for plaintiffs to launch fishing expeditions based on superficial allegations with little or no evidence of misappropriation" and then tailor their claims to information obtained through discovery. (Guerney et al., "Benefits of Early Discovery in Defending Trade Secret Misappropriation Claims, New York Law Journal, vol. 249-No. 113, Thursday, June 13, 2013.) By refusing to provide specifics, Claimant foreclosed the possibility of meeting its burden and knew or should have known that it was doing so.

Claimant's principal fact witnesses testified at length about vague claims never made in the Demand for Arbitration (e.g., proprietary "Bridgewater logic"), and on cross-examination, often testified at length and evasively. In contrast, Respondents' testimony, both on direct and cross-examination, was straightforward, sincere, consistent and credible.

VI. Award on Claimant's Claims

On the question of whether Respondents, or either of them, misappropriated Bridgewater's trade secrets, given that the burden of proof rests with the party making that claim, we find as follows:

- Claimant failed to articulate the trade secrets it alleged were misappropriated with sufficient particularity to enable the Tribunal to conclude that Respondents had misappropriated trade secrets.

- Claimant failed to prove Squire had access to any trade secrets.

- Claimant failed to prove Squire used or disclosed any alleged trade secrets or confidential information.

- Claimant failed to prove Minicone had access to four of the five alleged trade secrets. (He signed a TSA for the Statistics-Based Growth Estimator project but there was no evidence that Bridgewater used the rough model he built in its actual working system, that is, in anything Bridgewater actually did or does.)

- Claimant failed to prove that Minicone misappropriated, used or disclosed any trade secret or confidential information relating to Bridgewater's Statistics-Based Growth Estimator as used by Bridgewater. (Again, Claimant provided no evidence that Bridgewater used or uses the rough model he built in its actual working system, that is, in anything Bridgewater actually did or does.)

- Claimant failed to identify the alleged confidential information Respondents, or either of them, used or disclosed and therefore failed to prove Respondents, or either of them, misappropriated, used or disclosed any of Claimant's confidential information.

THEREFORE, Claimant's claims are denied in full.

VII. Respondents' Counterclaims

Respondents allege, "Bridgewater initiated this arbitration proceeding for the sole purpose of preventing or hindering Squire and Minicone's participation in a new fund" and that the proceeding is "a thinly-veiled attempt to interfere directly with the business of a competitor – an anti-competitive tactic…."

The counterclaim notes, and Squire testified, that (under federal securities law and applicable rules and regulations), Squire and Minicone had to report the dispute not only to TCM and its current investors but also must disclose the dispute to all potential investors so long as the case is pending. Thus, "Bridgewater need not prevail on its sham claims in order to accomplish its true goal of preventing Squire and Minicone, or TCM, from succeeding." Respondents alleged Claimant initiated proceedings "based on meritless claims for the sole purpose of thwarting competition" and constitute an unfair method of competition in violation of CUTPA. Finally, Respondents allege "Bridgewater's calculated decision to make baseless accusations against Respondents shortly after they joined a new fund constitutes tortious interference with business expectancies and contract under Connecticut law."

In essence, Respondents allege that this action is a sham, brought in bad faith with the purpose of harming Respondents and TCM - the competitor they formed.

In connection with the arbitration, Respondents seek an award of monetary damages, punitive damages and attorneys' fees and costs.

Claimant acknowledged at the outset, even prior to the arbitration, that it was not alleging either Respondent had breached his noncompete obligations and was not alleging that either Respondent had copied or taken any confidential materials other than what might be in their heads. (R-27, Demand for Arbitration).

In *Clinipad Corp. v. Aplicare, Inc.*, 1991 WL 27889, the court stated:

> The law is well settled that, in the absence of a restrictive agreement, a former employee can properly compete with his former employer. *Town and Country House & Homes Service, Inc. V. Evans*, 150 Conn. 314, 317. Even before the termination of his employment, an employee is entitled to make arrangements to compete, except he cannot use confidential information peculiar to his employer's business and acquired therein. Restatement, Agency 2d, Section 393 comment e. An employee has a right to grow with his experience, and he can carry away for general use his skill and everything that he has learned at his place of employment, except trade secrets. (citations omitted).

In a trade secret misappropriation case, the plaintiff bears the burden of establishing that the defendant had access to the claimed trade secret. *See Next Comms., Inc. v. Viber Media, Inc.*, 758 Fed. Appx. 46, 48 (2d Cir. 2018) ("the defendant must have accessed the trade secret to misuse it"); *see also EarthWeb, Inc. v. Schlack*, 71 F.Supp.2d 299, 305 (S.D.N.Y. 1999) (finding employee with limited access to trade secrets could not have misappropriated this information: "While the central nature of Schlack's position necessarily offered him a broad perspective over EarthWeb's day-to-day operations, in many important respects his access to highly confidential information was limited"); *id.* at 316 ("With respect to technical matters, the Court doubts that Schlack's generalized level of input permitted him access to the type of information traditionally afforded trade secret protection.").

Bridgewater failed to introduce sufficient evidence to establish that Squire had access to any of the five alleged trade secrets at issue in this arbitration, and failed to prove that Minicone had access to four out of the five alleged trade secrets. Indeed, the allegations of misappropriation against Squire were made in reckless disregard of Bridgewater's own internal records and the knowledge of responsible employees. The allegations of misappropriation against Minicone regarding at least four of the five alleged trade secrets were also made in reckless disregard of Bridgewater's own internal records and in connection with SBGE, in reckless disregard of the knowledge of its responsible employees.

Claimant rejected Respondents' reasonable offer, prior to filing this arbitration, to submit the parties' respective methodologies to a neutral third party, possibly even a retired Bridgewater employee, for comparison to determine what, if any, methodologies and/or confidential information Bridgewater thought Respondents had and were using. A reasonable negative inference is that any such submission would have shown absence of misappropriation of alleged trade secrets and any confidential information.

Claimant also refused to provide information regarding its methodologies beyond general descriptions of publicly available information during the discovery process, thus, by its own actions, precluding the possibility of proving its misappropriation claims.

Squire's testimony that Respondents' methodologies were developed independently based on academic literature was persuasive and credible. Without any discussion with Respondents, Respondents' expert, Bateson, testified that the TCM spreadsheets and models appeared to be based on academic literature, thus corroborating Squire's testimony.

Also as noted above, Claimant (i) failed to articulate the alleged trade secrets with sufficient specificity to enable Respondents, experts or the Tribunal to identify them, despite numerous requests and Tribunal orders to provide that information, (ii) produced no evidence that its alleged trade secrets as described were protectable, (iii) presented no evidence that it derived independent economic value from the information described not being generally known (since it was and is), and no evidence that it suffered any economic injury relating to its claims.

It is well-established the law requires a trade secret claimant to describe the secret with sufficient specificity to enable an accused to identify that trade secret. Reliance on possible exposure to general concepts is not sufficient. (*See e.g. Big Vision Private Ltd. v. E.I. DuPont De Nemours & Co.*, 1 F.Supp. 3d 244, 257 (S.D.N.Y 2014.) In *Gabriel Technologies Inc., et al. v. Qualcomm Inc*., et al., 2013 WL 410103 (S.D. Cal. Feb. 1, 2013), the court found plaintiff's misappropriation claims to be baseless because, *inter alia*, (i) plaintiff failed to adequately identify the allegedly misappropriated trade secrets during arbitration, resulting in expense discovery disputes, and (ii) plaintiff failed to heed several judiciary warnings as to the need for evidentiary support of its claims and instead proceeded with its claims without remedying the discovery deficiencies. In *Clearwater Systems Corp. v. EVAPCO, Inc.*, 2006 WL 726684 (D. Conn. Mar. 20, 2006), the court found bad faith because plaintiff's alleged trade secrets were either generally known in the industry or readily ascertainable.

Where a compilation is sought to be protected, the claimant "must describe the secret with sufficient specificity that its protectability can be assessed and show that its compilation is unique (citations omitted)." *Sit-Up Ltd. v. IAC/InteractitveCorp.* 2008 WL 46388. Descriptions of publicly available information or concepts, methods and processes generally known to professionals in the industry do not constitute that required specificity.

Here, as in *Sit-Up*, Claimant refused to provide the specificity required to inform Respondents of the trade secrets they were accused of misappropriating. Claimant's refusal commenced prior to June 9, 2017, and continued through the discovery process, despite demands from Respondents' counsel and in repeated contravention of the Tribunal's specific discovery orders. Claimant's refusal not only foreclosed the possibility of prevailing on its claims, it hampered Respondents' ability to prepare their defense, and compelled them to spend funds for their defense and time away from building their new business.

In *Alamar Biosciences Inc. v. Difco Laboratories Inc.*, 40 U.S.P.Q.2d 1437 (E.D. Cal. 1995), the court indicates a reasonable plaintiff is required to take steps a reasonably diligent plaintiff would take in investigating its claims. Claimant here did no such investigation and insisted it "didn't need to." The *Alamar* court also stated, "Whatever the state of [plaintiff's] counsel's knowledge was, [plaintiff] was aware of all the facts." The court also stated, "(b)ad faith may be inferred where the specific shortcomings of the case are identified by opposing counsel, and the decision is made to go forward despite the inability to respond to the arguments raised" (citing *Cf.* F.R.Civ.P. 11). In the matter before us, Respondents' counsel's demands and the Tribunal's pre-hearing orders clearly identified the shortcomings of Claimant's case.

In *Keller v. Keller*, 167 Conn. App. 138, 150 (Conn. App. Ct. 2016), the trial court "based its determination of bad faith in part on its finding that plaintiff had committed numerous willful violations of court orders." In *Fattibene v. Kealey*, 18 Conn. App. 344 at 361) quoting *Dow Chemical Pacific Ltd. v. Rascator Martime S.A.*, 782 F. 2d 329, 345 (2d Cir.1986), the court found a party's pursuit of frivolous contentions and willful violations of court orders constitutes bad faith. In *Zeller v. Consolini*, 59 Conn. App. 545, 555 (Conn. App. Ct. 2000), the court found "supplying false information" to constitute evidence of bad faith.

As stated above, Claimant knew, from the outset, that in order to prevail in its action it would be required to provide specific details of its alleged trade secrets and that descriptions beyond information publicly available and information generally known to professionals in the industry would not suffice to prove its case. When Jensen admitted allegations of misappropriation and disclosure of confidential information were based on a guess, he also stated, "…without seeing the literal code, obviously just an educated guess that it was a process that he had exposure to here." (Jensen, Tr. 195:16-19.) By so stating, Jensen also admitted that it was necessary to see the literal code to make a determination as to whether there had been a misappropriation. Bridgewater's insistence, pre-filing, that it be given "unfettered access" to TCM's systems also evidenced its awareness that proof of its misappropriation claims would require sufficient disclosure of the details of its alleged trade secrets to enable experts to compare them with the systems Respondents created for TCM. Finally, Bridgewater's hard-fought negotiations regarding the provisions of the Confidentiality Agreement indicated it knew it would be expected to provide the information and that it contemplated doing so.

Refusal to disclose sufficiently specific information (models, detailed PEDs) to enable experts to directly compare and determine whether Respondents used any of Bridgewater's confidential information, which Jensen testified was needed to make a determination (Jensen, Tr. 195:16-19) supports the inference that Claimant believed disclosure would have shown Respondents did not use any Bridgewater methodologies.

Refusal to disclose sufficiently specific information to enable experts to compare Bridgewater and TCM methodologies caused Respondents to expend funds to prove the independent bases for their methodologies, which they did.

The evidence presented establishes that Claimant knew what it described as trade secrets constituted descriptions of publicly available information or information generally known to professionals in the industry, yet Claimant persisted in its claims. That persistence demonstrates bad faith. (*See Stillwell Development, Inc. v. Chen*, 1989 WL 418783, *5, where the court found that knowing persistence in an invalid claim was said to demonstrate subjective bad faith; *see also Conxail Corp. v. Iconn Systems, LLC*, 61 N.C.3d 1081 at 1091, finding that even if a claim was initially brought in good faith, evidence that the plaintiff later knew or gained knowledge that its claims were factually baseless may constitute evidence of subjective bad faith; *BTS, US, Inc. v. Executive Perspectives, LLC*, 2014 WL 6804545, *12, holding that even though plaintiff may have had a colorable CUTSA claim at inception, not far into the discovery process it was clear plaintiff's claim had no merit and plaintiff's continued maintenance of its claims "gives rise to an inference that the arbitration was maintained for improper purposes.")

We make no finding as to whether Claimant has protectable trade secrets. It may. That is not the issue.

The issues at bar are whether Claimant's alleged four or five trade secrets *as described* constituted protectable trade secrets, and whether their claims of misappropriation were alleged and/or maintained for improper purposes. Based on the testimony of all the experts, we find that the evidence presented establishes that the alleged trade secrets, that is, *the trade secrets as described,* constituted publicly available information or information generally known to professionals in the industry, and that Claimant, a highly sophisticated entity, knew that the trade secrets *as described* did not constitute trade secrets. We further conclude that the claims of misappropriation were brought and/or maintained in bad faith for the purposes of causing Respondents' needless expenditures of money and time in order to defend themselves against the claims.

As indicated above, CUTPA requires a finding of "ascertainable loss of money or property." By asserting it was not asking for monetary damages, Claimant eliminated a required element of its breach of contract and CUTPA claims. Nonetheless, Claimant continued to assert claims under CUTPA as well as CUTSA, and for breach of contract. (*See* e.g., Gunther, Tr. 6:15:25.)

Neither of Claimant's experts provided a reliable basis for Claimant's allegations. Both of Respondents' experts provided independent, careful, detailed, impressive and highly credible testimony.

We conclude that Claimant did not have a reasonable basis for filing its claims of misappropriation of trade secrets or disclosure of confidential information as to Squire or Minicone. We conclude Claimant filed its claims in reckless disregard of its own internal records, and in order to support its allegations of access to trade secrets, manufactured false evidence. Finally, Claimant continued to press its claims even after discovery and the Tribunal's orders made it clear that Claimant's refusal to provide models and complete PEDs foreclosed the possibility of prevailing on its misappropriation claims. Claimant's actions in continuing to press its claims constitute further evidence that its intentions were not to prove misappropriation, but rather, were to adversely affect Respondents' ability to conduct a competitive business.

Claimant pursued the arbitration knowing that applicable securities rules and regulations would require TCM to disclose the pending dispute to prospective investors, and that such disclosure was likely to make prospective investors more wary of investing in the new competitor's fund. Claimant knew that its refusal to identify the alleged trade secrets with specificity would foreclose the possibility of proving its case, but would have the effect of extending the arbitration and making it difficult and expensive, both in dollars and compelling Respondents to take time away from the work of growing their (competitive) business, in order to defend against Claimant's allegations.

Claimant's refusal to provide specificity may also indicate that doing so would have made absence of misappropriation obvious. We need not, however, rely on negative inference to support its conclusion that the case was brought in bad faith. By (i) "guessing" (Jensen, Dep. Tr. 195:9-196:16) about misappropriation and in reckless disregard of internal evidence and employee knowledge (Brennan, Tr. 2357:2-3; 2362:14-2), (ii) generating false evidence, (iii) refusing to provide sufficient specificity in order to permit experts to compare what Claimant and Respondents were doing, and (iv) continuing to press its case knowing that its refusal to provide the very information it insisted prehearing it needed from TCM (and during the arbitration in violation of the Tribunal's orders), Claimant foreclosed, *by its own actions*, its ability to prove misappropriation.

To summarize: Claimant's position is that TCM's deck as forwarded to Bridgewater on or about February 2, 2017, was sufficient evidence of Respondents' misappropriation of trade secrets and disclosure of confidential information. This was a guess. (Jensen, Tr. 195:16-19.) A guess is not a sufficient basis on which to file claims of trade secret misappropriation and disclosure of confidential information. We recognize Claimant vigorously protested that it did not bring this action in bad faith. We find however, that the numerous facts introduced in support of Respondents' position regarding bad faith are persuasive. Those facts include the following:

- Bridgewater's CIO testified that Squire did not have access to any of Bridgewater's trade secrets. (Brennan, Tr. Tr. 2401:18-2403:22).

- Bridgewater's internal records showed Squire had zero access to Bridgewater's trade secrets. (CX 114:10, R-174).

- Bridgewater's internal records showed Minicone had access to 2% of Bridgewater's trade secrets, possibly based on his signing a TSA regarding one of the alleged trade secrets. (CX 114:10, R-174).

- Bridgewater knew the model Minicone built for Rotenberg was not used in Bridgewater's system (Rotenberg Tr. 483:5-13) and that it was unlikely that Minicone had access to Signals in 2013 (Rotenberg Tr. 486:22-487:12).

- Bridgewater generated false lists of employees who had access to its trade secrets during Respondents' tenure there, in reckless disregard of its own internal records.

- Bridgewater knew that TCM's pitch book was not similar to Bridgewater's marketing materials (Jensen, Tr. 326:9-25).

- Bridgewater knew or was reckless in not knowing that TCM's pitch book did not support an allegation that Respondents had misappropriated trade secrets or used or disclosed confidential information.

- Bridgewater knew, or was reckless in not knowing, that it had an obligation to be reasonably diligent in investigating its claims (*see Alamar, supra*) prior to filing suit.

- Bridgewater knew or was reckless in not knowing that the descriptions of trade secrets and confidential information it provided disclosed no information beyond what was publicly available or generally available to professionals in the industry.

- Bridgewater knew or was reckless in not knowing that the alleged trade secrets, that is, *the trade secrets as described,* constituted publicly available information or information generally known to professionals in the industry.

- Bridgewater knew or was reckless in not knowing that the trade secrets *as described* did not constitute trade secrets.

- Bridgewater knew, from the outset, that in order to prevail in its action it would be required to provide specific details of its alleged trade secrets and that descriptions of information publicly available or known to professionals in the industry would not suffice to prove its case.

- Bridgewater defied the Tribunal's repeated orders to provide sufficient specificity for each of its alleged trade secrets to enable Respondents to determine what they were accused of misappropriating, thus making it impossible for experts and the Tribunal to compare Claimant's actual methodologies with TCM's methodologies. Claimant's refusal supports a negative inference, *viz*., that had the information been provided, it would have been obvious that Respondents' methodologies were not the same as Claimant's.

- Bridgewater knew that its counsel provided Claimant's testifying experts with "facts" that its experts' independent investigation could not support, and therefore that the conclusions in their experts' reports were not a reliable basis for alleging misappropriation of trade secrets.

- Bridgewater withdrew its misappropriation claim regarding Signals ten days before the opening of the hearings, ostensibly because it was unwilling to identify the trade secret involved, but insisted it was preserving the claim as to methodology (unfair competition under CUTPA), leaving Respondents with uncertainty as to what they needed to defend against, thereby hampering counsel's ability to prepare Respondents' case and insisting on a claim that it knew or should have known it was not going to support because it was not claiming money or other ascertainable damages.

- Bridgewater knew or was reckless in not knowing that refusal to articulate its trade secrets with specificity by providing only information that was publicly known or generally available to professionals in the industry would foreclose winning its case for misappropriation. Its refusal made the case frivolous and therefore abusive.

- Bridgewater presented no evidence of damages or economic loss – an essential element of its unfair competition claim – but insisted on continuing to assert it, thus compelling Respondents to expend additional time and money in defending against the claim.

- Bridgewater knew that TCM would be required to disclose the pending dispute to its current investors and that the required disclosure was likely to have an adverse effect on the willingness of investors to invest in TCM, thus at least potentially reducing the appeal and impairing the value of TCM as a Bridgewater competitor.

- Bridgewater's fact witnesses never offered evidence defining the alleged trade secrets. Instead, they attempted to reframe Claimant's case by testifying at length and evasively about the importance of "ideas" and "Bridgewater logic", defined essentially as generating a theory and testing it. The method as described is well-known and widely used in economics and many other disciplines. The testimony had no relevance to defining and proving misappropriation of the alleged trade secrets or defining and proving disclosure or misuse of confidential information. It was, however, effective in extending the duration of the hearings and the pendency of this action.

Squire testified, feelingly and credibly, that its effect on Respondents and their new fund was oppressive, (i) by forcing Respondents to expend funds in order to defend themselves against a baseless suit, (ii) by compelling Respondents to spend time away from their fledgling business to defend themselves against a baseless suit, and eventually, (iii) by compelling them to sell a portion of their interests in TCM, which they did not want to do, in order to generate funds to defend themselves against a baseless suit.

Accordingly, for the reasons outlined above, we find that Bridgewater's claims of misappropriation of trade secrets were filed and maintained in bad faith.

Where claims of trade secret misappropriation are made in bad faith, CUTSA authorizes the award of attorneys' fees to the prevailing party. (C.G.S.A. Sec. 35-54.)

There is case law providing for awarding damages for bad faith under CUTPA as well.

CUTPA, however, requires a finding of an "ascertainable loss of money or property" at G.S.A. Section 42-110g(a), which provides:

> Any person who suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment of (an unfair trade practice) may bring action …to recover actual damages. Proof of public interest or public injury shall not be required in any action brought under this section.

Subsection (d) provides that reasonable attorneys' fees based on the work reasonably performed may also be awarded.

We interpret CUTPA requiring a showing of "ascertainable loss" and calling out entitlement to attorneys' fees and costs in a separate subsection as indicating that attorneys' fees alone do not meet the requirement of "ascertainable loss" under CUTPA.

Respondents testified that they suffered an ascertainable loss, in addition to attorneys' fees and costs of suit, because they were required to sell a portion of their interest in TCM in order to finance the arbitration. This constitutes an "ascertainable loss of property," but Respondents received money in exchange for that interest, albeit possibly at a "fire sale price". Had Respondents demonstrated the difference between the value they received for their interest and the value they would have received in an arms-length transaction between a willing buyer and a willing seller, they might have been able to prove the "ascertainable loss" CUTPA requires. The value of a percentage of a fledgling business is notoriously difficult to quantify however, and Respondents made no effort to do so. Beyond attorneys' fees and costs of suit, Respondents presented no evidence of "ascertainable loss."

With regard to tortious interference, there was evidence that Claimant may have received an inquiry from a prospective investor or investors about one or both Respondents, but Claimant refused to provide information about the identity of the inquiring party or parties and refused to disclose the details of the inquiries and exactly how it responded. In the face of Claimant's refusal to disclose any information regarding from whom it had inquiries and how it responded to those inquires, Respondents were forced to admit they had no evidence that Claimant was disparaging Respondents or TCM. While disclosure of a pending dispute may have, or is even likely to have, a negative effect on prospective investors, that is insufficiently specific to prove Respondents' counterclaim for tortious interference with business expectations or contract. Accordingly, Respondents' counterclaim for tortuous interference with business expectations or contract is denied.

VIII. Award Based on Bad Faith

On the question of whether Respondents have proved that Claimant brought and maintained this action in bad faith, we find in the affirmative and award Respondents attorneys' fees pursuant to C.G.S.A. Sec. 35-54 and costs as supported by AAA Employment Rules 1,39(d) and 45.

For the reasons stated above, all of Respondents' counterclaims are denied.

All claims and counterclaims not specifically granted or denied are hereby denied.

IX. Background; Subsequent Scheduling; Fees and Costs

The Tribunal issued an Interim Award in favor of Respondents on January 24, 2020 and set a schedule for submission of Respondents' attorney's fees and costs. Respondents filed their Submission for Attorneys' Fees and Costs with supporting documents, Claimant filed an Opposition with supporting documents, Respondents filed a Reply with supporting documents and Claimant filed a Sur-Reply with supporting documents. All filings were permitted and filed timely. The parties subsequently jointly requested suspensions for a total of sixty (60) days to try to work out a settlement. On May 25, 2020, the Tribunal was advised that the parties had been unable to settle and requested it to proceed to issue a Final Award.

In its Interim Award, the Tribunal stated, "On the question of whether Respondents have proved that Claimant brought this action in bad faith, the Tribunal finds in the affirmative and awards Respondents attorneys' fees and costs pursuant to C.G.S.A. Sec. 35-54 as supported by AAA Employment Rule 39(d)."

Section 35-54, quoted (correctly) in Section IV, provides only for "attorneys' fees" – costs are not specifically included. Claimant, in its Opposition (Sur-Reply) to Respondents' Submission, so notes. Respondents argue that even if not statutorily specified, the Tribunal has the authority to award costs and expenses based on equitable principles of fairness and inherent authority of a court (or tribunal) to do justice. In response, Claimant argues in its Sur-Reply that "The Panel cannot now award costs on a separate legal basis never before argued or considered by the Panel (general principles of equity and inherent authority of the Tribunal), without reopening the proceedings so Bridgewater may be heard on the merits of this issue."

The statement in Section VIII awarding "attorneys' fees and costs" is clear – the Tribunal intended to award both. As to the argument that Claimant has not been heard on the issues of unfairness and malicious intent, accusations of improper intent in bringing this action have been at issue since the outset of this case. These are not issues "never before argued or considered."

It is the intention and desire of the Tribunal to place Respondents in a position as near to what their situation would have been had the arbitration not been brought. The Tribunal can only award monetary compensation, and recognizes that no monetary award can compensate Respondents for the loss of executive time, missed opportunities, and forced sale of a portion of their interests in the company they formed. Whatever the inelegance of its Interim Award, it was clearly not the intention of the Tribunal to limit its authority to do justice.

As noted above, C.G.S.A. Sec. 35-54 provides that where a claim of misappropriation is brought in bad faith, the court may award reasonable attorney's fees to the prevailing party. The statute provides only for (reasonable) attorneys' fees; it does not specifically state that attorneys' fees include costs, either costs related to services provided by attorneys or costs of services of third parties that are reasonably incurred in connection with the arbitration.

With regard to attorneys' fees, Respondents' Submission describes fees from two firms. One firm, which did not appear at the hearing, invoiced fees "For services rendered" without any additional description of those services. The Tribunal cannot determine whether those fees are reasonable for the services rendered and therefore, those fees, totaling $40,012.50, are disallowed. The information provided by the Zeisler firm, for fees totaling $1,560,936.35 and related expenses of $95,436.70 is sufficiently detailed to enable analysis. After review, the Tribunal finds the hourly rates of the attorneys involved, the time spent and related expenses reasonable.

Respondents also submitted information regarding the fees and expenses of its expert witnesses. The Tribunal confirms that Respondents' experts were a necessary expense of the arbitration and that their fees and expenses are sufficiently and well documented, and reasonable.

Because Claimant raised the question of whether the Tribunal had the authority to award costs, the Tribunal requested information regarding its authority to award both costs related to attorneys' legal services and costs of expert witnesses. The submissions on the issue were extensive and somewhat in conflict.

There is support for the conclusion that reasonable expenses of attorneys are appropriately included in "attorneys' fees". (See *Evans v. Books-A-Million*, 762 F.3d 1288, 1298, 1299 (11th Cir. 2014), *Pinkham v. Camex, Inc*., 84 F.3d 292, 294-5 (8th Cir. 1996), *In re Media Vision Tech. Sec. Litig.*, 913 F. Supp. 1362, 1368 (N.D. Cal. 1966)). Accordingly, we award Respondents the second firm's attorneys' fees and expenses, a total of $1,656,373.05.

The award of the costs of expert witnesses, both fees and expenses, is more problematic. Claimant states that the only Connecticut case on point is *BTS, USA Inc. v. Executive Perspectives, LLC,* 2015 WL 3458637(2015), in which the court found it impossible, due to the intertwined nature of the CUTSA and other claims, to apportion fees to specific claims (as here) but stated, "(i)n the absence of express statutory provisions permitting award for costs, the court does not believe it is authorized to award such costs and therefore does not award any costs." (It did award post-judgment interest of 5%, half of the maximum 10% authorized.)

Respondents argue that the appropriate rationale for interpreting Section 35-54 is the Patent Act, citing *Mathis v. Spears*, 857 F. 2d 749 (1983) 8 U.S.P.Q. 2d 1551, stating that an award of attorney fees to the prevailing party is intended "to enable the court to prevent a gross injustice…" and that it may do so "in the exercise of its (a district court's) discretion and inherent equity power (to) include an award of reasonable expert witness fees…." (at [10]).

The recent Connecticut case of *Maurice v. Chester Housing Associates Limited Partnership*, 188 Conn. App. 21, 35-36 (2019) adopts the logic of the *Mathis* case, stating that a court has inherent authority to assess costs "calibrated to compensate for damages resulting from a litigant's bad faith acts." (at [17].) (*See also Maris v. McGrath,* 269 Conn. 834, 844, 850 A. 2d 133 (2004) stating the American rule "does not apply when the opposing party has acted in bad faith.")

The testimony of Respondents' expert witnesses was key to the favorable result Respondents achieved. Their expert witnesses' fees and expenses were reasonable. The Tribunal believes the better rule, and the just result, is to follow the teaching of *Maurice*. Accordingly, Respondents are awarded expert fees and costs totaling $335,038.44.

In accordance with the AAA Employment Rules and Employment/Workplace Fee Schedule, Claimant employer has advanced administrative fees and costs, and the arbitrators' compensation. The AAA Rules are referenced and thus incorporated in the Respondents' employment agreements, and they supersede contrary provisions in those agreements (Rules 1, 39(d), and 43-45). Accordingly, those fees and costs shall remain with Claimant. The administrative fees and expenses of the American Arbitration Association totaling $3,800.00, shall be borne by Claimant, and the compensation of the arbitrators totaling $660,045.47, shall be borne by Claimant.

To summarize, Respondents are awarded the sum of $1,560,936.35 in attorneys' fees, and costs of $95,436.70, plus expert witness fees and costs of $335,038.44, for a total award of $1,991,411.49, payable by Claimant to Respondents, jointly and severally, within thirty (30) days of the date of this Order. Administrative fees and costs shall remain with Claimant-employer. This Award is in full settlement of all claims and counterclaims submitted to this arbitration. All claims and counterclaims not specifically granted or denied are hereby denied.

So Ordered:

__*Micalyn S. Harris*________________
Micalyn S. Harris, Chair of the Tribunal

____
William L. Mentlik, Arbitrator

Dated: July 1, 2020

PARTIAL CONCURRENCE AND DISSENT

I concur in the result reached by the majority's Final Award, denying Claimant's claims, but do so for the narrower and more limited reasons discussed in Part I below. I also concur in the result reached by the Final Award, denying Respondents' counterclaims that alleged violations of the Connecticut Unfair Trade Practices Act ("CUTPA") and tortious interference, but again do so for more limited reasons. *See* Part II below. I respectfully dissent from and accordingly do not join in the remainder of the Final Award. In particular, I dissent from the Final Award's determination that an award of attorneys' fees and expenses to Respondents may or should be made "pursuant to C.G.S.A. Sec. 35-54 [the Connecticut Uniform Trade Secrets Act ("CUTSA")] as supported by AAA Employment Rules 1, 39(d) and 45," *see* Final Award at 22, or on any other ground stated in the Final Award.

I. Claimant's Claims.

A. Claimant's Trade Secret Claims.

I concur in the result reached by the majority in the Final Award - denying Claimant's trade secret claims, *see* Final Award, at 12-13 - but for the more limited reason that misappropriation was not established.

Claimant chose to withdraw one of its five original trade secret claims – the claim for misappropriation of the alleged Signal Construction Methodology – shortly before the Arbitration Hearing. (*See* Cl. Post-Hearing Mem., at 4-5, ⁋14 & n. 25.)

Claimant's election to present its four remaining trade secret claims based on narrative "plain English" descriptions of the alleged secrets rather than by demonstrating misappropriation of actual code, programs, formulas or algorithms, although permissible under Connecticut law,[1] limited the Tribunal's ability to assess whether misappropriation

1 CUTSA defines a "trade secret" as constituting any "information, including a formula, pattern, compilation, program, device, method, technique, process, drawing, cost data or customer list that: (1) [d]erives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and (2) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy." Conn. Gen. Stat. § 35-51(b). Connecticut law does not require that the "information" constituting a trade secret be expressed in any particular form, such as computer code, spreadsheets, algorithms or models. Rather, "information" constituting trade secrets may reside in, and be conveyed by, documents, training materials or verbal discussions among employees. *See General Reinsurance Corp. v. Arch Capital Grp*., 2007 WL 3121766, at *10 (Conn. Super. Ct. Oct. 17, 2017); *see also Dreamcatcher Development Software Development, LLC v. Pop Warner Little Scholars, Inc.,* 298 F. Supp. 2d 276, 282-83 (D. Conn. 2004); *Ed Nowogroski Ins., Inc. v. Rucker*, 971 P.2d 936, 946 (Wa. 1999); *Altavion, Inc. v. Konica Minolta Sys. Lab., Inc*., 226 Cal. App. 4th 26, 47 (Cal. App. 2014).

of those alleged secrets had been established, or not, on any evidentiary basis other than the expert testimony offered on that subject. Three experts offered expert opinion testimony on whether trade secret misappropriation had been established – Messrs. Leibowitz, Bateson and Lewis. In general, I preferred and accepted the testimony of Respondents' experts Bateson and Lewis, and particularly Mr. Bateson, to that of Claimant's expert Mr. Leibowitz on the misappropriation topics. As was also true of Respondents' expert witnesses Bateson and Lewis, I found Mr. Leibowitz to be a well-qualified and able witness. During the Arbitration Hearing, however, he was very effectively cross-examined. The answers that he gave during that cross-examination significantly diminished the probative value of both his prior written report and of his earlier direct testimony at the hearing on Claimant's claims for misappropriation of the alleged Statistics Based Growth Estimator ("SBGE"), Slack Measure Process and Short Rate Trading Methodology trade secrets. Claimant apparently acknowledged this. *See* Cl. Post-Hearing Mem., at 14, ⁋38. As a result, and taken together with the other evidence presented, the evidentiary record presented at the Arbitration Hearing failed to establish misappropriation of the alleged SBGE, Slack Measure Process and Short Rate Trading Methodology trade secrets by a preponderance of the evidence.

On the fifth trade secret claim, for misappropriation of Claimant's alleged Portfolio Construction and Risk Control Methodology trade secret, the totality of the evidence presented was mixed. Mr. Leibowitz testified with some force, even allowing for his cross-examination, that in his opinion this particular alleged trade secret had been misappropriated. On balance, however, I concluded that Claimant also failed to carry its burden of proving misappropriation on this claim by a preponderance of the evidence. I reached this conclusion mainly because the testimony of Messrs. Bateson and Lewis was persuasive on this point, and because I accepted the Respondents' testimony, which I found credible, describing the considerable lengths they went to and efforts they made to base their new venture TCM's approach to Portfolio Construction and Risk Control Methodology on publicly-available sources rather than on any trade secrets of Claimant.[2]

For these reasons, I concur with the Final Award's determination that Claimant's trade secret claims should be denied but do so for the more limited reason that Claimant failed to establish that Respondents misappropriated any of the alleged trade secrets presented at the hearing.

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2 Claimant's efforts to argue a sixth alleged trade secret (Bridgewater's "combined investment pipeline" or "investment framework" portrayed as a "combination" of the alleged SBGE, Slack Measure Process, Short Rate Trading Methodology and Portfolio Construction and Risk Control Methodology trade secrets) were not persuasive and were not established. Although a unique combination of publicly-known or commercially available elements may constitute an enforceable trade secret in appropriate circumstances, *see Bulldog NY LLC v. Pepsico, Inc.,* 2010 WL 11562080, at *2 (D. Conn. 2010) *Lydall, Inc. v. Ruschmeyer*, 919 A.2d 421, 440 (Conn. 2007); *Elm City Cheese Co. v. Federico*, 752 A.2d 1037, 1047-48 (Conn. 1999); Milgrim on Trade Secrets § 1.01, for the reasons discussed above in text Claimant failed to demonstrate misappropriation either of any of the four individual components of the alleged "combination" or, consequently, misappropriation of the alleged "combination" as a whole.

B. The Breach of Contract Claims Based on Respondents' Employment Contracts.

As summarized in its Post-Hearing Brief, at 21, ¶48, Claimant's claim that Respondents violated their employment agreements by misusing "Confidential Information" as defined in those agreements was based on "the same reasons that Respondents have wrongfully misappropriated Bridgewater's trade secrets. . .." *See also* Cl. Prop. Form of Partial Final Award, at 43, ¶104. In view of my conclusion, discussed above, that misappropriation of the alleged trade secrets was not established, I concur with the Final Award's determination that Claimant's breach of contract claims based on the Respondents' employment contracts should be denied, *see* Final Award, at 12-13, but do so for the limited reason that Claimant failed to establish that Respondents misused any Confidential Information in breach of those agreements.

C. The Breach of Contract Claim Against Respondent Minicone Based on His Trade Secret Agreement ("TSA").

Respondent Minicone's various arguments that he is not bound by his TSA, Cl. Ex. 39 ("Acknowledgment of Receipt of Trade Secret Information and Agreement to Maintain the Secrecy of Said Information"), were not credible and were not established. The evidence presented established that this agreement squarely covered the alleged SBGE trade secret and that Respondent Minicone signed it on November 15, 2011. By its terms, that agreement obligated Respondent Minicone to "notify Bridgewater in writing prior to the performance of any services by me that relate, directly or indirectly, to (1) asset management (2) trading, investing in or researching financial markets. . . The notification shall include the identity and a brief description of the proposed employer or other entity and a description of the proposed services." The evidence established that Mr. Minicone did not provide any such notice to Bridgewater prior to Claimant's discovery, from other sources, of Mr. Minicone's TCM-related activities. Accordingly, Claimant demonstrated an ongoing breach of this contractual notice obligation by Respondent Minicone for the time period between approximately November 2015, when Mr. Minicone began working on TCM-related matters, and February 2017, when TCM began trading. Claimant learned from other sources of Mr. Minicone's involvement in the new TCM venture around the same time as the TCM launch. Discussions between the parties began then, but ultimately reached no agreement. Claimant's argument that it suffered recoverable damages because it did not receive the required notice sooner, which might have allowed it to negotiate an agreed informal resolution of the dispute, was speculative and was not established. Rather, the evidence demonstrated that informal efforts to avert the arbitration failed after Claimant eventually learned of Mr. Minicone's activities with TCM from other sources. No other persuasive evidence of damage caused by Mr. Minicone's earlier breach of the TSA was presented.

Based on this record, I concur with the Final Award's determination that Claimant's breach of contract claim based on Mr. Minicone's TSA should be denied, *see* Final Award, at 12-13, but do so for the limited reason that Claimant failed to establish that it was damaged by Mr. Minicone's breach of the notice requirement contained in his TSA.

D. Claimant's Claim for Alleged Violation of CUTPA by Respondents.

Claimant's CUTPA claim alleged that Respondents engaged in unfair competition against Bridgewater in violation of CUTPA. (*See* Demand for Arbitration, Cl. Ex. 1, Fourth Cause of Action.) Claimant's CUTPA claim did not allege that Respondents' alleged violations of that statute caused Claimant to suffer any recoverable or quantifiable damages, and Claimant's prayer for relief on this claim was limited to declaratory relief, an award of fees and costs as damages caused by the alleged violation, and an injunction prohibiting Respondents from representing in TCM's marketing efforts that TCM uses covar capping as part of its Risk Control methodologies, and from misleadingly depicting its signals and output gap methodologies. In its Pre-Hearing Brief, at 27, ⁋95, Claimant correctly noted that "under CUTPA, a party alleging unfair competition must allege that it (1) suffered an ascertainable loss of money or property; (2) caused by an unfair method of competition or an unfair or deceptive act in the conduct of any trade or commerce." *See* Conn. Gen. Stat. §42-11 Ob (a). No sufficient evidence was presented at the Arbitration Hearing establishing that Claimant's CUTPA claim satisfied either of these requirements. In its Post-Hearing Brief, at 31, ⁋74 & n. 253, Claimant argued that "the fact that a plaintiff fails to prove a particular loss or the extent of the loss does not foreclose the plaintiff from obtaining injunctive relief and attorneys' fees pursuant to CUTPA if the plaintiff is able to prove by a preponderance of the evidence that an unfair trade practice has occurred *and a reasonable inference can be drawn by the trier of fact* that the unfair trade practice *has resulted in a loss to the plaintiff.*" (Emphasis supplied). *See Service Road Corp. v. Quinn,* 698 A.2d 258, 265 (Conn. 1997). No sufficient evidence was presented at the Arbitration Hearing that permitted the Tribunal to reasonably "infer," by "a preponderance of the evidence," that the alleged deceptive conduct of Respondents or TCM "resulted in a loss" to Bridgewater.

Based on this record, I concur with the Final Award's determination that Claimant's CUTPA claim should denied, *see* Final Award, at 12-13, but do so for the limited reason that Claimant failed to establish that it suffered any loss that was either caused by or that occurred as a result of the alleged CUTPA violation.

II. The CUTPA and Tortious Interference Counterclaims.

I also concur in the result reached in the Final Award that the only two counterclaims that were actually pleaded in this case must be denied.

A. Respondents' CUTPA Counterclaim.

I concur in the result reached in the Final Award that the Respondents' CUTPA counterclaim should be denied, *see* Final Award, at 21-22, but do so for the limited reason that Respondents failed to establish that they (1) suffered "an ascertainable loss of money or property;" (2) that was "caused by. . ." the particular CUTPA violations alleged in their counterclaim. *See* Conn. Gen. Stat. §42-11 Ob (a).

B. Respondents' Tortious Interference Counterclaim.

I concur in the result reached in the Final Award that Respondents' tortious interference counterclaim must be denied, *see* Final Award, at 21-22, but do so for the following limited reasons: Respondents evidence failed to establish that Claimant ever intentionally communicated with any actual or prospective TCM investors or customers in an improper attempt to interfere with TCM's business relationships. Respondents' evidence also failed to establish that Bridgewater's alleged misconduct caused Respondents to suffer any actual loss.

III. Dissent from the Remainder of the Final Award.

I dissent from the remainder of the Final Award. In particular, I do not join in the majority's discussion of the other issues raised by the trade secret claims, including whether Claimant described the trade secrets on which it based its claims with sufficient specificity and whether Claimant demonstrated that Respondents had access to those trade secrets while at Bridgewater. I found the evidence on the access issues mixed and hard-fought, with both sides having a case to present on those points. On the specificity issues, I have reluctantly concluded that no amount of narrative description of the alleged trade secrets short of producing code or algorithms would have satisfied this majority. Although Connecticut law permitted Claimant to choose to base its claims on narratively-described methodologies, *see* n. 1 above, and to make the companion choice not to risk disclosure of its most valuable and proprietary investment code, algorithms, formulas and programs during litigation of its claims, this choice apparently offended the majority and caused it to include numerous statements in the Final Award that are unwarranted. In my view, the Final Award's recurring speculation as to why Claimant chose to prosecute its trade secret claims based on plain English descriptions rather than production of code fails to make reasonable allowance for the Claimant's understandable caution in litigating the case in a manner intended to prevent disclosures of what it believes are its most valuable trade secrets. The majority ascribes bad motives to conduct that more likely was animated by caution and a desire to be careful to avoid further perceived breaches of valuable trade secrets and intellectual property while the case was in progress.

The Final Award contains many broad mischaracterizations of the evidence presented in this arbitration. Some of these, that have a possible bearing on the relief to be awarded here, are discussed below. In order to keep this dissent from becoming any longer than it already is, I shall not separately discuss all the others in detail. As discussed in Parts I and II above, I concur in the result reached by the majority denying Claimant's claims and Respondents' Counterclaims for the limited reasons set forth above. I dissent from all other aspects of the Final Award.

Insofar as the Final Award authorizes an award of attorneys' fees and costs, I dissent for the following more specific reasons.

A. The Final Award's decision to "award Respondents attorneys' fees pursuant to C.G.S.A. Sec. 35-54 and costs as supported by AAA Employment Rules 1, 39(d) and 45," *see* Final Award, at 21, erroneously grants relief on a new and different claim or counterclaim for relief that was never pleaded by Respondents or permitted by the Tribunal as required under Rule 5 of the applicable arbitral rules (the AAA's Employment Arbitration Rules). Such an award exceeds this Tribunal's authority under the contractually-specified arbitral rules. The award also improperly awards such relief under circumstances where timely, fair and due notice that the Respondents had made a claim for such relief was not given to the opposing party prior to commencement of the Arbitration Hearing, prior to completion of presentation of its evidence, or prior to the due date for its principal post-hearing brief.

The Final Award bases its award of attorneys' fees on the following analysis: "Where claims of trade secret misappropriation are made in bad faith, CUTSA authorizes the award of attorneys' fees to the prevailing party. (C.G.S.A. Sec. 35-54.) . . . On the question of whether Respondents have proved that Claimant brought and maintained this action in bad faith, we find in the affirmative and award Respondents attorneys' fees pursuant to C.G.S.A. Sec. 35-54 and costs as supported by AAA Employment Rules 1, 39(d) and 45." Final Award, at 20, 21-22.

I dissent from this award in part because it purports to grant relief on a request for attorneys' fees never properly asserted or permitted as a new or different claim or counterclaim in accordance with the contractually-specified arbitral rules, and never made at all by Respondents until after the Arbitration Hearing had already been held and completed.

The procedural record on this point is as follows:

The "Mediation and Arbitration" clause contained in both Respondents' employment contracts with Claimant provided in pertinent part that:

> You [*i.e.,* the Employee] agree that you will submit all claims that you may have against Bridgewater. . . to non-binding mediation pursuant to the procedures described in Exhibit A. You agree to submit any claims not resolved by mediation to binding arbitration under The National Rules for the Resolution of Employment Disputes of the American Arbitration Association ("AAA"). . . Bridgewater. . . may submit any claims against you to binding arbitration as set forth above, or may instead elect to commence an action in a court of law. . .Either you or Bridgewater may initiate arbitration proceedings by filing a demand for arbitration at the New York office of the AAA. The arbitrator's fee and any fees and costs owed to the AAA will be divided equally between you and Bridgewater; you will be entirely responsible for your own

attorneys' fees and disbursements. . ..

(Cl. Ex 8 at 006 (Employment Agreement of Respondent Zachary Squire); Cl. Ex. 32 at 006 (Employment Agreement of Respondent Lawrence Minicone, *see also* Cl. Ex. 101). The agreements go on to provide for possible fee-shifting if the employee alleges "a claim of discrimination," in which case the arbitrator may award fees and disbursements to the employee if the employee prevails on such a claim, and Bridgewater may be awarded fees and disbursements on such a claim if the arbitrator finds that the claim was brought "in bad faith" or that the discrimination claim would "justify an award of sanctions under Rule 11 of the Federal Rules of Civil Procedure. . .." (Cl. Ex. 8, at 006.) No claims of discrimination were asserted by the Respondents in the present arbitration. Accordingly, as to all of the claims and counterclaims asserted in this case, the parties' agreements provide that (i) Respondents "will be entirely responsible for [their] own attorneys' fees and disbursements. . .., (ii) the "arbitrator's fee and any fees and costs owed to the AAA will be divided equally between" Bridgewater and the employee; and (iii) the case must be conducted in accordance with the requirements of the AAA's Employment Arbitration Rules.

The parties' subsequent pleadings[3] and the Tribunal's pre-hearing Procedural Orders (*see, e.g.,* Order No. 1, at 5; Order No. 7)), further confirmed that the AAA's Employment Arbitration Rules apply here. All parties and all members of the Tribunal agreed on this throughout the case. The Final Award specifically confirms the applicability of those Rules on its first page and again in its fee award made on page 22 of the award.

Respondents' Counterclaims, Cl. Ex. 4, were filed herein on December 21, 2017. The Counterclaims alleged two counterclaims – one counterclaim alleged violation of CUTPA and the other one alleged tortious interference. *See* Counterclaims, at 3 (alleging two counterclaims, one for "an unfair method of competition in violation of CUTPA," and one for "tortious interference with business expectancies and contract under Connecticut law"). *See also* Counterclaims at 1.) The Respondents' Answer to the trade secret claims is set out at pp. 1-3, in the discussion that precedes their "Counterclaims." Nowhere in the pp. 1-3 discussion do the Respondents allege a counterclaim for attorneys' fees and expenses based on CUTSA, or a counterclaim for fees under the Connecticut trade secrets statute, or make any claim for or mention of a request for an award of attorneys' fees pursuant to CUTSA, or make any mention of a request for an award of attorneys' fees on any basis.

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3 S*ee, e.g.,* Claimant's Demand for Arbitration, filed November 7, 2017, Cl. Ex. 1, at 1 ("This Demand for Arbitration is submitted on behalf of Claimant in accordance with Section R-4 of the Employment Arbitration Rules and Mediation procedures of the American Arbitration Association ("AAA"), effective November 1, 2009. . .."); Claimant's Answer to Counterclaims, Cl. Ex. 102, filed January 5, 2018, at 1("This Answer to Respondents' Counterclaim is submitted on behalf of the Claimant in accordance with Section R-4(b)(iv) of the Employment Arbitration Rules and Mediation procedures of the American Arbitration Association ("AAA"), effective November 1, 2009. . .."

Claimant's Answer to Counterclaims, Cl. Ex. 102, filed on January 5, 2018, at 2, ¶2, specifically acknowledged that "[t]he Respondents have filed two counterclaims against Bridgewater, both based on its filing of a Demand for Arbitration. The Respondents allege that Bridgewater's initiation of proceedings is itself (1) an unfair method of competition in violation of [CUTPA], and (2) tortious interference with business expectancies and contract." The entirety of the Claimant's Answer to Counterclaims was devoted to setting forth Claimant's responses to those two counterclaims.

Other than the two counterclaims set out in Respondents' December 21, 2017 Counterclaims, Respondents never sought or obtained leave from the Tribunal to offer any new or different claims or counterclaims. Respondents' Pre-Hearing Memorandum, submitted on June 17, 2019, immediately before the Arbitration Hearing began, discussed Respondents' Counterclaims at that brief's pages 21-23. No mention was made there of any counterclaim or request for fees and expenses based on CUTSA. Rather, that brief's discussion of the Counterclaims addressed only the two previously-pleaded Counterclaims – for alleged violations of CUTPA and for alleged tortious interference. Pages 1-20 of that brief discussed the trade secret issues without any mention of a counterclaim based on CUTSA, or a counterclaim under the Connecticut trade secrets statute, or any claim for an award of attorneys' fees pursuant to CUTSA. Similarly, Claimant's Pre-Hearing Brief, also filed June 17, 2019, discussed the Counterclaims at its pages 26-29. That brief's discussion of the Counterclaims also addressed only the two previously-pleaded Counterclaims - alleged violation of CUTPA and alleged tortious interference. No mention was made of any third counterclaim, for alleged violation of CUTSA, or any new claim for an award of attorneys' fees based on CUTSA. Thus, both sides went to the Arbitration Hearing – and presumably decided what evidence they wished to present at it – based on the shared understanding that Respondents had alleged two Counterclaims, not three, and that those Counterclaims alleged violations of CUTPA and tortious interference, not CUTSA.

Respondents' Post-Hearing Memorandum, filed October 31, 2019, following completion of the Arbitration Hearing, addressed the Counterclaims at 33-35. As with the pre-hearing submissions, only two Counterclaims were discussed – the counterclaims alleging CUTPA violations and tortious interference. At pages 27-29, and again at pages 34-35, however, Respondents also argued, for the first time in this case, that "Bridgewater owes attorneys' fees to Respondents under Conn. Statute §35-54" and requested "an award of their reasonable attorneys' fees under Conn. Gen. Stat. 34-54 [*i.e.,* CUTSA], as well as an award of fees under . . . CUTPA." (*Id.,* at 35.) The "Conclusion" section that followed, also on page 35, included, in its ¶2, a request for an award of attorneys' fees and costs "pursuant to Section 35-54 of Connecticut's trade secret statute. . .," along with requests for similar relief under the CUTPA and tortious interference Counterclaims. Claimant's opening Post-Hearing Brief, also filed on October 31, 2019, addressed the Counterclaims at its pages 31-33. That discussion addressed only the two Counterclaims that had actually been pleaded – the Counterclaims alleging CUTPA violations and tortious interference. Since the parties were directed to file their opening post-hearing briefs simultaneously, Claimant's opening post-hearing brief had no occasion to address, and did not address, the Respondents' request, made for the first time on October 31, 2019, in their opening post-hearing brief, after the Arbitration Hearing had been held and completed, for an award of fees "pursuant to Section 35-54 of Connecticut's trade secret statute. . .." Both parties' post-hearing reply briefs, each filed subject to a 10-page limit imposed by the Tribunal, very briefly addressed the Respondents' October 31, 2019, request for an award of fees and costs "pursuant to Section 35-54 of Connecticut's trade secret statute. . .." Claimant's Post-Hearing Reply Memorandum, filed November 20, 2019, at 9-10, ¶¶20-21, devoted two paragraphs to the issue, opposing the request. Respondents' Post-Hearing Reply memorandum, also filed November 20, 2019, discussed the issue in three paragraphs at pp. 9-10.

The Final Award acknowledges, in its discussion at 13-22, that only two counterclaims were filed - the Counterclaims alleging CUTPA and tortious interference. This Tribunal has now unanimously agreed that those two counterclaims – the only ones that were actually pleaded – must be denied, *see Id.,* and Part II above. The Counterclaims that were actually pleaded therefore cannot serve as a lawful basis for the Final Award's fee award.

Instead, the Final Award bases its award of fees on the Respondents' October 31, 2019, request for an award of fees and costs "pursuant to Section 35-54 of Connecticut's trade secret statute. . .." This new and different claim was never alleged or permitted in this case in accordance with the applicable arbitral rules, was first raised as a request for relief, with no reference to the prior pleadings, after the Arbitration Hearing had already been held and completed, after the opposing party's evidentiary submissions had been made and completed, and before the opposing party had even seen the Respondents' request at the time the parties' opening post-hearing briefs were simultaneously exchanged. Respondents' untimely request was an afterthought, first raised in post-hearing briefing.

This Tribunal's authority to grant relief based on an amended claim or counterclaim under the AAA's Employment Arbitration Rules is governed, and limited by, Rule 5 of those rules, as follows:

> Changes of Claim. Before the appointment of the arbitrator, if either party desires to offer a new or different claim or counterclaim, such party must do so in writing by filing a written statement with the AAA and simultaneously provide a copy to the other party(s), who shall have 15 days from the date of such transmittal within which to file an answer with the AAA. After the appointment of the arbitrator, a party may offer a new or different claim or counterclaim only at the discretion of the arbitrator.

The Final Award erroneously grants relief on a "new or different claim or counterclaim" that was never offered by Respondents or permitted by this Tribunal as required under Rule 5 of the applicable arbitral rules. The award violates Rule 5 by granting Respondents monetary relief on a "new or different claim or counterclaim" that had neither been asserted nor permitted prior to commencement of the Arbitration Hearing, or prior to completion of the parties' presentation of their evidence at that hearing.

The Final Award therefore denies Claimant the arbitral process the parties contracted for in the arbitration agreements contained in the Respondents' employment contracts – an arbitration that would be conducted in accordance with the procedural requirements of the AAA's Employment Arbitration Rules. For this reason, the Final Award's award of attorneys' fees and costs constitutes action by the majority in excess of the particular and limited authority the parties agreed to give this arbitral Tribunal: The parties' agreements here did not agree to confer any power on this Tribunal to act as *amiable compositeur* or to decide their dispute "*ex aequo et bono"* or to conduct this arbitration under any set of arbitral rues other than the arbitral rules specified in their agreements. The Tribunal's authority to act as arbitrators here derives entirely from the parties' contracts. Those agreements obligated this Tribunal, and only granted the Tribunal the limited authority, to conduct this arbitration in accordance with the procedural requirements of the contractually-specified AAA Employment Arbitration Rules.

The Final Award states, at 2, that "We also note that Connecticut law seeks to deter bringing misappropriation claims in bad faith by providing that the prevailing party is entitled to recover attorneys' fees of suit incurred in defending against such bad faith claims, thus authorizing its courts to grant attorneys' fees in such cases. (*See* Connecticut Uniform Trade Secret Act, "CUTSA", C.G.S.A. Sec. 35-54 and Connecticut Unfair Trade Practices Act, C.G.S.A. Sec. 42-110a-b.) AAA Employment Rule 1 provides that in the event of a conflict between AAA rules and arbitration contract rules, the AAA rules govern. AAA Employment Rules 39(d) and 45 authorize granting attorneys' fees and costs to the extent a court would have authority to do so." This statement does not demonstrate authority for the procedurally defective fee award authorized in the Final Award, and misstates the applicable arbitral rules in two important respects.

First, nothing in Rule 39(d) authorizes an AAA arbitrator to disregard or ignore the other requirements established in the AAA's Employment Arbitration Rules, such as Rule 5, whenever court rules or procedures may differ. Rule 39(d) provides that "The arbitrator may grant any remedy or relief that would have been available to the parties had the matter been heard in court including awards of attorney's fees and costs, in accordance with applicable law." This provision is plainly intended to assure that AAA arbitrators will have the authority to grant the same substantive remedies and relief, including fees, that could have been sought if the matter had been filed in a court. Nothing in this provision either expressly or by reasonable implication amends the *procedures* required under specified arbitral rules that address what must be done in order to give parties fair notice of the claims being asserted against them. Whether or not a Connecticut court might have authority to make a grant of attorneys' fees under C.G.S.A. § 35-54 following trial on a record that did not include a timely prior request for such relief, the parties here expressly contracted for an arbitration conducted under AAA Employment Arbitration Rules, including Rule 5, which requires timely prior notice of and prior Tribunal permission to assert such new claims. Nothing in Rule 39(d) authorizes the majority to provide the parties only part of the arbitral process they agreed should govern in this proceeding.

Second, Rule 39(d) expressly limits the authority of this Tribunal to grant fees unless its decision to do so is "in accordance with applicable law." As discussed below, the award made here does not satisfy that standard. Based on the legal authorities cited to us by the parties, a court could not find "bad faith" warranting a fee award under C.G.S.A. § 35-54 without applying the two-prong test discussed below in text. The majority here does not apply the two-prong test mandated by the applicable authorities as the standard for assessing whether "bad faith" is established or not. If that test is applied, it is apparent that the evidentiary record in this case does not satisfy either prong. Accordingly, Rule 39(d) does not empower the majority to make the fee award made in the Final Award because it is not made "in accordance with applicable law."

Accordingly, I dissent from the Final Award's purported award of attorneys' fees and costs pursuant to C.G.S.A. Sec. 35-54 because that award constitutes action in excess of the Tribunal's arbitral authority. The majority has exceeded the powers the parties agreed to give this Tribunal by granting relief on a "new or different claim" not properly or timely asserted by Respondents, never permitted or allowed by the Tribunal, and thus not properly before us under Rule 5 of the arbitral rules the parties agreed must govern this proceeding. *See,* the Federal Arbitration Act, 9 U.S.C. §1 *et seq.* ("FAA")*,* Section 10(a)(4). I also dissent from that award for the additional reason that it unfairly prejudices the opposing party: The Final Award grants relief on a new and different claim for relief, not previously asserted in the case, under circumstances where timely, fair and due notice that the new claim would be entertained was not given to the opposing party prior to commencement of the Arbitration Hearing, or prior to completion of presentation of its evidence, or prior to the due date for its principal post-hearing brief. *See,* FAA*,* Section 10(a)(3).

B. <u>Neither C.G.S.A. § 35-54 nor Rule 39(d) of the AAA's Employment Arbitration Rules authorize the award of attorneys' fees and costs made in the Final Award</u>.

This Tribunal's authority to grant attorneys' fees under the AAA's Employment Arbitration Rules is governed, and limited, by Rule 39(d) of those rules, as follows:

> The arbitrator may grant any remedy or relief that would have been available to the parties had the matter been heard in court including awards of attorney's fees and costs, in accordance with applicable law.

As discussed above, the Final Award's stated basis for the "Award Based on Bad Faith" is: "On the question of whether Respondents have proved that Claimant brought and maintained this action in bad faith, we find in the affirmative and award Respondents attorneys' fees pursuant to C.G.S.A. Sec. 35-54 and costs as supported by AAA Employment Rules 1, 39(d) and 45." Final Award, at 21-22. I respectfully dissent from this award for the separate and additional reason that neither C.G.S.A. § 35-54 nor the cited provisions of the AAA's Employment Arbitration Rules authorize the award of attorneys' fees and costs made in the Final Award.

Conn. Gen. Statute § 35-54 grants a court discretionary authority to "award reasonable attorneys' fees to the prevailing party. . . when a CUTSA claim has been brought in bad faith." Section 35-54 applies "only to claims under CUTSA." *See Clinipad Corp. v. Aplicare, Inc.,* 1991 WL 88156, at *1 (Conn. Super. Ct. May 21, 1991). "No definition of 'bad faith' is provided in CUTSA. . . A claim is made in 'bad faith' [when] it is 'entirely without color and [is taken] for purposes of harassment or delay or >for other improper purposes.'" *Clinipad, supra,* at *2. Whether a claim is colorable, is a matter of "whether a reasonable attorney could have concluded that facts supporting the claim might be established, not whether such facts had been established." *Clinipad, supra,* at *2, *citing Fattibene v. Kealey,* 18 Conn. App. 344, 361 (1989). Courts have generally held this means that "a party seeking fees for 'bad faith' conduct must demonstrate that the opposing party acted in both objective and subjective bad faith." *Clearwater Sys. Corp. v. EVAPCO, Inc.,* 2006 WL 726684, at * 1 (D. Conn. March 20, 2006).

Thus, the applicable authorities cited to us by the parties limit our authority to find "bad faith" and make a fee award under C.G.S.A. § 35-54 to cases where both parts of a two-pronged test have been established: (1) The trade secret claims asserted must have been "entirely without color." The authorities cited to us by the parties suggest that a good way to assess whether this prong is satisfied is to determine "whether a reasonable attorney could have concluded that facts supporting the claim might be established . . .." (2) There must be evidence that the claim was asserted "for purposes of harassment or delay or for other improper purposes." The *EVAPCO* decision teaches that this second prong can be established only if the record contains evidence of both objective and subjective bad faith.

These exacting standards are not met here.

First, the Final Award does not apply the legal standards, summarized above, that govern when C.G.S.A. § 35-54 authorizes an award of fees and costs. Although the Final Award makes several references to "bad faith" as the basis for its fee award, *e.g.*, Final Award at 20, the Final Award ignores both prongs of the standards, discussed above and derived from the authorities cited to us by the parties, that govern our authority to find a "bad faith" basis for a fee award under C.G.S.A. § 35-54. On the first prong, the Final Award fails to address whether Bridgewater's claims were "entirely without color." In addition, the Final Award also makes no effort to test for whether the claims were "entirely without color" by using the factor specifically suggested for this purpose in the applicable authorities cited to us – by asking whether no "reasonable attorney could have concluded that facts supporting the claim might be established." Instead, the Final Award bases its finding of bad faith on a myriad of other, different and confusing standards, not based on the applicable authorities.[4] Our authority to make a fee award under Rule 39(d) of the AAA's Employment Arbitration Rules is limited to situations where we can do so "in accordance with applicable law." Here the majority purports to find "bad faith," and thus authority to make such an award under C.G.S.A. § 35-54 and Rule 39(d), without applying the applicable legal standard governing determinations of bad faith under that statute at all.

Second, if the first prong of the applicable test for bad faith had been applied, it would be apparent that the evidentiary record in the present case does not permit a finding that Bridgewater's trade secret claims were "entirely without color." The Final Award fails to acknowledge numerous aspects of the evidentiary record and other aspects of this case that, under any fair assessment, preclude a finding that Bridgewater's trade secret claims were "entirely without color," or that no "reasonable attorney could have concluded that facts supporting the claim might be established." The evidence cited in Claimant's post-hearing briefs and proposed form of award was all admitted into evidence by this Tribunal, and thus constitutes part of the evidentiary record in this arbitration. Although I concur in the result reached by the majority on Claimant's trade secrets claims, for the limited reasons discussed in Part I above, that body of evidence must be acknowledged in any fair assessment of whether those claims were "entirely without color." Several aspects of that record that seem to me to have particular relevance to application of the first prong of the applicable test for finding bad faith are specifically referenced in the Appendix attached to this Partial Concurrence and Dissent. This Appendix is not intended to constitute a review of all of the evidence presented, but rather to point out those parts of the record that, I believe, most clearly preclude a principled finding that the trade secret claims were "entirely without color." The recitation set forth in the Appendix, I believe, demonstrates that this was a hard-fought case in which the evidence presented was mixed. The mixed outcome is the best proof of that – all three arbitrators ultimately agree that all of the Claimants' claims and all of the Respondents' Counterclaims should be denied. Both sides had a case to present here. Both sides presented claims that the Tribunal ultimately rejected. But neither side presented claims that were "entirely without color."

Nowhere is the Final Award's failure to apply the "entirely without color" standard more clear than in its discussion of whether the trade secret claims were alleged with sufficient specificity. For example, the Final Award states, at 17, that:

> We make no finding as to whether Claimant has protectable trade secrets. It may. That is not the issue.
>
> The issues at bar are whether Claimant's alleged four or five trade secrets *as described* constituted protectable trade

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4 The Final Award bases its finding of bad faith on the discussion running from its pages 13-21. That discussion does not apply, or even mention, the two-prong test for assessing, lawfully, whether bad faith has been proven or not. As discussed in the Appendix, many of the items referenced in that discussion are sweeping and one-sided mischaracterizations of a mixed evidentiary record.

> secrets, and whether their claims of misappropriation were alleged and/or maintained for improper purposes. Based on the testimony of all the experts, we find that the evidence presented establishes that the alleged trade secrets, that is, *the trade secrets as described,* constituted publicly available information or information generally known to professionals in the industry, and that Claimant, a highly sophisticated entity, knew that the trade secrets *as described* did not constitute trade secrets. We further conclude that the claims of misappropriation were brought and/or maintained in bad faith for the purposes of causing Respondents' needless expenditures of money and time in order to defend themselves against the claims. (Emphasis in original.)

Rather than applying the "entirely without color" standard, the Final Award goes astray here by finding that the trade secrets as described by Claimant were insufficiently specific and that Claimant should have known this in advance. The award overlooks the contrary evidence that, of the five trade secret claims originally alleged by Claimant, one – the SBGE trade secret – was contractually acknowledged by Respondent Minicone in his TSA, Cl. Ex. 39, to be a valid trade secret owned by Bridgewater to which he had been given access, a second – the Portfolio Construction and Risk Control Methodology trade secret – was found by expert witness Leibowitz to be a valid trade secret that had been the subject of "clear misappropriation" by Respondents, as discussed above, and a third – the Signal Construction trade secret – was found by all three arbitrators on the eve of the Arbitration Hearing to raise genuine issues of material fact sufficient to preclude grant of a dismissal motion.

The Final Award's statements are also inaccurate and incomplete summaries of the totality of the evidence presented on whether Respondents described its alleged trade secrets with sufficient specificity. Shortly after the arbitration began, the Tribunal directed Claimant to file a Bill of Particulars further describing the trade secrets that were the bases for claims. Claimant did so, in detail. Cl. Ex. 3. In addition, Mr. Leibowitz testified that, based on the materials presented by Bridgewater, he could substantially "replicate" Bridgewater's methodologies from scratch based on the narrative descriptions offered by Claimant. Tr. 920 (Leibowitz). Both of the Respondents' experts also testified that they too were able to assess the Bridgewater methodologies at issue based on the descriptions and documents provided by Bridgestone. *See* Tr. 1234, 1247 (Bateson), 2147-48 (Lewis). This evidence precludes a finding that Claimant's narrative descriptions of its alleged trade secrets rendered the claims "entirely without color." At the end of the day, the majority does not really accept the teaching of the case law collected in n. 1 above: Connecticut law permits parties to assert trade secret claims based on narrative descriptions of those secrets, and without disclosing valuable code, algorithms or formulas. Instead, the award concludes that Claimant should have foreseen that the Tribunal would find its narrative descriptions insufficient unless accompanied by code and algorithms, and then finds "bad faith" based on Claimant's failure to predict the majority's resolution of that disputed issue. This analytical model essentially concludes that Claimant acted in bad faith by following the established teaching of the cases collected in n.1 above and would render the "entirely without color" standard (if it had been applied here at all) capable of being satisfied anytime a trade secret claimant proceeding under color of those cases loses its case.

Third, the Final Award erroneously makes its award of fees and costs without offering any evidentiary basis establishing the second prong of the legal standards that govern whether C.G.S.A. § 35-54 permits such a fee award here. Such an award is within our authority only if the evidence presented established that the trade secret claims were initiated "for purposes of harassment or delay or for other improper purposes." Rather than apply this standard, based on actual evidence of intent to harm a competitor, or of intent to file claims known to be specious for purposes of harassment and delay, the Final Award identifies what the majority sees as the defects in Claimant's trade secret claims, announces that Claimant should have seen all along that it would not prevail on those issues, notes that the pendency of the case has been hard on Respondents, and then – based on speculation and in part expressly on "inference," Final Award at 16, without an actual evidentiary basis – concludes that Claimant therefore must have brought the case in bad faith in order to harass a new competitor.[5] This conclusion is based on surmise, not evidence. It departs entirely from the *EVAPCO* requirement that the second prong necessary to permit a C.G.S.A. § 35-54 fee award – proof that the claim was asserted "for purposes of harassment or delay or for other improper purposes" – requires evidence both of objective and subjective bad faith. No such evidence was present in our hearing record, and none is referenced in the Final Award.

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5 The Final Award, at 16, states: "The evidence presented establishes that Claimant knew what it described as trade secrets constituted descriptions of publicly available information or information generally known to professionals in the industry, yet Claimant persisted in its claims. That persistence demonstrates bad faith.." A party's decision "to persist in its claims" is not evidence that the second prong of the applicable test for bad faith under C.G.S.A. § 35-54 has been proven. Rather, such a finding requires actual *evidence*, and under *EVAPCO, supra,* there must be evidence of both objective and subjective bad faith, demonstrating that the claims were asserted for an improper purpose. Moreover, basing such a determination on a standard of whether or not the descriptions constituted "publicly available information or information generally known to professionals in the industry" abandons the applicable first-prong requirement that under C.G.S.A. § 35-54 trade secret claims should be found to have been filed in bad faith only if they are "entirely without color." That standard is plainly not satisfied here because Mr. Leibowitz, who *is* just such a "professional in the industry" and who, whatever the issues raised by his testimony on whether misappropriation was established, found that the descriptions did *not* constitute "publically available information." This was thus a disputed point on which Claimant presented extensive expert evidence in support of its position, not a claim made "entirely without color."

For these reasons, I dissent from the Final Award's determination that C.G.S.A. § 35-54 authorizes either a finding of "bad faith" or an award of fees and costs against Claimant here. Since the legal authorities governing availability of fee awards under that statute do not permit such an award on the record presented here, I also dissent on the additional ground that the Final Award's decision to make such an award exceeds this Tribunal's authority under Rule 39(d) of the applicable arbitral rules.

Every case that is decided generally has a winning and a losing party. Every claim that is unsuccessful was not brought in bad faith. C.G.S.A. § 35-54 was never intended to, and does not, authorize a discretionary "English Rule" – a prevailing party automatically gets its fees – whenever someone fails to prevail on a trade secret claim. This is particularly true in a case, as here, where the parties to the case previously agreed that, except in the case of discrimination claims, Respondents "will be entirely responsible for [their] own attorneys' fees and disbursements. . .." The Final Award erroneously applies Section 35-54, designed to be a rare procedure available only in exceptional and egregious cases, to a mixed record in which each party had a case to present. The Final Award does so without lawful authority under the case law interpreting Section 35-54, in violation of the requirement of Rule 39(d) of the arbitral rules that arbitrators may only award judicial remedies "in accordance with applicable law," and does so in contravention of the parties' express contractual agreement that the Respondents should bear their own fees and costs in this arbitration.

Finally, although these are smaller points (when viewed from a dollar-value standpoint, although not small at all when viewed from the standpoint of respect for the law), I also dissent from the award insofar as it is purportedly based on C.G.S.A. § 35-54 for three additional reasons. First, the award makes no attempt to limit its award of fees and costs only to work done and costs incurred on the trade secret claims, the stated basis for the award, but instead, except for a small amount of work done by the Liddle & Robinson firm at the outset of the case, awards fees and costs for all of the work done by Respondents' counsel. This case had four sets of claims and two counterclaims. It cannot be right that 100% of the work was done on the trade secret claims and that no work at all was done on the three other sets of claims or on the two counterclaims. C.G.S.A. § 35-54 affords the majority no lawful basis to award any fees and costs on the two sets of breach of contract claims, the unsuccessful CUTPA claim or on the two unsuccessful counterclaims, especially where the parties expressly agreed in their arbitration agreement that the Respondents should bear their own fees and costs in this arbitration on all claims except discrimination claims. *See Total Recycling Servs. of Ct. v. Connecticut Oil Recycling Servs., LLC,* 63 A.3d 896, 905 (Conn. 2013)("[W]hen an action involving certain claims for which the recovery of attorneys' fees is allowed also includes other claims for which such recovery is not. . .the court must determine whether the fees may be apportioned accordingly.") Second, it is unreasonable, particularly in a case where (on the majority's theory of the case) only one set of claims is fee-bearing, for the majority not to make some adjustment to the fee application to correct for its broad use of block billing entries to describe the work done. *See, e.g., Doe v. Darien Board of Educ.,* 2015 WL 87700003 at *9 (D. Conn. Dec. 14, 2015 (percentage reduction to correct for block billing). Third, C.G.S.A. § 35-54 affords the majority no lawful basis to make any award of costs or expenses to Respondents. The plain language of the statute provides at most for an award of "reasonable attorneys' fees to the prevailing party." The statute does not authorize, either expressly or by implication, a companion award of expenses or costs. *See BTS USA, Inc. v. Executive Perspectives LLC*, UWYCV116010685S, 2015 WL 3458637 at *2 (Conn. Super. Ct. May 21, 2015 ("In the absence of an express statutory provision permitting an award of costs, the court does not believe it is authorized [under C.G.S.A. § 35-54] to award such costs. . ..") The majority's attempt to rewrite or ignore the CUTSA's clear wording by reference to practice under other statutes, with different provisions and enacted for other purposes, strays impermissibly from the language of the particular statute relied upon as authority for the award.

C. <u>The Final Award's determination that the parties "waiv[ed]" their contracts' agreements that Respondents must bear their own attorneys' fees and disbursements in this arbitration is erroneous and exceeds the Tribunal's authority</u>.

The Final Award states, at 2, that:

> The governing contracts also provide that in the event of arbitration, each party shall bear its own costs and attorneys' fees. In that regard, Claimant did not initially request fees in its Demand. But in responding to Respondents' request for fees in their Counterclaim, Claimant did not seek to invoke the contractual provision on fees as a defense to Respondents' request. Later, during prehearing briefing—and again in posthearing briefing—when both parties requested an award of fees, neither invoked the contract provision as a defense. Accordingly, as there is nothing in the contracts between the parties that would make the fee provision self-executing, but rather just a protection to be invoked if desired, the request by both parties establishes a waiver of that provision here. We also note that Connecticut law seeks to deter bringing misappropriation claims in bad faith by providing that the prevailing party is entitled to recover attorneys' fees of suit incurred in defending against such bad faith claims, thus authorizing its courts to grant attorneys' fees in such cases. (*See* Connecticut Uniform Trade Secret Act, "CUTSA", C.G.S.A. Sec. 35-54 and Connecticut Unfair Trade Practices Act, C.G.S.A. Sec. 42-110a-b .) AAA Employment Rule 1 provides that in the event of a conflict between AAA rules and arbitration contract rules, the AAA rules govern. AAA Employment Rules 39(d) and 45 authorize granting attorneys' fees and costs to the extent a court would have authority to do so.

I dissent from this determination. Absent a statutory source of authority – which, as discussed above, C.G.S.A. § 35-54 does not provide in this case - this Tribunal's authority to make an award of fees and costs derives entirely from the parties' contractual agreements, and from their agreed arbitral rules.

In the present case, as discussed above, those contracts could not be more clear. In a case not involving discrimination claims, Respondents "will be entirely responsible for [their] own attorneys' fees and disbursements. . .." The Final Award's stated reasons for disregarding this clear agreement are unpersuasive and constitute action in excess of the Tribunal's authority. The majority's contention that "there is nothing in the contracts between the parties that would make the fee provision self-executing, but rather just a protection to be invoked if desired" effectively reads an important part of the parties' contractual agreements with one another out of their contracts. The contracts clearly provide that in the events that have happened – an arbitration not involving discrimination claims - Respondents "will be entirely responsible for [their] own attorneys' fees and disbursements. . .." This Tribunal has no authority to disregard or refuse to apply that clear agreement. In taking this position, the majority improperly substitutes its notion of the appropriate outcome in this case instead of interpreting and applying the contracts in question. *Compare, Stolt-Nielsen, S.A. v. Animalfeeds International Corp.,* 559 U.S. 662, 130 S. Ct. 1758, 1767-70, 176 L.Ed. 2d 605 (2010).

The Final Award's statement quoted above – that "when both parties requested an award of fees, neither invoked the contract provision as a defense. Accordingly, . . . the request by both parties establishes a waiver of that provision here" – is similarly unwarranted. The statement that Claimant did not "invoke the provision as a defense" is just wrong. Insofar as the Counterclaims pleaded prior to the Arbitration Hearing (*i.e.,* the CUTPA and tortious interference Counterclaims) sought fees, Claimant's Answer to Counterclaims, Cl. Ex. 102, at 4, ⁋16, expressly "denie[d] each and every allegation set forth in the Respondents' counterclaims." Greater specificity, or more detailed notice pleading, than this is expressly not required by the applicable arbitral rules. *See* the AAA's Employment Arbitration Rules, Rule 4(b)(iv)(An answer to a counterclaim "shall provide Claimant's brief response to the counterclaim and the issues presented. . .") and 4(c) ("The form of any filing in these rules shall not be subject to technical pleading requirements.") Such pleading falls far short of establishing a knowing or intentional waiver of Claimant's entitlement to enforce its contract rights concerning the fee claims asserted by Respondents. (Even if it did constitute such a waiver, the asserted "waiver" at most would be applicable to the fee claims that had been asserted as of the date of filing of the pleading, which did not then include the request for fees based on CUTSA. *See infra.*)

The award's statement that "both parties requested an award of fees" also fails to state a lawful basis for a finding of waiver. Claimant did not seek an award of fees or costs in its favor on either its trade secret claims or on its contract claims based on Respondents' employment contracts, and also did not seek a general prevailing-party award of its fees and costs. Claimant did seek recovery of some of its fees and costs as a species of damages on its contract claim based on alleged breach of Respondent

Minicone's TSA and on its statutory claim for violation of CUTPA. No authority is provided by the majority, and none was cited to us by the parties, for the Final Award's unsupported conclusion that making such limited claims, on certain claims but not others, on one claim arising under a contract other than the Respondents' employment contracts (*i.e.,* Cl. Ex. 39, Respondent Minicone's TSA agreement) and the other arising under a statute (CUTPA), for some fees and costs as a species of damages, but not for the other fees and costs incurred in the case, and in particular not on the trade secret claims, constitutes a knowing and intentional "waiver" under Connecticut law of the parties' express contractual agreement that Respondents "will be entirely responsible for [their] own attorneys' fees and disbursements. . ." in any arbitration not involving discrimination claims. Asserting such limited and specific affirmative claims cannot, as a matter of law, work a "waiver" of an entirely separate contractual defense.

Most importantly, all of the conduct – Claimant's supposed failure to plead a defense to the fee claims made based on the two Counterclaims that had actually been pleaded as of the date of filing of the Claimant's Answer to Counterclaims, and Claimant's limited requests to recover fees and costs on two of its claims, not including the trade secret claims – took place *before* Respondents ever submitted a claim for attorneys' fees under CUTSA in this case. As discussed above, this claim was first raised as a request for relief in Respondents' Post-Hearing Brief, after the Arbitration Hearing had already been held and completed, and was promptly opposed in the only remaining pleading opportunity left to it (Claimant's Post-Hearing Reply Memorandum, filed November 20, 2019) once Claimant learned of the late-asserted claim. It is impossible, as a matter of law, for a party to knowingly and intentionally waive a contractual defense to a claim that has not yet been asserted and of which the supposedly waiving party is unaware. Moreover, once Claimant finally did learn of the late-asserted claim for fees pursuant to CUTSA, Claimant promptly opposed it in Claimant's Post-Hearing Reply Memorandum.

Finally, the majority's "waiver" argument ultimately fails to establish any affirmative basis for a contract-based award of fees. At most, the majority's analysis argues that Claimant supposedly "waived" a possible defense to Respondents' claims for an award of certain fees and costs. Even if such a "waiver" could be found, it does not establish an affirmative contract-based source of authority for this Tribunal to make an award of fees and costs. The record presented certainly does not support a finding that the parties ever agreed during the case to replace their contracts' express provisions specifying that Respondents "will be entirely responsible for [their] own attorneys' fees and disbursements. . ." with substitution of the "English Rule" (*i..e.,* the prevailing party automatically gets an award of fees and costs). At most, the majority's "waiver" analysis might support an argument that the parties' contracts should be deemed silent on fees and costs claims. In the United States, generally, a prevailing party is not entitled to an award of fees and costs absent a statutory basis or an express contractual provision authorizing such an award.

The Final Award fails to establish any such alternative affirmative basis for its fee award.

As discussed above, C.G.S.A. § 35-54 does not provide such a basis in this case.

Nor do the three provisions of the arbitral Rules cited by the majority in the statement quoted above, and again in its fee award at 21-22 of the Final Award: Rule 1 of the AAA's Employment Arbitration Rules provides that "If a party establishes that an adverse material inconsistency exists between the arbitration agreement and these rules, the arbitrator shall apply these rules." Rule 39(d) provides that the arbitrator may grant any remedy or relief that would have been available to the parties had the matter been heard in court including awards of attorney's fees and costs, in accordance with applicable law." Rule 45 provides that "Unless otherwise agreed by the parties or as provided under applicable law, the expenses of witnesses for either side shall be borne by the party producing such witnesses." As discussed above, Rule 39(d) does not authorize the fee award made in this case for multiple reasons, including the key considerations that the claim for such an award was not properly or timely asserted or permitted as required under Rule 5b of the same set of arbitral rules, and because such an award is not "in accordance with applicable law" under C.G.S.A. § 35-54. Absent a lawful statutory basis for the award, there is no "conflict between AAA rules and arbitration contract rules" and nothing in these three rules, singly or together, establishes an affirmative contract-based source of authority for this Tribunal to make its award of fees and costs. Similarly, absent the particular statutory basis relied upon in the Final Award (*i.e.,* CUTSA), no general doctrine of "equity" empowers the majority to disregard and override the express terms of the parties' contractual agreement that Respondents "will be entirely responsible for [their] own attorneys' fees and disbursements. . .." As discussed above, the parties' agreements here did not agree to confer any power on this Tribunal to act as *amiable compositeur* or to decide their dispute "*ex aequo et bono.*"

Finally, Rule 45(d) by its terms forbids the award of expenses made in the Final Award, at 24, insofar as those expenses include "the expenses of witnesses." The Final Award expressly recites that its award of $335,038.44 made on its page 24 includes both "expert witness's fees and expenses." Both the parties' contractual agreement that Respondents "will be entirely responsible for [their] own . . . disbursements. . ." and Rule 45 expressly preclude this part of the Final Award. Based on the parties' contractual agreement that in a case not involving discrimination claims "[t]he arbitrator's fee and any fees and costs owed to the AAA will be divided equally between you and Bridgewater," I also dissent from the majority's allocation of AAA fees and arbitrator compensation made above on page 24.

Accordingly, for the reasons given above, I dissent from the Final Award's finding of "waiver," quoted above. The Final Award impermissibly disregards the express terms of the contracts and arbitration agreements from which this Tribunal derives its arbitral authority, also violates arbitral Rule 45(d), and is therefore made in excess of this Tribunal's authority.

Thomas J. Brewer, Arbitrator
Dated: July 1, 2020

APPENDIX TO PART III.B OF PARTIAL CONCURRENCE AND DISSENT

Contractual Acknowledgements of Trade Secrets. Respondent Minicone entered into a contract in which he expressly agreed that the alleged SBGE trade secret is a valid and existing trade secret and that he had access to it. Cl. Ex. 39, Mr. Minicone's TSA, expressly recited, at 1, that "I have recently participated in and been exposed to Bridgewater's proprietary Statistics Based Estimator project . . .This Project involves sensitive, confidential, trade secret information belonging to Bridgewater. . . the aforesaid Confidential Information constitutes trade secrets. . . .." The TSA also acknowledged, at 1-2, that the Confidential Information covered by it "involves proprietary trade secret information belonging to Bridgewater. . . [that]is not available in the public domain in an integrated form. . . [and] my use or disclosure of the Confidential Information would irreparably harm Bridgewater. . .." Similarly, both Respondents signed employment contracts, again prior to the onset of the present dispute, in which they expressly agreed that Bridgewater possessed valuable intellectual property, including specifically trade secrets, to which Respondents would have access during the course of their work and that Respondents were contractually obligated not to misuse or divulge to third parties. "[Respondent] will have access to confidential and proprietary information ('Confidential Information'). . Such Confidential information includes. . . trade secrets, intellectual property. . . [and] also includes the systemized investment decision-making process utilized by Bridgewater (including the use of economic decisions in buy-sell decisions. . ..") Cl. Ex. 8, at pp. 4-5. *See also* Cl. Ex. 32, 101. This evidence was relevant to, and weighed against, Respondents' contentions that Bridgewater failed to establish that Respondents had "access" to Bridgewater's trade secrets, that Bridgewater did not establish any "protectable" trade secrets and that Bridgewater's alleged trade secrets were "readily ascertainable." The evidence referenced above established that Respondents contractually agreed otherwise, in employment contracts freely entered into before the present dispute arose and gave the Respondents a possible incentive to testify otherwise later.

Time and Efforts Invested in Creating the Trade Secrets. All of the principal Bridgewater witnesses testified that Bridgewater owns proprietary trade secrets and intellectual property of great value, developed by large numbers of Bridgewater employees working together over a period of years or even decades, and that the company zealously protects that intellectual property. (Testimony of Bridgewater witnesses Jensen, Brennan, Rotenberg and Trudel.) Mr. Jensen, for example, testified that Bridgewater manages over $160 billion in investment funds, placed with it by approximately 350 of the most sophisticated investors in the world, and over the course of the past several decades has produced "more Alpha"[6] for its clients than any other comparable investment firm. He further testified that Bridgewater is able to do this because of the trade secrets and intellectual property the company has painstakingly developed and protected over a long period of time. *See* Tr. 84-107, 132-33, 174-77 (Jensen)(among other things, estimating that development of Bridgewater's SBGE trade secret took four years with 8-10 people working on it, that development of Bridgewater's Slack Measure Process has been ongoing for 25-30 years with 10-12 people working on it, that development of Bridgewater's Short-Rate Trading methodology has been ongoing for approximately 20 years with 20-25 people working on it and that development of Bridgewater's Portfolio Construction and Risk Control Process took 10 years with 25 people working on it). *See also* Tr. 712 (Leibowitz) (Bridgewater is "in the business of creating intellectual property" in order to "build[] their competitive advantage in the market. . ."), 2335-36 (Brennan), 353-56 (Rotenberg), 569 (Trudel). This testimony was relevant to, and weighed against, Respondents' contentions that Bridgewater lacked "protectable" trade secrets and that Bridgewater's trade secrets are "readily ascertainable." This evidence is also relevant to whether Bridgewater brought and maintained its trade secret claims because it genuinely believed it has valuable trade secrets that needed to be protected, whether it was reasonable for Bridgewater to be concerned about whether the two Respondents plausibly could have created similar methodologies in a fourteen-month time period while holding full-time jobs elsewhere, without documenting how they did it, and whether it brought those claims "for purposes of harassment or delay or for other improper purposes."

Claimant's Discovery of and Reaction to TCM's 2017 Marketing Presentation. At the beginning of February 2017, roughly coincident with TCM's launch, Bridgewater learned - from a Bridgewater client, not from Respondents or TCM - that TCM had been circulating a marketing presentation entitled "Next Generation Macro Investing: Fundamental Macro Plus An Analytical Edge," Cl. Ex. 10, R. Ex. 206, Tr. 162-64 (Jensen). Several Bridgewater employees who reviewed the 2017 Marketing Presentation testified that they were alarmed by two aspects of it: They concluded that it closely resembled Bridgewater's investment approach in the presentation's language, formatting, and content. *See* Tr. 166-204 (Jensen), 2356-57 (Brennan), 607 (Trudel). In addition, based on its contents, they became concerned "that what [Respondents] had put together here was stuff that they learned at Bridgewater and only stuff that they learned at Bridgewater" and that it amounted to a "reconfiguration of [Bridgewater's] hard work." *See* Tr. 166-69 (Jensen). Based on their review of the 2017 Marketing Presentation, Bridgewater became "highly concerned" that Respondents were misappropriating Bridgewater's Confidential Information. Tr. 207-08 (Jensen). I found this testimony credible. This evidence militates against a finding that Claimant's claims were "entirely without color." It also sheds important light on why Bridgewater decided to assert its

6 "Q. Can you explain what you mean by that? A. So of all the hedge fund (*sic)* in the world Bridgewater delivered more money to our clients than any other hedge fund that exists." Tr. 92 (Jensen).

trade secret claims here, and thus constitutes the most direct evidence in the record on whether Bridgewater asserted and maintained its trade secret claims "for purposes of harassment or delay or for other improper purposes" – the second prong that must be satisfied in order for an award of fees to be authorized under C.G.S.A. § 35-54 – or not.

Claimant's Discovery of Other Evidence Concerning Respondents' TCM Activities. Bridgewater subsequently learned during its preparation of this case for trial that other marketing and promotional materials prepared by Respondents in mid-to-late 2016 in preparation for TCM's launch highlighted Mr. Minicone and Mr. Squire's prior experience at Bridgewater, and misstated Mr. Squire's prior position at Bridgewater as "Head of Trading Strategy for FX" at Bridgewater, which was untrue. Cl. Ex. 84 at 084.006; Tr. 168 (Jensen)("That was an inaccurate statement of what he had done. An attempt to make it out like he had created this stuff at Bridgewater rather than learned it.") In other marketing materials from 2016, TCM described itself to potential investors in terms that directly referenced Bridgewater. In particular, Respondents described TCM as "one of the only managers to marry the fundamental insights of a Bridgewater with the analytical rigor of a DE Shaw, based on the skills and experience we acquired there *through our involvement in each facet of the investment and risk management processes*." Cl. Ex. 69 (emphasis supplied). Those materials also described TCM's "Substantive Edge" as based on "our experience at the world's most successful asset managers," including Bridgewater. Respondents asserted that this experience gave Respondents the "tools" to measure "fundamental drivers of macro assets" in real time. *Id.* A 2018 TCM marketing presentation also noted that "beyond our backing and edge as differentiation, we stand out among old and new managers alike as the first and only D.E. Shaw & Bridgewater alumni fund in existence." Cl. Ex. 85. This evidence, especially the Respondents' broad description of the "tools" and "experience we acquired there through our involvement in each facet of the investment and risk management processes" made in Cl. Ex. 69, was relevant to, and weighed against, Respondents' contentions that Respondents "lacked access to" Bridgewater's trade secrets and had not misappropriated Bridgewater's intellectual property. This evidence is also relevant to whether Bridgewater brought and maintained its trade secret claims because it genuinely believed Respondents' conduct threatened misappropriation of Bridgewater's trade or whether it brought those claims "for purposes of harassment or delay or for other improper purposes." The Final Award's statement that "Claimant's position is that TCM's deck as forwarded to Bridgewater on or about February 2, 2017, was sufficient evidence of Respondents' misappropriation of trade secrets and disclosure of confidential information. . .," Final Award at 18, is thus an inaccurate misstatement of "Claimant's position" insofar as it suggests that Claimant's only evidentiary basis for suspecting misappropriation of trade secrets was the 2017 TCM Marketing Presentation, CL. Ex. 10. The statement takes no account of the other evidence discussed above, and the inferences Bridgewater was reasonably entitled to draw from that evidence, and for that reason is an incomplete, inaccurate and one-sided summary of the evidentiary record.

Respondent Minicone's Breach of His Trade Secret Agreement. Claimant also learned, close to the time it learned of TCM's launch, that Respondent Minicone was in breach of the notice provision of his TSA and had apparently been disregarding that duty for some considerable period of time. Cl. Ex. 39; Tr. 2049 (Minicone). (The record eventually established that he had been in breach for about 14 months – from November 2015 when he started working on TCM-related matters, (*see* Tr. 1667 (Squire) and 2073-76 (Minicone), and February 2017, when TCM launched and Bridgewater learned of his activities, including his prior breach, from other sources.) Mr. Minicone's failure to notify Bridgewater for more than a year of his work for TCM, as was required under his TSA, was understandably viewed by Bridgewater as suspicious and heightened Bridgewater's concerns about potential misuse of its confidential information, including trade secrets. *See, e.g.,* Tr. 2426 (Brennan) ("[I]t started off with a concern, I mean, just my honest concern of why did they not tell us**?** And when they're telling us things, are those the right things? We're only seeing what's literally in a set of materials they did not intentionally give to us. So it started off with a perspective of, you know, will we be getting the truth?"). Upon such discovery, Bridgewater decided to investigate Minicone's activities, including the reasons why he had not complied with his TSA, drew unsurprising inferences from the fact that he had not honored his TSA, and decided to take legal steps to investigate whether its trade secrets were at risk. This evidence was relevant to Mr. Minicone's credibility, to whether Respondent Minicone "had access" to Bridgewater's trade secrets and to whether Bridgewater had plausible reasons to suspect misappropriation. This evidence is also relevant to whether Bridgewater brought and maintained its trade secret claims because it was genuinely concerned that Respondents' conduct threatened misappropriation of Bridgewater's trade secrets or whether it brought those claims "for purposes of harassment or delay or for other improper purposes."

Failure to Settle Not Evidence of Anything. Following Bridgewater's discovery of TCM's launch, the parties entered into several attempts at settlement negotiations. No agreement was reached. This arbitration followed. The Final Award, at 14, comments: "Claimant rejected Respondents' reasonable offer, prior to filing this litigation, to submit the parties' respective methodologies to a neutral third party for comparison . . . A reasonable negative inference is that any such submission would have shown absence of misappropriation of alleged trade secrets and any confidential information." It is inappropriate to decide whether a claim is or is not "entirely without color" based on positions taken by a party during pre-litigation settlement negotiations. Parties make and reject settlement demands for all sorts of reasons, usually (and properly) not fully known to the trier of fact, and those choices do not establish that the claims asserted later were or were not "entirely without color." Here, Bridgewater was dealing with two former employees, one of whom had breached his TSA notice duty for more than a year. Bridgewater's refusal to release its code, algorithms, formulas and programs for review to an outside umpire or to those Respondents' counsel as a condition necessary to achieve a settlement with those two individuals is irrelevant to whether its claims were "entirely without color." It is also inappropriate to decide whether a claim is or is not "entirely without color" based on a "negative inference" rather than actual evidence. This is particularly true here, where a more reasonable inference is readily available. As the Final Award notes, at 5, "Bridgewater and TCM each regard their models, algorithms, and related intellectual property as proprietary, and potentially valuable to the other." An alternative "inference," more reasonable than the one the majority chooses to draw, is that the settlement negotiations failed because, at the end of the day, Bridgewater concluded that it could not safely risk disclosure of its most valuable trading and investment code, models, algorithms, formulas and programs – the "crown jewels" of its intellectual property - to an outsider, particularly if the settlement procedure would have also entailed disclosure to Respondents' counsel. Bridgewater evidently concluded it could lawfully, and more safely, pursue its trade secret claims against Respondents based on "plain English" descriptions of its trade secrets, without either side being required to disclose investment code and algorithms, which is what eventually happened. Such an inference is more reasonable and tethered to the evidence presented than the more dire "negative inference" adopted by the majority. The "negative inference" drawn by the majority is speculative, and affords no sound basis for concluding that the trade secret claims were or were not "entirely without color" at the time Bridgewater decided to pursue them.

<u>The "Reasonable Attorney" Test</u>. Claimant engaged able and experienced counsel to represent it. Counsel, presumably after conducting an attorney-client- and work product-privileged review of the possible claims, about which we know nothing and about which – appropriately – no evidence is contained in our record, agreed to represent Claimant and subsequently filed and prosecuted the arbitration, including by asserting the particular trade secret claims that were included in the Demand for Arbitration. The authorities cited to us by the parties teach that one important factor to consider in deciding whether the trade secret claims at issue were "entirely without color" is "whether a reasonable attorney could have concluded that facts supporting the claim might be established, not whether such facts had been established," *Clinipad, supra,* at *2. Wilmer Cutler Pickering Hale and Dorr, LLP (later joined at the hearing by James Pooley) certainly qualifies as a "reasonable attorney" that in fact did so "conclude."

<u>Expert Reports: Leibowitz</u>. Before Claimant took this case to trial it sought and obtained review and analysis of its trade secret claims from two independent and well-qualified experts, both of whom were later allowed by the Tribunal to testify as experts qualified to express expert opinions in their testimony. Mr. Leibowitz's expert report, later admitted into evidence at the hearing as Cl. Ex. 95 – and summarized here only very briefly (the report ran to 59 pages) – opined, among other things, that "It is clear to me that Respondents relied heavily on the training they received at Bridgewater, and followed a similar process in building an integrated systematic macro investment strategy at TCM. . . their [TCM] presentation is a mirror of the way Bridgewater describes, represents and presents concepts to clients . . . it is my opinion that Respondents have attempted to create in TCM a scaled down version of Bridgewater while misrepresenting TCM's capabilities and experience as being in line with Bridgewater. They have taken shortcuts, whether due to expediency or approach, but have added very little in the way of original thinking, but particularly in Portfolio Construction and Risk Control, they have more directly misappropriated intellectual property, as described in detail below. . .After taking into account the highly unusual and complex integrated portfolio construction process implemented at Bridgewater and comparing it with TCM, it is my opinion that TCM has misappropriated intellectual property in their approach. . . the combination of concepts employed are highly unique to Bridgewater." (Cl. Ex. 95, at 1, 8 and 57-59.) The contents of the Leibowitz Report were relevant to, and constituted independent evidence weighing against, Respondents' assertions that Bridgewater lacked a reasonable basis to pursue its claims for misappropriation of trade secrets by Respondents.

Expert Reports: Knez. Although Claimant's other expert, Peter Knez, was not asked to opine about whether trade secret misappropriation had occurred or not, Mr. Knez was asked to offer an expert opinion, which he was extremely well qualified to do based on his prior experience in the industry creating investment funds, about whether it was possible for two young ex-employees, while holding down other jobs for most of the relevant time period, to develop a full suite of investment methodologies for TCM relying solely on their own work in the short time that they claimed to have done so in their deposition testimony. Mr. Knez's expert report, later admitted into evidence as Cl. Ex. 96, opined (again, editing heavily – the report is 24 pages long) that:

> Respondents both testified that they began developing TCM's models in mid-2016. They further testified that each of the models was operational either weeks or months thereafter, and that all models were production ready by TCM's launch in February 2017. Based on my experience starting similar asset management funds, I find this assertion entirely improbable. . . Respondents could not have developed and launched TCM in the time they claim "from the ground up," which is to say, without drawing heavily on their experience at Bridgewater. . .
>
> By my estimation, such an effort would take a team of five or six very talented individuals working full time approximately two years to produce a similar platform from the ground up. This leads me to believe that TCM's models could only have been built by the two Respondents over the course of months, working outside of business hours, if they actively drew on their knowledge of Bridgewater's investment process and sought to copy it.
>
> My opinion in this regard is further supported by the near total lack of documentation reflecting Respondents' design and development process. In order to do the research, drafting, testing and refinement necessary to produce TCM's models, I would expect to see a voluminous record. It is standard industry practice to record every version of a model to develop institutional knowledge. . .
>
> On this basis, it is my opinion that it would have been nearly impossible for Respondents to establish TCM in the time they claim without relying in large part on Bridgewater's approach. It is also my opinion that Respondents could not have established TCM without keeping any sort of records regarding their research or

> testing efforts, unless they had a very clear development plan drawn from their experience at Bridgewater. . ..

Cl. Ex. 96 (Knez Report), at 8, 19, 21-22 (citations to the deposition testimony omitted). The contents of the Knez report were relevant to, and constituted independent evidence weighing against, Respondents' assertions that Bridgewater lacked a reasonable basis to pursue its trade secret claims.

Motion to Dismiss Denied. Prior to the Arbitration Hearing, Respondents applied for and obtained leave to file a motion to dismiss the Signal Construction trade secret claim. (Prehearing Order No. 13.) Respondents did not seek leave to include in the proposed motion a request to dismiss the other four trade secret claims alleged by Claimant. The parties subsequently briefed the motion. On May 31, 2019, the Tribunal unanimously denied the Respondents' motion to dismiss on the ground that it "raises issues of fact." (Prehearing Order No. 16.)

Expert Testimony: Leibowitz. At the Arbitration Hearing, Bridgewater presented testimony from its expert witness Lawrence Leibowitz. That testimony and Mr. Leibowitz's Expert Report, Cl. Ex. 95, were admitted into evidence. Both the testimony and the Expert Report expressed Mr. Leibowitz's expert opinion that Respondents had committed misappropriation of trade secrets. The bottom line on this testimony, for purposes of assessing whether a fee award is permissible under C.G.S.A. § 35-54, is that Mr. Leibowitz opined that he found "clear misappropriation" of Bridgewater's IP by Respondents. Cl. Ex. 95, at 17-18; Tr. 756 (Leibowitz). This evidence precludes a finding that Bridgewater's trade secret claims were "entirely without color." As discussed in Part I above, the expert evidence and testimony Bridgewater offered at the hearing ultimately did not persuade this Tribunal that misappropriation had been established. This outcome falls well short, however, of establishing that the trade secret claims asserted were either "entirely without color" or asserted in bad faith for purposes of harassment or delay. Expert witnesses are often effectively cross-examined. In addition, although the majority seems to have found the practice unusual and criticizes it in the Final Award, at 9-10, it is routine for counsel presenting an expert witness to instruct the witness to make specified factual and/or legal assumptions provided by counsel in order to set the context for the witness to offer his or her opinion evidence. Nothing about that practice as used here warrants the Final Award's conclusion that it "undermined their [Claimant's experts'] credibility as neutral and independent experts." (Final Award, at 9.) Even if the majority feels that the particular assumptions provided by counsel diminished the weight of the evidence offered into evidence by Claimant's principal expert witness, such a determination at most goes to the weight of the evidence offered, and falls to establish that the claim on which the expert testified was "entirely without color" or was offered in bad faith. There is a clear difference between offering an expert that, based on review of a mixed record in a hard-fought case, as was the case here, ultimately fails to persuade the trier of fact that misappropriation has been established, on the one hand, and bringing a "sham" claim that was filed in "bad faith," on the other.

Expert Testimony: Knez. The evidence presented at the Arbitration Hearing established that Respondents began building TCM's investment methodologies in about

November 2015. *See* Tr. 1667 (Squire). Although this time period was slightly longer than the time period assumed by Mr. Knez in his report, which was based on the Respondents' earlier deposition testimony, Mr. Knez's other observations concerning the Respondents' TCM-related preparations were reiterated in the evidence he presented at the hearing: All of TCM's methodologies were constructed and completed by February 2017 by the two former Bridgestone employees, Respondents Squire and Minicone. *See* Tr. 1720-23 (Squire), 2073-83 (Minicone). Both Respondents had other jobs during much of the period when they were building these methodologies. *See* Tr. 1667 (Squire), 1952-53, 2071 (Minicone). Respondents testified that they did not keep any record of development for any of their methodologies other than the models themselves, and that they did not save any iterative versions of the models during development, or otherwise record their research or changes to the models over time. Tr. 1721-22 (Squire), 2082-83 (Minicone). Respondents also testified that they did not keep a record of third-party materials they consulted while developing their methodologies. Tr. 1724 (Squire). Mr. Knez's testimony at the hearing about these matters tracked his earlier opinions expressed in his report – that Respondents' claims to have built the TCM systems in such a short period of time, from the ground up, without keeping any records of what they did, was "implausible." Tr. 1077-83 (Knez). This testimony, especially when coupled with the more extensive analysis contained in Mr. Knez's report, Cl. Ex. 96, was relevant to, and weighed against, Respondents' assertions that Claimant pursued its trade secret claims in bad faith. Mr. Knez's testimony constituted important, and independent, evidence that Bridgewater had good reason to believe that Respondents' development of TCM's methodologies occurred improbably rapidly, under unlikely conditions (while Respondents were employed elsewhere than TCM), with an absence of documentation of how they did it that departed from usual industry standards, in circumstances where it was either "nearly Impossible" (Knez Report) or "implausible" (Knez hearing testimony) for TCM's models to have been built unless Respondents "actively drew on their knowledge of Bridgewater's investment process and sought to copy it." (Knez Report).

<u>Initial Reaction of Respondents' Expert</u>. Respondents' expert Mr. Lewis testified at the Arbitration Hearing that when he first reviewed the information provided to him concerning the case his "initial reaction was gosh these guys probably took intellectual property." Tr. 2139 (Lewis). He later changed his mind after further work, but even one of Respondents' two principal expert witnesses initially had the same reaction as Bridgewater management about whether good grounds appeared to exist to believe Respondents had misappropriated Bridgewater intellectual property.

<u>The "Protect the House" Memo</u>. The evidence presented was mixed on whether Respondents had access during their time working at Bridgewater to the alleged trade secrets at issue. The Final Award leans very heavily on one particular documentary exhibit, Cl. Ex. 114 (the so-called "Protect the House" Memo), in support of its conclusions that "Bridgewater's internal records showed Squire had zero access to Bridgewater's trade secrets" and "showed Minicone had access to 2% of Bridgewater's trade secrets. . .." (Final Award, at 18.) In addition to overlooking the extensive other evidence admitted into the record on the "access" issue, *see, e.g.,* the evidence discussed above in this Appendix and Tr., 610, 662-63 (Trudel), 761-66 (Rotenberg), 787-826

(Leibowitz), these statements oversimplify and mischaracterize the one document cited by the majority for both of these conclusions. As is not infrequently the case in complex commercial litigation, Cl. Ex. 114 was a somewhat confusing and cryptic document, which both sides cited in support of their various positions, and the evidence presented concerning it was at best mixed. Mr. Jensen's testimony, for example, indicated that the above-quoted conclusions mischaracterize the document's statements concerning the access issues. (*See* Tr. at 235-49 (Jensen)("Q. . . . You have Zachary Squire . . . and Lawrence Minicone close to 0 percent; correct? A. No . . . having access to three or four percent of Bridgewater is a lot of money. . . And I just want to be clear about what that means. Two to three percent of all the intellectual property Bridgewater has developed in 40 years.") Other parts of the same document indicate that Bridgewater considered Respondents, when put together at TCM, to pose the highest risk of any former employees, and that Bridgewater was in contact with Respondents "as Part of IP Theft Pursuit." (See Cl. Ex. 114 at pp. 004-5 and 010.) Although both sides found content they liked in this document, the document can just as well be cited for the propositions that Bridgewater was genuinely concerned about the risks posed by Respondents and was pursuing them out of concern that they had stolen Bridgewater's IP, as for the contrary conclusions drawn by the majority. Nothing about Cl. Ex. 114 established that Claimant's trade secret claims were "entirely without color."

"<u>Guessing</u>." One of the linchpins of the Final Award's critique of Claimant's case on the misappropriation issues is the assertion that Bridgewater's only evidence of misappropriation was the 2017 TCM Marketing Presentation and "guessing." For example, the Final Award states, at 18, that "Claimant's position is that TCM's deck as forwarded to Bridgewater on or about February 2, 2017, was sufficient evidence of Respondents' misappropriation of trade secrets and disclosure of confidential information. This was a guess. (Jensen, Tr. 195:16-19.) A guess is not a sufficient basis on which to file claims of trade secret misappropriation and disclosure of confidential information." This portion of the award inaccurately misstates "Claimant's position" insofar as it suggests that Claimant's only evidentiary basis for suspecting misappropriation of trade secrets was the 2017 TCM Marketing Presentation, CL. Ex. 10, or "a guess." It also misstates the cited testimony from Mr. Jensen. The Final Award's discussion of this testimony fails to acknowledge that the cited testimony addressed only one slide in the 2017 TCM Marketing Presentation that was relevant only to the alleged Slack Measure trade secret, Tr. 191-93 (Jensen); Cl. Ex. 10, slide 32, rather than the entirety of Claimant's trade secret claims. Further, the cited testimony, read in its entirety, clearly expresses Mr. Jensen's belief that the slide gave Bridgewater good reason to be concerned that Respondents were misappropriating the alleged Slack Measure trade secret:

> . . . Again, that's exactly how we do it. . .exactly the work product he [Respondent Minicone] was exposed to in his role, applied to the literal concept he was exposed to in his role. . .. Q. Is there something different about what they are showing their output gap on slide 32 – is there something

> different about the way most other people do it as compared to Bridgewater? A. Yes. . .They are clearly taking a frame of reference and recentering their measure consistent with the way Bridgewater does it. . .So getting this level they had on their chart here is – nobody else had this level. . . Q. All right. And what do you conclude by looking at the way they've centered their output gap or slack signal? What do you conclude in terms of what they've done vis-à-vis Bridgewater? A. Again, I conclude – and without seeing the literal code, obviously just an educated guess that this was a process he had exposure to here. He gets an outcome that, as far as I know, and including all the stuff they submitted is the only one that comes out positive in that timeframe. . .it's relevant because that's a unique measure of what slack would be at that time. Bridgewater measured it the same way. That was a . . . very different measurement than the rest of the world had at that time. . . had they generated this independently. . .extremely unlikely to come out with the same answer. So without the formula, without knowing exactly what they're doing, it's pretty clear to me that they're doing something highly similar to what – they came out with this unique outcome. Q. And when you say "that," where? Bridgewater? A. At Bridgewater in the process of the output gap he worked on with Jason Rotenberg.

Tr. 191-97 (Jensen). Mr. Jensen's testimony, read in full and in context, makes clear that his reference to an "educated guess" was simply a shorthand way of acknowledging that he had not been able to examine TCM's code or algorithms (*i.e.,* he was necessarily giving his testimony "without the formula" used by TCM), and thus was limiting his testimony – appropriately – to the conclusions that could be drawn from inspection of slide 32 of TCM's Marketing presentation. The Final Award's mischaracterization of this testimony as an admission that the entirety of Claimant's case on misappropriation was based on "guessing" misstates the evidence in an unfair and one-sided manner.

Absence of Second-Prong Evidence. Finally, the evidentiary record is devoid of any evidence constituting proof that Bridgewater asserted and maintained its trade secret claims "for purposes of harassment or delay or for other improper purposes" – the second prong that must be satisfied in order for an award of fees to be authorized under C.G.S.A. § 35-54. Although the Final Award speculates about why Bridgewater filed its trade secret claims, there is no evidence in this record demonstrating that Bridgewater maintained this case for any improper purpose. Rather, based on the evidentiary record presented, all three arbitrators have agreed that Respondents' CUTPA and intentional interference Counterclaims must be denied. This is an appropriate decision, because no evidence established that Bridgewater had any improper contacts with potential customers of or investors in TCM. To the contrary, Cl. Ex. 105 showed Bridgewater very appropriately declining to respond to a telephone inquiry from a third party seeking information about TCM – *i.e.,* being careful not to interfere with TCM's business relationships. Similarly, there is no evidence in the record, or any such evidence referenced in the Final Award, that Bridgewater filed its trade secret claims knowing them to be without merit or for the purpose of delay. On the other hand, as discussed above, the evidentiary record is full of evidence indicating that Bridgewater management brought this case because it genuinely believed that its trade secrets exist and were being misappropriated by Respondents.