SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

LAWRENCE MINICONE, ZACHARY SQUIRE, Petitioners, v. BRIDGEWATER ASSOCIATES, LP, Respondent.	Index No. 652855/2020 Mot. Seq. 001

MEMORANDUM OF LAW IN OPPOSITION TO PETITION TO CONFIRM AN ATTORNEYS' FEES AWARD WHERE NO PARTY PREVAILED IN AN ARBITRATION, AND WHERE THE CONTROLLING AGREEMENTS AND CONTROLLING LAW EXPLICITLY PROHIBIT SUCH AWARD

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PRELIMINARY STATEMENT

Respondent Bridgewater Associates, LP ("Bridgewater"), an investment management firm based in Westport, Connecticut, has employed its proprietary investment methodologies to great success, amassing $138 billion in assets under management and becoming one of the most well-respected firms in the industry. Bridgewater's success is the product of a deep knowledge of the global economy and its unique approach to investing, which has taken decades of significant investment to develop and refine. The details of that approach are secret, highly valuable, and, understandably, closely guarded.

Bridgewater files this opposition ("Opposition") to a motion by Petitioners Lawrence Minicone and Zachary Squire ("Petitioners") to confirm an award of attorneys' fees (the "Motion") in an arbitration where no party prevailed, and in which the governing agreements and law explicitly forbid such an award.[1]

While Bridgewater strongly disagrees with the arbitration majority's fact-finding, as well as Petitioners' selective citation to findings unsupported or contradicted by the record, Bridgewater's sole challenge here is to the award of attorneys' fees. Bridgewater does not challenge the panel's overarching holding that no party, including Petitioners, proved their claims. Specifically, Petitioners accused Bridgewater of violating the Connecticut Unfair Trade Practices Act ("CUTPA") and tortiously interfering with business expectancies or contracts, but the arbitration panel found Petitioners failed to prove their case. Final Award at 21.

The underlying arbitration arose from Bridgewater's efforts to protect its hard-earned trade secrets from misuse by Petitioners, two former employees whom Bridgewater reasonably believed

[1] Following the Motion, Bridgewater filed an opposition and cross-petition to vacate the arbitration award on July 3, 2020 in *Bridgewater Associates, LP v. Minicone* (N.Y. Sup.) (index number pending). Bridgewater will confer with Petitioners on consolidating these related proceedings.

had wrongfully misappropriated those secrets. Petitioners worked for Bridgewater from 2008 to 2013 and 2010 to 2013, respectively. Immediately after their non-compete terms ended, Bridgewater learned that Petitioners began work that led to starting an investment firm, Tekmerion Capital LP ("TCM"). After reviewing a pitch deck that closely resembled Bridgewater's—one that Petitioners' own expert initially concluded contained Bridgewater's intellectual property—Bridgewater engaged in its own good faith investigation, albeit without subpoena power or discovery rights, and concluded that Petitioners had misappropriated its trade secrets in violation of the law and Petitioners' employment agreements. Consistent with those agreements, Bridgewater served a demand for arbitration, alleging that Petitioners had violated Connecticut's Uniform Trade Secrets Act ("CUTSA") by misappropriating Bridgewater's confidential information concerning various proprietary investment methodologies. Petitioners counterclaimed, bringing unfair trade practices and tortious interference claims against Bridgewater. Following discovery and two weeks of hearings, the panel found that neither party had met their burden on the claims alleged. *See generally* Gay Affirm. Ex. 1 ("Interim Award" or "Interim Dissent," depending).

But two members of the panel did not stop after they found that no party proved their claims. Instead, they "ascribe[d] 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," Gay Affirm. Ex. 3 at 29 ("Final Award" or "Final Dissent," depending), and granted Petitioners' request, raised for the first time in post-hearing briefing, for an award of attorneys' fees under a fee-shifting provision in CUTSA. The majority's attorneys' fees award was made without acknowledging or applying the required two-prong test that Bridgewater's claim must be "entirely without color" and made for "purposes of harassment or delay," and without application of the "clear evidence" standard that applies to those twin determinations. Moreover,

the majority reached its decision despite clear provisions in the governing employment agreements barring an award of fees, thereby exceeding its contractual authority. Finally, the majority imposed this award without giving Bridgewater a meaningful opportunity to respond, and so unfairly prejudiced Bridgewater in violation of the arbitrators' statutory obligations.

Bridgewater filed briefing that squarely raised these arguments, but the fact record was closed. *See* Gay Affirm. Ex. 2 at 1–9 ("Fees Br."). The majority again disregarded the plain terms of the governing contracts and controlling law, issuing a Final Award of $1,991,411.49 in favor of Petitioners on July 1, 2020. Implicitly acknowledging error, the majority deleted references to the erroneous preponderance standard, but tellingly failed to articulate *any* standard in its place—much less the correct one. These changes are merely cosmetic; the analysis in the Final Award is materially indistinguishable from the Interim Award, and no more availing. The majority's glaring substantive and procedural errors drew a sharp rebuke from the dissenting member of the panel, who noted the majority's "many broad mischaracterizations of the evidence," Final Dissent at 29, and compiled a ten-page appendix rebutting each of the majority's core holdings. Petitioners conveniently omit any reference to the dissent whatsoever.

Judicial review of arbitration awards is appropriately circumscribed, and vacatur only justified in narrow circumstances. But arbitration is a creature of contract. Arbitrators are no more permitted to disregard the terms of the contract empowering them to resolve disputes than are the contracting parties themselves. When arbitrators cease operating under the authority of that contract—including in the rare circumstance when they ignore the clear legal principles the parties agreed would control—courts must step in. The panel here had no contractual or statutory authority to award attorneys' fees under these circumstances, much less to do so without giving

Bridgewater meaningful notice and opportunity to present evidence. The Motion must be denied and the award of attorneys' fees must be vacated.

BACKGROUND AND PROCEDURAL HISTORY

A. Petitioners Join Bridgewater and Sign Employment Agreements with Clear Arbitration and Confidentiality Provisions

Lawrence Minicone joined Bridgewater in August 2008 and Zachary Squire joined in August 2010. Petitioners' employment with Bridgewater was governed by largely identical employment agreements. Gay Affirm. Exs. 4 & 5 at 6. Both agreements provide that Bridgewater "may submit any claims against you [the employee] to binding arbitration" under the National Rules for the Resolution of Employment Disputes of the American Arbitration Association ("AAA").[2] *Id.* The agreements are to be "governed by, and construed and enforced in accordance with, the laws of the State of Connecticut, without regard to its conflict of laws provisions." *Id.*

The agreements further provide that the "arbitrator's fee and any fees and costs owed to the AAA will be divided equally between you [the employee] and Bridgewater," but that "you [the employee] will be entirely responsible for your own attorneys' fees and disbursements." *Id.* The contracts permit a single exception, for a successful claim of discrimination, when Petitioners can obtain attorneys' fees through arbitration. *Id.* There is no other basis in the contracts for an award of attorneys' fees to Petitioners. In contrast, the agreements do specify that *Bridgewater*—and Bridgewater only—can recover attorneys' fees "if the arbitrator determines that you [the employee] have acted in bad faith or have asserted claims that, if asserted in federal court, would justify an award of sanctions under Rule 11." *Id.*

[2] The rules are available at https://www.adr.org/sites/default/files/EmploymentRules_Web_2.pdf.

Petitioners acknowledged in their employment agreements that they "will have access to confidential and proprietary information," which includes "trade secrets, intellectual property" and "the systemized investment decision-making process utilized by Bridgewater." *Id.* at 3–4. The employment agreements therefore required Petitioners to maintain the confidentiality of Bridgewater's proprietary information and technologies, and not "use, divulge, disclose or otherwise make accessible to any other person or entity any Confidential Information." *Id.* at 3. This duty survived Petitioners' employment with Bridgewater. *Id.*

B. Bridgewater Obtains Evidence That Petitioners Misappropriated Its Trade Secrets

During their tenures at Bridgewater, Minicone and Squire gained access to Bridgewater's intellectual property and proprietary processes used in its investment strategies. Squire, for example, received specialized training on Bridgewater's approach to portfolio construction and risk control in preparation for his role within Bridgewater's Account Management Group. And Minicone, because of his work with Bridgewater's valuable Statistics Based Growth Estimator ("SBGE") project, entered into a separate Trade Secret Agreement ("TSA") in which he agreed that the SBGE project "involves sensitive, confidential, trade secret information belonging to Bridgewater," and that "the aforesaid Confidential Information constitutes trade secrets" that are "not available in the public domain in an integrated form." Final Award at 45. Given this access to valuable proprietary information, the TSA required that Minicone, even after expiration of his non-compete agreement, "notify Bridgewater in writing prior to performance of any services that relate, directly or indirectly, to (1) asset management [or], (2) trading, investing in or researching financial markets." *Id.* at 27.

In 2013, Petitioners left Bridgewater for other firms and in 2017 launched their own small investment firm, TCM. In violation of the terms of Minicone's TSA, he did not give Bridgewater

advance notice of that new venture. Around that same time, Bridgewater learned that TCM had circulated a marketing presentation to prospective clients that closely resembled Bridgewater's own investment approach in language, formatting, and content. Final Dissent at 46–47. Based on the presentation's content, Bridgewater employees believed Petitioners had reconfigured and exploited Bridgewater's protected investment strategies and misappropriated its trade secrets. *Id.* Given that this conduct occurred without the notice required from Minicone under the TSA, Bridgewater believed that Petitioners were not only trying to profit using Bridgewater's confidential information but also taking steps to hide their malfeasance. *Id.* at 47.

C. Arbitration Reveals Further Evidence of Misappropriation

Faced with marketing materials that Bridgewater employees believed reflected the misappropriation of Bridgewater's confidential information by two former employees, one of whom had breached his notice obligations, Bridgewater drew reasonable inferences and filed an arbitration demand, as provided under the employment agreements. Specifically, Bridgewater brought claims of misappropriation of five distinct trade secrets in violation of CUTSA, unfair competition in violation of CUTPA, breach of contract against Minicone for non-compliance with the terms of his TSA, and breach of contract against both Petitioners for their use or disclosure of confidential information. Final Award at 1–2. Petitioners brought counterclaims (1) under CUTPA, alleging that Bridgewater's arbitration claims were brought to competitively interfere with TCM, and (2) for tortious interference with business expectancies and contract under Connecticut law. *Id.* at 2. Petitioners brought no other counterclaims.

Discovery in the arbitration gave Bridgewater further reason to believe that Petitioners had misappropriated Bridgewater's trade secrets. *See* Final Dissent at 46–47. During the evidentiary hearing, which lasted almost two weeks, Bridgewater adduced substantial proof in support of its claims. Bridgewater put on extensive testimony outlining the significant capital, human and

otherwise, involved in developing Bridgewater's strategies to manage $160 billion drawn from 350 of the world's most sophisticated investors. *Id.* at 45–46. Many of those strategies exist independently of computer code, spreadsheets, or algorithms and reside in the minds of senior Bridgewater personnel. These trade secrets can thus be transferred orally, subject to the extensive security measures that Bridgewater employs. Because Bridgewater's intellectual property is both demonstrably successful and easily transferable, there is significant risk that departing Bridgewater employees will wrongfully appropriate it after they leave.

Testimony confirmed that the Petitioners had access to Bridgewater's intellectual property and did not need to remove any physical materials from Bridgewater to misappropriate it. *Id.* at 52–53. Testimony further confirmed that TCM's materials and methodologies as reflected in its pitch deck were remarkably similar in style and substance to Bridgewater's own. *Id.* at 46.

Bridgewater put on two experts, both of whom the panel recognized as well-qualified. The first, Peter Knez, testified based on his extensive experience creating investment funds that "[Petitioners] could not have developed and launched TCM in the time they claim 'from the ground up' … without drawing heavily on their experience at Bridgewater." *Id.* at 50. This led Knez to believe Petitioners "actively drew on their knowledge of Bridgewater's investment process and sought to copy it." *Id.*

The second expert, Lawrence Leibowitz, confirmed Mr. Knez's expert opinion. Mr. Leibowitz concluded that "[Petitioners] relied heavily on the training they received at Bridgewater, and followed a similar process in building an integrated systematic macro investment strategy," attempting "to create in TCM a scaled down version of Bridgewater while misrepresenting TCM's capabilities and experience as being in line with Bridgewater." *Id.* at 49. Pointing out that Petitioners had "taken shortcuts" and "added very little in the way of original thinking,"

Mr. Leibowitz concluded that they had "misappropriated intellectual property" because "the combination of concepts employed are highly unique to Bridgewater." *Id.* The differences between TCM's approach and Bridgewater's was due not to innovation or independent insight, but to simplifications because of TCM's lack of resources and gaps in Petitioners' memories.

In short, Bridgewater introduced significant evidence that TCM derived its investment pipeline by misappropriating Bridgewater's unique and protected trade secrets. Even Petitioners' own expert testified at the hearing that his initial reaction upon reviewing the case was, "[G]osh these guys probably took intellectual property." *Id.* at 52.

After the hearing concluded and the evidentiary record closed, and despite the significant evidence Bridgewater adduced, Petitioners for the first time sought an award of attorneys' fees under CUTSA, alleging Bridgewater's bad faith in bringing the arbitration. *Id.* at 30. Bridgewater's only opportunity to respond to this new claim before the Interim Award was through written argument in its ten-page reply brief, which also had to address the numerous claims and counterclaims properly raised by the parties in the hearing.

D. Two Members of the Panel, Over Vigorous Dissent, Grant Petitioners' Unauthorized Request for Attorneys' Fees

In a decision issued January 24, 2020, the panel unanimously found that neither Bridgewater nor Petitioners proved their claims. Interim Award at 13, 21. Even though Petitioners had failed to prove their CUTPA or tortious interference claims, and without the benefit of a meaningful opportunity for Bridgewater to be heard, two members of the panel awarded Petitioners attorneys' fees and costs, purportedly pursuant to CUTSA, C.G.S. Sec. 35-54, and AAA Employment Rule 39(d). Interim Award at 21.

The majority began by incorrectly describing the governing employment agreements as providing "that in the event of arbitration, each party shall bear its own costs and attorneys' fees."

Id. at 2. The majority then concluded that Bridgewater had implicitly waived that (non-existent) provision by seeking its own attorneys' fees in connection with its CUTPA claim and breach of contract claim against Minicone, which arose separately under the TSA. *Id.*

According to the majority, Bridgewater not only alleged its trade secrets with insufficient specificity for the panel to determine that they were protectable but should have predicted this outcome from the outset. The majority reached this extreme result even though Bridgewater's expert—whom the arbitrators recognized was qualified to offer his expert opinion on the topic—concluded based on the same trade secret descriptions that Petitioners had misappropriated Bridgewater's confidential information. And, indeed, even Petitioners' expert initially recognized the possibility as well. Interim Dissent at 47. "We recognize," the majority wrote, that "each party introduced evidence in support of its position regarding bad faith. We find however, based on the preponderance of the evidence standard, that the numerous facts introduced in support of Petitioners' position regarding bad faith are more persuasive." Interim Award at 18; *see also id.* at 21 (concluding, "based on the preponderance of the evidence standard" and "despite Claimant's evidence on the issue," that Bridgewater brought its claims in bad faith). Notably, the "evidence" to which the majority pointed had been received and tested by Bridgewater in regard to the claims and counterclaims submitted to the panel in advance of the hearing, not on Petitioners' claim for fees under CUTSA, which was asserted only after the hearing had closed.

While concurring in the decision on the insufficiency of proof on each party's claims, the third member of the panel dissented from the fee determination on several grounds, both as a matter of substance and of process. Foremost among these objections, the dissent pointed out that attorneys' fees were available under CUTSA only upon a clear showing of "objective and subjective bad faith," meaning both that the legal claim was objectively "entirely without color" and that it

was brought "for purposes of harassment or delay or other improper purposes." Interim Dissent at 33. As the dissent explained, the majority did "not apply the legal standards … that govern" when attorneys' fees are appropriate, "ignor[ing] both prongs of the standard[] … derived from the authorities cited … by the parties." *Id.* Specifically, the dissent concluded, the majority made "no effort to test for whether the claims were 'entirely without color' by … asking whether no 'reasonable attorney could have concluded that facts supporting the claim might be established," and instead "bas[ed] its finding of bad faith on a myriad of different and confusing standards, not based on the applicable authorities." *Id.* at 34. Moreover, as the dissent correctly explained, "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,'" as required by CUTSA. *Id.* at 49.

The dissenting arbitrator went on to explain that, if the required test 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.'" *Id.* at 34–35. In fact, the record "demonstrates that this was a hard-fought case in which the evidence was mixed." *Id.* at 37. And although "[b]oth sides presented claims that the [T]ribunal ultimately rejected[,] …. [n]either side presented claims that were 'entirely without color.'" *Id.* Ultimately, "[e]very claim that is unsuccessful was not brought in bad faith." *Id.* at 40.

The dissent also noted that the majority's award of fees on grounds introduced at the last minute prejudiced Bridgewater's rights and violated AAA Employment Rule 5. *Id.* at 28–33. AAA Employment Rule 5 provides that, "a party may offer a new or different claim or counterclaim only at the discretion of the arbitrator." *Id.* at 31. But the Petitioners never properly asserted a claim for attorney's fees under CUTSA, and in any case "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." *Id.* at 32–33. Notably, the majority failed to address the multiple and independent points of error raised in the dissent.

E. The Panel Issues a Final Award, Further Ignoring the Governing Contracts and Clear, Controlling Law

Because the Interim Award was not final, the panel was free to correct its error following briefing on attorneys' fees. Petitioners recognized as much, beginning their submission on attorneys' fees and costs with further (incorrect) legal arguments against the dissent's opinion. In its opposition brief, Bridgewater pointed the panel to the clear, governing terms of the relevant employment agreements, noting that the "Majority's Interim Award disregards the parties' clear and undisputed contractual agreement that [Petitioners] would 'be entirely responsible for [their] own attorneys' fees and disbursements,' thereby plainly exceeding the [panel]'s authority and prejudicing Bridgewater's fundamental rights." Fees Br. ¶ 18. As Bridgewater explained, it "could not possibly have waived this unilateral provision by making its own request for an award of fees." *Id.* ¶ 20. Nor did Bridgewater "waive[] its rights by not raising the issue itself." *Id.* *First*, as Bridgewater pointed out in its fees brief, "such conduct could not possibly establish the intentional relinquishment or abandonment of a known right or privilege, which is required to establish waiver." *Id.* *Second*, and most obviously, Bridgewater *did* raise this contractual provision in its fees brief, well before the Final Award and when the majority could still correct its mistake.

Likewise, Bridgewater directed the panel to clear Connecticut law governing the award of attorneys' fees under CUTSA. "Under Connecticut law, a party seeking an award of attorneys' fees under Section 35-54 must establish that a claim of misappropriation is both ***entirely without color***, and made for ***purposes of harassment or delay or for other improper purposes***. This

requires a finding that 'the opposing party acted in both objective and subjective bad faith.'" *Id.* ¶ 14. A claim is "entirely without color" only if "no reasonable attorney could have concluded that facts supporting the claim ***might be established***, not whether such facts ***had been established***." *Id.* ¶ 15. Bridgewater explained that the majority did not purport to apply this correct standard, *id.* ¶ 16, and why this standard clearly had not been met, *id.* ¶ 17.

Despite being aware of the governing contract's clear provisions, both from the record and Bridgewater's brief, and of the governing law's clear requirements, both from the dissent and from Bridgewater's brief, the majority reaffirmed the Interim Award, converting it to a Final Award of $1,991,411.49.

Although the majority deleted from the Final Award its prior reference to an erroneous "preponderance of the evidence" standard, the substance of the majority's analysis is materially indistinguishable from that of the Interim Award. Final Award at 18 ("We recognize Claimant vigorously protested that it did not bring this action in bad faith," but finding, without identifying any evidentiary standard, "[Petitioners]' position regarding bad faith [] persuasive."). The dissenting arbitrator concluded that, while the Final Award no longer expressly embraces a preponderance standard, the majority nevertheless still "bases its finding of bad faith on a myriad of other, different and confusing standards, not based on the applicable authorities." Final Dissent at 36–37. Petitioners' Motion followed.

ARGUMENT

Bridgewater does not seek to vacate the panel's decision concerning any claims that were legitimately at issue in the arbitration. Prosecuting trade secret claims while maintaining those secrets' confidentiality is notoriously difficult. *See generally* Kevin R. Casey, *Identification of Trade Secrets During Discovery: Timing and Specificity*, 24 AIPLA Q.J. 191 (1996). While Bridgewater continues to believe its trade secret descriptions were sufficient, it respects the parties'

contractual agreement to arbitrate this dispute and the arbitrators' decision to deny both Bridgewater's and Petitioners' substantive claims.

Bridgewater objects only to that portion of the majority's decision which governing law and the parties' contracts independently and expressly forbid: the award of attorneys' fees to Petitioners. For the reasons set forth below, the Motion fails and the award must be vacated.

I. THE MAJORITY EXCEEDED ITS AUTHORITY BY AWARDING ATTORNEYS' FEES THAT THE PARTIES' CONTRACTS EXPLICITLY BARRED

The Federal Arbitration Act ("FAA") governs this Motion. *See Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 119 (2001). Section 10(a)(4) of the FAA requires courts to vacate an arbitral award "where the arbitrators exceeded their powers." 9 U.S.C. § 10(a)(4). "The authority of the arbitral panel is established only through the contract between the parties who have subjected themselves to arbitration, and a panel may not exceed the power granted to it by the parties in the contract." *Porzig v. Dresdner, Kleinwort, Benson, N. Am. LLC*, 497 F.3d 133, 140 (2d Cir. 2007). "This rule applies not only to the arbitrator's substantive findings, but also to his choice of remedies. He may not impose a remedy which directly contradicts the express language of the [governing contract]." *Leed Architectural Prods., Inc. v. United Steelworkers of Am., Local 6674*, 916 F.2d 63, 65 (2d Cir. 1990).

While appropriately deferring to arbitrators' decisions within the scope of the parties' agreement, the Second Circuit has therefore not hesitated to affirm vacatur of arbitral rulings that impose obligations or remedies the arbitrators had no contractual authority to impose. *See, e.g.*, *id.* (affirming vacatur where arbitrator made determination the contract expressly left to company accountants); *Coast Trading Co. v. Pac. Molasses Co.*, 681 F.2d 1195, 1198 (9th Cir. 1982) ("[W]e vacate this arbitration award as being contrary to remedies provided in the contract and as beyond the authority of the arbitrators under the submission."); *Matter of Town of Newburgh v. Civil Serv.*

Employees Ass'n, 611 N.Y.S.2d 899, 901 (2d Dep't 1994) (modifying award and holding that arbitrator "is not free to fashion a remedy outside the scope of the limiting language of the agreement").

In *In re Marine*, for example, the Second Circuit reversed confirmation of an arbitration award because the contract granted certain rights to the claimants only if a merger or buyout of the respondent company occurred. The arbitrator ruled that no merger or buyout had occurred, but nevertheless awarded those rights to claimants. *In re Marine Pollution Serv., Inc.*, 857 F.2d 91, 93 (2d Cir. 1988). The contract unambiguously precluded the application of the remedial provision in those circumstances, so the court held the arbitrator exceeded its authority and vacated the award. *Id*. at 96; *see also 187 Concourse Assocs. v. Fishman*, 399 F.3d 524, 527 (2d Cir. 2005) (affirming vacatur where arbitrator fashioned remedy contrary to controlling agreement).

Courts will therefore vacate attorneys' fee awards if the governing contracts do not allow such an award. *See, e.g.*, *In re Arbitration Between UBS Warburg LLC*, 744 N.Y.S.2d 364, 365 (1st Dep't 2002) (affirming vacatur of attorneys' fee award to respondent because the "parties' agreement … entitled only petitioners to attorneys' fees; there was no reciprocal provision in [respondent's] favor"); *Stewart Tabori & Chang, Inc. v. Stewart*, 723 N.Y.S.2d 492, 494 (1st Dep't 2001) (affirming vacatur of attorneys' fees that "was not authorized by the parties' agreement … or by any statute or court rule").

Here, both Petitioners expressly agreed that "you [the employee] will be entirely responsible for your own attorneys' fees and disbursements," unless they succeeded on a discrimination claim. Gay Affirm. Exs. 4 & 5 at 6. Petitioners did not bring or prevail on a discrimination claim. They were therefore "entirely responsible for [their] own attorneys' fees and disbursements." *Id.* By holding otherwise, the majority plainly exceeded its authority under the governing contracts,

which were expressly asymmetrical when it came to the availability of an award of attorneys' fees. Despite the employment agreements' clarity, the majority incorrectly described the arbitration agreements as providing "that in the event of arbitration, each party shall bear its own costs and attorneys' fees." Final Award at 2.

Not only did the majority completely misread the agreements, but it determined (on its own and without advance notice of the issue) that Bridgewater had "waived" the benefit of this provision by seeking its own attorneys' fees on a different, narrow set of claims. But Bridgewater could not possibly have waived a provision that barred only *Petitioners* from obtaining attorneys' fees by making its *own* request for an award of fees as a species of damages. Moreover, Petitioners did not ask for attorneys' fees until their post-hearing brief, and Bridgewater promptly brought the contractual provisions at issue to the panel's attention in its briefing on the fee award. Fees Br. ¶¶ 18–22. The majority was thus indisputably aware of the provisions barring an attorneys' fee award to Petitioners, and of Bridgewater's desire to exercise that contractual right, before the Interim Award was final. But the majority refused to correct its overreach, instead simply converting the erroneous Interim Award to an erroneous Final Award and awarding Petitioners $1,991,411.49 to which they were not entitled under clear and undisputed provisions of the governing contract.

The Second Circuit made clear in *ReliaStar Life Ins. Co. of N.Y. v. EMC Nat. Life Co.* that "parties who wish to limit the scope of an arbitrator's sanction authority to exclude attorney's fees" may do so by contract. 564 F.3d 81, 89 (2d Cir. 2009). The employment agreements here did exactly that, and the majority exceeded its authority when it failed to apply that clear contractual limitation. In *ReliaStar*, the appellate court found that a broad provision in an arbitration agreement—"Each party shall bear the expense of … outside attorneys' fees," *id.* at 84—was too general to preclude arbitrators from awarding attorneys' fees based on a finding of bad faith. The Second

Circuit premised its ruling on the fact that there was no specific language in the parties' agreement that "signals the parties' intent to limit the arbitrators' inherent authority to sanction bad faith participation in the arbitration. Certainly, nothing … references bad faith or sanction remedies." *Id.* at 88. If there were such specific language barring an award of attorneys' fees, however, an arbitrators' award to the contrary would exceed its authority and be vacated.

That is exactly the case here. The employment agreements empowering the arbitrators expressly demonstrate the parties' intent to permit an award of attorneys' fees upon a finding of bad faith solely in favor of Bridgewater, and not against it, unless the employee's claim was for discrimination. The attorneys' fees provision in these employment contracts was not a "simple statement" like the provision at issue in *ReliaStar*. *Id.* at 89. Here, the parties to the employment agreements, and thus the parties to the arbitration, obviously *did* "consider[] the question of whether to limit the arbitrators' authority to sanction bad faith conduct," *id.* at 88, because the agreements *expressly* provide that the arbitrators can impose attorneys' fees as a sanction against *only Petitioners*. "The arbitrator was not free to disregard this unambiguous language and craft her own remedy." *Missouri River Servs., Inc. v. Omaha Tribe of Nebraska*, 267 F.3d 848, 855 (8th Cir. 2001). The majority did just that.

The parties' contract expressly provided that the panel could award attorneys' fees for bad faith *only* to Bridgewater. There is no corresponding contractual authority to award attorneys' fees to Petitioners. The majority thus squarely exceeded its authority. *See In re Arbitration Between UBS Warburg LLC*, 744 N.Y.S. at 365.

II. THE MAJORITY'S AWARD OF ATTORNEYS' FEES ON GROUNDS INTRODUCED AT THE ELEVENTH HOUR PREJUDICED BRIDGEWATER'S RIGHTS

Section 10(a)(3) of the FAA provides that district courts should vacate arbitration awards "where the arbitrators were guilty of misconduct in … refusing to hear evidence pertinent and

material to the controversy[,] or of any other misbehavior by which the rights of any party have been prejudiced." 9 U.S.C. § 10(a)(3). "Although an arbitrator is not required to comport with the strictures of formal court proceedings in conducting the arbitration hearing, he or she must nevertheless grant the parties a fundamentally fair hearing." *Kaplan v. Alfred Dunhill of London, Inc.*, 1996 WL 640901, at *5 (S.D.N.Y. Nov. 4, 1996). A fundamentally fair hearing requires that "each of the parties to the dispute [has] an adequate opportunity to present its evidence and argument." *Tempo Shain Corp. v. Bertek, Inc.*, 120 F.3d 16, 20 (2d Cir. 1997).

In the normal course in state court, defendants move for attorneys' fees under CUTSA *after* the merits decision, and that motion is then the subject of separate and specific briefing and argument. *See, e.g.*, *Clinipad Corp. v. Aplicare, Inc.*, 1991 WL 88156, at *1 (Conn. Super. Ct. May 21, 1991) (noting that "[m]otions for an award of reasonable attorney's fees … have been filed" and "[a]ll parties have been heard on said motions").

The arbitral rules applicable here likewise do not permit granting relief against a party that has not had a full and fair opportunity to defend itself. As the dissent explained, before the appointment of the arbitrator, changes of claim must be made "in writing," and the opposing side "shall have 15 days … within which to file an answer." Rule 5 further provides that, "[a]fter the appointment of the arbitrator, a party may offer a new or different claim or counterclaim only at the discretion of the arbitrator." As the dissent laid out, the majority's clear violation of the rules the parties chose to govern their dispute is an independent ground for vacatur.

It is undisputed that the first time Petitioners asserted a claim for attorneys' fees and costs under Section 35-54 of CUTSA was in their post-hearing brief, *after* the hearing was concluded and the evidentiary record was closed. Given the parties' simultaneous submission schedule, Bridgewater's first and only chance to respond to this new claim before the Interim Award was in

its ten-page post-hearing reply brief. The reply brief also had to address every other argument Petitioners raised. And Bridgewater, of course, could not introduce new evidence in that brief. Moreover, Bridgewater received no notice before the panel issued the Interim Award of any claim or argument that it had somehow "waived" its contractual protection against an attorneys' fees award.

Nor did Bridgewater's brief on fees and costs suffice to render this process fair. The majority had already made its decision, and it did not meaningfully consider the arguments Bridgewater advanced. *See* Final Award at 22–23 (summarily concluding that "accusations of improper intent in bringing this action have been at issue since the outset of this case").

If Petitioners had timely raised their claim for attorneys' fees under CUTSA, or if Bridgewater had been given a fair opportunity to respond to that claim as well as to the majority's accusation of waiver, then Bridgewater would have marshaled the evidence required to establish its good faith in bringing and maintaining its claims, reinforcing and supplementing record testimony from its employees demonstrating that when Bridgewater obtained Petitioners' marketing materials, it was immediately concerned that these materials indicated misappropriation of Bridgewater's trade secret material, and presented evidence directed to the relevant legal standard. *See e.g.*, Interim Dissent at 41–42, 46; Final Dissent at 46–47, 52; Section III, *infra*.

III. THE MAJORITY MANIFESTLY DISREGARDED CONNECTICUT LAW AND EXCEEDED ITS AUTHORITY UNDER THE AAA RULES AND THE CONTRACT

Even if the majority were permitted under the governing contracts to award Petitioners' attorneys' fees, and even if Bridgewater received a meaningful opportunity to be heard, their award must be vacated because it was issued in manifest disregard of controlling Connecticut precedent and in violation of the governing rules of arbitration. Specifically, the majority awarded attorneys'

fees purportedly under Connecticut law pursuant to AAA Rule 39(d),[3] which generally allows arbitrators to award "any remedy or relief that would have been available to the parties had the matter been heard in court including" an award of attorneys' fees "in accordance with applicable law." But the majority failed to apply governing Connecticut law at all, much less to award fees "in accordance" with that law. The majority thus exceeded its authority under the AAA Rules and acted in manifest disregard of the law.

Courts must vacate arbitral awards on the ground of manifest disregard of the law if "(1) the arbitrators knew of a governing legal principle yet refused to apply it or ignored it altogether, and (2) the law ignored by the arbitrators was well-defined, explicit, and clearly applicable to the case." *Porzig*, 497 F.3d at 139. Arbitrators cannot "shield from judicial correction an outlandish disposition of a grievance" and escape their obligation to apply the rules and law to which the parties agreed "simply by making the right noises." *In re Marine Pollution*, 857 F.2d at 94 (citation omitted). "[T]he AAA arbitrator here is assumed to have the same power as a [Connecticut court] to award attorneys' fees, but must still make that determination in accordance with the substantive law such a court would apply." *Asturiana De Zinc Mktg., Inc. v. LaSalle Rolling Mills, Inc.*, 20 F. Supp. 2d 670, 674 (S.D.N.Y. 1998); *see also, e.g.*, *Porzig*, 497 F.3d at 143–44 (vacating arbitration award of attorneys' fees for manifest disregard of federal law); *Sawtelle v. Waddell & Reed, Inc.*, 754 N.Y.S.2d 264, 273 (1st Dep't 2003) (vacating award of punitive damages where panel "completely ignored applicable law").

A defendant seeking an award of attorneys' fees under Section 35-54 of CUTSA must establish that a claim of misappropriation is both "entirely without color" and made for "purposes

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[3] The majority also cites to AAA Rules 1 and 45 for the purported authority to award fees—but like Rule 39, both Rule 1 and Rule 45 require arbitral panels to abide by "applicable law."

of harassment or delay or for other improper purposes." *Clinipad Corp*, 1991 WL 88156, at *2. "Whether a claim is colorable for purposes of the bad faith exception 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*." *BTS, USA, Inc. v. Exec. Perspectives LLC*, 2014 WL 6804545, at *13 (Conn. Super. Ct. Oct. 16, 2014). The law is equally clear that an award of attorneys' fees must be based on "clear evidence" of bad faith. *Berzins v. Berzins*, 51 A.3d 941, 947 (Conn. 2012); *see also Puff v. Puff*, 222 A.3d 493, 510 (Conn. 2020); *Kupersmith v. Kupersmith*, 78 A.3d 860, 872 (Conn. App. Ct. 2013) (reversing award of fees based solely on fact that motion was "lacking in a reasonable basis in fact and law").

The majority was unquestionably aware of these well-established legal standards for an award of attorneys' fees under C.G.S. Section 35-54, as they were clearly set forth in the dissent, *see* Interim Dissent at 33–35, and in Bridgewater's brief on fees and costs, *see* Fees Br. ¶¶ 14–17.

But the majority did not acknowledge this standard, much less attempt to apply it: "We recognize," the majority wrote, that "each party introduced evidence in support of its position regarding bad faith. We find however, based on the preponderance of the evidence standard, that the numerous facts introduced in support of Petitioners' position regarding bad faith are more persuasive." Interim Award at 18; *see also id.* at 21 (concluding, "based on the preponderance of the evidence standard" and "despite Claimant's evidence on the issue," that Bridgewater brought its claims in bad faith). The majority did no better in the Final Award, omitting references to the preponderance standard, but failing to replace it with *any* standard—much less the correct one. Final Award at 18 ("We recognize Claimant vigorously protested that it did not bring this action in bad faith," but finding, without identifying any evidentiary standard, that "Petitioners' position regarding bad faith [] persuasive."). Tellingly, the majority's analysis in the Final Award remains,

in sum and substance, identical to what was contained in its Interim Award. The mere deletion of the words "preponderance of the evidence" is unavailing. The majority's approach was in manifest disregard of Connecticut law and in excess of its authority under the AAA Rules.

The majority's conclusion on bad faith was in manifest disregard of clear Connecticut law because the arbitrators failed to find "clear evidence" to satisfy each prong of the standard. As the dissent explained, "basing such a determination on a standard of whether or not the [trade secret] descriptions constituted 'publicly available information or information generally known to professionals in the industry' abandons the applicable first-prong requirement that … trade secret claims should be found to have been filed in bad faith only if they are 'entirely without color.'" Final Dissent at 39 n.5.

Rather than adhering to the requirement that it find that no reasonable attorney could have concluded that facts supporting the claim might be established before awarding attorneys' fees, the majority simply stated that such facts had not been established and then inferred bad faith. That is exactly the wrong inquiry under Connecticut law. *BTS, Inc.*, 2014 WL 6804545, at *13. Indeed, one seeking attorneys' fees under CUTSA necessarily cannot satisfy the "entirely without color" test where, as the majority concedes, there is substantial evidence in the record supporting the plaintiff's claims. That is because objective bad faith only "exists where there is a ***complete lack of evidence*** supporting Plaintiff's claims." *Id*. at *14 (emphasis added). Thus, in *BTS*, the court awarded attorneys' fees only as to one trade secret claim because discovery revealed the defendants had not changed the practice at issue since long before they allegedly learned the plaintiffs' trade secret; the court *declined* to find bad faith and award attorneys' fees for claims that were supported only by "scant evidence." *Id.* at *15–16; *see also Clinipad Corp*, 1991 WL 88156, at *2 (finding objective bad faith as to the claims for which "no evidence was introduced"). By

finding objective bad faith and awarding fees despite recognizing that Bridgewater had adduced meaningful evidence, the majority expressly disregarded Connecticut's clear legal standard governing an award of fees under Section 35-54 of CUTSA.

Essentially, "the award concludes that Claimant should have foreseen that the [panel] 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." Final Dissent at 38–39. Of course, it would be absurd to impose such a burden on a prospective litigant. As the dissent explains: "This analytical model 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 [established] cases loses its case." *Id.* at 39. The majority thus did not simply misapply Connecticut law. It ignored it and issued an award squarely in contravention of its clear dictates.

Finally, by awarding attorneys' fees under a manifestly erroneous legal standard, the majority also exceeded its authority under Article 39(d) of the AAA Rules, which requires that any award of attorneys' fees be "in accordance with applicable law." Because the majority's award of fees was plainly not "in accordance with applicable law," but was in manifest disregard of that law, the award of attorneys' fees under Section 35-54 of CUTSA should be vacated.

CONCLUSION

For the foregoing reasons, Bridgewater respectfully requests that the Court deny the Motion and vacate the award of attorneys' fees.

Dated: New York, NY
July 14, 2020

Respectfully submitted,

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

LAWRENCE MINICONE, ZACHARY SQUIRE,

Petitioners,

v.

BRIDGEWATER ASSOCIATES, LP,

Respondent.

Index No. 652855/2020

CERTIFICATE OF WORD COUNT COMPLIANCE

I hereby certify that this Memorandum of Law in Opposition to the Motion to Confirm is in compliance with Commercial Division Rule 17. The foregoing document was prepared using Microsoft Word, and the document contains 6,902 words as calculated by the application's word counting function.

Dated: New York, NY
July 14, 2020

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