

Dkt. No. x10 CV 116010685 : Superior Court
BTS, USA Inc. : Complex Litigation Docket
v. : at Waterbury
Executive Perspectives, LLC et al. : October 16, 2014

MEMORANDUM OF DECISION

Preliminary Statement

This action arises out of a series of events which began when defendant Marshall Bergmann (Bergmann) left his employment at plaintiff, BTS, USA Inc. (BTS) and went to work for a competitor, defendant, Executive Perspectives, LLC (EP). Plaintiff brought this action alleging in five counts: (1) a violation of the Connecticut Uniform Trade Secrets Act (CUTSA) by both defendants; (2) breach of Bergmann's employment contract by Bergmann; (3) tortious interference with business relationships by both defendants; (4) tortious interference by EP with Bergmann's employment agreement; (5) a violation of Connecticut's Unfair Trade Practices Act (CUTPA) by both defendants. The defendants denied the allegations and seek a determination that the CUTSA count was brought and/or maintained in bad faith, thus entitling EP to an award of attorney's fees. The gravamen of the plaintiff's complaint is that Bergmann and EP misappropriated trade secrets, client lists, and other confidential information;¹ that Bergmann and EP solicited BTS clients in violation of the employment contract; and that EP tortiously interfered with the employment contract by soliciting such trade secrets and client lists from Bergmann. BTS further alleges that the conduct at issue violated CUTPA. The case was tried to the court over the course of four days in January 2014. The court heard testimony from five

¹Prior to trial, BTS had also claimed a CUTSA violation for misappropriation of its product technology. On the first day of trial, BTS advised the court and the defendants that it would not be pursuing those claims at trial. However, the product technology claims, which were the focus of much of the discovery and pre-trial proceedings, are included in the defendants' bad faith claim and so are discussed at length herein.

witnesses; was provided deposition transcripts from one witness, and received many exhibits. At the conclusion of the plaintiff's case, the defendants moved for dismissal pursuant to Practice Book Section 15-8. The court reserved decision.² Post-trial briefing was completed on April 28, 2014. Additional argument on the issue of the plaintiff's purported bad faith was heard on July 28, 2014.³ The court has reviewed the evidence adduced at trial, the testimony of the witnesses, the arguments advanced in the parties' briefs, the cases and authority cited therein, and renders this decision after consideration of all of these items.

Factual Findings

"In a case tried before a court, the trial judge is the sole arbiter of the credibility of the witnesses and the weight to be given specific testimony. . . . It is within the province of the trial court, as the fact finder, to weigh the evidence presented and determine the credibility and effect to be given the evidence." (Citations omitted; internal quotation marks omitted.) *Cadle Company v. D'Addario*, 268 Conn. 441, 462 (2004). The court makes the following factual findings by a fair preponderance of the evidence, unless otherwise indicated, based upon the better, more credible evidence, presented.⁴

BTS, is part of a Swedish based international corporation which designs and markets training simulations, experiential educational exercises and related product to business and

² The court denies the defendants motion to dismiss made pursuant to PB §15-8. The court renders this decision on the merits of the claims, considering the plaintiff's as well as the defendants' evidence and arguments. While the court finds the plaintiff's evidence insufficient to meet its burden, the court believes that to dismiss the claims as requested by the defendants would require the court to make credibility determinations, something the court is not permitted to do. *August v. Charter Oak Lending Group*, 127 Conn. App. 428, 434 cert. denied 302 Conn. 901 (2011). The court notes that the plaintiff did fail to establish a prime facie case with respect to one of the claims made pursuant to CUTSA in count one. However, the court cannot dismiss portions of a count for failure to make out a prime facie case, but must consider the entirety of the claimed misconduct. The remaining claims under CUTSA and the remaining counts required a determination as to the credibility of witnesses.

³ In advance of oral argument, the court notified the parties that the court would be rendering a verdict for the defendants.

⁴ The court does not attempt to include in this decision all of the evidence relied upon in the court's factual findings. The court has considered all of the evidence admitted and the reference to any subset of the evidence presented should not be construed as identifying the exclusive basis for the court's finding. Nor should the court's failure to identify or mention specific evidence give rise to an inference that such evidence has not been considered.

industry. The products include business simulations designed to educate and train client employees, whether upper management; middle management or front office workers. There are essentially three types of product: learning maps, computer simulations, and board games. The products can be sold "as is" or they can be customized to varying degrees. As needed, a simulation can be designed almost from scratch to suit the specific model or needs of the client. The President of BTS is Jonas Akerman.

EP is a direct competitor of BTS. EP designs and sells the same types of product to the same types of clients, with the exception of learning maps. EP does not have any learning map type products in its inventory. It does however have both computer simulations and board game products. EP can also sell product "as is" or can customize the product to whatever extent is necessary to meet the needs of the client. Although a direct competitor of BTS, EP is much smaller than BTS. The President of EP is John Wells.

EP has been in business since 1983. EP has changed names and has changed hands a few times over the years but in 2004, John Wells and John Thomas, (both cofounders of the company in 1983), reacquired the business and all of its assets. The court credits the testimony of Wells that throughout its existence, EP's simulation technology has gone largely unchanged and relies in large measure on the original technology acquired in 1983. Although it has expanded with time, the inventory of products has been unchanged, for the most part, since approximately 2009. EP has always had the ability and the manpower to customize its simulations. EP has had board game simulations in its inventory for many years. EP has not created any new products or simulations since approximately 2009.

The court further finds, crediting the testimony of Wells and the documentary evidence offered by the defendant, that as of the filing of this lawsuit, most of this information was known

to BTS. In 2008, BTS considered acquiring EP. As a result, subject to a confidentiality and non-disclosure agreement, BTS' financial advisors and BTS were given access to much of EP's proprietary information. EP disclosed details of its corporate structure; personnel; sales history; client information; capabilities; liabilities and other information pertinent to a determination as to whether it was a good prospect for acquisition. During this time, Wells and Akerman had discussions about EP's capabilities to include the scope and range of its customization ability. Ultimately, BTS determined not to proceed.⁵

Marshall Bergmann was employed by BTS from 2005 until mid-June 2010. He was a Senior Director at the time he left. As such, he had access to much of BTS' proprietary information and was involved in many of the proprietary processes, i.e. product pricing, at BTS. When Bergmann began work at BTS, he signed an employment contract which contained a number of restrictions, to include a non-compete clause upon his departure. Material to the plaintiff's claim that the contract was breached by Bergmann and/or interfered with by EP are the following provisions:

2.1 Employee shall not for a period of two (2) years immediately following the end of the Employee's active duties with Employer, either directly or indirectly, either for himself or for any other person, company or other business entity:

- a. Make known or otherwise make available to any person, company, and/or other business entity the names and addresses of any clients (whether the corporate entity or the individuals employed by such corporate entity) of Employer or any other information pertaining to them;
- b. Call on solicit or take away or attempt to call on solicit or take away or communicate in any manner whatsoever, with any of the clients of Employer;
- c. Call on, solicit, or take away, or attempt to call on solicit, or take away or communicate in any manner whatsoever, with any of the clients of Employer on behalf of any business which directly competes with employer.

⁵ Given BTS's access to this information, and the additional evidence offered by the defendants as to EP's relative capabilities and products through the years, Akerman's testimony that he believed that EP could not perform customizations, and that EP did not have board games in its inventory is not credible.

2.2 For the purposes of this Agreement, clients shall be defined as any person, company or other business entity whom the Employer has performed work or services for, solicited business and/or collected monies from, with the twelve month period immediately preceding the end of the Employee's active duties with the Employer.

(Plaintiff's Exh. 1).

While at BTS, Bergmann was involved in an effort to do business with the Royal Bank of Canada (RBC). Ultimately, RBC decided not to do business with BTS and decided to give the business to a Canadian business school. RBC turned down BTS' offer in June 2010. Prior to 2010, RBC was not a client of BTS. BTS had not previously done any business with RBC.

Also in June 2010, Bergmann accepted a job offer from EP to work in its New York office. He gave two weeks' notice to BTS. He did not tell BTS that he was going to work for a competitor. Bergmann testified that he did not take any contact lists, client lists, vendor lists or other BTS information with him when he left. This testimony is credited. Further, Wells testified that Bergmann did not share BTS client lists, client information, technology, product information, pricing strategies or other proprietary information. Nor did EP solicit any such information from Bergmann upon his arrival or at any time thereafter. This court finds Wells' testimony credible.

Shortly after he began work at EP, Bergmann posted his new job to his LinkedIn account. Those to whom he was "linked" on this social media could have received a notification of this posting. Whether a "linked" individual received notice of the posting or not would depend on the particular settings selected by that person. One of the tasks given Bergmann when he joined EP was to improve and revamp the EP website, which he did. Upon completion he posted an invitation to "check out" the new website via his

LinkedIn account. Some of the individuals to whom Bergmann was “linked” were clients and contacts he had developed while at BTS. He did not “unlink” these people when he left BTS. He was not asked to do so. He never had any discussions with anyone at BTS about his LinkedIn account. In fact, many people at BTS have similar LinkedIn accounts and are still linked to Bergmann.

Shortly after he began work at EP, Bergmann contacted Liz Carreiro and Jan Wilmott, both of whom worked at RBC. Carreiro and Wilmott were the contacts at RBC Bergmann dealt with when trying to sell the BTS product/project shortly before his departure from BTS. He had known Jan Willmott for years, to include a time when Wilmott did not work at RBC. In his correspondence, Bergmann advised RBC that he had taken a new job with EP and he attempted to meet with and discuss EP’s capabilities for possible business in the future. The correspondence was clearly designed to get business with RBC for EP, something readily acknowledged by Bergmann in his testimony. The correspondence also included some comparisons between EP and BTS which were unfavorable to BTS as well as some arguably disparaging comments about BTS. The communications did not contain any proprietary information belonging to BTS and did not make reference to any such information. Ultimately, RBC did not do any business with EP. In fact, to date, RBC has done no business with EP. Bergmann’s last correspondence or contact with RBC occurred in November 2010.

Conversely, after Bergmann left BTS, Akerman maintained regular contact with RBC. BTS continued in discussions with RBC and in 2013, sold RBC an education/training product. During that process, BTS initially quoted a particular price to RBC. RBC responded that the price was too high. As a result, BTS developed different

options by which RBC could obtain the same result or objective but which would be less costly. The product was scaled back in some respects in order to achieve these cost savings. Ultimately, RBC chose one of the options developed by BTS. This option was \$73,000.00 less expensive than the originally quoted product proposal. BTS provided the work/product to RBC and to this day enjoys a good business relationship with RBC.⁶

While at EP, within two years of his arrival, Bergmann was assigned to work in the field at Hewlett Packard (HP). He did not solicit HP and did not have any role in securing the business of HP. He was merely assigned to help deliver the product. HP was a client of BTS as well though Bergmann never did any work for HP while he was at BTS. HP remains a client of BTS and there was no evidence that Bergmann's work on the HP project included the use of any BTS proprietary or confidential information. Nor was there evidence offered that Bergmann's work on the HP project had any adverse impact on BTS or its relationship with HP.

Richard Kelly is one of EP's independent contractors in Australia. He is also a former employee of BTS, Australia, Inc. Kelly left BTS Australia in February 2009. After he left BTS Australia, he went to work for a firm called AJ Lucas. While at AJ Lucas, he had discussions with BTS Australia about BTS Australia providing a product/training exercise to AJ Lucas. In connection with those discussions, BTS Australia gave Kelly a "participant kit" for one of its learning map products called "Conductor." The kit was contained within a cardboard box which was designed to look like a large envelope. It also bore artwork specific to the Conductor game. Kelly, individually or on behalf of AJ Lucas, was not asked to enter into a confidentiality agreement with respect to the participant kit. He was not advised that either the box or its

⁶ BTS claims that this \$73,000.00 differential represents damages in this case. That claim is discussed *infra*.

contents were proprietary or that they were not to be shared with anyone else. Although AJ Lucas ultimately determined not to do business with BTS Australia, no one at BTS Australia asked Kelly to return the participants kit or the box in which it was housed. In sum, the box and the kit were given away by BTS to AJ Lucas as a potential client without any restrictions. When Kelly left his employment with AJ Lucas, he took the box and the participant kit home.

In 2010, Kelly contacted EP about possible employment opportunities. He was hired as an independent contractor for marketing and sales of EP's inventory of products in Australia. Also in 2010, EP was thinking about changing its packaging for one of its board game products, "Takeoff" and perhaps "Wild Fire" as well. During a discussion on this issue, Kelly advised EP that the box used by BTS might be of interest. Thereafter, he took a photograph of the outside of the "Conductor" box he had received when he was at AJ Lucas and sent the photographs to EP.⁷ EP then did a mock up of its own art work for a similar style box. Bergmann advised EP that Ironwood Lithographers was the vendor that BTS used for its packaging. He gave Kelly Snider, at EP, the name of Jay Topczewski as a point of contact at Ironwood and told her to mention his name as the reference. BTS employees, to include Bergmann, were never told that vendor names are proprietary and not to be shared. Bergmann's employment contract, which contained a lengthy description of information deemed "confidential," did not include the names of vendors as subject to its nondisclosure provisions.

Snider contacted Topczewski by email to inquire about a quote for packaging. She sent the EP mock up as well as the photographs of the "Conductor" participant kit box. Topczewski

⁷ Although plaintiff asserts that EP conceded it had the content of the participant kit as well, the record is quite to the contrary. The only thing Kelly ever gave or showed to EP was the photograph of the outside of the box.

did not believe that he could or should be using the BTS packaging as a base design for EP. He declined to do business with EP and advised BTS of his interactions with EP.

All of the events which purport to comprise the tortious conduct complained of occurred in the latter six months of 2010. And notwithstanding these events, BTS continues to enjoy an excellent and ongoing business relationship with Ironwood; RBC changed from being a prospective client of BTS to an actual client; RBC and BTS enjoy an ongoing business relationship; RBC never gave any business to EP; EP has done no business with Ironwood; EP never changed its "Take Off" or "Wildfire" packaging.

Discussion

With these facts found, it is manifest that the plaintiff's evidence is so lacking that the determination that the plaintiff has failed in its burden of proof is completely unremarkable.⁸

Count One – CUTSA

Under the Uniform Trade Secrets Act, Conn. Gen. Stat. §35-50 et. seq., a plaintiff can seek damages, as well as equitable relief, for the misappropriation of trade secrets. Under the act, "misappropriation" includes "acquisition of a trade secret by a person who knows or has reason to know that the trade secret was acquired by "improper means." Conn. Gen. Stat. §35-51(b)(1). It also includes:

[d]isclosure or use of a trade secret ... without express or implied consent by a person who (A) used improper means to acquire knowledge of the trade secret or (B) at the time of the disclosure or use, knew that the knowledge of the trade secret was (i) derived from or through a person who had utilized improper means to acquire it; (ii) acquired under circumstances giving rise to a duty to maintain its

⁸ The plaintiff's case relies largely on the testimony of Jonas Akerman, who presented on many issues, as not credible. The court observed Mr. Akerman's unwillingness to let go of beliefs or suspicions which were concededly based upon false premises. He offered testimony on "facts" only to have those same "facts" to be revealed as his personal opinion, for which no corroborating evidence was offered. He was unreasonably intransigent when confronted with contrary evidence. His testimony was often refuted by other witnesses as well as the documentary evidence submitted. He was evasive and defensive. At times, his testimony was simply inexplicable.

secrecy ...; or (iii) derived from a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use...

Conn. Gen. Stat. §35-51(b)(2)(A) and (B). “Improper Means,” for purposes of the allegations in this complaint includes “breach or inducement of a breach of a duty to maintain secrecy.”

Conn. Gen. Stat. §35-51(a). Finally, “trade secret” is defined to include:

“information, including a formula, pattern, compilation, program, device, method, technique, process, drawing, cost data or customer list that: (1) Derives 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(d).

“A primary issue to be determined ... is whether there is a trade secret existing which is to be protected.” (Internal citation omitted) *Elm City Cheese Co. v. Federico*, 251 Conn. 59, 71 (1999). The statutory definition of a trade secret set forth above is reflective of the factors courts typically consider when determining the existence of a trade secret: “(1) the extent to which the information is known outside the business; (2) the extent to which it is known by employees and others involved in the business; (3) the extent of measures taken by the employer to guard the secrecy of the information; (4) the value of the information to the employer and to his competitors; (5) the amount of effort or money expended by the employer in developing the information; and (6) the ease or difficulty with which the information could be properly acquired or duplicated by others. Additional factors cited by courts include: (7) the extent to which the principal-agent relationship was a confidential or fiduciary one; (8) the method by which the former agent acquired the alleged secret; (9) the former agent's personal relationship with the customers; and (10) the unfair advantage accruing to the former agent from the use of his former

principal's alleged secret.” *Nationwide Mutual Ins. Co. v. Stenger*, 695 F. Supp. 688, 691 (D.Conn.1988).

“[T]he party claiming trade secret protection must prove that the information ... was the subject of reasonable efforts to maintain its secrecy.” *Elm City Cheese Co. v. Federico*, 251 Conn. 59, 78 (1999). “[T]he question of whether in a specific case, a party has made reasonable efforts to maintain the secrecy of a purported trade secret is by nature a highly fact-specific inquiry ... What may be adequate under the peculiar facts of one case might be considered inadequate under the facts of another. According to §35-51(d)(2), the efforts need only be ‘reasonable under the circumstances ...’”[Emphasis in original. Internal citations omitted.] *Id.* at 80.

With these principles in mind, the court looks to the claims made here. BTS argues that the “Conductor” box was a trade secret, misappropriated by EP and Bergmann. It further argues that the name of the vendor who makes the box and the contact information for that vendor, Ironwood, is a trade secret misappropriated by EP and Bergmann.⁹ BTS has failed to meet its burden in this regard.

The packaging of the participant kits is merely the vessel by which the product is carried to clients. The packaging is widely distributed and viewable to all those along its distribution path. It was given to both clients and prospective clients alike. There was scant evidence of any effort made to conceal or keep hidden the packaging for participant kits. The box at issue here

⁹ BTS also asserts that EP misappropriated its pricing strategies and information. BTS adduced little if any evidence from which such a finding might be made. The court does not herein further address this claim. BTS claims EP and Bergmann misappropriated client lists. BTS offers no evidence of such a claim, with the possible exception of RBC which was, at best, a potential future client. Bergmann testified he did not take any lists and Wells testified that Bergmann did not provide any lists. This testimony was credited. The court does not herein further address this claim. BTS also asserts that EP and Bergmann misappropriated, used and disseminated BTS “confidential information.” Aside from the claims addressed above, BTS offers no evidence from which such a finding could be made. The court does not herein further address this claim. Indeed, BTS continues to make broad sweeping allegations of wrongdoing by EP even though the evidence at trial as to such sweeping allegations was utterly lacking.

was given away without any restrictions as to its use or dissemination. Nor was there evidence of any independent economic value to be derived from keeping the packaging secret, nor evidence of economic value to be gained by another as a result of its disclosure or use.

The plaintiff also failed to establish that the name of the vendor who makes the packaging is a trade secret. BTS employees, to include Bergmann, were never told that vendor names are proprietary and not to be shared. Bergmann's employment contract, which contained a lengthy description of information deemed "confidential" did not include the names of vendors as subject to its nondisclosure provisions. The fact that Bergmann told Snider to use his name further supports the conclusion that Bergmann was under no obligation to keep BTS vendor names secret. Ironwood was identified as a partner of BTS' predecessor in interest, The Real Learning Company in that company's website. Ironwood has no contractual obligation or understanding with BTS that it must keep its status as the BTS box maker a secret. BTS discloses Ironwood as its printer/vendor on those occasions that Ironwood is required to speak directly to the client or on those occasions when Ironwood ships the product directly to the client.

In the face of this evidence, BTS offers only the testimony of Akerman that the box and vendors' names are trade secrets. This is not sufficient.

Furthermore, BTS failed to establish that either the box or the vendor name was misappropriated or obtained through "improper means." BTS Australia gave the box to Kelly when Kelly worked for AJ Lucas. It did so without restriction of any sort. It required no confidentiality agreement; did not request its return and never told Kelly the box (or even its content) were proprietary or not to be shared. Kelly, who was not even an employee of EP at the time, was under no obligation or duty to maintain the box's secrecy. He took it home, where it

stayed. Months later, when Kelly worked for EP, he took a picture of the outside of the box and sent it to EP. BTS offers no evidence to contradict these facts. Nor does BTS offer a cogent explanation as to how EP's possession of the photograph of the outside of the box can be the result of "misappropriation" under these facts.

Similarly, for the same reasons that the vendor identities cannot be considered trade secrets, their use or disclosure cannot constitute misappropriation. Bergmann was not under any duty to maintain the secrecy of the vendor's identities. The names were therefore not obtained through improper means and their use by EP was not misappropriation.

Finally, the plaintiff has failed to establish any actual loss or harm as a result of these purported trade secret misappropriations. Actual loss is a prerequisite to monetary recovery under CUTSA. *News America Marketing In-Store, Inc., v. Marquis*, 86 Conn. App. 527, 542 (2004). BTS offered no evidence and identifies no losses resulting from the Ironwood disclosure or the use of the outside of the box.¹⁰ Plaintiff argues, in essence, and in conclusory fashion, that the misappropriation of a trade secret is *de facto* harmful.

BTS also argues that EP misappropriated its "trade dress" when it attempted to redesign its packaging using the Conductor box and when Bergmann modified the EP website to "look and feel" like BTS's website. This argument was advanced, for the first time, in the plaintiff's post trial brief and these "trade dress" claims appears nowhere in the plaintiff's complaint. Indeed, these types of claims are generally advanced pursuant to the federal Lanham Act, located at 15 U.S.C. §1125 et. seq. There is no claim by the plaintiff that the complaint includes a claim under the Lanham Act.

¹⁰This is no surprise as it is manifest that no harm was occasioned by these short lived and unproductive interactions between Ironwood and EP. EP never changed its packaging; Ironwood did no business with EP; Ironwood continues to do business with BTS.

“Pleadings are intended to limit the issues to be decided at the trial of a case and [are] calculated to prevent surprise.... [The] purpose of pleadings is to frame, present, define, and narrow the issues, and to form the foundation of, and to limit, the proof to be submitted on the trial... It is axiomatic that the parties are bound by their pleadings.” (Internal quotation marks omitted, citations omitted.) *Brye v. State*, 147 Conn. App. 173, 177 (2013). “A [party] may not allege one cause of action and recover upon another.” (Citations omitted; internal quotation marks omitted.) *Boccanfuso v. Conner*, 89 Conn. App. 260, 286-87 cert. denied, 275 Conn. 905(2005).

Further, when a cause of action is based upon statutory authority, the plaintiff must identify that authority in the complaint. Practice Book §10-3(a). “[F]ailing to do so will not necessarily bar recovery as long as the defendants are sufficiently apprised of the applicable statute during the course of the proceedings.” *Spears v. Garcia*, 66 Conn. App. 669, 674 (2001). “The critical consideration under § 10–3[a] ... is whether the [defendant was] on notice of the statutory basis for the plaintiffs’ claims.” *Caruso v. Bridgeport*, 285 Conn. 618, 629 (2008). Noncompliance with Section 10-3(a) is excused “where the record discloses that neither the opposing party nor the trial court [was] confused or misled as to the statutory basis of the party's claim.” (Citations omitted.) *Skakel v. Benedict*, 54 Conn. App. 663, 684 (1999). *See also, LePage Homes, Inc. v. Planning and Zoning Com'n of Town of Southington*, 74 Conn. App. 340, 345-346 (2002).

Until the filing of its post trial brief, the plaintiff’s claims were purported to be brought exclusively under CUTSA, not the federal Lanham Act. However, the “trade dress” case on which he relies as supporting this claim, *Parker Waichman LLP v. Gilman Law LLP*, 2013 WL 3863928 (E.D.N.Y., Seybert, J.) was a federal Lanham Act case. The plaintiff does not cite, and

this court is not aware of, any authority that “trade dress” can be the subject of a CUTSA claim. Nor does the complaint put anyone, defendants or the court, on notice that the plaintiff was pursuing either a Lanham Act cause of action¹¹ or a “trade dress” claim under CUTSA.

For these reasons, the plaintiff’s “trade dress” claim is not considered.¹²

The last argument advanced in an effort to establish the trade secret claim is that the RBC solicitation between June and November 2010 by Bergmann was misappropriation of trade secrets. BTS’ theory is not entirely clear but it appears that the use of the contact information for Wilmott and Carreiro and the “good will” established with Wilmott and Carreiro while Bergmann was employed at BTS constitutes a misappropriation of trade secrets. With this premise as the basis of the CUTSA claim, BTS claims that the \$73,000.00 differential between its offering price to RBC in the 2013 business transaction, and the final negotiated price are the damages caused by Bergmann’s conduct in 2010. This claim is rejected and is fatal to any monetary recovery under CUTSA.

It is axiomatic that the burden of proving damages is on the party claiming them.... When damages are claimed they are an essential element of the plaintiff’s proof and must be proved with reasonable certainty.... Damages are recoverable only to the extent that the evidence affords a sufficient basis for estimating their amount in money with reasonable certainty.” (Internal

¹¹ Indeed, a Lanham Act case requires has highly specific pleading requirements. *See, ID7D Co., Ltd. v. Sears Holding Corp.* 2012 WL 1247329, 6 (D.Conn.) (D.Conn.,2012) (There are four pleading requirements for a claim of trade dress infringement involving the appearance of a product under the Lanham Act: (1) that ‘the claimed trade dress is non-functional;’ (2) that ‘the claimed trade dress has secondary meaning;’ (3) that ‘there is a likelihood of confusion between the plaintiff’s good and the defendant’s;’ and (4) plaintiff must ‘offer ‘a precise expression of the character and scope of the claimed trade dress.’) The complaint cannot fairly be read to include any of these allegations.

¹² Even if this court were to consider the “trade dress” argument as properly brought pursuant to CUTSA, the evidence was wholly lacking. BTS did not include any evidence as to what its website even looked like; its content; its layout; its format. The court has no ability to compare the two websites and thus no evidence upon which to base a finding that the trade dress was misappropriated. The only evidence offered to support the accusation of “trade dress” misappropriation, was the lay opinion of Jonas Akerman. This is not sufficient. As to the box, EP never actually changed its own packaging so there is absolutely no basis upon which to find actual, potential or likely consumer confusion as to the source of the product.

quotation marks omitted.) *Lawson v. Whitey's Frame Shop*, 241 Conn. 678, 689 (1997). While a plaintiff need not prove damages with mathematical exactitude, a plaintiff must establish the amount of loss “with reasonable certainty and not speculatively and problematically.” (Internal quotation marks omitted.) *Carrano v. Yale-New Haven Hospital*, 279 Conn. 622, 650 (2006). The approximation of damages cannot “be calculated based on a contingency or conjecture.” (Internal quotation marks omitted.) *Id.* The damages claimed must be actually caused by the claimed CUTSA violation. *News America Marketing In-Store, Inc. v. Marquis, supra.* at 542.

Plaintiff's theory of damages is factually and legally unfounded. The claimed damages of \$73,000.00, purportedly caused by the 2010 RBC solicitation, is fanciful, at best. This court, as the trier of fact, has no basis upon which to conclude that Bergmann's contact with RBC in 2010 is causally connected to RBC's rejection of BTS' initial product price proposal 3 years later. EP was not discussed or mentioned by RBC in any fashion during the 2012 and 2103 negotiation between RBC and BTS. EP was not competing for the same business. There is no evidence that the discussions between Bergmann and RBC between June and November 2010 played any role in the decisions RBC made regarding business with BTS in 2013. There is no evidence that RBC would have done anything differently in those discussion or negotiations had the conversations with Bergmann not occurred. Like much of this case, this is a theory which is born of suspicion and is supported only by unfounded speculation. It is conjecture in its purest form. Plaintiff has failed in its proof of any actual loss or damages.

Alternatively, the plaintiff seeks injunctive relief. CUTSA does allow for the granting of injunctive relief, in appropriate cases, in addition to or in lieu of damages, CGS §35-53(a). However, nor has plaintiff established that injunctive relief is appropriate.

Bergmann left BTS over four years ago. The last act by Bergmann which is even arguably a CUTSA violation occurred in November 2010. If, *arguendo*, the RBC solicitation was considered a CUTSA violation, it was done without malice or improper intent¹³; it was isolated in nature; it caused no harm to BTS; and it has not been repeated. There is no evidence or indication that Bergmann or EP have done anything wrong since that time and no indication that Bergmann or EP intend to use any of BTS's confidential information into the future. "It is clear that the power of equity to grant injunctive relief may be exercised only under demanding circumstances," and is a determination left to the sound discretion of the trial court. *Anderson v. Latimer Point Management Corporation*, 208 Conn. 256, 262 (1988).

Thus, absent any actual damages or cause for injunctive relief, the CUTSA claim premised upon the RBC solicitation also fails.

For all of the foregoing reasons, judgment will enter in favor of EP and Bergmann as to Count One.

Counts Three through Five

Count Three alleges tortious interference with business relationships by EP and Bergmann. Count Four alleges tortious interference by EP with the employment contract between Bergmann and BTS. Count Five alleges a CUTPA violation. To the extent that these counts include allegations that these torts were committed through the misappropriation of trade secrets, as indicated above, those allegations are unproven and cannot therefore support these

¹³ Bergmann testified that he was not concerned about contacting Wilmott and Carreiro because he knew RBC had rejected the BTS proposal and so was not a then current client of BTS. He also had enjoyed a business and friendly relationship with Wilmott for years, to include a period of time before Wilmott worked at RBC.

claims. The only evidence which implicates these three counts is the evidence concerning Bergmann's solicitation of RBC between June and November 2010.¹⁴

Tortious Interference with Business/Contractual Relationships (Counts Three and Four)

“Connecticut has long recognized a cause of action for tortious interference with business relations. ... The necessary elements of a cause of action in tortious interference with business relations are the existence of a business relationship, an intentional and improper interference with that relationship and a resulting loss of benefits of the relationship.... A plaintiff states an actionable cause [for tortious interference with a contract] by alleging that the defendant intentionally interfered with a business or contractual relationship of the plaintiff and that the plaintiff, as a result, has suffered an actual loss....” (Internal Citations omitted; Internal quotations omitted.) *Holler v. Buckley Broadcasting Corp.* 47 Conn. App. 764, 768-769 (1998).¹⁵

As to count three, Plaintiff's proof fails to establish that BTS lost the benefits of its relationship with RBC or that BTS suffered an actual loss. The evidence is uncontroverted that the relationship between BTS and RBC was not interfered with in any fashion. Indeed, quite to the contrary, notwithstanding the Bergmann contact in 2010, BTS maintained regular communications and a quality relationship with RBC beyond the time of Bergmann's solicitation and in fact consummated a business transaction in 2013.

¹⁴ Given the factual findings above, it is a foregone conclusion that there was no interference whatsoever with BTS's relationship with Ironwood. Further, to the extent BTS claims interference with its relationship with HP by virtue of Bergmann's assignment to work on an HP project while at EP, the evidence established that the HP/BTS relationship was not impacted in any fashion. There simply was no interference and no harm or damage caused by the events involving Ironwood and/or HP.

¹⁵ Actual loss is a requisite showing whether the claim is against Bergmann and EP for interfering with BTS's relationship with RBC (count three) or whether the claim is against EP for interfering with BTS's contractual relationship with Bergmann (count four).

As to count four, the claim that EP tortuously interfered with the employment contract between Bergmann and BTS, there was scant evidence of any wrongdoing by EP vis-a-vis the employment contract. EP did not solicit trade secrets or confidential information from Bergmann or otherwise induce a breach by him of the employment agreement. On this count, BTS argues only that EP's alleged "knowledge and consent" with respect to Bergmann's solicitation of RBC in 2010 was tortious interference. The plaintiff offered no evidence however that anyone at EP was aware of, involved in or supportive of Bergmann's solicitation of RBC.

As to both counts three and four, as noted, the plaintiff must prove damages. "In determining the proper measure of damages, we are guided by the purpose of compensatory damages, which is to restore an injured party to the position he or she would have been in if the wrong had not been committed." (Internal quotation marks omitted.) *Rizzuto v. Davidson Ladders, Inc.*, 280 Conn. 225, 248 (2006). As was the case with the CUTSA claim, the plaintiff must establish that the damages alleged resulted from and were caused by the alleged tortious interference. *See, Reyes v. Chetta*, 143 Conn. App. 758, 768 (2013).

With respect to both counts three and four, plaintiff again argues that the \$73,000.00 differential between its offering price and the final negotiated price on the 2013 RBC deal are the damages caused by the tortious interference alleged. However, the reasoning set forth above regarding the lack of proof of damages as to the CUTSA count, has equal application as to counts three and four, the tortious interference counts. The plaintiff's inability to establish any loss or damage as a result of the 2010 solicitation of RBC, forecloses any finding that EP tortuously interfered with the employment contract or that EP and/or Bergmann tortuously interfered with BTS's business relationship with RBC.

For all of the foregoing reasons, judgment will enter in favor of the defendants on counts three and four.

CUTPA (Count Five)

“Any person who suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment of a method, act or practice prohibited by § 42-110b, may bring an action to recover actual damages.” C.G.S. § 42-110g(a). A plaintiff is not required to prove a specific amount of actual damages to make out a prima facie case under CUTPA.

Hinchcliffe v. American Motors Corp. 184 Conn. 607, 612-16 (1981). However, in order to recover money damages (as opposed to an award of equitable relief) the plaintiff must prove actual damages. *See, e.g. Service Road Corp. v. Quinn*, 241 Conn. 630, 644 (1997)(In the absence of proof of actual damages, CUTPA plaintiff may still be awarded equitable relief.)

Defendants argue that BTS has failed to establish either “ascertainable loss” or actual damages. BTS counters that its actual damages are the \$73,000.00 “lost” in the negotiation with RBC in 2013. However, as found above, BTS failed to prove these purported “losses” were caused by the defendants’ conduct, whether or not such conduct might be considered a CUTPA violation.¹⁶ Judgment will enter in favor of the defendants on count five.

Breach of Contract (Count Two)

BTS alleges that Bergmann breached his employment contract by misappropriating BTS trade secrets, disclosing confidential information to EP and by breaching the covenant not to compete. The findings above foreclose a finding of breach based on the Ironwood disclosure or any alleged CUTSA violation. Remaining then is first, the impact of Bergmann’s solicitation of RBC between June and November 2010. The court need not decide whether that solicitation

¹⁶The court notes however that many of the arguments the plaintiff advances in support of the CUTPA claim are those already rejected above with respect to the other counts.

violated the employment agreement because BTS has failed to establish any resulting harm or damages.

It is well established that “[t]he elements of a breach of contract action are the formation of an agreement, performance by one party, breach of the agreement by the other party and damages.” (Internal quotation marks omitted.) *Pelletier v. Galske*, 105 Conn.App. 77, 81, 936 A.2d 689 (2007), cert. denied, 285 Conn. 921, 943 A.2d 1100 (2008). Although this court has intimated that causation is an additional element thereof; see *McCann Real Equities Series XXII, LLC v. David McDermott Chevrolet, Inc.*, 93 Conn.App. 486, 503–504, 890 A.2d 140, cert. denied, 277 Conn. 928, 895 A.2d 798 (2006); proof of causation more properly is classified as part and parcel of a party's claim for breach of contract damages. As the United States Court of Appeals for the Federal Circuit aptly explained, “damages for breach of contract are recoverable where: (1) the damages were reasonably foreseeable by the breaching party at the time of contracting; (2) the breach is a substantial causal factor in the damages; and (3) the damages are shown with reasonable certainty.” (Internal quotation marks omitted.) *Kansas Gas & Electric Co. v. United States*, 685 F.3d 1361, 1369 (Fed.Cir.2012); see also *National Market Share, Inc. v. Sterling National Bank*, 392 F.3d 520, 525 (2d Cir.2004) (“[c]ausation is an essential element of damages in a breach of contract action”); *West Haven Sound Development Corp. v. West Haven*, 201 Conn. 305, 316, 514 A.2d 734 (1986) (“[w]e believe that the evidence was sufficient to support the jury's determination that the breach of contract *caused the plaintiff to suffer damages* in this case” [emphasis added]); 11 J. Perillo, Corbin on Contracts (Rev. Ed. 2005) § 55.7, p. 26 (in action for breach of contract “a causal relation [must] be shown to exist between the defendant's conduct and the harm for which damages are sought”).

Meadowbrook Center, Inc. v. Buchman, 149 Conn. App. 177, 185-186 (2014).

Here, Bergmann stopped having any contact with RBC in November 2010; EP never got any business from RBC; RBC's relationship with BTS was unharmed and continues to this day; BTS was able to sell product to RBC in 2013. As conceded by Akerman, RBC and BTS continue to enjoy an excellent business relationship. As with the other counts of the complaint, BTS assigns the \$73,000.00 price reduction for the 2013 transaction to be the damages in its breach of contract claim. However, as found above, that claim is pure conjecture. BTS has failed to establish that it suffered any financial or other harm or loss as a result of Bergmann's conduct vis-a-vis RBC in 2010.

To the extent BTS seeks injunctive relief as contemplated under the employment agreement, and therefore argues that it need not establish damages for the claimed breach of the agreement, BTS has failed to establish that such relief is appropriate under the circumstances. As was the case with the claimed CUTSA violation arising out of the RBC solicitation, even if the court were to determine that the RBC solicitation was a breach of the non-compete, the solicitation was brief in duration; it resulted in no financial or other gain to Bergmann or EP; it caused no harm or financial loss to BTS; it did not negatively impact the relationship between RBC and BTS in any fashion; it was not done maliciously; it has not been repeated; it occurred almost 4 years ago; the non-compete time period under the contract has expired.

Thus, with respect to the RBC solicitation, the plaintiff has failed to prove a breach of the employment contract.

To the extent that BTS relies upon Bergmann's use of his LinkedIn account for its breach of contract claim, those claims fail as well. The posts made by Bergmann do not amount to solicitation or otherwise breach the agreement. He announced his new employment, a common occurrence on LinkedIn, and he invited linked individuals to visit the EP website. There was no evidence as to the extent to which any BTS clients or customers received the posts. The posts would have been received only by those whose settings alert them to such posts.¹⁷ There was no evidence that any BTS client or customer accepted the invitation and viewed the EP website or that any BTS client or customer did business with EP as a result. BTS had no policies or procedures regarding employee use of social media; did not request or require ex-employees to delete BTS clients or customers from LinkedIn accounts; did not discuss with Bergmann his LinkedIn account in any fashion, and to this day allows employees to maintain LinkedIn

¹⁷ It would be difficult indeed to find liability for such incidental contacts, when the parties to whom they are directed can choose to receive them or not.

accounts without monitoring or restriction from BTS. Thus, under the circumstances, Bergmann's use of his LinkedIn account after he left BTS did not breach his employment contract. *See, e.g. Enhanced Network Solutions Group, Inc. v. Hypersonic Tech. Corp.* 951 N.E. 2d 265 (Ind. Ct of App. 2011)(Posting a job opportunity on LinkedIn page was not solicitation.); *Invidia LLC v. Difonzo*, 2012 WL 5576406 (Mass. Super. 2012)(Becoming "friends" with former clients on Facebook did not, in and of itself, violate non-compete clause.); *Pre-Paid Legal Services, v. Cahill*, 924 F. Supp. 2d 1281 (E.D. Okla 2013)(Former employee's postings on Facebook which touted his new employer's product and which were viewed by former colleagues did not violate agreement to not recruit employees from his former employer.).

The court notes that the use of social media, whether it is Facebook, Linked In, Twitter, or some other forum, has become embedded in our social fabric. Absent an explicit provision in an employment contract which governs, restricts or addresses an ex-employee's use of such media, the court would be hard pressed to read the types of restrictions urged here, under these circumstances, into the agreement. Indeed, such an expansive interpretation of the employment contract would likely render it unenforceable as overly broad. "A covenant that restricts the activities of an employee following the termination of his employment is valid and enforceable if the restraint is reasonable. ... There are five criteria by which the reasonableness of a restrictive covenant must be evaluated: (1) the length of time the restriction is to be in effect; (2) the geographic area covered by the restriction; (3) the degree of protection afforded to the party in whose favor the covenant is made; (4) the restrictions on the employee's ability to pursue his occupation; and (5) the extent of interference with the public's interests. ... The five prong test ... is disjunctive, rather than conjunctive; a finding of unreasonableness in any one of the criteria

is enough to render the covenant unenforceable.” (Internal citations omitted.) *New Haven Tobacco Co. v. Perrelli*, 18 Conn. App. 531, 533-34 (1989).¹⁸

BTS’ next claim is that Bergmann’s work at HP was a breach of the non-compete clause in his employment contract. This claim fails because again, BTS offers no evidence of loss or damage associated with this work by Bergmann. Further, the evidence did not include evidence that Bergmann solicited this business, used or shared BTS confidential information in connection with this work, or that his assignment to HP had any adverse impact on BTS. In light of the fact that the non-compete clause has expired, injunctive relief based upon this purported breach is not appropriate.

Finally, absent any other evidence that Bergmann has misappropriated trade secrets or otherwise used BTS confidential information to the benefit of EP and the detriment of BTS, injunctive relief is inappropriate.

For all of the foregoing reasons, judgment will enter in favor of the defendant Bergmann on count two.

The Request for Attorney’s Fees

Conn. Gen. Stat. § 35-54 provides “If a claim of misappropriation is made in bad faith ... the court may award reasonable attorney's fees to the prevailing party.” Our appellate courts have not yet had occasion to interpret this provision or to define “bad faith” as that term is used in the statute. However, our Appellate Court has described generally conduct which would constitute “bad faith” in the context of purported “bad faith” litigation claims or tactics. In *Fattibene v. Kealey*, 18 Conn. App. 344 (1989), the Appellate Court held that the bad faith exception to the general rule that a prevailing party does not recover its costs or attorney fees, is

¹⁸ In addition, plaintiff did not advance any argument that Bergmann’s use of his LinkedIn account resulted in any damages to BTS.

satisfied “ upon the record showing that [the claim] is “entirely without color and [is taken] for purposes of harassment or delay or for other improper purposes” *Id.* at 360-361. “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*.’ ”(emphasis in original). *Id.* at 361. ¹⁹ “To determine whether the bad faith exception applies, the court must assess whether there has been substantive bad faith as exhibited by, for example, a party’s use of oppressive tactics or its wilful violations of court orders; ‘the appropriate focus for the court ... is the conduct of the party in instigating or maintaining the litigation.’” *Id.*, quoting, *Dow Chemical Pacific Ltd. V. Rascator Martime S.A.*, 782 F.2d 329, 345 (2d Cir. 1986). At least one superior court jurist has applied the *Fattibene* analysis to a CUTSA bad faith claim. *See, Clinipad Corp. v. Aplicare, Inc.* 1991 WL 88156, 1 (Conn.Super)(Fracasse, J., May 21, 1991)(Court found claims lacked any evidence and were brought for oppressive purposes.)

It is worth noting that these principles closely mirror the requirements for establishing bad faith under the Uniform Trade Secrets Act as passed by several of our sister states. “Decisions interpreting [the bad faith provision] of other states’ versions of the Uniform Trade Secrets Act, ... have held that a party seeking fees for “bad faith” conduct must demonstrate that the opposing party acted in both objective and subjective bad faith.” *Clearwater Systems Corp. v. Evapco, Inc.*, 2006 WL 726684 (D.Conn., Underhill, J.)(March 20, 2006). In Maryland, a party seeking fees under the Maryland version of the Act (MUTSA) must show “clear evidence that the action [was] entirely without color and taken for other improper purposes amounting to

¹⁹ The standard that the court is required to apply is an objective one – the viewpoint of a “reasonable attorney.” In apply this standard, this court makes no finding about nor criticism of plaintiff’s counsel. It is the client, in this case BTS, who determines the nature and scope of the claims to be pursued. This court does not inquire into nor consider, for purposes of the pending issue, the actual or subjective role of counsel in pursuing those claims.

bad faith. *Contract Materials Processing, Inc. v. Kataleuna GMBH Catalysts*, 222 F. Supp. 2d 733 (D. Md. 2002) “Bad faith exists when the case does not present a colorable claim and the action was prosecuted vexatiously, wantonly, or for oppressive reasons.” *Optic Graphics, Inc. v. Agee*, 87 Md. App. 770, 591 A 2d. 578, 588 (1991).

Similarly, California applies a two prong objective/subjective analysis to bad faith claims brought under California’s version of the Act. *Stillwell Development, Inc. v. Chen*, 1989 WL 418783 (C.D. Cal. 1989)(Finding the plaintiff’s claim was so objectively specious that an inference of subjective bad faith could also be made.); *Gemini Aluminum Corp. v. California Custom Shapes, Inc.*, 95 Cal. App. 4th 1249, 1262 (2002)(Bad faith found to exist when the court finds “objective speciousness of the plaintiff’s claim and subjective misconduct in bringing or maintaining a claim for misappropriation of trade secrets.”). As observed by a Pennsylvania tribunal, in defining bad faith under the Act, many states “draw on their own state’s pre-existing test for defining bad faith.” *Krafft v. Downey*, 68 A. 3d 329, 336 (Pa. Super, 2013)(Applying without adopting the California two prong test.)

Connecticut’s definition of bad faith, as discussed above, also appears to have both subjective and objective components. That a claim is “entirely without color” is an objective determination that the claim is essentially, specious. Whether a claim “is taken for purposes of harassment or delay or for other improper purposes” requires a determination of the party’s subjective intent.

“Objective speciousness exists where there is a complete lack of evidence supporting Plaintiff’s claims.” *Computer Econ., Inc. v. Gartner, Group, Inc.*, 1999 WL 33178020, at *6 (S.D. Cal. December 14, 1999).” Subjective misconduct exists where a plaintiff knows or is reckless in not knowing that its claim for trade secret misappropriation has no merit.” *Id.* In proving subjective misconduct, a prevailing defendant may rely “on direct evidence of plaintiff’s knowledge . . . and [subjective misconduct] may also be inferred from the speciousness of plaintiff’s trade secret claim and its conduct during litigation.” *Id.* ... “The knowing

persistence in an invalid claim demonstrates subjective bad faith.” *Stillwell Development Inc, v. Chen*, 1989 WL 418783, (C.D. Cal. 1989).

Contract Materials Processing, Inc. v. Katalauna GMBH Catalysts, 222 F. Supp. 2d 733, 744-745 (D. Md. 2002).

Movants have the burden of proof on the “bad faith” claim under § 35-54.

Additional facts are necessary to resolve this issue. BTS initially claimed that Kelly misappropriated board game technology and processes. This claim was made largely due to Akerman’s suspicions that Kelly had done so. Those suspicions purportedly arose out of the coincidental timing regarding Kelly’s departure from BTS and EP’s addition of board games to its advertised inventory. Specifically, Akerman said EP began advertising board game product on its website in January 2009, the same time Kelly had left BTS to go to EP. Therefore, Akerman suspected and assumed that Kelly misappropriated board game trade secret information and gave it to EP in January 2009. However, not long after this litigation began, that these premises were factually flawed came to light. First, EP has had board game technology and advertised such (to include on its website) for many years prior to 2009. Second, Kelly did not leave BTS in January 2009. He left in February 2009. Kelly did not go to EP from BTS and had no contact with EP until January 2010. In the interim, he worked for AJ Lucas. Further, the evidence established the BTS was fully aware that Kelly did not leave until February 2009 and that he did not pursue employment with EP at that time. Indeed, after he left BTS Australia, he discussed a potential business transaction between AJ Lucas and BTS Australia.

An additional purported justification for pursuing these claims was Akerman’s suspicion that Bergmann had also shared product technology with EP. This suspicion turns out to be

equally flawed and wholly incredible. Akerman claimed that EP did not have the capacity to provide “level 2” customization to its simulation products until Bergmann began working at EP. Therefore, he reasoned, Bergmann must have shared that technology and processes with EP. However, as found above, throughout its existence, EP has had the ability to customize product to whatever extent was necessary in order to meet a client’s needs. A review of the EP website going back many years confirms this testimony. Further, as already found above, BTS was fully aware of EP’s ability to perform “level 2” customization of its simulations as a result of the information provided by Wells and EP during the 2008 due diligence. The information disclosed by EP during that due diligence included the extent to which EP’s work involved customization and the time value of its customization business. Again, Akerman’s stated “suspicions” as justification for this lawsuit were not well founded, could have been debunked with a modicum of due diligence and in fact, are not credible.²⁰

Akerman further testified that in 2010, when it was brought to his attention that EP had contacted Ironwood and appeared to have a “Conductor” participant kit, he became further concerned or suspicious of EP. However, soon into the litigation, BTS knew that the box had been given to Kelly by BTS, without restriction, while he was at AJ Lucas. BTS was provided chapter and verse as to the circumstances under which the Conductor box and kit came into

²⁰ At trial, BTS produced, for the first time, a page from a multi-page document which was prepared by BTS’s financial advisors during the 2008 due diligence. It is a one page summary which encapsulates the advisor’s assessment of EP and the viability of an acquisition. The one page summary does not include any mention of EP’s capacity to customize its product to suit the needs of its clients. Akerman testified that this is a document on which he relied in coming to his belief that EP had lost its previous ability to customize until after Bergmann was hired. However, the document itself was part of a bigger document which included a second page containing a fair amount of information on EP’s customization capacity. Plaintiff’s effort to bolster what the court has found to be false testimony with an incomplete and misleading document is troubling. While this court does not go so far as to conclude that Akerman sought to mislead the court by withholding the second page, It does appear to this court that he was trying to bolster his own false statement that he did not believe EP had a high level of customization capability.

Kelly's possession. BTS has never developed any evidence that the kit itself was ever seen or used by EP. Indeed, EP still has no learning map type of product in its inventory.

Notwithstanding BTS' s actual knowledge of when Kelly left, the complete debunking of the assumptions about Kelly, and BTS' knowledge that EP could in fact customize its product before 2010, BTS continued to seek extraordinary discovery in this case to include all of EP's product technology.²¹ The court (Dubay, J.), recognizing the dearth of evidence to support BTS's suspicions, ordered a very limited review, by a court appointed expert, of a single EP product. The expert found no evidence of any similarity between the EP product chosen by BTS and any of BTS's products. The court (Dooley, J.) thereafter determined that no justification existed for a further intrusion by BTS into EP's products or product technology.

On the first day of trial BTS advised EP and the court that the CUTSA claim would be limited and would not include any claim that EP misappropriated product technology. BTS did not concede that no evidence existed to support the claim, but rather, blamed the court's ruling restricting access to EP's products, as the reason that it was unable to prove its suspicions regarding EP. Notwithstanding BTS's pronouncement on the first day of trial, EP has offered voluminous testimony and evidence that no such misappropriation occurred. It does so not to disprove the plaintiff's case, but to advance its own claim that the CUTSA action was brought and maintained in bad faith.

EP's claim that the CUTSA count was advanced in bad faith relies largely on the utter dearth of evidence, as outlined above, to support the initial allegations of product technology misappropriation. BTSs responds that the lawsuit was only commenced after a series of events which gave rise to grave concern regarding Bergmann and EP, to wit: Bergmann did not tell

²¹ The plaintiff also sought ; a list of current and former clients; a description of which products were sold to which clients; and other clearly protected trade secret information.

BTS he was going to a competitor; BTS learned that Bergmann was at EP; Bergmann contacted RBC within weeks of joining EP (conduct which BTS believed violated the employment agreement); Ironwood was contacted by EP and BTS learned that EP had what appeared to be a participant kit for one of its learning map products; EP requested a similar packaging design to the one used by BTS for Conductor. Under these circumstances, BTS argues it had legitimate reason to believe Bergmann was sharing BTS proprietary information and trade secrets.

This court agrees that at its inception, the plaintiff had a colorable CUTSA claim. BTS had received sufficient information to give rise to an inference that EP was in possession of BTS trade secrets and pursuing the how and the extent of the situation through this litigation was not bad faith on the part of BTS. However, not far into the discovery process, it was abundantly clear that the product technology claim had no merit. All of BTS's suspicions or concerns regarding product technology misappropriation should have been adequately laid to rest by the end of 2011. By then, it was abundantly clear that EP had not modified nor added to its technology or product inventory since approximately 2009, long before Kelly and Bergmann joined EP.²² This was made clear to BTS through discovery requests; deposition testimony; and responses to document requests.

Further, Akerman's factual assumptions and suspicions regarding Kelly were fully debunked by then. Kelly was not hired by EP until 2010 and EP had board games long before Kelly was hired. To the extent that the participant kit for "Conductor" raised concerns, it was also clear that EP does not have and has never had a learning map type of product. Conductor is

²² BTS' reliance upon the court's determination to permit a third party expert review of an EP product as a binding conclusion that as of the date of the order the court recognized a colorable claim is misplaced. The question of whether to permit discovery does not require a determination as to the merits of the underlying claims, but merely whether information should be accessible to locate evidence of those claims. In this case, the court notes that the inquiries overlap to a certain extent because EP tried to preclude the expert review on the grounds that the claims were, in fact, baseless. Nonetheless, the court's allowance of the third party review does not, as urged by BTS, end the court's inquiry here.

a learning map product. For BTS to maintain these claims after the discovery process made crystal clear that the very premises upon which his suspicions were purportedly based were factually inaccurate gives rise to an inference that the litigation was maintained for improper purposes. Indeed, to date, aside from factually flawed premises and the unfounded suspicions of Akerman, BTS has offered no explanation for persisting in its claim of product technology misappropriation.

In sum, no later than end of 2011, there was simply nothing left to justify or explain BTS's persistence in pursuing the CUTSA claims as to product technology. BTS's quest to obtain EP product technology through discovery and court process, after their claims were laid bare as meritless, gives rise to an inference of improper motive on the part of BTS. The court finds that BTS's determination to maintain the product technology CUTSA claims as of the end of calendar year 2011 and through to the first day of trial was made in bad faith as that term has been defined by our appellate courts. The court will hear evidence as to the attorney's fees incurred defending these claims during that time period.

The claim that the Conductor box was a trade secret and was misappropriated was, as found, wholly without merit. Akerman's testimony, if believed, might have established that the packaging was considered a trade secret, thus making this claim "colorable" at the inception of the litigation. However, in light of the circumstances under which the box and its content came into Kelly's possession, i.e. it was given to him by BTS without restriction while he was employed at AJ Lucas, the claim of "misappropriation" as defined by CUTSA was demonstrably false and no longer "colorable" upon those circumstances coming to light. Maintaining such a claim, under those circumstances, amounts to bad faith. Those circumstances were known to BTS (if not before commencement of the litigation) certainly by the end of 2011. The court will

hear evidence as to the claimed attorney's fees incurred defending this claim after that date and through trial.

The claim that the vendor names and contact information, specifically, Ironwood, was a trade secret was supported by scant evidence. However, Akerman did testify that the information is presently not available to the public and that BTS does not advertise or share openly its vendor's identities. While the court found the evidence lacking in terms of the plaintiff's burden, it was not a claim "without color."

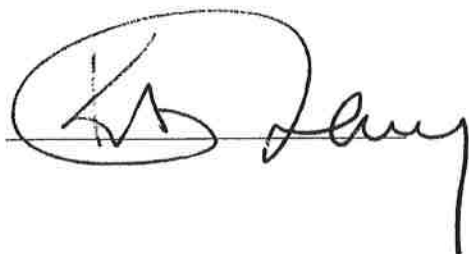
The claim that the RBC solicitation involved the misappropriation of a trade secret was also, throughout the litigation, a colorable claim. While the court has found that the solicitation itself did not include the use of trade secrets such as pricing information, RBC was a potential client of BTS; was an entity BTS had tried to do business with and clearly hoped to do business with in the future. Willmott and Carreiro were client contacts developed by Bergmann while at BTS. Both Wells and Akerman agree that potential clients and current clients can be proprietary in nature and can be and often are considered trade secrets. To the extent that Bergmann was under a duty not to disclose such information, his solicitation of RBC on behalf of EP could give rise to a good faith claim of a CUTSA violation. The court did not resolve this aspect of the CUTSA claim however because it did not need to do so. The CUTSA claim premised upon the RBC solicitation was colorable. That the conduct, for the reasons articulated above, could not be the basis for an award of damages or the granting of injunctive relief, does not alter this conclusion. Losing on the merits for these reasons, does not make the claim without color at the time it is brought or tried.²³

²³ The defendants rely on the fact that the plaintiff's damages theory did not come into existence until 2013, years after the litigation was commenced. They further argue that the damages claim was so frivolous as to make manifest the bad faith with which the plaintiff was proceeding. This argument would be very compelling were it not for the

Whether or not the CUTSA claim was colorable at the outset, portions of it became objectively specious shortly into the discovery process. BTS's persistence in maintaining certain of these CUTSA claims, to include those which it dropped before trial and one which it brought to trial (the box), was motivated by improper purposes.

The parties are directed to contact court officer Jonathan Stuckal to schedule a hearing on the question of attorney's fees.

SO ORDERED

A handwritten signature in black ink, appearing to read "Jonathan Stuckal". The signature is written in a cursive style and is enclosed within a hand-drawn oval.

fact that the plaintiff was also seeking injunctive relief. Whether damages might be proven would not therefore defeat the claims.