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BIONIC BUFFALO, INC.

AMERICAN ARBITRATION ASSOCIATION

In the matter of

BIONIC BUFFALO, INC.

Case No.
79 117 00112 99 JEMO

Claimant,

vs.

**MOTION FOR CHANGE OF
AWARD BY ARBITRATORS
DESIGNATING CLAIMANT AS
PREVAILING PARTY AND FOR
OTHER RELIEF
[NRS 38.237]**

IINTEGRATED SYSTEMS, INC. and
WIND RIVER SYSTEMS, INC.,

Respondent

_____ /

COMES NOW Claimant BIONIC BUFFALO, INC., by and through its counsel,
STEPHEN N. SCHEERER, ESQ., and in accordance with **NRS 38.237** and
applicable law, provides its ***Motion for Change of Award By Arbitrators Designating
Claimant as Prevailing Party and for Other Relief from the
Reasoned Interim Award*** dated December 5, 2007, served by facsimile on

December 6, 2007 and received by Claimant on December 12, 2007.

This Motion is supported by the accompanying Points and Authorities, attached exhibits and all other pleadings and paperwork on file herein or otherwise made a part of the record of the proceedings conducted by the American Arbitration Association.

Dated this _____ day of December, 2007.

STEPHEN N. SCHEERER, ESQ.
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Incline Village, Nevada 89451
(775) 831-1772

Attorney for Plaintiff
BIONIC BUFFALO, INC.

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POINTS AND AUTHORITIES

I. HISTORY

On 19 April 1996, ISI entered into an agreement (Exh.Pg 1-44) with KETI, to deliver to KETI certain software pursuant to KETI's Ginseng II project. KETI is a consortium of Korean electronics companies. KETI was producing a prototype which could be used by its members to develop their own products. However, a member was not entitled to produce products using the ISI-delivered software without a separate license from ISI. Thus, ISI hoped to sell additional licenses to the various KETI members.

In order to acquire some of this software to satisfy KETI, on 20 September 1996, ISI entered into a Software License Agreement (Exh.Pg. 45-56) with Bionic Buffalo (sometimes "Claimant" or "BBC"). There was a minor amendment on 27 September 1996 (Exh.Pg. 57). The Software License Agreement allowed ISI to sublicense Bionic Buffalo's trade secret DSM-CC to ISI's customers, not only to KETI. However, KETI was to be the first customer. As with ISI, Bionic Buffalo also hoped to derive additional revenues from sublicenses to the KETI members.

Whenever ISI licensed the DSM-CC to one of its customers, ISI was to pay Bionic Buffalo a certain amount. Because Bionic Buffalo did not have the opportunity to approve or deny licensing to any customer -- indeed, Bionic Buffalo might not even know in advance that there was such a customer, and could not evaluate that customer's creditworthiness -- ISI was to be responsible for payment to Bionic Buffalo, regardless of whether or not ISI's customer paid ISI on time, or even paid at all.

Some of the payment obligations were triggered by “acceptance” of the software, which was defined on page 5 of the Agreement (Exh.Pg. 49). Acceptance is defined as any one of the following:

- (1) demonstration that the software performed its function; or
- (2) a customer’s explicit acceptance of the software; or
- (3) ISI’s assertion to a customer that payment was due to ISI (by invoice or otherwise), thus indicating that ISI believed the software was commercially valuable and viable

There were no specific delivery dates or schedules incumbent upon Bionic Buffalo by the terms of the Software License Agreement. Under the Software License Agreement, Bionic Buffalo was obligated to make deliveries only to ISI, except in the case of KETI. Deliveries could be made at Bionic Buffalo’s discretion to any customer, but KETI was entitled to direct support from Bionic Buffalo.

DSM-CC was a new product, still under development by Bionic Buffalo. In order to allow ISI and KETI to have early access to the product, allowing them to integrate it with their own systems, Bionic Buffalo made some early, incomplete deliveries. These were not required by the contract, but are common practice in such situations. The final, complete delivery (designated release 1.11) was made 12 December 1996. (See Exh.Pg. 203-211 for a list of various deliveries made, and Exh.Pg. 118-135 for a discussion of schedules.)

Deliveries from Bionic Buffalo were made by e-mail to Ben Fahy, who worked at ISI’s Doctor Design office in San Diego, where the deliveries were integrated with the rest of the software from ISI for delivery to KETI.

ISI's BREACH OF CONTRACT

In advance of the final delivery, ISI invoiced KETI (Exh.Pg. 58) on 13 November 1996 for the final payment under the ISI-KETI agreement, thus triggering ISI's payment obligation to Bionic Buffalo. ISI was required to notify Bionic Buffalo that such a payment was due, but did not do so. ISI reminded KETI about the invoice on 18 December 1996 (Exh.Pg. 60). According to the Software License Agreement, ISI should have notified Bionic Buffalo promptly of the invoice, and should have paid Bionic Buffalo thirty days after the invoice to KETI, but did neither. These were the first and second breaches of the ISI-Bionic Buffalo agreement, as enumerated in Claimant's Prehearing Brief of 13 May 2002 (Exh.Pg. 249-266, at 250-252).

Software such as DSM-CC is a component in a larger system. It does nothing by itself. It is expected that it will be combined with other software when incorporated into a larger system. Ben Fahy did some of this work. For example, he combined some of ISI's software, written by him, with Bionic Buffalo's software, for delivery to KETI. The e-mail shown on Exh.Pg. 59 explains how he combined a Stream State Machine from Bionic Buffalo with other software to create a program called xplay, which will be discussed below.

KETI had provided ISI with special hardware to be used for development. It was required that the delivered system work on KETI's special hardware. In December 1996, ISI shipped the KETI hardware back to KETI, with the software installed.

KETI began running a series of acceptance tests on the hardware and software. On 25 January 1997, KETI released its first acceptance test report. (Exh.Pg. 60A) (Note: the date on the report is wrong, it reads "1996" but should read "1997".)

According to the report, all DSM-CC functions were given an “ok” status. This was explicit acceptance by KETI of Bionic Buffalo’s product, which was another trigger obligating ISI to make payment to Bionic Buffalo. Bionic Buffalo did not yet know about ISI’s 13 November 1996 (Exh.Pg. 58) invoice to KETI.

The ISI-KETI agreement (Exh.Pg. 4-5) holds that KETI accepts the software when it fails to report material errors within 30 days of receipt. KETI received their returned hardware on 15 December 1996, and the 30 day “Post-Delivery Period” (as it is called in the ISI-KETI agreement) had passed without report of material errors in DSM-CC on 15 January 1997. Accordingly, based on the twin reasons of the acceptance test result and the passage of the Post-Delivery Period, Bionic Buffalo invoiced ISI for the final payment on 4 February 1997. (Exh.Pg. 61).

After KETI had accepted the software, Bionic Buffalo under the Software License Agreement had a continuing obligation to support ISI and KETI for one year to correct errors which might have been found in the software. Thus, when in late February 1997, KETI discovered some compiler warning messages in ISI’s delivery, Bionic Buffalo attempted to determine their cause and, if appropriate, render a solution. Bionic Buffalo sent two releases to KETI (release 1.12 on 24 February 1997 and release 1.13 on 3 March 1997), but KETI could not install the new software and the warnings would not go away.

From around 5 March to 10 March 1997, there was a discussion by e-mail (Exh.Pg. 62-72 and 73-80) to ascertain what version of the software was being used by KETI. It was discovered that ISI had not shipped the final, complete version of Bionic Buffalo’s software with ISI’s release to KETI. Instead, ISI had negligently shipped one of

the prior, interim releases, and the failure to use the latest release was the cause of KETI's inability to integrate releases 1.12 and 1.13.

Failure by ISI to have used the final release 1.11 shipped 12 December 1996 had at least three adverse consequences:

(1) The prior, interim releases were known to be deficient (that is why they were "interim"), thus exposing KETI to the possibility of errors and omissions, and concomitantly exposing Bionic Buffalo to increase support expense and loss of reputation.

(2) The prior, interim release sent by ISI to KETI was slightly incompatible in structure from the final release. This made it problematic to replace. [An analogy might be a part for an automobile which in prototypes used bolts separated by 1-1/2 inches, but in the final model changed to 1-5/8 inch bolt separation. KETI couldn't simply bolt on the new part, because the bolt separation was different.]

(3) For the first two reasons, the Software License Agreement on page 8 (Exh.Pg. 52) requires that the latest version be used to entitle ISI or KETI to software support from Bionic Buffalo. Unfortunately, KETI was at the mercy of ISI here, because ISI had negligently shipped them a prior, interim, incomplete release.

In the midst of this, KETI released its second acceptance test report (Exh.Pg. 72A-72B) on 8 March 1997. The report showed that the messages appeared when "DDI did integration after modifying some of BBC's codes". (Note: DDI is the Doctor Design subsidiary of ISI, San Diego, which did the development work for KETI.) Thus the warning messages, which presumably were not found on the first shipment, were caused by ISI's modification of Bionic Buffalo's software.

The improper use of Bionic Buffalo's support service caused by ISI's negligent failure to use the final 1.11 version of DSM-CC is the fourth breach of the Agreement, as detailed in Claimant's Brief (Exh.Pg. 249-266, at 247-248). The changes made to Bionic Buffalo's software, and failure to use the latest version, hindered Bionic Buffalo in its attempts to support KETI directly as required by the Agreement, and constituted the sixth breach. (Exh.Pg. 248)

ABSENCE OF BAD FAITH BY BIONIC BUFFALO

The Panel, in its Reasoned Interim Award (Exh.Pg. 280-286), concluded (Exh.Pg. 283-284) that Claimant acted in bad faith by failing to give current versions to Respondent and instead gave them to KETI.

Respondent had the current version (release 1.11) but did not use it as required by the Agreement, and, moreover, the Agreement requires Bionic Buffalo to support KETI directly. [The Panel's ruling is tantamount to saying, "Claimant acted improperly by failing to fix the problems caused by Respondent's negligence and errors, and Claimant acted improperly by acting in accordance with the Agreement to attempt to correct the problems".]

By this time, it appeared to Bionic Buffalo that ISI's Doctor Design subsidiary was unwilling or unable to properly take care of KETI, the mutual customer of ISI and Bionic Buffalo. On 11 March 1997, Bionic Buffalo wrote a letter (Exh.Pg. 81-83) to ISI's president David St Charles, summarizing the problems with KETI, and offering to help. Bionic Buffalo assumed that David St Charles was a reasonable person, and would be interested in knowing that there were problems, and in satisfying ISI's customers. Unfortunately, an e-mail exchange (Exh.Pg. 84-85) within ISI later showed that ISI's

primary concern seemed to be avoiding blame, and not fixing the problems. Moreover, the exchange was disparaging to Claimant.

TERMINATION OF AGREEMENT

On 14 April 1997, with ISI not fixing its KETI problems, and ISI's payment to Bionic Buffalo being five months overdue, Bionic Buffalo wrote again to David St Charles (Exh.Pg. 86-87), giving a 72-hour warning notice that it intended to terminate the Software License Agreement. All Bionic Buffalo received in return was ridicule.

Finally, on 19 April 1997, Bionic Buffalo terminated the Agreement. In the termination notice (Exh.Pg. 88-92), Bionic Buffalo gave the reasons for the termination, and reminded ISI that the Software License Agreement required ISI to destroy all copies of the product, cease using the product, and make payment regardless to Bionic Buffalo.

After the termination, ISI should have destroyed all copies of Bionic Buffalo's product in its possession, including the Fahy code which was a combination (Exh.Pg. 59) of Bionic Buffalo's product and ISI's software. ISI did not destroy the code, which constituted the ninth breach of the Agreement as alleged in Bionic Buffalo's Prehearing Brief (Exh.Pg. 257)

MISAPPROPRIATION

ISI knew after termination that it did not have rights to the Bionic Buffalo code. This was reflected in an internal e-mail (Exh.Pg. 93) of 22 April 1997, which stated "Unfortunately, ISI does not have the rights to M. Marking's DSMCC Source code". Nevertheless, ISI wrote eight days later to KETI (Exh.Pg. 94-98), telling KETI

that KETI could continue to use the source code. ***Under the Agreement (Exh.Pg. 54), the termination of the Agreement also terminated KETI's rights, since ISI had not yet paid for KETI's license. This e-mail, along with others, was a misappropriation and an inducement to misappropriate, which itself is a misappropriation.***

“There are no technical limitations on the nature of the conduct that constitutes ‘use’ of a trade secret... As a general matter, any exploitation of the trade secret that is likely to result in injury to the trade secret owner or enrichment to the defendant is a ‘use’ ... Thus, marketing goods that embody the trade secret, employing the trade secret in manufacturing or production, relying on the trade secret to assist or accelerate research or development, or soliciting customers through the use of information that is a trade secret... all constitute ‘use.’ The nature of the unauthorized use, however, is relevant in determining appropriate relief.” (Cognis Corp. v. Chemcentral Corp., 430 F.Supp.2d 806 at 812, N.D.Ill., 2006, 64 Fed.R.Serv.3d 1102)

Although Bionic Buffalo, to mitigate injury to KETI which had been caught in the crossfire, had granted KETI a ***“temporary oral license”*** to use the code, ISI's 30 April 1997 letter purported to grant additional rights to KETI which were not granted by the temporary license. ISI's letter (Exh.Pg. 94-98) clearly said “your [KETI's] license is with ISI and DDI”. ISI's purported license to KETI was not only broader in scope in the temporary oral license, it was perpetual. The temporary oral license was not perpetual, and was limited to purposes of testing and development. ***ISI's assertion of a grant of license to KETI, consistently maintained in later communications, was obviously “likely to result in... enrichment” to Respondent, and thus is a “use” as***

contemplated by NRS 600A. The enrichment was the payment by KETI of the invoice of the previous November, which was made by KETI to ISI in November 1997. Had ISI told KETI the truth, that KETI no longer had a right to use the software shipped by ISI in accordance with the terms of the 19 April 1997 ISI-KETI agreement (Exh.Pg. 1-44), then it is problematic that KETI would have eventually paid the invoice.

BBC's CONTINUING GOOD FAITH

While trying to protect KETI's interests, Bionic Buffalo persisted in good faith attempts to negotiate with ISI for a settlement after termination.

On 10 May 1997 (Exh.Pg. 99-100), Bionic Buffalo proposed a settlement which would have reinstated the license for KETI but not for additional customers; given the problems with ISI with regard to KETI, Bionic Buffalo did not wish to take on more problems by allowing ISI to grant licenses to more customers. Bionic Buffalo asked, in addition to the overdue payment, ***100 Korean won as consideration. At the time, that was about eleven cents.*** [Valid consideration may be as minute as a "scintilla" or "peppercorn].

In addition, to sweeten the deal and get the technical issues fixed, Bionic Buffalo offered to take over some of ISI's obligations to KETI regarding support for the video server, since ISI seemed unable to resolve those problems on its own. ISI did not accept the offer.

On 31 May 1997 (Exh.Pg. 103A) , KETI released its third acceptance test report. The report noted that the warning message problem had been fixed by ISI on 18 April 1997. As far as KETI was concerned, there were no more problems with DSM-CC. Still, ISI refused to pay, blaming problems in other parts of the

system on Bionic Buffalo but refusing to describe what the problems were so it was impossible for Bionic Buffalo even to consider if it was responsible. KETI, however, felt the problems were in portions of the system for which Bionic Buffalo was not responsible.

On 8 June 1997 (Exh.Pg. 104-105), Bionic Buffalo offered to accept half payment pending resolution of the problems in Korea, with the other half to be escrowed by KETI. Bionic Buffalo would, at its own expense, send an engineer to Korea and determine the cause of the video server problems, and fix them if they turned out to be Bionic Buffalo's. (Neither Bionic Buffalo nor KETI believed that Bionic Buffalo was responsible for the problems.) With the problems fixed or determined to be due to ISI, then KETI would hand over the second half of the payment, by then overdue almost seven months. Again ISI did not accept.

Having addressed all of ISI's concerns, and having offered to expend money and time to go to Korea to resolve the problems, there was not much more Bionic Buffalo could offer.

REQUEST FOR AUDIT AND DENIAL OF AUDIT

Meanwhile, on 12 May 1997 (Exh.Pg. 101-102), Bionic Buffalo told ISI it wanted to conduct an audit under the provisions of the Software License Agreement. ISI wrote back 29 May 2007 (Exh.Pg. 103), saying that the audit would require arbitration to decide the “circumstances and procedures”, without even attempting to discuss those circumstances and procedures. Effectively, ISI was saying, “If you want an audit, you have to sue us.” This constituted another breach of the

Agreement, the eighth breach as enumerated at Exh.Pg. 255-257 in Claimant's Prehearing Brief.

On 11 July 1997, KETI released its fourth acceptance test report. It continued to find Bionic Buffalo's software without problems, although problems persisted in ISI's portion of the system. The payment was now eight months overdue, and ISI continued to refuse to pay.

On 17 August 1997, Bionic Buffalo released a report (Exh.Pg. 106-117) describing the current status of the KETI software. Then, it released an additional report (Exh.Pg. 118-135) analyzing the schedule delays. Both reports were included as exhibits to Bionic Buffalo's Case Disclosure Statement (Exh.Pg. 181-197). Neither of the reports has been challenged by Respondent; in fact, they have been scrupulously ignored. They lay the blame for the technical problems and schedule delays in the KETI project, squarely at ISI's feet.

On 2 September 1997, ISI wrote to KETI (Exh.Pg. 136), continuing to assert that KETI had a right to use the Bionic Buffalo software, in an attempt to get KETI to make the final \$195,000 payment contemplated by the November 1996 invoice. This was continuing misappropriation as explained above in the context of a previous assertion along the same lines

CONTINUING MISAPPROPRIATION.

ISI continued to use the Bionic Buffalo code in other ways, all of which are misappropriations since the code should have been destroyed after termination. ISI analyzed the code in e-mails on 19 May 1997 (Exh.Pg. 173-175), ISI wrote "...in examining the code..." (Exh.Pg. 173) and "Today Ben and I looked at the code and

remembered that we did implement the User-Network as delivered by Michael Marking in the code delivered to KETI". (Exh.Pg. 175)

REVERSE ENGINEERING BY ISI

The above stated analysis of the code is classic reverse engineering, prohibited by the Agreement. When Fahy did it prior to termination in April 1997, to "combine" Bionic Buffalo's code with his, it was misappropriation and breach of contract. Even after the contract terminated, the "use" evidenced by the above e-mails (Exh.Pg. 173-175) is prohibited, and is misappropriation.

EXPERT OPINION ESTABLISHING MISAPPROPRIATION

Jon Callas, Claimant's expert, in his report (Exh.Pg. 212-215), found that ISI's shipments to KETI (the KETI release 5, sent by ISI to KETI 3 June 1997, still contained Bionic Buffalo's code. Version 1997.08.22.00 (see Exh.Pg. 208), copied by Claimant directly from KETI's server on 22 August 1997, confirms that KETI was still using Bionic Buffalo's software on that date. ISI had made ten deliveries (Exh.Pg. 206-208) between termination and that date, so ISI was still shipping Bionic Buffalo software to KETI after termination. Respondent has not refuted this. ISI was misappropriating Bionic Buffalo's DSM-CC in hopes of enrichment in the form of the final payment, which was made in November 1997.

Implying that dropping ISI's arbitration action against Bionic Buffalo would grant a license to KETI, ISI again wrote on 19 November 1997 (Exh.Pg. 137-138), saying the arbitration demand had been dropped, and again asking for payment.

ISI's FAILURE TO DESTROY SOFTWARE AND FAILURE TO PROVIDE AUDIT

ISI eventually paid Bionic Buffalo in November 1997, with interest, but Bionic Buffalo had never agreed to resuscitate the Agreement. Bionic Buffalo had offered to create a new, amended agreement, through settlement offers as already described. However, ISI never accepted any of those offers.

Accordingly, despite payment, in accordance with the terms of the Agreement, ISI did not acquire a right to use the Bionic Buffalo software, ISI was still obligated to destroy and stop using the Bionic Buffalo code and its derivatives, and ISI was still obligated to allow an audit.

FEBRUARY 25, 1998 FILING OF COMPLAINT

On 25 February 1998, Bionic Buffalo filed its claim (Exh.Pg. 139-142), seeking a preliminary injunction and arbitration according to the terms of the Agreement.

MISAPPROPRIATION THROUGH USE OF BBC SOFTWARE TO ACCELERATE RESEARCH AND DEVELOPMENT OF REPLACEMENT "DOLAN" SOFTWARE DEVELOPED AFTER FILING OF BBC COMPLAINT OF FEBRUARY 25, 1998

Apparently in an attempt to evade and reduce liability, and perhaps finally realizing that Bionic Buffalo was serious in its demands, ISI decided to create a replacement for the DSM-CC which Bionic Buffalo had delivered fourteen months before the complaint. They had a consultant, Michael Dolan, who had earlier worked on a project unrelated to DSM-CC, and they approached him about replacing the Bionic Buffalo code. Dolan understood on 3 March 1998 that he was to be a "Marking replacement". (Exh.Pg. 147) On 12 March 2008 (Exh.Pg. 143), they gave Michael Dolan the Ben Fahy code to study. The Ben Fahy code was shown earlier to be a combination of Bionic Buffalo and ISI code, and should have been destroyed after license

termination in April 1997. Therefore, giving Dolan the Fahy code was a prohibited disclosure under NRS 600A, and was an additional misappropriation of Bionic Buffalo's trade secret stream state machine and other information, included among the other trade secrets in Bionic Buffalo's DSM-CC.

Not only had been Fahy used Bionic Buffalo's stream state machine in his own implementation of a program called xplay, he had left copies of the original Bionic Buffalo software on his own machine in a subdirectory of xplay. Dolan found this directory in Ben's software (Exh.Pg. 143), and asked Tim McConnell, the project manager, about it. McConnell replied (Exh.Pg. 144-145) that it was Bionic Buffalo's code.

Dolan knew that access to the Fahy code would accelerate his own code development. On 3 March 1998, he wrote (Exh.Pg. 148-149) that using the Fahy code would reduce the development time from twenty weeks to twelve weeks, a savings of eight weeks.

Dolan studied the Fahy code at length. He exchanged e-mails (Exh.Pg. 150, 156-158, 171) with McConnell and Fahy discussing the Fahy code, which was a combination of the Bionic Buffalo code with Fahy's own development. In Exh.Pg. 171, he showed knowledge of Bionic Buffalo's development efforts.

After studying the Fahy code, Dolan made a business proposal to ISI on 25 March 1998. (Exh.Pg. 151-153). As one of the conditions of the project, Dolan required "free use of Ben's demo source code for this development (mostly for documentation, not actual use)". Dolan employed the word "use" twice in that sentence, in two difference senses. The second time, he used it as programmers often do, to mean

“copying”. The first time, the meaning was broader. Either way, his use of the code was clearly a misappropriation, “relying on the trade secret to assist or accelerate research or development” (**Cognis Corporation v. ChemCentral Corporation, 430 F. Supp 2d 806, 64 Fed. R. Serv. 3d 1102 (2006)**) *shortening the development time from twenty weeks to twelve weeks*. As Dolan explained (Exh.Pg. 148), the “lion’s share of the task is the learning curve and not the actual coding”. Copying was of less benefit than simply studying the trade secret and other information contained in Fahy’s code.

On 2 April 1998, he offered a revised proposal, with the requirement for Fahy’s code remaining. The condition found its way into his contract with ISI (Exh.Pg. 160-163, at 161) on 15 April 1998. The Fahy code would not even exist at this time, had ISI not breached the Agreement by failing to destroy it at after termination in April 1997. The Fahy code was so important to him, that he kept it in his own directories until it was time to deliver his “new” DSM-CC to KETI. Regarding KETI pre-delivery #4, McConnell asked in May 1998, “Are you really going to deliver a subdirectory named Ben?” (Exh.Pg. 172)

DISCREPANCIES IN MARCO THOMPSON AFFIDAVIT

Pursuant to the litigation following Bionic Buffalo’s February 1998 District Court Claim, Marco Thompson wrote an affidavit (Exh.Pg. 161-170) on 3 April 1998. He made various false statements. Among these were:

(a) “There were far more bugs in the software than there should have been”. In fact, years later, and after thousands of pages of discovery, ISI has not identified a single error in the delivery.

(b) “Marking was ... [arguing] that KETI had accepted his software... We were arguing to the contrary...” In fact, KETI did accept the software. (Exh.Pg. 60A, 72A-72B, 103A, 105A)

(c) “Our proposal to arbitrate under both agreements in either specified venue was rejected.” In fact, Bionic Buffalo agreed to arbitrate both disputes together in Carson City.

(d) Bionic Buffalo “now wanted more (arguing for consequential damages)”. In fact, the relief sought at that point included only an audit and destruction of the software, and did not include any money damages, though the possibility of asking for additional relief had been reserved in the Claim.

The affidavit was further dishonest in that it disingenuously ignored the terms of the Agreement between the party. Also, Marco Thompson makes much of his purported desire to “mediate” and “arbitrate”, and his alleged concern for KETI’s interests. If Thompson were truly interested in mediation, he would have responded to the points in Bionic Buffalo’s numerous letters. If he were truly concerned about KETI’s interests, he would not have, as he did, end work on the KETI project after ISI was paid, notwithstanding remaining serious problems in ISI’s deliverables. Once he got KETI’s money, he failed to satisfy his duties to KETI. He only decided to develop a new DSM-CC after Bionic Buffalo filed its claim.

GRANT OF AUDIT TO BBC AS PREVAILING PARTY PURSUANT TO CONTRACT

In its Report of Preliminary Hearing and Scheduling Order No. 2 on 13 December 2000 (Exh.Pg. 176-180), the Panel granted Claimant part of one of its petitions for relief: a limited scope audit. (Exh.Pg. 177-178) Although Claimant was entitled to a full audit

under the terms of the Agreement, Claimant agreed to this as the beginning of a full audit, expecting the procedure to be completed later. "Claimant could request follow up or supporting documentation from Respondent to to complete this audit review." (Exh.Pg. 178) Claimant continues to maintain that it is entitled to additional audit procedures under the terms of the Agreement. However, having been granted some relief by the Panel, Claimant is prevailing party in this matter.

BBC'S NINE MISAPPROPRIATION CLAIMS

ISI has carefully steered clear of the main points of Bionic Buffalo's claims, as those claims were set forth in Claimant's Case Disclosure Statement of 18 January 2001 (Exh.Pg. 200) After discovery, the scope of the claims was expanded and set forth in more detail in Claimant's Prehearing Brief of 13 May 2002 (Exh.Pg. 249-266) In that Brief are nine allegations of misappropriation of trade secret. Only the seventh claim is related to Dolan's development of DSM-CC. Dolan did not even begin his work until after Bionic Buffalo's claim was made in February 1998. The basis for the other claims is almost entirely in 1996 and 1997, before Dolan was engaged for the development. Moreover, the seventh claim, regarding Dolan's work, is based on many of the other claims. For example, Dolan used Fahy's code, which included Bionic Buffalo's trade secret stream state machine, to accelerate the development of his own code. However, to render a decision on the seventh claim requires consideration of, among other claims and issues, the fourth claim (Exh.Pg. 260-261, which involves continued failure to destroy, and use of, the Bionic Buffalo code (and derivatives, including the Fahy code) after the April 1997 termination.

While Claimant certainly continues to assert that development of the Dolan code involves a misappropriation (based on acceleration of development through use of the Fahy code, which should have been destroyed in April 1997), the entire issue of the lack of “similarity” of the Dolan code was raised as a red herring to distract from the main foci of Bionic Buffalo’s allegations. **[There is no cognizable legal authority cited by the Panel to support its position]**. The Panel acknowledged in their Prehearing Order No. 4 (Exh.Pg. 232-234) that this was a secondary issue: “Mr. Marking stated that claimant’s primary claim was with regard to actions taken prior to supposed independent development.” (Exh.Pg. 232) Dolan was not engaged by ISI to do the DSM-CC work until 1998, after the Claim was filed in February 1998, and after the actions of 1996 and 1997 upon which the thrust of the contract claims and the other misappropriation claims are based.

After raising the similarity red herring, then Respondent employed the “Friday defense”, maintaining that, if no misappropriation occurred on Friday, then it could not have occurred on Monday, Tuesday, Wednesday, or Thursday.

MORE EXPERT TESTIMONY REGARDING MISAPPROPRIATION

Jon Callas, claimant’s expert, found in his report (Exh.Pg. 212-216) that Fahy reverse engineered Bionic Buffalo’s code. (Exh.Pg. 212-213, 215) Callas found some Bionic Buffalo files, with copyrights, in Fahy’s code. Later, Dolan admitted finding the same files in Fahy’s code, but Dolan said he did not look at them.

There is a significant reason Respondent’s expert has not refuted this: she was told to look at the wrong code. In her report (Exh.Pg. 217-231), Barbara Fredericksen wrote, “The Callas Report is misleading where it references the presence of Marking

code in release KETI_REL_5 without noting that this release predates the dispute between BBC and ISI that led ISI to perform its independent development effort.”

Apparently, Ms Fredericksen is uninformed: based on the evidence, and even on Marco Thompson’s dishonest and misleading affidavit, a dispute certainly existed prior to KETI_REL_5 (June 1997), which was shipped by ISI to KETI after the license termination. Mr. Callas’ conclusion goes to the heart of Bionic Buffalo’s fourth and eighth claims of misappropriation.

From the first hearing,

“ARBITRATOR: Was there any copying by Mr. Doland [sic] of the Fahey [sic] code?”

“WITNESS [Fredericksen]: That is not a question that I attempted to answer specifically other than with respect to these modules of concern that bore Mr. Marking’s copyright. I really don’t have an answer for you there.”

(20-21 February 2002 hearing transcript, page 233)

“Q [Zumpft]: Did you ever compare Mr. Fahey’s code to the Bionic Buffalo Corporation code?”

“A. Only really with respect -- the only detailed analysis I did was with respect to those four modules, the three in the ‘Michael’ directory and the DSMCC.H file, the ones that contain the Bionic Buffalo copyright.

“... the only detailed scrutiny I gave was to those four modules that I could identify as Mr. Marking’s code because I didn’t have specific pedigree on the other Fahey materials?”

“Q. Your goal here was to compare Mr. Doland’s code with Bionic Buffalo Corporation’s code?

“A. In the largest part, yes. ... early on, the analysis focused on the two endpoints [(the Dolan code and the Bionic Buffalo code)]... [b]ecause it was our understanding that that was where the real dispute lay.”

(Transcript, pages 253-254)

In other words, Respondent’s expert was instructed to look at the wrong code.

Therefore, it has not been refuted that Fahy’s code was derived from the Bionic Buffalo code. It also appears irrefutable that Dolan used Fahy’s code in his development.

Although McConnell, over four years later, testified in this matter that Fahy did not use Bionic Buffalo code in developing his own code, Fahy’s own contemporaneous writing (Exh.Pg. 59) contradicts McConnell’s testimony.

The Panel, after seeing this evidence, ruled that there was no similarity between Bionic Buffalo’s code and Dolan’s code, so there could be no misappropriation. Not only was this a misapplication of the law (which does not make such an assertion anywhere), it disregards the substance of the seventh allegation of misappropriation, based on acceleration of product and process development.

Furthermore, the Panel’s decision defied all logic: it concluded that, since the seventh claim was unfounded, that six of the other claims could not stand, where those six other claims were based on events occurring prior to Dolan’s development. “The Panel dismissed all Misappropriation Claims on the basis (1) that this Panel found independent development of the Dolan Code in the First Hearing.” (Reasoned Interim

Award, page 3, Exh.Pg. 282) This is accepting the Friday defense by Respondent, a defense which is totally illogical. This decision to dismiss the other misappropriation claims was made early in the second hearing, so Claimant never received a hearing on his misappropriation claims.

In Prehearing Order No. 4 (Exh.Pg. 232-234), the Panel ordered, "...the first hearing on substantial similarity and development will go forward... This initial hearing will not pertain to any damage issues nor to any other theory of liability to be presented by claimant." (Exh.Pg. 233) However, at no time did Claimant assert that Dolan's code was similar to Bionic Buffalo's code. Bionic Buffalo's case was not founded upon "similarity". Therefore, the first hearing was spent on a defense against a nonexistent allegation. In the Partial Decision, First Hearing, the Panel concluded, "During this first bifurcated hearing, BBC had the burden of proof to establish that the Dolan Code was substantially similar to the Marking Code." (Exh.Pg. 244) Perhaps that was what the arbitrators intended. However, that is not what the seventh allegation of misappropriation said. Bionic Buffalo did not allege that the Dolan code was substantially similar to Bionic Buffalo's code. The allegation was that use of the misappropriated Fahy code was used to accelerate Dolan's development. Accordingly, to prevail on the claim, Bionic Buffalo had the burden of proof to establish just that: the Fahy code was improperly used to accelerate Dolan's development. The claim as imagined by the Panel was different from the claim made by Bionic Buffalo.

Having fabricated a claim which was not made, the arbitrators expected the rest of the claims to be heard in the second hearing. "All remaining issues of liability and damages shall be presented" at the second hearing. (Exh.Pg. 233) However, when the

second hearing was held, all misappropriation claims were dismissed at the beginning, including the claim actually made with respect to the Dolan code, so Bionic Buffalo never had a chance to have any one of its misappropriation claims heard.

Given the misunderstandings already shown, it may be important to show another one possible. The Panel found that Dolan did review “xplay” and “noticed the name of a file potentially of BBC... he did not review, examine, become familiar with or read the actual file material.” (Exh.Pg. 244) At the same time, Claimant maintains that Dolan studied xplay. This is not contradictory. The directory which Dolan found was named “michael”, and contained some Bionic Buffalo files. It was the “michael” directory and its contents which were avoided by Dolan. Dolan did not avoid xplay itself, or the containing directory. The “michael” directory and its contents were remnants of the Bionic Buffalo code which Fahy used when he combined his code with the Bionic Buffalo code to create the xplay source or sources. As is often the habit of programmers, Fahy kept the “michael” files around for reference, in the same way that Dolan kept the “ben” files Dolan used for reference. Fahy had a directory “michael”, and Dolan had a directory “ben”. Each had directories containing some of the material they used to accelerate their own development. Claimant did not allege that Dolan viewed Claimant’s code, but leaves the possibility open. Claimant alleged only that Dolan viewed the Fahy code, including the xplay file which is a combination of Bionic Buffalo’s code and Fahy’s own code.

The other bases for dismissing the misappropriation claims were flawed, as well.

Regarding the oral license excusing the misappropriation, there is nothing in NRS 600A to maintain that KETI's relationship with Bionic Buffalo in any way excused Bionic Buffalo's misappropriation. A grant of license to KETI has nothing to do with ISI's misappropriation in continuing to use the code after termination as described above. This is logically equivalent to saying, "Since A gives something to B, then it's OK for C to steal from A and give the purloined items to B." The argument is contrary to the law, and does not hold water.

Regarding an absence of ISI's obligations to "police" KETI, it is one thing to say that ISI must police KETI, it is entirely another to permit ISI to encourage KETI to misappropriate. The statute calls ISI's actions an "inducement to misappropriate".

Regarding the finding that there was no evidence that KETI did disclose the secret to its members, such a finding has no bearing on the argument. ISI hoped to sell additional licenses to the KETI members. Attempted sale or marketing of a trade secret without license, even if unsuccessful, is a misappropriation. The extent to which ISI might have been successful might have a bearing on damages rather than liability, and is a matter for the audit.

Finally, the eighth and ninth claims were not in any way against KETI. There might be other potential claims against KETI, but the basis for the arguments was not predicated on any action or inaction by KETI. Panel's conclusion is logically flawed.

The Panel's conclusion that an audit was not necessary has no bearing on whether one should be ordered. The conclusion goes against the law as cited in Claimant's prehearing brief, and against the unopposed testimony of Claimant's auditing expert Ryan Corrigan.

EQUITABLE REMEDIES FOR BREACH OF CONTRACT AND IMPLIED COVENANT

To hold that the claims of breach are irrelevant because no lost profits were shown is seriously in error. Claimant sought affirmative injunctive relief in the form of an Arbitrators' panel determination that an audit should be allowed. **Additionally, destruction of the software was requested and has been Ordered. Destruction of the software was requested as a contract remedy for breach of contract in this matter.**

A partial Audit was Ordered by the Panel through discovery as well. An audit is allowed by the Agreement, regardless of the presence or absence of any breaches by Respondent. An audit was requested and a partial audit has been allowed after Order by the Arbitrators. .

The destruction of the software is required after termination as a contract remedy after termination of the Agreement for breach of contract. The destruction of the software was Ordered by the Panel in the Reasoned Interim Award. The claims of breach of contract and breach of the implied covenant of good faith and fair dealing arise from ISI's failure of payment, subsequent termination, and remaining remedy of destruction of software resulting from the termination of contract resulting from contract breach.

The claims for breach of contract are not rendered moot or irrelevant based upon Respondent's subsequent payment of the contract price with interest to Claimant after termination.

In addition, the claims of breach are fundamental to some, but not all, of the

misappropriation claims. For example, the failure to pay Bionic Buffalo in a timely fashion occasioned the termination, which obligated Respondent to destroy Bionic Buffalo's code and its derivatives; ISI's failure to destroy the software made its continued use (to ship to KETI, to obtain the final payment from KETI to ISI, and so on) acts of misappropriation.

Misappropriation follows hand in glove from the failure to destroy all copies of the BBC software in ISI's and KETI's position. The fallacy of the position that ISI's software developed with the "Dolan" Code has somehow replaced all copies of the BBC software is not supported by independent evidence due to the failure of the Panel to allow a full audit to the Claimant. In fact, the Dolan Code was developed through the use of proprietary BBC software in any event.

The Nevada Uniform Trade Secrets Act says, in part, "Damages include both loss caused by misappropriation and unjust enrichment caused by misappropriation that is not taken into account in computing the loss." (from NRS 600A.050.1) Damages are not only what Claimant lost, but also what Respondent gained by the misappropriation. For example, Respondent was able to gain a payment from KETI it would not otherwise have received, and Respondent was able to save development expense by accelerating its own development through use of the trade secret.

FORM OF AWARD

Although the form of the award was to be a "reasoned award", the Panel did not cite cognizable law in support of the denial of the Claimant's claims for misappropriation. Inasmuch as Panel's award apparently disregarded law cited by Claimant, and no cognizable contrary laws were cited, the parties are entitled to know

the legal reasons behind the Panel's award, and thus seek clarification regarding those reasons, and use of appropriate law.

II. LAW

Claimant reincorporates and restates the History and discussion stated in I. above as if more fully stated and reincorporated at this point.

A. PRELIMINARY DISCUSSION

The operative Contract in this matter states under "**General Provisions**" states "**Applicable Law. This Agreement shall be construed pursuant to substantive law of the State of Nevada.**" [Exhibit Pages 000045-56]

The substantive law of the State of Nevada addresses arbitration under the provisions of Nevada Revised Statutes, Chapter 38, Mediation and Arbitration.

NRS 38.237 reads as follows:

"NRS 38.237 Change of Award by Arbitrator.

1. On motion to an arbitrator by a party to an arbitral proceeding, the arbitrator may modify or correct an award:

(a) Upon a ground stated in paragraph (a) or (c) of subsection 1 of NRS 38.242;

(b) Because the arbitrator has not made a final and definitive award upon a claim submitted by the parties to the arbitral proceeding; or

(c) to clarify the award.

2. A motion under subsection 1 must be made and notice given to all parties within 20 days of after the movant receives notice of the award.

3. A party to the arbitral proceeding must give notice of any objection to the motion within 10 days after receipt of the notice.

4. If a motion to the court is pending under NRS 38.239, 38.241 or 38.242, the court may submit the claim to the arbitrator to consider whether to modify or correct the award:

- (a) Upon a ground stated in paragraph (a) or (c) of subsection 1 of NRS.38.242;
- (b) Because the arbitrator has not made a final and definitive award upon a claim submitted by the parties to the arbitral proceeding; or
- (c) to clarify the award.

5. An award modified or clarified pursuant to this section is subject to subsection 1 of NRS 38.236 and to NRS 38.239, 38.241 and 38.242.”

On December 5, 2007 the Arbitrators entered their ***Reasoned Interim Award***.

Service of the Reasoned Interim Award was made by facsimile transmission on December 6, 2007 with receipt of service occurring thereafter on December 12, 2007.

Prior to receipt of the Reasoned Interim Award, Claimant BIONIC BUFFALO, INC. made a ***“R-32 Request for Post Hearing Filing of Documents or Other Evidence – Re: AAA Case #79 117 00112 99”*** by electronic mail [email] to Jesse Molina, Case Administrator for the American Arbitration Association on December 10, 2007.

The R-32 Request was made in part to confirm communications between the Case Administrator and the Claimant wherein Mr. Molina, by email dated November 29, 2007, had requested a copy of the Hearing Briefs. Mr. Molina, on behalf of AAA, stated in his email that

“I do not have one in the file and it appears that one may not have been filed. If you could, please provide me with a copy or confirm that one was not filed.”

Claimant’s counsel responded to Mr. Molina’s email by return email to

Mr. Molina dated November 29, 2007 and stated that:

“Your email of today finds me away from my office (40 miles away) where the file is presently located.

I am attempting to locate my clients by telephone and email without present success.

My recollection is that there was a hearing brief filed with the Arbitrators' Panel and the issues therein [sic] were addressed at the time of the 2nd Hearing. The transcript of the 2nd Hearing has, of course, been provided."

Claimant's counsel's email also volunteered additional points and authorities regarding the "implied covenant of good faith and fair dealing."

The implied covenant of good faith and fair dealing had previously been addressed verbally, as well as in the Claimant's Pre-Hearing Brief, at the time of the 2nd Arbitration Hearing of May 21, 2007 and May 22, 2007.

Mr. Molina responded by email on November 30, 2007, stating "Thank you for your message and email. I look forward to receiving the brief."

Thereafter, on **November 30, 2007**, Claimant's counsel was able to provide a copy of the "Claimant's Pre-Hearing Brief" originally served on May 13, 2002 by mail **by facsimile to Mr. Molina**. Additionally, a copy of the facsimile transmission was also provided to both of the Respondent's counsel..

A copy of Claimants' Pre-Hearing Brief originally served on May 13, 2002, was located and provided to the AAA by copy to Mr. Molina, by facsimile Claimant's Pre-Hearing Brief of May 13, 2002 which had been used in the Second Arbitration Hearing of May 21, 2002 and May 22, 2002. for the benefit of the Arbitrators.

Plaintiff seeks clarification of the Reasoned Interim Award of December 5, 2007 and such other relief as may be available under the provisions of NRS 38.237.

Paragraphs 5 and 6 of the Complaint in this matter filed with the First Judicial District Court [with respect the Agreement of the parties] read as follows:

" 5. The parties agreed specifically that:

"..... any dispute relating to the terms, interpretation or performance of this agreement (other than claims for preliminary injunctive relief or other pre-judgment

remedies) shall be resolved at the request of either party through binding arbitration.”

6. The parties further agreed that:

“ any cause of action arising out of or related to this agreement, including an action to confirm or challenge an arbitration award, may only be brought in the courts of applicable jurisdiction in Nevada, at Carson City, and the parties hereby submit to the jurisdiction and venue of such courts.”

The substantive law of the State of Nevada applies to the Claimant BBC’s Motion for Change of Award by Arbitrators in accordance with the Software License Agreement.

B. AAA MISSING DOCUMENTS AND REQUEST FOR MISSING DOCUMENTS BY AAA

Due to the apparent reality that the AAA is missing relevant documents relating to the arbitration and that the Claimant may have been prejudiced by such absent or missing documents, the Claimant seeks a clarification from the AAA as to the present state of the record and the documents that AAA has in its possession, the date of supplemental receipt by AAA of requested documents from the Claimants and the transmission of the documents to the panel of Arbitrators.

It would seem that the absence of the documents would render it difficult for the Arbitrators to provide any reasoned Opinion when the documents were not received by AAA, thereafter routed to the three arbitrators, and resulted , in part, in an Interim Reasoned Award being promulgated when the Arbitrators were not in possession of relevant Court documents utilized in making the Interim Reasoned Award when the AAA and thereafter the Arbitrators could not have had the opportunity to review the points and authorities in support of the Claimants’ position, which were significant in substance.

**C. WRITTEN TRANSCRIPT OF 2ND ARBITRATION HEARING OF
MAY 21 AND MAY 22, 2007**

The written transcript was not transcribed until September 21, 2007 due in part to the fact that the underlying court reporter's tapes were in storage and could not be located for some time. Subsequently the original transcript was transcribed. Upon receipt by the Claimant's counsel, the original was provided by Federal Express to the AAA upon receipt by Claimant's counsel.

It appears that AAA scanned copies of the Transcript into their records but did not originally provide a copy to the Arbitrators. On October 9, 2007, the AAA contacted counsel for the Claimant and asked if copies of the Transcripts had been provided to the Arbitrators directly and not through AAA . Counsel for the Claimant informed the AAA that direct service had not been made to the Arbitrators and the Arbitrators would be provided copies of the Transcript by AAA directly by electronic means.

The confusion regarding the matter is that the Arbitrators, in their Interim Reasoned Award, referred to the audio transcript as the official transcript, where previously the Arbitrators had requested at the time of the May 22, 2002 Hearing that the written transcript would be the official transcript of the proceedings.

Claimant's counsel is concerned that the Arbitrators may not have had ample opportunity to review the Official written transcript before providing their Interim Reasoned Award.

Counsel provides three (3) written copies of the written transcript of the Hearing of May 21, and May 22, 2002 herewith for the benefit of the Arbitrators.

Additionally, the Claimant's counsel provides three (3) written copies of the Transcript of the February 20, 2002 and February 21, 2002 Hearing herewith for the benefit of the Arbitrators so they may have the opportunity to review all testimonial evidence elicited at both Hearings for their benefit.

D. THE ARBITRATORS FAILED TO APPLY THE UNIFORM TRADE SECRETS ACT AND THE PROVISIONS OF NRS 600A, THE NEVADA UNIFORM TRADE SECRETS ACT, WHEN INCORRECTLY RULING ON THE LAW OF MISAPPROPRIATION OF NEVADA IN THIS CASE.

This complainant's complaint alleges breach of contract and misappropriation as claims for relief. The Arbitrators panel decided that the first hearing "was limited in scope to issues of the substantial similarity and independent development" of relevant software relating to the Claimant's claims.

The Arbitrators did not address any of the Claimants' breach of contract claims in the first hearing.

The Arbitrators simply addressed the issues of misappropriation applying the law of California that pre-dated the California version of the codification of the Uniform Trade Secrets Act in support of its position that a determination of "substantial similarity and independent development" was necessary to find a misappropriation. This was an error of law.

The case cited by the Arbitrators, **Droeger v. Welsh Sporting Goods Corp.** 541 F2d. 790 (C.A. 9th, 1976) was based upon a determination of California law that pre-existed the adoption of the California version of the Uniform Trade Secrets Act and is not a statement of applicable law in Nevada [or arguably,

California, for that matter].

The leading case in Nevada is Frantz v. Johnson, 116 Nev. 455, 999 P.2d 351 (Nev. 2000) which applies the codification of NRS 600A, the Nevada Uniform Trade Secrets Act, as it relates to the law of misappropriation.

“NRS 600A.090 of the Nevada Uniform Trade Secrets Act, titled “Effects of chapter on other law and remedies,” provides that:

- 1. Except as otherwise provided in subsection 2, this chapter displaces conflicting tort, restitutionary and other law of this state providing civil remedies for misappropriation of a trade secret.*
- 2. This chapter does not affect:**
 - (a) Contractual remedies, whether or not based upon misappropriation of a trade secret;*
 - (b) Other civil remedies that are not based upon misappropriation of a trade secret; or*
 - (c) Except as otherwise provided in NRS 600A.035, criminal sanctions, whether or not based upon misappropriation of a trade secret.”**

Nevada law does not require a finding of “substantial similarity” for purposes of establishing a misappropriation of a trade secret. Nevada

Revised Statutes, under NRS 600A.030(5) defines a trade secret as:

“information, including without limitation, a formula, pattern, compilation, program, device, design, prototype, procedure, computer programming instruction or code that:

- (a) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by the public or any other persons who can obtain commercial or economic value from its disclosure or use; and**
- (b) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.**

The Nevada law of misappropriation is codified as follows:

Nevada Revised Statutes , NRS 600A.030(2) provides that:

“Misappropriation means:

- (a) Acquisition of the trade secret of another by a person by improper means;**
- (b) Acquisition of the trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means; or**
- (c) Disclosure or use of a trade secret of another without without express or implied consent by a person who:**
 - (1) Used improper means to acquire knowledge of the trade secret;**
 - (2) At the time of disclosure or use, knew or had reason to know that his knowledge of the trade secret was:**
 - (I) Derived from or through a person who had used improper means to acquire it;**
 - (II) Acquired, under the circumstances giving rise to a duty to maintain its secrecy or limit its use; or**
 - (III) Derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limits its use; or**
 - (3) Before a material change of his position, knew or had reason to know that it was a trade secret and that knowledge of it had been acquired by accident or mistake**

The Nevada Uniform Trade Secrets Act [and other uniform trade secrets acts] do not define the term “use”, however. Nonetheless, there appears to be a growing trend to define “use” in accordance with the provisions of the the Restatement 3d of Unfair Competition, Section 40, comment c (1995), which states (in part) as follows:

“There are no technical limitations on the nature of the conduct that constitutes “use” of a trade secret..... As a general matter, any exploitation of the trade secret that is likely to result in injury to the trade secret owner or enrichment to the defendant is a “use” Thus marketing goods that embody the trade secret, employing the trade secret in manufacturing or production , *relying on the trade secret to accelerate research or development*, or soliciting customers through the use of information that is a trade secret all constitute “use.” The nature of the unauthorized use, however, is relevant in determining appropriate relief.”

(See Cognis Corp v. CHEMCENTRAL Corp. , 430 F. Supp. 2d 806, 64 Fed R. Serv. 3d 1102 (N.D. Ill., 2006).

The facts of this case lend themselves to a finding of misappropriation of a trade secret in accordance with NRS 600A.030(2), in part, as the Respondent made

“(c) Disclosure or use of a trade secret of another without express or implied consent by a person who (2) At the time of disclosure or use, knew or had reason to know that his knowledge of a trade secret was ... (II) Acquired, under circumstances giving rise to a duty to maintain its secrecy or limit its use.”

“Use” may be shown through the reliance on the Petitioner’s trade secret when the Respondent used the Petitioner’s trade secret in developing the Dolan code and used the Petitioner’s trade secret to accelerate the research or development of its own code [See **Restatement 3rd of Unfair Competition, Section 40,**

Comment c (1995).]

E. BREACH OF CONTRACT / IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING IN TRADE SECRETS LITIGATION

The Claimant also made claims for Breach of Contract and Breach of the Implied Covenant of Good Faith and fair dealing in accordance with the Software License Agreement.

Initially, Claimant reminds the Panel of the provisions of the Nevada Uniform Trade Secrets Act and the provisions of NRS 600A.090(2), which reads, in part, as follows:

“2. This chapter does not affect:

- (a) *Contractual remedies, whether or nor based upon misappropriation of a trade secret;*
- (b) *Other civil remedies that are not based upon misappropriation of a trade secret*”

Frantz v. Johnson, supra at P. 465, footnote 4, states:

“We note that JBM’s cause of action for breach of the implied covenant of good faith and fair dealing would not be barred provided

it was grounded in contract. An implied covenant of good faith and implied covenant of good faith and fair dealing exists in every Nevada contract and essentially forbids arbitrary, unfair acts by one party by one party that disadvantage the other. See Consolidated Generator v. Cummins Engine, 114 Nev. 1304, 1311, 971 P.2d 125q, 1256 (1998); Overhead Door Co. v. Overhead Door Corp., 103 Nev. 126, 128, 734 P.2d 1233, 1235 (1987)

NRS 600A.090(2)(a) explicitly provides that contractual remedies, even those based upon misappropriation of trade secrets, are not displaced by the UTSA. Accordingly, we conclude the district court did not err in awarding damages based on the contractual remedy of breach of the covenant of good faith and fair dealing.”

The Claimant’s breach of contract and implied covenant claims are not excluded by the codification of the Nevada UTSA and accordingly have been pursued by the Claimants.

The Claimant’s submit that had the Arbitrators applied the correct law regarding the Nevada Uniform Trade Secrets Act and its law of misappropriation, as codified, that the Claimant would have been the prevailing party on the issue of the several claimed counts of misappropriation.

Nonetheless, all of the Claimant’s contractually based claims are based independently of the law of misappropriation, as codified in Nevada under NRS Chapter 600A.

Petitioner as the party bringing the action, customarily is provided the opportunity to bring his claims forward into evidence first. Unfortunately, the sequence of presentation was ordered to commence with the issue of the Respondent’s defense to only one of the Claimant’s claims for misappropriation, the Respondent’s defense regarding the Petitioner’s claim of misappropriation of Claimant’s software through the use of said software to “assist or accelerate research or development..... through the use of information that is a trade secret” relating to the use of the BBC Code to assist

or accelerate development the development “ of the Fahy Code giving rise to the “creation” of the Dolan Code.

“Substantial similarity” is not the law of misappropriation of Nevada even though substantial similarity may well exist between the codes as the BBC/Marking Code was used to “assist and accelerate research and development” of the Fahy Code which was used to assist or accelerate research or development” of the Dolan Code . [See

Restatement 3d of Unfair Competition. Section 40, comment c (1995).

The Claimant’s breach of contract claims arise from, among other things, the Respondent’s failure to pay the incremental charges for development of the BBC/Marking Code delivered to ISI after ISI billed KETI for the software.

Notice of breach was provided and ISI was given ample time to cure the breach and not only failed to pay the contractually incurred charges as required by the contract, but ISI also denied BBC had performed under the contract.

The Software Development Contract required the payment to BBC after ISI billed KETI for the software. ISI not only failed to pay BBC but also failed to disclose to BBC that the billing had occurred.

Although KETI did not pay ISI immediately after being billed, KETI’s payment to ISI was not a condition precedent to the payment due to BBC by ISI.

ISI’s allegation of lack of contract performance by BBC continued even after KETI informed ISI in writing that BBC’s performance was acceptable.

Additionally, BBC cured other software problems that were caused by ISI’s failure to integrate BBC’s software into the ISI portions of the software, which were , once again, acknowledged by KETI in writing as having been cured.

The fact is that ISI failed to perform its duties under the Software Development Contract through failing to pay BBC after BBC had performed under the subject contract. Payment was due upon billing ISI for BBC's contract services to ISI.

After BBC's Notice of Breach was provided to ISI and time was provided by BBC in an effort to seek a cure of the breach, ISI failed to pay the contract price and remedy the breach of contract.

BBC's contract remedies upon termination were (1) damages for failure of payment; and (2) destruction of all software in accordance with the Software Development Contract.

F. CLAIMANT IS THE PREVAILING PARTY ON THE BREACH OF CONTRACT CLAIM AS THE PANEL HAS PROVIDED A REQUESTED REMEDY, TO-WIT: DESTRUCTION OF SOFTWARE

BBC terminated the Software Development Contract for material breach as a result of ISI failing to pay the contract price.

ISI also refused to provide the contract remedies to which BBC was entitled, as stated in the contract. BBC has requested destruction of software and has been provided with this requested remedy.

above, for ISI's contract breach, and available after termination of the contract.

Ultimately, thereafter ISI provided only one of the remedies for breach of contract, through the payment of the contract price, plus interest. However, as ISI had breached the contract and the contract had been terminated, BBC's contract remedies had not been satisfied.

Litigation followed.

BBC was still entitled to destruction of the software as a remedy for breach of

contract. The destruction of software did not occur. In lieu thereof, the Respondent continued to use the software, misappropriating the software for its use and benefit. Thereafter, the Claimant filed its action for Arbitration seeking equitable and injunctive relief, including the destruction of the software based upon the breach of the contract and subsequent termination, seeking the destruction of the software.

Only after the Complaint was filed, did the Respondent attempt to create replacement software, allegedly in substitution for the software previously provided by BBC for the benefit of ISI pursuant to contract. Had the complaint not been filed, it is unlikely that “substitute” software would have been developed. Given the likelihood that the Arbitrators’ would find a breach of contract and Order the destruction of the software, the Respondent, as described above, committed an additional act of misappropriation through relying upon the Claimant’s trade secrets in assisting and accelerating researching the development of allegedly “new” software to replace the software previously licensed to the Respondent in accordance with the terms and conditions of the Contract.

Although the Panel has ruled that there was no misappropriation in the development of the replacement software, the Claimant submits this determination occurred through the mistaken misapplication of legally insufficient and non-cognizable authority.

There can be no question that the Panelists have awarded the Claimants relief requested and available to the Claimant under the Contract, to-wit: the destruction of the software. Paragraph 32 of the “Interim Reasoned Award” states as follows:

“Once the Final Award is issued to the parties and their respective counsel and within a period of sixty (60) days following the issuance of the Final

Award, Respondent shall immediately turn over to Claimant all copies of the Porting Kit and other Confidential Information relating to the Porting Kit installed or recorded on any hard disk or other storage medium. Respondent shall upon completing this required transfer and destruction, certify in writing to this Panel and to Claimant that it has complied with these requirements. No such destruction or transfer shall be deemed to be spoliation of evidence for any purpose whatsoever.”

Accordingly the Claimant is the prevailing party as it has been awarded relief in accordance with the prayer of its Complaint for equitable and injunctive relief.

The refusal to destroy the software was one of the reasons that the litigation was commenced. The Panel has Ordered that the software be destroyed. There can be no question that the Claimant is receiving the requested and desired relief under the complaint, the remedy under the Contract not previously agreed to by the Respondent, the destruction of the software.

Accordingly, BBC is the prevailing party as it has been provided relief for breach of contract in accordance with the contract.

G. CLAIMANT IS PREVAILING PARTY ON THE AUDIT CLAIM

In the current dispute, the Panel has awarded the Claimant an audit through the discovery process. An audit is allowed under the Claimant’s Prehearing Brief (Exh.Pg. 249-266) cited law holding that:

(1) Performance under the terms of a contract is required as long as it is possible and lawful.

(2) It is irrelevant whether Claimant would benefit or not from the audit.

(3) Generally Accepted Accounting Principles (GAAP) and Generally Accepted Auditing Standards (GAAS) are presumed to apply.

(4) An “audit”, as specified in the Software License Agreement, is distinct from a “review”, as ordered by the Panel.

(5) The scope of examination in an audit includes a sampling from a population necessarily larger than the population of materials to be confirmed. (From which it is obvious that the scope of discovery has not been adequate to complete an audit.)

Moreover, Claimant’s expert, Ryan Corrigan, testified that an audit was still necessary, notwithstanding the absence of evidence of misuse. (22 May 2002 Hearing, page 172, lines 16-20) There was no contrary testimony.

No opposing law to these principles was presented by Respondent, nor was any cited by Panel. Accordingly, it appears that the Panel knew about the law and chose to disregard it, and refused to consider the evidence, when rendering the following decision in its Reasoned Interim Award (Exh.Pg. 280-286):

(1) “The Panel expressly finds that there was no evidence adduced during the final Hearing to support a reasonable basis for conducting an audit.” This disregards the law and uncontroverted testimony that no such basis is required.

(2) “Claimant has failed to show any... evidence demonstrating improper use...” Notwithstanding that no basis is required, Claimant was prevented from presenting all of its misappropriation claims, as explained elsewhere in this document.

(3) “Claimant drafted the Agreement...” All evidence and testimony is that the Agreement was negotiated mutually, so Panel’s conclusion is not grounded in the evidence. (5 June 1998 District Court Hearing, page 5, and Marco Thompson Affidavit, Exh.Pg. 174-170)

Finally, since the Panel ordered on 13 December 2000 that the audit would be done by discovery, the Order provides the Claimant with requested affirmative injunctive relief as allowed under the terms and conditions of the Contract. An audit has been allowed and, accordingly, Claimant is a prevailing party on the claim of audit.

Accordingly, the Reasoned Interim Award provides that the audit has already been awarded and performed, or the Panel improperly ordered an insufficient audit.

In either instance, an audit was Ordered and Claimant has obtained a form of relief that was allowed under the Contract as a result of the litigation. Accordingly, the Claimant is a prevailing party on the issue of audit as well.

H. CLAIMANT IS THE PREVAILING PARTY

The fact of the matter is Claimant has been provided substantive relief in the Orders of this Panel that renders the Claimant the prevailing party.

In the current dispute, the Panel awarded the Claimant an audit through discovery with the potential for additional relief beyond that already afforded before the issuance of the Reasoned Interim Award allowed no further audit..

Additionally, the Claimant has been provided with relief in the form of destruction of the software which is a remedy provided to the Claimant after the termination of the contract.

“A prevailing party is one who has been awarded some relief by a court.”

Buckhannon Bd. and Care Home, Inc. v. West Virginia Dept. of Health and Human Resources, 121 Sect. 1835, 532 U.S. 598 (U.S. W.Va. 2001).

Accordingly, the Panel is requested to change its Reasoned Interim Award and designate the Claimant as the prevailing party and award attorney’s fees and

costs to the Claimant in this matter, in addition to the relief provided to the prevailing party in this action in the form of audit and destruction of software as allowed by the contract and previously denied to the Claimant by the respondent necessitating the litigation in this matter.

CONCLUSION

Based upon the foregoing, the Claimant respectfully requests that the Panel revisit and change its Award in accordance with NRS 38.237 designating the Claimant as the prevailing party in this matter and awarding the Claimant its reasonable costs and attorneys' fees in the matter. Additionally, the Claimant urges the Panel to effectuate substantial justice through revisiting its determination and further ruling in a manner consistent with applicable and cognizable law in accordance with the provisions of NRS 600A, the Nevada Uniform Trade Secrets Act and finding and holding that the Respondents have committed acts of misappropriation and awarding appropriate damages against the Respondents and in favor of the Claimant therefore.

Dated this _____ day of December, 2007.

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CERTIFICATE OF SERVICE

I, STEPHEN N. SCHEERER, ESQ., in accordance with NRCP 5(b),
certify that I mailed a true and correct copy of the above Motion to the below named
addressees, this date, as follows:

Jesse M. Molina, Case Administrator
American Arbitration Association
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[Motion, Exhibit List and Chronology by Fax]

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Dated this _____ day of December, 2007

STEPHEN N. SCHEERER, ESQ.