IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
CASE NO. 9:13-CIV-80725-MARRA

CURTIS J. JACKSON, III,

Plaintiff,

v.

SLEEK AUDIO, LLC, MARK KRYWKO,
MICHAEL KRYWKO, JASON KRYWKO
and GREGORY WYSOCKI,

Defendants.

_______________________________________/

NOTICE OF FILING REDACTED FINAL AWARD

Plaintiff, CURTIS J. JACKSON, III, through undersigned counsel, herewith files its Redacted Final Award pursuant to Court Order dated March 24, 2014 [D.E. 58].

Dated: April 3, 2014

Respectfully submitted,

SHUTTS & BOWEN LLP

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 3, 2014, a true and correct copy of the foregoing was filed using the Clerk's CM/ECF system which will send a notice of electronic filing to: Kristin M. Ahr, Esq., kahr@broadandcassel.com, Broad and Cassel, One North Clematis Street, Suite 500, West Palm Beach, FL 33401, Mark F. Raymond, Esq., mraymond@broadandcassel.com, Rhett Traband, Esq., rtraband@broadandcassel.com, Broad and Cassel, One Biscayne Tower, 21st Floor, 2 S. Biscayne Blvd., Miami, FL 33131 and Dennis K. Egan, Esq., degan@kotzsangser.com, Lynn A. Sheehy, Esq., lsheehy@kotzsangster.com, Kotz Sangster Wysocki, P.C., 400 Renaissance Center, Suite 3400, Detroit, Michigan 48243, *Attorneys for Sleek Audio, LLC, Mark Krywko, Michael Krywko, Jason Krywko, and Gregory Wysocki*.

SHUTTS & BOWEN LLP

By: s/ John F. Mariani
John F. Mariani
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JAMS
ATLANTA, GEORGIA AND NEW YORK, NY

SLEEK AUDIO, LLC,
Claimant,
--against --
CURTIS J. JACKSON, III,
Respondent.
And
CURTIS J. JACKSON, III.
--against –
SLEEK AUDIO, LLC *et al*
Respondents.

JAMS Ref. Nos. 1440003176 and 1440003314

FINAL AWARD

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Place of Arbitration: West Palm Beach, Florida

Date of Final Award: July 15, 2013

Procedural Background

The undersigned Arbitrator has been designated in accordance with Section 7.4 of the April 10, 2010 Securities Purchase Agreement between Sleek Audio, LLC ("Sleek") and Curtis J. Jackson, III ("Jackson"). This arbitration is a consolidation of two arbitration proceedings among the parties: JAMS Arbitration Ref. No. 1440003176 which addresses claims by Sleek against Jackson and JAMS Arbitration Ref. No. 14400003314 which asserts claims by Jackson against Sleek and Respondents Mark Krywko, Jason Krywko and Michael Krywko (collectively, the "Krywkos"). Mr. Gregory Wysocki ("Wysocki") was initially a Respondent in JAMS Arbitration Ref. No. 14400003314 but was no longer a party to the arbitration as a result of the February 8, 2013 Partial Final Award re: Respondent Gregory Wysocki's Motion for Summary Judgment.

Plenary arbitration hearing sessions were conducted before the Arbitrator in West Palm Beach, Florida, at which evidence was adduced on February 18-20, 22, 25-28 and on March 1, 2013, during which the parties presented a substantial number of documentary and other types of evidence and testimony was taken from several fact and expert witnesses.

The Arbitrator carefully reviewed and considered the testimony, the documentary and other evidence, the allegations and arguments of counsel and the pre-hearing briefs and post-hearing findings of fact and conclusions of law and found, concluded and issued on May 2, 2013 an Interim Award which is attached hereto as Exhibit A and which is incorporated by reference as if fully set forth herein. The Interim Award granted Sleek's claims against Jackson and denied Jackson's claims against Sleek and the Krywkos.

That Award was an Interim, rather than a Final, Award because Section 7.4 of the April 10, 2010 Securities Purchase Agreement between Sleek and Jackson provides that "[t]he prevailing party in any ...arbitration shall be entitled to an award of reasonable attorneys' fees and costs. ..." The Arbitrator interpreted the word "shall" in Section 7.4 to mean "must."

No evidence or testimony regarding the parties' attorneys' fees and costs was received in the record of the final hearing. The Arbitrator retained jurisdiction in this arbitration for the parties to submit to the Arbitrator their written positions on the amount of reasonable attorneys' fees and costs to be awarded "to the prevailing party", which Sleek, the Krywkos, Wysocki and Jackson did.

Therefore, this Final Award is entered which adopts the findings of fact and conclusions of law set out in the Interim Award and includes the amount of the reasonable attorneys' fees and costs to be awarded to Sleek, the Krywkos and Wysocki as the prevailing parties in this arbitration.

This Final Award contains statements of facts found by the Arbitrator to be true and necessary to this Award. To the extent that this recitation may differ from, and does not include a reference to or analysis of every element of, any party's position, that is the result of determinations by the Arbitrator as to credibility, relevance, burden of proof considerations, legal principles and the weighing of the evidence, both oral and written. This Final Award resolves all the claims and counterclaims raised in the parties' respective demands for arbitration, namely, JAMS Arbitration Ref. No. 1440003176 and JAMS Arbitration Ref. No. 14400003314 (as amended by Sleek's and Jackson's respective withdrawal of certain claims prior to the final hearing), and subsequent submissions of the parties. To the extent that any claim, counterclaim or demand for relief is not specifically addressed herein, it is hereby denied.

DISCUSSION

The Florida courts have adopted the federal "lodestar" method of determining the amount of attorneys' fees to be awarded in cases where a statute provides for the payment of such fees to prevailing parties. Florida Patient's Compensation Fund v. Rowe, 472 So.2d 1145 (Fla. 1985). The Florida courts also apply the lodestar method to cases involving contractual provisions for the award of attorneys' fees. Bell v. USB Acquisition Co., Inc., 734 So.2d 403 (Fla. 1999). Rowe was modified in Standard Guaranty Ins. Co. v. Quanstrom, 555 So. 2d 828 (Fla. 1990). Both Rowe and Quanstrom dealt with statutes that provide reasonable attorneys' fees and costs for prevailing parties. In tort and contract cases, Quanstrom modified the contingency fee multiplier in tort and contract cases, limiting it to 2.5 rather than 3 as in Rowe.

Counsel for Sleek, the Krywkos and Wysocki have submitted their respective evidence reflecting fees and costs for this matter, the submissions detailing the attorneys' fees by date, description of services rendered, name of time keeper and their hourly rate, as well a description of the disbursements. Jackson has challenged the fee and costs submissions on four grounds. First, he claims that the issue of the amount of attorneys' fees to be awarded is exclusively within the jurisdiction of the Florida courts, not the Arbitrator. Second, he contends that Sleek has not demonstrated that a contingency multiplier is appropriate in this case. Third, he challenges Sleek's allocation of fees and expenses between two arbitration cases, the present one and the G-Unit Brands v. Sleek Audio arbitration yet to be tried. Finally, Jackson seeks the exclusion of certain categories of Sleek's fees and expenses.

I. <u>The Arbitrator Has The Authority to Award Attorneys' Fees and Costs</u>

Jackson argues that under Section 682.11 of the Florida Arbitration Code, a court and not the arbitrator has exclusive jurisdiction to determine the amount of attorneys' fees to be awarded in an arbitration unless there is an "express waiver" of this statutory right, citing Turnberry Associates v. Service Station Aid, Inc., 651 So. 2d 1173, 1175 (Fla. 1995). However, the Federal Arbitration Act, 9 U.S.C. § 1 et seq., and not the Florida Arbitration Code governs this case. See, e.g., Mastrobono v. Shearson Lehman Hutton, 514 U.S. 52 (1995); Southland Corp. v. Keating, 465 U.S. 1, 104 (1984).

Even assuming that the Federal Arbitration Act does not supersede Section 682.11, there has been an express waiver by Jackson to have a Florida court determine the attorneys' fees. First, the respective arbitration clauses of the Operating Agreement (Joint Ex. N) and the Securities Purchase Agreement (Joint Ex. O), which were both executed by Jackson, require arbitration of "[a]ny dispute, claim or controversy arising out of or relating to this Agreement or the breach, termination, enforcement, interpretation or validity thereof. . . ." Clearly, the amount of attorneys' fees is an arbitrable dispute, claim or controversy arising out of the agreements. Also, the agreements' respective arbitration clause provides that the Arbitrator has the authority to award "any remedy or relief that a court of competent jurisdiction sitting in the state encompassing the Designated Location could grant in conformity to applicable law." Those arbitration clauses also require that any binding arbitration is to be administered by JAMS under its Comprehensive Arbitration Rules, except as modified by the arbitration clauses themselves. JAMS Rules 24(f) and (g) provide that the Award of the arbitrator may allocate fees and expenses.

Additionally, Mr. Jackson's Statement of Claim includes the following: "Accordingly, Mr. Jackson asks the Arbitrator to award him his expenses and reasonable attorney's fees associated with the prosecution of this case." Jackson's counsel also signed a Stipulation of Arbitrator dated February 7, 2012 in which he agreed on Jackson's behalf to arbitrate all claims between the parties and to give up "any rights" Jackson possessed to have the matter litigated in court. Further, Jackson's April 4, 2013 Preliminary Statement concludes with the following: ". . . Jackson is entitled to an award in his favor: . . .(2) Awarding Jackson his reasonable attorney fees and costs in defending Sleek's [sic] in an amount to be determined by the Arbitrator." Finally, Jackson's Post-Hearing Brief and Proposed Findings of Fact and Conclusions of Law both requested, again, his reasonable "attorney fees and costs in an amount to be determined by the Arbitrator. . . ."

It is clear that there have been several express waivers by Jackson to have a Florida court determine the amount of the fees and costs to be awarded to the prevailing party and that, therefore, the Arbitrator, and not a Florida court, may award the prevailing parties in this arbitration their respective reasonable attorneys' fees and costs.

II. Sleek Has Demonstrated a Basis for an Attorneys' Fees <u>Enhancement Multiplier</u>

Sleek's attorney fee submission requests approximately $1.9M in attorneys' fees (the "lodestar" amount arising from the product of the number of hours worked by Sleek's attorneys and the respective attorney's reasonable hourly rate). Sleek's counsel, under a fee arrangement with Sleek, are entitled to secure 34% of Sleek's recovery in this matter after deduction of expenses. Affidavit of Dennis K. Egan, Exhibit A to the Attorney Fee and Cost Submission of Sleek Audio, LLC. Sleek further requests that the lodestar amount be doubled as a result of the application of an "enhancement" or "contingency" multiplier which applies in cases where attorneys' fees and costs are being awarded to the prevailing party pursuant to a contract, rather than a statute. See, e.g., Bell v. U.S.B. Acquisition Co., Inc., 734 So.2d 403 (Fla. 1999);

Standard Guaranty Ins. Co. v. Quanstrom, 555 So. 2d 828 (Fla. 1990); Florida Patient's Compensation Fund v. Rowe, 472 So.2d 1145 (Fla. 1985). Under Quanstrom, various multipliers can be applied, depending on whether the likelihood of success at the outset is "success more likely than not," "even," or "success unlikely." A multiplier of 1.5 to 2.0 is applied to an "even" case which is how Sleek characterizes this case and, therefore, requests that a multiplier of 2 be applied.

Jackson contends that the Affidavit of Mark Krywko, belatedly submitted as Exhibit B to Sleek's Reply in Support of Attorneys' Fee and Cost Submission, is inadequate to show that a contingency multiplier ". . .was warranted in order for Sleek to retain competent counsel. Mr. Krywko's affidavit speaks only in generalities. Not only does it fail to enumerate which law firms Mr. Krywko consulted, it does not even say how many firms he consulted, or whether these firms specialized in contingent fee litigation (as many do, even in such complex areas as antitrust) or specialized in intellectual property litigation. . . . What also is missing are the details of the contingent fee arrangement that Mr. Krywko proposed to the other Florida firms that he says he spoke with. . . ."

Additionally, Jackson argues that four members of Sleek's law firm are also Members of Sleek itself, giving the firm an interest in representing Sleek, "if only to salvage what all parties admit had become a worthless investment and to assure repayment of loans made by such Members as Gregory Wysocki, a partner in Sleek's law firm in this case." (Emphasis added).

It is true that details are lacking in the Krywko affidavit, but even Jackson admits that "[t]here is no dispute that Sleek Audio lacked the funds to pay counsel on an hourly basis. . . ." Jackson's Sur-Reply Brief, p. 2. Thus, the "relevant market" would have required "a contingency fee multiplier to obtain competent counsel. . . ." It is not surprising that Krywko could not find competent counsel in Florida to take on this case, especially when there was no evidence at the time of commencement of the case for misappropriation of Sleek's trade secrets that Jackson would use the trade secrets in his SMS headphones since they had not yet been released when the case was filed. See Attorney Fee and Cost Submission of Sleek Audio, LLC, p. 11. What is surprising is that members of Sleek's law firm, realizing better than anyone how "worthless" their investment was in Sleek, would have agreed to potentially "throw good money after bad."

One of the Quanstrom factors to be evaluated in determining whether a multiplier is necessary is "the results obtained. . . ." Quanstrom, supra at 834. The results achieved herein by Sleek's counsel, namely, prevailing on all claims and Jackson's counterclaim, are more favorable than would have been predicted based, in part, on the evidence available at the time of the commencement of the arbitration against Jackson. However, the results certainly cannot be attributable to "inferior performance by defense counsel" who mounted a very rigorous and thorough defense on behalf of Jackson of Sleek's claims and prosecuted Jackson's claims with similar zeal. Perdue v. Kenny A., 130, S.Ct. 1662, 1674 (2010).

In view of "the amount involved, the results obtained and the type of fee arrangement between the attorney and his client," a multiplier of 2 is necessary in this matter. Quanstrom, supra at 834.

III. Sleek's Allocation of Certain Expenses Between This Case and the G-Unit Brands Case is Fair

Sleek has allocated to this matter 66% of certain costs to this case and leaving the remaining costs to the G-Unit Brands v. Sleek Audio arbitration pending in New York. However, Jackson proposes a 50/50 split of costs between this arbitration matter and the G-Unit Brands matter, arguing that there are really only two arbitrations: this case, including Jackson's counterclaims against Sleek and third-party claims against the Krywkos and Wysocki, and the

G-Unit Brands arbitration. Of course, Jackson is ignoring that this arbitration is the result of the combination of two arbitration matters involving multiple parties and numerous issues, and the G-Unit Brands matter which involves but a single claim brought by Jackson that Sleek breached the Brand License Agreement (Joint Ex. P). The present case was very complex, as compared with the G-Unit Brands matter. As an example, if focus is only on the hearing in this arbitration, this case took 9 days with 11 live witnesses, along with the deposition testimony of 5 other witnesses, plus the numerous exhibits. See Interim Award (Exhibit A). Therefore, Sleek's allocation of costs is fair and is adopted.

IV. Sleek, the Krywkos and Wysocki are Entitled to their Submitted Reasonable Attorneys' Fees and Costs

Rowe, supra at 1150, held that in determining reasonable attorneys' fees, the reviewer should address eight factors:

(1) The time and labor required, the novelty and difficulty of the question involved, and the skill requisite to perform the legal service properly;

(2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) The fee customarily charged in the locality for similar legal services.

(4) The amount involved and the results obtained;

(5) The time limitations imposed by the client or by the circumstances;

(6) The nature and length of the professional relationship with the client;

(7) The experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) Whether the fee is fixed or contingent.

Jackson has not challenged the reasonableness of the hourly rates for the attorneys and paralegals for Sleek, Krywkos and Wysocki involved or the number of hours they spent on the matter. However, he does object on several other grounds.

1. Redactions: Jackson objects to the form of Sleek's "block billing" entries whereby numerous tasks are entered covering a block of time that are "rife with redactions which make determining the nature and details of certain work performed (for example research) virtually impossible. . . ." As to the block billing form of the entries, Jackson has not provided any legal support for his contention that billing is deemed unacceptable. The Arbitrator notes that he commonly bills his clients utilizing "block billing,"

Sleek says that the redactions are necessary "because they will divulge case strategy and attorney client communications and could be harmful to any re-trial after appeal." While it may be debatable whether all of the redactions would be harmful to Sleek in divulging case strategy or work product at this late date in the proceedings, nonetheless, they don't hide the nature of the work performed (i.e. "research", "conference with XX"), just the respective subject matter of that work, such as the topics researched or what was discussed at the conferences between or among counsel. Again, Jackson has not cited applicable law regarding the unacceptability of such time entries, redacted or not.

Sleek has separately laid out and tabbed its various costs, such as those relating to "Arbitration Hearing and Hotel Costs – Marriott West Palm Beach" and "Internal Reproduction

Costs" as just 2 examples, under which are the respective invoices and receipts reflecting the particular cost sought to be reimbursed. Additionally, each category of costs is prefaced with a summary chart of the respective costs and an indication as to which costs were being allocated between this arbitration and G-Unit Brands. Also, even with the redactions, Jackson was able to parse the fees and costs sufficiently for him to prepare a chart that set out some of his objected-to fees, expenses and/or costs sought for a particular matter, such as mediation and attorneys' travel time. See, e.g., pp. 11, 14 and 15, Curtis J. Jackson's Response to Attorney Fee, Cost and Expense Submission. Thus, the timesheets and record keeping of Sleek (even with the redactions) and the other prevailing parties reflecting their respective attorneys' fees, expenses and costs do not appear to be "inadequate, confusing or imprecise." Dr. Gail Van Diepen, P.A. v. Brown, 55 So.3d 612, 614 (Fla. 5th DCA 2011).

2. <u>Mediation</u>: Prior to the arbitration, the parties unsuccessfully mediated this dispute. Jackson argues that the mediation was entirely separate from the arbitration and, thus, Sleek is not entitled to recover attorneys' fees or expenses from the unsuccessful mediation. However, the Operating Agreement required that the parties mediate the dispute "prior to commencement of mediation. . . .The parties further agree that they will share equally in the costs of mediation, other than each party's attorneys' fees." Joint Ex. N, para. 9.1. In fact, the title of Section 9.1 is "Arbitration" so that both Jackson and Sleek considered the mediation proceeding to be a prerequisite to any arbitration.

Sleek has withdrawn its request for Jackson to pay Sleek's share of the mediator's fees (i.e., the "costs of mediation") in the amount of $11,712.84 but it is entitled to recover its attorneys' fees and costs associated with the mediation.

3. Attorney Fees for Travel Time: Jackson objects to the recovery of travel time for Sleek's counsel. The Florida Statewide Uniform Guidelines for Taxation of Costs in Civil Cases does not provide for recovery of attorney travel time and expenses as "reasonable" attorney fees or costs. In re amendments to Uniform Guidelines for Taxation of Costs, 915 So.2d 612 (Fla. 2005). However, as the Guidelines state, they ". . .are advisory only. The taxation of costs in any particular proceeding is within the broad discretion of the trial court. . . ." As discussed above, Sleek was unable to obtain Florida counsel which can be the basis for allowing the recovery of Sleek's counsels' travel time and expenses. See, Centex-Rooney Const. Co., Inc. v. Martin Cnty, 725 So.2d 1255, 1261 (Fla. Dist. Ct. App. 1999). This case involved witnesses and parties in multiple states and necessitated travel. As such, Sleek's counsel's travel time and associated costs are recoverable.

4. Arbitration Hearing Costs: Jackson contends that the travel, food and lodging expenses of Sleek's out-of-town litigation team should not be shifted to Jackson because it did not use Florida counsel. Those expenses are recoverable because of Sleek's inability to obtain Florida counsel, as discussed above.

5. Westlaw: Jackson claims that $17,077.21 of the total $20,628.94 in Westlaw research expenses on behalf of Sleek should be deducted, because Jackson cannot tell exactly what was researched in view of the redactions of the subject matter or issue researched. Jackson argues that because there is no specification of the subject matter researched," it is not possible to determine if work was done multiple times, by multiple timekeepers." It is not clear why that would be of concern, even if Jackson knew of the subject matter researched, as it is not uncommon to conduct Westlaw searches of the same subject matter by different people, thereby researching the issue from different perspectives. Further, the amount expended on

computerized research for a case of this complexity appears to be very reasonable and will be allowed.

6. D-4 Legal Costs for Document Storage: Jackson objects to invoices from an outside E-discovery vendor, D4, LLC, of the cost of maintaining documents subsequent to the end of the post-hearing briefing. Sleek is entitled to those document hosting costs, because it was uncertain whether those records would be needed for the post- hearing brief, if additional post-hearing filings would be required and/or whether additional documents would be requested by the Arbitrator. As soon as Sleek's counsel was certain it did not need to retrieve further documents, the documents were stored. The bill at issue was for hosting of documents during the month of March 2011. The arbitration ended in March and the post-hearing briefs were not yet completed by the D4 invoice date of March 31, 2013. Therefore, all of the D4 costs are recoverable

7. Patent attorney fees: Sleek's counsel consulted a patent attorney to determine what impact, if any, the patent opinion obtained by Jackson, and referenced in discovery documents, would have on this arbitration. In addition, the patent attorney was consulted on issues of trade secrets and how any patents might affect a trade secrets case. These fees are recoverable.

8. Blackburn's Fees and Costs: Jackson contends that Sleek is not entitled to recover attorneys' fees, costs or expenses associated with its expert, Tom Blackburn, who Sleek chose not to call as a witness at the hearing. Sleek's response is that when it became clear at the hearing that its testifying expert, Dr. Bursal, would be able to respond to all areas of inquiry from Jackson's counsel, Sleek decided that Blackburn's testimony was cumulative. However, Sleek contends that there was no way of knowing that Blackburn would be cumulative until counsel for

Jackson completed his questioning of Dr. Bursal. In view of that, the fees and costs attributable to Blackburn are recoverable.

CONCLUSION

Incorporating the Conclusion from the Interim Award and based on the findings and analysis set forth above, the Arbitrator hereby presents a final Conclusion that:

1. Sleek's claim of misappropriation of Sleek's trade secrets by Jackson is GRANTED;

2. Sleek's claim of breach by Jackson of his duty of confidentiality to Sleek is GRANTED;

3. Sleek's claim of civil conspiracy by Jackson is GRANTED;

4. Sleek's claim of breach by Jackson of his non-disclosure agreement with Sleek is GRANTED;

5. Sleek's claim of unjust enrichment by Jackson is GRANTED;

6. Jackson's claim that the Krywkos and Sleek fraudulently induced Jackson into entering into the SPA1 and investing in Sleek is DENIED; and

7. Jackson's claim that the Krywkos breached their fiduciary duties to Sleek and Jackson by their gross mismanagement of Sleek is DENIED.

8. Sleek is awarded the sum of $11,693,247.

9. All other claims, counterclaims and demands for relief are DENIED.

10. As the prevailing parties, Sleek, the Krywkos and Wysocki are entitled to their respective reasonable attorneys' fees and costs, as follows:.

Party	Fees	Costs	Total
Sleek	$3,792,901.83 (includes 2.0 contingency multiplier)	$525,941.53 (after deducting JAMS fees of $11,712.84)	$4,318,843.36
Krywkos	$112,320.00	$6,341.47	$118,661.47
Wysocki	$45,078.75	$5,747.59	$50,826.34
TOTAL	$3,950,300.58	$538,030.59	$4,488,331.17

July 15, 2013
Date

William H. Needle
William H. Needle, Arbitrator

EXHIBIT A TO FINAL AWARD

JAMS

ATLANTA, GEORGIA AND NEW YORK, NY

SLEEK AUDIO, LLC, Claimant, --against – CURTIS J. JACKSON, III, Respondent. And CURTIS J. JACKSON, III, --against – SLEEK AUDIO, LLC *et al.* Respondents.	JAMS Ref. Nos. 1440003176 and 1440003314

INTERIM AWARD

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Arbitrator:
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Place of Arbitration: West Palm Beach, Florida

Date of Final Award: May 2, 2013

Procedural Background

The undersigned Arbitrator has been designated in accordance with Section 7.4 of the April 10, 2010 Securities Purchase Agreement between Sleek Audio, LLC ("Sleek") and Curtis J. Jackson, III ("Jackson"). This arbitration is a consolidation of two arbitration proceedings among the parties. JAMS Arbitration Ref. No. 1440003176 addresses claims by Sleek against Jackson for:

(a) Misappropriation of trade secrets or confidential information of Sleek under the Florida Uniform Trade Secrets Act;

(b) Breach of Jackson's fiduciary duty as a member and director of Sleek regarding the Sleek by 50 over-the-ear ("OTE") headphone sold by Jackson's company, SMS Audio, LLC ("SMS");

(c) Civil conspiracy;

(d) Breach of his non-disclosure agreement with Sleek; and

(e) Unjust enrichment.

Prior to the hearing, Sleek withdrew its claims for tortious interference, violation of the Lanham Act and fraud, misrepresentation and inducement.

JAMS Arbitration Ref. No. 14400003314 asserts claims by Jackson against Sleek and Respondents Mark Krywko, Jason Krywko and Michael Krywko (collectively, the "Krywkos") for:

(a) Sleek and the Krywkos fraudulently inducing Jackson to enter in the Securities Purchase Agreement dated April 20, 2010 (the "SPA1") under common law; and

(b) The Krywkos breaching their fiduciary and contractual duties owed to Sleek and to Jackson by their gross mismanagement of Sleek.

Prior to the hearing, Jackson withdrew his claim for fraudulent inducement of Jackson to enter into the Securities Purchase Agreements and Operating Agreement in violation of the Securities Act of 1933. While there was no pleading in his Demand for Arbitration in JAMS Arbitration Ref. No. 14400003314 (Joint Ex. C) of his common law claim for fraud in the inducement, it will nevertheless be addressed herein.

Mr. Gregory Wysocki was initially a Respondent in JAMS Arbitration Ref. No. 14400003314 but was no longer a party to the arbitration as a result of the February 8, 2013 Partial Final Award re: Respondent Gregory Wysocki's Motion for Summary Judgment. The Arbitrator found that Mr. Wysocki was entitled to a judgment as a matter of law on Claimant Jackson's derivative claim of breach of fiduciary duty, the only claim then-remaining against Mr. Wysocki.

Plenary arbitration hearing sessions were conducted before the Arbitrator in West Palm Beach, Florida, at which evidence was adduced on February 18-20, 22, 25-28 and on March 1, 2013, during which the parties presented a substantial number of documentary and other types of evidence and testimony was taken from the following fact and expert witnesses:

- Respondent Mark Krywko, Chief Executive Officer of Claimant/Respondent Sleek;
- Respondent Mike Krywko, Chief Financial Officer of Claimant/Respondent Sleek;
- Respondent Jason Krywko, Chief Operating Officer of Claimant/Respondent Sleek;
- Respondent/Claimant Curtis Jackson, III ("Jackson");
- David Gil, former Marketing Director of Sleek;
- Dr. Faruk Bursal, an expert witness presented by Sleek on the issue of liability;
- Rodney Crawford, CPA, an expert witness presented by Sleek on the issue of damages;
- Gregory Collins, CPA, a business and financial advisor to Jackson;
- Nicolee ("Nikki") Martin (plus designated testimony from her deposition), who runs G-Unit Records and is Vice-President of SMS Audio, LLC ("SMS Audio");
- Jason Hardi (plus designated testimony from his deposition), who worked on the headphones at issue for both Sleek and SMS Audio; and
- Brad Feinstein, formerly associated with Lighthouse Financial and more recently with Titan Worldwide Entertainment.

Only deposition testimony was designated for the following individuals:

- Brian Nohe, President of SMS Audio, both as an individual and as a designated 30(b)(6) witness from SMS Audio;
- Beau Reid, a graphic designer who worked on the headphones at issue for both Sleek and SMS Audio;
- Gregory Wysocki, a Sleek Director; and
- Mazen Allawi, Senior Application Engineer at Microchip.

Robert Anders, an industrial design expert witness, was presented by Jackson through his expert report.

The parties submitted pre-hearing briefs and post-hearing findings of fact and conclusions of law. Counsel for each party were unusually skilled and efficient, and each side's case was thoroughly and vigorously presented and argued.

The Arbitrator has carefully reviewed and considered the testimony, the documentary and other evidence, the allegations and arguments of counsel and the pre-hearing briefs and post-hearing findings of fact and conclusions of law and finds, concludes and issues the following Interim Award. This Award is an Interim, rather than a Final, Award, because Section 7.4 of the April 10, 2010 Securities Purchase Agreement between Sleek and Jackson provides that "[t]he prevailing party in any . . .arbitration shall be entitled to an award of reasonable attorneys' fees and costs. . . ." The Arbitrator interprets the word "shall" in Section 7.4 to mean "must."

Since no evidence or testimony regarding the parties' attorneys' fees and costs was received in the record of the final hearing, both Sleek and Jackson's post-hearing briefs request that the Arbitrator determine the amount of reasonable attorneys' fees and costs that are to be awarded to them as the respective prevailing party. The Krywkos' post-hearing brief requests that the Arbitrator award attorneys' fees and costs to Sleek.

Therefore, the Arbitrator retains jurisdiction in this arbitration for the parties to submit to the Arbitrator their written positions on the amount of reasonable attorneys' fees and costs to be awarded to the prevailing party in accordance with the schedule set out in the Conclusion, after which the Arbitrator shall enter a Final Award which will adopt the herein findings of fact and conclusions of law and shall include the amount of the reasonable attorneys' fees and costs to be awarded to the prevailing party.

This Interim Award contains statements of facts found by the Arbitrator to be true and necessary to this Award. To the extent that this recitation may differ from, and does not include a reference to or analysis of every element of, any party's position, that is the result of determinations by the Arbitrator as to credibility, relevance, burden of proof considerations, legal principles and the weighing of the evidence, both oral and written. Save for the amount of reasonable attorneys' fees and costs to be awarded to the prevailing party, this Interim Award resolves all the claims and counterclaims raised in the parties' respective demands for arbitration (as amended by Sleek's and Jackson's respective withdrawal of certain claims prior to the final hearing) and subsequent submissions. To the extent that any claim, counterclaim or demand for relief is not specifically addressed herein, it is hereby denied.

FINDINGS OF FACT

A. Sleek Audio, LLC

Based upon his significant experience in custom hearing aids as a licensed hearing aid specialist, Respondent Mark Krywko formed Sleek in Florida in 2006 to make and sell custom molded earphones made for an individual's ear canal. He became a member of the company and its Chief Executive Officer; his son, Respondent Jason Krywko, became a member and the Chief

Operating Officer; and Respondent Mark Krywko's brother, Respondent Mike Krywko (who was a CPA) became a member and Sleek's Chief Financial Officer. (Tr. 123-124).[1]

Mark Krywko developed Sleek Audio's products, the SA6, the SA7 and the SA1 products, in addition to wireless products that accompanied those products. Tr. 116-117. The SA6s were the first tunable in-ear headphones and won the Innovations Honoree award at the 2009 Consumer Electronics Show ("CES"). Tr. 103; 139-140. The SA7 received a Best of Innovations Award at the 2011 CES Show. (Tr. 512). The history of Sleek and its products is further summarized in a 2009 marketing plan (Sleek Ex. 58; Tr. 140-141), and in some articles, (Sleek Ex. 59; Tr., 141-142).

B. **Sleek's Search for Money**

In 2009, Sleek was experiencing "cash shortfalls" and was in need of funds to, among other things, generate an inventory of its existing inventory of "Legacy" products, the SA1 and SA6 earbud products, as well as to finish the development of a new product, the SA7 earphone that would allow for a deeper base ("louder music") than the SA6. Tr. 136-137, 158, and 1667. The cash shortfall got worse as the year progressed, with Sleek owing a lot of money to its vendors. Tr. 1665-1667; Sleek Ex. 523.

Through Jared Jefferies, an individual who was then a New York Knicks basketball player and who had invested $200,000 into the company, Sleek retained a New York City brokerage house MultiTrade to attempt to raise an additional $1.3 million by the end of 2009. Tr. 138, 608-609. MultiTrade was unsuccessful, but one of its representatives, Shawn Rogers,

[1] References herein to hearing transcripts will be "Tr. [Page]". References herein to deposition transcripts will be "[Witness] Dep. Tr. [Page]". Only one witness was deposed over more than one day. Witness Brian Nohe was deposed both individually ("Dep. Tr. I") and as a designee of SMS Audio ("Dep. Tr. II"). References to hearing exhibits will be "Jt. Ex. ___", "Sleek Ex. ___" and "Jackson Ex. ___".

knew Greg Collins, who was Jackson's business and financial manager. Tr. 138. In January, 2010, MultiTrade's owner, Michael Morfit, bridged the Sleek engagement over to his brother Jeffrey's company, Lighthouse Financial. Tr. 139.

C. **Sleek Meets Jackson**

In January, 2010, Jeffery Morfit and Brad Feinstein, a Lighthouse employee, arranged for Mark and Jason Krywko to meet with Jackson in New York. Jackson is a well-known entertainment figure who has the stage name "50 Cent." Also at the meeting were Feinstein, Collins and Jackson's business manager, Nicolee ("Nikki") Martin. Tr. 139. Previously, one of Jackson's business associates, professionally known as Dr. Dre, had launched a successful headphone line called Beats. Jackson was not interested in investing just in Sleek's earbud business; what he wanted was to have Sleek design and make for him OTE wireless headphones. While Jackson knew even before his first meeting with the Krywkos that the company had not previously made an OTE headphone Tr. 147-148, 960-961, 1246 and 1399), he had no interest in investing in the company if Sleek couldn't build the headphones. Tr. 1242. As Jackson testified: ". . . I wanted to produce the actual headset, like the overhead headset, not really what the product they had there, it was cool but it was like niche, like really a tech guy enjoys it, not like the everyday person might [use]." Tr. 955-956.

Mark Krywko said of that meeting with Jackson:

> **A. He had told us that the headphones were more interesting to him because he saw the success that the Dr. Dre Beats [headphones] had on the market. And that he wanted something that could be worn like jewelry, but he also wanted something that sounded good as well, and that's why he was interested in what we could do for him because, acoustically, we knew what we were doing with putting out sound and how the ear perceives it.**
>
> * * *

> Q. Were you adverse to the concept of an endorsement deal as opposed to an investment?
>
> **A. No, not at all. We were looking for funding and I had no objection to it.**

Tr. 146.

The Krywkos expressed to Jackson at that meeting that they could transfer their wireless earbud technology to a headphone. Tr. 1240. After the first meeting with Jackson, Mark Krywko consulted with Dynamic Innovations, which had worked on the design and manufacturing of Sleek's earbud products, to see if they could also design and build the OTE headphones, even though Dynamic had also not ever designed or built such a product. Tr. 149-152. Satisfied that they could make the OTE headphone, the Krywkos had a second meeting with Jackson where Jackson gave Mark Krywko general information on how he wanted the headphones to sound and he was provided with some very preliminary sketches of a headphone. Sleek Ex. 91; Tr. 155. At the second meeting, among other things, Mark Krywko suggested that screws and carbon fiber/Kevlar be used as part of the design. Tr. 155-56. The parties decided to move forward with the project (Tr. 155-156), and Jackson agreed to invest $1.3 million dollars in Sleek and also to become a member of the company; the next step was to negotiate a contract between Jackson and Sleek. Tr. 1243-12487; *see also* Tr. 156-157. Jackson knew that the headphone was a new product for Sleek and the Krywkos and that it was different than designing an earbud. Tr. 997-999.

When asked at the hearing why the investment amount that Sleek was seeking from Jackson in 2010 was the same $1.3 million it had sought to raise in 2009--when Sleek only had its "legacy products" -- Mark Krywko testified that "everyone" knew that an additional $3-$5 million was needed to develop the Sleek by 50 headphone. Tr. 158-159, 1797-1798; *see, also*

Tr. 630. Not surprisingly, there is a dispute between the parties as to whether "everyone" knew that.

D. Sleek and Jackson Enter Into the Securities Purchase Agreement ("SPA1")

What is not in dispute is that on April 20, 2010, the parties entered into a Securities Purchase Agreement ("SPA1"). Jt. Exhibit O. Collins testified that, prior to the execution of SPA1, he didn't "investigate" the financial condition of Sleek Audio but did look at the Sleek financial statements (Sleek Ex. 209 and 210), contracts, tax returns and "got some background material regarding the debt of the company" to make sure that everything was consistent. Tr. 1247, 1250; 614. Indeed, Collins did not dispute the statements in the SPA that Sleek had provided Jackson with copies of its 12/31/09 balance sheet, income statement and statement of cash flows or the representation that those financial statements fairly represented the financial condition of Sleek. Tr. 1380-81. There was, in his words, "a general due diligence," leaving him with an understanding that the company was "cash poor." Tr. 1250. But his "due diligence" efforts apparently were not sufficient for him to "know prior to the investment how these guys were with cash, and . . . what they actually were going to do with cash even though we agreed on a Use of Funds. So I didn't know what kind of a burn rate they would have." Tr. 1286.

Sections 2, 3 and 7 of the SPA1 contain warranties and representations, certain of which are set out below:

SECTION 2. REPRESENTATIONS AND WARRANTIES OF THE COMPANY

> § 2.1 (l) Use of Proceeds. The aggregate purchase price received by the Company from the Investor shall be used pursuant to the Use of Proceeds attached hereto as Schedule 2.1(l). . . .
>
> § 2.1 (m) The Company has delivered to Investor its unaudited financial statements (including balance sheet, income statement and statement of

cash flows) as of December 31, 2009 for the fiscal year then-ended (the "Financial Statements")....

§2.1(o) To the Company's knowledge, since December 31, 2009, there has been no event or circumstances of any kind that have had or reasonably be expected to have a material adverse effect on the Company, its business, operations or prospects.

SECTION 3. INVESTOR REPRESENTATIONS

§ 3.1 (f) The Investor acknowledges that the Company has not made any written representations, warranties or covenants in respect of the Company, its business, results of operations, financial condition or prospects, or the offering of Membership Interests to be purchased pursuant to this Agreement except as expressly set forth in this Agreement and the Operating Agreement without limiting the generality of the foregoing, except as may be provided herein, no person has made any written or oral representation to the Investor that any person will re-sell or repurchase the Membership Interests or refund any of the purchase price of the Membership Interests.

§ 3.1(j) The Investor is sufficiently knowledgeable and experienced in making of investments so as to be able to evaluate the risks and merits of his investment in the Company, and is able to bear the economic risk of loss of its investment in the Company.

§ 3.1(l) The Investor believes he has received all the information he considers necessary or appropriate for deciding whether to purchase the Membership Interests. The Investor has had an opportunity to ask questions and receive answers from the Company regarding the terms and conditions of the offering of the Membership Interests and the business, properties and financial condition of the Company. . . .

SECTION 7. GENERAL

§ 7.8 Integration. This Agreement, including the exhibits, documents and instruments referred to herein or therein, constitutes all of the Agreements and supersedes all other prior Agreements and understandings, both written and oral, among the parties with respect to the subject matter hereof.

Securities Purchase Agreement dated April 22, 2010, Joint Exhibit O.

(The parties also executed a November 2010 Securities Purchase Agreement ("SPA2") which contained the same representations and warranties. Jackson Ex. 744.)

"Knowledge of the Company" in Section 2.1 was defined in Section 2.2 as "the actual knowledge of the Officers of the Company, assuming reasonable inquiry." Jackson did not present any testimony that Sleek breached those warranties and representations. To the contrary, Collins testified that he had no reason to believe that Sleek had breached its warranty and representation in SPA1 and that the financial statements fairly presented the financial condition and operating results of Sleek. Tr. 1380-81.

E. **"Additional Funding"**

Additionally, SPA1 included Schedule 2.1(l) entitled "Use of Funds" that delineated how Jackson's $1.3M investment was to be applied. Most importantly, the Schedule also contained the following statement that Michael Krywko insured was in the agreement: "**Use of Proceeds presently expected to provide the Company with sufficient working capital until June 15, 2010. . . .**" (Emphasis added). Of the total investment, only $248,950.96 was allocated to the "50 product line development & inventory" because, as Collins testified, the Krywkos said "that would be enough to do it." Tr. 1255.

However, since Sleek had not built an OTE headphone before, Mark Krywko did not know how much it would cost to build the headphone because it had not been designed yet. Tr. 168. Also, Feinstein understood that the $248+K was not enough to design and make the whole OTE headphone product and testified that he told Jackson and his representatives that before the deal closed. Tr. 1920. Jackson also testified that he understood that all of his $1.3M was not going to be used for the headphone (Tr. 825) and that the $248+K would result in a prototype, but "[i]t wasn't going to do the whole thing. . . . " Tr. 1007.

On July 29, 2010, Michael Krywko sent an email to Collins and copied Feinstein and Martin in which he stated:

> At the time of closing everyone acknowledged that there would be a need for additional funding by the end of July. . . . The need for funding was addressed several times over the past months through submitted cash flow projections as well as various meetings and discussions.

Sleek Exh. 151.

At the hearing, Collins testified that the above statements in the e-mail were not accurate in terms of what was being represented by Sleek to the Jackson team at the time of the negotiations regarding the SPA1. Tr. 1294-1295. But he certainly became aware of Sleek's additional cash needs very soon after the execution of the SPA1 when, on May 18, 2010, Michael Krywko sent Collins a "proposed 2010 budget/cash flow" (Sleek Exh. 148). Collins responded by email on June 7, 2010 (Sleek Exh. 149) that "[t]he one thing that is certain is that you are going to need cash soon. . . .*I anticipate that you are going to need $2 to $3 million over the next six to nine months* and we need to figure out the best way to get that money into the company! . . ." (Emphasis added).

F. **Second and Restated Operating Agreement (the "Operating Agreement")**

Another agreement, the Second and Restated Operating Agreement (the "Operating Agreement"), was also entered into by the parties on April 22, 2010 (Joint. Ex. N), Sleek's first Operating Agreement having preceded Jackson's investment into Sleek. The Operating Agreement includes the following confidentiality provision:

> 9.24 Confidentiality. Confidential Information shall be defined as all non-public material and information concerning any matters relating

> to the business of the Company, as well as the personal and financial information of Members and, to the extent applicable, the family members of Members who are individuals and the affiliates of Members who are entities, and all trade secrets, know-how, ideas, concepts and methodologies incorporated therein, including, without limiting the generality of the foregoing, any of such information concerning manner of operation, plans or other data without regard to whether all of the foregoing matters will be deemed confidential, material or important, and it is agreed that the same are important, material and confidential and gravely affect the effective and successful conduct of the business of the Company and its good will and, in the case of Confidential Information of Members, gravely affect Members.

Under Section 5.1.3 of the Operating Agreement, Jackson was appointed to the Board and he continued as a member of Sleek's Board at least through the hearing; Section 5 further specified that the initial Finance Committee would be Mark Krywko, Gary Hòbbib and Collins. Jt. Exhibit. N, § 5.1.1. Collins served on the Finance Committee from April 22, 2010 through at least the hearing. Tr. 618, 1275-76. Mike Krywko regularly kept Collins informed regarding the financial condition of Sleek, particularly about the company's cash needs. Sleek Ex. 149, 150, 159, 153-58, 160-63; Jackson Ex. 520.

Section 3.4 of the Second Operating Agreement specified the amount of guaranteed payments that were to be paid to the Krywkos. *See* Schedule B attached to Jt. Exhibit. N. Jackson subsequent contentions that the guaranteed payments set out in Schedule B were too high or should not have been made in view of Sleek's cash needs was waived at the time the Agreements were signed. However, Mark Krywko testified that there were only 3 "full" monthly payments made on those guaranteed amounts and that they then were reduced by 50% and then went down to 25% a few months after that, in view of cash flow problems. Tr. 1733.

G. **Brand License Agreement**

Also on April 22, 2010, Sleek and G-Unit Brands, Inc., a Jackson company, executed a "Brand License Agreement" which stated in Paragraph 4b that "Sleek Audio shall use best efforts to provide prototypes of each Headphone Product to G-Unit on or before October 15, 2010, for review and approval by G-Unit as provided herein, and to launch the retail sale of the full line of both Headphone and Custom Ear Bud Products on or before February 15, 2011." Testimony was taken and exhibits were introduced at the hearing relating to whether Sleek complied with this provision. The Arbitrator understands that whether any alleged breaches of the Brand License Agreement occurred is not at issue in this case as that will be addressed in another arbitration pending between the parties in New York.

H. **The Sleek by 50 Headphone**

The headphone produced by Sleek was called the "Sleek by 50." It is the Arbitrator's position that it is not necessary to a recite in this Interim Award all of the myriad of details introduced into evidence relating to the design and development of those headphones including, as merely examples, the exterior design renderings and their approval by Jackson, the "prototype" of the Sleek by 50 headphones, the 2011 Computer Electronic Show and the TV Goods/Sleek agreement, in order to evaluate and consider the parties' claims, *infra*.

I. **Sleek's Trade Secrets**

(a) **The Gimbal Mechanism in the Sleek by 50 Headphone**

Sleek's expert, Dr. Faruk Bursal, has a Bachelor of Science degree from MIT, a Master of Science degree from the University of California – Berkley, and a Ph.D. from the University of California – Berkley, all in mechanical engineering. Tr. 414. He presented a competent expert opinion based on his significant knowledge, his 20-plus years of mechanical engineering experience and, in particular, his almost 10 year experience dealing directly with headphones as the manager of all mechanical engineering operations in the Bose Design Center where his duties included the design of headphones. Tr. 424, 441.

Jackson's current headphones, the Synch by 50, and the Street by 50 are basically the same design, mechanically, but the Synch by 50 is a wireless model and the Street by 50 is wired. Tr. 442. Dr. Bursal opined that Jackson's Street by 50 and Synch by 50 headphones "share a multitude of mechanical design details with the Sleek by 50, without having the same features in common with other headphones cited as similar by Jackson or, indeed, any other exemplar headphones that" he had been able to locate." Tr. 429, 444; Sleek Expert Exh 1. In his opinion, the "design of the Synch by 50 – and therefore the Street by 50 – was copied from that of the Sleek by 50." Tr. 429. Further, he stated that "[t]he likelihood of such an overlap of features and design details to be arrived at independently by two design groups is infinitesimally small [*i.e.*, 'so small as to be practically zero']." Tr. 444-445 and 429, 497.

Dr. Bursal particularly considered Sleek's paddle-gimbal mechanism to be "truly a unique piece," because he had never seen it before, not in his years at Bose or in the research that he did for this matter. Tr. 434. Mark Krywko testified that he began working with Beau Reid from Dynamic Innovation on concepts and renderings for the headphones, including the gimbal design. Tr. 166-167, 237-240; *see also* Reid Dep. Tr. 73, 80-82. (In October 2010, Jason Hardi also became involved with the Sleek by 50 headphones on behalf of Sleek, but he had "minimal involvement" in its design. Tr. 1535-1536.) Reid, who is not an engineer and does not have a degree in engineering, had never previously designed headphones (Reid Dep. Tr. 32, 49) so his opinion that the gimbal design in the Sleek by 50 was "not unique in any way" (Reid Dep. Tr. 216) is not considered credible, by the Arbitrator.

Dr. Bursal did not disassemble several of the third-party headphones that he examined in arriving at this opinion, because of "the feel of the headphone and the absence of any resistance . . . [led him] to *suspect* that" the headphones did not incorporate a gimbal with foam pads. Tr. 486. At the hearing, Dr. Bursal physically examined a Soul by Ludacris SL 300 headphone (Exhibits 1209-1215) which he had previously looked at in a store but had not disassembled. That headphone had a "unique two-dimensional, two-axis gimbal piece" (Tr. 461) but it was "nowhere the same" as the Sleek and Jackson gimbals. Tr. 463.

It is noted that some witnesses testified that the gimbal design was not proprietary. For instance, Brian Nohe, President of SMS Audio (Jackson's company that has manufactured and markets his Synch by 50 and Street by 50 headphones), testified that he could "go find . . . 2000 headphones that have the exact same design" (Nohe 1/16/12 Dep. Tr. 79), but did not present any evidence that might have supported that opinion. He wasn't "a technical guy" (Nohe 1/16/12 Dep. Tr. 71; *see also* Tr. 67) and his previous position was with his own company that sold earbuds and earphones (but not headphones) that were designed and manufactured by others.

Based upon his extensive experience with headphones and the fact that Jackson presented no credible evidence that the Sleek by 50 paddle-gimbal design existed in any third-party headphone at the time of the development of the Sleek by 50 headphone, the Arbitrator accepts as credible Dr. Bursal's conclusion that those third-party headphones did not have a gimbal/pad mechanism similar to the Sleek-designed headphone.

It is undisputed that the exterior of the Sleek by 50 headphone was publicly displayed at the 2011 CES, resulting in any exterior design features of the headphones being in the public domain and incapable of being considered thereafter to be trade secrets of Sleek. *See, e.g.*, Tr. 309-316; Jackson Exh. 1246. However, the design of the gimbal would not have been available to the public at the time of its misappropriation, since there had been no offer for sale or sale of Sleek OTE headphone so it would not have been either "generally known to" or "readily ascertainable" by others who might profit from its use or disclosure. *See, e.g.*, Tr. 474-475. The fact that it would have been readily ascertainable through reverse-engineering once the product was put on the market does not impact on the fact that its internal mechanical design was not previously shown to the public and remained a trade secret at the time of its misappropriation. That is true even though, as the design work on the Sleek by 50 headphone began, Sleek and Dynamic reverse-engineered several OTE headphones that were already on the market to see if they could incorporate into the Sleek by 50 features from those third-party headphones. *See, e.g.*, Tr. 271, 275.

According to Dr. Bursal, the gimbal mechanism is valuable for several reasons: (1) it gives the earphones a more solid and robust feel; (2) it prevents the inner earcup from rattling relative to the outer earcup when it is shaken; and (3) it allows the entire center of the earcup to be used for the positioning of a printed circuit board so the PCB can be pushed as far as possible to the outside of the earcup, which allows the acoustic volume to be maximized and provides a deeper base sound. Tr. 435-437, 442. Dr. Bursal opined that Sleek's gimbal mechanism was a better design than that in the Beats headphones because of Sleek's increased acoustical/volume. Tr. 444. Thus, Dr. Bursal established the "independent value" of Sleek's gimbal mechanism in the marketplace and that it is "not generally known."

Dr. Bursal testified that the overall integration of the components in the Sleek by 50 headphone was also unique (Tr. 67-68) and that the value of the Sleek headphones comes from the fact that all of the parts have to come together to produce something that is unique and performs as intended (the whole is greater than the sum of the parts). Tr. 472-73.

Mark Krywko's videos of his comparison of the Sleek by 50 with the Synch by showed that several of the inner parts of the Sleek by 50 and the Synch by 50 and Street by 50 headphones were the same. Sleek Ex. 60. For instance, the Sleek by 50 model gimbal and ring or cup matched the gimbal and ring dimensions of the Sync product, such that the retaining ring from the Sync design can be fitted perfectly on the Sleek gimbal. Tr. 266-268.

Dr. Bursal could not opine on the ultimate issue, namely, whether the gimbal mechanism is a trade secret of Sleek, because he was not advised by Sleek of any facts relating to whether reasonable steps had been taken by the company to protect the design of its gimbal mechanism. As to whether Sleek took the necessary steps to ensure that the gimbal mechanism was "not readily ascertainable," the following sets out the substantial protective plans and procedures Sleek took to maintain the secrecy of all of its information:

(a) Sleek has written confidentiality agreements with all of its employees. (Tr. 353-354; 506);

(b) Sleek's computer network system is password protected. (Tr. 355);

(c) Sleek has a program that segregates its confidential information or trade secrets on the company's computer network. (Tr. 355-56);

(d) When Sleek employees want to access confidential files, a password is required; the password grants that person limited access to the information on the system. (Tr. 356);

(e) Sleek's computer network was not accessible remotely. (Tr. 357);

(f) All Sleek employees have password protections on their cellphones. (Tr. 358).

(g) Sleek has a routine practice of requiring people and companies who are bidding for work with Sleek to sign a Non-Disclosure Agreement ("NDA") even before Sleek enters into a contract with that person/company. (Tr. 359);

(h) Before the Sleek by 50 headphone was designed, everyone from Jackson's team signed a non-disclosure agreement. (Tr. 158);

(i) Sleek had non-disclosure agreements with all the people and companies it dealt with in connection with the Sleek by 50 product. (Tr. 283);

(j) At all times, Sleek Audio kept the inside of the earcup secret and confidential. (Tr. 773);

(k) Sleek employees were not even allowed to see the design of the inside of the earcup. (Tr. 773-74); and

(l) Sleek's policy was they would not receive bids from a company unless that company first signed a non-disclosure agreement. (Tr. 234).

Additionally, Sleek required all vendors to sign confidentiality agreements and Non-Disclosure Agreements ("NDA") when working with or for Sleek. Tr. 519-20. Mark Krywko testified that Sleek had an NDA with Dynamic and Standard Microsystems Corporation ("SMSC") and its predecessor Kleer (Tr. 359) that confirms the deposition testimony of Mazen Allawi, the Senior Application Engineer with Microchip (the successor to SMSC), that SMSC would not talk to customers unless there was a non-disclosure agreement in place. Allawi Dep. Tr. 27. Allawi also testified that he was told not to release any Sleek material without Mark Krywko's approval and he did not do so. Allawi Dep. Tr. 82-83. Sleek was reasonable in its belief that SMSC would honor both its written and verbal extension of those agreements to keep Sleek's information confidential, because it refused to release any information without Sleek's approval. Tr., 773. Jackson knew that Sleek controlled the files at SMSC relating to the Sleek by 50 product; that under Kleer's Statement of Work (SOW), it honored an agreement with Sleek to keep its information confidential; and that SMSC would not give those files to Jason Hardi without authorization from Sleek. Tr. 843-44; Jackson Ex. 962. No evidence was presented that SMSC ever violated its confidentiality to Sleek.

Mark and Jason Krywko testified that Sleek had a signed Confidentiality Agreement with Dynamic Innovations, although no such agreement was introducted into evidence. Tr. 171, 229, 280, 768-769. Sleek had worked on several projects with Dynamic Innovations before meeting Jackson. Tr. 143. Sleek was comfortable working with Dynamic Innovations because it was a military contractor, and it stressed confidentiality. Tr. 172. Contemporaneous with the SPA1 and the other agreements being finalized (around April, 2010), Mark Krywko began working with Dynamic Innovations, and specifically Beau Reid, to work on concepts and renderings of ideas for the headphones. Tr. 166-67.

Reid understood that there was a non-disclosure agreement between Sleek and Dynamic Innovations regarding the work that Dynamic did for Sleek; under that agreement, he agreed to not to disclose Sleek's drawings or information to third parties. Reid Dep. Tr. 23. When Reid became an employee of Dynamic, he signed an employment agreement that contained a provision regarding the confidentiality of Dynamic's information. Reid, AEO Dep. Tr. 11. As a general matter, the confidentiality provision required him to keep Dynamic information confidential, as well as the information of Dynamic's customers with whom he came into contact. Reid Dep. Tr. 35 and AEO Dep. Tr. 12. He specifically understood that the renderings and design work he did on the Sleek by 50 headphones for Sleek Audio was something that had value to Sleek and that Sleek did not want distributed or communicated to third parties. Reid Dep. Tr. 35.

When Mark Krywko first met with Jason Hardi, a Non-Disclosure Agreement was signed so that the product could be discussed, according to Mr. Krywko. Tr. pp. 194, 229. Mr. Krywko also testified that he was told by Hardi that he had a signed non-disclosure agreement with Forecast3D, the independent vendor that manufactured the prototypes of the Sleek by 50 headphone that were featured and displayed to the public at the 2011 CES and on the Conan O'Brien show (Tr. 1713), with some of those headphone parts being used on the Parts Board, Sleek Ex. 233.

When confidential information was forwarded by Hardi to parties who were suspected not to be bound by a confidentiality agreement, Sleek followed up by email to Hardi stating: "This is proprietary information. It should not be distributed to anyone without Mark's consent, including getting bids from other companies," because it was confidential. Tr. 765-766; Jackson Ex. 777. Hardi and Bruce Hahn responded, stating there was nothing to worry about because there were non-disclosure agreements covering everything. Tr. 766. Hardi testified at his deposition that every person and company that was in the "trusted network" for the development of the Sleek by 50 project, which included Forecast, Dynamic, TV Goods and G-Unit, among others, were under a non-disclosure agreement. Hardi, 1/16/12 Dep. Tr. 337.

Mazan Allawi, who is presently the Senior Application Engineer at Microchip, successor to SMSC, testified by deposition that he started work on the Sleek headphone in October, 2010 and was in charge of the design for its electronic PCB or circuit board. Allawi Deposition Tr. 17, Exh. 449. He worked with Mark Krywko as well as Jason Hardi and Beau Reid at Dynamic Innovations. Allawi Dep. Tr. 21-23. He testified that there was a non-disclosure agreement between Sleek and SMSC and that he could only release Sleek information to Sleek. Allawi Dep. Tr. 28-29 and 82-83.

The Arbitrator notes that there were certain security lapses alleged by Jackson, including that there was no evidence that Sleek had entered into NDA's or confidentiality agreements with

Kleer, SMSC, Dynamic or Forecast (apparently contradicting Hardi's above testimony, to some degree), but there was no evidence presented by Jackson that such alleged lapses, as well as any of the others alleged by Jackson to have occurred, resulted in any public disclosure of any trade secret or confidential information of Sleek. Sleek has demonstrated "reasonable steps" in establishing and maintaining a consistent, company-wide policy and approach to keeping its information "secret," thereby establishing that element of the statutory definition of a "trade secret."

(b) <u>Sleek's "Splash Page"</u>

Sleek Audio paid for and owned the Sleek by 50 website "splash page." Tr., p. 525. David Gil, the former Marketing director for Sleek, testified that from a marketing perspective, information collected on a splash page is very valuable, because Sleek had several thousand people sufficiently interested in Sleek's products submit their personal information, including names and email addresses, which thereby creates valuable "hard leads" for Sleek to contact even before a product hits the market; it provides a "direct sales stream.". Tr. 525-27, 537. As of February 9, 2011, the splash page contained contact information for 3,639 potential customers.

In early February, 2011, Gil was contacted by an employee of Jackson's company, G-Unit Records, Correntin Villemeur (a/k/a "Frenchy"), who asked for the password to the splash page to see how many names had been collected. Tr. 531. At the time Gil was asked for the password of the splash page, Gil believed that Sleek and Jackson's team were on the same team as Frenchy had previously helped Gil with the splash page so Gil gave him the password. Tr. 532.

On February 9, 2011, Gil emailed Frenchy and asked about data that was being captured. Sleek Ex. 4. Gil was concerned, because Frenchy indicated he had given information to the wrong person and Gil let him know that it was critical to find out what happened, because it was very valuable information and access to it should be limited to members of the Sleek and Jackson teams. Tr. 533. That day, when Gil subsequently attempted to retrieve the names from the database, he was unable to get onto the server; eventually, it was found that the information had disappeared from the splash page. Tr. 533-534, 538.

Also on February 9th, Nicolee "Nikki" Martin (who is Jackson's personal business manager and sits on the Board of Directors of SMS Audio), sent an email to Steve Rogai, CEO of TV Goods, and Collins saying: "David Gil is onto us, LOL. He emailed and called Frenchy to see this AM about the data, where it would be captured, where it would be held and who would have access to it. Frenchy is trying to buy some time. Not sure where things are in relation to the website ownership." Sleek Ex. 3, Tr. 1216-17. According to Gil, "LOL" means "laughing out loud." Tr. 1215. Sleek Ex. 4 is another February 9th email from Martin to Frenchy in which Martin states: "Tell him something like sorry, you just have to finish editing a video for 50 or something, we'll get to it, LOL." Tr. 1217.

The February 9th emails indicate that Jackson's team was attempting to steal Sleek's splash page and the customer information contained therein. Tr. 538-539. Sleek's internet contractor determined that the server had been taken from Sleek, along with the information; Sleek no longer had access to it at that point in time. Sleek's internet contractor then brought the data back into the Sleek server and cut G-Unit off. Tr. 538-39. Sleek's contractor was able to show that Sleek's access to the splash page had been cut off; the only person who had access to that page, other than the contractor, was Frenchy. Tr. 575. Martin did not know if the approximately 3,700 consumer contact information was ever returned to Sleek. Tr., p. 1222-23.

Under the Confidentiality provision of the Second Operating Agreement (Section 9.24, Jt. Ex. N), the information on the splash page qualifies as a trade secret of Sleek, and was misappropriated by one or more persons employed by one or more of Jackson's companies for the potential benefit that the information provided in connection with Jackson's Street by 50 and Synch by 50 headphones.

J. **Design and Development of the SMS Headphones**

Jackson wanted the new SMS headphone to look like the Sleek by 50 headphones, because that was the original design he had picked. Tr. 868, 896. Jackson picked for development of his SMS headphone the same team that had access to the Sleek by 50 design -- Jason Hardi and Beau Reid—and did not look at hiring any other design firms. Tr. 837. Jackson was intimately involved with the design of the SMS Audio headphones. Tr. 836-37, 864, 865-868, 878, 886, 897-98, 918. Hardi and Reid were directed by Jackson to create a new headphone for SMS Audio "from scratch" (Tr. 1353-54, 1596); it was to be like the Beats headphone, but better. Tr. 1577-1578. Hardi chose the same articulation method for the earcups that was in the Sleek product. Tr. 1598.

The design of the Street by 50 and Synch by 50 is alleged to have started on April 18, 2011 (Tr. 1599). However, on April 4, 2011, Hardi, as an independent contractor for SMS, sent an email to Jackson that attached

> updated drawings. . . for both wireless and wired units. They are hot; easily can be modified some, if need be, for IP. I have [redacted] working with me on the wireless technology, as well, away from Kleer as a company so as not to miss a beat when you are ready to pull the trigger.

Sleek Exhibit 26.

Jackson agreed that the drawing was of the Sleek by 50 product but bearing the SMS Audio logo. Tr. 886, 1608-1609.

When Jackson was asked whether he, as a Sleek director, should have then called Mark Krywko and told him that he had received a drawing of a headphone by Hardi that was using "your stuff", Jackson tellingly replied:

> **A. No, I didn't –I didn't haven't had communications with them since.**
>
> Q. But you are on the Board?
>
> **A. Right.**
>
> Q. You haven't resigned?
>
> **A. I'm on the board of a company that doesn't exist; there's no finances involved. It's not a functioning company, what do you want me to do?**

Jackson apparently felt he was justified in using Sleek's property because, in his opinion, it was no longer a "functioning company."

Hardi received at least one sample of the Street by 50 headphones from Merry Electronics in China by May 16, 2011, exclaiming in an email of that date to Martin that "[t]hey look and sound amazing!!!!" Tr. 1615-1616; Sleek Exh. 234 In the opinion of Dr. Bursal, the SMS Audio headphones could not have been started from scratch and, within 28 days (assuming the April 18th "start date"), result in a headphone that would "look and sound amazing." Tr. 441-442. It could only have happened because Reid and Hardi used their knowledge of Sleek's headphone trade secrets.

K. **Length of Development Cycle for an OTE Headphone**

The Arbitrator finds as credible Dr. Bursal opinion "that a product of the sophistication and complexity of a pair of wired or wireless headphones typically requires at least an [eighteen]-month development cycle to design, develop and qualify for mass production" and that a company without headphone experience would take even longer than 18 months to develop headphones. Tr. 429-30, 445 and 503; Sleek Expert Ex. 1. While the 18 month period might be based on his experience at a large corporation such as Bose and the attendant development states that he testified about, but the timeline of the commencement of design work by SMS in April 2011 and its introduction of the Sync by 50 headphones in November 2011 did not realistically allow for developing, from the ground up, a new pair of headphones, and starting mass production thereof with an overseas vendor. Tr. 445, Sleek Expert Ex. 1. The Arbitrator agrees with Dr. Bursal's opinion that the Synch by 50 and the Street by 50 headphones hit "the market much, much sooner than they could have otherwise." Tr. 443.

Jackson did not offer rebuttal expert testimony on whether Sleek had any protectable trade secrets in its Sleek by 50 headphone and whether or not they were misappropriated or on the length of time for the development cycle of headphones.

CONCLUSIONS OF LAW

I. Sleek's Claims Against Jackson

A. Jackson Misappropriated Sleek's Trade Secrets

Under the Florida Uniform Trade Secrets Act ("FUTSA"), the claimant in a trade secret action bears the burden of demonstrating that (1) the information it seeks to protect is a trade secret, namely that it possesses some independent economic value, the value of the information is derived from the fact that it is not generally known by others who might profit from its use or disclosure, the information is not readily ascertainable by that same class of persons (and it derives independent economic value from that fact as well) and (2) that reasonable steps were taken to protect its secrecy. Fla. Stat. § 688.004(2)a and (b); *see, e.g., American Red Cross v. Palm Beach Blood Bank, Inc.*, 143 F.3d 1407, 1410 (11th Cir. 1998); *Lee v. Cercoa, Inc.*, 433 So.2d 1, 2 (Fla. 4th DCA 1983); "A Primer on Florida Trade Secret Law: Unlocking the 'Secrets' to 'Trade Secret' Litigation," 11 U. Miami Bus. L. Rev. 1, 11-12 (2003).

Based on the testimony of Sleek's expert, Dr. Bursal, the Arbitrator finds that the paddle-gimbal mechanism and the overall integration of the components in the Sleek by 50 headphone possess "independent economic value" the value of which are "derived from" the fact that they were (at the time of their misappropriation) "not generally known" by others who might profit from their use or disclosure and they were "not readily ascertainable" by that same class of persons (and they derive "independent economic value" from that fact as well).

Further, the evidence shows that those features were subject to "reasonable" efforts under the circumstances to maintain their secrecy. No "heroic measures" to preserve secrecy are required under the FUTSA, only that the claimant have taken "reasonable steps" to protect the secrecy of anything it considers to be a trade secret. *See,* ""Trade Secrets" at http://www.patentfla.com/articles/trade_secrets.html

As a result, the gimbal mechanism and the overall integration of the components in the Sleek by 50 headphone can be characterized as being Sleek's statutorily protected trade secrets. Fla. Stat. § 688.004.

The FUTSA, at Fla. Stat. § 688.002(4), then defines misappropriation of a trade secret as:

(a) Acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means; or

(b) Disclosure or use of a trade secret of another without express or implied consent by a person who:

1. Used improper means to acquire knowledge of the trade secret; or

2. At the time of disclosure or use, knew or had reason to know that her or his knowledge of the trade secret was:

a. Derived from or through a person who had utilized improper means to acquire it;

b. Acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use; or

c. Derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use; or

3. Before a material change of her or 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.

That Sleek's headphone trade secrets ended up in Jackson's Street/Synch by 50 headphones is a result of what is referred to analogous in trade secret cases as the inevitable disclosure doctrine. That doctrine holds that when an individual possesses such critical knowledge of a company's trade secrets, he can be temporarily or even permanently banned from working in a specific job at a new employer, because doing so would inevitably lead him, consciously or unconsciously, to disclosure of his former employer's trade secrets. The idea is that an employee who wants to succeed at his new position will rely on skills and information learned from his former employer, including trade secrets so it would be logical to assume that his employment by a competitor would eventually result in a disclosure of this information. *See, e.g.*, *Fountain v. Hudson Cush-N-Foam Corp.*, 122 So. 2d 232, 234 (Fla. Dist. Ct. App.1960); *see, also,* Rowe, *When Trade Secrets Become Shackles: Fairness and the Inevitable Disclosure Doctrine*, 7 Tul. J. Tech. & Intell. Prop. 167 (2005).

Thus, pursuant to the inevitable disclosure doctrine, it is possible that Sleek, becoming aware that both Reid and Hardi were now employed by SMS, could have sought an injunction against their new employment. In any event, it was inevitable that Hardi and Reid, possessing extensive and intimate knowledge of Sleek's OTE headphone program and taking on the identical employment roles with SMS, would (and did) rely on Sleek's trade secrets and incorporate them into the Synch by 50 and Sleek by 50 headphones.

Jackson contends, of course, that Sleek did not possess any trades secrets regarding the Sleek by 50 headphone. However, if there any such trade secrets, he argues that there is no evidence that he participated in any misappropriation of Sleek's trade secrets and, therefore, he should not be personally liable for the acts of others in misappropriating any trade secrets. He argues, *inter alia,* that SMS Audio is not a party to this arbitration; that even though he owns a majority interest in SMS, it is a separate legal entity; that Sleek did not assert a claim to "pierce the corporate veil"; that he did not personally acquire any trade secrets of Sleek; that Reid and Hardi were not Jackson's agents, but instead were independent contractors who were hired by SMS to design the Sync by 50 and Street by 50 headphones; that he did not authorize or direct

Reid or Hardi to engage in any wrongful or unlawful activity; that, to the contrary, Hardi and Reid were expressly instructed to return to Sleek any confidential information that they possessed and not to use any Sleek by 50 design features in the design of the Sync by 50 or Street by 50 headphones; that there is no evidence that Jackson or SMS were aware that Reid or Hardi had incorporated Sleek by 50 design features into SMS products they designed; and that Reid and Hardi were entitled to use the knowledge they gained on the design of OTE headphones in the design work they did for SMS on the Sync by 50 and Street by 50 headphones. *See* pages 63-65, Jackson's Post-Hearing Findings of Fact and Conclusions of Law.

Jackson can be held personally liable for misappropriation of Sleek's trade secrets without piercing the corporate veil or without their being a direct claim against his company, SMS. Corporate officers can be held liable for "commit[ting] or participat[ing] in the commission of a tort, whether or not it is also by or for the corporation." *Home Loan Corp. v. Aza*, 30 So. 2d 814, 815-16 (Fl. Ct. App. 2006), quoting *Orlovsky v. Solid Surf, Inc.*, 405 S.2d 1363, 1364 (Fl. Ct. App. 1981). Here, the claim against Jackson for the misappropriation of trade secrets lies in tort. *See, e.g., Arch Aluminum & Glass Co., Inc. v. Haney,*, 964 So.2d 228, 231 (Fl. Ct. App. 2007) (categorizing misappropriation of trade secrets as a tort). So long as a corporate officer "was aware of or ratified" the use of the improperly obtained trade secrets and knew or should have known it was "acquired by improper means," he or she can be held personally liable for misappropriation of trade secrets. *PMC, Inc. v. Kadisha*, 93 Cal. Rptr. 2d 663, 673-74 (Cal. Ct. App. 2000). In *PMC*, the California Court of Appeals held that "[l]iability imposed on a corporate shareholder, officer, or director who knows or has reason to know about tortious misappropriation . . . and allows it to occur is *not* vicarious." *Id.* at 678.

SMS is a company in which Jackson is the majority owner (Jackson stated that "I own SMS." – Tr. 827) as well as its CEO (Tr. 104) and is on its Board (Tr. 827). At least through the arbitration hearing, Jackson has remained a Director of Sleek. Tr. 887. Jackson knew as a Sleek Board member that he had a fiduciary duty to Sleek to look out for the best interests of Sleek. Tr. 828. Since Jackson sits on the boards of other boards and owns several companies (Tr. 827, 951-952), he is familiar with what it means to be a on a Board of Directors. He knew that under the Operating Agreement, he had a very clear confidentiality obligation regarding Sleek's property. Tr. 829-830.

While still serving in the capacity of a Sleek Director, Jackson participated in the tort of misappropriating Sleek's trade secrets by directing SMS to hire Reid and Hardi (the same two people that Jackson knew had designed and supervised the production of the Sleek by 50 headphone) so that they would then assume at SMS the identical roles they had at Sleek in designing and sourcing a headphone for himself that would bear his "50" trademark. Tr. 836. Jackson didn't even look at hiring anyone else or a design firm to work on the SMS Audio project. Tr. 837. Hardi and Reid's new employment inevitably led them (consciously, in their case) improperly to rely on Sleek's trade secrets, including the gimbal mechanism and the unique overall integration of the components in the Sleek by 50 headphone, and use this information on behalf of SMS and Jackson, breaching their duty to sleek to maintain as secret Sleek's trade secrets.

Jackson signed off on all important decisions regarding the Sleek headphone project (Hardi Dep. Tr. 319) ("I had 50 sign off because 50 wanted to sign off. He wanted to be involved."). As he did for the Sleek by 50 headphone, Jackson was intimately involved in the design and approval of at least the exterior appearance of the Street by 50 and Synch by 50 headphones. He willfully and knowingly used Reid and Hardi's design even though he knew or reasonably should have known that they would inevitably create the design by misappropriating trade secrets from their former employer. *See, e.g., Sensormatic Electronics Corp. v. TAG Co. US, LLC*, 632 F. Supp.2d 1147 (S.D. Fla. 2008), *aff'd on other grounds*, 367 Fed. Appx. 143 (Fed. Cir. 2010). Accordingly, he can be held personally liable for the misappropriation.

Sleek's splash page content also qualifies as a trade secret in that it possessed some independent economic value, the value of the information was derived from the fact that it was not generally known by others who might profit from its use or disclosure, the information was not readily ascertainable by that same class of persons (and it derives independent economic value from that fact as well) and (2) that reasonable steps were taken to protect its secrecy.

B. <u>Jackson Breached His Fiduciary Duty Owed to Sleek</u>

To state a claim for breach of fiduciary duties under Florida law, a plaintiff must show that:

(1) The defendant owed plaintiff fiduciary duties;

(2) The defendant breached those duties; and

(3) The defendant's breach of fiduciary duties is the proximate cause of the damages suffered by plaintiff.

Gracey v. Eaker, 837 So.2d 348, 353 (Fla. 2002).

As a Director of Sleek, Jackson owed a fiduciary duty to Sleek to exercise due care to protect the interests of Sleek. Jackson breached that duty by participating in the misappropriation of Sleek's trade secrets which is the proximate cause of damages to Sleek in the form of lost sales of Jackson's headphone and the attendant lost royalties.

C. **Jackson Participated in a Civil Conspiracy**

To properly state a claim for civil conspiracy, a plaintiff must allege (a) a conspiracy between two or more parties (b) to do an unlawful act or to do a lawful act by unlawful means; (c) the doing of some overt act in pursuance of the conspiracy; and (d) damage to plaintiff as a result of the acts done under the conspiracy. *Florida Fern Growers Assoc, Inc. v. Concerned Citizens of Putnam Cty*, 616 So.2d 562. 565 (Fla. 5th DCA. 1993). A civil action for conspiracy requires an underlying actionable underlying tort which results in damage to the plaintiff. *Wright v. Yurko,* 446 So. 2d 1162, 1165 (Fla. 5th DCA 1984); *Liappas v. Augoustis,* 47 So.2d 582 (Fla. 1950). Each of the co-conspirators "need only know of the scheme and assist in it in some way to be responsible for all the acts of his co-conspirators." *Donofrio v. Matassini*, 503 So.2d 1278 (Fla. 2d DCA. 1987).

The evidence shows that Jackson worked in concert with other individuals, namely Reid and Hardi, to incorporate the misappropriated trade secrets of Sleek into Jackson's Street by 50 and Synch by 50 headphones. Furthermore, as a result of the conspiracy, Sleek has suffered damages in the form of lost sales of Jackson's headphones by Sleek and attendant royalty payments to Sleek. Accordingly, Jackson has actively participated in a civil conspiracy to misappropriate Sleek's trade secrets.

D. **Jackson Breached His Confidentiality Agreement With Sleek**

In Florida, an action for breach of contract consists of three primary elements. A plaintiff must establish: (1) that a valid contract was formed between the parties; (2) that the other party failed to perform as required under the contract; and (3) that damages resulted from the alleged breach. *See, e.g., Knowles v. C.I.T. Corp.*, 346 So.2d 1042, 1043 (Fla. 1st DCA 1977).

As discussed above, Section 9.24 of the Second and Restated Operating Agreement entered into by the parties on April 22, 2010 (Joint. Ex. N) relates to "Confidentiality" with trade secrets being included within the definition of what is "Confidential Information." There has been no contention by Jackson that the Operating Agreement was not a valid contract between himself and Sleek. The Arbitrator has found that Jackson misappropriated Sleek's trade secrets which resulted in damages to Sleek in the form of lost sales of Jackson's headphones by Sleek and attendant royalty payments to Sleek. Therefore, Jackson breached the Operating Agreement and the Confidentiality provision, in particular.

E. **Jackson Was Unjustly Enriched**

Jackson knowingly and intentionally enjoyed the benefit of Sleek's confidential and propriety information under the circumstances listed above that make it inequitable for him to do so. The elements of a claim for unjust enrichment are:

(1) The aggrieved party as conferred a benefit on the defendant;

(2) The defendant has knowledge of the benefit;

(3) The defendant accepted or retained the benefit; and

(4) The circumstances are such that it would be inequitable for the defendant to retain the benefit without paying fair value for it.

Della Ratta v Della Ratta, 927 So.2d 1055 (Fla 4th DCA 2006); *Hillman Construction Corp v Wainer*, 636 So.2d 576 (Fla 4th DCA 1994). As the Florida courts have pointed out, "[a]n action for 'unjust enrichment' exists to prevent the wrongful retention of money or property of another, in violation of good conscience and fundamental principles of justice or equity." *Henry M. Butler, Inc. v. Trizec Prop., Inc.*, 524 So.2d 710, 711 (Fla. 2d DCA 1988).

The evidence shows that Sleek is entitled to recover on this claim: Jackson was intimately involved in the misappropriation of Sleek's trade secrets and has utilized the information to sell [redacted] dollars' worth of headphone products. The Arbitrator finds that it would be inequitable for Jackson to retain the benefit of Sleek's trade secrets without paying fair value for it.

II. Jackson's Claims Against Sleek and the Krywkos

A. The Krywkos and Sleek Did Not Fraudulently Induce Jackson Into Entering Into the SPA1 and Investing in Sleek

Jackson contends that the Krywkos and Sleek fraudulently induced Jackson into entering in the SPA1 and in investing in Sleek because, *inter alia*, they represented that the $248,950.96 set out in the SPA1's "Use of Funds" Schedule for "50 product line development & inventory" was sufficient to develop a very limited production run of OTE headphones; that it was feasible to do so, using "best efforts," in compliance with the deadlines found in the BLA; and that the Krywkos' years spent developing, manufacturing and bringing to market their earphone products combined with their access to others in the consumer audio product industry gave the Krywkos a superior ability to evaluate, in all respects (including financial), Sleek's ability to develop OTE headphones within the framework established in the BLA.

These representations, Jackson argues, were rendered misleading by omission of the fact that Sleek was financially incapable of developing the OTE headphone at all, much less within the deadlines set in the BLA, without an additional $3-5 million investment in addition to Jackson's $1.3 million investment, as Mike Krywko subsequently acknowledged in an e-mail sent to Collins, Jackson's business manager. Jackson argues that no amount of due diligence by Jackson would have uncovered that Sleek needed $3-5 Million more than Jackson's $1.3 Million investment in Sleek.

The elements of fraudulent inducement under Florida law are:

(1) The representor made a misrepresentation of a material fact;

(2) The representor knew or should have known of the falsity of the statement;

(3) The representor intended that the representation would induce another to rely and act on it; and

(4) The plaintiff suffered injury in justifiable reliance on the representation.

Joseph v. Liberty Nat'l Bank, 873 So.2d 384, 388 (Fla. 5th DCA 2004).

The SPA's signed by the parties contains the above-noted exculpatory language in the form of warranties and representations in Sections 2, 3 and 7 which insulate Sleek and the Krywkos from these alleged claims. The April, 2010 and November, 2010 SPA's clearly stated that Sleek and the Krywkos had not made any written representations, warranties or covenants with respect to Sleek, its business, results of operations, financial conditions or prospects, or the offering of Membership Interests to be purchased pursuant to the SPA's. The evidence and testimony indicated that Jackson had neither received nor requested, and that he agreed that he had no need to receive, any prospectus, sales or advertising literature or offering memorandum in order to assist him in making an investment decision with respect of the purchase of the Membership Interests pursuant to the SPA's.

Pursuant to Section 3(1)(j) of the SPA's, Jackson represented that he was sufficiently knowledgeable and experienced in the making of investments so as to be able to evaluate the risks and merits of his investment in Sleek. Jackson further represented that he had received all the information he considered necessary or appropriate for deciding whether to purchase the Membership interests. SPA's Sections 3.1(f), (j) and (l). In addition, Jackson acknowledged that all financial statements through December 31, 2009 were provided to him. SPA's Section 2.1(m). Finally, the SPA's provide for a merger and integration clause that clearly states that the signed SPA's supersede all prior oral and written agreements or understandings between the parties. SPA's Section 7.8.

In view of the above, Jackson's allegation is not credible that the Krywkos fraudulently induced Jackson to invest in Sleek by failing to disclose the "material fact" that (ultimately) $3-$5 Million additional funding was going to be necessary to design, develop and launch the headphone. It's irrelevant whether or not Collins and Jackson became aware only after entering into the SPA1 Agreement that Sleek needed additional funding of at least $2-$3 Million on top of Jackson's initial investment of $1.3M in view of the clear notice in Schedule 2(1)(1) of the SPA1 agreement that Sleek would need an additional (but an unstated amount of) funds within less than 2 months from the execution date of the agreement. With actual, clearly stated knowledge that at least the final, execution draft of the SPA1 agreement was going to contain that alert, it was incumbent on Jackson and Collins to, at the very least, inquire before signing the agreement: "How much more additional funds are going to be needed?" But there is no evidence that they did so. The fact that Jackson (who acknowledged in the agreement that he was an experienced investor) or Collins, his business manager, didn't is reflective of the less than stellar analysis of Sleek's financials and the other lack of their due diligence expended prior to the execution of the SPA1.

What is also instructive is Collins' reply to Michael Krywko's email that "I anticipate that you are going to need $2 to $3 million over the next six to nine months and we need to figure out the best way to get that money into the company!" Collins doesn't register in his response (sent, incidentally, several weeks after he received Michael Krywko's May 18th email) the shock and outrage that one might expect if Krywko's proposed 2010 budget/cash flow (sent less than one month after execution of the agreement) was, indeed, the first time Collins or Jackson became aware that Sleek needed an additional two-three million dollars. Instead, Collins simply replies rather matter-of-factly that "we need to figure out the best way to get that money into the company!"

In view of the above, the Arbitrator does not find that that Jackson has met his burden in proving that the Krywkos and Sleek fraudulently induced Jackson into entering in the SPA1 nor breached their representations and warranties contained therein.

B. **Krywkos Did Not Breach Their Fiduciary Duties to Sleek and Jackson**

Jackson contends that the Krywkos breached their fiduciary duties to Sleek and him by their gross mismanagement of Sleek. Under the Florida laws applying to corporations and limited liability companies, the Krywkos, as managers and directors, have limited liability: A director is obligated to discharge his duties in good faith and in a manner that he reasonably believes to be in the best interests of the company. FSA §607.0830(1); *See, e.g., Rehabilitation Advisors, Inc. v Floyd*, 601 So2d 1286 (Fla 1992).

Elements of a claim for breach of fiduciary duty are the existence of a fiduciary duty, and the breach of that duty such that it is the proximate cause of the plaintiff's damages. *Cruselle VRD Mong,* 59 So3d 1178, 1181 (Fl. 5th DCA. 2011). FSA 607.0831 codifies the liability of directors as a presumption against liability, by saying no liability, unless 1) the director breached or failed to perform his duties as director and 2) the breach or failure constitutes a) a violation of criminal law, unless the director had reasonable cause to believe his conduct was lawful or no reasonable cause to believe his conduct was unlawful; b) involves a transaction from which director derives, either directly or indirectly, an improper personal benefit; c) receives improper distributions; d) for corporation (derivatively) or for shareholders, has a conscious disregard for the best interest of the corporation or willful misconduct; or e) other than the corporation or shareholders recklessness or an act or omission which was committed in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property.

FSA 608.4225 sets forth the standard for manager-members of LLC's. While it imposes a duty of care on managing members, the duty of care is limited to refraining from engaging in grossly negligence or reckless conduct, intentional misconduct or a knowing violation of law.

The Florida Business Judgment Rule is a bar to the claims by Jackson under which directors are presumed to have acted in good faith and are, thus, protected against lawsuits asserting deficient conduct. The business judgment rule is a judicially created presumption that decisions are made by disinterested directors on an informed basis in a good faith belief that the decision will serve the best interests of the corporation. If the Plaintiff cannot overcome the presumption, usually by specific proof of conflict of interest, illegality, fraud, or bad faith, the rule prohibits the court from going further and examining the merits of the underlying business decision and the directors are protected from personal liability. *See, e.g., Hollywood Towers Condominium Ass.n v. Hampton*, 40 So.3d 784 (Fla. 4th DCA. 2010); *Kloha v. Duda*, 246 F. Supp. 2d 1237, 1244-45 (M.D. Fla. 2003).

Directors are protected by the business judgment rule under Florida law no matter how poor their business judgment, unless they acted fraudulently, illegally, oppressively, or in bad faith. *Bal Harbour Club, Inc. v. AVA Dev., Inc.*, 316 F.3d 1192, 1994-95 (11th Cir. 2003), quoting, *Int'l Ins. Co. v. Johns*, 874 F.2d 1447, 1458 (11th Cir. 1989), and *FDIC v. Stahl*, 89 F.3d 1510, 1517 (11th Cir. 1996); *see also Lake Region Packing Assn., Inc. v. Furze*, 372 So.2d 212, 216 (Fla. 3d DCA 1976). Further, a director's gross negligence, without more, does not constitute breach of the fiduciary duty to act in good faith. *In re Walt Disney Company Derivative Litig.*, 2004 Del. Ch. LEXIS 27 (Del. Ch. Mar. 9, 2004). Greater culpability, such as a conscious disregard of one's responsibilities or intentional dereliction of duty is required. *Id.* Imposition of liability against a director for bad faith "requires a showing the directors knew that they were not discharging their fiduciary obligations." *Lyondell Chem. Co. v. Ryan*, 970 A.2d 235 (Del. 2009).

Jackson contends that one reason that the Krywkos breached their fiduciary duties to Sleek is that

> . . . when faced with an opportunity to avoid the financial collapse of their company by selling to Jackson assets related to the "Sleek by 50" headphone for [redacted] dollars and a per-unit sold royalty, the Krywkos refused to do so, despite the fact that, by that time, the Company lacked the financial capability to bring the headphone to production-ready status, much less finance production itself. The evidence shows that in 2011, Jackson offered to buy assets related to the OTE headphone from Sleek for [redacted] cash, plus a [redacted] non-

> refundable royalty paid in advances of [redacted] the first year and [redacted] per year for the following two years. This was an amount of money that was desperately needed for Sleek to maintain solvency or become solvent. Despite having signed a term sheet that indicated agreement on most of the major points of the deal [Jackson Ex. 980], including these financial terms, the Krywkos changed their minds and demanded even more money, which Jackson refused to give. Their decision to turn their backs on this bona fide offer rendered the Company insolvent, to the point where it has virtually ceased operations today. In making that decision, the Krywkos consciously disregarded the best interests of Sleek and acted with gross negligence in performing their duties as managing members of Sleek. . .

Jackson's Post-Hearing Brief, p 100-101.

Mark Krywko testified that although he did not agree with all the terms in the term Sheet setting forth Jackson's offer, he signed it anyway on behalf of Sleek because, as the document states, it was "for discussion purposes only. . ." and he viewed it

> as a starting point on both sides...[W]e signed it in good faith that we could negotiate something from a starting point and it never materialized. . . . The negotiations broke down because of what they wanted and where they were not willing to go, where they wanted to put us. . . .

Tr. 1781-1794.

In deciding that it was in the best interests of the company not to go forward with the Jackson proposal, Mark Krywko and his brothers also consulted with Gregory Wysocki, another Sleek Director (Tr. 1791), who "represents a good number of shareholders in the company." Tr. 1787. Mark Krywko further testified that he consulted with Sleek's attorneys about the matter "our attorneys are telling us that we would be insolvent the moment we signed this. . . ."). Tr. 1783.

This is similar to what occurred in the *Lyondell* case where the court found that the directors, in rejecting an offer for sale of their company, were aware of the company's value and its prospects and they considered the offer with the assistance of financial and legal advisors. There was no evidence from which to infer that they knowingly and completely failed to undertake their responsibilities, thereby breaching their fiduciary duty of care, loyalty and candor. The *Lyondell* directors were found not to have breached their duty of loyalty by failing to act in good faith.

The testimony of Jackson and Feinstein further indicates the lack of liability on behalf of the Krywko defendants. In response to questions regarding whether they believed the Krywkos acted in bad faith in an attempt to harm Sleek or the other shareholders, they both testified that the Krywkos were not acting bad faith in managing Sleek.

> Jackson:
> Q. Okay. With respect to Sleek Audio, do you think the Krywkos were trying to hurt their company with respect to sitting on the board, in terms of their business decisions?
>
> **A. I'm not sure-- I don't think it was intentional. . . .**

Tr. 1015.

> **No. I kind of got just incompetence, not exactly knowing what you are doing. And the money is in it, and it was just burning.**
>
> * * *
>
> **But I was just explaining to you why I don't feel like they did it with ill intentions. I think they just didn't understand what they were asking me at that point.**

Tr. 1018-1019.

> Feinstein:
> Q. Mr. Feinstein, I just have a few questions for you. My name is Robert Sheehan and I am the attorney for the Krywkos individually. Is it fair to say that you probably don't think the Krywkos are the best business people in the world?

A. It would be fair to say that I felt that the Krywkos, in this particular instance, were not the best business people.

Q. Do you think that they did anything intentional to harm their company, though?

A. Absolutely not.

Q. Do you think they did anything intentionally to harm the other directors and shareholders of Sleek?

A. No.

Tr. 1972-1973.

In view of the above, the Arbitrator finds that Jackson has not met its burden of proving that the Krywkos breached their fiduciary duties to Sleek by their gross mismanagement of Sleek, because Jackson has not shown the necessary proof of conflict of interest, illegality, fraud, or bad faith to overcome the presumption that the Krywkos are protected from personal liability under the Florida Business Judgment Rule.

III. Damages

Sleek must prove that it suffered damages caused by Jackson's alleged misappropriation of the trade secrets. *Maxxim Med., Inc. v. Prof'l Hosp. Supply, Inc. (In re Maxxim Med. Group, Inc.)*, 434 B.R. 660, 690 (Bankr. M.D. Fla. 2010). Jackson argues that Sleek, despite receiving over $2 million in capital from Jackson and sources that Jackson arranged, was unable to design, develop and launch the Sleek by 50 and that Sleek's business failure is a direct result of the Krywkos' gross mismanagement of Sleek and its resources. Moreover, Jackson further argues that Sleek rejected Jackson's offer to infuse more capital into the company and pay royalties for the right to finish development, market and sell the Sleek by 50 product and so like the plaintiff in *Maxxim*, Sleek's own conduct, rather than Jackson's, is the cause of the damages it seeks to recover. Therefore, Jackson contends that Sleek has failed to meet its burden of proving that its damages were caused by the alleged misappropriation of the trade secrets by Jackson. The Arbitrator disagrees with that allegation.

The FUTSA provides in pertinent part:

> [A] complainant is entitled to recover damages for misappropriation. Damages can include both the actual loss caused by misappropriation and the unjust enrichment caused by misappropriation that is not taken into account in computing actual loss. In lieu of damages measured by any other methods, the damages caused by misappropriation may be measured by imposition of liability for a reasonable royalty for a misappropriator's unauthorized disclosure or use of a trade secret.

Fla. Stat. §688.004(1).

Under Section 688.005, if the misappropriation was "willful and malicious," an award of "exemplary" damages may also be made in an amount not exceeding twice any award made under Section 688.004(1).

Under the FUTSA, a party may recover both the actual loss caused by the misappropriation of trade secret or disgorgement of the misappropriator's profits so long as those profits are not duplicative of the party's actual loss. *Sensormatic Elec. Corp. v. TAG Co. US, LLC*, 632 F.Supp.2d 1147, 1168 (S.D. Fla. 2008). Unjust enrichment damages typically are calculated by the infringing party's profits. *Id.*

Alternatively, and in lieu of unjust enrichment damages, the owner of a trade secret can seek damages in the form of a reasonable royalty. Fla. Stat. §688.004. A reasonable royalty is calculated by determining what the parties would have hypothetically agreed to as a fair royalty at the time the misappropriation occurred. *Linkco v. Fujitsu LTD.*, 232 F. Supp.2d 182, 185 (S.D.N.Y. 2002).

Jackson argues that although Sleek asserts its claims against Jackson personally, Sleek seeks to recover the past and future profits it calculates SMS has earned and will earn from the sale of the Sync by 50 and Street by 50 products. However, he argues that Sleek has presented no evidence showing that Jackson received any of the money it calculates that SMS received or will receive from the sale of the Sync by 50 and Street by 50 products. Thus, Jackson further argues that Sleek has failed to present sufficient evidence of "unjust enrichment" received by Jackson. The Arbitrator rejects that argument in view of the above-noted findings that Jackson, who is the CEO of SMS and is at least its majority, if not outright, owner and is on its Board, worked with Reid and Hardi who he hired to work at SMS and who incorporated the misappropriated trade secrets of Sleek into Jackson's Street by 50 and Synch by 50 headphones. The Arbitrator takes "judicial notice" that Jackson profits from the sale of the Street/Synch by 50 headphones. *See, e.g., http://www.hollywoodreporter.com/earshot/50-cent-headphones-qvc-389567.*

Sleek called an expert witness on the subject of damages, Rodney Crawford, a CPA, who submitted two reports: an initial report (Sleek Expert Ex. 3) and a supplemental report, Sleek Expert Ex. 4. Crawford's *curriculum vitae* was attached to his initial report, Sleek Expert Ex. 3, as Exhibit B. He has extensive experience testifying on damages issues, including royalties and lost profits (Tr. 1035) and presented a competent and credible expert opinion on damages based on his significant knowledge and experience. Jackson did not offer any expert testimony on damages.

Crawford opined that awarding damages on the basis of lost profits of Sleek Audio would not be possible, because Sleek never sold its Sleek by 50 headphone. Tr. 1045-1046. He, therefore, calculated measures of damages based upon disgorgement of the profits made by SMS

Audio on the sale of the Sync by 50 and Street by 50 products (Tr. 1043) which is the best measure of Sleek's damages. Initial Report, Sleek Expert Ex. 3, ¶ 28; Supplemental Report, Sleek Expert Ex. 4, ¶ 8.

Crawford reasonably calculated disgorgement of SMS Audio's profits based on the best available data produced by Jackson, including actual sales of the Sync by 50 and Street by 50 products through December, 2012, and projections of future sales produced by Jackson in discovery in the case. Tr., 1052-53, 1146; *see also*, Initial Report, Sleek Expert Ex. 3, ¶¶ 42-50, and Supplemental Report, Sleek Expert Ex. 4, ¶¶ 16-22. Extending damages into the future is acceptable in this case, because SMS Audio is still marketing and selling the Sync by 50 and Street by 50 products and there was no definitive evidence of discontinuing the sale of those products. Tr. 1048-1049. Allawi testified that he was not aware of any discontinuation or phase out by SMS Audio of the Jackson headphones. Allawi Dep. Tr. 90. As of the date of this Award, the Arbitrator is aware that SMS is still offering for sale the Synch by 50 and Street by 50 headphones at least through its website (http://smsby50.com/).

Crawford specifically used for future sales some five-year projections produced by SMS Audio prepared in 2012, which were attached to his Report as Exhibit I, which he viewed as the most conservative and recent. Tr. 1061. He reasonably calculated the cost of the two products based upon data provided by SMS Audio (Tr. 1051; Initial Report, Sleek Expert Ex. 3, ¶¶ 51-53 and Supplemental Report, Sleek Expert Ex.¶¶ 16-22), as well as what he called "contribution margin", which is the contribution that sale of a particular product makes toward the overall profitability of the business. Tr. 1059.

Crawford also calculated reasonable royalties payable to Sleek on the products. Tr. 1045, 1070; Supplemental Report, Sleek Expert Ex. 4, ¶¶ 30-36. In determining a reasonable royalty, Crawford looked at, *inter alia*, the licensing history of the parties, including the [redacted] royalty payable by Sleek to G-Unit Brands under the Brand License Agreement (Jt. Exh. P). Tr. 1072-73. He testified that royalty rates between competitors such as Sleek and SMS Audio tend to be higher. Tr. 1073.

Crawford applied the royalty to sales of the entire product (Tr. 1074-75) which Jackson objects to, arguing that Sleek failed to present any evidence of the amount of profits earned by SMS that are attributable to Sleek's claimed trade secrets. Moreover, Jackson claims that Sleek's damage calculation completely overlooks the significant marketing power of the 50 Cent brand, which is entirely attributable to Jackson. Even if Sleek is entitled to trade secret protection for some of the Sleek by 50 design features, he contends that it has failed to present sufficient evidence as to the value of those features--or the share of SMS profits to be disgorged that is attributable to them and not other aspects of the SMS headphones, most notably the "50 Cent" brand. Since Jackson is arguing that there should be an apportionment of damages that is only attributable to Sleek's trade secrets, that burden fell to Jackson who did not present any evidence to that end.

Courts have awarded reasonable royalties in cases when there are no lost profits of plaintiff and financial benefit to defendant attributable to trade secret cannot be determined. *See, e.g., Ajaxo, Inc. v. E*Trade Fin. Corp.*, 187 Cal. App. 4th 1295 (Cal. Ct. App. 2010). Crawford testified that he did not select the data for his charts that would produce the highest damages number, explaining that he did not use sales projections by Hardi attached as Exhibit F to his initial report, Sleek Expert Ex. 3, because those projections ended up being substantially higher than the actual results. Tr 1055-56. Had Crawford used the Hardi projections, he testified that the damages figures would have been much, much higher. Tr. 1056. Crawford's lost profits and royalty calculations are both reliable and credible, particularly where no contrary expert testimony was provided by Jackson.

Jackson argues that any unjust enrichment damages are limited to a "head start period" which is "the amount of time it would have taken the defendant to independently develop its product without the benefit of [Sleek's] trade secrets to Sleek's claim for damages." *Sensormatic Elec. Corp.*, 632 F. Supp.2d at 1168. Keeping in mind the above-noted 18 month period opined by Dr. Bursal to design, develop and qualify for mass production an OTE headphone and that a company without headphone experience would take even longer than 18 months to develop headphones, coupled with a finding that Jackson's actions regarding the design and development of his Street by 50 and Synch by 50 headphones warrant the award of exemplary damages, the Arbitrator finds that Crawford's 3-year period of royalty calculations is credible.

Crawford produced charts of lost profits/disgorgement calculations using SMS Audio's [redacted] forecasts for product sales, which are attached to the Supplemental Report as Exhibits C-1 [redacted] and C-2 [redacted]. Tr. 1093. Exhibit C-3 contains Crawford's calculations of a mid-point set of profits, picking the midpoint of the [redacted] projections. *Id.*

Crawford was most comfortable using the lost profits calculations on Chart 1 in the Supplemental Report, which were:

Present Value of Net Profits (using C&W Contribution Margin)

Basis	3 Years	4 Years	5 Years	6 Years	7 Years

[redacted]

Crawford's royalty calculations were on Chart 2 of the Supplemental Report, Sleek Expert Ex. 4, p. 13, which reduce future royalty payments to present value (Tr. 1081):

Present Value of Royalties - [redacted]

Rate	3 Years	4 Years	5 Years	6 Years	7 Years

[redacted]

Present Value of Royalties - [redacted]

Rate	3 Years	4 Years	5 Years	6 Years	7 Years

[redacted]

Present Value of Royalties - [redacted]

Rate	3 Years	4 Years	5 Years	6 Years	7 Years
[redacted]					

The Arbitrator adopts the Brand License Agreement royalty rate of [redacted] applied to SMS' "midpoint" net profits for a period of 3 years, which totals $11,693,247. This amount of damages is for Jackson's misappropriation of Sleek's trade secrets, breach of the fiduciary duty he owed to Sleek, his participation in a civil conspiracy, the breach of his confidentiality agreement with Sleek and for his unjust enrichment.

The amount of damages to be awarded to Sleek has been somewhat tempered by the Arbitrator's belief that Sleek and Jackson were unintentionally at cross-purposes from the beginning of their relationship, with Sleek looking at Jackson's investment primarily as a means to fund what they believed to be their core business, namely, high-end earbuds, while Jackson chiefly viewing Sleek as a vehicle to develop and market his headphones. Also, the Arbitrator agrees with Feinstein's observation noted above, namely, that the Krywkos did not have a good head for business. Thus, the Arbitrator can sympathize with Jackson's growing frustration that he was putting money into Sleek and not, in his opinion, seeing the results that he assumed would be forthcoming on a timely basis. Likewise, the Arbitrator can appreciate the Krywkos' frustration with what they perceived was Jackson's team taking control of their company to carry out Jackson's goals, to the apparent exclusion of their earbud business. However, Jackson's frustrations do not justify the actions he took or were taken on his behalf and do not take way from the Arbitrator's conclusion that Sleek has met the respective burden of proof on each of its claims.

INTERIM CONCLUSION

Based on the findings and analysis set forth above, the Arbitrator hereby presents an interim conclusion that:

1. Sleek's claim of misappropriation of Sleek's trade secrets by Jackson is GRANTED;
2. Sleek's claim of breach by Jackson of his duty of confidentiality to Sleek is GRANTED;
3. Sleek's claim of civil conspiracy by Jackson is GRANTED;
4. Sleek's claim of breach by Jackson of his non-disclosure agreement with Sleek is GRANTED;
5. Sleek's claim of unjust enrichment by Jackson is GRANTED;
6. Jackson's claim that the Krywkos and Sleek fraudulently induced Jackson into entering into the SPA1 and investing in Sleek is DENIED; and
7. Jackson's claim that the Krywkos breached their fiduciary duties to Sleek and Jackson by their gross mismanagement of Sleek is DENIED.
8. Sleek is awarded the sum of $11,693,247.
9. All other claims, counterclaims and demands for relief are DENIED.
10. As the prevailing party, Sleek is entitled to its reasonable attorneys' fees and costs. To that end, Sleek shall make a written submission of the amount of its reasonable attorneys' fees and costs, including copies of attorney invoices, within 21 days of the date of receipt by counsel of this Interim Award and Jackson shall have 10 days to respond. The Arbitrator will then enter a Final Award which will include a determination of Sleek's reasonable attorneys' fees and costs.

May 2, 2013
Date

William H. Needle
William H. Needle, Arbitrator

PROOF OF SERVICE BY EMAIL & U.S. MAIL

Re: Jackson, Curtis J., III vs. Sleek Audio, LLC, et al
Reference No. 1440003314

I, Meghan Koransky, not a party to the within action, hereby declare that on May 03, 2013 I served the attached Interim Award on the parties in the within action by Email and by depositing true copies thereof enclosed in sealed envelopes with postage thereon fully prepaid, in the United States Mail, at Atlanta, GEORGIA, addressed as follows:

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Curtis J. Jackson, III

Michael E. Krywko

I declare under penalty of perjury the foregoing to be true and correct. Executed at Atlanta, GEORGIA on May 03, 2013.

Meghan E Koransky

Meghan Koransky
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PROOF OF SERVICE BY EMAIL & U.S. MAIL

Re: Jackson, Curtis J., III vs. Sleek Audio, LLC, et al
Reference No. 1440003314

I, Linda Samuels, not a party to the within action, hereby declare that on July 15, 2013 I served the attached Final Award dated July 15, 2013 on the parties in the within action by Email and by depositing true copies thereof enclosed in sealed envelopes with postage thereon fully prepaid, in the United States Mail, at Atlanta, GEORGIA, addressed as follows:

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I declare under penalty of perjury the foregoing to be true and correct. Executed at Atlanta, GEORGIA on July 15, 2013.

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