



IN THE SUPREME COURT OF THE STATE OF DELAWARE

ALARM.COM HOLDINGS, INC.,)
)
Plaintiff Below,)
Appellant,)
) No. 360, 2018
v.)
) Court Below:
ABS CAPITAL PARTNERS INC.,) Court of Chancery of
ABS PARTNERS V, LLC, and) The State of Delaware
ABS PARTNERS VII, LLC,) No. 2017-0583-JTL
)
Defendants Below,)
Appellees.)

APPELLANT'S OPENING BRIEF

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NATURE OF PROCEEDINGS

This appeal concerns a misapplication of the Rule 8 pleading standard to the serious and highly plausible allegations of misconduct contained in the plaintiff's complaint. Alarm.com Holdings, Inc. ("Alarm.com") sued three defendants—ABS Capital Partners Inc., ABS Partners V, LLC, and ABS Partners VII, LLC (collectively "ABS")—for misappropriation of trade secrets under the Delaware Uniform Trade Secrets Act ("DUTSA") and for common law misappropriation of confidential information. ABS was a large shareholder of Alarm.com for many years, during which it was privy to the entire suite of Alarm.com's trade secrets and confidential information. But just one year after an ABS partner stepped down as chairman of the Alarm.com Board, ABS invested in and is now leading ipDatatel, a competitor to Alarm.com, down the same path that Alarm.com and its employees worked tirelessly to pave.

The allegations in the complaint, accepted as true and read in the light most favorable to Alarm.com, easily establish that it is not simply plausible but probable that ABS has misappropriated Alarm.com's trade secrets while investing in and leading ipDatatel. That should have been sufficient to defeat ABS's motion to dismiss. The Court of Chancery nevertheless dismissed Alarm.com's complaint, holding that it is somehow *implausible* to believe that ABS misappropriated Alarm.com's trade secrets. Opinion (attached as Exhibit A). The Court of

Chancery’s analysis ignored the substantial and highly plausible allegations of Alarm.com’s complaint and focused instead on contracts where Alarm.com permitted ABS to compete with Alarm.com *on the condition that ABS did not misappropriate Alarm.com’s trade secrets and confidential information*. These contracts are wholly irrelevant to the question whether, as a factual matter, the complaint plausibly alleges that ABS misappropriated Alarm.com’s trade secrets—which the complaint plainly does. The lower court nevertheless thought that these contracts, which are not even discussed in the complaint, establish as a matter of law that any allegations of misappropriation are implausible—even though not a single contract authorizes misappropriation. The Court of Chancery’s ruling improperly bolts the courthouse doors to Alarm.com’s plausible claims for relief and effectively holds that anyone who has been authorized to compete with a company is immune *as a matter of law* from a misappropriation suit, even if the defendant has foresworn any right to use trade secrets to compete with the plaintiff.

The Court of Chancery then committed a second legal error, dismissing Alarm.com’s alternative common law claim for misappropriation of confidential information on the ground that DUTSA displaces that claim. But DUTSA only displaces claims “providing civil remedies for misappropriation of a trade secret,” 6 Del. C. § 2007(a), and Alarm.com pled its common law claim in the alternative should a court determine that the information identified in the complaint does not

satisfy the statutory definition of a “trade secret.” In dismissing the common law claim, the court did not adequately treat with the statute’s text or this Court’s decision in *ASDI, Inc. v. Beard Research, Inc.*, 11 A.3d 749 (Del. 2010), which foreclose the lower court’s finding of displacement. The court instead relied on what it perceived to be DUTSA’s purpose, but the purpose of that statute was to fortify protections for trade secrets, not to abolish protections for any information that does not rise to the level of a trade secret, no matter how confidential and valuable that information might be.

On July 13, 2018, Alarm.com timely appealed the Court of Chancery’s decision.

SUMMARY OF ARGUMENT

I. The Court of Chancery erred in dismissing Alarm.com's DUTSA claim on the ground that Alarm.com failed to plausibly allege misappropriation. The traditional Rule 8 pleading standard applies, *Savor, Inc. v. FMR Corp.*, 812 A.2d 894, 896-97 (Del. 2002), and the Court of Chancery erred by effectively applying a heightened pleading standard. The allegations of the complaint set forth a reasonably conceivable set of circumstances whereby ABS has misappropriated Alarm.com's trade secrets. These circumstances include but are not limited to allegations that: (1) ABS invested in a competitor to Alarm.com soon after divesting from its years-long and highly lucrative stake in Alarm.com and its seat on Alarm.com's Board; (2) ABS announced (only after Alarm.com initiated its lawsuit) that Ralph Terkowitz, an ABS partner and the former chairman of Alarm.com's board, will not serve on ipDatatel's board, but ABS conspicuously did not disavow that Terkowitz played a role in ABS's diligence of and decision to invest in ipDatatel; (3) ABS outbid other potential investors for ipDatatel on the basis of its inside knowledge; (4) an industry expert has recognized that ipDatatel's potential for success is driven by the fact that ABS has long enjoyed unfettered access to Alarm.com's trade secrets; and (5) the sheer scope of ABS's exposure to Alarm.com's trade secrets makes misappropriation all but inevitable.

II. The Court of Chancery erred in dismissing Alarm.com’s common law claim for misappropriation of confidential information on the ground that DUTSA displaces this claim. DUTSA only displaces laws “providing civil remedies for misappropriation of a trade secret,” 6 Del. C. § 2007(a), and so Alarm.com’s common law claim is viable should a court determine that Alarm.com’s confidential information does not satisfy DUTSA’s definition of a “trade secret.” The Court of Chancery’s decision squarely conflicts with this Court’s decision in *Beard Research*, 11 A.3d 749, which affirmed a decision holding that DUTSA does not displace a similar common law claim because that claim “can be premised on the misuse of a plaintiff’s confidential information, even if that information does not rise to the level of a trade secret.” *Beard Research, Inc. v. Kates*, 8 A.3d 573, 602 (Del. Ch. 2010). The Court of Chancery ignored DUTSA’s text and instead looked to its supposed purpose. But even if this purpose-driven inquiry were appropriate (and it is not), the statute was designed to expand legal protection for information that satisfies DUTSA’s definition of a “trade secret,” not to abolish legal protection for valuable confidential information that does not rise to the level of a “trade secret.”

STATEMENT OF FACTS

I. ABS Invests in Alarm.com and Acquires Alarm.com's Trade Secrets and Confidential Information.

Alarm.com is a pioneer in the home security system market, offering cloud-based security and automation solutions through service providers. A42, A46. Alarm.com also designs and sells related hardware for the smart home, including cellular communications, smart thermostats, and video cameras. A47.

In 2009, ABS acquired a majority stake in Alarm.com. A47. ABS appointed one of its general partners, Ralph Terkowitz, as chairman of the board, and Terkowitz served on Alarm.com's board until August 2016. A42, A48. Two other ABS partners, Bobby Goswami and Tim Weglicki, also served on Alarm.com's board. A50. Terkowitz, Goswami, and Weglicki were privy to the full suite of Alarm.com's most sensitive trade secrets and confidential information. A49-50. Terkowitz was especially involved with Alarm.com, participating in most, if not all, of the company's business decisions, including those relating to its business model, go-to-market strategies, litigation, marketing, and pricing models. A49.

Terkowitz (and thus ABS) acquired Alarm.com's trade secrets and confidential information through multiple sources. For example, Terkowitz had regular conversations with Steve Trundle, Alarm.com's CEO, during which Trundle communicated to Terkowitz, in minute detail, Alarm.com's business strategy, trade secrets, and confidential information. A49. Terkowitz also attended Alarm.com

board meetings where the company's trade secrets and confidential information were discussed, and he received copies of the PowerPoint decks prepared for those meetings. A52.

Other executives at ABS also learned about Alarm.com's trade secrets, including ABS's Managing Partner, Phil Clough. Indeed, if anyone at ABS would have learned those trade secrets (other than Terkowitz, Goswami, and Weglicki), it would have been Clough, given his position as Managing Partner of ABS, and given that ABS's investment in Alarm.com had a value higher than the sum of the value of all the other investments made by the ABS fund. A51-52. And it is Clough who will serve as a director of ipDatatel. A51, A68.

The trade secrets and confidential information that ABS acquired include information concerning Alarm.com's customers and end users, A53-56; competitor and market analysis, A56-60; subsidiaries and acquisition targets, A60-62; confidential financial information, A62-63; products, A63-65; marketing strategy and spend, A65-67; and source code, A43, A47, A67.

II. Alarm.com Expressly Prohibits ABS From Misappropriating Alarm.com's Trade Secrets and Confidential Information.

Alarm.com and ABS agreed to several contracts that prohibited ABS from misappropriating Alarm.com's trade secrets and confidential information. Four contracts are relevant to the decision below:

2008 NDA. When ABS explored an investment in Alarm.com, ABS agreed in a non-disclosure agreement that it could use the confidential information it learned during the diligence “*solely* for the purpose of evaluating the Proposed Transaction,” and it further agreed “that the Confidential Information will be kept confidential and that [ABS] and [its] Representatives will not disclose any of the Confidential Information in any manner whatsoever” A183 (emphasis added). ABS could disclose the confidential information only if (1) Alarm.com gave “prior written consent” and (2) disclosure was only to individuals “who need to know such information for the sole purpose of evaluating” the proposed transaction and “who agree to keep such information confidential” A183.

The NDA expressly conditioned any ABS investment in a competitor on its compliance with these confidentiality obligations: “*Subject to your observance of all the terms of this letter agreement, including the confidentiality obligations, nothing in this letter agreement will prevent you from evaluating a possible investment in ... a company whose business is similar or competitive with the business of [Alarm.com].*” A183-84 (emphasis added). The NDA stated that “[t]he occurrence or existence of such similar or competitive activities shall not, by itself, be *conclusive evidence* that you have failed to observe your confidentiality obligations set forth herein, provided that none of the Confidential Information is provided or disclosed

to any Competing Company without [Alarm.com's] prior written permission.” A184 (emphasis added).

2009 Stockholder Agreement. The 2009 Stockholder Agreement likewise made clear that ABS had a duty to maintain the confidentiality of Alarm.com's trade secrets and confidential information. Section 2.2 permitted stockholders owning 5% or more of Alarm.com's stock (including ABS) to appoint an observer to the Board “provided that each observer shall execute a confidentiality agreement in form and substance reasonably acceptable to the Board of Directors” A240.

2012 Stockholder Agreement. Section 12.16 of the 2012 Stockholder Agreement required that ABS and other stockholders “use the same degree of care [with Alarm.com's proprietary and confidential information] as such Stockholder uses to protect its own confidential information” with respect to certain confidential information it obtained. A451. Section 12.16 permitted ABS to “disclose such proprietary or confidential information” to current and former partners or members only if those individuals maintain the information in the strictest confidence and “sign[] a non-use and non-disclosure agreement” A451. The agreement allowed ABS to enter into business “with any other company (whether or not competitive with [Alarm.com]) provided that such Stockholder or Permitted Disclosee does not, except as permitted in accordance with this Section 12.16, disclose or otherwise

make use of any proprietary or confidential information of the Company in connection with such activities” A451.

Further, Section 2.2(f) permitted ABS to appoint one of its partners, Tim Weglicki, as an observer to the Alarm.com Board, subject to two conditions. First, Weglicki and other observers had to “execute a confidentiality agreement in form and substance reasonably acceptable to the Board of Directors.” A432. Second, Alarm.com “reserve[d] the right to exclude any Observer from a meeting if the Observer’s presence at such meeting would jeopardize any privilege of the Company or involve highly confidential or sensitive information of the Company” A432.

2012 Certificate of Incorporation. The 2012 Certificate of Incorporation provided that ABS and others “shall have no duty (contractual or otherwise) not to, directly or indirectly, engage in the same or similar business activities or lines of business as [Alarm.com]” A212. This agreement also stated that these entities have no duty to avoid opportunities that might be “a corporate opportunity for the Corporation.” A212. But the agreement did not authorize ABS to misappropriate Alarm.com’s trade secrets or confidential information.

III. ABS Divests From Alarm.com and Promptly Invests in a Competitor.

In 2015, Alarm.com had an initial public offering on the NASDAQ exchange. A50. With the completion of the IPO, ABS’s preferred stock was converted into common stock. A50. Terkowitz remained on the board of Alarm.com and served

on various committees, including the audit and compensation committees, until he resigned in August 2016. A50.

Only months later, in 2017, Alarm.com learned that ABS was attempting to acquire a controlling interest in two smart-home security companies, ipDatatel and Resolution Products. Like Alarm.com, ipDatatel makes a cellular communicator that enables remote monitoring and control of devices in a home through a smartphone. A67-68. Resolution Products makes hardware for alarm systems, including cellular modules, control panels, and sensors. A68.

On September 6, 2017, thanks to financial backing from ABS, ipDatatel and Resolution Products merged, creating a new venture (“ipDatatel”) that will directly compete with Alarm.com. A42, A67-68. ABS acquired a substantial share of ipDatatel, and it will exercise significant influence over that entity. A42. Clough, the Managing Partner of ABS, will serve on ipDatatel’s Board. A51, A68. Only one year elapsed between when Terkowitz left Alarm.com’s Board and when ABS purchased a substantial stake in ipDatatel—which means that ABS’s diligence into the new competitor began only months after it left Alarm.com, if not sooner. A42.

ABS used its knowledge of Alarm.com’s trade secrets to become comfortable with the idea of investing in ipDatatel. A43. ipDatatel was sold in an auction-like process, and ABS initially decided to bid, and eventually emerged as the winning bidder willing to pay more than anyone else, because it had access to and knew it

could exploit Alarm.com's confidential business playbook, putting ABS at a unique competitive advantage. A44.

ABS used, and will continue to use, Alarm.com's trade secrets and confidential information to grow ipDatatel. A67-70, A73. ABS's knowledge of Alarm.com's trade secrets and confidential information is so extensive that ABS could not reasonably avoid using this information in the course of operating and leading ipDatatel. A69-70. ABS will contribute Alarm.com's secret knowledge not only of what works in the smart-home industry, but also of what does not work. A70. ABS is unlikely to try business strategies at ipDatatel that it knows did not work for the founders and management team at Alarm.com who were engaged in an identical business. This insider knowledge will no doubt benefit ipDatatel's growth to the detriment of Alarm.com and its remaining shareholders. A70. The harm to Alarm.com is particularly acute given that ipDatatel will be in the same stage as Alarm.com was in 2009. A70. ABS will be able to use Alarm.com's confidential information and trade secrets to shorten ipDatatel's growth time. A70.

An industry expert has already recognized that ipDatatel's potential for success is driven by the fact that, for years, ABS had total unfettered access to Alarm.com's trade secrets and confidential information. As the reporter explained, "[i]f not for the involvement of ABS, the merger of ipDatatel and Resolution Products [] might go largely unnoticed outside of the smart-home niche." Julie

Jacobson, *ipDatatel, Resolution Products Merger: The One Alarm.com Tried to Kill*, CEPRO (Sept. 6, 2017), <https://goo.gl/9Wx41x>. But, the reporter explained: “ABS, however, makes this deal particularly interesting, given its track record with Alarm.com” *Id.* The reporter emphasized that ABS “knows a thing or two about Alarm.com IP.” *Id.*

IV. After Alarm.com Sues, ABS Declines to State that Terkowitz Was Not Involved in the Diligence of and Investment in ipDatatel.

On August 14, 2017, Alarm.com sued ABS and Terkowitz, alleging claims for breach of fiduciary duty, aiding and abetting breach of fiduciary duty, misappropriation of trade secrets under DUTSA, and common law misappropriation of confidential information. A21.

After Alarm.com filed its original complaint, ABS announced for the first time that Terkowitz will not serve on ipDatatel’s Board. A44-45. However, ABS has never denied that Terkowitz was involved with the diligence and purchase of ipDatatel, nor has it denied that Terkowitz will continue to advise his partners at ABS on ipDatatel. A44-45. ABS has never explained the extent to which Terkowitz was involved in ABS’s diligence of, and decision to invest in, ipDatatel. A44-45.

On September 22, 2017, Alarm.com filed the operative Amended Complaint, describing its trade secrets and confidential information in greater detail and alleging only the two misappropriation claims against ABS. A41.

V. The Court of Chancery Dismisses Alarm.com's Complaint.

On June 15, 2018, the Court of Chancery dismissed the amended complaint with prejudice. With respect to the DUTSA claim, the court assumed that Alarm.com adequately pled three of the four elements of a DUTSA claim, i.e., that Alarm.com possesses trade secrets, Alarm.com communicated those trade secrets to ABS, and the communication was made pursuant to an understanding that ABS would maintain the secrecy of the information. Opinion at 13. The court nevertheless held that Alarm.com failed to plausibly plead the fourth element, misappropriation by ABS. *Id.*

The court characterized Alarm.com's misappropriation claim as "rel[ying] only on ABS's investment in [ipDatatel]," and it concluded that this investment cannot plausibly create an inference that ABS misappropriated Alarm.com's trade secrets. *Id.* at 15. The court so ruled because contracts between Alarm.com and ABS—the 2008 NDA, 2009 and 2012 Shareholder Agreements, and 2012 Certificate of Incorporation—permit ABS to invest in competitors so long as ABS does not misappropriate Alarm.com's trade secrets. *Id.* at 15-18. The court concluded that because ABS has the "ability to invest in a competitor" so long as it does not misappropriate any trade secrets, it is somehow implausible to believe that ABS misappropriated any trade secrets. *Id.* at 15. The court did not address the many circumstances discussed in the complaint giving rise to a plausible inference

that ABS is competing with Alarm.com not lawfully but rather in an unlawful manner. *See id.* at 13-19.

The court then dismissed the common law misappropriation claim on displacement grounds. The court acknowledged that DUTSA does not displace “civil remedies that are not based upon misappropriation of a trade secret,” Opinion at 20 (quoting 6 Del. C. § 2007(b)(2)), and it conceded that Alarm.com’s common law misappropriation claim is based upon “materials that do not qualify as a trade secret,” *id.* at 22 (emphasis added). The court nevertheless stated that allowing the common law claim to proceed “runs contrary to the purpose underlying DUTSA,” which the court thought was to “distinguish[] between protected trade secrets and non-protectable business information.” *Id.* “[P]ermitting this claim,” the court concluded, would be “[c]ontrary to the intent of the Uniform Act.” *Id.* at 21.

ARGUMENT

I. ALARM.COM HAS PLAUSIBLY ALLEGED MISAPPROPRIATION.

A. Questions Presented.

Whether the Court of Chancery erred in (1) effectively applying a heightened pleading standard to Alarm.com's DUTSA claim, A292-94, and (2) concluding that Alarm.com did not plausibly allege that ABS misappropriated Alarm.com's trade secrets, A295-322.

B. Scope of Review.

This Court reviews *de novo* the dismissal of a complaint under Rule 12(b)(6). *CML V, LLC v. Bax*, 28 A.3d 1037, 1040 (Del. 2011).

C. Merits of Argument.

1. *The Court of Chancery improperly applied a heightened pleading standard.*

Although the Court of Chancery cited the proper pleading standard, Opinion at 12, it in fact applied a heightened pleading standard to the amended complaint. DUTSA claims are subject to the traditional "liberal notice pleading standards" of Rule 8. *Savor*, 812 A.2d at 897. This is not a high bar: (1) "all well-pleaded factual allegations are accepted as true," (2) "even vague allegations are well-pleaded if they give the opposing party notice of the claim," (3) "the Court must draw all reasonable inferences in favor of the non-moving party," and (4) "dismissal is inappropriate unless the plaintiff would not be entitled to recover under any reasonably

conceivable set of circumstances susceptible of proof.” *Id.* at 896-97 (quotation marks omitted).

Moreover, “the common scenario” in trade secrets cases involves a plaintiff who “may not know which parts of its trade secrets have been misappropriated or cannot determine the full scope of its claims until” after discovery. *Uni-Systems, LLC v. United States Tennis Ass’n*, 2017 WL 4081904, at *4 (E.D.N.Y. Sept. 13, 2017) (unpublished). The Court of Chancery thus acknowledged that even “at trial,” “[m]isappropriation and misuse can rarely be proved by convincing direct evidence.’ ” Opinion at 14 (quoting *Greenberg v. Croydon Plastics Co.*, 378 F. Supp. 806, 814 (E.D. Pa. 1974)). Moreover, “in most cases, ‘plaintiffs must construct a web of perhaps ambiguous circumstantial evidence from which the trier of fact may draw inferences which convince him that it is more probable than not that what plaintiffs allege happened did in fact take place.’ ” *Id.* at 14-15 (quoting *Merck & Co., Inc. v. SmithKline Beecham Pharms. Co.*, 1999 WL 669354, at *20 (Del. Ch. Aug. 5, 1999) (unpublished)).

The lower court failed to apply the proper pleading standard, because Alarm.com’s complaint easily satisfies Rule 8’s liberal notice pleading standard. Alarm.com’s complaint indisputably alleges each of the elements of a DUTSA claim; the facts alleged in the complaint are at least *plausibly* true; and if these facts

are true, they certainly amount to misappropriation. This simple proposition should resolve this appeal.

2. *Alarm.com has plausibly alleged misappropriation.*

The Court of Chancery assumed that Alarm.com adequately alleged every element of its DUTSA claim except the misappropriation element. Opinion at 13. But the court concluded that the complaint “relies only on ABS’s investment in [ipDatatel],” and that the only plausible inference is that ABS invested in a manner that did not run afoul of its strict obligations not to misappropriate trade secrets. *Id.* at 15.

The lower court erred because, assuming the well-pleaded allegations to be true and drawing all reasonable inferences in Alarm.com’s favor, the complaint undoubtedly alleges facts establishing that Alarm.com would be entitled to recover under some “reasonably conceivable set of circumstances susceptible of proof.” *Savor*, 812 A.2d at 897 (quotation marks omitted). Even at the pleading stage, Alarm.com has leveled serious allegations, both circumstantial and not, making it at least reasonably conceivable that ABS has misappropriated some or all of Alarm.com’s trade secrets.

Alarm.com did not rely “only on ABS’s investment in [ipDatatel],” Opinion at 15, but also on the circumstances of that investment—circumstances set forth at

length in the complaint and briefing below, but almost entirely ignored by the Court of Chancery:

First, ABS does not meaningfully dispute that it is in possession of the valuable Alarm.com information identified in the complaint. This information, which the Court of Chancery assumed constitutes a “trade secret” under DUTSA, was communicated to Terkowitz, and it is certainly plausible that he would have reported on those trade secrets to others at ABS, including Phil Clough, ABS’s managing general partner and a director of ipDatatel. *See, e.g.*, A48-50. Indeed, it is a near certainty that Clough was apprised of Alarm.com’s valuable information, given his position within ABS and the size of ABS’s investment in Alarm.com. A51-52.

Second, ipDatatel is a *direct competitor* to Alarm.com, competing in the very industry and indeed via the very same technology as Alarm.com. *See, e.g.*, A42, A44. This is not a case where ABS is competing in an adjacent or similar space—it is precisely the same space where ABS and its partners spent years harvesting Alarm.com’s trade secrets.

Third, the extraordinary speed with which ABS moved from having access to Alarm.com’s trade secrets to investing in and leading a competitor creates a powerful inference of misappropriation. *See, e.g., Weinschel Eng’g Co. v. Midwest Microwave, Inc.*, 297 A.2d 443, 445 (Del. Ch. 1972) (denying motion to strike

misappropriation claim based on “the sequence of events surrounding the departure from Weinschel of key employees with access to important information and their subsequent employment by a new company ..., which immediately began to produce products substantially similar to those produced by Weinschel”). Only one year elapsed between when Terkowitz left Alarm.com’s board and when ABS purchased its stake in ipDatatel—which means that ABS’s diligence into the new competitor likely began only months after he left Alarm.com, if not sooner. A42, A67. This temporal proximity creates a plausible inference of misappropriation, both standing alone and in the context of the remaining allegations in the complaint. *Weinschel*, 297 A.2d at 445.

Fourth, shortly after Alarm.com filed its original complaint, ABS announced for the first time that Terkowitz would not serve as a director of ipDatatel. A44-45. Given that Terkowitz knows virtually the entire suite of Alarm.com’s trade secrets and confidential information, *see, e.g.*, A49, ABS’s decision to sideline the individual with the most knowledge of ipDatatel’s business (and only after the complaint was filed) can reasonably be interpreted as a tacit admission that Terkowitz’s involvement with ipDatatel *would* be improper because it would result in the purposeful or inevitable misappropriation of Alarm.com’s trade secrets. Moreover, ABS has never denied that Terkowitz was involved with ABS’s diligence of and investment in ipDatatel, nor has ABS denied that Terkowitz will continue to

advise ipDatatel in an informal manner. In fact, it is implausible to believe that he was *not* involved at those earlier stages of ABS's investment in ipDatatel. To the contrary, it is reasonable to infer—and Alarm.com is entitled to this inference—that ABS's limited and carefully worded disclaimer that did *not* disclaim that Terkowitz was involved with the diligence of ipDatatel means that Terkowitz *was* involved in that diligence. It is also far from far-fetched to believe that Terkowitz would have disclosed Alarm.com's trade secrets during that diligence process, as that information plainly was relevant to the process. All of these facts and inferences undoubtedly give rise to a plausible case of misappropriation.

Fifth, as the Court of Chancery acknowledged, Alarm.com alleged that ABS invested in ipDatatel only “following an auction in which ABS outbid other potential investors.” Opinion at 15. But the court did not explain why it was implausible to believe Alarm.com's allegation that “ABS initially decided to bid, and eventually emerged as the winning bidder and was willing to pay more than anyone else, because it had access to and knew it could exploit Alarm.com's confidential business playbook, putting ABS at a unique competitive advantage unavailable to other bidders.” A44.

Sixth, an industry expert has already commented that ipDatatel's potential for success is driven by the fact that, for years, ABS had total unfettered access to Alarm.com's trade secrets and confidential information. A44. The reporter

explained that “if not for the involvement of ABS, the merger of ipDatatel and Resolution Products [] might go largely unnoticed outside of the smart-home niche.” Julie Jacobson, *ipDatatel, Resolution Products Merger, supra*. But, the reporter explained, “ABS ... makes this deal particularly interesting, given its track record with Alarm.com,” and given that ABS “knows a thing or two about Alarm.com IP.” *Id.*

Seventh, the sheer scope of ABS’s exposure to Alarm.com’s trade secrets makes the disclosure of those trade secrets all but inevitable. *Bimbo Bakeries USA, Inc. v. Botticella*, 613 F.3d 102, 111-12 (3d Cir. 2010). The complaint alleges, and ABS does not dispute, that ABS was involved in every aspect of Alarm.com’s business, including its business model, pricing strategy, go-to-market strategy, marketing strategy, and method and process for assessing and entering new markets. *See, e.g.*, A48-50. If anything, it is implausible to believe that ABS could “unlearn” this treasure trove of secret information about Alarm.com and ignore it all while operating ipDatatel.

The decision below almost entirely ignores these allegations; it makes no effort to explain why these serious allegations are implausible and do not give rise to an inference of misappropriation. They undoubtedly are plausible and do give rise to an inference of misappropriation.

If the Court of Chancery had adhered to well-established pleading standards, it would have allowed Alarm.com to take discovery and prove its case. Certainly, the circumstances supporting liability set forth above are susceptible to proof. For example, it would be susceptible to proof to determine whether Terkowitz had in fact utilized Alarm.com's trade secrets in assisting ABS in deciding whether to invest in ipDatatel and whether he had in fact shared Alarm.com's trade secrets with Clough. In light of the complaint's detailed, plausible allegations, Alarm.com is entitled to take discovery to ascertain whether ABS, in fact, utilized Alarm.com's trade secrets as part of its decision-making process into investing in ipDatatel and whether it continues to misuse this information as ipDatatel competes against Alarm.com.

To be sure, Alarm.com cannot know for certain at this time precisely which or how many of the trade secrets ABS has already appropriated. Even after full discovery, “[r]arely will the plaintiff in a misappropriation of trade secrets case discover the ‘needle’ in his opponent’s ‘hay stack’ of documents” or “enjoy the ‘Perry Mason moment’ when the defendant’s chief executive officer buckles under the weight of cross examination and admits that his company has misappropriated the plaintiff’s trade secret.” *Savor, Inc. v. FMR Corp.*, 2004 WL 1965869, at *8 (Del. Super. Ct. July 15, 2004) (unpublished). *See also* Opinion at 14-15.

But this does not mean all misappropriation claims are doomed—much less that they are doomed *at the threshold*, as the Court of Chancery held here. “[I]t is now well-settled that the plaintiff may prove misappropriation of trade secrets with circumstantial evidence.” *Savor*, 2004 WL 1965869, at *8. *See also Beard Research*, 8 A.3d at 597 (sufficient evidence of misappropriation where defendant offered similar products and could not have developed its business as quickly without misappropriating trade secrets). The plausible allegations of the complaint easily satisfy Rule 8.

3. *The parties’ contracts confirm the plausibility of Alarm.com’s allegations.*

The Court of Chancery did not engage with any of these extensive allegations of the complaint. Instead, the court focused almost entirely on contracts permitting ABS to invest in competitors *so long as it did not misappropriate Alarm.com’s trade secrets*, and it held that these contracts make it implausible to believe that ABS misappropriated any trade secrets.

As an initial matter, even under the Court of Chancery’s reading of these contracts, they do not justify dismissal of the complaint. When evaluating a motion to dismiss, courts do not weigh the evidence; rather, they accept the plaintiff’s well-pleaded allegations as true and dismiss only if the plaintiff cannot recover under “any reasonably conceivable set of circumstances susceptible of proof.” *CML V*, 28 A.3d at 1040.

In any event, that Alarm.com and ABS had a “shared understanding about ABS’s ability to invest in a competitor,” Opinion at 15, does not somehow render implausible the allegations that ABS is *unlawfully* competing with Alarm.com. The 2008 NDA, for example, contained strict language clarifying that ABS may use Alarm.com’s information “solely for the purpose of evaluating the Proposed Transaction,” and stating that ABS’s permission to invest in other companies was “[s]ubject to [ABS’s] observance of all the terms of this letter agreement, including the confidentiality obligations” A183.

Indeed, although the Court of Chancery concluded that the contractual agreements precluded any finding of misappropriation, the 2008 NDA proves the opposite: It states that ABS’s competition with Alarm.com “shall not, by itself, be *conclusive evidence* that you have failed to observe your confidentiality obligations set forth herein, *provided that* none of the Confidential Information is provided or disclosed to any Competing Company without [Alarm.com’s] prior written permission.” A184 (emphases added). That ABS’s competition with Alarm.com is not “conclusive evidence” of misappropriation does not mean such competition is somehow conclusive evidence that ABS has acted lawfully. To the contrary, the NDA contemplates precisely the fact-bound inquiry that the Court of Chancery pretermitted, i.e., an inquiry into whether the business information was “disclosed to any Competing Company without [Alarm.com’s] prior written permission.” *Id.*

The 2009 and 2012 agreements do not help ABS either. The 2009 and 2012 stockholder agreements permitted ABS to possess Alarm.com’s trade secrets *only if* ABS agreed to maintain that information in the strictest confidence. The 2009 agreement permitted board observers “provided that each observer shall execute a confidentiality agreement in form and substance reasonably acceptable to the Board of Directors” A240. The 2012 Stockholder Agreement permitted ABS to compete with Alarm.com “provided that such Stockholder or Permitted Disclosee does not, except as permitted in accordance with this Section 12.16, disclose or otherwise make use of any proprietary or confidential information of the Company in connection with such activities” A451.¹ And the 2012 Certificate of Incorporation simply permitted ABS to compete with Alarm.com; it did not permit ABS to compete in a manner that violates trade secret laws.

At bottom, the Court of Chancery’s emphasis that ABS could compete with Alarm.com so long as it did not violate its confidentiality duties simply begs the relevant question: *Did ABS violate its agreements and duties?* Under the Court of Chancery’s holding, any and all misappropriation claims where the plaintiff lacks, at the pleading stage, a smoking gun proving violation of a defendant’s confidentiality duties are effectively foreclosed. But Alarm.com is entitled to take

¹ Section 12.16 contains exceptions irrelevant to this case, such as for the disclosure of documents already in the public domain.

discovery given the plausible allegations of misuse of Alarm.com's information. Even after full discovery, such a smoking gun rarely rears its head. Opinion at 14-15; *Savor*, 2004 WL 1965869, at *8. The court's decision essentially immunizes investors or fiduciaries from a misappropriation claim, at the threshold, whenever (as if often and perhaps almost always the case) the investor or fiduciary has a right to compete with the plaintiff. That has never been and should not be the law.

The complaint plausibly alleges that ABS misappropriated Alarm.com's trade secrets. The Court of Chancery erred by effectively applying a heightened pleading standard and dismissing the complaint.

II. DUTSA DOES NOT DISPLACE ALARM.COM'S COMMON LAW CLAIM.

A. Question Presented.

Whether DUTSA displaces Alarm.com's common law claim even though that claim is "not based upon misappropriation of a trade secret," 6 Del. C. § 2007(b)(2). A284-92.

B. Scope of Review.

This Court reviews *de novo* the Court of Chancery's statutory interpretation and legal conclusions. *CML*, 28 A.3d at 1040.

C. Merits of Argument.

The plain language of DUTSA makes clear that the statute does not displace civil remedies, like Alarm.com's common law claim, that are not based upon the allegation that the defendant misappropriated a trade secret. The Court of Chancery erred because it ignored the plain text of the statute in favor of what it thought to be the statute's purpose, but the court misunderstood that purpose too.

1. *The plain text of DUTSA only displaces civil remedies for misappropriation of trade secrets.*

a. Section 2007 of DUTSA expressly identifies those claims that DUTSA displaces—and those it does not:

(a) Except as provided in subsection (b) of this section, this chapter displaces conflicting tort, restitutionary and other law of this State providing civil remedies for misappropriation of a trade secret.

(b) This chapter does not affect:

- (1) Contractual remedies, whether or not based upon misappropriation of a trade secret;
- (2) Other civil remedies that are not based upon misappropriation of a trade secret; or
- (3) Criminal remedies, whether or not based upon misappropriation of a trade secret.

Thus, Subsection (a) only displaces, as relevant here, laws “providing civil remedies *for misappropriation of a trade secret.*” 6 Del. C. § 2007(a) (emphasis added). The text is clear: the statute displaces—and *only* displaces—claims complaining that one party misappropriated another’s “trade secret.”

Subsection (b) then identifies the remaining category of claims that DUTSA “does not affect.” *Id.* § 2007(b). As relevant here, DUTSA does not affect or displace “[o]ther civil remedies *that are not based upon misappropriation of a trade secret.*” *Id.* § 2007(b)(2) (emphasis added). Again, a “trade secret” has a specific meaning defined in *Id.* § 2001(4). Thus if a claim is not based upon misappropriation of such a “trade secret,” DUTSA “does not affect” it. *Id.* § 2007(b)(2).

ABS has argued that the information Alarm.com alleges it misappropriated—including customer lists, secret financial information, competitor and market analysis, and so on—does *not* qualify as a “trade secret” within the meaning of Section 2001(4). If ABS is wrong—if this information *is* a “trade secret” under DUTSA—then Alarm.com must sue under DUTSA, and its common law claim is

displaced. But if ABS is *correct*—if this material is not a “trade secret”—then it simply cannot be that Alarm.com’s common law claim for *misappropriation of non-trade secrets* somehow “provid[es] civil remedies for misappropriation of a trade secret.” *Id.* § 2007(a). *See, e.g., Callaway Golf Co. v. Dunlop Slazenger Grp. Americas, Inc.*, 295 F. Supp. 2d 430, 437 (D. Del. 2003).

Importantly, subsection (a) is the *only* subsection of DUTSA that provides for displacement. Thus it must provide the basis for the court’s displacement ruling. But subsection (a) only displaces laws “providing civil remedies for misappropriation of a trade secret.” And the court below conceded that Alarm.com’s common law claim concerns “materials that *do not qualify as a trade secret.*” Opinion at 22 (emphasis added). The court has thus rewritten subsection (a) to displace remedies not only “for misappropriation of a trade secret” but also for some larger unidentified category of claims concerning business information that does not qualify as a trade secret. This is not what the statute says. Meanwhile, the court’s decision takes a correspondingly narrow reading of subsection (b)(2), rewriting that provision to state that DUTSA displaces a category of claims “not based upon a misappropriation of a trade secret,” even though subsection (b) says it “does not affect” them.

b. Even if the text were ambiguous, an important canon of construction—the presumption against displacement of the common law—compels the conclusion

that DUTSA does not displace Alarm.com’s common law claim. “The tenets of statutory construction require us to interpret statutes consistent with the common law unless the statutory language clearly and explicitly expresses an intent to abrogate the common law.” *PHL Variable Ins. Co. v. Price Dawe 2006 Ins. Trust*, 28 A.3d 1059, 1072–73 (Del. 2011) (footnote omitted). In other words, this Court may find displacement only if DUTSA “clearly and explicitly” displaces Alarm.com’s common law claim. *Id.*

ABS cannot come close to showing clear and explicit intent to displace; to the contrary, the statute plainly does *not* displace Alarm.com’s common law claim. The Supreme Court of Arizona emphasized this canon of construction when it held that Arizona’s analogous version of UTSA does not displace common law claims for misuse of confidential information. *Orca Commc’ns Unlimited, LLC v. Noder*, 337 P.3d 545, 547–48 (Ariz. 2014). The court emphasized that “[i]n addition to giving [AUTSA] a broader preemptive sweep than that statute’s text supports,” the displacement argument fails because “[a]t the least, [AUTSA’s] text creates reasonable doubt about the legislature’s intent regarding displacement of common-law claims that do not involve trade secrets as defined in AUTSA.” *Id.* The presumption against displacement of the common law requires resolving any doubt against displacement.

c. The decision below does not simply conflict with the plain language of the statute; it also creates no guidance in future cases. The business community is left to guess as to which claims that are not based on misappropriation of a trade secret are nevertheless displaced by a statute that by its plain terms does not displace those claims, with the answer lying only in a future judge's guess about whether DUTSA's drafters intended that claim to be displaced.

Following the plain text of DUTSA, by contrast, establishes a simple, clear, and administrable test: if a claim "provid[es] civil remedies for misappropriation of a trade secret," it is displaced, 6 Del. C. § 2007(a); otherwise, the claim is "not based upon misappropriation of a trade secret," and it is not displaced, *id.* § 2007(b)(2). "[T]he phrase 'based upon' ... is read most naturally to mean those elements of a claim that, if proven, would entitle a plaintiff to relief under his theory of the case." *Saudi Arabia v. Nelson*, 507 U.S. 349, 357 (1993). To prove its common law claim for misappropriation of confidential information, Alarm.com need not prove the existence of a trade secret. Thus the common law claim is not displaced.

2. *This Court has already held that DUTSA does not displace claims analogous to Alarm.com's common law claim.*

This Court's decision in *ASDI, Inc. v. Beard Research, Inc.*, 11 A.3d 749 (Del. 2010) also forecloses the counterintuitive conclusion that DUTSA displaces Alarm.com's common law claim. *Beard Research* involved facts that are closely analogous to those of this case: Former employees allegedly misappropriated

information from their former employer and used that information to create a competitor to their former employer. *Beard Research, Inc. v. Kates*, 8 A.3d 573, 580 (Del. Ch. 2010). The defendants argued that DUTSA displaced the plaintiffs’ breach-of-fiduciary-duty claim, but the Court of Chancery rejected that argument, and this Court affirmed. The Court of Chancery emphasized that to prevail under DUTSA, “a plaintiff must show that the information in question qualifies as a trade secret under 6 Del C. § 2001(4),” but that the fiduciary-duty “claim can be premised on the misuse of a plaintiff’s confidential information, even if that information does not rise to the level of a trade secret.” *Id.* at 602. Thus, the court held, “[e]ven if Plaintiffs’ misappropriation of trade secrets claim had failed, they still could show a breach of fiduciary duty by demonstrating that [a former employee] stole and misused [the plaintiffs’] confidential information” *Id.* Because “[t]he same facts [were] not required to establish all the elements of both the misappropriation and breach of fiduciary duty claims,” the Court of Chancery held that the fiduciary duty claim was not displaced. *Id.* This Court affirmed in full “on the basis of [the Court of Chancery’s] well-written Merits and Spoliation Opinions.” *Beard Research*, 11 A.3d at 750.

Without acknowledging that this Court affirmed in *Beard Research*, the court below in this case attempted to distinguish the Court of Chancery’s decision in *Beard Research* on the ground that it involved “the existence of a fiduciary relationship,

which required proof beyond what is required for misappropriation under DUTSA and which brings with it special duties and obligations.” Opinion at 21-22. The court suggested that Alarm.com’s “claim for common law misappropriation, by contrast, has the same scope and parameters as a claim for misappropriation under DUTSA. The only difference is that the common law claim extends protection to materials that do not qualify as a trade secret.” *Id.* at 22.

There are several problems with this analysis. First, *Beard Research* simply did not turn on the existence of a fiduciary relationship—it turned on the fact that DUTSA displaces claims concerning “trade secrets” but not “confidential information.” Second, even if the existence of a fiduciary relationship were relevant, ABS, through Terkowitz, has a fiduciary relationship to Alarm.com. Third, and most importantly, the “only difference” that the Court of Chancery found—that Alarm.com’s common law claim concerns “materials that do not qualify as a trade secret,” Opinion at 22—makes all the difference, because here, no less than in *Beard Research*, the non-displaced claim relies “on the misuse of a plaintiff’s confidential information, even if that information does not rise to the level of a trade secret.” *Beard Research*, 8 A.3d at 602.

This Court’s pre-*Beard Research* decision in *Savor, Inc. v. FMR Corp.*, 812 A.2d 894 (Del. 2002), likewise defeats the Court of Chancery’s decision below. *Savor* involved a plaintiff corporation that sued two corporations that allegedly stole

the plaintiff's business idea. *Id.* at 895. This Court first held that the plaintiff adequately alleged a DUTSA claim. *Id.* at 897. It then held that common law claims for unfair competition and conspiracy were displaced because "Savor's common law claims seek civil remedies based *solely* on the alleged misappropriation of a trade secret." *Id.* at 898 (emphasis added). Here, unlike in *Savor*, Alarm.com's common law claim is not based "solely on the alleged misappropriation of a trade secret," *id.*; indeed, it is not based *at all* on the misappropriation of a trade secret. Rather, Alarm.com presses its common law claim in the alternative in the event the courts conclude that the information in question does *not* qualify as a trade secret—a conclusion that is possible for at least some of the business information identified in the complaint.²

3. *Non-binding court decisions confirm that DUTSA does not displace Alarm.com's common law claim.*

Numerous highly-persuasive Delaware state and federal trial court decisions support and adopt our argument, based on the plain language of DUTSA, that claims for misappropriation of non-trade secrets are not displaced by a statute that only

² For example, the complaint alleges that ABS misappropriated the identity of Alarm.com's dealers and its methods of evaluating markets, A53-54, A56-60, but a court might conclude that this information is "readily ascertainable by proper means," 6 Del. C. § 2001(4)(a). Likewise, the complaint alleges that ABS misappropriated Alarm.com's confidential financial information, A62-63, but a court might conclude that this information does not "[d]erive[] independent economic value ... from not being generally known," 6 Del. C. § 2001(4)(a).

displaces “civil remedies for misappropriation of a trade secret.” 6 Del. C. § 2007(a). One leading decision is *Overdrive, Inc. v. Baker & Taylor, Inc.*, 2011 WL 2448209 (Del. Ch. June 17, 2011) (unpublished), which denied a motion to dismiss certain tort claims, including a claim for conversion of confidential information, and which rejected the defendant’s argument that DUTSA displaced those claims. The court explained that DUTSA only displaces claims that depend upon “whether a trade secret in fact exists or is alleged as an element of each claim” *Id.* at *4. The court held that dismissal of the complaint was inappropriate because the success of these common law claims “does not *necessarily* depend on the success of plaintiff’s misappropriation of trade secrets claim.” *Id.* at 5. “If no trade secret was in fact at issue,” the court explained, “a conversion claim could still exist based on the misappropriation of confidential information—a finding of a trade secret is not an essential element of a conversion claim.” *Id.* Therefore, in this case no less than in *Overdrive*, whether our claim “is preempted by the DUTSA depends on whether the information in question was in fact a *trade secret* (not merely confidential information).” *Id.*

The court below in this case criticized *Overdrive* because it “did not explore the intent of the drafters of the Uniform Act or the rationale for the preemption provision,” Opinion at 23, but *Overdrive* focused instead on the *text* of the statute, which is the starting point (and here, ending point) of the analysis. In any event, as

Alarm.com explains below, its reading of DUTSA is the only one consistent with the statute's purpose and rationale. The Court of Chancery also tried to distinguish *Overdrive* on the ground that it involved a claim for conversion, not misappropriation of confidential information, *id.* at 24, but both claims have an essential identity: the inappropriate misuse of confidential information.

The Court of Chancery also ignored a number of additional decisions that Alarm.com cited below and that persuasively explain why DUTSA does not displace claims not based on misappropriation of a trade secret. For example, *Petroplast Petrofisa Plasticos S.A. v. Ameron International Corporation*, 2009 WL 3465984 (Del. Ch. Oct. 28, 2009) (unpublished), held that California's UTSA did not displace a common law misappropriation claim. The court explained that "a plaintiff can plead a common law misappropriation claim as an alternative to a CUTSA claim in case the information at issue is found not to be a trade secret." *Id.* at *10. The court thus held that "the claim for common law misappropriation may be dismissed as preempted" *only if* "[t]he Court ultimately determines ... that the information ... qualifies as a trade secret" *Id.* at *11.

Similarly, in *Callaway Golf*, the United States District Court for the District of Delaware explained that a defendant offers "contradictory" arguments when it claims (as ABS claims here) "that [the plaintiff's] information does not constitute 'trade secrets' and that [its] 'trade secrets' allegations are preempted by" the

Uniform Trade Secrets Act. 295 F. Supp. 2d at 437 (applying California’s UTSA). As the court explained, a defendant “cannot have it both ways,” arguing both that (1) the information is not a trade secret for purposes of UTSA, and (2) UTSA displaces a common law claim that involves material that does not rise to the level of a trade secret. *Id.* See also, e.g., *Accenture Glob. Servs. GMBH v. Guidewire Software Inc.*, 631 F. Supp. 2d 504, 508 (D. Del. 2009); *Moon Express, Inc. v. Intuitive Machs., LLC*, 2017 WL 4217335, at *10, *12 (D. Del. Sept. 22, 2017) (unpublished) (magistrate judge).

The Court of Chancery here supported its decision chiefly by relying upon *Atlantic Medical Specialists, LLC v. Gastroenterology Associates, P.A.*, 2017 WL 1842899 (Del. Super. Ct. Apr. 20, 2017) (unpublished), which held that DUTSA displaces a tortious interference of contract claim even if the information at issue in that count does not amount to a trade secret. *Atlantic Medical*, however, contradicts the very rule it *conceded* this Court announced in *Beard Research*, i.e., that DUTSA does not preempt a common law claim that “may be made out even if the business information is not a trade secret.” *Atlantic Medical*, 2017 WL 1842899, at *15. *Atlantic Medical* nevertheless found displacement only because it thought this Court’s decision in *Savor* (which predates *Beard Research*) held that DUTSA displaces claims concerning confidential information that does not amount to a trade

secret. As already discussed *supra*, *Savor* held nothing of the sort, and it did not somehow *sub silentio* overrule *Beard Research*.

The Court of Chancery acknowledged that courts across the country are divided about whether UTSA displaces common law claims like Alarm.com’s, but it suggested that a majority agrees with its view. Opinion at 23-24. The dispositive point, however, is that the text, structure, and history of DUTSA compel the conclusion that our common law claim is not displaced. In any event, at least three state supreme courts have already held that UTSA does *not* displace claims that do not rely upon proving that the misappropriated information constitutes a “trade secret” within the meaning of UTSA. *Orca Commc’ns*, 337 P.3d at 547–48 (Arizona); *Burbank Grease Servs., LLC v. Sokolowski*, 717 N.W.2d 781, 792 (Wis. 2006); *Fred’s Stores of Mississippi, Inc. v. M & H Drugs, Inc.*, 725 So.2d 902, 908 (Miss. 1998).

4. *The Court of Chancery’s purpose-driven analysis was improper and misread the purpose of DUTSA.*

Rather than study DUTSA’s text, the Court of Chancery relied primarily on its understanding of the unarticulated “goal” of DUTSA’s drafters, Opinion at 20, and the perceived “purpose underlying DUTSA,” *id.* at 22. But if a statute “is unambiguous, then there is no room for judicial interpretation and the plain meaning of the statutory language controls.” *CML*, 28 A.3d at 1041 (quotation marks omitted). Because the statute’s text is plain, there is no need for the lower court’s

purpose-driven inquiry. Even if this inquiry were appropriate, the court below misunderstood DUTSA's purpose and effect.

At the outset, it is important to reiterate the importance of the displacement question. Although Alarm.com believes that most or all of the information in its complaint satisfies the statutory definition of a "trade secret," a court may conclude that some of the information—valuable and confidential though it may be—does not meet the statutory definition. The question then becomes: Does this information—again, indisputably valuable to the company and maintained as confidential by its employees—receive no protection whatsoever from misappropriation, no matter how brazen and deliberate that misappropriation may be? We respectfully submit the modest proposition that the Uniform Trade Secrets Act—a statute motivated by an overriding desire to *strengthen* trade secrets laws—was not also designed to *entirely eliminate* any and all protection for such confidential information that does not rise to the level of a trade secret.

a. The starting point for any extra-textual inquiry into UTSA's purpose must begin with the statute's Prefatory Note, which the Court of Chancery did not discuss. *See Prefatory Note*, Uniform Trade Secrets Act, Uniform Laws Annotated (1985) (hereinafter "Prefatory Note"). The Prefatory Note demonstrates that UTSA was designed to bolster and achieve uniformity in trade secret law, explaining that "[n]otwithstanding the commercial importance of state trade secret law to interstate

business, this law has not developed satisfactorily.” *Id.* The Prefatory Note explains that at the time, the “development [of trade secrets law] is uneven,” with few decisions on the topic in many jurisdictions, and that “even in states in which there has been significant litigation, there is undue uncertainty concerning the parameters of trade secret protection, and the appropriate remedies for misappropriation of a trade secret.” *Id.* The Uniform Act was further designed to *improve* trade secrets law, for “[t]he Uniform Act also codifies the results of the better reasoned cases concerning the remedies for trade secret misappropriation.” *Id.*

Ambiguities concerning the status and scope of trade secret protection created uncertainty for the business community. The Prefatory Note favorably relies upon one commentator who explained that “[u]nder technological and economic pressures, industry continues to rely on trade secret protection despite the doubtful and confused status of both common law and statutory remedies.” *Id.* (quoting Comment, *Theft of Trade Secrets: The Need for a Statutory Solution*, 120 U. PA. L. REV. 378, 380-81 (1971)). That Comment explained that *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938) ruled out the possibility of a uniform federal common law of trade secrets, *Theft of Trade Secrets, supra*, at 378, while subsequent Supreme Court decisions presented “the threat of federal preemption of state trade secret law,” *id.* at 380. Faced with this buzzsaw—the abolition of a federal common law prohibiting misappropriation, and federal preemption of state law on the topic—“[t]he Uniform

Act codifies the basic principles of common law trade secret protection, preserving its essential distinctions from patent law.” Prefatory Note.

Thus “[t]he contribution of the Uniform Act,” the Prefatory Note explains, “is substitution of unitary definitions of trade secret and trade secret misappropriation, and a single statute of limitations for the various property, quasi-contractual, and violation of fiduciary relationship theories of noncontractual liability utilized at common law.” *Id.* The various provisions of DUTSA bear out this unifying purpose. One section defines what constitutes a “trade secret” and what counts as “misappropriation.” 6 Del. C. §§ 2001(2), (4). Another section makes clear not only that “[a]ctual or threatened misappropriation may be enjoined,” but also provides circumstances where the injunction should be terminated or royalties should be paid. *Id.* § 2002. Other sections standardize the calculation of damages, *id.* § 2003, determine the availability of attorneys’ fees, *id.* § 2004, outline how courts may preserve the secrecy of trade secrets during litigation, *id.* § 2005, and establish a uniform statute of limitations, *id.* § 2006.

None of this supports the Court of Chancery’s counterintuitive suggestion that, in addition to strengthening trade secrets law, the drafters of UTSA (and the Delaware General Assembly) both intended—*sub silentio* and notwithstanding the clear language of Section 2007—to *entirely abolish* all protection for confidential information that does not meet the statute’s definition of a “trade secret.” To the

contrary, as the Supreme Court of Arizona has recognized, “[n]othing in [the statute’s] language suggests that the legislature intended to displace any cause of action other than one for misappropriation of a trade secret.” *Orca Commc’ns*, 337 P.3d at 182.

This purpose is confirmed by the March 1976 report of the committee that began drafting the Uniform Act, which expressly recognized that the committee’s effort was not an all-encompassing bid to entirely overhaul the protection of business information. That report explains that some had proposed “broadening the scope of the proposed Uniform Act to include misappropriation of nonconfidential intellectual property as well as misappropriation of trade secrets.” A499. But the committee explained that this broader “ambitious project could delay unnecessarily the promulgation of uniform state legislation concerning trade secret protection with respect to which greater consensus exists” A499. Accordingly, the committee suggested that the Uniform Act “leave[] to the common law and other state and federal legislation the actionability of misappropriation of nonconfidential intellectual property.” A500. The committee’s emphasis on generating consensus for a more limited project strongly confirms our argument that in clarifying protection for “trade secrets,” UTSA did not take the much bolder and more controversial step of abolishing protection for everything that does not rise to the level of a trade secret.

b. The Court of Chancery offered little contrary evidence to support its belief that DUTSA's purpose was to extinguish all claims for misappropriation of confidential information that does not rise to the level of a trade secret. The Court of Chancery relied on no primary sources and only two secondary sources cited in footnote 51 of its opinion. *See* Opinion at 20 n.51 (citing Robert Unikel, *Bridging the "Trade Secret" Gap: Protecting "Confidential Information" Not Rising To The Level Of Trade Secrets*, 29 LOY. U. CHI. L.J. 841 (1998) and Edmund W. Kitch, *The Expansion of Trade Secrecy Protection and the Mobility of Management Employees: A New Problem for the Law*, 47 S.C. L. REV. 659 (1996)). (The Court of Chancery also cited the Restatement (Third) of Unfair Competition, *see* Opinion at 20 n.51, but that Restatement does not concern UTSA.)

Neither law review article supports the Court of Chancery's conclusion. The court relied upon Kitch for the proposition that "[t]he Restatement of Unfair Competition, following the lead of the Uniform Trade Secrets Act and cases following the Act, eliminates the distinction between information that is a trade secret and other confidential information. All secret information of economic value falls within the definition of trade secrets." Opinion at 20 n.51 (quoting Kitch, *supra*, at 662). At most, this statement supports Alarm.com's separate argument, not implicated in this appeal, that most or all of the information in the complaint constitutes a "trade secret" under DUTSA. As Kitch explains, UTSA "confirms a

significant expansion of the remedies available to protect confidential information in private hands.” *Id.* at 663. Otherwise, Kitch’s statement is true so far as it goes: UTSA protects trade secrets and does not protect non-trade secrets. The question presented here—a question not analyzed by Kitch—is whether UTSA *eliminates protection under other laws* for non-trade secret information.

Unikel’s article likewise does not support the Court of Chancery’s decision. The purpose of Unikel’s article is to demonstrate that confidential information that does not rise to the level of a trade secret “still is worthy of legal protection.” Unikel, *supra*, at 844. Unikel did not review the text or history of UTSA to conclude whether particular claims are displaced, but he ultimately concluded that, although UTSA displaces some states laws (no one doubts that it does), “[m]any, if not most of the [] legal theories [discussed in the article] for the protection of ‘confidential information’ remain viable, even in jurisdictions that have adopted the UTSA and its broad preemption provision.” *Id.* at 890.

In sum, the plain text of DUTSA makes clear that Alarm.com’s common law claim—which is “not based upon misappropriation of a trade secret,” 6 Del. C. § 2007(b)(2)—is not displaced by DUTSA. Nothing in the text or purpose of DUTSA suggests otherwise, and the Court of Chancery’s finding of displacement should be reversed.

CONCLUSION

For the foregoing reasons, this Court should reverse the Court of Chancery's decision dismissing Alarm.com's complaint.

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Respectfully submitted.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on August 30, 2018, a copy of the foregoing was served by LexisNexis File & Serve on the following attorneys of record:

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