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IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

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NATURE OF PROCEEDINGS

This Court should affirm the Court of Chancery's dismissal of Alarm.com Holdings Inc.'s amended complaint. Alarm sued 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. Both of these claims require a showing that the defendant improperly used or disclosed protected information. But the amended complaint provides no factual allegations—only conclusory statements—that could satisfy this critical element. The Court of Chancery was therefore correct to grant ABS's motion to dismiss.

ABS, a venture capital firm, bought a controlling stake in Alarm in 2009. The parties' contractual commitments included repeated and express agreements that ABS could invest in Alarm's direct competitors, and that any such investment by ABS would not violate its confidentiality obligations.

After Alarm conducted its initial public offering, ABS gave up its seats on Alarm's board and eventually exited its equity position altogether. A full year after the IPO, Alarm alleges ABS invested in one of its competitors. Despite Alarm's express (and repeated) acknowledgement that ABS could do exactly that, Alarm asks the Court to infer merely from the fact of that investment that ABS violated DUTSA and Delaware common law by improperly using or disclosing Alarm's protected information.

But the only purported factual support for that contention is *the investment itself*. Alarm fails to provide allegations that could permit a reasonable inference that ABS improperly used or disclosed Alarm's trade secrets or confidential information when investing in a competitor. Instead, it summarily concludes that ABS *must* have misused its information at some point before, during, or after making that investment. Court of Chancery Rule 8 requires more than that.

Alarm's common law claim for misappropriation of confidential information fails for the additional reason that DUTSA preempts it. DUTSA displaces all claims that rest upon "the same alleged wrongful conduct" as a trade secrets claim. *Savor, Inc. v. FMR Corp.*, 812 A.2d 894, 898 (Del. 2002). Here, Alarm alleges a DUTSA claim and a common law claim for misappropriation of confidential information both arising from "the same alleged wrongful conduct": ABS's investment in a potential competitor. DUTSA therefore preempts Alarm's common law claim.

The Court of Chancery correctly concluded that Alarm's conclusory allegations were insufficient under Rule 8 and that DUTSA preempts Alarm's common law claim. This Court should affirm.

SUMMARY OF ARGUMENT

I. Denied. The Court of Chancery correctly ruled that the allegations in Alarm's amended complaint do not permit the inference that ABS improperly used or disclosed its trade secrets. Rule 8 does not permit courts to "draw unreasonable inferences in the plaintiff's favor." *Clinton v. Enter. Rent-A-Car Co.*, 977 A.2d 892, 895 (Del. 2009).

Alarm asks the Court to infer from ABS's alleged access to Alarm's trade secrets and its investment in a potential competitor that Alarm has improperly used or inevitably will use Alarm's trade secrets. That inference is unreasonable. Mere access to trade secrets and "opportunity to misappropriate . . . is insufficient to give rise to an inference" that trade secrets were improperly used or disclosed. *Elenza, Inc. v. Alcon Labs. Hldg. Corp.*, 183 A.3d 717, 725–26 (Del. 2018). Moreover, Alarm consistently and expressly permitted ABS to invest in its competitors and agreed that such investments do not suggest the improper use or disclosure of its trade secrets.

The factual allegations here sharply contrast with those in *Savor*, 812 A.2d 894, the case upon which Alarm most heavily relies. In *Savor*, the plaintiff alleged that the defendants had improperly used its protected marketing strategies and payment processes by employing those same exact strategies and processes in its own product. *Id.* at 895. Because Alarm's amended complaint lacks any such similar factual allegations, it should be dismissed.

II. Denied. The Court of Chancery also correctly ruled that DUTSA displaces Alarm's common law claim for misappropriation of confidential information. This Court, however, need not reach that question, because Alarm failed to offer sufficient allegations to permit either its DUTSA or its common law claim to proceed. But if this Court does rule on the preemption question, the Court of Chancery should be affirmed.

In *Savor*, this Court held that DUTSA precludes "common law claims [] based on the same alleged wrongful conduct as the trade secrets claims." *Id.* at 898. That precisely describes Alarm's common law claim. The five "circumstances" Alarm argues show that ABS misappropriated its trade secrets, Appellant's Opening Br. (hereinafter "Br.") 4, are the same five circumstances that show it misappropriated its confidential information. The only difference between these claims is whether a court would conclude the purported protected information is a "trade secret." Br. 34–35. That is a legal conclusion, not a difference in "alleged wrongful conduct." *Savor*, 812 A.2d at 898. Moreover, Alarm's proposed approach contradicts this Court's instruction to undertake the preemption analysis *before* "determin[ing] [whether] a trade secret exists." *Id.* Alarm's common law claim is therefore preempted.

Seeking to overcome the precedential weight of *Savor*, Alarm offers its own, and narrower, interpretation of DUTSA's preemption provision, 6 *Del. C.* § 2007(a). Alarm's quasi-textual argument is not just contrary to controlling precedent, but based on a false premise: that business information can fall short of DUTSA's expansive definition of "trade secret," yet still be considered "confidential" under Delaware common law. That is not so—which may be why Alarm never quotes DUTSA's expansive definition of "trade secret."

If the Court finds it necessary to reach the question, it accordingly should affirm the Court of Chancery's ruling that DUTSA preempts Alarm's common law claim for misappropriation of confidential information.

STATEMENT OF FACTS

A. ABS Invests In Alarm And Preserves Its Right To Invest In Alarm's Competitors.

ABS is a venture capital firm based in Baltimore and incorporated under the laws of Delaware. A46. It has developed an expertise in "early-stage growth companies" within the "tech-enabled services and health care" industries. A369, A48. Like many of its peers, ABS pursues sector-specific strategies that require it to invest in several companies within the "same field[]." *Id.*; *see also* A370.

In 2009, ABS took a controlling stake in Alarm, a home security technology company. A46–47. Consistent with ABS's business model, the parties repeatedly and expressly agreed that ABS had the right to invest in Alarm's competitors. Op. 2–11. When ABS first began exploring a potential investment in Alarm, the parties entered into a Non-Disclosure Agreement ("NDA") that specifically preserved ABS's other investment rights. A183–84. The NDA plainly stated, "nothing in this letter agreement will prevent you from evaluating a possible investment in and/or collaboration with, or entering into any transaction with (including any investment in), a company whose business is similar or competitive with the business of the Company." *Id.* Further, the agreement made clear that any "competitive activities shall not, by itself, be conclusive evidence that [ABS has] failed to observe [its] confidentiality obligations." A184. Alarm recognized these protections were necessary because ABS "deal[s] with many companies, some of which may, independently of [Alarm] pursue similar or competitive paths regarding their products or services, technology, and/or market development plans." A184.

Alarm reaffirmed this agreement several times in the following years. Alarm's 2009 Stockholders Agreement allowed holders with five percent or more of Alarm's equity to observe board meetings, provided that the equity holder did not "invest in any [other] entity engaging . . . in the business of selling residential or commercial alarm security products or services." A241. ABS was exempt from this requirement. *Id.* In 2012, Alarm amended its Stockholder Agreement and again agreed that ABS had the right to "invest in . . . any other company (whether or not competitive with [Alarm]." A451. Its newly amended certificate of incorporation also continued to exempt ABS and any director that ABS selects from any "duty (contractual or otherwise) not to, directly or indirectly, engage in the same or similar business activities or lines of business as [Alarm] or any of its subsidiaries." A212. And in 2015, Alarm adopted a Code of Business Conduct that stated it is not a conflict of interest for a "member of the Board who is also a partner or employee of an entity that is a holder of Alarm common stock . . . (a 'Fund') . . . [to] acquire[] knowledge of a potential transaction . . . that may be an opportunity of interest for both [Alarm] and such Fund." A217.

ABS's 2009 investment entitled it to three of Alarm's five board seats. Ralph Terkowitz served as chairman of the board. A48. The amended complaint alleges that two other ABS partners, Bobby Goswami and Tim Weglicki, also served on Alarm's board at various times. A50.[1] In 2012, Alarm offered a new series of preferred stock and amended its certificate of incorporation. A50. Under the new certification of incorporation, Alarm's board of directors was increased to seven members, two of which ABS had the right to appoint. *Id.* Mr. Terkowitz remained chairman of Alarm until 2015, when Alarm conducted an initial public offering and began trading on the NASDAQ exchange. *Id.* Mr. Terkowitz left Alarm's board entirely in August 2016, *id.*, as ABS transitioned to the role of passive investor in the now-public company. Shortly thereafter, ABS sold its remaining shares in Alarm, fully exiting its position.

B. <u>One Year Later, ABS Announces Plans To Invest In One Of Alarm's Competitors.</u>

In 2017, a full year after Mr. Terkowitz left Alarm's board, ABS announced that it planned to acquire a controlling interest in a holding company that was to house both ipDatatel and Resolution Products, Inc. (the "ipDatatel venture"). A67. "[I]pDatatel makes a cellular communicator that enables remote monitoring and control of devices in a home through a smartphone app[lication]. A67–68.

[1] Mr. Goswami and Mr. Weglicki never served on Alarm's board at the same time. They sporadically served as either a board member or an observer.

"Resolution Products, Inc. makes hardware for alarm systems, including cellular modules, control panels and sensors." A68.[2]

Phil Clough, ABS's managing general partner, will serve as a director of the newly formed company. A51. Mr. Clough never served as one of Alarm's directors and has had no direct involvement with Alarm. A49–50. Mr. Terkowitz has had no direct involvement with the ipDatatel venture and will not serve as one of the new company's directors. A367, A44–45.

C. <u>Faced With New Competition, Alarm Initiates Multiple Lawsuits To Block The Transaction.</u>

In August 2017, ABS informed Alarm as a professional courtesy that it planned to make a significant investment in the ipDatatel venture. A368, A28. Four days later, Alarm filed a complaint in the Court of Chancery, asserting claims for violation of DUTSA, common law misappropriation of confidential information, and breach of fiduciary duty. A21.

Five days after that, Alarm filed a motion for a temporary restraining order to block the transaction. B3-11. The Court of Chancery denied the TRO. B10. It ruled, among other things, that the complaint was "not specific enough in terms of actually identifying things that are readily identifiable as trade secret[s]." B8. In

[2] Throughout the amended complaint, Alarm refers to the ipDatatel venture as a "direct competitor." *See* A67–70. They may use the same "distribution channel," A67, but they offer distinct products and employ different underlying technology. *See* A46–47, 67–68.

addition, the court ruled that allegations that "Mr. Terkowitz is going to be involved in some respect with the new company" do not inherently show that he has or will improperly use Alarm's trade secrets. B9.[3] Similarly, the court questioned Alarm's theory that an investor should be prevented "from investing in the same space based on the fact that they played a role in the growth of a company in a similar space." B10.

Three days after the Court of Chancery denied Alarm's TRO motion, Alarm initiated a separate lawsuit against ipDatatel in the Eastern District of Texas for patent infringement. *See Alarm.com Inc. et al. v. ipDatatel, LLC*, No. 2:17-cv-00608-JRG (E.D. Tex.). Although that lawsuit delayed the closing of the deal by two weeks, the transaction was finalized on September 6, 2017. A67.

D. Alarm Files Its Amended Complaint In The Court Of Chancery.

Alarm filed its amended complaint in the Court of Chancery in late September. A40. Dropping its claim for breach of fiduciary duty, Alarm continued to press for relief under DUTSA and common law misappropriation of confidential information. A71–76. Like its original complaint, Alarm's amended complaint is broken into two main sections. A53–70. The first section, entitled "Confidential Information," explains the nature of Alarm's purportedly protected information and the times when an ABS partner allegedly would have been in

[3] This observation was made before ABS confirmed that Mr. Terkowitz will have no direct involvement in the ipDatatel venture. A367, A44–45.

possession of it. A53–67. The second section is entitled "ABS competes with Alarm.com." A67.[4] This portion of the amended complaint states that "ipDatatel is a direct competitor in Alarm's distribution channel," A67, and speculates that ABS invested in the ipDatatel venture because ABS "had access to Alarm.com's" trade secrets. A68. Similarly, it asserts that because ABS invested in ipDatatel, it cannot "reasonably avoid utilizing" Alarm's confidential information. A69. The amended complaint does not, however, explain which of Alarm's trade secrets ABS used—or how it used them—when investing in ipDatatel. A67–70.

Based upon these allegations—that ABS possessed confidential information, and that ipDatatel competed with Alarm—the amended complaint concludes, "In connection with their planned new venture, [ABS] either have disclosed to ipDatatel and Resolution Products, or used in connection with their venture with ipDatatel and Resolution Products, or so plan to disclose or use, Alarm.com's trade secrets without Alarm.com's express or implied consent." A73.

E. <u>The Court Of Chancery Dismisses The Amended Complaint.</u>

ABS moved to dismiss. As it explained, Alarm's amended complaint failed to plead adequately "*any* of [DUTSA's four] elements." A155. Alarm's allegations failed to satisfy DUTSA's first element, that "a trade secret exists," by

[4] Although this section is labeled "ABS competes with Alarm.com," ABS does not "compete" with Alarm. Rather, as amended complaint itself makes clear, ABS *invested* in ipDatatel, which is Alarm's purported competitor. *See* A67–70.

never alleging that the purportedly secret information was valuable or that Alarm took reasonable steps to maintain its secrecy. A154–56; *see also* 6 *Del. C.* § 2001(4) (defining "trade secret"). ABS then argued that Alarm's allegations also failed to address DUTSA's second and third elements, requiring the plaintiff to have communicated the trade secret to the defendant pursuant to an understanding that its secrecy would be maintained. A161–66; *see also* 6 *Del. C.* § 2001(2)(b)(2)(B). Even if Alarm sufficiently alleged that Mr. Terkowitz had received secret information, it failed to support the allegation that he then passed that information onto ABS. A161–62.

Lastly, ABS contended that the amended complaint failed to allege that ABS had improperly used or disclosed Alarm's trade secrets. A166–72. To state a DUTSA claim, a plaintiff must allege a trade secret was "misappropriated," which the statute defines as either acquisition through "improper means," including bribery, theft, and espionage, or "disclosure or use" without permission. 6 *Del. C.* § 2001(2). Here, Alarm alleged simply (and only) that ABS invested in one of Alarm's supposed competitors, not that it improperly used or disclosed Alarm's secret information when making that investment. A166–72.

The court granted ABS's motion to dismiss. Op. 1. First, the court ruled that Alarm's factual allegations were insufficient under Rule 8 to state a DUTSA claim. Op. 12. It assumed, for the sake of its legal analysis, that the amended complaint's allegations were sufficient to plead DUTSA's first three elements: it accepted without deciding that at least some of the supposedly secret information Alarm identified "constituted a trade secret"; that the information was communicated to ABS; and that the communication was made pursuant to an understanding that ABS would "maintain the secrecy of the information." *Id.* at 13. The court then ruled that even with those facts assumed, "Alarm has not pled facts supporting a reasonable inference of misappropriation." *Id.*; *see* 6 *Del. C.* § 2001(2) (defining "misappropriation").

Focusing on DUTSA's "fourth element," the court held the amended complaint does not plead adequately that ABS "misappropriated" Alarm's trade secrets. Op. 13. The court noted that to support Alarm's inference that ABS improperly used or disclosed its trade secrets, "Alarm relies only on ABS's investment in [ipDatatel], made approximately a year after Mr. Terkowitz left Alarm and following an auction in which ABS outbid other potential investors." Op. 15. It then ruled that these allegations simply suggest that "ABS invested in a company that competes with Alarm," a separate question from whether ABS improperly used or disclosed trade secrets when making that investment. *Id.* Such an inference was particularly unreasonable here, the court went on, because "Alarm and ABS always understood" that ABS could invest in Alarm's competitors. *Id.* The court discussed at length the 2008 NDA, the 2009

Stockholders Agreement, the 2012 Stockholders Agreement, the amended certificate of incorporation, and the 2015 Code of Business Conduct, all of which support that finding. Op. 2–11. In the end, the amended complaint "fails because Alarm has not pled" sufficient facts to infer "ABS misappropriated or improperly used Alarm's trade secrets." Op. 25.

Second, the court ruled that DUTSA preempted Alarm's common law claim for misappropriation of confidential information. Op. 19. Its analysis relied on this Court's pronouncement in *Savor* that "if common law claims are based on the same alleged wrongful conduct as the trade secret claims, they are precluded under 6 *Del. C.* § 2007." Op. 21 (citing *Savor*, 812 A.2d at 898). Because Alarm's common law misappropriation claim has the "same scope and parameters" as a DUTSA claim, the court ruled it satisfies the *Savor* standard. Op. 22. The court further explained that the "drafters of the Uniform [Trade Secrets] Act sought to create a bipartite categorization of commercial knowledge into either 'a protected 'trade secret' or unprotected 'general skill and knowledge.'" Op. 19–20 (citation omitted). Therefore, to "extend protection to materials that do not qualify as a trade secret," as Alarm requests, would run counter to DUTSA's purpose. *Id.* at 22; *see also Atl. Med. Specialists, LLC v. Gastroenterology Assocs., P.A.*, 2017 WL 1842899, at *15 (Del. Super. Ct. Apr. 20, 2017); Op. 23–24.

Alarm appeals each of these two rulings.

ARGUMENT

I. ALARM'S DUTSA CLAIM WAS PROPERLY DISMISSED.

A. Questions Presented.

Whether the Court of Chancery correctly ruled that Alarm's conclusory allegations that ABS improperly used or disclosed its information failed to state a DUTSA claim. A166–72, A343–47.

B. Scope of Review.

This Court reviews *de novo* the dismissal of a complaint under Rule 12(b)(6). *In re Gen. Motors (Hughes) S'holder Litig.*, 897 A.2d 162, 168–69 (Del. 2006).

C. Merits of Argument.

Alarm's amended complaint fails to state a DUTSA claim. The Court of Chancery correctly ruled that to plead adequately a claim under DUTSA, a plaintiff must offer factual allegations to suggest that the defendant improperly used or disclosed its trade secrets. Op. 15. Alarm's amended complaint falls far short of this requirement. Its factual allegations, and the inferences that logically flow from them, suggest only that ABS invested in a potential competitor, not that it improperly used or disclosed Alarm's protected information when making that investment.

1. To survive a motion to dismiss, Alarm was required to offer specific, non-conclusory allegations that ABS improperly used or disclosed its trade secrets.

To survive a motion to dismiss under Rule 12(b)(6), a plaintiff must offer more than "conclusory allegations that are unsupported by specific facts." *Allen v. Encore Energy P'rs L.P.*, 72 A.3d 93, 100 (Del. 2013) (citing *Gantler v. Stephens*, 965 A.2d 695, 704 (Del. 2009)). The court may "draw reasonable inferences that logically flow from" plaintiff's factual allegations, but will not "draw unreasonable inferences in plaintiff's favor." *Clinton*, 977 A.2d at 895. And a plaintiff's factual allegations, if true, must "satisfy [all] elements" of a claim. *Malpiede v. Townson*, 780 A.2d 1075, 1096 (Del. 2001); *see also In re Volcano Corp. Stockholder Litig.*, 143 A.3d 727, 737 (Del. Ch. 2016) ("Failure to plead an element of a claim" is grounds for dismissal), *aff'd*, 156 A.3d 697 (Del. 2017) (TABLE).

A DUTSA claim has four distinct elements. *See Elenza*, 183 A.3d at 721. The first three are: "(1) a trade secret exists; (2) the plaintiff communicated the secret to the defendant; (3) there was an express or implied understanding that the secrecy of the matter would be respected." *Id.* The fourth requires a plaintiff to demonstrate that the "[trade secret] was improperly *used or disclosed* to the injury of the plaintiff." *Id.*[5] (emphasis added); *see also Nucar Consulting, Inc. v. Doyle*, 2005 WL 820706, at *9 (Del. Ch. Apr. 5, 2005) ("The remaining issue, therefore, is whether [defendant] *used* the [p]otential [c]lient [l]ist." (emphasis added), *aff'd*, 913 A.2d 569 (Del. 2006) (TABLE)); *Spear Mktg., Inc. v. BancorpSouth Bank*, 791 F.3d 586, 600–01 (5th Cir. 2015) (same).

As a consequence, in order to state a DUTSA claim, it is insufficient to allege only that a trade secret exists and that the defendant had access to it. A DUTSA complaint must contain specific factual allegations additionally contending that the trade secrets were improperly used or disclosed. *See Accenture Glob. Servs. GmbH v. Guidewire Software Inc.*, 581 F. Supp. 2d 654, 662–64 (D. Del. 2008) (granting a motion to dismiss because "there is no allegation that [defendant] either disclosed or used the secrets in developing [its product]").

Savor follows that principle. 812 A.2d 894. In *Savor*, this Court reversed the Superior Court's dismissal of a complaint that contained factual allegations sufficient to satisfy all four elements of a DUTSA claim. *Id.* at 897. Speaking to DUTSA's fourth element, the complaint provided more than a "conclusory allegation that [the defendant] used or disclosed" trade secrets because it

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[5] This element is rooted in 6 *Del. C.* § 2001(2)'s definition of "misappropriation." Under that definition, a trade secret is "misappropriated" when it is either acquired through "improper means," such as bribery, theft, or espionage, *see* § 2001(2)(a), 2001(1), or "disclos[ed] or use[d]" without permission.

specifically alleged the defendant had used the plaintiff's "unique program" of "marketing strategies and [payment] processes" in its own competing products. *Id.* at 896. The same goes for *UtiliSave, LLC v. Miele*, a case concerning three separate claims that an employee breached a confidentiality agreement. 2015 WL 5458960 (Del. Ch. Sept. 17, 2015). The court dismissed two of the claims because the plaintiff failed to plead facts alleging the defendant "use[d] or disclose[d]" defendant's confidential information. *Id.* at *10. The court, however, allowed the third claim to proceed because the complaint offered facts to suggest the defendant had actually "used" plaintiff's client list when it contacted one of plaintiff's "longstanding and valuable client[s]." *Id.* at *10.

Here, the Court of Chancery correctly required Alarm to plead similar factual allegations of improper use or disclosure. It did not, as Alarm argues, apply "a heightened pleading standard." Br. 16–18; *see Solomon v. Pathe Commc'ns Corp.*, 672 A.2d 35, 38 (Del. 1996) (rejecting plaintiff's argument that the Court of Chancery "incorrectly applied a heightened pleading standard"). It quite correctly "accepted as true" all of Alarm's factual allegations, "dr[ew] all reasonable inferences in favor" of Alarm, and analyzed whether Alarm could prevail on its DUTSA claim under "any reasonably conceivable set of circumstances." Op. 12 (citing *Savor Inc.*, 812 A.2d at 896–97). Applying this standard, the court required Alarm to allege specific, non-conclusory allegations that, if true, could satisfy each element of a DUTSA claim. *See* Op. 13–14. It correctly found Alarm had not met that standard.

2. Alarm's conclusory allegations did not permit the inference that ABS improperly used or disclosed its trade secrets.

The amended complaint identifies information, such as Alarm's marketing strategies and customer lists, that Mr. Terkowitz allegedly would have seen when he was a member of Alarm's board in 2015 and 2016. A53–56, A65–67. But unlike in *Savor*, it conspicuously lacks factual allegations that Mr. Terkowitz, ABS, or the ipDatatel venture then *used* those marketing strategies to promote ipDatatel's own products. *Compare* A65–67, *with Savor*, 812 A.2d at 896. Similarly, in contrast to *UtiliSave*, the amended complaint offers no factual allegations that ABS contacted a customer on Alarm's client list once Mr. Terkowitz allegedly had access to it. *Compare* A53–56, *with UtiliSave*, 2015 WL 5458960, at *10. The amended complaint's references to "competitor and market analysis," "subsidiaries and acquisition targets," "confidential financial information," and "products" also fail to offer factual allegations that ABS improperly *used or disclosed* any of that information. A56–60, A60–62, A62–63, A63–65.

Instead, the amended complaint looks to the fact that ABS "acquired a significant ownership stake" in one of Alarm's potential competitors to support its allegation of improper use. A67; *see also* A67–70. Based upon that investment—

an investment that Alarm specifically and repeatedly permitted ABS to make—Alarm concludes: "In connection with their planned new venture, Defendants either have disclosed ipDatatel and Resolution Products, or used in connection with their venture with ipDatatel and Resolution Products, or so plan to disclose or use, Alarm's trade secrets without Alarm's express or implied consent." A73.

This "conclusory recitation" is insufficient to state a claim under Rule 8. *Spring Real Estate, LLC v. Echo/RT Hldgs., LLC*, 2013 WL 6916277, at *7 n.66 (Del. Ch. Dec. 31, 2013). Alarm's conclusion that ABS used or disclosed its trade secrets is only that—a conclusion. It fails to "allege *facts* sufficient to show that the legal elements of a claim have been satisfied." *In re Coca-Cola Enters., Inc. S'holders Litig.*, 2007 WL 3122370, at *4 n.28 (Del. Ch. Oct. 17, 2007), *aff'd sub nom. Int'l Bhd. Teamsters v. Coca-Cola Co.*, 954 A.2d 910 (Del. 2008) (TABLE). Because it relies only on conclusory statements to satisfy DUTSA's fourth element, Alarm's DUTSA claim should be dismissed. *See, e.g.*, *Accenture*, 581 F. Supp. 2d at 662–63 (The complaint "presents nothing more than 'conclusions' and a 'formulaic recitation of elements of a cause of action.'"); *Exal Corp. v. Roeslein & Assocs., Inc.*, 2013 WL 6843022, at *5 (N.D. Ohio Dec. 27, 2013) (dismissing as conclusory a complaint that "recites that trade secret information 'has been' used or disclosed").

Lacking direct factual allegations, Alarm rests on its argument that ABS's improper use or disclosure of its protected information can be reasonably inferred from the "circumstances of [ABS's] investment" in ipDatatel. Br. 18. It cannot. The factual circumstances Alarm identifies do not suggest anything unusual or "suspicious" about ABS's investment. *Elenza*, 183 A.2d at 723 (identifying as "suspicious circumstances" an e-mail where defendant stated it wanted to "leverage" plaintiff's information and a rapid development in [defendant's] technological "capabilities" over a two-year period). They show only that one year *after* an ABS partner served on Alarm's board, ABS invested in one of Alarm's potential competitors, just as the parties' agreements had contemplated. (Indeed, the agreements contemplated that ABS could invest in a competitor *at the same time* it held its controlling stake in Alarm. *See* A183–84, A212, A217.).

Alarm's laundry list of allegations about the circumstances of ABS's investment in ipDatatel does not remotely bear on the separate question of whether ABS improperly used or disclosed Alarm's protected information when it invested in ipDatatel:

1. Alarm points out that ABS "is in possession of" trade secrets, Br. 19, and later argues that the "sheer scope" of its protected information suggests improper use, Br. 22. But under DUTSA, possession and improper use or disclosure are separate elements; mere possession does not give rise to an inference of improper

disclosure. *Elenza*, 183 A3d at 725–26 ("[O]pportunity to misappropriate . . . is insufficient to give rise to an inference of misappropriation because [plaintiff] could only establish that [defendant] 'could have' used [defendant's] designs."); *Savor, Inc. v. FMR Corp.*, 2004 WL 1965869, at *9 (Del. Super. Ct. July 15, 2004) (rejecting the argument "that transmission *must have occurred* because the relevant players had access to each other"). A complaint's allegations that a defendant had *access* to valuable information (regardless of its scope) thus are insufficient to plead that the defendant *misused* that information. *See Accenture*, 581 F. Supp. 2d at 663; *Knights Armament Co. v. Optical Sys. Tech., Inc.*, 568 F. Supp. 2d 1369, 1377 (M.D. Fla. 2008) (dismissing a complaint alleging the defendant "had access to trade secrets" but had "no further details as to how the [defendants] allegedly used the trade secrets").

That is especially true here, where ABS's alleged access to Alarm's information is not remotely suggestive of wrongdoing. A52. Alarm alleges that ABS became exposed to Alarm's information by virtue of Mr. Terkowitz's seat on Alarm's board. *Id.* But because ABS's initial investment in Alarm entitled it to board seats, A48–50, that alleged exposure was expected, indeed unavoidable. As a result, its access does not constitute the type of "suspicious circumstance[]" that allows a plaintiff to meet the pleading standards. *See Elenza*, 183 A.2d at 723.

2. Alarm also alleges that ipDatatel is one of its "direct competitor[s.]" Br. 19. No surprise there; again, because the 2008 NDA, the 2009 Stockholders Agreement, the 2012 Stockholders Agreement, the amended certificate of incorporation and the 2015 Code of Business Conduct all expressly anticipate that ABS will invest in a competitor, A183–84, A241, A451, A216–17, it is difficult to see how that investment could be considered suspicious or unexpected. Indeed, ABS and other venture capital firms routinely acquire significant stakes and board seats in potentially competitive companies as a way to pursue sector-specific investment strategies and build industry expertise. A48, A370.

3. Third, there also was nothing unusual about the "speed" at which Alarm invested in ipDatatel. Br. 19. The parties' agreements and the amended certificate of incorporation permitted ABS to hold a controlling share of Alarm and *concurrently* invest in ipDatatel or Alarm's other potential competitors. *Compare* A212 *with* Br. 20 (complaining that diligence on ipDatatel began "months after" Mr. Terkowitz left Alarm). By the time ABS invested in ipDatatel, it had been an entire year since ABS gave up its seats on Alarm's board and became a passive investor. A50, A67. Moreover, two full years had passed since Alarm's IPO rendered ABS a minority stockholder. A50. If ABS was entitled to invest in competitors even while Mr. Terkowitz sat on its board, it is unreasonable to infer that ABS's subsequent investment in ipDatatel was impermissible.

4. Alarm next asserts that ABS "has never denied that [Mr.] Terkowitz was involved with ABS's diligence of and investment in ipDatatel," and that ABS's (purported) decision to "sideline" Mr. Terkowitz constitutes an admission of misappropriation. Br. 20.[6] For this proposition, Alarm cites to pages 44 and 45 of its record appendix, which allege that ABS has stated "Mr. Terkowitz will not serve on [ipDatatel's] board." A44. But those pages contain nothing about whether Mr. Terkowitz has ever denied or admitted involvement in the diligence process.

Regardless, the amended certificate of incorporation allows the directors that ABS appoints (*i.e.*, the "Preferred Directors," A210) to "directly or indirectly, engage in the same or similar business activity . . . including those deemed to be competing with [Alarm]." A212. So even accepting Alarm's allegation that Mr. Terkowitz was involved in ipDatatel diligence, Alarm's own governing agreement recognizes that Mr. Terkowitz's involvement in that process does not suggest he or ABS misused Alarm's trade secrets.

5. It is similarly unremarkable, and unilluminating, that ABS "was willing to pay more than anyone else" when purchasing ipDatatel. Br. 21. This argument is just a different gloss on Alarm's suggestion that ABS's investment in ipDatatel

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[6] This allegation is not contained in the complaint, and can be rejected for this reason alone. *See McMullin v. Beran*, 765 A.2d 910, 916 (Del. 2000).

is inherently suspect. *See supra* 21–23. Once ipDatatel chose to be sold at auction, the only way ABS could exercise its investment right—which was both permissible and foreseeable—was by outbidding other potentially interested buyers. And again, the agreements between the parties did not just permit ABS to inquire or bid on competitors. They permitted ABS to invest in competitors, which is exactly what ABS did. Alarm therefore offers no reasonable, factual basis to infer that ABS was interested in the ipDatatel venture because it had access to Alarm's trade secrets.

6. Alarm also cites to an article from a so-called "industry expert" (also called a "reporter") who took an interest in the ipDatatel venture. Br. 21–22. This reporter stated that ABS "knows a thing or two about Alarm.com." *Id.* But "know[ing]" about Alarm and about the home security industry does not suggest that ABS improperly used or disclosed Alarm's protected information. Citing to this article is just another one of Alarm's attempts to push its theory that access equals use, a fallacy this Court and others have repeatedly rejected. *See supra* 21–23.

7. Seventh, the amended complaint's factual allegations do not permit the inference that by serving as a director of ipDatatel, Mr. Clough will "inevitabl[y]" disclose Alarm's trade secrets. Br. 22; A69, A73. The "inevitable" use or

disclosure doctrine has never been applied to an outside director.[7] Instead, it is typically invoked when an employee is accused of misconduct or has taken a new job that will require him to "unlearn" a trade secret that was integral to his former employment. *See, e.g.*, *W.L. Gore & Assocs., Inc. v. Wu*, 2006 WL 2692584, at *13 (Del. Ch. Sept. 15, 2006). For example, in *Bimbo Bakeries USA, Inc. v. Botticella*—the only case Alarm cites to—inevitable disclosure "rest[ed] on a solid evidentiary basis" of the specific misconduct by the defendant. 613 F.3d 102, 118 (3d Cir. 2010). Among other things, the defendant failed to "disclos[e] to Bimbo his acceptance of a job offer from a direct competitor, . . . and cop[ied] Bimbo's trade secret information from his work laptop onto external storage devices." *Id.* Similarly, in *W.L. Gore & Assocs., Inc.*, the defendant's misdeeds showed he "ha[d] no moral compass and c[ould] not police himself or take responsibility for his actions." 2006 WL 2692584, at *8. The court ruled he could therefore not "be trusted to avoid using [plaintiff's] trade secrets" when working for a competitor. *Id.* at *14.

Moreover, these cases usually concern one of a company's "most prolific inventors," or other vital employee. *See id.* at *12, *see also id.* at *14 (relying on a

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[7] *See, e.g.*, *E.I. duPont de Nemours & Co. v. Am. Potash & Chem. Corp.*, 200 A.2d 428, 431, 435 (Del. Ch. 1964) (former employee who took position with competitor immediately); *Am. Totalisator Co. v. Autotote Ltd.*, 1983 WL 21374 (Del. Ch. Aug. 18, 1983; *Am. Hoechst Corp. v. Nuodex, Inc.*, 1985 WL 11563 (Del. Ch. Apr. 23, 1985).

case where the employee/defendant "had designed and organized" plaintiff's trade secret). Their work is so enmeshed in the creation or use of trade secrets that it would be a "virtual impossibility" to perform a similar job without divulging them. *Id.* at *17 (citation omitted). As a result, these defendants are usually forced to sign non-compete agreements as a condition of their initial employment. *See id.* at *1; *see also Utilisave*, 2015 WL 5458960, at *9 (under certain circumstances, the parties' confidentiality agreement could have begun to "operate more like a non-compete[ ]" agreement).

Alarm's allegations are on very different footing. Alarm's amended complaint alleges *no* facts suggesting that ABS, Mr. Terkowitz, or Mr. Clough committed misconduct or intended to use Alarm's trade secrets. And unlike an integral employee, a director's more limited role allows him to serve on another company's board without using or disclosing secret information. Indeed, directors—including those on Alarm's own board—commonly serve on multiple boards within the same industry. A170, A263. Alarm points to no legal authority suggesting this routine practice somehow violates trade secrets law. And it (again) overlooks how ABS's express permission to invest in competitors sets it apart from employees who specifically agree not to work at other companies within the same industry.

Alarm's unprecedented application of the "inevitable" use or disclosure theory to board members is even less credible under the circumstances of this case. Mr. Clough has had no personal involvement with Alarm's business. A50. Mr. Terkowitz left Alarm's board over a year ago. A50. Alarm therefore asks this Court to infer that one of Alarm's former directors conveyed trade secrets to one of his business partners who in turn will "almost certainly" improperly disclose that information merely by sitting on a potential competitor's board. *UtiliSave*, 2015 WL 5458960, at *9. That Rube-Goldberg-esque causal chain has no place in a pleading. Alarm expressly agreed it would not object to ABS's investment in a competitor, and it offers no factual support or legal authority to draw any nefarious inference from ABS's having exercised that prerogative.

Finally, the various contractual provisions prohibiting ABS from improperly using or disclosing Alarm's trade secrets, *see* Br. 24–28, do nothing to get Alarm past a motion to dismiss. Simply identifying these provisions is not sufficient to allege that ABS somehow violated them. *See, e.g.*, *Strikeforce Techs., Inc. v. WhiteSky, Inc.*, 2013 WL 3508835, at *7 (D.N.J. July 11, 2013) ("Notably missing from the Complaint are non-conclusory factual allegations setting forth what actions [defendant] allegedly took to violate these provisions."). What's more, to the greatest extent possible, all contract provisions must be "harmonize[d] and given effect." *Martin Marietta Materials, Inc. v. Vulcan Materials Co.*, 68 A.3d

1208, 1225 (Del. 2012). Here, several contractual provisions permit ABS to invest in Alarm's competitors. *See, e.g.*, A451. Several others prohibit it from improperly using Alarm's trade secrets. *See, e.g.*, *id.* Alarm's argument that ABS's exercise of the former suggests a violation of the latter fails to "give[] effect" to ABS's investment rights and goes against the most coherent, holistic interpretation of the parties' agreements. *See Martin*, 68 A.3d at 1225.

Alarm saves its most heated rhetoric for last: it asserts the Court of Chancery's opinion will forever "doom" all misappropriation claims "at the threshold." Br. 24; *see also* Br. 2. That is false. The amended complaint was dismissed because it contained no specific alleged facts that, if true, would reasonably imply ABS improperly used or disclosed Alarm's trade secrets. *See* Op. 25. That does not "doom" all misappropriation claims at the threshold any more than a court's dismissal of a plaintiff's fraud claim for failure to plead with specificity "dooms" all fraud claims at the threshold.

Indeed, it is Alarm's position—not the court's decision—that, if adopted, would create broad and harmful consequences. Inferring improper use or disclosure from such empty allegations would abrogate the investment rights that ABS and scores of other investors bargain for and rely on as part of their business models. If these bargained-for protections can be overcome this easily, it will substantially hamper the efficient movement of capital and make it far more difficult for promising companies to raise necessary funds.

Because the amended complaint offered no factual allegations to permit the inference that ABS improperly used or disclosed trade secrets when investing in ipDatatel, the Court of Chancery's Opinion should be affirmed and Alarm's DUTSA claim should be dismissed.

II. DUTSA DISPLACES ALARM'S COMMON LAW CLAIM.

A. Question Presented.

Whether Alarm's common law misappropriation of confidential information claim is displaced because it is based on the "same alleged wrongful conduct" as the trade secrets claims. *Savor*, 812 A.2d at 898; A172–74; A348–52.

B. Scope of Review.

This Court reviews the Court of Chancery's interpretation of Delaware law *de novo*. *Parkcentral Glob., L.P. v. Brown Inv. Mgmt., L.P.*, 1 A.3d 291, 295–96 (Del. 2010).

C. Merits of Argument.

The Court of Chancery correctly ruled that DUTSA displaces Alarm's common law claim for misappropriation of confidential information. But this Court need not reach that question. Because the amended complaint's factual allegations are insufficient to plead a common law claim for misappropriation of confidential information, Rule 8 provides an independent basis for dismissal. *See, e.g.*, *King v. DAG SPE Managing Member, Inc.*, 2013 WL 6870348, at *7 (Del. Ch. Dec. 23, 2013) (noting that the court "need not decide the preemption issue" because plaintiffs have failed to plead adequately a claim under the potentially preempted statute).

A common law misappropriation of confidential information claim has three distinct elements: (1) that the plaintiff "had a property interest in the confidential information; (2) that the defendant wrongfully exerted dominion over the confidential information; and (3) that the plaintiff sustained damages as a result." *Sustainable Energy Generation Grp., LLC v. Photo Energy Projects B.V.*, 2014 WL 2433096, at *14 (Del. Ch. May 30, 2014).[8] *See also* A75–76. The claim's second element, "wrongfully exert[ing] dominion," is just another way of saying the defendant "used or disclosed [plaintiff's] [p]roprietary [i]nformation." *Sustainable Energy*, 2014 WL 2433096, at *15. As already explained, the amended complaint's factual allegations do not sufficiently plead that ABS improperly used or disclosed Alarm's protected information. *See supra* 19–30. Because Alarm failed to plead all elements of its common law claim, this Court can dismiss it without deciding whether it is preempted.

In any event, Alarm's common law misappropriation claim is precluded because it relies on "the same alleged wrongful conduct" as its DUTSA claim. *Savor*, 812 A.2d at 898. Rather than accept *Savor*'s (controlling) pronouncement, Alarm asks the Court to credit the mistaken notion that business information can

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[8] *Sustainable Energy* is one of the rare post-DUTSA cases that involves a common-law claim for misappropriation of confidential information. But the defendants never argued the claim was preempted under DUTSA, "devot[ing] little" attention to that claim at all. 2014 WL 2433096, at *14.

fail to meet DUTSA's expansive definition of "trade secret" yet still be entitled to common law protection. 6 *Del. C.* § 2001(4). The Court should decline that invitation. Alarm's remaining arguments are similarly unpersuasive.

1. Alarm's common law misappropriation claim is preempted because it rests on the same allegations of misconduct as its DUTSA claim.

This Court's holding and analysis in *Savor* control Alarm's common law claim. DUTSA preempts any "conflicting tort, restitutionary and other law of this State providing civil remedies for misappropriation of a trade secret." 6 *Del. C.* § 2007(a). As the Court of Chancery correctly noted, *Savor* interpreted that provision to mean: if "common law claims are based on the same alleged wrongful conduct as the trade secret claims, they are precluded." Op. 21 (quoting *Savor*, 812 A.2d at 898). Because it is undisputed that Alarm's common law claim relies on "the same alleged wrongful conduct" as its DUTSA claim, it is preempted. *See Savor*, 812 A.2d at 898.

In *Savor*, the plaintiffs charged defendants with misappropriation of trade secrets, unfair competition, and conspiracy. *Id.* at 896. All three of these claims were "based upon" allegations that the defendants used plaintiffs' protected information to "create[] a similar" competing product. *Id.* at 895–96. Looking to Section 2007, the Superior Court ruled that plaintiff's unfair competition and conspiracy claims were preempted because they were "grounded in the same facts which purportedly support the Misappropriation of Trade Secrets claim." *Savor, Inc. v. FMR Corp.*, 2001 WL 541484, at *4 (Del. Super. Ct. Apr. 24, 2001), *aff'd*, 812 A.2d 894 (Del. 2002). On appeal, the plaintiffs argued that dismissal was premature "because the trial court has not yet determined that a trade secret exists." *Savor*, 812 A.2d at 898. In their view, the plaintiffs should have been "allowed to proceed with [their] alternative common law claims" in the event that their DUTSA claim failed. *Id.* This Court rejected that argument. It held that Section 2007 precludes any claim that "[is] based on the same alleged wrongful conduct as [a DUTSA] claim." *Id.* Because plaintiffs' unfair competition and conspiracy claims were "based on" the same allegations that defendants used their information to make a competing product, Section 2007 preempted those claims. *Id.*

The DUTSA and common law claims in Alarm's amended complaint are also based on the same allegations of misconduct. The bulk of the amended complaint lists supposedly secret information that Alarm considers to be "confidential information," a "trade secret," or both. A53–67. Alarm then alleges that ABS used that information when it "acquired a significant ownership stake" in ipDatatel. A67. Based upon five supposedly unusual "circumstances," Br. 4; A67–70, Alarm alleges that ABS violated DUTSA by either "dislos[ing] or us[ing]" Alarm's trade secrets "in connection with the planned new venture." A73. Then, looking again to those *same* five circumstances, Alarm alleges ABS violated

Delaware common law "by disclosing that confidential information to ipDatatel and Resolution Products." A75. Because these two claims are plainly based upon "the same alleged wrongful conduct," the common law claim is preempted. *Savor*, 812 A.2d at 898.

Alarm does not even attempt to argue its two claims are based upon different allegations. Instead, it asserts that Section 2007 "*only* displaces" claims where defendant has misappropriated something that meets Section 2001(4)'s definition of a "trade secret." Br. 29 (emphasis in original); *see also* Br. 34–35. That is exactly what the plaintiff argued to the *Savor* court. *See* 812 A.2d at 898. And as explained, this Court rejected that argument, holding that courts need not "determine [ ][whether] a trade secret exists" before undertaking the preemption analysis. *Id.*; *see also Ethypharm S.A. France v. Bentley Pharm., Inc.*, 388 F. Supp. 2d 426, 433 (D. Del. 2005) ("Because all claims stemming from the same acts as the alleged misappropriation are intended to be displaced, a claim can be displaced even if the information at issue is not a trade secret."); *see also Atl. Med. Specialists*, 2017 WL 1842899, at *15 (relying on *Savor* to rule DUTSA displaces "common law claims based on misappropriation of business information even in cases in which the claim does not meet the statutory definition of 'trade secret' under the [c]ode").

In ruling as it did, *Savor* aligned Delaware with the "majority" of states that "examine[] the factual allegations underlying each claim to determine whether a claim, whatever its label, is based upon misappropriation of a trade secret." *BlueEarth Biofuels, LLC v. Hawaiian Elec. Co*., 235 P.3d 310, 316–17 (Haw. 2010); *see also Mortgage Specialists, Inc. v. Davey*, 904 A.2d 652, 665 (N.H. 2006) ("The majority of courts that have examined this issue have not relied upon the label attached to the claim, but have examined the facts underlying the claim to determine whether it is preempted by the UTSA" (citations omitted)).[9] Here, Alarm does just that; it offers a different label to hold ABS liable for the same alleged acts that underpin its DUTSA claim. *See* A73, A75. Alarm's common law misappropriation claim is therefore preempted.

2. Alarm's contrary arguments ignore that DUTSA's definition of "trade secret" includes anything that would qualify as "confidential" business information.

Although the Court's analysis could begin and end with *Savor*, Alarm's anti-preemption arguments fail for yet another reason. Nearly all of them are premised

[9] Several courts and commentators have expressly noted that *Savor*'s holding places Delaware in this "majority." *Mortgage Specialists*, 904 A.2d at 665 (citing to *Savor* when it "agree[s] with the majority of courts"); *New S. Equip. Mats, LLC v. Keener*, 989 F. Supp. 2d 522, 534 (S.D. Miss. 2013); *Chatterbox, LLC v. Pulsar Ecoproducts, LLC*, 2007 WL 1388183, at *3 (D. Idaho May 9, 2007); *Atl. Med. Specialists*, 2017 WL 1842899, at *15; Charles Tait Graves & Elizabeth Tippett, *UTSA Preemption and the Public Domain: How Courts Have Overlooked Patent Preemption of State Law Claims Alleging Employee Wrongdoing*, 65 RUTGERS L. REV. 59, 72 n.32 (2012) (citing to *Savor* when stating Delaware "ha[s] taken the majority approach to UTSA preemption").

on the false notion that business information can fail to meet Section 2001(4)'s expansive definition of "trade secret" yet still receive legal protection. Throughout its brief, Alarm argues that common law misappropriation of confidential information claims are permitted so long as the underlying information does "not qualify as a 'trade secret' under DUTSA." Br. 29; *see also* Br. 30 (referring to "some larger unidentified category of claims concerning business information that does not qualify as a trade secret"); Br. 3, 34, 35, 39. But because DUTSA's inclusive definition of "trade secret" under Section 2001(4) encompasses any potentially "confidential" business information, Alarm's theory fails.

Section 2007 preempts all non-DUTSA civil claims alleging "misappropriation of a trade secret." 6 *Del. C.* § 2007(a). Section 2001(4) in turn defines "trade secret" as any

> "information, including a formula, pattern, compilation, program, device, method, technique or process, that: (a) [d]erives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and (b) [i]s the subject of efforts that are reasonable under the circumstances to maintain its secrecy."

6 *Del. C.* § 2001(4). This definition—which Alarm never quotes in full—plainly "include[s] *all* business information with independent value derived from secrecy." Richard F. Dole, Jr., *Preemption of Other State Law by the Uniform Trade Secrets Act*, 17 SMU SCI. & TECH. L. REV. 95, 108 (2014) (emphasis added).

That was not always the case. Before DUTSA, Delaware did not define "trade secret" to encompass all secret business information. Like many other states, Delaware instead relied upon Section 757 of First Restatement of Torts. *See Data Gen. Corp. v. Digital Comput. Controls, Inc.*, 357 A.2d 105, 107 n.2 (Del. Ch. 1975); *Bunnell Plastics, Inc. v. Gambler*, 1980 WL 3041, at *4 (Del. Ch. Sept. 24, 1980). And under that Restatement, "trade secret[s] . . . differ[ed] from other secret information." RESTATEMENT (FIRST) OF TORTS § 757 cmt b. Trade secrets were defined as a "process or device for continuous use in the operation of [a] business," generally relating "to the production of goods." *Id.*

By contrast, Section 2001(4)'s definition of "trade secret" is broad enough to "create[] a system in which information is classified only as either a protected 'trade secret' or unprotected 'general . . . knowledge.'" *Mortgage Specialists*, 904 A.2d 664 (internal quotation marks and citation omitted); *see also* Op. 19–20. DUTSA's definition of "trade secret" therefore necessarily includes anything that could be considered "confidential" business information. Moreover, by broadly defining "trade secret" to encompass anything that would have previously been considered "confidential" business information under state common law, DUTSA furthers its goal of achieving cross-state "uniform[ity]" with respect to misappropriation laws. 6 *Del. C.* § 2008.

With little other choice, Alarm is forced in a footnote to make the argument that its "confidential information" could still be protected *even if* it were "readily ascertainable" or did not "[d]erive[ ] independent economic value . . . from not being generally known." Br. 35 n.2 (quoting 6 *Del. C.* § 2001(4)(a)). Curiously, Alarm never defines what it means by this odd flavor of "confidential information." But even under the most generous definition, information that is readily ascertainable or generally known could not qualify as "confidential."

Alarm's reliance on *ASDI, Inc. v. Beard Research, Inc.*, 11 A.3d 749 (Del. 2010), fails for the same reason. *See* Br. 32–35. In *Beard*, this Court affirmed a Court of Chancery opinion holding that if the "success of [a] common law claim . . . depend[s] on the success of the trade secrets claim," DUTSA preempts it. *Beard Research, Inc. v. Kates*, 8 A.3d 573, 602 (Del. Ch. 2010), *aff'd sub nom. ASDI, Inc. v. Beard Research, Inc.*, 11 A.3d 749 (Del. 2010). By Alarm's own admission, its trade secrets claim would fail and its common law claim could succeed only if Alarm could "not prove the existence of a trade secret." Br. 32; *see also* Br. 34. But if Alarm cannot prove the existence of a "trade secret" as DUTSA defines it, then neither can it prove the existence of confidential information. *See supra* 36–

38. Because Alarm's common law claim rises and falls with its DUTSA claim, *Beard Research* only supports the conclusion that it is preempted.[10]

In sum, Section 2007 preempts all non-DUTSA civil claims alleging "misappropriation of a trade secret." 6 *Del. C.* § 2007(a). Alarm argues that its common law claim for misappropriation of confidential information falls outside of that provision because it is based on information that "does *not* qualify as a 'trade secret' within the meaning of Section 2001(4)." Br. 29. Fatally, Alarm's argument overlooks that anything that could be considered "confidential" business information is included in Section 2001(4)'s expansive definition of "trade secret."

3. Alarm's remaining arguments also fail.

Alarm offers a series of other arguments in an attempt to revive its common law claim. To support its overly narrow interpretation of "trade secret," Alarm looks to (by its own admission) "non-binding court decisions." Br. 35–39. None of these cases, however, suggests that the definition of "trade secret" is somehow narrower than Section 2001(4)'s plain text indicates or that *Savor* was wrongly decided. First, Alarm argues *Overdrive, Inc. v. Baker & Taylor* "support[ed] and adopt[ed] [their] argument." Br. 35–36. But *Overdrive* dealt with a common law

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[10] Alarm's reliance on *Beard Research* fails for an additional reason. *Beard Research* dealt with a breach of fiduciary duty claim, which unlike Alarm's common-law misappropriation claim, does not require "[t]he same facts" to establish all the elements of a DUTSA claim. *Beard Research*, 8 A.3d at 602. The Court of Chancery here therefore correctly ruled that the "existence of a fiduciary relationship" was a "distinguishing fact in *Beard*." Op. 21.

claim for conversion, defined as "the wrongful exercise of dominion over the property of another, in denial of that person's right, or inconsistent with it." 2011 WL 2448209, at *5 n.31 (Del. Ch. June 17, 2011). The court there noted that *if* that property also happens to be a trade secret, then "the same facts are used to establish the elements of both claims," and the conversion claim would be preempted. *Id.* at *4. Because at that point it was unclear if the property was a trade secret, the court ruled it was "premature" to decide the preemption question. *See id.* at *5. By contrast, here, we already know that Alarm is using the exact "same facts" to press its common law claim and its DUTSA claim. *See* A53–67. Alarm's misappropriation of confidential information claim therefore rests on different footing than the conversion claim at issue in *Overdrive*. Moreover, to the extent that *Overdrive* suggests DUTSA does not preempt Alarm's common law claims for misappropriation of confidential information, *see* Br. 36, that suggestion contradicts *Savor*'s instruction to analyze allegations of "wrongful conduct," 812 A.2d at 898, rather than the claim's label. And it would go against the more recent decisions in this case and in *Atl. Med. Specialists*, 2017 WL 1842899, at * 18.

Next, Alarm looks to two Delaware cases that interpret *California* case law regarding CUTSA's preemption provision. *See* Br. 37–38 (discussing *Petroplast Petrofisa Plasticos S.A. v. Ameron Int'l Corp.*, 2009 WL 3465984 (Del Ch. Oct. 28, 2009) and *Calloway Golf Co. v. Dunlop Slazenger Grp. Americas, Inc.*, 295 F.

Supp. 2d 430, 437 (D. Del. 2003)). Although *Petroplast* interpreted two California cases that did seem to make a distinction between "trade secret" and "confidential information" for purposes of *CUTSA*, *id.*, these cases never discuss—or even cite to—Section 2001(4)'s broad definition of "trade secret."

Calloway Golf is of even less help to Alarm. That case, which also turned on the application of California precedent, concerned common law claims "of conversion, unjust enrichment, patent title and negligence." 295 F. Supp. 2d at 437. The court simply ruled that "until it is shown that the information is entitled to trade secret protection, it is premature to rule whether Dunlop's claims of conversion, unjust enrichment, patent title and negligence are preempted under CUTSA." *Id.* The court never opined on common law misappropriation claims (or the allegations that underpin them), let alone suggested such claims would survive DUTSA's preemption clause.

Retreating further, Alarm argues that the Court of Chancery failed to "study DUTSA's text," opting instead to perform a "purpose-driven inquiry." Br. 39–40. To the contrary, *Alarm*, not the Court of Chancery, is interpreting DUTSA without reference to the statutory definition or "trade secret" provided in Section 2001(4). By contrast, the Court of Chancery's determination that DUTSA categorizes commercial knowledge into either "a protected 'trade secret' or unprotected 'general skill and knowledge," Op. 20 (citations omitted), is rooted in the expansive definition of "trade secret" found in the text of Section 2001(4).

Moreover, Alarm overlooks that DUTSA's text compels courts to consider the statute's underlying purpose, stating: "This chapter shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this chapter among states enacting it." 6 *Del. C.* § 2008. And that purpose—in addition to the statute's text—forecloses Alarm's common law claim. If allowed to proceed, Alarm's common law misappropriation claim would be actionable in Delaware, but not in other states. That localized differentiation would defeat DUTSA's purpose of achieving cross-state uniformity for misappropriation claims, effectively "reduc[ing] the UTSA to just another basis for recovery." *BlueEarth Biofuels*, 235 P.3d at 326.

As its last gasp, Alarm selectively quotes from DUTSA's prefatory note and discusses a March 1976 report from the committee that drafted the UTSA. Br. 40–43. Neither of these documents supports Alarm's argument that its common law claim is not preempted. For one thing, Alarm omits that the prefatory note begins by articulating the need for "enactment of a uniform state law to protect against the wrongful disclosure or wrongful appropriation of trade secrets, *know-how* or *other information* maintained in confidence by another." UNIFORM TRADE SECRETS ACT prefatory note (emphasis added). As such, the note reinforces that the statute was designed to create uniformity with respect to both trades secret claims and confidential information claims. Not surprisingly, then, at least one state has relied on this excerpt when ruling that DUTSA preempted common law misappropriation claims like Alarm's. *See Mortgage Specialists*, 904 A.2d at 662–63. And with respect to the March 1976 committee report, the excerpted language Alarm cites concerns "*non*confidential intellectual property," Br. 43, making its relevance to Alarm's *confidential* information claim unclear.

Finally, throughout its brief, Alarm cites repeatedly to the recent Arizona Supreme Court case of *Orca Commc'ns Unlimited, LLC v. Noder*, 337 P.3d 545 (Ariz. 2014). *See* Br. 31, 39, 43. Arizona court decisions do not control Delaware Court of Chancery rulings. *This* Court's decisions do. And the fact that Alarm focuses on this case more than *Savor* displays the overall weakness of its position. *Orca* waded into a "split of authority" that *Savor* already placed Delaware on the opposite side of. *Orca*, 337 P.3d at 548; *see supra* n.9. And the Arizona UTSA, the statute at issue in that case, specifically omitted the equivalent of Section 2008's directive that the Act be "applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this [Act] among states enacting it." *See Orca*, 337 P.3d at 549. As a result, the Arizona Supreme Court was interpreting a different statute, one that did not place a premium on achieving uniformity with respect to misappropriation laws. Finally, although the

Arizona court noted some confidential business information may fall outside "AUTSA's broad definition of 'trade secret'" *id.*, it never identified what that information may be or how that information could continue to be considered "confidential." Nothing in *Orca* calls *Savor* into question, nor could it. DUTSA therefore preempts Alarm's common law misappropriation claim.

CONCLUSION

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

<u>/s/ Raymond J. DiCamillo</u>
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