

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE**  
**IN AND FOR NEW CASTLE COUNTY**

<b>SAVOR, INC.,</b>	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. 00C-10-249 JRS
	)	
<b>FMR CORP.</b> , a Delaware corp.,	)	
<b>FMR CORP.</b> , a Massachusetts corp.,	)	
and <b>UPROMISE, INC.</b> ,	)	
	)	
Defendants.	)	

Date Submitted: November 16, 2001  
Date Decided: March 14, 2002

**MEMORANDUM OPINION**

*Upon Defendants' Motions to Dismiss. **GRANTED.***

Jeffrey K. Martin, Esquire, HARVEY, PENNINGTON, CABOT, GRIFFITH & RENNEISEN, LTD., Wilmington, Delaware; Howard M. Cyr, III, Esquire, HARVEY, PENNINGTON, CABOT, GRIFFITH & RENNEISEN, LTD., Philadelphia, Pennsylvania. Attorneys for Plaintiff.

Kevin G. Abrams, Esquire, RICHARDS, LAYTON & FINGER, One Rodney Square, Wilmington, Delaware; John D. Donovan, Jr., Esquire, ROPES & GRAY, Boston, Massachusetts. Attorneys for Defendants, FMR Corp. of Delaware and FMR Corp. of Massachusetts.

Anthony W. Clark, Esquire, SKADDEN, ARPS, SLATE, MEAGHER & FLOM, LLP, One Rodney Square, Wilmington, Delaware; James R. Carroll, Esquire, SKADDEN, ARPS, SLATE, MEAGHER & FLOM, LLP, Boston, Massachusetts. Attorneys for Defendant, Upromise, Inc.

**SLIGHTS, J.**

## I. INTRODUCTION

In this case, the Court considers for the second time whether Plaintiff, Savor, Inc. (“Savor”), has stated a viable claim for misappropriation of trade secrets. The Court dismissed Savor’s last pleading (its Second Amended Complaint) because, among other deficiencies, it failed to identify the trade secret it alleged was misappropriated.<sup>1</sup> The Court granted Savor leave to amend its complaint for the third time, ordered the Prothonotary to place certain portions of the Third Amended Complaint under seal, and entered a protective order with respect to documents appended to the pleading that purportedly contained trade secret information. The protective measures were implemented in response to Savor’s concern that it could not describe the trade secret in its pleading without revealing the very information for which it sought trade secret protection. Even with such measures in place, however, Savor still has not described its purported trade secret and now claims that it is not required to do so under the Court’s liberal notice pleading standards.

In their motions to dismiss Savor’s latest offering, Defendants, FMR Corp. (“FMR”) and Upromise, Inc. (“Upromise”), argue, *inter alia*, that they cannot reasonably be expected to defend Savor’s claim of misappropriation when Savor

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<sup>1</sup>*See Savor, Inc. v. FMR Corp.*, Del. Super., C.A. No. 00C-10-249, Slights, J. (April 24, 2001) (Mem. Op.) (*Savor I*). Savor amended its first complaint as a matter of right before defendants answered. Thereafter, Savor amended its complaint a second time without leave of Court. The Second Amended Complaint was the subject of *Savor I*. This decision addresses Savor’s Third Amended Complaint.

continues in its refusal to notify Defendants of exactly what trade secret they have misappropriated. The motions, and Savor's latest response to the motions, raise this issue: can a plaintiff in a misappropriation of trade secrets case rest on a complaint which does not describe in any detail the trade secret it alleges was misappropriated? The Court concludes that even under the Court's generous notice pleading standards, a plaintiff alleging misappropriation of trade secrets must identify the secret with sufficient particularity to enable the defendant to prepare its defense. Savor has not done so here. Consequently, Defendants' motions to dismiss must be **GRANTED**.

## **II. STATEMENT OF FACTS AND PROCEDURAL HISTORY**

### **A. Facts**

Savor alleges that Defendants misappropriated trade secrets relating to the creation and implementation of a rebate program whereby consumers of certain products and services receive rebate funds from participating vendors for investment in designated State Qualified Tuition Plans.<sup>2</sup> In September, 1998, Savor provided Abram Claude, a senior executive at FMR, with information about its rebate program with the hope that FMR would serve as a fund manager for the program's investments.<sup>3</sup> Mr. Claude refused to sign a confidentiality agreement, but assured

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<sup>2</sup>Third Amended Complaint ("Third Am. Comp.") at ¶6.

<sup>3</sup>*Id.* at ¶7.

Savor that “he personally would respect the secrecy of the information.”<sup>4</sup> During September and October 1998, Savor and Mr. Claude discussed Savor’s rebate program by telephone on several occasions.<sup>5</sup> According to Savor, Mr. Claude frequently activated the speaker function on his telephone so that other FMR employees could participate in the discussions.<sup>6</sup> After several weeks of negotiations, FMR declined to participate in Savor’s rebate program.<sup>7</sup>

Upromise was formed in February, 2000.<sup>8</sup> News reports in July, 2000 describe a rebate program initiated by Upromise and managed in part by FMR. According to Savor, Upromise’s rebate program is identical to the rebate program it proposed to FMR in 1998.<sup>9</sup> When Upromise launched its rebate program, it did so with the assistance of James Fadule, a former employee of FMR.<sup>10</sup> Savor alleges that Mr. Fadule worked directly with Mr. Claude at FMR before working at Upromise.<sup>11</sup> Savor also alleges that certain materials in Upromise’s possession are identical to

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<sup>4</sup>*Id.*

<sup>5</sup>*Id.* at ¶8.

<sup>6</sup>*Id.*

<sup>7</sup>*Id.* at ¶9.

<sup>8</sup>*Id.* at ¶13.

<sup>9</sup>*Id.* at ¶¶15-18.

<sup>10</sup>*Id.* at ¶ 19.

<sup>11</sup> Mr. Fadule left FMR to go to Merrill Lynch. He then left Merrill Lynch to join Upromise. *Id.* at ¶19.

copies of materials Savor sent to Mr. Claude.<sup>12</sup> In essence, Savor alleges that the information it sent to FMR made its way to Upromise, presumably through Mr. Fadule. Upromise, in turn, improperly used the information to its commercial advantage.

## **B. Procedural History**

A brief recount of the procedural history in this case, and particularly the evolution of Savor's position with respect to the nature of its burden to plead a trade secret, is helpful to place the motions *sub judice* in context. As stated, this is Savor's third attempt adequately to plead a claim for misappropriation of trade secrets. During oral argument on Defendants' motions to dismiss the Second Amended Complaint, Savor acknowledged that its rebate program, in itself, does not qualify as a trade secret.<sup>13</sup> Rebate programs are well-known in various industries to induce commerce. Savor argued, however, that the specific means by which its rebate program would be implemented constitute trade secrets.<sup>14</sup>

In *Savor I*, the Court agreed that “[t]he processes by which the rebate program might be implemented ... may qualify for trade secret protection.”<sup>15</sup> The Court held,

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<sup>12</sup>*Id.* at ¶¶21-24.

<sup>13</sup>Tr. at 23 (March 13, 2001).

<sup>14</sup>*Id.*

<sup>15</sup>*Savor I, supra*, Mem. Op. at 9.

however, that Savor's Second Amended Complaint was "...devoid of any reference to the means by which Savor intended that its rebate program should be implemented or any other details of the program itself."<sup>16</sup> Indeed, the words "methods, processes, and techniques" are nowhere to be found in the Second Amended Complaint.

Savor all but conceded at oral argument that its Second Amended Complaint was deficient because it referred to Savor's trade secret in general and conclusory terms.<sup>17</sup> Savor pledged to rectify the deficiency if the Court would enter an appropriate order protecting the information comprising its trade secret from public disclosure.<sup>18</sup> Accordingly, in *Savor I*, the Court granted Defendants' motions to dismiss but granted Savor leave to amend and to file under seal so that it could describe its trade secret in sufficient detail to allow Defendants to understand exactly what they were alleged to have misappropriated.<sup>19</sup>

In its Third Amended Complaint, Savor's attempt to give substance to its claim of trade secret consists of the following amendment to paragraph six of its complaint:

"This program was comprised of information which included marketing strategies and methods, techniques and processes for extracting payments from program participants, aggregating the funds until they

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<sup>16</sup>*Id.*

<sup>17</sup>Tr. at 25-26, 29 (March 13, 2001).

<sup>18</sup>Savor acknowledged that "the methods, techniques, and processes have not yet been delineated" and stated that it was "prepared to do so in a [third] Amended Complaint." Tr. at 26, 29 (March 13, 2001).

<sup>19</sup>*See* Super. Ct. Civ. R. 5(g).

met any minimum payment requirements under a State Qualified Tuition Plan, and then paying them over to the Plan. The details of this information, are described in an exhibit, to be marked ‘Exhibit A’ hereto, with respect to which plaintiff is making a motion under Superior Court Rule 5(g) to have said exhibit placed under seal.”

In addition, Savor added paragraph 32 to its Third Amended Complaint which states simply: “[t]he strategies, methods, and techniques described in Exhibit ‘A’ constitute trade secrets.”<sup>20</sup> Exhibit A to the Third Amended Complaint consists of 120 pages of miscellaneous information, appended in no discernable order, which include various letters (some authored by third parties), charts, sales pitches, newspaper articles, pictures of proposed credit cards, a patent application, and copies of websites maintained by organizations unaffiliated with the parties here. At oral argument on the motions to dismiss the Third Amended Complaint, Savor advised the Court that the essence of the trade secret information appears in pages 44 -120 of Exhibit A.<sup>21</sup>

### **III. DISCUSSION**

#### **A. Standard of Review**

When considering a motion to dismiss, the Court should read the complaint generously, accept all of the well-pleaded allegations contained therein as true, and

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<sup>20</sup>Savor also substantially amended its pleading to address the deficiencies noted by the Court in *Savor I* with respect to the misappropriation component of its claim. In view of the Court’s conclusion that Savor’s claim should be dismissed for inadequately pleading a trade secret, the Court will not address Defendants’ contention that the Third Amended Complaint does not state a viable claim for misappropriation.

<sup>21</sup>Tr. at 46-47 (October 26, 2001).

construe them in a light most favorable to the plaintiff.<sup>22</sup> “A complaint is ‘well-pleaded’ if it puts the opposing party on notice of the claim being brought against it.”<sup>23</sup> Delaware courts, however, will not accept mere conclusory allegations as true.<sup>24</sup> “Conclusory allegations alone cannot be the platform for launching an extensive, litigious fishing expedition for facts through discovery in the hope of finding something to support them.”<sup>25</sup>

## **B. Savor Has Not Stated a Claim For Misappropriation of Trade Secret**

### **1. A Complaint Must Specifically Identify A Trade Secret To State A Viable Claim for Misappropriation of Trade Secret**

The obvious starting point when pleading a claim for misappropriation of trade secret is to allege that a trade secret, in fact, exists.<sup>26</sup> Under Delaware law, a trade secret consists of: “(1) information; (2) that derives independent economic value,

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<sup>22</sup>*E.I. Du Pont de Nemours and Co. v. Monsanto Co. et al.*, 2001 WL 652019 (D. Del.)(ORDER)(citing *Johnson v. Gullen*, 925 F.Supp.244, 247 (D.Del. 1996)). See also *In re Tri-Star Pictures, Inc. Litig.*, 634 A.2d 319, 326 (Del. 1993)(the reviewing court must accept the allegations of the complaint as true).

<sup>23</sup> *Savor I, supra*, Mem. Op. at 5 (citation omitted).

<sup>24</sup> See *Criden v. Steinberg*, 2000 WL 354390 at \*2 (Del. Ch.); *Nebenzahl v. Miller*, 1996 WL 494913 at \*3 (Del. Ch.)(citation omitted).

<sup>25</sup> *Id.*(citation omitted). See also *Savor I, supra*, Mem. Op. at 8 (“the rules of this Court, even in the context of notice pleading, will not countenance a complaint which rests its claims for relief solely upon conclusory allegations of fact; such allegations will not be accepted as true.”).

<sup>26</sup> *Wilmington Trust Co. v. Consistent Asset Mgt. Co.*, Del. Ch., C.A. No. 8867, Allen, C. (March 25, 1987)(Mem. Op. at 8).

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 (3) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.”<sup>27</sup>

“An averment simply that the plaintiff has a ‘secret process’ is a bare legal conclusion.”<sup>28</sup> Plaintiff must provide in its complaint some meaningful description of the “information” for which it seeks trade secret protection in order to direct the litigation (particularly discovery) in a manner which will allow the defendant and, ultimately, the Court to assess the “independent economic value” that might be generated by keeping the “information” secret.<sup>29</sup> “A plaintiff has no cognizable trade secret claim until it has adequately identified the specific trade secrets that are at issue.”<sup>30</sup>

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<sup>27</sup>Del. Code Ann. tit 6, §2001(4) (1999) (“Section 2001 (4)”).

<sup>28</sup>*Diodes, Inc. v. Franzen*, 260 Cal. App.2d 244, 252 (Cal. Ct. App.1968).

<sup>29</sup>*See* Section 2001 (4). *See also Diodes, Inc.*, 260 Cal.App.2d at 252 (affirming the dismissal of complaint for misappropriation of trade secret for failure sufficiently to identify trade secret noting that the complaint must provide defendants reasonable guidance in determining the scope of appropriate discovery ).

<sup>30</sup>*See Cambridge Internet Solutions, Inc. v. Avicon Group*, 1999 WL 959673 at \*2 (Mass. Super.)(holding that “plaintiffs must demonstrate a factual basis for their claim and, where possible, identify their alleged trade secrets with some specificity”); *Cabot Corp. v. Fansteel, Inc.*, 1990 WL 181960 at \*3 (Del. Ch.)(holding that “[w]hile the complaint relies heavily upon the implications that arise from the conclusory phrase ‘trade secrets’, it does not do so inappropriately” as “the specifics of the secrets and the alleged misappropriation are identified”).

To require a plaintiff alleging misappropriation of trade secrets to identify the trade secret at issue with some specificity is not onerous, impractical or inconsistent with notice pleading. Unlike the situation where the facts relating to a particular claim are “peculiarly within the defendant’s knowledge and control,”<sup>31</sup> in which case a relaxation of basic pleading requirements may be justified, the nature of a particular trade secret is “peculiarly within the [plaintiff’s] knowledge and control.” No amount of discovery from the defendant will assist the plaintiff in better understanding or describing its own trade secret. The trade secret, if it exists, is well-known to the plaintiff at the outset of the litigation.

On the other hand, a defendant who has engaged in an ongoing commercial dialogue with a plaintiff deserves to know, as among the information transmitted to it by the plaintiff, specifically what aspect or content of the information plaintiff contends is entitled to “trade secret” protection. This basic notification is necessary to enable the defendant to mount a defense. A complaint which does more than attach generic, nondescript labels to its claim of trade secret at the outset of the

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<sup>31</sup>See e.g., *Nelson v. Monroe Regional Med. Center*, 925 F.2d 1555, 1567 (7th Cir. 1991)(antitrust claim); *Craftmatic Securities Litigation v. Kraftsow*, 890 F.2d 628, 645 (3d Cir. 1989)(securities fraud claim); *Levine v. Prudential Bache Prop., Inc.*, 855 F. Supp. 924, 931 (N.D. Ill. 1994)(RICO and civil conspiracy claim); *Greenberg v. Croydon Plastics Co., Inc.*, 378 F. Supp. 806, 814 (E.D. Pa. 1974)(misappropriation prong of misappropriation of trade secrets claim).

litigation is entirely consistent with the expectation that the initial pleading will put the defendant on notice “of the claim being brought against it.”<sup>32</sup>

## **2. The Third Amended Complaint Does Not Adequately Describe Savor’s Trade Secret**

Savor has agreed that its rebate idea, alone, is not a trade secret.<sup>33</sup> Thus, general references to a rebate program in its complaint will not suffice to state a claim for misappropriation. Savor acknowledged the non-specific allegations in its Second Amended Complaint and represented that once the Court implemented appropriate protective measures it would plead its case.<sup>34</sup> The Court upheld its end of the deal when it cleared the way for Savor to file its Third Amended Complaint under seal. “[Now that] protective orders have been erected to maintain the necessary secrecy, plaintiff must come forward with particularized trade secrets.”<sup>35</sup>

Despite its commitment to flesh out specifically the secret “processes, strategies, methods, and/or techniques” by which its rebate program would be

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<sup>32</sup>*Precision Air, Inc. v. Standard Chlorine of Del., Inc.*, 654 A.2d 403, 406 (Del. 1995). See also Super. Ct. Civ. R. 8(a)(complaint should “put opposing party in notice of the claim being brought against it”).

<sup>33</sup>Tr. at 23 (March 13, 2001). *Accord Jostens, Inc. v. National Computer Sys., Inc.*, 318 N.W.2d 691, 698 (Minn. 1982)(“Mere variations in general processes known in the field which embody no superior advances are not protected”); *Computer Care v. Services Sys. Ent., Inc.*, 982 F.2d 1063, 1073 (7<sup>th</sup> Cir. 1992)(generally known business practices not “trade secret”); *American Nursing Care of Toledo v. Leisure*, 609 F. Supp. 419 (N.D. Ohio 1984)(same).

<sup>34</sup>Tr. at 29 (March 13, 2001).

<sup>35</sup>*IDX Systems Corp. v. Epic Systems Corp.*, 165 F. Supp.2d 812, 816-817 (W.D. Wis. 2001).

implemented, Savor again has chosen to rely upon generalities and conclusory allegations. But this time Savor attempted to enhance its presentation by fastening to its complaint a compilation of documents comprised of newspaper articles, sales pitches, and other information, the content or context of which is nowhere explained in the pleading. By doing so, Savor has sent the Court and Defendants on an unguided safari through a marsh of seemingly benign information in search of a trade secret.<sup>36</sup> Indeed, at oral argument, when the Court inquired of Savor where in the Third Amended Complaint Savor had described its trade secret, the Court was directed generally to Exhibit A.<sup>37</sup> When the Court requested that Savor recite specifically where in Exhibit A the trade secret could be found, Savor was unwilling, or unable, to oblige.<sup>38</sup> When pressed further by the Court, Savor asserted that “the whole package” is “all part of the trade secret.”<sup>39</sup> And then, when the Court appeared unpersuaded that a newspaper article and a publicly accessible website would qualify for trade secret protection, Savor retreated to the position that “on a 12(b)(6) motion,

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<sup>36</sup>While not prohibited in the Court’s rules of civil procedure, the Court notes that the attachment of a lengthy exhibit to a complaint, without the benefit of cross references in the complaint or other explanation, is not an effective means by which to plead a claim. *Rose v. Bartle*, 871 F.2d 331, 340, n.3 (3<sup>d</sup> Cir. 1989)(“[L]engthy exhibits containing...evidentiary matter should not be attached to the pleadings”)(citing 5 *C. Wright & A. Miller, Federal Practice and Procedure* §1327, at 489 (1969)).

<sup>37</sup>Tr. at 37, 43, 44, 46-47 (Oct. 26, 2001)(it should be noted that the Court directed this inquiry to counsel on at least four separate occasions).

<sup>38</sup>*Id.*

<sup>39</sup>*Id.* at 47.

we made the allegation that these are trade secrets, and that has to be accepted by the Court because there's been no discovery as to the parameters of this.”<sup>40</sup>

“Simply to assert a trade secret resides in some combination of other known data is not sufficient, as the combination itself must be delineated with some particularity in establishing its trade secret status.”<sup>41</sup> And “neither defendants nor this Court are required to sift through stacks of [information] and speculate as to what amorphous ‘concepts, designs, methods, and processes’ found within that plaintiff may be seeking to protect.”<sup>42</sup> If Savor, in fact, possesses a trade secret, it should have identified the information comprising the secret in its complaint as it was directed to do in *Savor I*. In the absence of such basic information in its pleading, the Court will not allow Savor to wield the Court’s process in a manner which unjustifiably would require the defendants to answer, litigate and ultimately defend a claim that is deficient on its face as a matter of law.

#### **IV. CONCLUSION**

For the foregoing reasons, Defendants’ motions to dismiss must be **GRANTED**. The Third Amended Complaint fails to state a claim for misappropriation of trade secrets upon which relief may be granted. As indicated in

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<sup>40</sup>*Id.*

<sup>41</sup> *Jostens*, 318 N.W.2d at 699 (citing *Struthers Scientific & Int’l Corp. v. General Foods Corp.*, 51 F.R.D. 149, 153 (D. Del. 1970)).

<sup>42</sup> See *IDX Systems Corp.*, *supra*, 165 F. Supp.2d at 818.

*Savor I*, plaintiff will not be given leave to amend its complaint again. It appears that Savor simply is unable to identify its purported trade secret. Consequently, the dismissal is **with prejudice**.

**IT IS SO ORDERED.**

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Judge Joseph R. Slights, III

Original to Prothonotary