



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.)

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INTRODUCTION

ABS's response brief fails to demonstrate that, once the well-pleaded allegations of Alarm.com's complaint are accepted as true and Alarm.com receives the benefit of all reasonable inferences, it is somehow not even "reasonably conceivable" that ABS misappropriated Alarm.com's trade secrets and confidential information. Rather, the complaint pleads, in extraordinary detail, precisely how ABS acquired Alarm.com's trade secrets, and the circumstances indicating that ABS subsequently improperly used and disclosed them. Nothing more is required at this stage of the case.

This Court should reject ABS's implicit plea that courts should adopt a heightened pleading standard for misappropriation cases. Reviewing allegations much less specific than those presented here, this Court has already held that the traditional pleading standard applies to misappropriation claims and that circumstantial evidence that the defendant acquired the plaintiff's trade secrets and then competed with the plaintiff suffices to overcome a motion to dismiss. *Savor, Inc. v. FMR Corp.*, 812 A.2d 894, 897 (Del. 2002). ABS, like the defendant in *Savor*, claims that these plausible circumstantial allegations "fail[] to adequately allege ... misappropriat[ion]," but "[t]he short answer to these arguments is that, at this stage of the proceedings, [the plaintiff] gets the benefit of all favorable

inferences.” *Id.* ABS’s response fails to muster a single case granting a motion to dismiss under circumstances similar to this case.

Weaker still is ABS’s argument that the Delaware Uniform Trade Secrets Act (“DUTSA”) displaces Alarm.com’s common law claim for misappropriation of confidential information. ABS’s response brief does not even attempt a textual analysis of DUTSA’s displacement provisions, 6 DEL. C. §§ 2007(a) and (b). ABS *does not even cite* the critical subsection, § 2007(b), much less explain how that subsection’s statement that DUTSA does not displace “civil remedies that are not based upon misappropriation of a trade secret,” *id.*, nevertheless displaces a claim based upon misappropriation of material that does not qualify as a trade secret. Indeed, this Court has already affirmed that DUTSA does not displace claims concerning information that does not rise to the level of a “trade secret” under the statute. *ASDI, Inc. v. Beard Research, Inc.*, 11 A.3d 749, 750 (Del. 2010). ABS’s fallback argument, that the definition of a “trade secret” is so broad as to include any information that Alarm.com holds in confidence, gains ABS nothing because it would simply mean that Alarm.com has properly identified trade secrets under DUTSA.

This Court should reverse the Court of Chancery’s decision dismissing Alarm.com’s complaint.

I. ALARM.COM HAS PLAUSIBLY ALLEGED A DUTSA VIOLATION.

To survive the motion to dismiss, Alarm.com need only establish that it may recover under “any reasonably conceivable set of circumstances susceptible of proof.” *Savor*, 812 A.2d at 897 (quotation marks omitted). ABS’s effort to establish that Alarm.com has not surmounted this minimal burden rests primarily on two ill-constructed pillars. First, ABS claims that Alarm.com’s allegations “suggest only that ABS invested in a potential competitor,” and that it is inconceivable that ABS is competing in an unlawful manner. Appellees’ Answering Brief at 15 (Oct. 1, 2018) (“Response”). Second, ABS claims that contracts granting it a conditional right to compete with Alarm.com *so long as it does not misappropriate Alarm.com’s trade secrets* somehow neuter any possibility that ABS misappropriated trade secrets. *See id.* at 23-29.

A. It is Reasonably Conceivable that ABS Has Misappropriated Alarm.com’s Trade Secrets.

Alarm.com’s complaint plainly alleges that ABS has misappropriated the trade secrets at issue. This factual allegation is not plead in a conclusory fashion. Rather, Alarm.com has provided detailed facts supporting its claims. The complaint identifies a specific instance in which the trade secrets were used, namely, the investment in IpDatatel. This allegation, in turn, does not rely solely on the fact of ABS’s investment in ipDatatel, as ABS wrongly insists, but on that fact and the *circumstances* surrounding that investment. *See Appellant’s Opening Brief* at 19-22

(Aug. 30, 2018) (“Opening Br.”). The complaint also alleges that given ABS’s detailed knowledge of Alarm.com’s most important trade secrets on a broad array of topics, it is inevitable that future use of the trade secrets will occur, and indeed has already occurred. Reading the complaint as a whole, the allegations easily give rise to a reasonably conceivable inference of misappropriation.

Alarm.com’s allegation that a former insider and board member, steeped in knowledge of the plaintiff’s trade secrets, left the plaintiff while his firm, the defendant, promptly invested in and put one of its partners on the board of a competitor, falls within the heartland of misappropriation claims that easily survive a motion to dismiss. As explained by a decision ABS relies upon, when a plaintiff alleges “that a[] former employee of plaintiff had access to trade secrets in the context of his or her employment ... general allegations that defendant had access to trade secrets in the context of his or her employment and later left to compete directly with plaintiff will usually suffice” to survive a motion to dismiss. *Accenture Global Servs. GMBH v. Guidewire Software Inc.*, 581 F. Supp. 2d 654, 662 n.8 (D. Del. 2008) (“*Accenture Global I*”). See also *Eastman Chem. Co. v. AlphaPet Inc.*, 2011 WL 5402767, at *5 (D. Del. Nov. 4, 2011), *report and recommendation adopted* 2011 WL 6148637 (D. Del. Dec. 9, 2011) (unpublished). That is precisely the case here, where ABS had front-row access to Alarm.com’s trade secrets and then left to invest in and lead a competitor.

1. Alarm.com’s complaint contains comparable or more specific allegations than those previously found sufficient to survive a motion to dismiss. The leading decision is *Savor*, where this Court allowed a DUTSA claim to proceed when the plaintiff alleged misappropriation based solely on the allegation that the plaintiff had presented its proprietary program to a third-party corporation, and two years later, a former employee of that third-party corporation launched a similar program for the defendant company. 812 A.2d at 895-96. The defendant argued in *Savor*, as ABS argues here, that the plaintiff needed to show greater proof of misappropriation at the threshold, but this Court disagreed, emphasizing the “minimal standards governing notice pleading,” *id.* at 895, and stating that “[t]he short answer to [defendant’s] arguments is that, at this stage of the proceedings, *Savor* gets the benefit of all favorable inferences,” *id.* at 897.

ABS attempts to distinguish *Savor* on the ground that the plaintiff there “specifically alleged the defendant had used the plaintiff’s ‘unique program’ of ‘marketing strategies and [payment] processes’ in its own competing products.” Response at 18 (alteration in original). But Alarm.com has similarly specifically alleged that ABS misused and improperly disclosed—and will continue to misuse and improperly disclose—its trade secrets. For example, the complaint alleges that “ABS has already misused this inside information in becoming comfortable with the idea of investing in the ipDatatel Venture, and indeed in outbidding all competitors

for ipDatatel.” A43; *see also* A68. Similarly, the complaint alleges that ABS has utilized and will “utiliz[e] this information in the course of operating and leading the new ipDatatel Venture,” such as by deploying its knowledge of “Alarm.com’s method and process for evaluating potential acquisitions and for operating subsidiaries,” and its knowledge of “Alarm.com’s customers, including its customer lists, the identity and sales tactics of its most successful (and least successful) dealers.” A69. This is enough to survive the motion to dismiss.

The inference of misappropriation here is much stronger than in *Savor*, where the only circumstance *was* the mere fact that a former insider had launched a competing product. Alarm.com has alleged much more, including (1) greater temporal proximity between ABS’s exit from Alarm.com and its investment and board service in ipDatatel, (2) ABS’s steadfast refusal to disclaim that Ralph Terkowitz (an ABS partner and former chair of Alarm.com’s Board) was involved in the diligence of ipDatatel, (3) that ABS won an auction to invest in ipDatatel, (4) an industry expert’s observation that ABS’s investment in ipDatatel makes sense because of ABS’s intimate knowledge of Alarm.com’s proprietary information, and (5) the sheer scope of ABS’s exposure to Alarm.com’s trade secrets. Opening Br. at 18-22.

Alarm.com’s allegations are also at least as strong as those in *Elenza, Inc. v. Alcon Laboratories Holding Corp.*, 2015 WL 1417292 (Del. Sup. Ct. Mar. 11, 2015)

(unpublished), where the court denied a motion to dismiss a DUTSA claim where the allegations of misappropriation were that (1) the defendant (similar to ABS here) acquired the plaintiff's trade secrets in its capacity as an investor in and business partner with the plaintiff, and (2) around the time it exited its investment in the plaintiff, the defendant filed a patent application for technology that was similar but not identical to the trade secrets it acquired from the plaintiff. *Id.* at *1-2, 6-7.

Similarly, in *Eastman Chemical*, a plaintiff licensed certain trade secrets to the defendants and transferred its employees to the defendants, and the plaintiff then alleged that the defendants misappropriated non-licensed trade secrets via those employees, with the basis for the allegation being the construction of a manufacturing plant in Alabama the year after agreement on the license. 2011 WL 5402767, at *1-2. The court denied a motion to dismiss, holding that the plaintiffs adequately alleged use and disclosure because the complaint alleged both “a specific illicit pathway (involving its former employees) through which confidential information flowed,” and “a set of relevant events (the mid-2009 start-up of the Alabama plant) that was the impetus for the alleged wrongful disclosure and use.” *Id.* at *9. Here too, Alarm.com has alleged a specific illicit pathway (former members of the Alarm.com Board) and events whereby the wrongful disclosure and use happened (ABS's rapid diligence of, successful bid for, investment in, and leadership of ipDatatel).

2. As Alarm.com has explained, *see* Opening Br. at 22, ABS was so steeped in Alarm.com’s trade secrets that, at least at this stage of the litigation, it is reasonable to infer that its improper use and disclosure of trade secrets was inevitable. In a leading case on the “inevitable disclosure” doctrine, the Third Circuit upheld a preliminary injunction prohibiting a defendant from working for his former employer’s competitor, notwithstanding that the defendant, like ABS here, had a contingent right to compete with the plaintiff so long as he did not disclose the plaintiff’s trade secrets. *Bimbo Bakeries USA, Inc. v. Botticella*, 613 F.3d 102, 105 (3d Cir. 2010). If the defendant’s access to the plaintiff’s trade secrets gave rise to a “sufficient likelihood or substantial threat of disclosure of a trade secret” to warrant entry of a preliminary injunction in *Bimbo Bakeries*, ABS’s massive exposure to all of Alarm.com’s trade secrets is surely enough to overcome a motion to dismiss. That conclusion might change if Terkowitz had always been screened from ipDatatel, or if Phil Clough (the managing partner of ABS and a director of ipDatatel) had always been screened from Alarm.com, but the plausible allegations are to the contrary.

Faced with decisions including *Bimbo Bakeries* indicating that the departure of a former *employee* to a competitor usually presents a reasonably conceivable case of misappropriation, *see also, e.g., Accenture Global I*, 581 F. Supp. 2d at 662 n.8, ABS emphasizes that this case involves alleged misappropriation not by a lower-level employee but rather *by the former chairman of Alarm.com’s Board*. Response

at 25-27. It is hard to see why this counts in ABS's favor. ABS certainly has produced no case supporting its argument. Terkowitz had access to all of Alarm.com's trade secrets and proprietary information—far more than any lower-level employee. The Complaint further alleges that Terkowitz had frequent meetings and communications with Alarm.com's CEO wherein the CEO discussed Alarm.com's trade secrets and confidential information with Terkowitz. A51-53. A Delaware court has already allowed a common law claim rooted in misappropriation to proceed where the plaintiff alleged, *inter alia*, that the former chairman of one of its customers improperly communicated the misappropriated information to a defendant corporation when the former chairman joined the defendant's board of advisors. *Accenture Global Servs., GMBH v. Guidewire Software Inc.*, 631 F. Supp. 2d 504, 507 (D. Del. 2009) ("*Accenture Global II*"). Board chairmen, no less than the employees they oversee, are subject to the misappropriation laws.

ABS undercuts its case further by exaggerating that Alarm.com relies on a "Rube-Goldberg-esque causal chain." Response at 28. This causal chain takes ABS the sum total of a single sentence to explain, *id.*, and simply involves Terkowitz using Alarm.com's proprietary information *himself* to conduct diligence into ipDatatel and communicating that information to Clough for his use directing ipDatatel.

ABS also protests that its investing tactics are business-as-usual for “ABS and scores of other investors.” *Id.* at 29. Setting aside that ABS offers no evidence of industry-wide practices, Alarm.com’s contracts with ABS *repeatedly and consistently* insist upon ABS maintaining the confidentiality of Alarm.com’s proprietary information. Regardless of what industry-wide practices may be (a question of fact that, if it is relevant at all, must be answered at summary judgment or trial), what matters for present purposes is that the complaint plausibly alleges that this particular investor committed misappropriation. ABS’s argument, if accepted, would lead to the unacceptable result that trade secrets plaintiffs need a ‘smoking gun’ proving misappropriation simply to state a claim, at least where the defendant has a limited contractual right to compete.

3. ABS musters remarkably few cases granting a motion to dismiss a misappropriation claim. ABS primarily cites cases like *Savor* and *Elenza* that *denied* motions to dismiss. In support of its argument, ABS relies heavily upon *Accenture Global I*, but that case is a far cry from this one. The *Accenture Global I* plaintiff wholly failed to allege how the defendant obtained the trade secrets (alleging only that the defendant “somehow” did) or how the defendant disclosed or used them (alleging only that the defendant developed a product “surprisingly quick[ly]”). 581 F. Supp. 2d at 663 (alteration in original). Here, by contrast, Alarm.com has specifically alleged how ABS acquired its trade secrets (through Terkowitz and other

board members) and how it disclosed or used them (in the diligence of, bidding on, and operation of ipDatatel). Notably, in *Accenture Global II*, after the plaintiff amended its complaint to provide greater detail about how the defendant obtained the proprietary information (the plaintiff had disclosed its proprietary information to customer executives who then served as board advisors to the defendant), the same court denied a motion to dismiss a common law tortious-interference claim based on the alleged misappropriation. *Accenture Global II*, 631 F. Supp. 2d at 506-07, 509.

4. ABS's arguments distill to a demand that Alarm.com come forward at the pleading stage with evidence detailing the precise ways in which ABS has misappropriated its trade secrets. ABS demands that Alarm.com muster evidence that, for example, ABS "actually 'used' plaintiff's client list" in contacting one of Alarm.com's customers. Response at 18 (quoting *Utilisave, LLC v. Miele*, 2015 WL 5458960, at *10 (Del. Ch. Sept. 17, 2015) (unpublished)). Setting aside that the complaint *does* allege ABS used Alarm.com's trade secrets in investing in ipDatatel, e.g., A43, A68-69; the law does not require proof of use at the pleading stage. "It is not common for a trade secret misappropriation plaintiff to know, prior to discovery, the details surrounding the purported theft," and the acceptable reality is "that a trade secret misappropriation plaintiff may have minimal facts available to it at the pleading stage." *Accenture Global I*, 581 F. Supp. 2d at 662. *See also* Opening Br. at 17.

Notably, even as ABS protests that it is *inconceivable* that it has misappropriated Alarm.com’s trade secrets, its response contains carefully-worded non-concessions about the extent to which ABS partners steeped in knowledge of Alarm.com’s proprietary information have been involved with ipDatatel. For example, ABS represents only that Terkowitz had “no *direct* involvement” with ipDatatel, and that Clough similarly had “no *direct* involvement” with Alarm.com. Response at 9 (emphases added). What does this mean? It should be for a neutral court after the taking of appropriate discovery, not ABS and its litigation team shielded from third-party inquiry, to determine whether Terkowitz and Clough’s involvement with Alarm.com and ipDatatel was sufficiently “indirect” such that it did not involve misappropriation of Alarm.com’s immensely valuable proprietary information—at least where, as here, there are plausible allegations that give rise to a powerful inference of misappropriation.

5. ABS’s remaining arguments lack merit. ABS argues that the remarkable speed with which it exited Alarm.com and began to lead ipDatatel is irrelevant, Response at 23, but it cites nothing supporting that argument. To the contrary, such temporal proximity provides strong or even dispositive evidence of misappropriation, at least at the motion-to-dismiss stage. *See, e.g., Savor*, 812 A.2d at 895; *Elenza*, 2015 WL 1417292, at *6; *Weinschel Eng’g Co. v. Midwest Microwave, Inc.*, 297 A.2d 443, 445 (Del. Ch. 1972).

ABS also claims that it is unremarkable that an industry expert has noted that it “knows a thing or two about Alarm.com IP.” Response at 25 (quotation marks omitted). But ABS fails to engage with the totality of what the reporter said, including that ABS’s investment in ipDatatel made particular sense “given [ABS’s] track record with Alarm.com” and its extensive knowledge of Alarm.com. Opening Br. at 12-13. It is hard to see how Alarm.com’s allegations are not even reasonably conceivable when they have already been largely endorsed by an industry expert.

B. The Contracts Confirm Rather than Undermine the Allegations in the Complaint.

ABS’s argument, like the Court of Chancery’s ruling, ultimately rests on ignoring the plausible allegations of the complaint and instead emphasizing that certain contracts establish that (1) ABS had a strict duty to maintain the confidentiality of Alarm.com’s proprietary information, and (2) ABS could compete with Alarm.com only if it complied with these confidentiality obligations. But the fact that ABS could *lawfully* compete with Alarm.com does not somehow render inconceivable the allegation that ABS has *unlawfully* done so. If ABS’s argument were accepted, the existence of these commonplace contracts would strangle virtually every misappropriation case.

ABS cites no decision suggesting that its contingent right to compete with Alarm.com negates any reasonably conceivable inference that it has misappropriated trade secrets. Yet ABS relies on these contracts to refute just about every one of the

circumstances that create a plausible inference of misappropriation. *See, e.g.*, Response at 23 (ipDatatel is a direct competitor to Alarm.com); *id.* (temporal proximity); *id.* at 24 (Terkowitz's involvement with the diligence of Alarm.com).

It is not surprising that ABS cites no authority supporting the weight it wishes to give these contracts, for such a ruling makes little sense. Particularly incoherent is ABS's reliance on the rule of contractual interpretation that all provisions of a contract must be harmonized and given effect. *Id.* at 28. This rule—a guide for interpreting the meaning of contractual provisions—does not provide a presumption that the defendant did not violate a contractual or legal guarantee. Moreover, Alarm.com's interpretation does give meaning to all of the terms of the contract. Ironically, it is ABS' interpretation that would read out of the contract its obligation not to pilfer and misuse Alarm.com trade secrets.

There are indeed numerous decisions allowing misappropriation or related claims to proceed notwithstanding the existence of contracts similar to those here. For example, *Overdrive, Inc. v. Baker & Taylor, Inc.* allowed common law claims related to misappropriation to proceed notwithstanding that the defendant claimed to have a limited contractual right to compete with the plaintiff. 2011 WL 2448209, at *2, 5-7 (Del. Ch. June 17, 2011) (unpublished). Similarly, *Accenture Global II* denied a motion to dismiss a common law claim based on the alleged misappropriation of confidential information, notwithstanding that a party that

allegedly disclosed the information to the defendant had signed a nondisclosure agreement with the plaintiff promising not to wrongfully disclose the information. 631 F. Supp. 2d at 506, 509. *See also, e.g., Elenza*, 2015 WL 1417292, at *1; *Eastman Chem.*, 2011 WL 5402767, at *1.

* * * * *

This Court should reverse the Court of Chancery’s decision dismissing Alarm.com’s DUTSA claim. To the extent ABS argues that the complaint insufficiently alleges misappropriation for purposes of the common law claim, the foregoing analysis rebuts that argument too, for Alarm.com has adequately pled improper misappropriation of its highly valuable and secret proprietary information, regardless of whether that information is a “trade secret” under DUTSA or only common law confidential information.

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

A. ABS Does Not Even Attempt To Square Its Displacement Argument With the Text of DUTSA's Displacement Provision.

Alarm.com's opening brief contains an extensive analysis of DUTSA's displacement provisions, 6 DEL. C. §§ 2007(a) and 2007(b). Alarm.com explained that the Court of Chancery's decision variously rewrites, overreads, and renders surplusage subsections 2007(a) and 2007(b); cannot be squared with the presumption against displacement of the common law; and renders the statute unintelligible and empty of guidance for the business community. Opening Br. at 28–32.

Although statutory interpretation begins (and often ends) with “the plain meaning of the statutory language,” *CML V, LLC v. Bax*, 28 A.3d 1037, 1041 (Del. 2011) (quotation marks omitted), ABS does not even attempt to ground its argument in the text of DUTSA's displacement provisions. Reading ABS's brief, one would not even know that subsection 2007(b) exists, because ABS does not cite, much less analyze, this critical provision. As for subsection 2007(a), ABS quotes it once in passing but never analyzes that provision either. *See* Response at 33. And ABS completely ignores the presumption-against-displacement argument too.

ABS's ostrich-like approach to the statute's text is telling. ABS's displacement argument cannot possibly be squared with the statutory provisions

upon which its argument must rest. If it is true, as ABS has argued below, that the material identified in the complaint does not rise to the level of a “trade secret” as defined in section 2001(4), it cannot possibly be that Alarm.com’s claim for misappropriation of *non-trade secrets* is displaced by a statutory provision that displaces *only* laws “providing civil remedies for misappropriation of a trade secret.” 6 DEL. C. § 2007(a) (emphasis added). Instead, when a claim does not rely on misappropriation of information that is a “trade secret” as defined in the statute, the Delaware General Assembly made clear that DUTSA “does not affect” it because such claims are “not based upon misappropriation of a trade secret.” *Id.* § 2007(b). This should be the end of the matter.

B. Other Sections of DUTSA Confirm Alarm.com’s Interpretation of Section 2007.

Only if DUTSA’s displacement provision “is ambiguous” does the Court consider the statute “as a whole and ... read each section in light of all the others to produce a harmonious whole.” *CML V*, 28 A.3d at 1041. Flouting this rule, ABS ignores the DUTSA displacement provision (section 2007) and purports to divine the scope of that section by proceeding directly to two other sections, §§ 2001(4) and 2008. Even assuming resorting to these other sections were appropriate, neither helps ABS.

1. First, ABS argues that section 2007 displaces Alarm.com’s common law claim because an entirely different section—section 2001(4)—has a broad

definition of what constitutes a trade secret, such that “anything that could be considered ‘confidential’ business information is included in Section 2001(4)’s expansive definition of ‘trade secret.’ ” Response at 40. This argument, if correct, would only serve to prove that Alarm.com stated a claim under DUTSA. ABS appears to be arguing that the allegedly misappropriated material all constitutes a “trade secret” under DUTSA, so long as Alarm.com held the material in confidence (as it alleges to have done). As Alarm.com explained in its opening brief, “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” Opening Br. at 35. To the extent ABS wishes to concede that the material in fact constitutes a trade secret under DUTSA, then Alarm.com’s common law claim would indeed be displaced by section 2007(a), since in that event, the claim may proceed under DUTSA itself. In this scenario, ABS, having achieved dismissal of the common law claim on the ground that the information constitutes a “trade secret,” would be estopped from later arguing that the information is *not* a trade secret. *Motorola Inc. v. Amkor Tech., Inc.*, 958 A.2d 852, 859 (Del. 2008).

ABS thus misses the mark when it argues that “Alarm is forced in a footnote to make the argument that” certain information may be confidential even if it does not qualify as a trade secret. Response at 39 (citing Opening Br. at 35 n.2). Alarm.com has always argued that all or virtually all of the information in its

complaint constitutes a trade secret under DUTSA. It is *ABS* that has argued below (but not in this Court) that Alarm.com cannot establish that the material identified in the complaint constitutes a “trade secret.” *See* Response at 11.

To the extent *ABS*’s opaque argument is meant to implicitly suggest that the material identified in the complaint is not even held in confidence by Alarm.com, such that it cannot “qualify as ‘confidential,’ ” *id.* at 39, this argument fails for two reasons. First, this argument is wholly undeveloped in *ABS*’s brief, and thus is waived. *Roca v. E.I. du Pont de Nemours & Co.*, 842 A.2d 1238, 1242 n.12 (Del. 2004). *ABS* makes no effort to demonstrate that any of the information identified in the complaint is readily ascertainable, generally known, or otherwise not confidential. Second, this argument is inappropriate at the motion-to-dismiss stage, where the Court must accept as true Alarm.com’s well-pled allegation that it has maintained the confidentiality of its highly sensitive business information. A74-75.

2. Second, *ABS* argues that section 2007 displaces Alarm.com’s common law claim because another section—section 2008—provides that DUTSA must be “applied and construed to make uniform the law with respect to the subject of this chapter among states enacting it.” 6 DEL. C. § 2008. *ABS* suggests that regardless of what the General Assembly actually enacted, this Court should find displacement because, if Alarm.com prevails, its common law claim “would be actionable in Delaware, but not in other states.” Response at 43. *ABS* appears to be adverting to

its earlier suggestion that its displacement position is the “majority” position. *Id.* at 36. While a full tally of state and federal court decisions across the land is impracticable and unnecessary, courts across the country are undoubtedly divided over the displacement question, so section 2008 provides no reason to pick ABS’s anti-textual reading of section 2007 rather than Alarm.com’s interpretation, which appears to be the majority position among both state supreme courts and Delaware courts.

C. *Beard Research and Savor Confirm that DUTSA Does Not Displace Alarm.com’s Common Law Claim.*

Alarm.com’s opening brief explained that this Court’s decision in *ASDI v. Beard Research, Inc.*, 11 A.3d 749 (Del. 2010), affirmed a Court of Chancery’s decision that DUTSA did not displace a common law breach-of-fiduciary-duty 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). *See* Opening Br. at 32-33.

ABS’s principal effort to distinguish *Beard Research* is no distinction at all. Instead, ABS repeats its argument that any information that would qualify as “confidential information” for purposes of the common law claim necessarily also qualifies as a “trade secret” for purposes of the statutory claim. “[I]f Alarm cannot prove the existence of a ‘trade secret’ as DUTSA defines it,” ABS contends, “then

neither can it prove the existence of confidential information.” Response at 39. ABS’s argument is simply nonresponsive to the fact that *Beard Research*’s holding plainly adopts Alarm.com’s displacement argument. Indeed, *Beard Research* and other decisions leave open the possibility that some information may qualify as confidential information even if it does not satisfy the definition of a trade secret. In the event this Court agrees with the premise of those decisions, then the common law claim cannot be dismissed at this stage. *See* Opening Br. at 35 n.2.

ABS does not otherwise grapple with the holding of *Beard Research*, other than to offer a footnote suggesting that *Beard Research* is distinguishable because it involved a fiduciary duty claim. Response at 40 n.10. As Alarm.com explained when anticipating this argument in the Opening Brief (pp. 33-34), *Beard Research*’s analysis simply did not turn on the unique nature of a fiduciary duty claim. ABS simply ignores this argument.

ABS relies instead on *Savor*, 812 A.2d 894. But the 2002 *Savor* decision predates *Beard Research*. *Savor*’s holding must thus be read in light of this Court’s later pronouncement in *Beard Research*. And if ABS’s interpretation of *Savor* were correct, then *Beard Research* could not possibly have been decided the way it was. Tellingly, ABS does not attempt to reconcile its interpretation of *Savor* with this Court’s later holding in *Beard Research*.

Even on its own terms, *Savor* does not help ABS. The *Savor* plaintiff did not allege, as Alarm.com alleges, that even if the allegedly misappropriated information was not a trade secret, it was protected confidential information. Rather, the plaintiff alleged that the defendant engaged in unfair competition and conspiracy solely because of its “alleged misappropriation of a trade secret.” 812 A.2d at 898 (emphasis added). In other words, the plaintiff alleged only that apart from misappropriating trade secrets, the defendant also engaged in unfair competition and conspiracy by seizing the trade secrets. *Id.*

Savor did not hold, as ABS wrongly suggests (Response at 34-35), that the displacement inquiry may always be decided before the trial court has “determined that a trade secret exists.” 812 A.2d at 898. This portion of *Savor* simply quotes the plaintiff’s argument, which this Court rejected because the entire complaint depended “solely on the alleged misappropriation of a trade secret.” *Id.* Even if *Savor* were ambiguous on this point, *Beard Research* resolves the point in Alarm.com’s favor, as it affirmed a decision holding that the displacement question must await a determination of whether the information constitutes “confidential information, even if that information does not rise to the level of a trade secret.” *Beard Research*, 8 A.3d at 602.

D. ABS Does Not Meaningfully Defend the Court of Chancery’s Purpose-Driven Analysis, and It Largely Ignores Alarm.com’s Discussion of DUTSA’s Purpose.

The Court of Chancery’s decision finding displacement was based not on DUTSA’s text but rather on the court’s belief that the “purpose” of DUTSA was not only to protect trade secrets but also to *totally eliminate* protection for any information that is confidential and valuable but does not rise to the statutory definition of a trade secret. Opinion at 21–22. Alarm.com’s opening brief explored UTSA’s statutory text and structure, its Prefatory Note, and the 1976 report of the drafting committee, to demonstrate that it is not tenable to believe that in addition to strengthening trade secrets law, the drafters of UTSA (and the General Assembly) intended—*sub silentio* and notwithstanding the clear language of section 2007—to totally abolish all protection for confidential information that does not meet the statute’s definition of a trade secret. Opening Br. at 39–43.

ABS does not meaningfully defend the Court of Chancery’s purposivism. Even more damaging to its argument, ABS offers no reason why the drafters of UTSA would have wanted to completely abolish all legal protections for valuable and confidential information that does not rise to the level of a trade secret. And ABS’s efforts to explain away the legislative history are unconvincing.

With respect to the Prefatory Note, ABS does not engage with Alarm.com’s analysis of how that document shows a purpose only to unify trade secret law, not

to abolish an entire unarticulated category of non-trade-secret law. ABS argues only that the Prefatory Note supposedly “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.’ ” Response at 43 (quoting *Prefatory Note*, Uniform Trade Secrets Act, Uniform Laws Annotated (1985)). This passage, which appears midway through the Prefatory Note (not at the outset), is not even a statement by the drafting committee. Rather, it is a quotation from the ABA’s Patent Section, made a decade earlier, concerning the initial impetus for a uniform law. The final version of the statute, of course, protected only trade secrets, and its displacement section specifically makes clear that the statute does not affect other confidential information. And with respect to the 1976 report, ABS emphasizes that the language Alarm.com cites refers to “nonconfidential intellectual property,” Response at 44, which is true but does not change the analysis. The point of Alarm.com’s argument is that the 1976 report emphasizes UTSA’s limited purpose of reaching trade secrets only and nothing more.

CONCLUSION

For the foregoing reasons, the 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 October 16, 2018, a copy of the foregoing was served by LexisNexis File & Serve on the following attorneys of record:

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