

CAUSE NO. 2021-28763

MICHAEL BOLSINGER

*Plaintiff,*

v.

HOUSTON ASTROS, LLC,

*Defendant.*

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IN THE DISTRICT COURT OF

HARRIS COUNTY, TEXAS

61<sup>st</sup> JUDICIAL DISTRICT

**DEFENDANT HOUSTON ASTROS, LLC'S RULE 91a MOTION TO DISMISS**

Defendant Houston Astros, LLC (“*the Astros*” or “*Defendant*”) files this Motion to Dismiss (“*Motion*”) under the Texas Rule of Civil Procedure 91a.1, respectfully requesting the Court dismiss claims filed by Plaintiff Michael Bolsinger (“*Plaintiff*” or “*Bolsinger*”) on the grounds those claims have no basis in law or fact and award Defendant the attorneys’ fees and costs associated with defending the suit. Defendant would respectfully show the Court as follows:

**I. INTRODUCTION**

The claims in this case represent a baseless attempt by the Plaintiff to turn a headline-grabbing sports story into a cash recovery based on a single, brief appearance against the 2017 Astros. As the Petition makes plain, Plaintiff had limited professional success before ever facing the Astros, and he has had limited professional success after. Further, he remains unemployed by Major League Baseball despite the fact that the alleged cause of his poor outing against the Astros has been publicly discussed for over a year. This is actually Plaintiff’s second attempt to cash-in on his brief encounter with the 2017 Astros. He first filed different tort claims against the Astros in California, including negligence and unfair business practices, based on the same underlying allegations and only filed these new, reinvented causes of action in Texas after the California claims were dismissed.

Plaintiff has now abandoned his California causes of action and seeks to recover in this attempt based on two claims: (1) misappropriation of a “trade secret,” despite the fact that the

supposed secret relates to the meaning of signs on public display in a stadium and on a television broadcast and (2) common-law conversion of those signs, despite clear black-letter law establishing that something intangible—like the meaning of hand signals—cannot form the basis of a claim. So, these claims have no basis in law or fact, and they should be dismissed.

## **II. SUMMARY OF THE ARGUMENT**

In short, Plaintiff alleges that the hand gestures, or signs, used by his 2017 teammates on the Toronto Blue Jays to communicate pitch selection during a game played in Houston constituted “trade secrets” under Texas law. Plaintiff further alleges that the Defendant misappropriated the meaning of those signs and that this alleged misappropriation entitles the Plaintiff, as one of the players on the Blue Jays, to recovery under Texas’s Uniform Trade Secrets Act (“TUTSA”).

But the Petition makes plain that those signs were hardly a secret. Based on the allegations in the Petition, any spectator with the right seat and a pair of binoculars could observe the sign being given and the pitch that follows to decode the signs’ meaning. No rule or regulation would prevent this enterprising spectator from sharing the signs’ meaning with the general public in real time. The only difference between the general public and the Defendant is that, based on the allegations in the Petition, the rules of professional baseball prohibited the Defendant from using certain electronic means to decode the signs.

Plaintiff cannot recover for misappropriation under TUTSA because the signs cannot satisfy the elements of TUTSA’s definition of a trade secret and because Plaintiff has never owned the signs. TUTSA confirms what common sense tell us about the protected status of such public, rudimentary information. Most fundamentally, a trade secret must be an actual secret in order to qualify under TUTSA, and information that is public does not satisfy the statutory test. Plaintiff also does not allege that the signs represented some advancement in baseball technology or strategy developed by the Blue Jays or that the signs were anything more than an easily cracked

password used to convey information in a non-verbal manner. Such a basic method of communication does not satisfy TUTSA's additional requirement that a trade secret have independent economic value. Last, Plaintiff offers no factual support for the conclusory assertion that he owns the signs, as required for a valid TUTSA claim. For these reasons, and more, Plaintiff's misappropriation of trade secrets claim has no basis in law or fact and should be dismissed.

The common law conversion claim included in the Petition also fails as a matter of law, with three fatal defects: (1) Plaintiff does not own the signs in the first place, (2) to the extent that *any* entity can own a sequence of hand gestures, baseball signs would be intangible property, and as a matter of black-letter Texas law, intangible property cannot form the basis of a conversion claim; and (3) any such claim would be preempted by TUTSA.

### **III. RULE 91a STANDARD**

“The purpose of Rule 91a . . . is to require the early and speedy dismissal of baseless claims.”<sup>1</sup> The Texas Supreme Court recently recognized that “allowing courts to dismiss meritless cases before parties engage in costly discovery” under Rule 91a serves the objective of attaining adjudication of the rights of litigants through “great expedition and dispatch and at the least expense.”<sup>2</sup>

Under Texas Rule of Civil Procedure 91a, “a party may move to dismiss a cause of action on the grounds that it has no basis in law or fact.” “A cause of action has no basis in law if the allegations, taken as true, together with [any] inferences reasonably drawn from them do not entitle the claimant to the relief sought.”<sup>3</sup> In ruling on a 91a Motion to Dismiss, the court “[m]ust decide

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<sup>1</sup> *In re Joe Kelley Interests, Inc.*, 2019 WL 2521725, at \*1 (Tex. App.—Dallas June 19, 2019, no pet.).

<sup>2</sup> *Bethel v. Quilling, Selander, Lownds, Winslett & Moser, P.C.*, 595 S.W.3d 651, 656 (Tex. 2020).

<sup>3</sup> Tex. R. Civ. P. 91a.1.

the motion based solely on the pleading of the cause of action, together with any pleading exhibits permitted by Rule 59.”<sup>4</sup>

Rule 91a provides two circumstances under which a cause of action has no basis in law: (1) where the petition does not allege sufficient facts “to demonstrate a viable, legally cognizable right to relief,” and (2) where the plaintiffs “allege[] additional facts that, if true, bar recovery.”<sup>5</sup> “[T]he availability of a remedy under facts alleged is a question of law.”<sup>6</sup> In contrast, “[a] cause of action has no basis in fact if no reasonable person could believe the facts pleaded.”<sup>7</sup>

A petition will not survive Rule 91a dismissal if it contains “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements.”<sup>8</sup> To survive, the petition must provide “fair and adequate notice of the facts upon which the pleader bases his claim.”<sup>9</sup> The obligation to plead facts extends to each element of a cause of action.<sup>10</sup> Where a plaintiff fails to plead facts that plausibly show any necessary element of its claim, the claim should be dismissed.<sup>11</sup>

#### IV. ARGUMENT AND AUTHORITIES

##### A. Plaintiff’s trade secrets claim has no basis in law or fact.

Plaintiff’s first cause of action seeks recovery for an alleged misappropriation of trade secrets pursuant to TUTSA. To recover damages under TUTSA, a plaintiff must establish

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<sup>4</sup> Tex. R. Civ. P. 91a.6.

<sup>5</sup> *Guillory v. Seaton, LLC*, 470 S.W.3d 237, 240 (Tex. App.—Houston [14th Dist.] 2015, pet. denied).

<sup>6</sup> *City of Dallas v. Sanchez*, 494 S.W.3d 722, 724 (Tex. 2016).

<sup>7</sup> Tex. R. Civ. P. 91a.1; *Drake v. Chase Bank*, 2014 WL 6493411, at \*1 (Tex. App.—Fort Worth Nov. 20, 2014, no pet.).

<sup>8</sup> *Wooley v. Schaffer*, 447 S.W.3d 71, 76 (Tex. App.—Houston [14th Dist.] 2014, pet. denied) (internal citations omitted).

<sup>9</sup> *Thomas v. 462 Thomas Family Props., LP*, 559 S.W.3d 634, 639–40 (Tex. App.—Dallas 2018, pet. denied); see also *Zheng v. Vacation Network, Inc.*, 468 S.W.3d 180, 184, 186 (Tex. App.—Houston [14th Dist.] 2015, pet. denied).

<sup>10</sup> See *Zheng*, 468 S.W.3d at 186; see also *Salazar v. HEB Grocery Co., LP*, 2018 WL 1610942, at \*3 (Tex. App.—San Antonio Apr. 4, 2018, pet. denied, cert. denied) (holding “Salazar was required to plead facts, from which reasonable inferences could be drawn to support each element” of his claims to survive a Rule 91a motion).

<sup>11</sup> See, e.g., *Aguilar v. Morales*, 545 S.W.3d 670, 680 (Tex. App.—El Paso 2017, pet. denied).

(1) ownership of a trade secret, (2) misappropriation of a trade secret, and (3) injury caused by the misappropriation.<sup>12</sup> Plaintiff's claim has no basis in law or fact because the allegations pleaded cannot establish even the first of these three elements. The signs are not trade secrets, and, to the extent that any party can "own" hand gestures meant to convey pitching strategy, the signs are owned by the Toronto Blue Jays, not Plaintiff. The signs are hand gestures made in front of thousands of spectators, and the mere fact that the Blue Jays attempted to conceal the meaning of those signs from the Astros' hitters does not turn those gestures into trade secrets under Texas law.

**1. The signs do not qualify as trade secrets under TUTSA.**

The definition of "trade secret" under TUTSA starts with a very broad provision that includes "all forms and types of information," and then lists numerous examples of such information. The definition narrows significantly with the following two requirements:

- (A) the owner of the trade secret has taken reasonable measures under the circumstances to keep the information secret; and
- (B) the information derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable through proper means by, another person who can obtain economic value from the disclosure or use of the information.<sup>13</sup>

Plaintiff cannot establish these two elements of TUTSA's trade secret definition.

**a) Neither Bolsinger nor the Blue Jays took reasonable measures to keep the signs a secret.**

To qualify as a trade secret under TUTSA, the owner of the trade secret must take "reasonable measures under the circumstances to keep the information secret."<sup>14</sup> The Petition makes clear that the signs were not a secret at all. Using hand signals allows the Blue Jays' players to communicate regarding pitching strategy without announcing the next pitch out loud to the

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<sup>12</sup> *EJ Madison, LLC v. Pro-Tech Diesel, Inc.*, 594 S.W.3d 632, 643 (Tex. App.—El Paso 2019, no pet.).

<sup>13</sup> Tex. Civ. Prac. & Rem. Code § 134A.002(6).

<sup>14</sup> Tex. Civ. Prac. & Rem. Code § 134A.002(6)(A).

batter, but this hardly makes those signs, and their meaning, a secret. The Petition alleges that the Astros were able to decipher the meaning of the signs with a single centerfield camera focused on the signs made by the catcher to the pitcher. Petition ¶ 28. This same interaction would have been viewable to any of the thousands of spectators with the right view and to hundreds of thousands watching on TV. Plaintiff cannot establish that the Blue Jays took reasonable measures to keep the meaning of the signs secret when he chose to participate in a game where that meaning would be shared with the public.

Indeed, Plaintiff does not even claim to have complied with TUTSA's requirement that information can only be a trade secret if its owner has taken "reasonable measures under the circumstances to keep the information secret." Instead, Plaintiff rewrites this language to allege that the owners of the signs had "taken reasonable measures customary in the baseball industry to keep the signs a secret."<sup>15</sup> What Plaintiff means by "customary in the baseball industry" is that the Blue Jays' players display the signs in full public view in a manner that makes them easy to decipher and only take steps to temporarily shield that meaning from the Astros hitters. This rewrite of TUTSA's trade secret definition asks the Court to qualify something as a trade secret as long as it is kept secret from *someone*, for a brief moment in time, even if it is otherwise public knowledge. There is no support for such an expansive application of the statute.

Although cases interpreting TUTSA's secrecy requirement do not impose an absolute bar on disclosure to third parties, they set a much higher standard than what Plaintiff alleges here. For example, the Houston Fourteenth Court of Appeals concluded evidence that a customer database was only accessible to a limited number of employees who had login credentials was sufficient to

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<sup>15</sup> Pet. ¶ 38.

support a trade secrets claim.<sup>16</sup> By contrast, information that is “readily ascertainable by proper means such as trade journals, reference books or published material” and is not substantially a secret is not a trade secret.<sup>17</sup> For instance, in a case where the plaintiff argued a trucking company was its customer and therefore its identity was a trade secret, the El Paso Court of Appeals concluded that the identity of a trucking company was not a trade secret because it was a publicly operated company and its identity was easily discoverable.<sup>18</sup>

While TUTSA is a relatively new statute in Texas, the purpose of its enactment is to make trade secret law uniform among the states enacting the Uniform Trade Secrets Act (“UTSA”).<sup>19</sup> Thus, case law interpreting UTSA statutes in other jurisdictions are instructive. Case law from other UTSA states confirms that third-party disclosure is only permissible when it is limited and combined with an obligation or expectation of continued secrecy. Nondisclosure agreements are consistently cited as facts that support a plaintiff’s reasonable efforts to maintain secrecy.<sup>20</sup> By contrast, courts deny trade secret status if the information is not safeguarded, is publicly disclosed, and is readily ascertainable by mere observation.<sup>21</sup> For example, in a case applying Illinois’s Trade Secrets Act, a federal district court concluded plaintiff’s software was not a trade secret because it was publicly disclosed on the internet even though it was disclosed in a format that was unreadable to humans.<sup>22</sup> The court reasoned that the software could be translated into readable form through

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<sup>16</sup> *Reilly v. Premier Polymers, LLC*, 2020 WL 70742563, at \*6 (Tex. App.—Houston [14th Dist.] Dec. 3, 2020).

<sup>17</sup> *EJ Madison, LLC*, 594 S.W.3d at 643-44.

<sup>18</sup> *Id.*

<sup>19</sup> Tex. Civ. Prac. & Rem. Code § 134A.008 (“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.”).

<sup>20</sup> *See Surgidev Corp. v. Eye Tech., Inc.*, 828 F.2d 452, 455 (8th Cir. 1987) (applying Minnesota’s and California’s UTSA’s); *Uni-Sys, LLC v. United States Tennis Ass’n, In.*, 350 F. Supp. 3d 143, 172-73 (E.D.N.Y. 2018) (applying DTSA and New York law).

<sup>21</sup> *See Arkeyo, LLC v. Cummins Allison Corp.*, 342 F. Supp. 3d 622, 630 (E.D. Pa. 2017) (applying Illinois’s UTSA).

<sup>22</sup> *Id.* at 630.

a simple process and therefore its format was not a justification that the software was not publicly available.<sup>23</sup> In a Tennessee case applying that state’s Uniform Trade Secrets Act, a trivia game’s material, format, the questions read out loud, and the music played were not trade secrets because observers could readily obtain that information.<sup>24</sup> Similarly, the Federal Claims Court, applying the Uniform Trade Secrets Act, denied trade secret status to an integrated equipment list and design layout of a medical mobile unit because the plaintiff had publicly displayed a model unit at a trade show.<sup>25</sup>

Much like the software, the trivia game, and medical mobile unit, the signs exchanged by Plaintiff and his catcher were on public display and therefore do not have trade secret status. As a result, Plaintiff cannot establish the existence of a trade secret as a matter of law.

**b) The signs have no independent economic value.**

Plaintiff also cannot meet requirement (B) of the trade secret definition under TUTSA because the signs have no independent economic value. TUTSA’s definition of a trade secret requires that the “information derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable through proper means by, another person who can obtain economic value from the disclosure or use of the information.” The Petition includes the conclusory allegation that this element is satisfied, but does not explain how such value could be derived from a system of exchanged hand gestures.<sup>26</sup>

This requirement that the signs have independent economic value is a statutory codification of what common sense tells us about what is, and is not, a trade secret. The law does not protect information from disclosure or misappropriation simply because it is a secret—and justifiably so.

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<sup>23</sup> *Id.*

<sup>24</sup> *Hinson v. O’Rourke*, 2015 WL 5033908, at \*4-5 (Tenn. Ct. App. Aug. 25, 2015).

<sup>25</sup> *Mobile Medical Int’l Corp. v. U.S.*, 95 Fed. Cl. 706, 734, 738 (Fed. Cl. 2010).

<sup>26</sup> Pet. ¶ 38.



It is the independent economic value requirement that ensures that only certain types of information will be protected. For example, the number and suit of the cards in a poker player's hand represent "information," as described by TUTSA, and by concealing the cards from the other players, the poker player is taking reasonable means to maintain their secrecy. Thus, as long as the poker hand is not displayed to the public, the cards in a poker hand meet the first two elements of the TUTSA's statutory trade secret definition—information that is a secret. But it is clear that poker hands are not trade secrets, and the "independent economic value" element helps to explain why. Outside the context of the poker game—and of that particular hand being played—the knowledge of which cards are in the player's hand at that moment is worthless. There is no market for the information, and the poker player only values the secrecy of the information because of the rules of the game being played—not because the information would be valued in the broader economy.

Of course, if the players are betting on the game, the other players at the table might place some economic value on knowing the other players' cards, but the mere fact that there could be downstream economic benefits to winning the hand does not convert a particular combination of cards into a trade secret. The "economic value" in that situation is dependent on the outcome of the hands and the rules of the game being played. There is no *independent* value to the knowledge.

The same is true of baseball signs. Even if we assume there is a downstream economic benefit to the Astros from allegedly decoding and making use of the signs, this does not give the signs themselves any more independent economic value than the hand of cards. Whether the object in question is hand gestures or colorful pieces of cardstock, the value comes from the rules of the game and not from the any real economic market. The information is not a trade secret.

This distinction between information of independent value and information that merely leads to some item of value is well articulated in trade secrets cases. Numerous courts, both state and federal, applying TUTSA as well as the UTSA analogues in other jurisdictions, have held that a password is not a trade secret.<sup>27</sup> In a federal case applying TUTSA, the district court held that “passwords do not qualify as a trade secret under TUTSA” as a matter of law “because they do not have the ‘independent economic value’ in the sense of a ‘formula or customer list.’”<sup>28</sup> The reasoning behind this holding is clear: a password, in and of itself, is just a series of letters and numbers with no independent value. Some courts even dispute if a password qualifies as “information,” much less information with independent economic value.<sup>29</sup> The password may provide access to something of value, but the password itself does not gain trade secret status for its proximity to value. It is a secret, but not a legally cognizable trade secret.

This distinction and reasoning has been applied in other so-called “gateway” cases beyond just passwords. In *Bellwether Community Credit Union v. Chipotle Mexican Grill, Inc.*, the Plaintiff alleged that the credit card information of its customers was a trade secret.<sup>30</sup> Without question, the credit card information could be used by another person to generate economic value, but, as the district court held, this was only because of what the information provided access to—a line of credit—not because of the independent value of the numbers on the card. In these cases, the value of the information is “derivative of the thing that it is intended to protect.”<sup>31</sup> Indeed, a

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<sup>27</sup> *Emerald City Mgmt., LLC v. Kahn*, 2016 WL 98751, at \*19 (E.D. Tex. Jan. 8, 2016) (citing *State Analysis, Inc. v. Am. Fin. Assoc.*, 621 F.Supp.2d 309, 321 (E.D. Va. 2009); *MicroStrategy, Inc. v. Bus. Objects, S.A.*, 331 F.Supp.2d 396, 429 n. 4 (E.D. Va. 2004)); see also *North Star Media, LLC v. Winogradsky-Sobel*, 2011 WL 13220157, at \*11 (C.D. Cal. May 23, 2011).

<sup>28</sup> *Id.*

<sup>29</sup> See *id.* (citing *MicroStrategy, Inc. v. Bus. Objects, S.A.*, 331 F.Supp.2d 396, 429 n. 4 (E.D. Va. 2004)).

<sup>30</sup> 353 F. Supp. 3d 1070, 1086–87 (D. Colo. 2018).

<sup>31</sup> *Id.* at 1086.

password or other “gateways” do not derive independent economic value and therefore necessarily cannot be a trade secret as a matter of law.<sup>32</sup>

Plaintiff’s TUTSA claim in this case closely parallels these “gateway” fact patterns, in which the alleged trade secret is of no independent economic value. Treating the allegations of the Petition as true, an Astros representative sitting in the dugout can know that the catcher showing one finger is the “sign” for a fastball. He also might know Bolsinger’s credit card number. In both instances, this information has no independent economic value. The credit card number has no value without the line of credit it would be used to access, and the knowledge of the sign has no value without a future moment in time when it is used to identify the next incoming pitch.

Because the hand gestures used by the Blue Jays are nothing more than a gateway to the type of pitch to be thrown, Plaintiff’s claim that those signs are trade secrets have no basis in law.

**2. Plaintiff is not the “owner” of the signs and cannot bring a claim under TUTSA.**

Even assuming that the signs qualify as a trade secret, Plaintiff cannot maintain a claim for the alleged misappropriation of those signs under TUTSA because he does not own them. The very first element of a claim for misappropriation of a trade secret under TUTSA is “ownership of a trade secret.”<sup>33</sup> TUTSA defines the owner of a trade secret as “the person or entity in whom or in which rightful, legal, or equitable title to, or the right to enforce rights in, the trade secret is reposed.”<sup>34</sup> Plainly, there is no document giving Plaintiff “legal title” to the signs used by the Blue Jays, and so in order to be an “owner” under TUTSA, Plaintiff must establish that he had “equitable title” or “the right to enforce rights” in the signs.

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<sup>32</sup> *Emerald City Mgmt., LLC*, 2016 WL 98751, at \*19.

<sup>33</sup> *Morgan v. Clements Fluids S. Tex., Ltd*, 589 S.W.3d 177, 186-87 (Tex. App.—Tyler 2018, no pet.); see also *St. Jude Med. S.C., Inc. v. Jansenns-Counotte*, 2014 WL 7237411 , at \*14 (W.D. Tex. Dec. 17, 2014) (applying TUTSA).

<sup>34</sup> Tex. Civ. Prac. & Rem. Code § 134A.002(3-a).

Plaintiff does not even allege to have had “equitable title” or “the rights to enforce rights” in the signs. Instead, after alleging a cause of action under TUTSA, Plaintiff alleges in the section of the Petition outlining the cause of action for common law conversion that he “owned, possessed, or had the right to immediate possession of the signs.” Pet. ¶ 43. In the absence of a definitive allegation of ownership that has some basis in Texas precedent or statute, Plaintiff fails to establish ownership as a matter of law.<sup>35</sup> The Petition alleges that Plaintiff used the signs (Pet. ¶ 32) but offers no legally supportable link between his use of the signs and his potential ownership. Ownership cannot be inferred because there is no default rule or assumption under Texas law that an employee owns a trade secret that is used in the scope of employment.

To the contrary, one of the key historical reasons that trade secrets laws were developed in the first place was to protect employers from misappropriation by departing employees.<sup>36</sup> Similar to how the attorney-client privilege encourages and facilitates open dialogue between attorney and client, trade secrets laws allow employers to make use of sensitive and proprietary information with their employees without fear that the employee can monetize that information to the detriment of the employer. It is for this reason that there are so many examples of Texas employers bringing suit against former employees for misappropriation under TUTSA.<sup>37</sup> While Plaintiff does allege to have used the signs, there is simply no legal support for the idea that simply making use of a trade secret entitles a company’s employee to bring a claim for misappropriation under TUTSA.

Because Plaintiff has not alleged any facts sufficient to show he is the owner of the signs, Bolsinger cannot maintain a claim against the Astros for alleged misappropriation of trade

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<sup>36</sup> *Yovatt v. Winyard*, 1820 WL 2039 (U.K. Ct. Ch. 1820); *Eastman Co. v. Reichenbach*, 20 N.Y.S. 110 (Sup. 1892); *aff’d*, 29 N.Y.S. 1143 (Sup 1894).

<sup>37</sup> *See His Co., Inc. v. Stover*, 202 F.Supp.3d 685, 695 (S.D. Tex. 2016), *vacated as moot* by 2016 WL 6134939, 4:15-CV-00842; *Morgan v. Clements Fluids S. Tex., LTD.*, 589 S.W.3d 177, 187–88 (Tex. App.—Tyler 2018, no pet.).

secrets.<sup>38</sup> Plaintiff's claim fails as a matter of law because he cannot establish that he owns—or ever owned—the signs developed for use in the scope of his employment.

**B. Plaintiff's claim for conversion has no basis in law or fact because Plaintiff does not own the signs, the signs are intangible assets that cannot form the basis of a claim, and the claim is preempted by TUTSA.**

Plaintiff's common law conversion claim fails for three straightforward reasons.

**1. Plaintiff cannot bring a conversion claim because he does not own the signs.**

Plaintiff must establish that he is the owner of the signs in order to bring a claim for conversion and, as established above, see supra, § IV.A.2, Plaintiff's conclusory allegation that he "owned, possessed, or had the right to immediate possession of the signs" fails to establish ownership as a matter of law.<sup>39</sup> While TUTSA's statutory definition of ownership would not apply to a common law conversion claim, the common law definition of ownership used for conversion is equally implausible in this case. To establish a conversion claim, a plaintiff must demonstrate he "owned or had legal possession of the property or entitlement to possession."<sup>40</sup> A plaintiff who holds or possesses the property for the benefit of the owner cannot establish this element of a conversion claim.<sup>41</sup> Plaintiff's conclusory allegation fails to establish ownership as a matter of law, and no reasonable person could believe that Bolsinger owns a combination of hand gestures that he used during a baseball game as an employee of the Blue Jays. If anything, Bolsinger was only using the signs for the benefit of the Blue Jays as a team, which cannot establish he had ownership of the signs.

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<sup>38</sup> *Zabit v. Brandometry, LLC*, 2021 WL 1987007, at \*5-6 (S.D.N.Y. May 18, 2021) (applying DTSA).

<sup>39</sup> Pet. ¶ 43; *J.P. Morgan Chase Bank, N.A. v. Texas Contract Carpet, Inc.*, 302 S.W.3d 515, 537 (Tex. App.—Austin, no pet.).

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

<sup>41</sup> *Id.*

**2. Intangible property cannot form the basis of a common law conversion claim.**

Plaintiff's claim for conversion should be dismissed because baseball signs are intangible property that cannot form the basis of a conversion claim. With one inapplicable exception, "Texas has never recognized a cause of action for conversion of intangible property."<sup>42</sup> For example, the Houston Fourteenth Court of Appeals held that "intangible electronic communications" could not support a claim for conversion.<sup>43</sup> Plaintiff's conversion claim similarly has no basis in law.<sup>44</sup>

**3. Plaintiff's common law cause of action is preempted by TUTSA.**

Plaintiff's common law conversion claim also fails for the separate reason that it is preempted by Texas statute. TUTSA preempts all "conflicting tort, restitutionary, and other laws of this state providing civil remedies for misappropriation of a trade secret."<sup>45</sup> The fact that Plaintiff's TUTSA claim fails as a matter of law and fact does not change the preemption analysis.<sup>46</sup> This is because courts interpret TUTSA's preemption language broadly, holding that TUTSA was meant to preempt "all claims based upon the unauthorized use of information."<sup>47</sup> These courts reasoned that TUTSA is "intended to prevent inconsistent theories of relief for the same underlying harm by eliminating alternative theories of common law recovery which are premised on the misappropriation of a trade secret."<sup>48</sup>

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<sup>42</sup> *Express One Int'l v. Steinbeck*, 53 S.W.3d 895, 901 (Tex. App.—Dallas 2001, no pet.) (holding that a trademark is an intangible property right, and not subject to conversion); *see also Forum US, Inc. v. Musselwhite*, 2016 WL 6909297, at \*9 (S.D. Tex. Jan. 22, 2016) (applying Texas law) ("the majority of Texas courts and the Fifth Circuit have held that, under Texas law, conversion applies only to physical (tangible) property, not intangible property").

<sup>43</sup> *Robin Singh Educ. Services, Inc. v. Test Masters Educ. Services, Inc.*, 401 S.W.3d 95, 97-98 (Tex. App.—Houston [14th Dist.] 2011, no pet.).

<sup>44</sup> *Id.*; *see also Neles-Jamesbury, Inc. v. Bill's Valves*, 974 F.Supp. 979, 982 (S. D. Tex. 1997) (applying Texas law) (holding Texas law does not recognize conversion of a trademark).

<sup>45</sup> Tex. Civ. Prac. & Rem. Code § 134A.007(a).

<sup>46</sup> *MedioStream, Inc. v. Microsoft Corp.*, 869 F. Supp. 2d 1095, 1116 (N.D. Cal. 2012).

<sup>47</sup> *ScaleFactor, Inc. v. Process Pro Consulting, LLC*, 394 F. Supp. 3d 680, 685 (W.D. Tex. 2019) (*citing* *Embarcadero Techs., Inc. v. Redgate Software, Inc.*, 2018 WL 315753, at \*2 (W.D. Tex. Jan. 5, 2018) (*quoting* *360 Mortg. Grp.*, 2016 WL 900577, at \*6)).

<sup>48</sup> *360 Mortg. Grp.*, 2016 WL 900577, at \*6.

Courts have also recognized that common law conversion claims are preempted by TUTSA when those claims deal with intangible information. “Where a the plaintiff directs its conversion claim at the loss of the intangible right contained or integrated with the tangible item, its claim clearly addresses and seeks recovery for the same harm contemplated by TUTSA.”<sup>49</sup> In *Lifesize Inc. v. Chimene*, the District Court for the Western District of Texas, applying Texas law, declined to dismiss conversion claims premised on the theft of a laptop, but did dismiss conversion claims premised on the theft of the materials on the laptop itself.<sup>50</sup> By contrast, that same district court in *ScaleFactor, Inc. v. Process Pro Consulting, LLC*, dismissed a conversion claim that was premised only on the “unauthorized use of information,” even if some of the information was not a trade-secret, because it stemmed from the same underlying harm as plaintiff’s TUTSA claim.<sup>51</sup>

Like in *ScaleFactor*, Plaintiff’s only claim here is for the alleged misappropriation of an intangible thing—the signs—and any common law recovery for this misappropriation is preempted as a matter of law.

### **C. Request for Attorneys’ Fees under Rule 91a.7**

Plaintiff alleges that hand gestures exchanged between two participants represent a trade secret that was unlawfully misappropriated by the Defendant. Plaintiff makes this allegation even though the gestures, or signs, are visible to thousands who can also then see the pitch called for by that sign. The very idea that such a public act of communication could be considered a trade secret fails at the most basic level. This is confirmed by the statutory definition of a trade secret, requiring that the trade secret have independent economic value, and the requirement the information be

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<sup>49</sup> *Lifesize Inc. v. Chimene*, 2017 WL 1532609 at \*13 (W.D. Tex. Apr. 26, 2017).

<sup>50</sup> *Id.*

<sup>51</sup> *ScaleFactor, Inc. v. Process Pro Consulting, LLC*, 394 F. Supp. 3d 680, 685 (W.D. Tex. 2019).

owned by the plaintiff. Plaintiff's second cause of action for conversion is equally implausible but also fails for reasons of Texas law that should be readily apparent to the Plaintiff.

Rule 91a.7 provides that the court "may award" attorneys' fees to the prevailing party on a Rule 91a Motion to Dismiss, and Defendant respectfully asks for such an award for each of the two invalid causes of action, at an amount to be established at an evidentiary hearing.

#### IV. CONCLUSION

For the foregoing reasons, the Astros prays that this Court grant this Rule 91a Motion to Dismiss, dismiss Bolsinger's claims with prejudice, award the Astros all costs and reasonable and necessary attorney fees incurred, and grant any such other relief to which the Astros may be justly entitled.

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Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I certify that, on July 13, 2021, a true and correct copy of the foregoing document was served in accordance with the Texas Rules of Civil Procedure on all parties of record.

*/s/James L. Leader* \_\_\_\_\_  
James L. Leader