

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

VETNOS, LLC,

Plaintiff,

v.

SIDEPRIZE LLC d/b/a PRIZEPICKS,

Defendant.

Civil Action No. 1:23-CV-2746-WMR

SPECIAL MASTER'S REPORT AND RECOMMENDATION

This Report and Recommendation concerns Defendant SidePrize, LLC d/b/a PrizePicks' ("PrizePicks") Motion to Dismiss (Dkt. 14) and the Special Master submits it under the Court's December 21, 2023 Order (Dkt. 28) referring the Motion to Dismiss to him.

In the Motion, PrizePicks asks the Court to dismiss Plaintiff Vetnos, LLC's ("Vetnos") claims of patent infringement and trade secret misappropriation. Dkt. 14-1 at 6. Defendant argues that the patents are invalid under 35 U.S.C. § 101 for reciting nothing more than a patent-ineligible abstract idea. *Id.* at 5-13. The Motion also argues that Vetnos failed to plead sufficient facts to support a claim for trade secret misappropriation. *Id.* at 13-22.

After reviewing the parties' briefing and conducting a hearing on February 6, 2024, the Special Master recommends the Court deny PrizePicks' Motion to Dismiss. PrizePicks has failed to establish with clear and convincing evidence that the asserted patent claims are directed to patent-ineligible subject matter and that Vetnos' trade secret misappropriation claim was not sufficiently pleaded.

I. BACKGROUND

Vetnos alleges that PrizePicks infringes U.S. Patent Nos. 10,353,543 (the "543 Patent"), 11,157,147 (the "147 Patent"), and 11,579,754 (the "754 Patent") (collectively, the "Asserted Patents"). Dkt. 1 at ¶ 20. "Over the past decade, fantasy sports games have surged in popularity, becoming a significant part of the global

sports culture.” *Id.* at ¶ 5. “The technology behind traditional fantasy sports games, however, suffers from a variety of limitations and drawbacks.” *Id.* at ¶ 6. For example, “[b]ecause traditional fantasy sports games often span an entire season, fans must invest a significant amount of time managing their fantasy team to account for issues like player injuries, unfavorable matchups, etc.” *Id.* at ¶ 7. “Traditional fantasy sports games are also often based on a pari-mutuel format where fans are pitted against each other, and the prize pool varies based on the number of fans participating.” *Id.* at ¶ 8. “However, because winnings vary based on the behavior of other players in the player pool, pari-mutuel formats introduce an additional factor of chance or risk, potentially discouraging fans from playing.” *Id.* “Due to these and other factors, pari-mutuel formats may be less desirable to sports fans and/or may not be permitted in some jurisdictions, leaving sports fans with fewer options to exercise their skilled knowledge of sports teams and players.” *Id.*

“Since its founding in 2014, Game Sports Network, Inc. (“GSN”), and its successor Vetnos (collectively, the “Companies”), invested significant resources researching and developing a suite of technologies (the “Vetnos Technology”) that address these drawbacks and that power entirely new forms of fantasy sports games.” *Id.* at ¶ 6. Vetnos alleges Game Sports Network, Inc. (“GSN”) and its successor Vetnos (collectively the “Companies”) “developed technology that powers new games of skill that keep casual sports fans engaged through a long

season, enable fans to participate with minimal time investment, and allow fantasy sports operators to provide competitive, fixed prizes with managed risk.” *Id.* at ¶ 9. “The Vetnos Technology includes a system for providing daily fantasy sports games in which fans can test their sports knowledge and prediction skills and win prizes that are known, or “fixed,” in advance.” *Id.* at ¶ 11. “For example, with the Vetnos Technology, a daily fantasy sports game may present a series of “matchups” to a fan, such as whether a particular athlete will score over or under a certain number of points in an upcoming game.” *Id.* “A fixed prize may also be set based on the number of matchups (e.g., over-under propositions) in the series that the fan can correctly predict.” *Id.* at ¶ 12.

“The fixed-odds matchup format powered by the Vetnos Technology enables sports fans to exercise their sports knowledge and skill for transparent, unchanging prizes, allowing for fair and fun sports fan engagement.” *Id.* at ¶ 13. “And because each fixed-odds matchup is untethered from the underlying sports season, fans can participate and start fresh on a daily basis with minimal time investment.” *Id.*

Vetnos further alleges based on information and belief that “prior to the Companies’ innovations, there were no fixed-odds daily fantasy sports games in the market.” *Id.* at ¶ 14. “Rather, fantasy sports games were all burdened with a pari-mutuel format.” *Id.* “The Vetnos Technology has enabled new games and new prize structures, both within and without the daily fantasy sports category.” *Id.* at ¶ 16.

“Various organizations, including professional sports teams and leagues, have expressed interest in games made possible by the Vetnos Technology.” *Id.*

Vetnos sought protection of its work “developing the technology behind the daily fantasy sports world” ... “through various forms of intellectual property, including patents and trade secrets.” *Id.* at ¶ 19. To protect the Companies’ development of the Vetnos Technology, “the Companies sought and obtained patents protecting certain inventions underlying the same,” namely: the Asserted Patents. *Id.* at ¶ 20.

A. Asserted Patents

Vetnos alleges that PrizePicks infringes U.S. Patent Nos. 10,353,543 (the “543 Patent”), 11,157,147 (the “147 Patent”), and 11,579,754 (the “754 Patent”) (collectively the “Asserted Patents”). Dkt. 1 at ¶ 20. The Asserted Patents share a common specification for a “Method and System for Presenting and Operating a Skill-Based Activity.” *Compare* Dkt. 1-3 *with* Dkt. 1-4 *and* Dkt. 1-5.

At their core, the Asserted Claims are directed towards a system for presenting a fixed-odds, skill-based game. Dkt. 1-3 at Abstract. The Asserted Patents explain the drawbacks to prior art skill-based games. The prior art games were pari-mutual – where the size of the prize that is awarded to a winner is determined by the size of the pool and the number of winners. *Id.* at 21:6-41. The Asserted Patents describe a fixed-odds game to overcome those drawbacks. *Id.* at 9:12-17. In order to successful

administer a fixed-odds game, the patented system needs to identify even matchups – pairs of athletes or groups of athletes that have even odds of success. *Id.* at 10:5-11. Vetnos contends that its claims require the evaluation of millions of potential matchups in its claimed “event data.” Dkt. 18 at 12. The Asserted Patents also claim continually updating its event data to ensure its identification of even matchups is consistent with current events. *Id.* at 13-15. Lastly, the Asserted Patents describe assessing risk based on user-selected winners and the fixed payout odds. Dkt. 1-3 at 21:41-23:27, 28:53-29:51. These various processes are combined in the Asserted Patents’ claims to claim a system for presenting a skill-based game.

Claim 1 of the ’543 patent, its only independent claim, recites:

1. A system for presenting a skill-based game, the system comprising:

a non-transitory storage medium storing machine readable code; at least one activity server system comprising a processor configured to execute the machine readable code and to communicate over a wide area network with a plurality of presentation computing devices, each distinct one of the presentation computing devices associated with a distinct one of a plurality of users, and to receive information from the plurality of presentation computing devices; and

a device storage system coupled to the activity server system storing (i) information concerning the plurality of users, each user identifiable by a user account, and (ii) event data pertinent to a set of events and participants in the set of events;

wherein, the machine-readable code, when executed by the activity server system, causes performance of computer processes comprising:

separately responsive to communications initiated from each of the presentation computing devices, serving, over the wide area network, to the presentation devices, a set of matchups of participants along with associated fixed-payout odds based on winning user matchup selections, so as to cause the presentation devices to display the set of matchups to the users with the associated fixed payout odds, so as to offer separately through each of the presentation devices an opportunity to play the skill based game;

receiving, separately, from the presentation devices, over the wide area network, user roster data characterizing, with respect to the matchups, a set of user-selected winners;

updating the event data pertinent to participants in the actual events; and using the updated data to calculate and assign payouts to the users based on both the set of user-selected winners and the fixed payout odds, wherein determination of whether a given user is a winner or loser is based solely upon the given user's selections and not on those of other users:

wherein the machine-readable code, when executed by the activity server system, causes performance of computer processes further comprising:

receiving by the activity server system schedule information about a plurality of games from an information source containing the schedule information;

determining by the activity server system athletes expected to compete in the plurality of games by accessing player information from an information source containing the player information;

ranking by the activity server system the athletes using historical fantasy point performance values for the athletes based at least upon calculated expected fantasy point performance values to be scored by the athletes in a next game; and

causing display by the activity server system in a graphical user interface identities of the athletes according to their expected

fantasy point performance values wherein the graphical user interface allows a matchmaker to select players to assign to a matchup.

Dkt. 1-3 at 37:2-63. Claim 1 of the '147 Patent, its only independent claim, recites:

1. A system for presenting a skill-based game, the system comprising:

a non-transitory storage medium storing machine readable code;

at least one activity server system comprising a processor configured to execute the machine readable code and to communicate over a wide area network with a plurality of presentation computing devices, each distinct one of the presentation computing devices associated with a distinct one of a plurality of users, and to receive information from the plurality of presentation computing devices; and

a device storage system coupled to the activity server system storing (i) information concerning a plurality of users, each user identifiable by a user account, and (ii) event data pertinent to a set of events and participants in the set of events;

wherein, the machine-readable code, when executed by the activity server system, causes performance of computer processes comprising:

separately responsive to communications initiated from each of the presentation computing devices, serving over the wide area network, to the presentation devices, a set of matchups of participants along with associated fixed-payout odds based on winning user matchup selections, so as to cause the presentation devices to display the set of matchups to the users with the associated fixed payout odds, so as to offer separately through each of the presentation devices an opportunity to play the skill based game, by selecting matchups, wherein the skill based game on the presentation device of any given user is displayed with fixed-payout odds associated with the number of matchups selected by the given user for the game;

receiving, separately, from the presentation devices, over the wide area network, user roster data characterizing, with respect to the matchups, a set of user-selected winners;

updating the event data pertinent to participants in the actual events; and

using the updated data to calculate and assign payoffs to the users based on both the set of user-selected winners and the fixed payoff odds, wherein determination of whether a given user is a winner or loser is based solely upon the given user's selections and not on those of other users:

wherein the machine-readable code, when executed by the activity server system, causes performance of computer processes further comprising:

receiving by the activity server system schedule information about a plurality of games from an information source containing the schedule information;

determining by the activity server system athletes expected to compete in the plurality of games by accessing player information from an information source containing the player information;

ranking by the activity server system the athletes using historical fantasy point performance values for the athletes based at least upon calculated expected fantasy point performance values to be scored by the athletes in a next game; and

causing display by the activity server system in a graphical user interface identities of the athletes according to their expected fantasy point performance values wherein the graphical user interface allows a match maker to select players to assign to a matchup.

Dkt. 1-4 at 37:22-38:21. Lastly, claim 1 of the '754 Patent, its only independent claim, recites:

1. A system for presenting a skill-based game, the system comprising:

a non-transitory storage medium storing machine readable code;

at least one activity server system comprising a processor configured to execute the machine readable code and to communicate over a wide area network with a plurality of presentation computing devices, each distinct one of the presentation computing devices associated with a distinct one of a plurality of users, and to receive information from the plurality of presentation computing devices; and

a device storage system coupled to the activity server system storing (i) information concerning a plurality of users, each user identifiable by a user account, and (ii) event data pertinent to a set of scheduled events and a pool of participants in the set of scheduled events;

wherein, the machine-readable code, when executed by the activity server system, causes performance of computer processes comprising:

separately responsive to communications initiated from each of the presentation computing devices, serving, over the wide area network, to the presentation devices, a set of matchups, wherein each matchup offers, to a given user, an opportunity to make a choice selected from the group consisting of (i) a first set of participants, from among a plurality of sets of participants in the pool of participants, projected by the given user to achieve a first fantasy score superior to a second fantasy score of a second set of participants and (ii) a projection by the given user that a third fantasy score of a third set of participants will be over, or under, a projected fantasy score of the third set of participants projected by the activity server system, along with associated fixed-payout odds based on winning criteria, so as to cause each of the presentation devices to display the set of matchups and the associated fixed payout odds on a corresponding graphical user interface;

receiving, separately, from each of the presentation devices, over the wide area network, user roster data characterizing a set of user-selected winners with respect to selected matchups;

updating the event data pertinent to participants in the scheduled events; and

using the updated data to calculate and assign payoffs to the users based on both the set of user-selected winners and the fixed payoff odds, wherein determination of whether a given user is a winner or loser is based solely upon the given user's selections and not on those of other users:

wherein the machine-readable code, when executed by the activity server system, causes performance of computer processes further comprising:

receiving, by the activity server system, schedule information about a plurality of games from an information source containing the schedule information;

determining, by the activity server system, participants expected to compete in the plurality of games by accessing player information from an information source containing the player information;

evaluating, by the activity server system, using an automated process based upon statistical analysis and historical fantasy point performance values, for each of the participants, in the pool of participants, to determine statistically expected fantasy point performance values to be scored by the participants in a next game; and

causing display, by the activity server system, on the corresponding graphical user interface, of each participant in the set of matchups, wherein the corresponding graphical user interface allows the given user to make the choice.

Dkt. 1-5 at 37:2-38:7. The Parties disputed whether these independent claims are “representative” of all claims in the Asserted Patents. *See* Dkt. 14-1 at 8; Dkt. 18 at

15-16; Dkt. 21 at 6-7. But because the Special Master finds that the independent claims of the Asserted Patents are themselves valid, it is not necessary to resolve this issue.

B. Trade Secrets

“In developing, offering, and running a fixed-odds daily fantasy sports game, the Companies, including GSN, also developed certain confidential, proprietary methods (the “Trade Secrets”).” Dkt. 1 at ¶ 21. “In a fixed-odds daily fantasy sports game, a significant challenge for the game provider is the task of selecting the daily matchups that the provider offers players.” *Id.* at ¶ 22. “The fixed-odds format of the game means that the provider must produce matchups (1) in which the two outcomes that a player can select have an equal probability of occurring (i.e., a “coin flip” or 50/50 odds) and (2) that are attractive to players so that a sufficient number of players select each side of the matchup.” *Id.* “In the event the game provider produces a matchup that is not equally probable or that fails to generate a sufficient number of entries on either side, then the provider assumes the risk that prize payments associated with this matchup might be disproportionate to the entry fees paid by players.” *Id.*

“In addition to producing appropriate matchups, the provider of a fixed-odds daily fantasy sports game can manage risk in other ways, including by actively managing the number and type of matchups that it offers players at any time.” *Id.* at

¶ 23. “For example, for a series of four matchups, GSN generally offered prizes of ten times the player’s entry fee (i.e., 10:1 odds) versus a theoretical probability of correctly selecting four 50/50 matchups of 16:1.” *Id.* at ¶ 24. “This margin allowed GSN to make a profit while insulating GSN from risk.” *Id.* “[I]n a marketplace of competing providers of fixed-odds daily fantasy sports, the provider able to offer higher prizes at the same level of risk will have a competitive advantage.” *Id.* at ¶ 25. “A game provider with better risk management methodology will be able to offer higher prizes, eventually approaching the theoretical probability limit.” *Id.* at ¶ 26.

Vetnos alleges “GSN expended substantial time, labor, and resources to develop the Trade Secrets,” and “[t]he Trade Secrets have significant value, are not publicly known or readily ascertainable by proper means, and are maintained as confidential and proprietary information.” *Id.* at ¶ 27. Specifically, Vetnos represents:

the Trade Secrets include: (a) methods, strategies, and know-how for managing risk associated with providing fixed-odds daily fantasy sports games, including choice volume, risk correlation, risk concertation, sustained P&L stability, and card republication; (b) techniques for producing daily 50/50 matchups, including data sources, data translation, and formulas and algorithms used to analyze player data; (c) marketing strategies for fixed-odds daily fantasy sports games; and (d) customer data, including the identities, habits, preferences, and purchase history of GSN customers.

Id. at ¶ 28. Vetnos further alleges “[t]he Trade Secrets derive independent economic value and would be valuable to competitors ... because they demonstrate various

proofs of concept, speed research, and development efforts, and provide a roadmap for a developer of a competing fixed-odds daily fantasy sports game.” *Id.* at ¶ 29. Vetnos was assigned the Trade Secrets on November 14, 2018. *Id.* at ¶¶ 81-86.

Vetnos then alleges “GSN took various measures to protect the secrecy of the Trade Secrets.” *Id.* at ¶ 30. For example, “GSN had written policies and procedures governing their information technology and the security of confidential information, including the Trade Secrets.” *Id.* “The Trade Secrets were only available to specific GSN personnel with a business need to know the information.” *Id.* “GSN’s computer systems on which some of the Trade Secrets were stored could be accessed only by authorized individuals with log-in credentials.” *Id.* “GSN personnel who were provided access to the Trade Secrets were subject to confidentiality obligations with respect to the use or disclosure of GSN confidential information, including the Trade Secrets.” *Id.* at ¶ 31. “Employees are also required to adhere to strict rules and policies pertaining to the confidentiality of the Trade Secrets.” *Id.* “Employees are prohibited from disclosing or providing information regarding the Trade Secrets to an outside third party or entity.” *Id.*

“In October of 2018, PrizePicks announced that they had also released a system for daily fantasy sports that was based on a fixed-odds format (the “PrizePicks product”).” *Id.* at ¶ 33. Vetnos alleges “[t]he PrizePicks product uses the patent- and trade-secret-protected Vetnos Technology that the Companies

developed.” *Id.* at ¶ 34. Before the PrizePicks product, “PrizePicks (then d/b/a SidePrize LLC) was initially focused solely on facilitating side bets between parties in season-long, pari-mutuel fantasy sports games.” *Id.* at ¶ 36. However, as Vetnos alleges, PrizePicks later “pivoted to using the Vetnos Technology.” *Id.* at ¶ 37. Vetnos further represents that “[a]t least as early as July of 2018, PrizePicks demonstrated direct knowledge of, and a keen interest in, the ... patented, and proprietary technology developed by the Companies.” *Id.* at ¶ 38.

Around July of 2018, Steven Kerstein began consulting for PrizePicks. *Id.* at ¶ 45. A few years “prior to consulting for PrizePicks, Kerstein worked for GSN, handling risk-management techniques specific to the Vetnos Technology” beginning September 18, 2015. *Id.* at ¶ 45. Specific job duties of Kerstein at GSN included helping to “identify matchups appropriate for GSN’s fixed-odds gaming technology and to ensure the profitability of the matchups.” *Id.* at ¶ 46. “GSN policy was to require all incoming employees (including Kerstein) to execute a Non-Disclosure, Proprietary Information, Invention Assignment and Non-Solicitation Agreement (the “Non-Disclosure Agreement”).” *Id.* at ¶ 51.

The Non-Disclosure Agreement defined “Proprietary Information” as:

any information, whether or not in writing, of a private, secret, or confidential nature concerning the Company’s business, business relationships or financial affairs. By way of illustration, but not limitation, Proprietary Information shall be deemed to include any plan, method, data, know-how, research, information, procedure, development, invention,

improvement, modification, discovery, process, work of authorship, documentation, formula, technique, product (currently existing, in development or planned), idea, concept, design, drawing, specification, technique, trade secret or intellectual property right whatsoever or any interest therein whether patentable or non-patentable, patents and applications therefor, trademarks and applications therefor or copyrights and applications therefor, personnel data, records, marketing techniques and materials, marketing and development plans, customer names and other information related to customers, including prospective customers and contacts at customers, price lists, pricing policies and supplier lists of the Company, which have or may come into my possession, or which I have learned, or to which I had or have access, or which I may discover or develop or have discovered or developed, as a result of my role as an employee of the Company. Proprietary Information also includes any information described above that the Company treats as proprietary or designates as Proprietary Information, whether or not owned or developed by the Company.

Id. at ¶ 52. The Non-Disclosure Agreement further provided:

(i) during my work for the Company and thereafter, I will hold in confidence and will not directly or indirectly reveal, report, publish, disclose, transfer or use any of the Proprietary Information for any purposes, except in the course of my work for the Company;

(ii) I will not disclose to the Company or use on its behalf any information from any other source which I am required to keep confidential unless such information has become Proprietary Information because the Company acquired such information from the person to whom I owe this obligation, or by other means that does not violate the confidential nature of such information including it becoming public knowledge;

(iii) I will hold in strict confidence and not disclose or use any Proprietary Information of any Related Parties at any time either during or after the term of my employment, without the

express consent of the Company and the Related Party concerned; and

(iv) At any time, should I have a question whether any matter within the scope of the above definition might nonetheless be disclosed, I shall consult my immediate supervisor or any person to whom the Company's Chief Executive Officer or majority or its Board of Directors shall delegate this responsibility and abide by such person's or persons' decision.

Id. at ¶ 53. "On June 19, 2017, GSN informed Kerstein that he would be laid off."

Id. at ¶ 57. "In the months prior to the end of his employment, Kerstein secretly sent confidential information owned by GSN to his personal email account" in violation of the Non-Disclosure Agreement. *Id.* at ¶ 58.

"At least as early as 2018, Kerstein began consulting for PrizePicks on a part-time basis regarding risk management and other topics." *Id.* at ¶ 61. "Kerstein's LinkedIn profile states that as of June of 2021, his role with PrizePicks was 'Linesmaking and Risk Management.'" *Id.* at ¶ 63. Vetnos next alleged the following based "on information and belief:"

...PrizePicks hired Kerstein with the intention of obtaining the Trade Secrets, including, without limitation, the techniques for effectively managing risk when operating the fixed-odds daily fantasy sports game developed by GSN.

...[I]t was not until PrizePicks consulted with and hired Kerstein that it was able to effectively manage the risk associated with its fixed-odds daily fantasy sports game.

...PrizePicks knew or should have known that Kerstein possessed the Trade Secrets after his employment with GSN was terminated.

Id. at ¶¶ 64-66. Vetnos next represents “PrizePicks knew or should have known that Kerstein owed GSN a duty of confidentiality with respect to the Trade Secrets” because “[i]t is common in the industry for employees like Kerstein to be subject to post-employment restrictive covenants, including non-disclosure agreements.” *Id.* at ¶¶ 67-68.

“PrizePicks’ game pays unusually high prizes to players.” *Id.* at ¶ 70. Vetnos alleges “[p]rize amounts like the ones paid by PrizePicks would only be possible if PrizePicks were able to manage the risk associated with its fixed-odds daily fantasy sports offering with a high degree of sophistication enabled by the Trade Secrets.” *Id.* “The Trade Secrets enable efficient risk management that would allow PrizePicks to offer high prize amounts without the risk of losing significant amounts of capital.” *Id.* “PrizePicks’ use of the Trade Secrets enables PrizePicks to offer higher prizes than would otherwise be possible.” *Id.* at ¶ 72. Vetnos further alleges “PrizePicks’ misappropriation of the Trade Secrets permitted PrizePicks to capture a significant share of the market for fixed-odds daily fantasy sports gaming, grow its user base, and generate, on information and belief, hundreds of millions of dollars of net revenue.” *Id.* at ¶ 74.

On a telephone call in or around July of 2018 between Dan Orlow, the co-founder of both GSN and Vetnos, and PrizePicks’ CEO Adam Wexler, “Wexler told Orlow that he was impressed by the Vetnos Technology, but demonstrated a cavalier

approach to the intellectual property rights of the Companies.” *Id.* at ¶ 40. Specifically, Vetnos represents “Wexler told Orlow that, because ‘we liked your game so much, we decided to copy it.’” *Id.*

“In 2023, Vetnos learned for the first time that Kerstein sent confidential information belonging to GSN from his GSN email account to his personal email account in 2017.” *Id.* at ¶ 75.

Based on the similarity between the GSN product offering and the PrizePicks offering, the unusually high prizes offered by PrizePicks, PrizePicks’ employment of Kerstein, and Kerstein’s secret exfiltration of GSN confidential information, Vetnos became concerned that PrizePicks may have misappropriated the Trade Secrets.

Id. at ¶ 76. “On March 22, 2023, Vetnos’ counsel sent a letter to Wexler regarding Vetnos’ concern that PrizePicks may have misappropriated the Trade Secrets.” *Id.* at ¶ 77. “On April 19, 2023, counsel for PrizePicks responded to the March 22, 2023 letter”, and “PrizePicks did not deny that PrizePicks obtained and used confidential GSN information from Kerstein.” *Id.* at ¶ 78. “On May 9, 2023, Vetnos’ counsel sent another letter to PrizePicks’ counsel seeking the information and certifications demanded in the March 22, 2023 letter.” *Id.* at ¶ 79. “On May 19, 2023, counsel for PrizePicks sent another ... response to Vetnos’ counsel”, which again did “not deny that PrizePicks obtained and used confidential GSN information through its employment of Kerstein.” *Id.* at ¶ 80.

On December 17, 2017, Avaago, through its appointed Chapter 7 Bankruptcy Trustee, entered into an Asset Purchase Agreement with Mako Capital, LLC (“Mako”) for the sale of Avaago’s “Acquired Assets” free and clear of all liens, claims, and encumbrances. The “Acquired Assets” included, in part, “all of [Avaago’s] tangibles and/or intellectual property of any kind or nature” and “all other assets used by [Avaago] in the business known as ‘Game Sports Network, Inc.’”

On February 22, 2018, the United States Bankruptcy Court for the Southern District of New York entered an order authorizing the sale of Avaago’s assets and intellectual property, including the Trade Secrets, to Mako.

On March 9, 2018, Mako and Avaago, through Avaago’s Chapter 7 Bankruptcy Trustee, executed a Bill of Sale for the sale, assignment, transfer, conveyance, and delivery of Avaago’s Assigned Assets.

On November 14, 2018, Mako and Vetnos executed an Assignment and Assumption Agreement, which granted, transferred, assigned, conveyed, and delivered to Vetnos all of Mako’s assets, including the Trade Secrets.

Vetnos currently owns all of the Trade Secrets.

Id. at ¶¶ 82-86.

II. LEGAL STANDARDS

A motion to dismiss for failure to state a claim, including a motion based on patent eligibility, is evaluated according to the “well-settled Rule 12(b)(6) standard which is consistently applied in every area of law.” *Berkheimer v. HP Inc.*, 890 F.3d 1369, 1372 (Fed. Cir. 2018). A claim shall “be dismissed for failure to state a claim upon which relief can be granted if [the complaint] does not plead ‘enough facts to state a claim to relief that is plausible on its face.’” *TAGI Ventures, LLC v. NASCAR*

Digital Media, LLC, No. 1:16-CV-3425-MHC, U.S. Dist. LEXIS 163926, at *8 (N.D. Ga. Feb. 17, 2017) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 547 (2007)). The court is to construe all well-pleaded facts in the light most favorable to the pleader and accept the facts as true. *TAGI Ventures*, at *9. However, the factual allegations in the complaint must be “enough to raise a right to relief above the speculative level.” *Twombly*, 550 U.S. at 555. “Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice” and will warrant dismissal. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

A. 35 U.S.C. § 101 Subject Matter Eligibility

It is proper for courts to determine patent subject matter eligibility on a 12(b)(6) motion “when there are no factual allegations that, taken as true, prevent resolving the eligibility question as a matter of law.” *Voter Verified, Inc. v. Election Sys. & Software LLC*, 887 F.3d 1376, 1384 (Fed. Cir. 2018 (quoting *Aatrix Software, Inc. v. Green Shades Software, Inc.*, 882 F.3d 1121, 1125 (Fed. Cir. 2018))). Further resolving patent eligibility at the outset helps to “conserve scarce judicial resources” and “provides a bulwark against vexatious infringement suits.” *Ultramercial, Inc. v. Hulu, LLC*, 772 F.3d 709, 718-19 (Fed. Cir. 2014).

Under § 101, “[w]hen one invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, he may obtain a patent therefor, subject to the conditions and

requirements of this title.” 35 U.S.C. § 101. The Supreme Court has long held, however, that this section contains an important “implicit exception” for abstract ideas. *Alice Corp. Pty. Ltd. v. CLS Bank Int’l*, 573 U.S. 208, 216 (2014). The primary object of patent law, to encourage innovation, would effectively be thwarted if patents for mere abstract ideas could be upheld. *See id.* (noting that validating these patents would “‘improperly t[ie] up the future use of’ these building blocks of human ingenuity”). However, not all abstract ideas are necessarily patent ineligible. The Supreme Court in *Mayo Collaborative Servs. v. Prometheus, Inc.*, and *Alice* developed a two-step analysis to determine when abstract ideas sufficiently rise to the level of patent-eligible subject matter. *Mayo*, 566 U.S. 66 (2012); *Alice*, 573 U.S. 208 (2014).

First, courts must determine “whether the claims at issue are directed to a patent-ineligible concept,” such as an abstract idea. *Alice*, 573 U.S. at 208. Examples of abstract ideas are “mathematical formulas” or “fundamental economic practice[s] long prevalent in our system of commerce.” *Id.* at 218, 209. However, to ensure that the exceptions to § 101 do not swallow the rule, courts should avoid “describing the claims at such a high level of abstraction and untethered from the language of the claims” in the patents. *Enfish, LLC v. Microsoft Corp.*, 822 F.3d 1327, 1337 (Fed. Cir. 2016). If the claims are directed to an abstract idea, courts must next determine “whether [] additional elements ‘transform the nature of the claim’ into a patent-

eligible application,” such that it contains an “inventive concept.” *Alice*, 573 U.S. at 217 (quoting *Mayo*, 566 U.S. at 78). The Supreme Court has suggested that a claim directed to “improv[ing] the functioning of the computer itself,” for example, is enough to satisfy the inventive concept requirement of the second prong in the *Alice* framework, thereby rendering the patent eligible. *Alice* at 225. However, “the mere recitation of a generic computer cannot transform a patent-ineligible abstract idea into a patent-eligible invention.” *Id.* at 223.

1. Legal Standard for *Alice* Step One

Since “all inventions” at some level “embody, use, reflect, rest upon, or apply laws of nature, natural phenomena, or abstract ideas,” “it is not enough to merely identify a patent-ineligible concept underlying the claim” in step one of the *Alice* inquiry. *ChargePoint, Inc. v. SemaConnect, Inc.*, 920 F.3d 759, 765 (Fed. Cir. 2019) (quoting *Alice*, 573 U.S. at 217, then *Thales Visionix, Inc. v. United States*, 850 F.3d 1343, 1349 (Fed. Cir. 2017)). Instead, courts “must determine whether that patent-ineligible concept, [as a whole,] is what the claims are ‘directed to.’” *See Thales Visionix*, 850 F.3d at 1349 (quoting *Rapid Litig. Mgmt. Ltd. v. CellzDirect, Inc.*, 827 F.3d 1042, 1050 (Fed. Cir. 2016)). The Federal Circuit has described the inquiry “as looking at the ‘focus’ of the claims” and their “character as a whole.” *Elec. Power Grp., LLC v. Alstom S.A.*, 830 F.3d 1350, 1353 (Fed. Cir. 2016) (quoting *Enfish*, 822 F.3d at 1335-1336). At *Alice* Step One, courts consider claims “in their entirety to

ascertain whether their character as a whole is directed to exclude subject matter.” *Internet Patents Corp. v. Active Network, Inc.*, 790 F.3d 1343, 1346 (Fed. Cir. 2015).

There are several tools courts use in the “directed to” analysis. *ChargePoint*, 920 F.3d at 765 (quotations and citations omitted). For example, while the specification of a patent must ultimately yield to the claim language of the patent, the specification can illuminate the true focus of the claims and whether they are directed to an abstract idea. *Id.* at 766. Courts also consider the breath of the claims and whether they preempt other uses or applications of the abstract idea. *Id.* This is so because preemption “undergirds ... § 101 jurisprudence.” *Alice*, 573 U.S. at 223.

Claims “necessarily rooted in computer technology” to address problems “arising in the realm of computer[s]” are not directed to an abstract idea. *DDR Holdings, LLC v. Hotels.com, L.P.*, 773 F.3d 1245, 1257 (Fed. Cir. 2014). Even when claims address a non-computer or business challenge, they are not directed to an abstract idea when they are addressing a challenge particular to computer technology. *Id.* But not all claims addressing computer related problems are patent eligible. *See id.* at 1258. When such claims “broadly and generically claim ‘use of the Internet’ [or computers] to perform an abstract business practice (with insignificant added activity),” they are likely directed to an abstract idea. *Id.* (quoting *Ultramercial*, 772 F.3d at 716). Ultimately, claims that recite specific interactions, improve computer performance, or “do not attempt to preempt every application of

the idea” underlying the claims are not solely directed to an abstract idea. *DDR Holdings*, 773 F.3d at 1258-59. If the claims are not directed to an abstract idea, then the claims satisfy § 101 and the inquiry ends. *Core Wireless Licensing S.A.R.L. v. LG Elecs., Inc.*, 880 F.3d 1356, 1361 (Fed. Cir. 2018). The Court need not proceed to *Alice* Step Two. *Id.*

2. Legal Standard for *Alice* Step Two

If the Court finds the at-issue claims directed to an abstract idea, it proceeds to *Alice* Step Two and “examine[s] the elements of the claim to determine whether it contains an ‘inventive concept’ sufficient to ‘transform’ the claimed abstract idea into a patent-eligible application.” *Alice*, 573 U.S. at 221 (quoting *Mayo*, 566 U.S. at 72, 80). When the claim limitations involve more than performance of “‘well-understood, routine, [and] conventional activities’ previously known to the industry,” the claims are not directed to an abstract idea and satisfy § 101. *Alice*, 573 U.S. at 225 (quoting *Mayo*, 566 U.S. at 73). But “a claim directed to an abstract idea does not move into section 101 eligibility territory by merely requiring generic computer implementation.” *buySAFE, Inc. v. Google, Inc.*, 765 F.3d 1350, 1354 (Fed. Cir. 2014) (internal quotes omitted). Instead, the inventive concept must be “sufficient to ensure that the patent in practice amounts to significantly more than a patent” on the abstract idea. *See Mayo*, 566 U.S. at 72-73. In other words, “transformation into a patent-eligible application requires ‘more than simply stating

the abstract idea while adding the words “apply it.” *Alice*, 573 U.S. at 221 (quoting *Mayo*, 566 U.S. at 72).

III. ANALYSIS OF THE MOTION TO DISMISS

A. Section 101 Analysis

Based on the record before the Court, PrizePicks has not adequately shown that the Asserted Patents are directed to patent ineligible subject matter under § 101.

1. *Alice* Step One: Are the Claims “Directed To” an Abstract Idea?

PrizePicks argues that the “Asserted Patents merely claim the abstract ideas of collecting, analyzing, and presenting data so as to manage and operate skills-based contests, which is patent-ineligible subject matter.” Dkt. 14-1 at 10-11. In support, PrizePicks equates the Asserted Patents’ claims to claims the Federal Circuit has previously found to be directed to an abstract idea. *Id.* at 12-14. PrizePicks characterizes the independent claims into two sets of steps – an “Event Process” and a “Ranking Process.” *Id.* Namely, PrizePicks argues that the Event Process claim limitations “are analogous to those at issue in *In re Smith*, in which the patent recited the steps for conducting (or, in other words, the rules for playing) a variation on blackjack.” *Id.* at 12-13; *see also In re Smith*, 815 F. 3d 816, 817-19 (Fed. Cir. 2016). PrizePicks also argues that the Ranking Process claim limitations are analogous to those in *Electric Power* which described a process for monitoring the performance of an electric power grid in real-time by collecting data from multiple sources,

analyzing the data, and displaying the results. Dkt. 14-1 at 13-14; *see also Elec. Power Grp.*, 830 F.3d at 1350.

Vetnos argues that the case law cited by PrizePicks does not stand for the broad principle that patents claiming methods or systems for managing and/or operating a game or contest are direct to patent-ineligible abstract ideas. Dkt. 18 at 17. It also argued that “[t]he Federal Circuit has consistently held that claims are not abstract under *Alice* Step One when, as here, the human mind is not equipped to perform the claimed elements.” Dkt. 18 at 16-17; *see SRI Int’l, Inc. v. Cisco Sys., Inc.*, 930 F.3d 1295, 1304 (declining to find claims abstract because “the human mind is not equipped to [perform the elements] as recited by the claims.”).

The Special Master agrees with Vetnos that its claims are not directed to an abstract idea. While it is certainly true that the Federal Circuit has found some claims direct to skills-based games to be abstract, the Special Master finds that the Asserted Patents claim more. Additionally, Special Master finds there is a question of fact regarding whether the Asserted Patent claims can be performed in the human mind.

In conducting the *Alice* analysis, courts may find it helpful to compare the claims at issue to claims found to be directed to an abstract idea in previous cases. *Enfish*, 822 F.3d at 1334. Both parties cite competing cases for their respective positions. The Special Master finds that this case is distinguishable from cases cited by PrizePicks. The Special Master also finds the *Skillz Platform* case instructive.

Skillz Platform, Inc. v. AviaGames Inc., No. 21-cv-02436-BLF, 2022 U.S. Dist. LEXIS 45187 (N.D. Cal. Mar. 14, 2022).

PrizePicks equates the Asserted Patent claims to those found abstract in *Smith* and *Electric Power*. Dkt. 14-1 at 12-14. But the Special Master finds that neither case deals with claims analogous to the claims of the Asserted Patent, separately or in the aggregate.

The patents at issue in *Smith* claim the rules of a card game – a variation of blackjack. *Smith*, 815 F.3d at 817-18. The Special Master does not agree the Asserted Patent claims are analogous to the claims in *Smith*. The Federal Circuit requires courts look at the “focus” of claims and their “character as a **whole**.” *Enfish*, 822 F.3d at 1335-1336. The Federal Circuit also cautions that courts “must be careful to avoid oversimplifying the claims” in a § 101 analysis. *McRO, Inc. v. Bandai Namco Games Am. Inc.*, 837 F.3d 1299, 1313 (Fed. Cir. 2016) (quoting *TLI Commc ’ns LLC v. AV Auto., LLC (In re TLI Commc ’ns LLC Patent Litig.)*, 823 F.3d 607, 611 (Fed. Cir. 2016)). PrizePicks has both failed to look at the claims as a whole and has oversimplified the focus of the claims. While PrizePicks has characterized the “Event Process” as a set of game rules like those in *Smith*, it fails to account for the additional claim limitations that require a specific method for implementing that game. Dkt. 14-1 at 12-13. PrizePicks does not cite any authority for the proposition that courts should divide a claim into different tranches to determine if it is directed

to an abstract idea. Additionally, PrizePicks' characterizations of the "Event Process" steps themselves are oversimplified. The Special Master finds that the Asserted Patent claims are not analogous to those in *Smith*.

The patents in *Electric Power* "describe and claim systems and methods for performing real-time performance monitoring of an electric power grid by collecting data from multiple data sources, analyzing the data, and displaying the results." *Elec. Power Grp.*, 830 F.3d at 1351. The Federal Circuit found these claims to be abstract because they "do not go beyond requiring the collection, analysis, and display of available information in a particular field." *Id.* PrizePicks contention that the claims at issue in *Electric Power* are analogous to the "Ranking Process" of the Asserted Patent claims is inapposite. If the Asserted Patent claims were limited to the elements PrizePicks characterizes as the "Ranking Process," they would be abstract. But the Asserted Patent claims do not simply display that information, they do something with it, which amounts to significantly more than simply using a computer to implement an abstract idea.

The Special Master finds that the Asserted Patent claims, as a whole, are more akin to those in *Skillz Platform*. While this case is not binding on this Court, it is instructive. In *Skillz Platform*, the claims pertained to "a plurality of client devices participating in a digital competition by communicating with remote game servers." *Skillz Platform*, 2022 U.S. Dist. LEXIS 45187, at *22. The claims required use of

“pseudo-random number seeds” in order to “ensure that all users have common gameplay.” *Id.* While the *Skillz Platform* defendant, like PrizePicks, tried to characterize the claims as directed to the abstract idea of managing a game, that court disagreed. *Id.* at *27. The *Skillz Platform* court found that the at-issue claims were not directed to an abstract idea because there were steps beyond merely managing the game. *Id.* Specifically, the use of a pseudo-random number to improve game play was sufficient to find the claims were not directed to an abstract idea. *Id.* at *31-32.

Like in *Skillz Platform*, the Asserted Patents are directed to improving a specific issue in the prior art – the disadvantages of pari-mutuel games. Dkt. 1-3 at 21:16-41. The Asserted Patent claims utilize a system for ranking athletes in order to present 50-50 matchups and a system for assessing risk based on prior-user input. Despite PrizePicks’ statement to the contrary, the Special Master finds these systems are akin to the pseudo-random number generator in *Skillz Platform*. *See* Dkt. 21 at 13-14. Therefore, PrizePicks has not presented clear and convincing evidence that the Asserted Patent claims are directed to an abstract idea.

The Parties also discussed – in briefing and oral argument – the implication of whether the Asserted Patent claim could be performed manually by a human. *See* Dkt. 14-1 at 14-16; Dkt. 18 at 17; Dkt. 21 at 9-11. The Special Master finds this factor weighs in favor of finding the claims patent-eligible under *Alice* Step One. Both parties are in agreement that if a large enough volume of matches, athletes, and

variables are being analyzed, “a human mind cannot practically filter ... and parse” the data. Dkt. 18-6 at 3; *see also* Dkt. 18 at 17; and Dkt. 18-5 at 8-11. The dispute regarding this issue is whether the Asserted Patent claims require a sufficient volume of data. The Special Master finds, at minimum, a question of fact regarding whether the Asserted Patent claims require a sufficient volume of data.

Each of the Asserted Patent claims recite use of “event data pertinent to a set of events and participants in the set of events” or “event data pertinent to a set of scheduled events and a pool of participants in the set of scheduled events.” While the Asserted Patents’ specification does not explicitly define “set of [scheduled] events” it describes the claims as using “weekly NFL games occurring between Thursday and Monday.” Dkt. 1-3 at 15:50-54. The specification also describes “matchups” as one player or a group of players. *Id.* at 15:43-49. Absent claim construction to the contrary, the Asserted Patent claims, read in view of the specification, seem to require a sufficient volume of data that the human mind cannot practically filter and parse. Therefore, PrizePicks has not shown, by clear and convincing evidence, that the Asserted Patent claims are abstract because they could be done mentally.

2. *Alice* Step Two: Do the Claims Recite an “Inventive Concept”

Sufficient to “Transform” the Abstract Idea Into a Patent-Eligible Application?

Since the at-issue claims are not directed to an abstract idea, the Special Master need not reach *Alice* Step Two. But for completeness, the Special Master will briefly address the parties’ arguments for this step.

PrizePicks argues that because the claim limitations only require the use of generic computer components, they do not recite an inventive concept. Dkt. 14-1 at 16-18. It characterizes the claims as nothing more than “the method of collecting, analyzing, and displaying a determination about data” and “generic computer components.” *Id.* PrizePicks argues that the Asserted Patent claims are analogous to those in cases like *Planet Bingo*, which hold that the “claims’ requirement for a computer, a memory, an input, and other hardware does not establish an inventive concept.” Dkt. 14-1 at 17; *see also Planet Bingo, LLC v. VKGS, LLC*, 576 F. App’x 1005, 1008 (Fed. Cir. 2014).

Vetnos responds that its inventive concept is the innovative fixed-odds game that does not vary based on the fees paid or selection made by other users and winners are determined based only on their individual matchup selections. Dkt. 18 at 20-24. While PrizePicks does not contest that the Asserted Patent claims’ fixed-

odds format is novel, it disputes whether that itself is an inventive concept. Dkt. 21 at 14-16.

The Special Master agrees with Vetnos. PrizePicks seems to frame the Asserted Patent claims as nothing more than using generic computer components to perform what it calls the “Ranking Process” of the Asserted Patent claims. Dkt. 14-1 at 16-17. However, PrizePicks ignores that the Asserted Patent claims use that ranking process to administer what Vetnos contends is a novel, fixed-odds game. *Supra* Section I.A. When claim limitations involve more than the performance of “well understood, routine, [and] conventional activities’ previously known to the industry,” the claims are not directed to an abstract idea and satisfy § 101. *Alice*, 573 U.S. at 225 (quoting *Mayo*, 566 U.S. at 73). Based on the record before the Special Master, that is the case here. The at-issue claims recite more than simply analyze the event data and “apply it” to a computer. *See Alice*, 573 U.S. at 221 (“transformation into patent-eligible application requires ‘more than simply stating the abstract idea while adding the words “apply it.””) (quoting *Mayo*, 566 U.S. at 72).

There is nothing in the record indicating that applying the ranking process data to a fixed-odds game was well-understood or routine in the fantasy gaming industry before the Asserted Patent family. In addition, the Asserted Patent claims recite additional steps that provide a specific, discrete implementation of implementing a fixed-odds game. The claims recite an inventive concept under *Alice*

Step Two. *See BASCOM Glob. Internet Servs., Inc. v. AT&T Mobility LLC*, 827 F.3d 1341, 1350-51 (Fed. Cir. 2016) (holding that claims directed to filtering internet content were patent-eligible under *Alice* Step Two because the “claims [do not] preempt all ways of filtering content on the Internet; rather they recite specific, discrete implementation of the abstract idea of filtering content”).

The Special Master disagrees that the pre-*Alice* case *Bilski* divorces the issues of novelty and inventive concept, as PrizePicks contends. Dkt. 21 at 15; *see In re Bilski*, 545 F.3d 943, 958 (Fed. Cir. 2008). The Special Master is also unpersuaded by PrizePicks’ implication that “inventive concept” requires improvement to computer firmware or functionality. Dkt. 21 at 15-16.

B. Trade Secret Analysis

PrizePicks contends Vetnos’ complaint “fails to allege the existence of a protectable trade secret.” Dkt. 14-1 at 18. PrizePicks further argues that assuming Vetnos’ complaint does allege the existence of a protectable trade secret, the complaint “fails to allege any act of misappropriation.” *Id.* The Special Master finds Vetnos’ complaint alleges facts sufficient to support a claim of trade secret misappropriation.

Under both the Federal Defend Trade Secrets Act (“DTSA”) and the Georgia Trade Secrets Act (“GTSA”), a claim for trade secret misappropriation requires, *inter alia*, a “showing that: (1) the material at issue is a trade secret and (2) the

defendant misappropriated that trade secret.” *Northstar Healthcare Consulting, LLC v. Magellan Health, Inc.*, No. 1:17-cv-1071-ODE, 2020 U.S. Dist. LEXIS 257494, at *87 (N.D. Ga. Feb. 20, 2020).

1. Existence of a Trade Secret.

To state a claim under the DTSA or the GTSA, a plaintiff must first identify a plausible trade secret. *U.S. Sec. Assocs., Inc. v. Lumby*, No. 1:18-CV-5331-TWT, 2019 U.S. Dist. LEXIS 229635, at *27 (N.D. Ga. Sept. 24, 2019).

The GTSA defines trade secrets as confidential, proprietary information not commonly known by the public that:

(A) Derives economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and

(B) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

O.C.G.A. § 10-1-761(4). In addition to the elements above, the DTSA also requires that the trade secret be “related to a product or service used in, or intended for use in, interstate or foreign commerce.” 18 U.S.C. § 1836(b)(1). Under the GTSA, trade secrets can include methods, financial plans, product plans, or lists of actual or potential customers. O.C.G.A. § 10-1-761(4). Under the DTSA, a trade secret is:

all forms and types of financial [and] business ... information ... whether tangible or intangible, and whether or how stored, compiled, or memorialized physically, electronically ... if (A) the owner thereof has taken reasonable measures to keep such

information secret; and (B) the information derives independent economic value, actual or potential, from not being generally known to, and not readily ascertainable through proper means by, another person ...

18 U.S.C. § 1839(3).

At the motion to dismiss stage, “[c]ourts are in general agreement that trade secrets need not be disclosed in detail in a complaint alleging misappropriation for the simple reason that such a requirement would result in public disclosure of the purported trade secrets.” *EarthCam, Inc. v. OxBlue Corp.*, No. 1:11-cv-02278-WSD, 2012 U.S. Dist. LEXIS 191822, at *26-27 (N.D. Ga. Mar. 26, 2012) (quoting *Leucadia, Inc. v. Applied Extrusion Tech., Inc.*, 755 F. Supp. 635, 636 (D. Del. 1991)) (Plaintiff’s general reference to information about “its robotic camera system” and “how the interface allows users to access and control their cameras” was, at the pleading stage, sufficient to assert a trade secret claim).

The Special Master is not persuaded the cases illustrated by PrizePicks support its argument that Vetnos did not sufficiently allege the existence of a trade secret. First, the court in *Ferco Enterprises, Inc. v. Taylor Recycling Facility LLC*, No. 1:05-CV-2980-ODE, 2007 U.S. Dist. LEXIS 111035, at *39 (N.D. Ga. Oct. 16, 2007) determined the sufficiency of trade secret misappropriation claim on summary judgment after discovery was complete – not at the motion to dismiss stage, where the standard is far more liberal.

Next, in *Space Data Corp. v. X*, No. 16-cv-03260-BLF, 2017 U.S. Dist. LEXIS 22571, at *2 (N.D. Cal. Feb. 16, 2017), the plaintiff weather balloon company brought an action alleging, among other things, that the defendants had misappropriated its trade secrets. In the complaint, the plaintiff identified the trade secrets at issue only by vaguely alleging that they involved “data on the environment in the stratosphere” and “data on the propagation of radio signals from stratospheric balloon-based transceivers.” *Id.* at *4. In granting the defendants’ motion to dismiss in that case, the court found that this “high-level overview” of plaintiff’s purported trade secrets was too vague to support a trade secret misappropriation claim in that it failed to give the court or defendants notice of the boundaries of the case. *Id.* at *4-6.

In *Zoom Imaging Solutions, Inc. v. Roe*, No. 2:19-cv-01544-WBS-KJN, 2019 U.S. Dist. LEXIS 195374, at *12-15 (E.D. Cal. Nov. 8, 2019), the court found that references onto to “business information” and “valuable information” did not sufficiently identify the trade secrets at issue. Finally, in *Medafor, Inc. v. Starch Medical, Inc.*, No. 09-CV-0441 (PJS/FLN), 2009 U.S. Dist. LEXIS 61345, at *3 (D. Minn. July 16, 2009), the court found the plaintiff’s description of its trade secrets, namely, “business methodologies, formulas, devices, and compilations of information, including suppliers and customers ...” was “so broad” it was “meaningless.”

Here, unlike the cases cited by PrizePicks, Vetros' complaint alleges far more than a high-level overview of the trade secrets or mere references to business information and valuable information:

22. In a fixed-odds daily fantasy sports game, a significant challenge for the game provider is the task of selecting the daily matchups that the provider offers players. The fixed-odds format of the game means that the provider must produce matchups (1) in which the two outcomes that a player can select have an equal probability of occurring (*i.e.*, a "coin flip" or 50/50 odds) and (2) that are attractive to players so that a sufficient number of players select each side of the matchup. In the event the game provider produces a matchup that is not equally probable or that fails to generate a sufficient number of entries on either side, then the provider assumes the risk that prize payments associated with this matchup might be disproportionate to the entry fees paid by players.

23. In addition to producing appropriate matchups, the provider of a fixed-odds daily fantasy sports game can manage risk in other ways, including by actively managing the number and type of matchups that it offers players at any time.

24. For example, for a series of four matchups, GSN generally offered prizes of ten times the player's entry fee (*i.e.*, 10:1 odds) versus a theoretical probability of correctly selecting four 50/50 matchups of 16:1. This margin allowed GSN to make a profit while insulating GSN from risk.

25. Players prefer the highest possible prizes. Therefore, in a marketplace of competing providers of fixed-odds daily fantasy sports, the provider able to offer higher prizes at the same level of risk will have a competitive advantage.

26. A game provider with better risk management methodology will be able to offer higher prizes, eventually approaching the theoretical probability limit.

27. GSN expended substantial time, labor, and resources to develop the Trade Secrets. The Trade Secrets have significant value, are not publicly known or readily ascertainable by proper means, and are maintained as confidential and proprietary information.

28. The Trade Secrets include: (a) methods, strategies, and know-how for managing risk associated with providing fixed-odds daily fantasy sports games, including choice volume, risk correlation, risk concertation, sustained P&L stability, and card republication; (b) techniques for producing daily 50/50 matchups, including data sources, data translation, and formulas and algorithms used to analyze player data; (c) marketing strategies for fixed-odds daily fantasy sports games; and (d) customer data, including the identities, habits, preferences, and purchase history of GSN customers.

29. The Trade Secrets derive independent economic value and would be valuable to competitors, such as PrizePicks, because they demonstrate various proofs of concept, speed research, and development efforts, and provide a roadmap for a developer of a competing fixed-odds daily fantasy sports game.

30. GSN took various measures to protect the secrecy of the Trade Secrets. For example, and without limitation, GSN had written policies and procedures governing their information technology and the security of confidential information, including the Trade Secrets. The Trade Secrets were only available to specific GSN personnel with a business need to know the information. GSN's computer systems on which some of the Trade Secrets were stored could be accessed only by authorized individuals with log-in credentials.

31. GSN personnel who were provided access to the Trade Secrets were subject to confidentiality obligations with respect to the use or disclosure of GSN confidential information, including the Trade Secrets. Employees are also required to adhere to strict rules and policies pertaining to the confidentiality of the Trade Secrets. Employees are prohibited from disclosing or providing information regarding the Trade Secrets to an outside third party or entity.

32. As a small startup, Vetnos' patents, trade secrets, and other proprietary information were among the Companies' most valuable business assets and enabled the Companies to attract investors who could help the Companies bring the Vetnos Technology to market.

Dkt. 1 at ¶¶ 22-32. At this stage in the proceedings, taking the facts and reasonable inferences in the light most favorable to Vetnos, the Special Master is convinced Vetnos' complaint sufficiently represents the existence of a trade secret.

2. Misappropriation

Once a plaintiff alleges the existence of a trade secret, the plaintiff must then allege facts demonstrating misappropriation. The GTSA defines "misappropriation" as:

(A) Acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means; or

(B) *Disclosure or use of a trade secret of another without express or implied consent by a person who:*

(i) Used improper means to acquire knowledge of a trade secret;

(ii) *At the time of disclosure or use, knew or had reason to know that knowledge of the trade secret was:*

(I) Derived from or through a person who had utilized improper means to acquire it;

(II) Acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use; or

(III) *Derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use;* or

(iii) Before a material change of position, knew or had reason to know that it was a trade secret and that knowledge of it had been acquired by accident or mistake.

O.C.G.A. § 10-1-761(2) (emphasis added). The definition of “misappropriation” under the DTSA is similar. *See* 18 U.S.C. § 1839(5). “A non-disclosure agreement can be the basis for imposing a duty not to disclose a trade secret.” *Purchasing Power, LLC v. Bluestem Brands, Inc.*, 22 F. Supp. 3d 1305, 1315 (N.D. Ga. 2014) (citing *Penalty Kick Mgmt. Ltd. v. Coca Cola Co.*, 318 F.3d 1284, 1292 (11th Cir. 2003)).

PrizePicks’ cites to a number of district court cases to support its position that Vetnos’ complaint fails to allege misappropriation. First, PrizePicks’ reliance on *Agilysys, Inc. v. Hall*, 258 F. Supp. 3d 1331 (N.D. Ga. 2017) does not support its argument that no trade secret misappropriation is alleged in the complaint. In that case, while the court agreed that Hall “did not acquire the information by improper means,” “the Non-Disclosure Agreement was enforceable,” “[a]nd a non-disclosure agreement can be the basis for imposing a duty not to disclose a trade secret.” *Id.* at 1346. The court ultimately found the GSTA claim could proceed on that basis. *Id.*

In *Angel Oak Mortgage Solutions LLC v. Mastronardi*, 593 F. Supp. 3d 1234, 1243-1244 (N.D. Ga. 2022), the court analyzed that because the plaintiff did not allege in the complaint that Defendant Freidberg (unlike the other co-defendants) provided the trade secrets to third party LendSure, Defendant Freidberg’s acts of

merely sending information to himself, without sharing with a third party, did not constitute trade secret misappropriation.

In *Putters v. Rmax Operating, LLC*, No. 1:13-CV-3382-TWT, 2014 U.S. Dist. LEXIS 51520 (N.D. Ga.), Rmax never alleged in its counterclaim that Putters gave trade secret information to a third party. Rather, the counterclaim alleged, “confidential and proprietary information ... that Putters ... obtained ... will give Atlas ... a significant advantage in the insulation market.” *Id.* at *3. Moreover, there was no allegation in the counterclaim that Putters signed any sort of confidentiality agreement with Rmax during his employment. *See generally, Putters*, 2014 U.S. Dist. LEXIS 51520.

In *Argos USA LLC v. Young*, No. 1:18-CV-02797-ELR, 2019 U.S. Dist. LEXIS 150755, at *21 (N.D. Ga. June 28, 2019), the district court found the complaint failed to plead misappropriation by the defendant as to third party defendant Southeast failed because the allegations were merely conclusory and only founded on “information and belief.” Specifically, the complaint alleged:

99. On information and belief, Young and Southeast Ready Mix have used Argos’ stolen and misappropriated information to compete with Argos. Southeast sells ready-mixed concrete that shares certain design characteristics with Argos’ own proprietary mix designs and on information and belief, Young and Southeast used the information misappropriated from Argos to help develop and refine their own concrete mix designs.

...

102. On information and belief, Young used Argos' confidential and proprietary information, which Young stole and misappropriated during his tenure, to help Southeast compete against Argos.

...

135. Young eventually delivered the documents to one of Argos' competitors, Southeast, through that company's attorney, Gott.

136. Gott knew that the documents contained trade secrets.

137. Southeast knew that the documents contained trade secrets.

Id. The district court did, however, maintain the trade secret misappropriation claim as to disclosure to the defendant's attorney. *Id.* at *23-24.

Finally, in *Pellerin v. Honeywell International, Inc.*, 877 F. Supp. 2d 983, 989 (S.D. Cal. 2012), the court found Honeywell failed to allege facts to support the legal conclusion that Pellerin "used and/or disclosed" and "acquired and/or used" Honeywell's trade secrets or confidential information.

Based on a review of Vetnos' complaint and the cases cited by both parties, the Special Master finds the complaint also alleges facts, taken as true, sufficient to support misappropriation of Vetnos' trade secrets. Specifically, the complaint represents Kerstein was an employee at GSN subject to the Non-Disclosure Agreement, whereby Kerstein was prohibited from disclosing certain proprietary information, including the Trade Secrets. Dkt. 1 at ¶ 53. The complaint further alleges Kerstein, accessed the Trade Secrets in the course of his employment, and

secretly sent the Trade Secrets to his personal email account. *Id.* at ¶ 58. In June 2017, Kerstein was informed that he would be laid off from GSN. *Id.* at ¶ 57. Thereafter, he was hired by PrizePicks in 2018 for a similar role, and then hired full time in 2021. *Id.* at ¶¶ 61, 63. Also in 2018, PrizePicks “announced they had also released a system for daily fantasy sports based on a fixed-odds format” even though were previously “focused solely on facilitating side bets.” *Id.* at ¶¶ 33, 35-36.

The complaint further alleges PrizePicks “hired Kerstein with the intention of obtaining the Trade Secrets,” and that Prize Picks “should have known Kerstein,” a former GSN employee, would be subject to “a duty of confidentiality” because “[i]t is common in this industry for employees to be subject to post-employment restrictive covenants, including non-disclosure agreements.” *Id.* at ¶¶ 64, 66, 67, 68. Vetnos further represents that “PrizePicks’ game pays unusually high prizes to players,” which could “only be possible” by using Vetnos’ Trade Secrets. Finally, Vetnos states that when specifically accused by Vetnos of using Vetnos’ trade secrets, PrizePicks did not deny such use. *Id.* at ¶¶ 78, 80.

Taken as true, Vetnos’ complaint alleges misappropriation of its Trade Secrets by PrizePicks under the GTSA and the DTSA. The Special Master therefore recommends this Court deny PrizePicks’ motion to dismiss as to the trade secret misappropriation claims.

IV. CONCLUSION

For the reasons outlined above, the Special Master recommends denying PrizePicks' Motion to Dismiss.

Respectfully submitted, this 25th day of March, 2025.

/s/ William B. Dyer III

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