IN THE SUPREME COURT OF THE STATE OF NEVADA

GOLDEN ROAD MOTOR INN, INC., A Nevada Corporation d/b/a ATLANTIS CASINO RESORT SPA, Appellant/Cross-Respondent, vs. SUMONA ISLAM, An Individual, Respondent/Cross-Appellant, and MEI-GSR HOLDINGS LLC, A Nevada Limited Liability Company d/b/a GRAND SIERRA RESORT which claims to be the successor in interest to NAV-RENO-GS, LLC, Respondent.	Case No.:	64349
SUMONA ISLAM, An Individual, Appellant, vs. GOLDEN ROAD MOTOR INN, INC., A Nevada Corporation d/b/a ATLANTIS CASINO RESORT SPA, Respondent.	Case No.:	64452
MEI-GSR HOLDINGS LLC, A Nevada Limited Liability Company d/b/a GRAND SIERRA RESORT, Appellant/Cross-Respondent vs. GOLDEN ROAD MOTOR INN, INC., A Nevada Corporation d/b/a ATLANTIS CASINO RESORT SPA, Respondent/Cross-Appellant.	Case No.:	65497

District Court Case No.: CV12-01171
Honorable Patrick Flanagan, District Court Judge

GSR's Combined Answering Brief/Opening Brief on Cross-Appeal

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed.

These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

1. All parent corporations and listing any publicly held company that owns 10% or more of the party's stock or states that there is no such corporation:

There is no such corporation.

2. The names of all law firms whose partners or associates have appeared for the party or amicus in the case (including proceedings in the district court or before an administrative agency) or are expected to appear in this court:

Cohen|Johnson, LLC.

3. If any litigant is using a pseudonym, the statement must disclose the litigant's true name:

None.

DATED this 5th day of December 2014

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JURISDICTIONAL STATEMENT

As for Respondent/Cross-Appellant, MEI-GSR HOLDINGS, LLC, A Nevada Limited Liability Company d/b/a GRAND SIERRA RESORT which claims to be the successor in interest to NAV-RENO-GS, LLC (hereinafter "GSR"),[1] Cross-Appeal, this is an Appeal from the special order entered after final judgment, i.e. a March 14, 2014 order with notice of entry on April 11, 2014. [11 App. 2320-31]. *NRAP* 3A(b)(8). This Cross-Appeal was timely filed on April 14, 2011. [11 App. 2332-56](Amended Notices of Appeal: April 21, 2014, May 5 and 8, 2014) [11 App. 2357-2436].

STATEMENT OF ISSUES ON APPEAL

GSR respectfully submits the following Counter-Statement of Issues for Appellant/Cross-Respondent's, GOLDEN ROAD MOTOR INN, INC., A Nevada Corporation d/b/a ATLANTIS CASINO RESORT SPA ("Atlantis"), Appeal:

1. Whether the court properly determined what constituted a "trade secret" under Nevada's Uniform Trade Secret Act ("UTSA") (*NRS* 600A.010, et seq.) and whether the court properly and consistently applied those determinations to the claims presented by Atlantis by finding that GSR had not violated the UTSA.
2. Whether the court properly found that Atlantis' claims for tortuous interference and prospective economic advantage were preempted by the UTSA and also dismissed those claims against GSR.

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[1] On July 1, 2013, the court entered a stipulated order amending the parties to reflect that MEI-GSR HOLDINGS, LLC, A Nevada Limited Liability Company d/b/a GRAND SIERRA RESORT was the designated party-defendant in place of NAV-RENO-GS, LLC. [10 App. 2263-67].

3. Whether the court properly found that the Non-Competition Agreement ("Non-Compete Agreement") entered into between Respondent/Cross-Appellant, SUMONA ISLAM ("Sumona"), and Atlantis was unenforceable as against public policy and that GSR had not interfered with the Non-Compete Agreement.

4. Whether the court properly awarded GSR attorney's fees against Atlantis.

CROSS-APPEAL

As for its Cross-Appeal, GSR respectfully submits the following issue for Appeal:

1. Whether the court abused its discretion by not awarded GSR its additional requested attorney's fees not properly recoverable pursuant to the May 20, 2013 Offer of Judgment ("Offer of Judgment") [7 App. 1644-46] served upon Atlantis and rejected by Atlantis but which additional attorney's fees were recoverable pursuant to *NRS* 600A.060 upon the court's findings that Atlantis had acted in bad faith in its claims against GSR for misappropriation of a trade secrets.

STATEMENT OF THE CASE

A. NATURE OF THE CASE

These consolidated Appeals arise from an lawsuit filed in the *Second Judicial District Court* on April 27, 2012 by Atlantis, the owner and operator of the Atlantis Casino Resort Spa in Reno Nevada, against a former employee, Sumona, and Sumona's current employer, GSR, the owner and operator of the Grand Sierra Resort and Casino in Reno, Nevada. [1 App. 1-13; 89-103].

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After an 11 day bench trial, the court found in favor of GSR and against Atlantis on all causes of action and further awarded GSR attorney's fees in the amount of $190,124.50 and $15,540.85 in costs based upon the Offer of Judgment. [7 App. 1571-98, 1644-46; 9 App. 2019; 11 App. 2320-31]. The court found Sumona liable to Atlantis for breach of contract and violation of the UTSA and awarded Atlantis damages of $10,814 (UTSA Claim) and $13,060 (Breach of Confidentiality Agreement), as well as $20,000 in punitive damages, attorney's fees and a permanent injunction was issued against Islam only. [7 App. 1566-86; 2017-22].[2]

B. COURSE OF PROCEEDINGS/DISPOSITION

On April 27, 2012, Atlantis sued Sumona and GSR, wherein Atlantis alleged causes of action against GSR for (1) tortuous interference with contractual relations and prospective economic advantage; (2) violation of the Trade Secret Act; (3) declaratory relief; and (4) injunctive relief. [1 App. 1-13].

On May 3, 2012, Atlantis filed an *Ex Parte* Motion for Temporary Restraining Order and Preliminary Injunction ("TRO"). [1 App. 14-83]. On May 9, 2012, the court granted the *Ex Parte* as to Sumona. [1 App. 107-10]. On May 7, 2012, Atlantis filed an Amended Complaint. [1 App. 89-103]. On May 31, 2012, GSR filed its Answer. [1 App. 227-33]. On June 1, 2012, Islam filed her Answer. [1 App. 234-39].

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[2] Contrary to the relief sought by Atlantis herein against GSR, the court already awarded Atlantis their damages relating to misappropriation. [7 App. 1585]. "Under the double recovery doctrine, there can be only one recovery of damages for one wrong or injury." *Elyousef v. O'Reilly & Ferrario, LLC*, 245 P.3d 547, 549 (2010).

On July 5, 2012, the court entered a further order on the TRO. [2 App. 284-92]. On August 24, 2012, the parties entered into a Stipulation for Preliminary Injunction. [2 App 329-46]. On May 20, 2013, GSR served the Offer of Judgment on Atlantis. [7 App. 1644-46]. Trial was held between July 1, 2013 and July 18, 2013. [5 App. 1069-90].

On July 18, 2013, the court rendered its findings. [20 App. 4239-63]. October 1, 2013, the court entered its Findings of Fact and Conclusions of Law. [7 App. 1566-86, 1576-98]. On March 14, 2014, the court entered an order on GSR's Motion for Attorney's Fees and Costs. [11 App. 2313-19].

C. STATEMENT OF FACTS RELEVANT TO APPEAL

In 1996, Sumona began working for Circus Circus as a slot attendant in Reno, Nevada and later, in 1997, at Harrah's Casino ("Harrah's) in Reno, Nevada as a slot attendant and ultimately a dealer. In 2005, Sumona was promoted to the position of casino host[3] at Harrah's. Sumona's has lived in Reno during her adult life, has a minor child that lives with her and the minor child maintains a regular relationship with her father who also lives in Reno. [14 App. 2911-14; 15 App. 3175-76; 16 App. 3246-48].

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[3] There were agreements with Harrah's restricting Sumona's use of confidential and/or trade secret information acquired from Harrah's. [Exhibit 47]. After Sumona began working for Atlantis, Harrah's alleged that Sumona may be breaching those agreements by contacting Harrah's customers. [Exhibits 43-44]. Atlantis was aware that Sumona had signed confidentiality agreements with Harrah's. [14 App. 2945-46; 19 App. 4020-21]. Harrah's sent copies of letters to Deborah Robinson ("Robinson"), General Counsel for Atlantis, in June 2008 and October 2009. [Exhibits 43-44]. Atlantis never responded to Harrah's letters nor conducted any investigation. [19 App. 4024-26; 12 App. 2593-94]. Atlantis never removed Sumona's data from their database that Sumona had acquired while working at Harrah's. [19 App. 4001-02].

1. The Casino Host[4]

Hosts are responsible for creating and maintaining relationships with players and assisting players in their interactions with the casino in order to promote a players gaming at the casino. [14 App. 2915-23, 2932-34; 15 App. 3092, 3232-33; 17 App. 3449; Exhibit 20].

2. Host's Book of Business

A host's "book of business" or "book of trade" comprises the relationships that a host creates with players, which includes the player's name, addresses and other contact information. [12 App. 2602, 2610; 16 App. 3260-63, 3356; 17 App. 3448-49]. Sumona developed personal relationships with players and guests and developed her book of business while working at Circus Circus, Harrah's, Atlantis and GSR. [14 App. 2913; 16 App. 3261-62]. These relationships are developed over time from one casino to the next and as new relationships are developed these new players become part of a host's book of business. A good host is expected to add players to their book of business and these relationships can change over time and players can fluctuate their gambling habits through no causation of the host. [16 App. 3261-65; 12 App. 2554].

There was no difference in the personal relationships that Sumona developed at Harrah's versus Atlantis. Hosts can meet new players through a casino, other players, word of mouth, by moving from casino to casino and that is how a host grows their book of business. [16 App. 3262-64].

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[4] The role of a casino host and an executive casino host is the same. An executive casino host is generally required to have more experience and handles players that gamble at higher levels. [14 App. 2918; 13 App. 2847; 12 App. 2483-84; 17 App. 3565]. Sumona was an executive casino host at both Atlantis and GSR. [12 App. 2483-84; 14 App. 2907-10]. For purposes of brevity, the singular title of "host" will be used interchangeably herein.

While players are "coded" to a particular host by the casino, hosts, like Sumona, could nevertheless meet, interact and/or develop relationships with players not "coded" to her.[5] [14 App. 2930-01, 2993-94; 15 App. 3129-31, 3187, 3229; 16 App. 3302, 3265-66; 17 App. 3481-82, 3486-87]. It is common for a list of players coded to host to change day to day. [15 App. 3223, 3228]. Sumona would often interact with players not coded to her and build relationships with those non-coded players and such contacts would happen all the time. [16 App. 3265-66].

The court did **not** limit a host's book of business to only those players that are "coded" to a host. [7 App. 1582, 1593]. The court found that a host's book of business included those players that the "host has established a relationship." [7 App. 1582]. The court properly did **not** make a distinction between players that are "coded" currently or in the past or not coded as a defining characteristic of a host relationship. Not every host has the same type of relationship with a player [14 App. 2983] and a player can have a personal relationship with **more than one host and it is common**. [17 App. 3481-82]. The court's "other hosts' customers" category would not impair a host having a relationship with another host's player, as players can have relationships with more than one host. [7 App. 1582].

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[5] "Coding" a player to a particular host is done through a database by the casino and each have various procedures for coding and the number of players a host is permitted to have coded to them at any one time. [12 App. 2553; 16 App. 3298-3300]. Sumona had between 1200-1500 players at Atlantis and approximately 300-400 players at GSR. [14 App. 2935; 15 App. 3084-85, 3221-22; 16 App. 3326-28]. Changing coded players in and out to a particular host is a common practice in the industry. [14 App. 2934-35].

A. Testimony Regarding Host's Book of Business

There was testimony from both sides that a host's book of business was the personal property of the host.

Atlantis Personnel

Steve Ringkob ("Ringkob"), Corporate Director of Slot Operations for Monarch,[6] testified that a host's book of business could include "maybe some notation in terms of the gaming level of the guest" and there may be differing opinions on what is included in the book of business." [12 App. 2477, 2610]. Ringkob testified that Atlantis primarily hired Sumona to get her book of business and her relationships associated with those players and the practice of hiring hosts from other casinos to take advantage of their relationships with their players is a well-established practice. [12 App. 2549, 2573, 2600, 2609].

Ringkob does not consider information about Sumona's players from Harrah's to be a trade secret even if those players are found within Harrah's database, because it is "guests she has personal relationships with or alleged to be so." [12 App. 2591-93, 2615-17](emphasis). Atlantis was aware that Sumona had signed confidentiality agreements with Harrah's. [14 App. 2945-46; Exhibits 43-44, 47].

Ringkob testified that even after Sumona's book of business was entered into the Atlantis database that it was still Sumona's data. [12 App. 2538]. Ringkob testified that information contained in a host's book of business is not proprietary to Atlantis and a host can apply their book of business going elsewhere and that he expected that Sumona would contact the players in her book of business and move their business to the Atlantis. [12 App. 2600-02, 2607, 2614-15].

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[6] Monarch Casino & Resort, Inc. is the parent corporation of Atlantis. *See* Atlantis *NRAP* 26.1 Disclosure.

Ringkob believed that Sumona could properly bring her book of business, i.e. Exhibit 75, to GSR.[7] [12 App. 2644-45; Exhibits 19, 75, 80].

Frank DeCarlo ("DeCarlo"), the Director of VIP Services at Atlantis, believes that hosts, like a used car salesman, have a right to take their players from one place to another. [13 App. 2657, 2868]. Decarlo testified that "hosts own their own stuff." [13 App. 2713](emphasis). Decarlo believes that Sumona's confidentiality agreements with Atlantis did not prevent Sumona from taking her book of business. [13 App. 2712].

Susan Moreno ("Moreno") is a Senior Executive Host at Atlantis for 14 years and has been a host for 20-22 years. Moreno brought her book of business to Atlantis. [17 App. 3447-48]. Moreno testified that a player can have a personal relationship with more than one host and that is common. [17 App. 3481-82]. Moreno does not know any official position of Atlantis regarding what is part of a host's book of business. [17 App. 3486-87].

Lili Santos ("Santos"), is an Executive Casino Host at Atlantis for 8 years and has worked in the gaming industry for 36 years. [17 App. 3561-62]. Santos testified that even though a player is coded to another host, she could still know that person and still have a personal relationship with that other host's player. [17 App. 3602]. Ringkob testified that Santos was hired by Atlantis to get her book of business. [12 App. 2563-64].

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[7] Sumona testified that there were players that she developed a relationship with at Atlantis that were not listed on Exhibit 75. [15 App. 3187]. Additionally, Decarlo had Sumona code all her players to him [Decarlo] while Sumona was "titled" as a senior concierge manager at Atlantis. [15 App. 3207-08].

GSR Personnel

Shelly Hadley ("Hadley"), Executive Director of Grand and Elite Services for GSR, testified that all hosts have a book of business and it is customary for hosts to have relationships with guests that they may have had throughout the years and when a host leaves a casino they take those relationships with them. [16 App. 3284, 3321-22, 3363]. Hadley testified that it is not unusual for a host to make special marketing offers to a player not coded to them. [16 App. 3364-65]. Hadley was Sumona's supervisor. [14 App. 2953; 16 App. 3355]. Sumona testified that it is very common for hosts to move from casino to casino in order to develop personal relationships and grow their book of business. [16 App. 3262].[8]

In the court's findings of fact, the court stated:

> Steve Ringkob, **indeed almost every witness**, testified that there were certain items that hosts were entitled to take with them from property to property and that **a host's book of trade is the host's property and "nothing is wrong with her taking this information wherever she goes.**" [7 App. 1573] (emphasis).

B. Player Tier Levels

Casinos assign players to tiers based upon their gaming history. [15 App. 3158-59]. Players often share their tier status with other casinos in order to obtain offers. [16 App. 3266-67; Exhibit 32 (21 App. 4421-31)]. If a player presented Sumona with a player card with a top tier from another casino, that would tell Sumona they were a good player and it would give her an idea about what marketing offers to make, including larger marketing offers. This would happen daily, including at the Atlantis. [16 App. 3266-67].

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[8] Declaro has hired numerous hosts from other casinos, including GSR. [13 App. 2865, 2883, 2893-94]. Decarlo "**hopes** that they [the host] tells us the truth" about what players are part of the host's book of business and Decarlo is relying on what the host tells him. [13 App. 2894](emphasis).

Ringkob testified that there is nothing trade secret or confidential about the fact there's a tier system and people who gamble more are a higher tier. [12 App. 2551]. Atlantis utilized tier information from Sumona relating to her Harrah's players. [21 App. 4404, 4406; Exhibits 26-27].

3. Sumona's Hiring by Atlantis

In April 2008, Sumona started working at Atlantis, having been recruited by DeCarlo, to be a host. [14 App. 2907, 2942-48]. Decarlo was Sumona's supervisor. [14 App. 2953].

A. Atlantis Wanted Sumona's Book of Business

DeCarlo made it clear to Sumona when he hired her that he wanted her to bring her book of business to Atlantis, which Decarlo assumed was formulated during Sumona's employment at Harrah's. [13 App. 2867-68]. Decarlo was aware that Sumona had signed confidentiality agreements with Harrah's. [13 App. 2867-68; 16 App. 3253]. Due to a non-compete agreement with Harrah's, Atlantis initially placed Sumona under the "title" of Senior Concierge Manager for the six-month non-compete period. Sumona testified that she did not work as concierge manager. [14 App. 2999; 15 App. 3196-97, 3272]. Sumona worked as a host during this time period and Decarlo was aware of this fact. [15 App. 3195-99, 3203-09; 16 App. 3276-78, 3282-83; 19 App. 3856-57, 3870]. Sumona had access to the Atlantis player database from the start of her employment and she utilized the password of Santos, another host at Atlantis, and this was known to Decarlo. [14 App. 3001-02, 3208; 16 App. 3428-29, 3438; Exhibit 85].

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B. Atlantis' Due Diligence in Hiring Sumona

Atlantis' business practice in determining whether a host's book of business is theirs is to rely upon the word of the host. Decarlo testified, "[b]ecause at the end of the day, we can't tell, I have no way of telling what they hand me is their personal list or whether it's something that they just stole off of the screen from the place they just left." [13 App. 2687].

Ringkob testified that he does not determine whether a host has a personal relationship with a player, only whether they have some sort of a relationship or personal relationship with these people, that's the extent of your due diligence. [12 App. 2611]. Ringkob testified that as long as a host brings a reasonable number of players and the host says these are my players - then Atlantis is okay with using the information. [13 App. 2613]. Sumona had between 1200-1500 players at Atlantis and approximately 300-400 players at GSR. [14 App. 2935; 15 App. 3084-85, 3221-22].

Sumona testified that no one from Atlantis spoke to her about the trade secret provisions in her Harrah's contract and she gave Decarlo Harrah's June 26, 2008 letter and Decarlo told Sumona that he would take it to Robinson "and she'll take care of it." She never did. [16 App. 3254; 19 App. 4024-26; 12 App. 2593-94; Exhibits 43-44]. Harrah's October 22, 2009 letter met a similar fate. [16 App. 3255]. In contrast, GSR spoke with Sumona about Atlantis' April 6, 2012 letter and Sumona confirmed that she had personal relationships with the players. [16 App. 3256-57; 17 App. 3556].

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1. Use of Sumona's Book of Business

After starting at Atlantis, Sumona provided DeCarlo with her book of business, which were printouts from Harrah's. [14 App. 2970-73; 15 App. 3185-86; 16 App. 3252-53, 3271; 13 App. 2706-10]. Decarlo advised Sumona that Atlantis could not use the information from a Harrah's printout and requested that Sumona re-enter the information into a Microsoft Outlook format. [14 App. 2972, 3003-06]. Decarlo never told Sumona that the list had to be her "personal list." [15 App. 3217].

Decarlo didn't think that the information would "shrink" from the Harrah's printout to the Outlook file. [13 App. 2897; 15 App. 3218].[9] Decarlo never followed up with Sumona regarding the matter. [13 App. 2710]. Sumona gave the re-entered Outlook file on a flash drive to Atlantis approximately a month after she began working at Atlantis. [14 App. 2970-73; Exhibit 75]. Atlantis utilized Sumona's book of business. [15 App. 3003-04]. Sumona doesn't have the Harrah's printouts anymore. [14 App. 2976].

Decarlo requested that Sumona provide Atlantis with more information than was contained in the Outlook file, i.e. Decarlo specifically requested that Sumona provide player ratings or credit information about her players. [15 App. 3216-18; 16 App. 3242-43; 19 App. 4018]. This directive was contrary to Atlantis' own interpretation of what "trade secret" and/or "confidential information" is and would necessarily violate Atlantis' own confidentiality policy. [1 App. 50]. Atlantis' double-standard applied to another casino's host.

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[9] Exhibit 75 is dated January 2009. Sumona testified the document was printed on this date as the information in Exhibit 75 had been entered into the Atlantis database prior to that date. [15 App. 3271-72]. The handwritten notes on Exhibit 75 are not Sumona's. [15 App. 3186-87]. There were players that Sumona developed relationships with while working at Atlantis that are not reflected in Exhibit 75. [15 App. 3187].

[23 App. 4649-71; Exhibit 46]. In similar fashion, Ringkob testified that he asked Sumona which players she was able to bring to Atlantis and "what has been their experience, good or bad" and if there was anything that "Atlantis needs to offer to help to entice her guests to visit and give Atlantis a try." [12 App. 2536](emphasis). Ringkob testified that Exhibit 75 was uploaded into Atlantis database. [12 App. 2547].

C. Sumona's Work at Atlantis

Throughout her employment at Atlantis, Sumona wrote down her book of business in spiral notebooks. Sumona testified that some of the players in the spiral notebooks were players listed in Exhibit 75. [14 App. 2974-75, 2980-81; Exhibits 75, 80]. Sumona could take her book of business with her when she left Atlantis. [12 App. 2538-39, 2600-02, 2607, 2614-15, 13 App. 2712-13]. Sumona testified that she had a relationship with every player in the spiral notebooks, the players in the spiral notebooks were coded to Sumona, or had been coded to Sumona in the past or she knew them from Harrah's or had a relationship with them. [14 App. 2993-94; 15 App. 3063-64; 16 App. 3241-43]. Sumona brought players to Atlantis and added new players while at Atlantis and, as with Harrah's, these players would all be part of her book of business. [16 App. 3261-62].

Sumona was required to sign the Non-Compete Agreement which prevented Sumona from any employment whatsoever with any gaming business or enterprise within 150 miles of Atlantis for one year [1 App. 54; 15 App. 3180; 16 App. 3246], i.e. it specifically provided:

> . . . be employed by, **in any way affiliated** with, or **provide any services to**, any gaming business or enterprise located within 150 miles of Atlantis Casino Resort for a period of one (1) year after the date that the employment relationship between Atlantis and Team Member ends. [1 App. 54] (emphasis).

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Decarlo told Sumona that "he thought no judge in town will honor that, because it was too broad." [15 App. 3037-38]. The court so found. [7 App. 1579-80]. Sumona resigned from Atlantis on January 19, 2012. [15 App. 3044]. Prior to leaving Atlantis for GSR, Sumona changed some player data in the Atlantis database relating to her players. [15 App. 3047-56; 16 App. 3241].

No one at GSR requested that Sumona change any data or were even aware of this until just prior to Sumona being suspended by GSR. Sumona confirmed this during her May 3, 2012 interview. [14 App. 3112-16; 16 App. 3257-59; 17 App. 3548; Exhibit 73].

4. Sumona's Hiring By GSR

Sumona decided to leave Atlantis due to unhappiness with her compensation. [15 App. 3025-29]. Sumona interviewed with Hadley on two occasions and Sumona advised Hadley of the Non-Compete Agreement in the initial interview and provided GSR with a copy of the Non-Compete Agreement shortly thereafter and prior to Sumona's second interview with Hadley and Tom Flaherty ("Flaherty"), Vice President of Casino Operations for GSR. After having GSR counsel review the Non-Compete Agreement, GSR determined that it was illegally over broad and unenforceable and would not prevent the hiring of Sumona. [15 App. 3528, 3033-36]. GSR offered Sumona a position as a host.

GSR agreed to provide Sumona with a legal defense relating to the Non-Compete Agreement. [*See* Exhibit 14]. Sumona accepted the job as host with GSR on January 19, 2012 and began on January 25, 2012. [14 App. 2970; 16 App. 3377]. Sumona never told anyone at GSR that she had any trade secret or confidential information from Atlantis. [16 App. 3251-52].

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No one at GSR, including Hadley and Flaherty, ever asked Sumona to bring anything, including lists of any nature or any trade secret and/or confidential information, with her to GSR. [14 App. 2986-87; 16 App. 3249-50, 3279]. Flaherty told Sumona to just walk out [of Atlantis] and not bring anything with her to GSR other than her relationships. [16 App. 3250; 17 App. 3548]. Sumona did not bring the Outlook list or the flash drive to GSR. [14 App. 2980].

A. GSR Database

Hosts at GSR only have rights to add player names, addresses and contact information into the computer database, which is the same information the court found was a host's book of business. [16 App 3305-06, 3357-58; 19 App. 4015; 7 App. 1573, 1593].

Sumona added players to the database from her spiral notebooks.[10] [14 App. 2978-81; Exhibits 19, 80]. Sumona never showed the spiral notebooks to anyone at GSR nor was GSR aware of their existence. [14 App. 2986, 2988; 15 App. 3116, 3221; 16 App. 3351; 18 App. 3806-07; 20 App. 4148; 24 App. 5028-29]. Sumona testified there were no players in her spiral notebooks that she didn't have a relationship with at Atlantis. [14 App. 2993-94]. Sumona knew lots of people from Harrah's that were already in the Atlantis database so when she created the Outlook file she did not put them into the Outlook file. [15 App. 3125-54, 3136-43 (some Harrah's players that Sumona had personal relationships with were not coded to Sumona at Atlantis)].

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[10] Other than minor clerical assistance at Atlantis, there was nothing different about how Sumona entered player information into the GSR database, as opposed to how she did it at Atlantis. [16 App. 3252]. Sumona had no access to the GSR database after her suspension from GSR. [16 App. 3259-60].

Sumona added approximately 220 names to GSR database. [14 App. 2989-90; 15 App. 3063; Exhibit 19]. Sumona testified that "[p]robably half or more than half" of the players that she entered into the GSR database were already in the GSR database and approximately 107 of those players were found within Sumona's spiral notebooks. [14 App. 3234-35; 15 App. 3063-64; Exhibits 19, 80, 83]. The additional players are people that Sumona met working at Atlantis, knew from Harrah's or from the missing sixth spiral notebook [15 App. 3064-65] and that some of these players might have been coded to her at one point in time at Atlantis.

There were players that Sumona recognized in the GSR database from Harrah's and Atlantis and some of the players that she recognized from Atlantis had not been coded to her there and Sumona requested that those players be coded to her if they were un-hosted or her relationship was better. [15 App. 3065-83].

No one assisted Sumona in adding names to the GSR database and she did not show anyone at GSR the spiral notebooks nor did anyone at GSR ever ask for them or know of their existence. [14 App. 2985-88; 15 App. 3116, 3221; 16 App. 3251, 3351; 18 App. 3806-07; 20 App. 4148; 24 App. 5028-29]. Flaherty knew that Sumona would take relationships with her to GSR and would have those names or she would know those people. [17 App. 3552]. Sumona always told GSR that the players that she entered into the GSR database were players that she felt she had a personal relationship with and were part of her book of business. [16 App. 3296; 17 App. 3556]. This is the same type of affirmation that Ringkob and Decarlo deemed sufficient in order to allow Atlantis to utilize Sumona's book of business from Harrah's. [12 App. 2591, 2611-16; 13 App. 2687].

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A lot of players from Atlantis came to see Sumona at GSR on their own volition, before Sumona had even added them to the GSR database, requesting that Sumona be their host. Sumona estimated at least 20 to 30 players fell into this group alone. [14 App. 2991-92]. These players, and their friends, some of whom were not coded to Sumona at Atlantis, but that Sumona had developed relationships with, were upset with Sumona that they had not gotten marketing offers from Sumona while she was at GSR. [14 App. 2991-93]. Sumona never told anyone at GSR that the information she had was not part of her book of business or were players to whom she did not have a personal relationship. [19 App. 4015].

Evidence established that marketing offers that GSR made to Sumona's players were "not enough to get them in the car and drive" to GSR and that players wanted to combine offers. [Exhibit 41 (22 App. 4586, 4603, 4610-11); 18 App. 3807-10]. Players were advising GSR of what they wanted in terms of marketing offers and this would not be trade secret information as the player was providing this information and not Sumona. [Exhibit 71 (24 App. 5353)].

Sumona's conduct after working at GSR confirmed that she was not using confidential and/or trade secret information of Atlantis. Hadley testified that in "[a]ll of the conversations I had with Sumona, she insisted that she had relationships with everyone she solicited." [16 App. 3319]. Flaherty testified that Sumona wasn't doing anything different that any other host that GSR had hired in the past. [17 App. 3555]. Flaherty and Hadley testified they rely upon a host saying they have a relationship with a player and Sumona never told them that she did not have a relationship with any of the players she was working with at GSR. [16 App. 3296, 3301, 3363]. Sumona told them she did have relationships with the players. [17 App. 3556].

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B. Host Practices at GSR

Sumona could only make recommendations regarding marketing offers to players at GSR, as marketing decisions were made by a marketing committee that Sumona was not part of at GSR. [18 App. 3790-91, 3808]. While Sumona could make suggestions, she would learn of the offer after it had been made. [14 App. 2924-25; 15 App. 3091].

Sumona, like other hosts, can request marketing offers that are higher than a player's historic play at GSR. [16 App. 3312-15]. Sumona was not allowed to offer free play to guests and she could not provide "comps" to guests other than what was already in the system. [14 App. 2926-28]. Sumona "captured" or acquired new players while working at GSR that were added to her book of business. [14 App. 2984-86, 2991; Exhibit 19].

Nothing that Sumona did at GSR was any different from what she did at Atlantis or was unusual at GSR. [16 App. 3250-52, 3355-68; 17 App. 3555-56].

C. Suspension of Sumona

After learning of Sumona's alteration of some player data in Atlantis' database, GSR suspended Sumona on May 3, 2012. [24 App. 5029; Exhibit 73]. Following her suspension from GSR, Sumona was not allowed to come back onto the property, her company-issued cell phone was taken away and she ceased to have any access to the GSR database or players or the ability to send and/or receive emails or communications to or from players. [14 App. 2926, 2976-77, 3118-20; 15 App. 3183-84; 16 App. 3259-60, 3330; Exhibits 31, 73]. Thereafter, Sumona only spoke with Hadley on a few occasions to check on her work status. [15 App. 3181].

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Following the injunction, GSR took steps to ensure compliance with the terms of the injunction, including stopping future marketing and hosting efforts. [18 App. 3837-38, 3840-48; 16 App. 3331-54, 3348; Exhibits 31, 41, 50]. GSR's marketing system utilizes many different versions of offers. [18 App. 3828]. The GSR database is a read-only and as changes are made by Hadley the marketing program will cease marketing to those players. Those changes were completed by August 20, 2012 and GSR reasonably effectuated pulling marketing offers from its complicated mailing systems (with associated time lags related to mass mailings) in further compliance. [18 App. 3838-48; Exhibit 84 (28 App. 6024-25); Exhibits 31, 50]. Exhibit 75 was from Sumona's players from Harrah's and would not have been implicated in the injunction. [14 App. 2970-73; Exhibit 75; 1 App. 291-92, 336-37]. The court found GSR took reasonable steps to comply in good faith and timely compliance with the injunction. [7 App. 1595]. Sumona returned to GSR in June 2013 as a Special Event Manager without access to player files. [14 App. 2939-41].

D. LEGAL STANDARD FOR JUDICIAL REVIEW

"We have repeatedly held that findings of fact and conclusions of law, supported by substantial evidence, will not be set aside unless clearly erroneous. However, we have also recognized that construction of a contractual term is a question of law and this court is obligated to make its own independent determination on this issue, and should not defer to the district court's determination. *Sheehan & Sheehan v. Nelson Malley and Co.*, 121 Nev. 481, 486, 117 P.3d 219, 223 (2005).

"Substantial evidence has been defined as that which a reasonable mind might accept as adequate to support a conclusion." *McClanahan v. Raley's, Inc.*, 117 Nev. 921, 924, 34 P.3d 573, 576 (2001).

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Questions of law are reviewed *de novo*. *MGM Mirage v. Cotton*, 121 Nev. 396, 398, 116 P.3d 56, 57 (2005)(*citing Bullock v. Pinnacle Risk Mgmt*, 113 Nev. 1385, 1388, 951 P.2d 1036, 1038 (1997)).

"Statutory interpretation is a question of law which this court reviews *de novo*." *Whittier Trust Co. v. Getty (In re Orpheus Trust)*, 124 Nev. 170, 179 P.3d 562 (2008).

SUMMARY OF THE ARGUMENT

The court properly found based upon substantial evidence that GSR was not liable to Atlantis on its claims under the UTSA as the evidence established that: (1) a host's book of business, which includes a player's name, addresses and other contact information, is not a trade secret under the UTSA and neither Atlantis nor GSR treat such information as a trade secret; and (2) that GSR did not misappropriate any information constituting a trade secret from Atlantis.

While the court could find that Sumona had taken information from the Atlantis in excess of that information contained in her book of business, and thereby violate agreements between her and Atlantis (of which GSR was not a party nor alleged to have interfered), the court properly found that GSR's host business practices prevented a host from inputting information into the GSR databases beyond that contained in a host's book of business.

No evidence established, as required under the UTSA, that GSR knew or had reason to know that any information provided by Sumona constituted a trade secret and, in fact, the statements and actions of Sumona confirmed they were not.[11]

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[11] The court's permanent injunction, relating to Sumona only, is consistent as the information contained in the GSR database from Sumona is information that the court properly found was not a trade secret. [7 App. 1595 - ¶ 19].

Atlantis' claims against GSR for tortuous interference with contractual relations and prospective economic advantage were preempted by the UTSA and the Non-Compete Agreement was over broad and unenforceable as it unreasonably prevented Sumona from any meaningful employment.

While the court properly awarded GSR its attorney's fees and costs based upon the rejection of the Offer of Judgment, the court abused its discretion by not awarding GSR the remainder of its requested attorney's fees based upon Atlantis' bad faith in bringing and maintaining trade secret claims against GSR.

ARGUMENT

A. THE COURT PROPERLY APPLIED THE UTSA

The court's rulings regarding the proper application of the UTSA as to GSR, in relation to Sumona, fully comports with Nevada law. There is no inconsistency. The court properly found that a host's book of business (irrespective of whether the book of business contained "high value" players or not), which comprises the relationships that a host creates and maintains with players, including player names, addresses and contact information, is not a trade secret and that GSR had not committed any violation of the UTSA. [7 App. 1573, 1582, 1593-96; 12 App. 2602, 2610].

1. Host's Book of Business - Not a Trade Secret

"Broadly defined, a trade secret is information that derives independent economic value, actual or potential, from not being generally known to, and **not being readily ascertainable by proper means by the public**, as well as information that is subject to efforts that are reasonable under the circumstances to maintain its secrecy." *Finkel v. Cashman Professional, Inc.*, 270 P.3d 1259, 1264 (2012); *see also NRS* 600A.030(5)(a)-(b). "The determination of whether corporate information, such as customer and pricing information, is a trade secret **is a question for the finder of fact**." *Frantz v. Johnson*, 116 Nev. 455, 466, 999 P.2d 351, 358 (2000) (emphasis).

"We emphasize that **not every customer and pricing list will be protected as a trade secret** . . . ." *Id.* (emphasis). The court properly found based upon the testimony of both Atlantis and GSR personnel that a host's book of business is one such customer list that is not protected as a trade secret. A court's findings of fact and conclusions of law, which are supported by substantial evidence, will not be set aside unless clearly erroneous. *See Sheehan & Sheehan, supra.* In *Frantz*, this Court set forth several factors for the fact finder to consider in determining whether information is a trade secret: (1) the extent to which the information is known outside of the business and the ease or difficulty with which the acquired information could be properly acquired by others; (2) whether the information was confidential or secret; (3) the extent and manner in which the employer guarded the secrecy of the information; and (4) the former employee's knowledge of customer's buying habits and other customer data and whether this information is known by the employer's competitors. *Id.* at 467.

A. Information Known Outside/Properly Acquired

Testimony **by both parties** established that a host's book of business was property that belonged to the host **regardless of whether the host had been required to sign a trade secret and/or confidentiality agreement.** [12 App. 2600-02, 2614-16, 2538, 2645; 13 App. 2712, 2868; 16 App. 3321-22, 3262; Exhibit 75; (Ringkob) 12 App. 2591, 2607, 2645-46; (Ringkob believed that Sumona could bring her book of business, Exhibit 75, to GSR); (Decarlo) 13 App. 2868, 2712-13; (Hadley) 16 App. 3321-22; (Sumona) 3262; *see also* 12 App. 2453]. In the court's findings of fact, the court stated:

> Steve Ringkob, **indeed almost every witness**, testified that there were certain items that hosts were entitled to take with them from property to property and that **a host's book of trade is the host's property and "nothing is wrong with her taking this information wherever she goes.**" [7 App. 1573] (emphasis)

While Atlantis makes repeated references to whether Sumona was "coded" to any particular player(s) as evidence whether such players were in her book of business, the court properly made no such distinction based upon the testimony of both parties. [7 App 1582, 1593]. Moreno testified that a player can have a personal relationship with **more than one host and that is common**. [17 App. 3481-82]. This testimony, from Atlantis' own employee, would defeat their argument regarding "coding" because if a player can only be coded to one host at a time, nevertheless, a player can still have relationships with multiple hosts and vice versa. It is the relationship that matters. These relationships would necessarily include information that the host could openly observe about the players interactions with a casino that is open to the public and observations that could be observed by the general public, i.e. where a player is gambling, the particular machine the player is using, player cards, among others.

The testimony of Robinson, Atlantis' general counsel, provided substantial evidence for the court to conclude that a host's book of business is not a trade secret when Robinson testified that Atlantis was fully permitted to acquire Sumona's book of business, notwithstanding the existence of Harrah's confidentiality agreement. [19 App. 4021-24]. Hosts do not lose their proprietary interest in their book of business by signing confidentiality agreements. "An agreement between the employer and the employee that something is a trade secret or confidential is not controlling if in fact it is not." *Cambridge Filter v. Intern Filter Co., Inc.*, 548 F. Supp. 1301, 1306 (D. Nev. 1982). **It was not**. Robinson confirmed the same, wherein she testified:

> Q. So your position is that the creation of an agreement between an employee can make something a trade secret, because the Atlantis says in an agreement with an employee it is a trade secret. That's your position?
>
> A. **Not a trade secret under the Trade Secret Act**, but it can become confidential under a contractual agreement. [19 App. 4004-05](emphasis).

Decarlo, Sumona's supervisor, testified:

> Q. Okay. And you didn't think that violated the confidentiality agreement?
>
> A. You know, that's probably the whole rub of this whole thing is **that hosts forever have been able to move their guests around**, their personal guests around. And I just think it gives casinos heartburn. **But I think the host has the right, just like a used car salesman has the right to take their players from one place to another.** [13 App. 2868](emphasis).[12]

Hadley testified:

> You know, we do everything we can to keep computer information confidential; however, it's customary for hosts to have relationships with guests that they may have had throughout the years. **So hosts that leave the property or leave any casino are – have those relationships that they take with them.** So we don't control people, just information in the computer." [16 App. 3321-22](emphasis).

Atlantis' Confidentiality and Trade Secret Agreement ("Confidential Agreement") confirms the special nature of a host's book of business by providing that "intellectual property **may** include hotel or casino customer/guests lists . . ." and "[s]uch information is proprietary and **may** constitute "trade secrets . . . ." [1 App. 50-51](emphasis). Atlantis allows host's books of business to leave the property.

There is a long-standing practice in the gaming industry of casinos hiring hosts from another casino in order to obtain their book of business to drive business to the casino. [12 App. 2600; 19 App. 4044]. "First and foremost, trade secret law protects only information that is kept secret." *Flotec v. Southern Research, Inc.*, 16 F. Supp. 2d 992, 1000 (S. D. Ind. 1998). Atlantis embraces this business model in their repeated hirings of host's from other casinos, such as Sumona. [13 App. 2865, 2883, 2893-94].

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[12] This testimony related to Sumona's confidentiality agreement with Harrah's that Atlantis ignored. [19 App. 4024-26; 12 2593-94; Exhibits 43-44].

A host's book of business is "readily ascertainable by proper means by the public," and therefore, by definition cannot be a trade secret. The "sister-state" case law cited by Atlantis, which is not controlling, ignores the substantial evidence that a host's book of business is not a trade secret. *See Frantz.*

B. & C. Whether Information Confidential/Secret Extent/Manner Information Guarded

While there was testimony that both Atlantis and GSR considered their respective customer lists confidential and proprietary as to themselves, there was equally consistent testimony that such confidentiality was not imposed upon the respective host regarding their book of business. [12 App. 2600-02, 2614-16, 2538, 2645; 13 App. 2712, 2868; 16 App. 3321-22, 3262; Exhibit 75; (Ringkob) 12 App. 2591, 2607, 2645-46; (Decarlo) 13 App. 2868, 2712-13; (Hadley) 16 App. 3321-22; (Sumona) 3262. Pursuant to *NRS* 600A.030(5)(a), information will not be considered a "trade secret" if it is readily ascertainable by proper means by the public or any other person who can obtain commercial or economic value from its disclosure or use. "Where the plaintiff's customers are known to competitors as potential customers, the plaintiff's customer list is not a trade secret." *Cambridge Filter,* 548 F. Supp. at 1306. Competitors, such as Atlantis, routinely hire hosts for the purpose of acquiring their book of business. It is axiomatic that the hiring of a host will mean that a competitor such as Atlantis will acquire players within a competing host's book of business that are current and/or potential customers and thereafter attempt to drive those players business to Atlantis. This is Atlantis' business model. The host's book of business is not guarded, as both Ringkob and Decarlo testified that Sumona could take her book of business with her. [12 App. 2645; 13 App. 2712].

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D. Former Employee's Knowledge of Customer's Habits/Data & Knowledge by Employer's Competitors

There was substantial evidence established that it is common for players to gamble at multiple casinos, for players to obtain player's card from these casinos (thereby providing each casino with their contact information), for players to share marketing information between one casino and another in order to obtain better offers and for casinos to have substantial parity in their respective customer lists. [15 App. 3223-27, 3235, 3266, 3043; 17 App. 3470-73; 25 App. 5353; Exhibits 65-66].

Evidence established that marketing offers that GSR made to Sumona's players were "not enough to get them in the car and drive" to GSR and that players wanted to combine offers. [Exhibit 41 (22 App. 4586, 4603, 4610-11); 18 App. 3807-10]. Players were advising GSR of what they wanted in terms of marketing offers and this would not be trade secret information as the player was providing this information and not Sumona. [Exhibit 71 (24 App. 5353)].

It was common for Atlantis players to stop playing at the Atlantis even while Sumona was still working at the Atlantis. [15 App. 3234]. The court properly found that Sumona's book of business was hers to take to GSR. It was not limited to only players coded to Sumona. Sumona testified that more than half of the players she brought to GSR were already in the GSR database. [15 App. 3234-35]. Marketing strategies are not known between casinos. [17 App. 3481]. While the court found additional categories of player information to fall within the purview of the UTSA, nevertheless, the court properly found based upon substantial evidence that GSR's player database did not allow Sumona to enter information beyond that of a player's name, address and contact information. [7 App. 1593].

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"A former employee has the right to engage in a competitive business for himself and to enter into competition with is former employer, even for the business of those who had formerly been customers of his former employer, provided such competition is fairly and legally conducted." *Continental Car-Na-var Corp. v. Moseley*, 24 Cal. 2d 104, 148 P.2d 9, 13 (Cal. 1944).

2. No Misappropriation by GSR

Statutory liability under the UTSA is imposed only in cases where a party has obtained the trade secret information through "improper means" or through "misappropriation." *See NRS* 600A.030(5)(a)-(b).[13] There was no substantial evidence that established that GSR "knew or had reason to know" that any trade secret information had been utilized by Sumona at GSR.

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[13] *NRS* 600A.030(1) defines "improper means" as theft, bribery, misrepresentation, willful breach or willful inducement of a breach of a duty imposed by common law, statute, contract, license, protective order or other court or administrative order; and espionage through electronic or other means. *NRS* 600A.030(2) defines "misappropriation" as:

(a) Acquisition of the trade secret of another by a person by improper means;
(b) 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
(c) Disclosure or use of a trade secret of another without express or implied consent by a person who:
    (1) Used improper means to acquire knowledge of the trade secret;
    (2) At the time of disclosure or use, knew or had reason to know that his or her knowledge of the trade secret was:
        (I) Derived from or through a person who had used 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
    (3) Before a material change of his or her 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.

NRS 600A.030 is *not* a strict liability statute. Relevant evidence for purposes of GSR is not whether ultimately any such information is found to be a trade secret, it is only relevant to the extent that GSR "knew or had reason to know" that is was acquiring information protected as a trade secret. *cf. Siragusa v. Brown*, 114 Nev. 1384, 1391, 971 P.2d 801, 806 (1998)("when the plaintiff knew or in the exercise of proper diligence should have known of the facts constituting the elements of his cause of action is a question of fact for the trier of fact."). The court properly found that GSR did not seek or obtain any trade secret information and nothing that Sumona was doing at GSR was outside of common host practices. [16 App. 3250-52; 17 App. 3555-56].

The elements of a misappropriation of trade secret include: (1) a valuable trade secret; (2) misappropriation of the trade secret through use, disclosure, or nondisclosure of use of the trade secret; and (3) the requirement that the misappropriation be wrongful because it was made in breach of an express or implied contract or by a party with a duty not to disclose. *Frantz,* 116 Nev. at 466, 999 P.2d at 358.

A. GSR Only Sought Sumona's Book of Business

The court properly found that GSR had not violated the UTSA, as GSR acted reasonably and in good faith in ensuring that no information was obtained from Sumona other than her book of business which was not a trade secret. [7 App. 1593-95]. Evidence established that GSR never sought nor advised Sumona to bring any confidential and/or trade secret information from Atlantis to GSR. [17 App. 3536]. In fact, Flaherty specifically told Sumona to just walk out [of Atlantis] and not bring anything with her to GSR other than her relationships. [17 App. 3548-9]. Sumona did not show GSR the spiral notebooks and entered the information into the GSR database herself. The GSR player database restricted Sumona's ability to enter any information other than information that would properly be found within her book of business. [16 App. 3306, 3357].

B. Reasonable Reliance by GSR

Testimony by both Atlantis and GSR established that casinos rely upon the representations of hosts as to what players the host has developed a personal relationship with and are therefore part of the host's book of business. [13 App. 2613, 2687; 16 App. 3363-67]. Sumona repeatedly advised GSR, both after the commencement of her employment with GSR and after the issues with Atlantis arose that the information that she placed into the GSR database and was using, which information was limited to that information which normally comprises a host's book of business, was from her book of business and were players with whom she had a relationship. [16 App. 3296, 3301, 3312, 3319, 3358-61]. The letters sent by Sumona from GSR were based upon this same reasonable reliance that they were to players that were part of Sumona's book of business. [25 App. 5320-28; Exhibit 77; Exhibits 41, 48, 51]. Sumona's actions at GSR were consistent with other hosts. [17 App. 3355-58].

Atlantis' arguments relating to the use, i.e. placing them into the GSR database, by Sumona of players not "coded" to her Atlantis or "other hosts' customers" misconstrues the ruling of the court and impermissibly seeks to impose strict liability upon GSR where the statutory language does not provide. There was no substantial evidence that established that GSR knew or had reason to know that any players were not part of Sumona's book of business. GSR, like Atlantis, was entitled to rely upon Sumona's repeated affirmations that she had relationships with all the players.

Atlantis' arguments relating to their April 6, 2012 letter to GSR ignores the fact that GSR conducted a reasonable and good faith investigation to determine the validity of Atlantis' complaints, however, Atlantis did not provide GSR with any specific information and Sumona advised GSR that she was utilizing her book of business at GSR. [15 App. 3108; Exhibit 5].

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Sumona testified that contrary to Atlantis' April 6, 2012 letter, the players that were sent marketing offers by GSR were players with whom she had a personal relationship and those players had not expressed displeasure to Sumona about being contacted by GSR. [15 App. 3110-11, 3093-95]. In contrast, Atlantis' business practice in the face of similar complaints from other casinos is to do no investigation. [19 App. 4024-26; 12 App. 2593-94; Exhibits 43-44].

Testimony established that the marketing efforts made by GSR to the players that Sumona represented to be in her book of business were not inconsistent with that of other hosts at GSR [16 App. 3315, 3355; 17 App. 3556] and GSR would have no reason to know or should have known these efforts were improper - which they were not. The testimony of Christian Ambrose ("Ambrose"), Director of Planning and Analysis at GSR, relating to "changing precedent" related not to types or values of marketing offers but to the logistical mailing issues involved in extracting mailing lists. [18 App. 3787-91, 3808-10; Exhibit 41 (4613)]. Atlantis personnel did not know GSR's marketing strategies [17 App. 3469] and the figures utilized by Ambrose relating to GSR's internal mathematical formulas and marketing offers were not based upon any actual player data from Atlantis. [18 App. 3812-13]. Atlantis makes offers based upon a host's input, as Brandon McNeely ("McNeely"), Data Integration Manager for Atlantis, [18 App. 3613] testified:

> Because we're essentially the channel for marketing, as far as reporting goes and **we are a contact for hosts to make modifications to players. We send out offers, so we get contacts from hosts all the time about different offers to be sent out to different players and the creation of offers and promotions.** [18 App. 3629]

There was substantial evidence that GSR did not seek or advise Sumona to bring or utilize any trade secret and/or confidential information to GSR and only requested that she bring her relationships. [16 App. 3250; 17 App. 3548].

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C. Good Faith Efforts to Comply with Injunction

GSR took reasonable and good faith steps to comply with the injunction pending trial. First, the information in the GSR database from Sumona was not trade secret information as it comprised her book of business which consistent testimony revealed was freely transferable from property to property. Separately, a substantial portion of Sumona's book of business came from Harrah's and this would not be implicated in the injunction. [Exhibit 18; 14 App. 2970-73; Exhibit 75; 1 App. 291-92, 336-37]. Ringkob believed that Sumona could properly bring her book of business, i.e. Exhibit 75, to GSR. [12 App. 2644-45; Exhibits 19, 75, 80]. The stipulation for injunction was entered on August 24, 2012 [2 App. 329-46]. Atlantis did not bring any motions before the court referencing any violations of the injunctions pending trial. "A point not urged in the trial court, unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered on appeal." *Britz v. Consolidated Casinos Corp.*, 87 Nev. 441, 447, 488 P.2d 911, 915 (1971). GSR suspended Sumona and prevented her from having contact with players at GSR. [14 App. 2926, 2976-77, 3118-20; 15 App. 3120, 3183-84; 16 App. 3259-60, 3330; Exhibits 31, 41, 50, 73].

GSR froze in time Sumona's accounts so no other host could be assigned to them. [16 App. 3337]. GSR utilized mass mailings for marketing efforts that would be sent to thousands of players. [15 App. 3089-90]. GSR assigned "DNI" (Do Not Invite) and "M" (No Marketing) codes to Sumona's players and took reasonable efforts to cull the marketing programs that GSR utilizes in order to prevent any marketing and/or offers being sent to Sumona's players. [18 App. 3795-97, 3838-48; 16 App. 3331-48; Exhibit 50]. GSR's good faith efforts took time due to the size of the GSR database and the logistics involved in specially pulling Sumona's players. [16 App. 3342-54; 18 App. 3808-09, 3840-48; Exhibit 41]. The court found GSR took reasonable steps to comply in good faith and timely compliance with the injunction. [7 App. 1595].

The GSR database is a read-only and as changes were made by Hadley the marketing program ceased marketing to those players. Those changes were completed by August 20, 2012 and GSR reasonably effectuated pulling marketing offers (with associated time lags related to mass mailings) from its complicated mailing systems in further compliance. [18 App. 3838-48; Exhibit 84 (28 App. 6024-25); Exhibits 31, 50].

There was further compliance when Sumona gave everything she had in terms of documents at her deposition. [15 App. 3220-21]. The information in the GSR database from Sumona was not trade secret information. Sumona's letters to players were sent to players that she had a personal relationship and to some people that had expressed their interest and wanted to visit GSR. [15 App. 3089]. Decarlo had Sumona send out similar letters (approximately 1,000 or more) to all the players in her book of business when she first came to Atlantis. [15 App. 3198-99; 16 App. 3278; (Santos) 17 App. 3601].

Atlantis' April 6, 2012 letter to GSR did **not identify** any particular information and/or players that Atlantis claimed Sumona was improperly utilizing even though Atlantis claimed to be aware of such alleged specific instances. [21 App. 4291; 19 App. 4027]. While GSR conducted an investigation into Atlantis' claims, however, Atlantis impeded these efforts when it refused to supply GSR with any disputed information and/or player names. [19 App. 4027-29; 21 App. 4302; Exhibit 5].

In conducting its investigation[14], GSR reasonably relied upon Sumona's representation in her April 12, 2012 email to GSR counsel confirming "my list of players" to counsel for GSR. [25 App. 5320-28; Exhibit 77].

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[14] When Atlantis was confronted with similar complaints from Sumona's previous employer, Harrah's, Atlantis conducted no investigation. [19 App. 4022-26; Exhibits 43-44, 47].

B. THE COURT PROPERLY DISMISSED ATLANTIS' CLAIMS FOR TORTUOUS INTERFERENCE/ PROSPECTIVE ECONOMIC ADVANTAGE

Pursuant to *NRS* 600A.090, there is a complete preemption of the common law civil remedies for misappropriation of trade secrets. *See Frantz v. Johnson, supra* ("[t]he plain language of *NRS* 600A.090 precludes a plaintiff from bringing a tort or restitutionary action 'based upon' misappropriation of a trade secret beyond that provided by the UTSA."). This preemption would apply to claims for wrongful interference with prospective economic advantage. *See Custom Teleconnect, Inc. v. Intern. Tele-Services, Inc.*, 254 F. Supp. 2d 1173, 1182 (D. Nev. 2003). Separately, as the Non-Compete Agreement was impermissibly over broad, *see infra*, and therefore, unenforceable, as a matter of law GSR could not have interfered with the subject contract and the court properly dismissed those claims against GSR. [7 App. 1580-81, 1596].

C. GSR PROPERLY RELIED UPON THE ADVICE OF COUNSEL RELATING TO THE INVALIDITY OF THE NON-COMPETE AGREEMENT AND THE HIRING OF SUMONA

GSR relied in good faith upon the advice of their counsel in determining that Sumona's Non-Compete Agreement was unenforceable and did not prevent the hiring of Sumona and utilizing her book of business. Sumona provided GSR with the Non-Compete Agreement between her first and second interview at GSR and GSR's counsel had already reviewed the Non-Compete Agreement prior to making the employment offer to Sumona. [15 App. 3033-36]. The court so found. [7 App. 1596].

Advice of counsel was not required to be plead as an affirmative defense to Atlantis' allegations. *See Gerbig v. Gerbig*, 61 Nev. 387, 393, 128 P.2d 938, 940-41 (1942)("advice of counsel is not new matter, and that it need not be specially pleaded.").

D. THE NON-COMPETE AGREEMENT WAS UNREASONABLE IN SCOPE AND, THEREFORE, VOID AGAINST PUBLIC POLICY

The court properly found that the Non-Compete Agreement, which prevented Sumona from any employment "in any way affiliated with, or provide any services to, any gaming business or enterprise located within 150 miles of Atlantis Casino Resort for a period of one (1) year after the date that the employment relationship between Atlantis and Team Members ends" was unreasonable and against public policy. [1 App. 54; 7 App. 1579-80, 1596; 20 App. 4246]. There was no severability clause.

"Under well-settled rules of contract construction a court has no power to create a new contract for the parties which they have not created or intended themselves." *Old Aztec Mine v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981). In *Hansen v. Edwards*, 83 Nev. 189, 191-92, 426 P.2d 792, 793 (1967), this Court stated:

> An agreement on the part of an employee not to compete with his employer after termination of the employment is in restraint of trade and will not be enforced in accordance with its terms unless the same are reasonable. Where the public interest is not directly involved, the test usually stated for determining the validity of the covenant as written is whether it imposes upon the employee any greater restrain than is reasonably necessary to protect the business and good will of the employer. **A restraint of trade is unreasonable, in the absence of statutory authorization or dominant social or economic justification, if it is greater than is required for the protection of the person for whose benefit the restrain is imposed or imposes undue hardship upon the person restricted.** (emphasis)

The court properly found that the prohibition against any employment by Sumona who had attempted to create a career in the gaming industry from any role in any casino in any capacity was unreasonable and imposed an undue hardship on Sumona and was greater than that required for the protection of Atlantis. [20 App. 4246; 16 App. 3281].

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GSR further appropriately relied upon the advice of its counsel in determining that the Non-Compete Agreement was unenforceable and such defense is not required to be plead affirmatively. *See Gerbig, supra.*

Robinson, who created the Non-Compete Agreement, was forced to concede that the language of the Non-Compete Agreement would prohibit someone from working at a 7-Eleven, the TSA at the airport, a line cook or even a valet where any gaming occurred within the property. [19 App. 3964-67, 4030-34; *NRS* 463.0148 ("establishment" means any premises wherein or whereon any gaming is done); 16 App. 3246].

"We construe covenants not to compete according to their plain language, and such covenants are enforceable only if they are reasonable under the circumstances. Further we strictly construe the language of covenants not to compete; and in the case of an ambiguity, that language is construed against the drafter." *Sheehan & Sheehan v. Nelson Malley and Co.*, 121 Nev. 481, 489, 117 P.3d 219, 224-25 (2005).

1. No Modification of Non-Compete Agreement

Conceding that the Non-Compete Agreement is unenforceable, Atlantis seeks to revive the document by seeking "judicial modification." Not so. "It has long been the policy in Nevada that absent some countervailing reason, contracts will be construed from the written language and enforced as written." *Ellison v. C.S.A.A.*, 106 Nev. 601, 603, 797 P.2d 975, 977 (1990).

GSR respectfully submits that neither *Hansen v. Edwards*, 83 Nev. 189, 426 P.2d 792 (1967) nor *Ellis v. McDaniel*, 95 Nev. 455, 596 P.2d 222 (1979), nor any controlling law in Nevada, stand for the proposition that this Court may modify the Non-Compete Agreement as requested by Atlantis. "We are not free to modify or vary the terms of an unambiguous agreement." *State ex. rel. List v. Courtesy Motors*, 95 Nev. 103, 107, 590 P.2d 163, 165 (1979).

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Both *Hansen* and *Ellis* involved direct appeals following the granting of preliminary injunctions and *not* the appeal of the underling cases.

In *Hansen*, the non-compete agreement prevented Hansen from practicing surgical chiropody within 100 mile radius of Reno, Nevada. The agreement was silent as to the duration. Edwards obtained a preliminary injunction preventing Hansen from practicing surgical chiropody within 100 mile radius of Reno, Nevada pending trial upon the merits of the case. In modifying the terms of the preliminary injunction, this Court stated:

> It appears that the trial court by granting the injunction decided only that the covenant was valid and **reserved the question of reasonableness to the trial on merits.** However, a review of the record permits the conclusion that nothing more can be added than is presently known that would affect a **determination of that question.** The circumstances of this case warrant a confinement of the area of restraint to the boundary limits of the City of Reno and a time interval of one year commencing February 10, 1967, the date of the injunction. **A preliminary injunction may be modified at any time whenever the ends of justice require such action.** *In re Arkansas Railroad Rates*, 168 F. 720 (8 Cir. 1909). We deem the restriction thus modified to be reasonable. *Id.*, 83 Nev. at 192-3, 426 P.2d at 794 (emphasis).

GSR respectfully submits that *Hansen* does not stand for the proposition that this Court can modify the terms of a non-competition agreement, instead *Hansen* stands for the proposition that this Court may modify the terms of a preliminary injunction pertaining to a non-competition agreement pending a trial. *NRS* 2.110 ("This court may reverse, affirm or modify the judgment order appealed from . . . .").

In *Ellis*, this Court also dealt with a direct appeal of a preliminary injunction granted by the trial court. This Court found that the non-competition agreement was an unreasonable restraint upon Ellis and modified the preliminary injunction. *Id.*, 95 Nev. at 460, 596 P.2d at 225; *see also Camco v. Baker*, 113 Nev. 512, 520, 936 P.2d 829, 834 (1997)(refusing to overturn the trial court's decision to deny a preliminary injunction finding that the "covenant at issue is

overly broad as to future territory for possible expansion," and therefore Camco did not enjoy a reasonable likelihood of success on the merits of its claim, and thus injunctive relief was properly denied.").

In *Jones v. Deeter*, 112 Nev. 291, 296, 913 P.2d 1272, 1275 (1996), which was decided after *Hansen* and *Ellis* and was an appeal following the granting of a dispositive motion for summary judgment, this Court stated that "[t]he amount of time the covenant lasts, the territory it covers, and the hardship imposed upon the person restricted are factors for the court to consider in determining whether such a covenant is reasonable." **This Court further found that the five-year duration of the non-competition agreement was unreasonable and therefore the agreement was unenforceable.** *Id.* This Court in *Jones* did not modify the terms of the non-competition agreement and found that Jones could not be found in breach of the non-competition agreement. *Id.*

In this case, the court properly found, in relation to the Non-Compete Agreement's prohibition against employment in "any gaming business or enterprise," as follows:

> **However, the Court finds that the total exclusion is unreasonable.** This Court finds that **excluding the employment** of an individual such Ms. Islam, who has attempted to create a career in this industry **from any role in any casino in any capacity is an unreasonable restraint on her** – excuse me -- **it imposes an undue hardship on Ms. Islam and it is greater than that required for the protection of the person for whose the benefit is restraint is imposed.** And, therefore, the Court finds that contract unenforceable and dismisses the second cause of action, breach of contract." [20 App. 4246](emphasis).

As the Non-Compete Agreement was void as against public policy, GSR could not have interfered with the agreement and therefore the court properly dismissed Atlantis' claims relating thereto.

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E. THE COURT PROPERLY AWARDED GSR ATTORNEY'S FEES BASED UPON THE OFFER OF JUDGMENT

While the court properly awarded GSR attorney's fees based upon the Offer of Judgment that Atlantis rejected, nevertheless, GSR respectfully submits that the court erred and abused its discretion in failing to award GSR the remainder of the full amount of attorney's fees it requested pursuant to the UTSA.

The court's decision to grant GSR attorney's fees following the rendition of the court's decision following the bench trial was not "*sua sponte*," as the Honorable Patrick Flanagan merely added that GSR was entitled to attorney's fees and costs upon finding that GSR was entitled to judgment against Atlantis. [20 App. 4261-2]. The court did the same following the rendition of the court's decision pertaining to Atlantis and Sumona. [20 App. 4255]. Separately, the attorney's fees awarded to GSR and Atlantis were pursuant to statute and/or rule, i.e. *NRS* 600A.060, *NRCP* 68 and *NRS* 17.115. [9 App. 1997-98; 2005]. "Procedurally, when parties seek attorney's fees as a cost of litigation, documentary evidence of fees is presented to the trial court, generally in a post-trial motion." *Sandy Valley Assoc. v. Sky Ranch Estates Owners Assoc.*, 117 Nev. 948, 956, 35 P.3d 964, 969 (2001)(*overruled on other grounds in Horgan v. Felton*, 123 Nev. 577, 170 P.3d 982 (2007)). Both GSR and Atlantis filed post-trial motions for attorney's fees. [6 App. 1227-60, 1631-54; 10 App. 2147-71].

1. Offer of Judgment Attorney's Fees

The Offer of Judgment, pursuant to *NRCP* 68 and *NRS* 17.115, was served on Atlantis on May 20, 2013. [7 App. 1644-46]. Atlantis failed to accept the Offer of Judgment. [7 App. 1645].

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A. Validity of Offeror to Make Offer of Judgment

In arguing that NAV-RENO GS, LLC., the prior named party-defendant that was replaced by GSR pursuant to stipulation by all parties [10 App. 2263-67], was not permitted to make the Offer of Judgment, as it ceased business on October 1, 2012, Atlantis ignores well-settled Nevada law. Atlantis filed its lawsuit on April 27, 2012. [1 App. 1-13]. Atlantis filed its amended lawsuit on May 7, 2012. [1 App. 89-103]. NAV-RENO GS, LLC was a valid legal entity as of either April 27, 2012 or May 7, 2012. [1 App. 89-90, 228; 8 App. 1826; 10 App. 2261]. Pursuant to *NRS* 86.505(1) "[a] dissolved company **continues as a company for the purpose of prosecuting and defending suits**, actions, proceedings and claims of any kind or nature by or against it . . . ." (emphasis). NAV-RENO GS, LLC was fully permitted to make the Offer of Judgment in "defending suits," which suit was filed against it when it was a legal entity and which suit continued after it ceased to be a legal entity. Separately, pursuant to the court's July 1, 2013 Order, which was a stipulated order, GSR was substituted in place of NAV-RENO GS, LLC and GSR became "responsible for and has assumed all liabilities of Defendant NAV-RENO GS, LLC pursuant to a merger in October, 2012." [10 App. 2263-67]. As of the date of the Offer of Judgment, GSR was still designated as "NAV-RENO GS, LLC." [1 App. 89]. It was not until after the Offer of Judgment had expired that the court entered the stipulated order amending the designation from NAV-RENO GS, LLC. to GSR. [10 App. 2266-67]. Atlantis knew where the Offer of Judgment was coming from, as both GSR and NAV-RENO GS, LLC had the same counsel throughout the lawsuit. [10 App. 2263-67; 11 App. 2315].

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B. GSR Entitled to Attorney's Fees

Under *Nevada Rules of Civil Procedure, Rule 68* and *Nevada Revised Statutes* 17.115, a court has discretion to award an offeror attorney's fees in the appropriate circumstances. In *Beattie v. Thomas*, 99 Nev. 579, 588-589, 668 P.2d 268, 274 (1983), this Court enumerated four factors that must be considered by the trial court in determining when and how to exercise its discretion in the award of attorney's fees to an offeror after judgement is obtained, wherein it provided:

1. Whether the party's claim or defense was brought in good faith;
2. Whether the offer of judgment was reasonable and in good faith in both its timing and amount;
3. Whether the decision to reject the offer and proceed to trial was grossly unreasonable or in bad faith; and
4. Whether the fees sought by the offeror are reasonable and justified in amount.

In reviewing the attorney's fees requested by both GSR and Atlantis, the court stated, "[i]n this case, this court presided over this entire litigation, culminating in a multi-week bench trial. As such, this court is familiar with the quality of the advocacy of the attorney's, the character of the work performed by the lawyers and the result of those efforts.[15] The court has considered the *Beattie* factors in reaching its findings." [9 App. 2020].

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[15] These factors are enumerated in *Brunzell v. Golden Gate Nat. Bank*, 85 Nev. 345, 349, 455 P.2d 31, 33 (1969), i.e. (1) the quality of the advocate; (2) the character of the work done, including its difficulty, importance and the time and skill required, the prominence and character of the parties; (3) the work actually performed, including the attention given the work; and (4) the result as to whether counsel was successful and what benefit derived.

1. Claim/Defense - Good Faith

While the court found that Atlantis reasonably initiated the lawsuit, the court also found that Atlantis unreasonably and in bad faith maintained[16] the lawsuit against GSR. [9 App. 1989, 7 App. 1592-97]. In determining whether an offeree acted in "bad faith" or was "unreasonable" in rejecting an offer and proceeding to trial, the trial court may consider whether sufficient information was available to determine the merits of the offer. *See Trustees of Carpenters for S. Nevada Health & Welfare Trust v. Better Bldg. Co.*, 101 Nev. 742, 710 P.2d 1379 (1985). The court made repeated factual findings and conclusions of law that Atlantis acted in bad faith in relation to GSR. [7 App. 1592-97].

2. & 3. Offer Was Reasonable in Both Timing and Amount; and Rejection Was Unreasonable

The Offer of Judgment was reasonably made following the close of discovery and prior to the considerable attorney's fees and costs incurred in preparing for the trial. [1 App. 487; 10 App. 2179]. The timing of GSR's Offer of Judgment furthered the underlying purpose of utilizing offers of judgments, i.e. to promote and encourage settlement and save time and money for the court system, the parties and the taxpayers. *See Mujie v. A N. Las Vegas Cab. Co.*, 106 Nev. 664, 667, 799 P.2d 559, 561 (1990).

The amount of the Offer of Judgment, i.e. $75,000, represented a significant premium over the amount of damages that GSR's retained expert, Jeremy A. Aguero ("Aguero") opined under an actual "win-loss analysis" of $10,814 versus the higher amount associated under a "lifetime value analysis." [21 App. 4423].

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[16] *NRS* 18.010(2)(b) allows for an award of attorney's fees to the prevailing party, without regard to the recovery sought, when a complaint is brought or maintained without reasonable grounds.

The court ultimately utilized the actual win-loss analysis in awarding Atlantis $10,814 against Sumona only relating to the UTSA claim and properly found no liability as to GSR. [7 App.1584-85, 1587-98]. In *Bergmann v. Boyce*, 109 Nev. 670, 679, 856 P.2d 560, 565 (1993), this Court stated:

> *NRCP* 68 encourages the settlement of lawsuits by raising the stakes for a litigant who receives an offer of judgment. An offeree must balance the uncertainty of receiving a more favorable judgment against the risk of receiving a less favorable judgment and being forced to pay the offeror's costs and attorney's fees.[17]

4. Attorney's Fees Requested Were Reasonable

GSR requested $391,932.80 in attorney's fees. [9 App. 2155].[18]

The court awarded $190,124.50 based upon the Offer of Judgment. [11 App. 2317]. GSR provided detailed itemizations of the hourly rates and times associated with each person and further provided a detailed monthly itemization of attorney's fees incurred. Counsel further attested that all of the attorney's fees requested had reasonably, actually and necessarily been incurred by GSR. [10 App. 2173].

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[17] By rejecting the Offer of Judgment and failing to obtain a more favorable judgment, Atlantis is not entitled to any costs or attorney's fees. *NRS* 17.115(4)

[18] GSR's initial requested $455,068.24 in attorney's fees. [8 App. 1656]. GSR's renewed motion requested $391,932.80 in attorney's fees which were voluntarily reduced and followed the analysis the court used in awarding GSR's costs. [10 App. 2173; 9 App. 2019]. H. Stan Johnson's attorney's fees were reduced from $245,572.50 to $225,390.00 and Steven Cohen's attorney's fees were reduced from $117,600.00 to $58,875.00. [8 App. 1656; 10 App. 2173]. Atlantis had the benefit of Robinson's attendance throughout the entire trial. [19 App. 3974].

GSR provided the court *in camera* with its attorney's fees invoices to avoid any waiver of the attorney-client privilege. [8 App. 1771-73]. Atlantis offered to do the same in response to Sumona's objection to Atlantis' attorney's fees request as Atlantis also wanted to avoid a waiver of the attorney-client privilege. [6 App. 1385]. With regard to the documents Atlantis alleged satisfied the requirements of *NRCP* 54(d)(2)(B), it stated in counsel's affidavit that the fees were actually and necessarily incurred and were reasonable and the amount of fees claimed. [6 App. 1385]. This is what GSR did. [10 App. 2172-74].

Atlantis' citation to *Love v. Love*, 114 Nev. 572, 959 P.2d 523 (1998) is misplaced. The issue in *Love* was that the court had not stated the basis for its award of attorney's fees and costs, wherein there was more than one statutory basis for the district court to award attorney's fees and costs, i.e. *NRS* 18.010(2)(b) and *NRS* 125.150(3). In this case, the court expressly provided that the attorney's fees awarded to GSR were pursuant to the Offer of Judgment and the court analyzed the award under *Beattie* and *Brunzell.*

F. GSR CROSS-APPEAL

GSR ENTITLED TO ATTORNEY'S FEES UNDER UTSA

The court properly found that Atlantis' claims of misappropriation against GSR were maintained in bad faith. [7 App. 1596-97]. While "bad faith" has not been defined in the UTSA, in *Sasco v. Rosendin Electric Inc.*, 207 Cal. App. 4th 837, 845, 143 Cal. Rptr. 3d 828, 834 (2012), which the lower court utilized in its Findings of Fact [7 App. 1597], it stated that UTSA does not define "bad faith" and then utilized an objective specious standard where an action superficially appears to have merit but there is a compete lack of evidence to support the claim. *Truck Ins. Exch. v. Swanson*, 124 Nev. 629, 637, 189 P.3d 656, 662 (2008)("he who comes into equity must come with clean hands.").

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In this case, the record establishes that the very information that Atlantis claimed were "trade secrets" was information that Atlantis did not consider a trade secret when Atlantis was acquiring the same from other casinos' hosts and that Sumona was free to take her book of business to GSR and that GSR had neither sought nor acquired any trade secret and/or confidential information from Atlantis. Atlantis knew all this and still improperly maintained the lawsuit and the injunction against GSR. [12 App. 2600-02, 2614-16, 2538, 2645; 13 App. 2712, 2868; 16 App. 3321-22, 3262; Exhibit 75; (Ringkob) 12 App. 2591, 2607, 2645-46; (Decarlo) 13 App. 2868, 2712-13; (Hadley) 16 App. 3321-22; (Sumona) 3262; (Robinson) 19 App. 4004-05]. The court correctly found that Atlantis had acted in bad faith and the court should have properly awarded GSR all of its remaining requested attorney's fees pursuant to *NRS* 600A.060(1).

Pursuant to *NRS* 600A.060, the court was properly permitted to award reasonable attorney's fees to GSR as the prevailing party. *NRS* 600A.060 provides: If: (1) a claim of misappropriation is made in bad faith; (2) a motion to terminate an injunction is made or resisted in bad faith; or (3) wilful and malicious misappropriation exists, the court may award reasonable attorney's fees to the prevailing party. The court stated, "This is sufficient basis for an award of attorney's fees pursuant to *NRS* 600.060 [sic]." [7 App. 1597]. While the court awarded GSR some of its requested attorney's fees pursuant to the Offer of Judgment, the failure of the court to award GSR the remainder of its attorney's fees pursuant to *NRS* 600A.060 was an abuse of discretion and denied GSR proper recovery of the attorney's fees that it had incurred prior to service of the Offer of Judgment. *NRCP* 68(f)(2)(". . . and reasonable attorney's fees, if any be allowed, actually incurred by the offeror from the time of the offer." *NRS* 600A.060 does not contain any time-frame limitation upon the award of attorney's fees ("the court may award reasonable attorney's fee to the prevailing party.").

The court abused its discretion in not awarding GSR's its full attorney's fees. "A decision that lacks support in the form of substantial evidence is arbitrary or capricious and, therefore, an abuse of discretion." *Stratosphere Gaming Corp. v. City of Las Vegas*, 120 Nev. 523, 528, 96 P.3d 756, 760 (2004). The amount of attorney's fees for which GSR sought, which were not covered pursuant to the Offer of Judgment, were $149,687.05. [10 App. 2179 (attorney's fees from April 2012 through April 2013)].

G. CONCLUSION/PRAYER FOR RELIEF

Based upon the above arguments, GSR respectfully requests that this Court reject each an every issue raised on appeal by Atlantis, as well as each any every relief requested by Atlantis, and fully affirm the lower court's rulings in those regards.

GSR further respectfully requests that this Court find that the lower court erred by not awarding GSR its full requested attorney's fees and either award the same herein based upon the full record or remand this matter to the lower court for the limited purpose of determining the additional attorney's fees to be awarded to GSR.

DATED this 5th day of December 2014

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of *NRAP* 32(a)(4), the typeface requirements of *NRAP* 32(a)(5) and the type style requirements of *NRAP* 32(a)(6) because:

[x] This brief has been prepared in a proportionally spaced typeface using Word Perfect - Version X4 in 14 Point Times New Roman.

2. I further certify that this brief complies with the page or type-volume limitations of *NRAP* 32(a)(7) because, excluding the parts of the brief exempted by *NRAP* 32(a)(7)(C), it is proportionally spaced, has a typeface of 14 points or more and contains 13,664 words; and

3. Finally, I hereby certify that I have read this *Combined Answering Brief on Appeal and Opening Brief on Cross-Appeal* and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. I further certify that this *Combined Answering Brief on Appeal and Opening Brief on Cross-Appeal* complies with all applicable *Nevada Rules of Appellate Procedure*, including *NRAP* 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found.

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I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the *Nevada Rules of Appellate Procedure.*

DATED this 5th day of December 2014

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CERTIFICATE OF MAILING

Pursuant to NRCP 5(b), I certify that I am an employee of COHEN|JOHNSON, LLC., and that on this date I caused to be served a true and correct copy of the **GSR COMBINED ANSWERING BRIEF/OPENING BRIEF ON CROSS-APPEAL** on all the parties to this action by the method(s) indicated below:

__X__ by placing an original or true copy thereof in a sealed envelope, with sufficient postage affixed thereto, in the United States Mail, Las Vegas, Nevada and addressed to:

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DATED the 5th day of December, 2014.

An employee of Cohen-Johnson, LLC