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# IN THE SUPREME COURT OF THE STATE OF NEVADA

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Clerk of Supreme Court

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| GOLDEN ROAD MOTOR INN, INC., a Nevada Corporation d/b/a ATLANTIS CASINO RESORT SPA,<br>Appellant/Cross-Respondent,<br>vs.<br>SUMONA ISLAM, an individual,<br>Respondent/Cross-Appellant<br>and<br>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,<br>Respondent. | Case No.: 64349 |
| SUMONA ISLAM, an individual,<br>Appellant<br>vs.<br>GOLDEN ROAD MOTOR INN, INC., a Nevada Corporation d/b/a ATLANTIS CASINO RESORT SPA,<br>Respondent. | Case No.: 64452 |
| MEI-GSR HOLDINGS LLC d/b/a GRAND SIERRA RESORT,<br>Appellant/Cross-Respondent,<br>vs.<br>GOLDEN ROAD MOTOR INN, INC., a Nevada Corporation d/b/a ATLANTIS CASINO RESORT SPA,<br>Respondent/Cross-Appellant. | Case No.: 65497 |

**RESPONDENT'S ANSWERING BRIEF AND APPELLANT'S REPLY BRIEF REGARDING THE GRAND SIERRA RESORT**

Docket 64349 Document 2015-06570

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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 publicly-held companies owning 10% or more of the party's stock: This disclosing party identifies that Monarch Casino & Resort Inc. is its parent corporation, that Monarch Casino & Resort Inc. is publicly held, trading on the NASDAQ under the ticker symbol (MCRI) and that Golden Road Motor Inn, Inc. d/b/a Atlantis Casino Resort Spa is a wholly owned subsidiary.

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

Laxalt & Nomura, Ltd.

Lemons, Grundy & Eisenberg

3. If Litigant is using a pseudonym, the litigant's true name: None.

Respectfully submitted this 2nd day of March, 2015.

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## INTRODUCTION

2 The Grand Sierra Resort's ("GSR") arguments frame well the two very
3 significant public policy issues raised by this appeal: 1) The appropriate scope and
4 enforcement of restrictive covenants in Nevada; and 2) The use of trade secret
5 information by an employer recipient after it has been misappropriated.

6 GSR unpersuasively argues that the district court properly applied Nevada
7 law in finding the Non-Compete contract to be overbroad. If so, then any contract
8 that contains a comprehensive prohibition against employment with a competitor is
9 overbroad in Nevada. If this Court upholds the district court's ruling it will
10 dramatically change the law and practical application of the law of restrictive
11 covenants in Nevada, and the legal protection afforded to employers will be
12 significantly weakened.[1] If adopted, GSR's advocated new law will create a
13 slippery slope in the administration of every such agreement. The subjective
14 question of whether the new position is similar enough to the position held with the
15 former employer, so as to support the application of the non-competition covenant
16 will need to be determined in every action.[2] If that becomes the law, a factual
17 question will almost always arise and no bright line application of restrictive
18 covenants will be possible. For example if a sales representative is hired as a sales
19 manager by a competitor, is that an adequately different job to defeat the
20 application of an otherwise enforceable non-competition contract?

21 The public policy issue and ramifications of the position advanced by GSR
22 related to the application of Uniform Trade Secret Act ("UTSA") use prohibitions
23 is even more disturbing. GSR advocates that although Islam was found to have
24 willfully misappropriated Atlantis' Trade Secret information by illegally taking

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26 [1] NRS 613.200(4)

27 [2] Atlantis reminds the Court that in this matter Islam was employed in the exact
same position and held the same title at both employers, but because the contract
28 prohibited employment with a competitor in any position, the district court struck
the contract in its entirety as overbroad.

and then providing that information to GSR, GSR should be allowed to retain and continue to use that same trade secret information. Indeed, that was the unsettling finding of the district court. This ruling represents legal error and should be reversed. If affirmed, such an application of the UTSA will provide for wholesale misappropriation by subsequent employers who often, as here, are competitors of the original owners of the trade secret information. Atlantis respectfully submits that such a finding would make bad law for the State of Nevada and is not consistent with the spirit of the UTSA.

## FACTS RAISED BY GSR

GSR sets forth certain alleged facts in its brief that are incorrect or misleading, and/or misstate or are unsupported by the record. Many of the statements are made without citation to the record in violation of NRAP 28(e), and where citations are offered, some do not support the assertion advanced. Some examples follow:

### GSR's Focus Upon Alleged Actions Undertaken During Atlantis' Hiring Of Islam is Irrelevant

Both at trial and now on appeal, the defendants in this action have focused upon Atlantis' decision to hire Islam following her employment with Harrah's.[3] However, Islam's transition from employment with Harrah's to Atlantis is not the subject of the litigation and is irrelevant. Islam's employment with Harrah's was governed by completely different contracts with less restrictive requirements for post-employment obligations. Further, no evidence was ever introduced as to how Harrah's treated its data, and therefore there are no facts upon which a court could properly determine whether the information that Islam brought from Harrah's to Atlantis qualified as a trade secret under the UTSA.[4] The case at bar must be determined upon the contracts and obligations between Atlantis and Islam, and the

[3] *See for example*, GSR Answering Brief at 10-13.
[4] NRS 600A.030(5) and NRS 600A.032.

treatment of the relevant data by Atlantis. GSR's smokescreen argument that when Atlantis hired Islam it must have breached the same laws as GSR violated in its employment of Islam is irrelevant and speculative. If Harrah's believed that it had been wronged, it was Harrah's right to bring such an action. As GSR concedes, Harrah's did not bring such an action, despite the fact that apparently neither Atlantis nor Islam responded to Harrah's letters voicing concern.[5] A general statement of a legal positon asserted and abandoned by Harrah's in 2008 and 2009, years prior to this litigation, does not exculpate GSR of its clear and unlawful conduct proven in the record below, and this Court should not be distracted by GSR's red herring argument.

**GSR Erroneously Portrays That The Guests In Question All Originate In Sumona Islam's "Book Of Trade" That She Has the Right to Take to GSR**

This is a misleading assertion upon which virtually all of GSR's arguments improperly are grounded.[6] This contention was proven inaccurate at trial. The evidence establishes that only 18 of the 220 guests added to the GSR database by Islam were part of her book of trade (Exhibit 75 from trial).[7] Moreover, the evidence was uncontroverted that Islam did not utilize her book of trade, Exhibit 75 at trial, at all while at GSR.[8] Rather, Islam admitted that after she became

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[5] GSR Answering Brief at 11:15-19.
[6] *See for example*, GSR Answering Brief at 5:7-21, 6:9-19, 13:8-18, 15:12-16:23, 17:12-26 (asserting relationship equates to book of trade), 21:11-25:4, 26:18-20, 28:18-21, and 29:1-22.
[7] 18 App. 3653:11-19. Throughout this litigation the term "book of trade" was considered a collection of guest information compiled by a host through her own efforts, which information the host has a legal right to take with her and use for her own purposes, including at a subsequent employer because the information has not originated with the employer casino which has restricted its dissemination through contract and/or treatment as trade secret. *See for example*, 6 App. 1240:13-14 and 1241:4-15(Decision), 7 App. 1573:20-23(FFCL). *See also*, GSR Answering Brief at 15:6.
[8] 14 App. 2973:2-14, 2986:20-22, 2980:11-13, 2981:15-18(Islam).

employed by GSR she would daily enter information into the GSR database that she had illegally copied from the Atlantis database into the six spiral notebooks.[9] 14 App. 2978:9-2979:1, 14 App. 29801:9. Indeed, this was the finding of the district court. 7 App. 1577:1-5 (finding that Islam had input the information into the GSR database from the spiral notebooks she had wrongfully taken from Atlantis). Yet GSR relies upon the contention that as the information it received was asserted to come from Islam's book of trade its acceptance and continued use of that information is excused, as the cornerstone of its case on appeal.[10] Islam's book of trade is the Outlook list [Exhibit 75] not the spiral notebooks.

GSR also implies that Islam did not have a book of trade when she came to Atlantis because the information she brought purportedly consisted of trade secrets that were the property of Harrah's.[11] First, that issue was never brought before, nor determined by the trial court. Second, if true, it would only serve to further undermine GSR's position, as in that case the identity and contact information for even those 18 guests would not belong to Islam and therefore could not be appropriately transferred to GSR.

As described in additional detail below, the information that Islam claims represented her book of trade when she came to Atlantis is not determinative of this case. At issue is the protection of the information developed by Atlantis that Islam illegally took and gave to GSR.[12] This information includes guest lists, information measuring the value of guests and rating guests (such as player tracking and club information), marketing and guest development strategies and

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[9] *See also*, GSR Answering Brief at 15:12 (indicating information entered into GSR database came from the spirals).
[10] See, footnote 6 *Supra*.
[11] GSR Answering Brief at FN 4.
[12] Atlantis Opening Brief at Pages 6 and 24-27.

information and the services rendered to guests. All of these items are intellectual property that the district court determined to be trade secrets.[13]

**GSR's Focus Upon Personal Relationships Is Misplaced**

GSR also focuses upon personal relationships in an attempt to blur the line of proprietary information.[14] Basically, GSR's position is that if a host has met a guest, the host has a "relationship" with them and therefore the host can simply take the information that the host, or other hosts, or the employer has developed from the employer's database.[15] In so arguing, GSR fails to acknowledge that trade secret and contract law can govern the ownership of guest information. Additionally, as the district court articulated, a book of trade is something that has been developed outside of the context of the work for the employer.[16] Moreover, if a personal relationship existed between Islam and all of these Atlantis guests there would have been no need for her to surreptitiously and illegally take the address, telephone, email, and rating information from the Atlantis computer screen in her office and copy that information by hand into spiral notebooks, which she then used to populate the GSR database. The guests would have come and found her and the hundreds of solicitations in the record would not have been required or sent.

**Statements Without Citation To The Record**

In contravention to NRAP 28(e), GSR makes a number of significant statements of "fact" without citation to the record. Each of these should be

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[13] 6 App. 1247:10-1248:4. (Decision) and 7 App. 1582:19-1583:22 (FFCL).
[14] GSR Answering Brief at 5:10-21, 15:16-17, 17:12-26.
[15] GSR Answering Brief at 6:9-18.
[16] The district court found a "book of trade' to be "those names and contact information of guest that they [the host] have developed relationships throughout – through their own efforts." 20 App. 4244: 4-8. *See also,* 7 App. 1573:12-23 (FFCL). Importantly, although Islam claimed Exhibit 75 and 80 (the spirals) to be her book of trade the court found the creation of 80 improper and a violation of the UTSA. 7 App. 1573:24-27 and 1581:18-1583:24.

disregarded. Perhaps most critical and erroneous of these is the assertion that "[t]hroughout her employment at Atlantis, Sumona wrote down her book of business in spiral notebooks."[17] Not only is there no citation to the record in support of this bold assertion, the evidence at trial and the findings of the district court directly contradict it. Incredibly, GSR wishes this Court to assume that the information that Islam admitted to taking, and the district court found, was copied illegally by Islam's hand from the Atlantis computer screen into spiral notepads was or became her "book of business." That conclusion is unsupported by the facts adduced at trial. Rather, the district court found the information that Islam copied into those spirals notebooks and brought to GSR, where she transferred the information to the GSR database, was misappropriation, and a willful violation of the UTSA.[18]

**There Was No Evidence Offered that GSR Sought And Obtained An Opinion Of Counsel That The Non-Competition Between Atlantis And Islam Was Illegally Overbroad And Unenforceable**

Despite GSR's statement in its brief implying the opposite, there was no opinion of counsel admitted at trial indicating that the Non-Competition Agreement was legally unenforceable.[19] No such evidence was produced in the litigation, much less admitted into evidence at trial, and no affirmative defense of advice of counsel was raised pursuant to NRCP 8. In support of this assertion, GSR does not cite to any opinion of counsel admitted into evidence, but rather to the introduction page to Mr. Flaherty's testimony and Islam's testimony that she discussed the Non-Competition Agreement with management staff of the GSR.[20]

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[17] GSR Answering Brief at 13:8-9.
[18] 7 App. 1573:24-27, 1574:7-26, 1577:1-5, 1578:20-28, 1581:18-1583:26, 1585:8-1586:13 (FFCL), 20 App. (Decision of Court).
[19] GSR Answering Brief at 14:16-19.
[20] GSR Answering Brief at 14:19. *See* 15 App. 3036:4-7 wherein Islam testifies "I don't remember exactly what he [Flaherty] said, but something like their counsel

That is not advice of counsel or evidence of advice of counsel. Rather, even the decision of the district court demonstrates that its reliance is based upon assumption rather than fact. "Legal counsel apparently reviewed that [the Non-Compete] and gave the green light to hire Ms. Islam." 7 App. 1575:25-26 (emphasis added).

**GSR Has Misrepresented the Nature of the Atlantis Information It Obtained From Islam**

GSR's discussion of what a host can personally add to its database appears intended to mislead the Court regarding the undisputed evidence of confidential, proprietary information that GSR accepted from Islam and then used for its own benefit.[21] This issue and citations to the evidence supporting this misappropriation and use was discussed at length in the Atlantis Opening Brief.[22] GSR claims that Islam's "conduct after working at GSR confirmed that she was not using confidential and/or trade secret information of Atlantis."[23] Yet the evidence at trial clearly disproves this assertion.[24]

GSR also confirms that only the marketing committee can determine what offer is made to a perspective guest, and all Islam could do is "make recommendations."[25] This admission proves Atlantis' case. Islam provided the trade secret information to GSR and GSR used it to make marketing decisions and offers. The district court received evidence of those offers.[26] GSR unpersuasively

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looked at it and they think its okay, something like that." This hearsay statement does not establish proper foundation for an advice of counsel defense.

[21] GSR Answering Brief at 15:8-21.

[22] *See*, Atlantis Opening Brief Regarding GSR at pages 23-27.

[23] GSR Answering Brief at 17:17-18.

[24] *See*, Atlantis Opening Brief Regarding GSR at pages 23-27.

[25] GSR Answering Brief at 18:2-4.

[26] Trial Exhibits 33-40, 21 App. 4451- 22 App. 4579 (GSR spreadsheets exhibiting special and enriched marketing offers utilizing information from Islam). *See also*, 15 App. 3111:16-20 (Testimony of Islam confirming she used Atlantis information to determine the offer that the guest would find enticing).

touts its alleged compliance with the district court's injunctions by asserting it prevented Islam from having further access to those trade secrets of Atlantis after she provided them to GSR[27] and ceasing solicitations to 36 guests out of hundreds about whom Islam provided confidential information to GSR.[28] GSR's factual statement is also puzzling in its reference to Islam's book of trade brought to Atlantis, Exhibit 75 at trial.[29] GSR takes the position that although it had no copy of that document before this litigation, GSR nevertheless admittedly is utilizing the document. GSR attempts to justify its continued use of the Atlantis information it received from Islam, relying upon an assertion that those guests are part of Islam's alleged book of trade. Such reliance is misplaced. The evidence at trial demonstrated that only 18 of the guests added to the GSR database were persons that also appeared on Islam's book of trade.[30] Further, there is no evidence that GSR has ever held or been provided, outside of this litigation, with Islam's book of trade and it elsewhere in its brief notes that the list was not brought to GSR by Islam.[31]

## ARGUMENTS ON ATLANTIS APPEAL

### A. Application of UTSA

#### 1. GSR Incorrectly Frames the Issue in Dispute

The question before the Court is not whether a host's book of trade is a trade secret, [32] and GSR's attempt to distract this Court into determining the application

[27] GSR Answering Brief at 15:27-28 and 19:13-15.
[28] GSR Answering Brief at 19:6-10 compared to Atlantis Opening Brief at pages 23-27.
[29] GSR Answering Brief at 19:10-11.
[30] Atlantis Opening Brief Regarding Islam at 10:11-17 and 23 App. 4884-4887 (McNeeley comparison column showing which guests were also on outlook list).
[31] GSR Answering Brief at 15:6.
[32] That is a determination that cannot be made without knowing how the Book of Trade was compiled and has been treated and it is irrelevant to the issues before the district court or this appeal.

of the UTSA to a host's book of trade is not pertinent to this appeal.[33] Rather, the question is whether the Atlantis information taken by Islam and transferred to GSR is a trade secret. GSR, understandably, seeks to preclude this Court from considering that question as it knows a review of the evidence will find no support for the district court decision it now must defend. Therefore, GSR instead attempts to refocus on the comparatively innocuous issue of the host's book of trade and a host's personal relationships with guests. In its Opening Brief, Atlantis describes significant evidence constituting trade secret information of Atlantis that was disseminated to GSR by Islam and used by GSR to compete against Atlantis.[34] GSR has failed to address this evidence and instead seeks to refocus upon the non-determinative issue of a host book of trade. GSR's position is based upon the fiction that the only intellectual property that was misappropriated to it was the alleged book of trade belonging to Islam. That contention is false. If it were true then Islam would not have been found to have violated the UTSA. Moreover, the record establishes that Islam's book of trade, Exhibit 75, was not used by her during her employment with GSR. *Supra* at pages 3-4.

At trial, Islam's book of trade was identified as the list of players with whom she claimed to have a host relationship when she was hired by Atlantis. For the purposes of this litigation, that was accepted as the persons and contact information contained on Trial Exhibit 75. There is no evidence that Islam used that list in populating the GSR database. Rather, the evidence is that Islam added information to the GSR database by using the spiral bound lists of guest information she had wrongfully copied by hand from the Atlantis computer database.[35] Thus, rather than utilizing information from her "book of trade," Islam plainly admitted to using Atlantis intellectual property to populate the GSR database with names and

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[33] GSR Brief at 20:8-13, 21:11-18.
[34] *See*, Atlantis Opening Brief at pages 23-27.
[35] This is admitted by GSR in its brief. GSR Answering Brief 15:6 and 15:12-14.

contact information from high value guests of Atlantis.[36] She similarly used information gathered from her Atlantis employment to value the guests and determine the type of offer which would most likely be effective for a guest, and provided that to GSR.[37] Again, that information came not from Trial Exhibit 75, her book of trade, but from her experience and knowledge gained from years of employment at Atlantis and from the confidential player rating information she admittedly and wrongfully copied from her computer screen while she was still employed by Atlantis.[38] Thus, although GSR goes on at length misapplying Nevada case law to Islam's book of trade, Trial Exhibit 75, GSR's argument is irrelevant.

The relevant inquiry lies with the source of the information actually misappropriated. In that regard, the evidence is clear that none of the information came from Islam's book of trade and only 18 of the guests that were added from the spirals were even identified as also being therein. The actual and undisputed source of the information that GSR received, and continues to hold and presumably use in its electronic files was the spiral notebooks that Islam illegally copied by hand from the Atlantis database.

**2. Host's Book of Trade as a Trade Secret is Not Dispositive**

Whether a host's book of trade is a trade secret was not a pivotal question in this litigation. Atlantis submits that, consistent with the UTSA, *Finkel v. Cashman Professional Inc.*,128 Nev. __, 270 P.3d 1259 (2012) and *Frantz v. Johnson*,116 Nev. 455, 999 P.2d 351 (2000) such a determination, like any intellectual property, will depend upon what information is contained therein, its economic value, how it has been obtained and how the persons with access to it treat the information. In

[36] 14 App. 2978:9-2979:1, 14 App. 29801:9.

[37] *See for example*, 15 App. 3111:16-20, 3091:19-24, and 3099:15-23.

[38] This is consistent with a violation of the fourth factor examined in *Frantz v. Johnson*, 116 Nev. 455, 999 P.2d 351 (2000).

its Answering Brief, GSR continues a discussion of the host book of trade as if that is the trade secret information in dispute. Rather, the intellectual property at the center of this suit is the information Islam illegally copied from the Atlantis computer system by hand and transferred to GSR as well as the related information provided and used by GSR in guest marketing.[39]

Ironically, GSR's quote from its executive director of casino marketing Hadley sums this up. "So we don't control people, just information in the computer."[40] That is precisely the point. The Atlantis went to great lengths to protect the information in its computer and Islam misappropriated that information providing it to her new employer, GSR, who undisputedly utilized it in competition with Atlantis and continues to use that information today. Whether Islam's book of trade, Exhibit 75 from trial, is a trade secret is of no relevance. She elected to share it with Atlantis and although she had not provided it to GSR it can be assumed, for the purposes of this discussion that she could have. Had she provided her book of trade to GSR that would have included the identities of only 18 of the guests involved and none of their gaming or Atlantis derived proprietary player information. Thus, Islam's book of trade would have no impact on the hundreds of other elements of information involved in this dispute.[41]

GSR's discussion of historic hiring practices of the gaming industry generally, and at Atlantis specifically, similarly is irrelevant. The legal obligations

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[39] Atlantis Opening Brief at pages 23-27.

[40] GSR Brief at 24:11-12.

[41] Based upon the evidence at trial Islam had approximately 485 guests coded to her at GSR when the initial injunction occurred. 21 App. 4376-4389. (Islam's code list produced by GSR) of those, 220 had their identities added to the GSR database by Islam. 21 App. 4383-4389 (guests added by Islam after February 1, 2012). In addition Islam provided Atlantis' proprietary information to GSR in the form of marketing recommendations related to prospective guests. 21 App. 4451-22 App. 4579 (GSR Spreadsheets exhibiting special offers), 22 App. 4581-4586, 4605, 4613-4618(emails from Islam to GSR marketing directing offers be extended), and 22 App. 4684-4687 (Emails requesting free play).

of the parties are determined by the current status of the law in the State of Nevada and the terms of the particular contracts and agreements between the involved parties, with which GSR interfered. For that reason, GSR's citation to California case law, a State that does not allow non-competition agreements, is misplaced.[42]

**3. Application of the *Frantz* Factors**

The GSR's application of the *Frantz* factors is truncated in factual scope because GSR applies it only to its adopted definition of a host's book of trade.[43] As GSR is silent on the facts actually relevant to this dispute (the information Islam copied from the Atlantis computer screen by hand into 6 spiral notebooks) this Court can properly assume that GSR agrees that the information on the Atlantis computer database, which the district court found Islam had illegally copied onto the spiral notebooks she brought with her from Atlantis to GSR, is a trade secret as defined by *Frantz v. Johnson*, 116 Nev. 455,466, 999 P.2d 351, 358 (2000). This Court should further find that Islam had no right to copy or provide that Atlantis information to GSR.

Atlantis disputes GSR's contention that a customer list, even if only containing names and contact information, is not a trade secret. A list of high value gaming guests is precisely the type of list deserving of trade secret protection for the gaming industry in Nevada. This issue was comprehensively discussed in the Atlantis Opening Brief at pages 9-23 and those arguments will not be reiterated here. This concept also is acknowledged in the conflicting rulings of the district

[42] *See*, Citation to *ContinentalCar-Na-varCorp. Vl Moseley*, 24 Cal. 2.d 104, 148 P.2d 9(Cal 1944), GSR Brief at 27:1-5.

[43] As described in the factual discussion above, Islam's book of trade (Exhibit 75) was not utilized by her at GSR. Therefore, the foundational assumption of GSR's argument, that Islam shared with it her book of trade, is without any factual support.

court related to this issue.[44] As described therein the district court did find the particular information copied by Islam to be trade secrets of Atlantis, including customer lists and customer information.[45] Yet with regard to the claim against GSR the district court erroneously determined that a customer's name, address and contact information is not a trade secret.[46] The conflict between the rulings is also apparent in the order favoring GSR, finding that upon Islam's employment at GSR, she entered approximately 200 guests from her book of trade. 7 App. 1593:18-21. However, as described *supra* and in the same order one paragraph above, the information came not from her book of trade, but rather from the spiral notebooks she had illegally copied from the Atlantis database. 7 App. 1593:15-17.

Applying the first of the *Frantz* factors, the extent to which others outside the business know the information and the ease or difficulty with which others could acquire the information properly, GSR argues that this proprietary information can be determined by the public observance of the players. Atlantis submits that common sense indicates that not to be the case. Public observance of

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[44] Compare 7 App. 1574:7-12, 17-26, 1577:1-5, 1582:19-1583:22 (FFCL in favor of Atlantis stating that customer and guest lists, including player contact information, tracking and club information and guest preferences and gaming tendencies are highly sensitive trade secrets and proprietary and confidential information of Atlantis) to 7 App. 1593:18-1594:21, 1595:11-14, 1596:28-1597:10 (FFCL in favor of GSR finding that customer names, addresses, and contact information is not a trade secret under NRS 600A.010).

[45] *Id*.

[46] The district court also erroneously found that the GSR computer database permitted Islam to enter *only* guest names, address and contact information, and drew the improper conclusion that since this information purportedly is not protected trade secret information under the UTSA, GSR had not received protected trade secret information from Islam and thus, did not violate the UTSA. 7 App. 1593:18-25, 1596:28-1597:2. In addition to this being an untenable legal conclusion, it also lacks factual foundation. GSR's Executive Director of Casino Marketing plainly testified that hosts have the ability to add remarks about guests to the GSR computer database. 16 App. 3357:17-18.

a gaming guest will not result in learning their name, address or contact information such as telephone number or email. Thus, GSR has failed to address even the first factor.

GSR similarly fails to assail the proof set forth establishing the second factor, whether the information was confidential or secret. Indeed, GSR admits that it also considers such information secret.[47] Instead, it argues circularly that since a guest might be included in some host's book of trade, that information is pubic. Notably, GSR's argument ignores that a host might treat her book of trade as a trade secret and further fails to support this theory with any evidence from this case. GSR also fails to address the third factor, the extent and manner to which the employer guarded the information's secrecy. In this case the adequacy of the steps undertaken by Atlantis was not disputed and the court so found. 7 App. 1574:13-26, 1583:11-19 (FFCL).

In addressing the fourth *Frantz* factor, the former employee's knowledge of the customer's buying habits and other customer data and whether this information is known by competitors, GSR utterly fails to address Islam's knowledge. Instead GSR argues that guests provide their information freely. This is no doubt true for some guests, but of no significance to the claims here. Atlantis did not file suit against GSR based upon guests randomly deciding they would stop in and provide their information to GSR. The claim is based upon the information misappropriated to GSR by Islam and GSR's solicitations to Atlantis preferred guests based upon the information Islam provided about guest habits, value, preferences, tendencies and the marketing offers to which they would respond. GSR is silent as to these issues.

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[47] GSR Brief at 25:7-8.

The *Frantz* factors mandate a finding that GSR has violated the UTSA and an order reversing the district court's determination in favor of GSR, finding that a customer's name, address and contact information is not a trade secret.

**4. Misappropriation by GSR**

GSR claims not to have violated the UTSA; however, its analysis conveniently fails to address its use of Atlantis proprietary information provided to it by Islam. Indeed, GSR argues that its subjective intent in acquiring the information is controlling.[48] Nevertheless, the statute is clear and GSR has directly violated it. Use is misappropriation when the person using the information does not have permission of the owner and at the time of the use knew, or had reason to know that. The evidence is undisputed that GSR knew that Islam obtained the guest information through improper means, and that it had been acquired under circumstances giving rise to a duty to maintain its secrecy, or she owed a duty to Atlantis to maintain the secrecy of the information. NRS 600A.030(2)(c). Even if GSR did not initially direct Islam to take the information from Atlantis, GSR had the requisite knowledge, or reason to know, that it was wrongfully acquired.

GSR implies that the willfulness requirements of NRS 600A.050 and NRS 600A.060 are a required element to establish violation of the statutory scheme.[49] That is incorrect. All that is required is a showing that GSR knew or had reason to know of the nature of the information and still used the information. There is no exception that allows GSR to continue to use the information if, when it first started receiving information or agreed to receive it, GSR did not understand that it was trade secret information or that to do so would result in it violating the UTSA.[50] Given the knowledge GSR had, it is, as a matter of law, liable for its

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[48] GSR Brief at 27:7-28:16, 29:18-20.
[49] GSR Brief 28:1-4, 28:21-26.
[50] *See*, NRS 600A.030 et seq.

continued use of the Atlantis information and Atlantis requests this Court to so find and remand this matter to determine damages for that past and continued use.

GSR knew or should have known that it was using Atlantis trade secret information at least as of receipt of the cease and desist letter from Atlantis' General Counsel dated April 6, 2012.[51] In support of its contention that it conducted a reasonable and good faith investigation in response to the Atlantis letter GSR cites simply the testimony of Islam that she spoke with Tom Flaherty about the letter.[52] Even if the good faith investigation assertion is accepted and regardless of Islam's falsehood, wherein Islam allegedly told GSR that she was only utilizing her book of business [GSR Brief 29; 26-27], the fact is that after receiving the letter from Atlantis' General Counsel GSR had *reason to know* that it was receiving and utilizing proprietary information that was wrongfully acquired. Similarly, GSR certainly cannot deny it had reason to know after being served with a lawsuit, or after the district court entered an injunction, or after the entry of a permanent injunction against Islam, prohibiting her use of the information she had provided to GSR. Each of these facts provided GSR yet further reason to know. Additionally, the Court is reminded that, indeed, the district court found Islam had willfully violated the UTSA, imposing punitive damages, and awarding attorney fees and permanently enjoined her.[53] Accordingly, the initial information that GSR received from Atlantis' General Counsel well prior to commencement of litigation was correct. The fact that GSR chose to ignore it does not establish that GSR was without reason to know.

GSR's next argument suggests an exception to the misappropriation of trade secret information if a "personal relationship" existed between the source, Islam, and the hundreds of persons who received marketing offers sent by GSR based

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[51] 21 App. 4291-4299.
[52] GSR Brief at 29:27 citing to 15 App. 3108 and its responsive letter.
[53] 7 App. 1581:18-1583:26 and 1585:8-22 (FFCL).

upon Atlantis information derived from Islam.[54] GSR, again, cites to no exception in the UTSA or case authority and none exists.

Next, GSR attempts to excuse its use of information from Islam by arguing that it was following its standard practice. However, an examination of the portions of the record cited demonstrates that normally GSR conducted marketing based upon a strategy developed by a committee and a mathematical algorithm. In other words, the evidence showed that normally GSR employed an objective, almost scientific approach to marketing. However, when it came to marketing to the guests that Islam identified, management directed that offers were to be made at levels, amounts and in a form dictated by Islam.[55] This was not GSR's standard practice, and moreover GSR's explanation fails to address, or excuse, the multiple transfers of information from Islam to GSR. Those were described in detail in Atlantis' opening brief and will not be reiterated here.[56]

GSR's description of its purported compliance with the temporary injunction demonstrates the inadequacy of those efforts and the continued use of the Atlantis trade secret information then and likely now. A temporary restraining order ("TRO") was entered against Islam on May 9, 2012.[57] Counsel for GSR attended that hearing and therefore were aware that the district court had enjoined and prohibited Islam from being employed by GSR or any other competitor of Atlantis, from disclosing in any way confidential, proprietary or trade secret information of Atlantis, and from soliciting customers of Atlantis.[58] The initial TRO was expanded to include GSR on July 5, 2012.[59] That order prohibited GSR from using any information it had reason to believe was acquired by Islam directly

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[54] GSR Brief at 30.
[55] 18 App. 3807-3810.
[56] Atlantis Opening Brief Regarding Grand Sierra Resort at 23:16-27:19.
[57] 1 App. 116-119.
[58] *Id.*
[59] 2 App. 280-283.

or indirectly through Atlantis "or make use of any information which it knows has been the product of information Defendant SUMONA ISLAM brought to GSR through her employment."[60] This language is important as it encompasses all information produced or received by the GSR from Islam.[61] Notably the scope of the district court order mirrors NRS 600A.030(2)(c). GSR thereafter stipulated to the imposition of a preliminary injunction which extended the terms of the July 5th order against it.[62]

In its brief, GSR contends that it made adequate efforts to comply, but the discussion reveals not just the inadequacy of those past efforts, but the continued use of that information obtained from Islam.[63] For example GSR contends that it "froze" the information, but the transcript establishes that despite the freeze GSR did not remove the information and although it did not assign new hosts to the guests, it nevertheless had other hosts provide services to the guests in question.[64] Whether the guests are officially assigned to other hosts is of no moment. GSR is making use of the information in direct violation of the TRO. The contended compliance is of very limited benefit to Atlantis and is nowhere near that required by the district court's order. Indeed, the evidence cited demonstrates that GSR still has the information and is still hosting the guests. Further, the evidence proves that far fewer than the few hundred guests initially seen by GSR as involved were actually placed on the do not invite list.[65] Moreover, the solicitations modified in September, would not have impacted marketing until

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[60] 2 App. 282:14-21.
[61] Described in detail in the Opening Brief at 23:16-27:19.
[62] 2 App. 329-339.
[63] GSR Answering Brief at 31:1-32:14.
[64] 16 App. 3337:7-3338:9.
[65] Compare 16 App. 3339:16-3340:7 (Testimony describing GSR's efforts in August finally addressing the district court's July 5th Order) to 22 App. 4736-4741 (Email in September addressing 36 guests.)

October.[66] Thus, GSR admits to being slow to implement even minimal action, still has all of the information it ever received from Islam and notably it makes no representation nor cites to any statement in the record as to what it is doing with the information now. The record and even GSR's statements on appeal demonstrate that with the exception of 36 players, whose Atlantis derived information was not used for an unknown period of time, it has continued to use the information it received from Islam.[67]

GSR also implies that its violations of injunctions and continued use of Atlantis information should be excused as Atlantis did not bring a motion on any violation, thus the issue was not preserved below.[68] That contention is simply incorrect. Essentially, GSR argues that because it choose not to comply with the district court's injunctions and Atlantis sought damages at trial instead of seeking to hold GSR in contempt, its violations should be excused. If anything, the argument provides a basis for this Court to find the actions of GSR to be willful. *See*, NRS 600A.050(2). The UTSA claim was pursued against GSR, temporary injunctions were obtained and damages for the use of the information were requested and a permanent injunction was sought against it.[69]

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[66] 16 App. 10-20.

[67] 22 App. 4736-4741 (email string between Ambrose and Hadley); 18 App. 3837:14-3849:9 (Ambrose) and 16 App. 3332-3348 (Hadley). *See also*, 16 App. 3337:23-3338:4 (confirming that some GSR hosts have met and hosted the players coded to Islam and their information has not been removed from the GSR database.)

[68] GSR Brief at 31:11.

[69] 1 App. 89-103(Amended Complaint), 2 App. 284-292(TRO) , 2 App. 338-339(Preliminary Injunction), 20 App. 4059:4-9, 4074:17-4078:15, 4084:8-4087:7(Closing Argument).

### B. The Non-Compete Agreement Was Valid And Should Not Have Been Stricken

Not surprisingly, GSR continues to argue that the Non-Competition Agreement between Atlantis and Islam is unreasonable in scope. This issue was comprehensively discussed in Atlantis' Opening Brief Regarding Islam at pages 35-42 and in the Reply to Islam's Answering brief filed herewith at pages 5-8. Therefore Atlantis will not reiterate those arguments here, and instead adopts its arguments and authorities in those briefs by this reference. However, Atlantis once more respectfully emphasizes the significant public policy implications arising from this issue. In Nevada, non-compete contracts are allowed by statute and are common. NRS 613.200(4). Many employers rely upon non-competition covenants to facilitate the effective operation of their business while protecting their valuable information. Indeed, if GSR and Islam had observed the cool off period of the Non-Compete agreement between Islam and Atlantis, then much, if not all of these issues would likely have been avoided.

### C. The District Court Improperly Dismissed Atlantis' Claim For Tortious Interference

The district court determined that some of Atlantis' claims addressing tortious interference with the contractual relationship and future business with guests were best addressed pursuant to the UTSA.[70] But Atlantis did not concede below that the elements of such a claim had not been met or that cause of action should not be considered.[71] On appeal Atlantis maintains that GSR did violate the provisions of the UTSA and did interfere with the prospective relationships between Atlantis and its guests, as well as the contractual obligations of Islam to Atlantis and the district court erred in failing to so rule.[72]

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[70] 20 App. 4248:10-4249:3 (Decision of the Court), 7 App. 1581:14-16 (FFCL).
[71] 22 App. 4069:23-4071:7, 4077:13-24 (Closing Argument)
[72] Atlantis Opening Brief Regarding GSR at 2:12-17, 3:20-4:6,6:3-6, 18:1-23:15 and 27:20-28:14 .

The facts are undisputed that GSR knew of the Non-Competition Agreement between Islam and Atlantis and that concerns over that agreement and possible litigation were central to the employment negotiations between Islam and GSR.[73] The district court struck that contract as overbroad, determining it to not be valid. If the contract is valid and that determination was erroneous, then GSR's actions amount to tortious interference. The district court dismissed this claim based upon the invalidity of the contract.[74] Thus, if this Court upholds the Non-Compete Agreement, the district court's determination of this related claim also must be overturned, or at a minimum remanded for further consideration. The evidence did not establish that GSR instructed Islam to take information from Atlantis, but the evidence did establish that GSR accepted that information and continued to use that information even after receiving notice from Atlantis through the cease and desist letter, the service of this suit, and even after the district court had imposed injunctions prohibiting that use.[75]

**D. Defense Of Advice Of Counsel Was Not Before The Court And Not Supported By The Record**

As set forth in the facts, GSR fails to cite to any portion of the record to demonstrate an evidentiary foundation for this issue, nor was it raised as an affirmative defense pursuant to NRCP 8(c) in its Answer.[76] In support of this defense GSR only cites to portions of the record establishing that Islam provided GSR with a copy of the Non-Compete Agreement before GSR elected to make Islam an offer of employment, and that the offer ultimately included providing

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[73] 7 App. 1575:18-21(FFCL favoring Atlantis) and 7 App. 1593:10-11(FFCL favoring GSR).

[74] 7 App. 1596:22-27(FFCL favoring GSR).

[75] The first and only action taken by GSR in response to the notice from Atlantis, the suit and the district court's injunctive orders was cessation of solicitations to no more than 36 guests. 22 App. 4736-4741. *See also*, 16 App. 3332:1-3333:8, 3353:6-3354:16 (Hadley).

[76] 1 App. 227-233.

Islam with defense counsel at no cost to Islam in the anticipated litigation.[77] Those actions indeed demonstrate that even before hiring Islam, GSR contemplated that litigation may well ensue, and its review of the Non-Compete Agreement in particular sets foundation for the tortious interference claim leveled by Atlantis, but those actions do not properly support an exculpatory defense of advice of counsel.

It is implicit that to rely upon an affirmative defense of advice of counsel there must be evidence of advice and actions in good faith conformance with that advice. The case law cited by GSR, although predating NRCP 8, requires that it be shown that the relied upon advice was sought in good faith and given after a full disclosure of the facts known to the person claiming defense based upon the advice. *Gerbig v. Gerbig*, 61 Nev. 387, 128 P.2d 938 (1942). Thus, to enjoy protection afforded from such a defense GSR needed to disclose the advice received and demonstrate the facts upon which the advice was based. The district court could then determine if the actions of GSR were consistent with the advice and if the information upon which it was based was sought in good faith and in conjunction with disclosure of full facts known to GSR. In order to rely upon this defense, GSR needed to waive the attorney client privilege as to those issues relating to the alleged advice of counsel and introduce the requisite evidence. *Aspex Eyewear, Inc. v. E'Lite Optik, Inc.*, 276 F. Supp. 2d 1084, 1091 (D. Nev. 2003) ("when an accused infringer relies on the advice of counsel defense the accused infringer waives the attorney-client privilege...”); *see also Sedillos v. Bd. of Educ. of Sch. Dist. No. 1*, 313 F. Supp. 2d 1091, 1094 (D. Colo. 2004) (the decision to place the advice of counsel in issue in a case was an affirmative act which resulted in a waiver of the attorney-client privilege with respect to the subject matter of that advice). Here no waiver of privilege was lodged, that defense

[77] GSR Answering Brief at 33:21-24.

was not pleaded, and no evidence was submitted of the alleged advice of counsel, or of the information, if any, provided to counsel.

Despite this vacuum of evidence, the district court relied upon the affirmative defense of advice of counsel in reaching its decision, and in doing so, committed reversible error.[78] Indeed, the district court even found that "Atlantis knew that GSR had hired Ms. Islam based on its attorneys [sic] legal opinion that the agreement was overly broad in denying Ms. Islam the right to work in any capacity in any casino."[79] 7 App. 1595:16-18 (FFCL favoring GSR). GSR cites to no factual support for this finding because there is none. The decision of the district court should be reversed.

GSR cites to one case, *Gerbig v. Gerbig*, 61 Nev. 387, 128 P.2d 938 (1942), in support of its failure to raise advice of counsel as an affirmative defense.[80] However, that 1942 pre-NRCP case is not controlling because Atlantis' complaint was filed long after adoption of NRCP 8. *Gerbig* predates the rules and therefore reliance upon it for the proposition advanced by GSR is misplaced.

**E. The Award Of Fees Against Atlantis Was Improper**

The award of fees in favor of GSR should be reversed in conjunction with this Court's reversal of the district court finding that there was no violation of the UTSA, and/or that the Non-Compete agreement was unenforceable. If either of those determinations is reversed, no legal basis to award attorney's fees will exist under the UTSA or the offer of judgment. Absent the district court's erroneous rulings there is no basis whatsoever for an award of attorney fees against Atlantis.

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[78] 7 App. 1457:11-12 (FFCL) and 20 App. 4260:10-16(Oral Decision).
[79] This mistaken interpretation of the evidence can be seen in the district court's statements during closing arguments. See, 20 App. 4094:7-4096:13.
[80] As noted above GSR failed to present the evidence supported by the holding of *Gerbig*.

Contrary to GSR's assertion, the award of fees to GSR was sua sponte. No request was made, nor was evidence in support of such an award offered by GSR. Rather, GSR claims the award was a cost and suggests it should have been dealt with in post-trial motions. However, here GSR never made the request.[81]

With regard to the offer of judgment, Atlantis disputes its validity, and therefore its enforceability. GSR argues that despite the fact that the entity making the offer no longer existed, since GSR had the same counsel the offer should be found valid.[82] The question must be asked, had the offer been accepted and enforcement sought against the dissolved entity, would that argument carry the day?

Moreover, the *Beattie* factors do not support the award of attorney fees. Atlantis' claims were brought in good faith and the district court so found.[83] The question is the maintenance of the claims. As set forth in this appeal, Atlantis maintains that the district court must be reversed as GSR did violate the UTSA and still today retains and utilizes for its benefit Atlantis trade secret information that it derived from Islam and therefore continues its violation of the UTSA.[84] At the very minimum, the record establishes the basis for a legitimate legal question and demonstrates Atlantis' good faith basis to maintain its claims against GSR through trial.

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[81] In contrast, because Atlantis was seeking attorney fees as foreseeable damages arising from tortious conduct and breach of contract it not only requested such an award as part of its damages, but also presented evidence in the trial in support of that damage claim. This was consistent with the holding of the case cited by GSR, *Sandy Valley Assocs. v. Sky Ranch Estates Owners Ass'n*, 117 Nev. 948, 956, 35 P.3d 964, 969 (2001).

[82] GSR Answering Brief at 39:22-24.

[83] 7 App. 1577:24 (FFCL). *Beattie v. Thomas*, 99 Nev. 579, 588-89, 668 P.2d 268, 274 (1983).

[84] Ironically, the district court's decision prohibits the use of this same information by Islam.

The offer was not reasonable in its timing or amount ($75,000.)[85] As disclosed by the GSR's own claim for fees, the expense by that point had been significant and the Atlantis information had not been returned and remains with GSR today. Additionally, the amount was less than the value of the information as measured by every analysis presented save and accept the actual win loss claimed by GSR. Notably, we do not even know that current figure as GSR continues to retain the information and reap the benefits of the Atlantis trade secret information it obtained from Islam. The offer of judgment did not have a value representative of the information taken, and GSR ignores that it is not subject to the permanent injunction against Islam and continues its use of the information obtained from her.

Finally, the fees may or may not be reasonable in amount. Atlantis was not given the opportunity to properly evaluate this. Despite the Order of the district court and multiple requests by counsel for Atlantis, GSR failed to provide that information.[86]

## ARGUMENTS ON CROSS-APPEAL

### A. GSR's Fee Award Should Not Be Increased, It Should Be Reversed

Atlantis incorporates by reference the argument and authority included *supra*, in this Reply brief. As set forth therein, the award of fees against Atlantis has no appropriate legal basis and should be vacated and reversed. In its Cross-Appeal GSR seeks additur from this Court. [GSR Answering Brief at 44:20 – 45:7.]

Atlantis did not act in "bad faith" by bringing or maintaining this suit. NRS 600A.060 does not support the award of fees to the prevailing party. Rather, it must be demonstrated that Atlantis made the claim in "bad faith." Here the

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[85] 10 App. 2161-2163. *See also*, 10 App. 2199.
[86] 11App. 2330:1-3 (Order directing GSR to submit redacted copy of billing statements).

district court specifically found that the suit was properly initiated by Atlantis.[87] Thus, the district court either has committed error by finding that the claim was appropriately initiated by Atlantis or by finding that the claim was made in bad faith. It is impossible for both statements to be true and illogical that the district court could hold both views even subjectively.

## CONCLUSION FOR APPEAL AND CROSS-APPEAL

Atlantis reaffirms the request for relief set forth in its Opening Brief. The information provided to GSR by Islam, including the names, addresses and contact information of high value gaming guests is information which, treated as it was by Atlantis, constitutes protected intellectual property information in Nevada. As such the GSR's misappropriation of that information, as well as the other Atlantis trade secrets provided to it by Islam, including guest value and rating information, marketing information and gaming preference information, requires a finding that GSR violated the UTSA.

It is similarly obvious from the arguments and evidence advanced on appeal that the district court committed reversible error in ruling that the Non-Compete Agreement is overbroad. The record establishes that GSR tortiously interfered with that contract by hiring Islam and by funding the defense of this lawsuit. The record also establishes that GSR failed to raise, and presented no evidence upon which the district court properly could derive an affirmative defense of advice of counsel. Therefore the district court's application and reliance upon the affirmative defense of advice of counsel was clear error.

Atlantis further requests that the award of attorney fees and costs against it be reversed. It is axiomatic that the reversal of the district court's decisions regarding the UTSA and/or tortious interference with contract will eliminate any basis for such an award. Moreover, the award is improper for the other reasons set

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[87] 20 App. 4260:10(Decision of Court) and 7 App. 1577: 24 (FFCL).

forth in the briefs. Similarly, on the cross-appeal, this Court should deny any request for additur to the improper fee award.

Respectfully submitted this 2nd day of March, 2015.


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**ATTORNEY'S CERTIFICATE OF COMPLIANCE FOR RESPONDENT'S ANSWERING BRIEF AND APPELLANT'S REPLY BRIEF REGARDING THE GRAND SIERRA RESORT**

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 Microsoft Word in 14 point font and type style Times New Roman.

I further certify that this brief complies with the page or type-volume limitations of NRAP 28.1(e)(2)(A)(i) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points, and contains 8,514 words.

Finally, I hereby certify that I have read this Answering and Reply Brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular 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 2nd day of March, 2015.

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## CERTIFICATE OF SERVICE

I certify that on this date, I served a copy of the foregoing document upon all counsel of record by:

☒ Mail on all parties in said action, by placing a true copy thereof enclosed in a sealed envelope in a designated area for outgoing mail, addressed as set forth below. At the Law Offices of Laxalt & Nomura, mail placed in that designated area is given the correct amount of postage and is deposited that same date in the ordinary course of business, in a United States mailbox in the City of Reno, County of Washoe, Nevada.

☒ By electronic service by filing the foregoing with the Clerk of Court using the E-Flex system, which will electronically mail the filing to the following individuals at the email addresses set for the below.

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Dated this 2nd day of March, 2015.

/s/ L. MORGAN BOGUMIL
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