IN THE SUPREME COURT OF THE STATE OF NEVADA

Landon Shores,

Appellant/Defendant

vs.

Global Experience Specialists, Inc.,

Respondent/Plaintiff

Case No.72716

APPELLANT'S OPENING BRIEF

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LANDON SHORES

NRAP 26.1 DISCLOSURE

Pursuant to NRAP 26.1, the undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a).

No such corporations or entities exist.

Since the inception of this case, KEMP, JONES & COULTHARD, LLP has been counsel of record for Appellant Landon Shores. Mark Jones (Nev. Bar No. 267), Madison Zornes-Vela (Nev. Bar No. 13626), Matthew Carter (Nev. Bar No. 9524), and David Blake (Nev. Bar No. 11059) have appeared for Landon Shores and no other attorneys are expected to appear in this court in this case.

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JURISDICTIONAL STATEMENT

The Supreme Court of Nevada has jurisdiction over this case pursuant to NRAP 3A(b)(3). NRAP 3A(b)(3) permits an appeal from an order granting an injunction.

Appellant Landon Shores ("Shores") is appealing the district court's order granting a Preliminary Injunction in Respondent Global Experience Specialists, Inc.'s ("GES") favor on March 23, 2017.

The district court granted GES's Motion for Preliminary Injunction and entered the Preliminary Injunction on March 23, 2017. Shores timely filed a Notice of Appeal in the district court on March 24, 2017. *See* NRAP (4)(a)(1).

On May 30, 2017, the Nevada Supreme Court granted Appellant's Motion to Stay the Preliminary Injunction Pending Appeal, and determined that an expedited briefing schedule was warranted. Pursuant to the expedited briefing schedule set by the Nevada Supreme Court, Appellant's brief is to be filed by June 19, 2017.

NRAP 17 ROUTING STATEMENT

The routing of cases is addressed in NRAP 17. Under NRAP 17(a)(10), appeals from cases originating in business court are assigned to the Supreme Court. The instant appeal arises from a case originating in Department XII of Eighth Judicial District Court, which is designated as a business court and, therefore, falls within the

Appeals. As of today's date, Shores believes this case has not yet been assigned by the Nevada Supreme Court to the Court of Appeals.

ISSUES PRESENTED

Under Nevada law, a noncompete agreement must be reasonable to be enforceable. A noncompete clause is unreasonable if it imposes restraints greater than necessary to protect the employer's interest or imposes an undue burden on the former employee. An unreasonable clause in the noncompete agreement renders the entire agreement unenforceable as a matter of law.

To be reasonable, a territorial restriction in a noncompete agreement must be limited to areas in which the employer has a protectable business interest in the form of established customer contacts and goodwill. GES's Noncompete Agreement contains a blanket nationwide territorial restriction, but GES failed to provide evidence in obtaining its preliminary injunction that it had customer contacts and goodwill throughout the United States. Did the district court err in determining that the nationwide territorial restriction in the subject noncompete agreement was nonetheless reasonable, by relying solely on nonbinding, non-Nevada case law in spite of applicable black letter Nevada law to the contrary?

Did the district court further err in determining that the subject noncompete agreement was reasonable in spite the fact that the Noncompete Agreement is broader than necessary to protect GES because it precludes Appellant's future

employment that does not threaten GES's legitimate business interests and imposes an undue burden on Appellant?

Did the district court err in granting the Preliminary Injunction because the balance of harms weighs in Shores' favor and because GES failed to meet its burden to show irreparable harm, while Shores demonstrated irreparable harm in being forced to comply with an unenforceable noncompete agreement?

STATEMENT OF THE CASE

This case arises out of Respondent GES's attempt to enforce a noncompete agreement containing a noncompete clause with a nationwide territorial scope against Shores after Shores left GES's employment in January 2017. In March 2017, GES brought a Complaint against Shores, alleging claims for breach of contract, breach of the covenant of good faith and fair dealing, unjust enrichment, and injunctive relief, and moved for a Preliminary Injunction. The district court entered its order granting GES's Motion for Preliminary Injunction on March 23, 2017 and on March 24, 2017 Shores filed a Notice of Appeal.

STATEMENT OF RELEVANT FACTS

A. Shores' Employment with GES and Freeman

Shores began working for GES in 2013. Joint Appendix ("App."), Vol. I, at APP000066. GES is a general services contractor and, in that capacity, builds show floors for trade shows, conventions and corporate events. App., Vol I, at APP000066.

Generally, GES signs a contract with the show organizer and then all exhibitors for the show are required to utilize GES for certain services. App., Vol I, at APP000066. Shores' duties included soliciting show organizers to sign a contract with GES. App., Vol I, at APP000066.

Shores signed the subject Confidentiality and Non-Competition Agreement ("Noncompete Agreement") in or around September of 2016. App., Vol. I at APP000035-42. Section 1.6A of the Noncompete Agreement (the "Noncompete Clause") purports to prevent Shores from indirectly or directly competing with GES or performing services similar to those Shores performed at GES throughout the United States for a period of 12 months after leaving GES:

> Employee agrees that he/she will not directly or indirectly compete against the Company, whether as an employee, consultant, or otherwise, by performing services on his/her own behalf and/or on the behalf of any third party that are competitive with **and/or similar to the services that Employee performed for the Company during the last twelve (12) months of his/her employment** with the Company. Without limiting the foregoing, this restriction also applies to those parent companies, affiliates, and subsidiaries of the Company's competitors, including any successors or assigns whether now owned or purchased as a result of a stock and/or asset purchase, and/or acquired via merger or any other means during the term of this Agreement.
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> ...
>
> Employee agrees that a geographical restriction on competitive employment **in the United States**...is reasonable and necessary to protect the Company's legitimate business interests.

App., Vol. I, at APP000037-38. (emphasis added).

Shores accepted a sales position with Freeman Expositions, Inc. ("Freeman") in Anaheim, California and began working for Freeman on or about February 1, 2017. App., Vol. I, at APP000066. Shores moved to Anaheim, California, acquired a California driver's license. App., Vol. I, at APP000067, and became a resident of California before he began working for Freeman.

B. Lower Court Proceedings

On January 31, 2017, GES filed a Complaint against Shores, alleging claims for breach of contract, breach of the covenant of good faith and fair dealing, unjust enrichment, and injunctive relief. App., Vol. I, at APP000001-6. On the same day, GES filed a Motion for Preliminary Injunction pursuant to the Noncompete Agreement, requesting an order enjoining Shores from: 1) soliciting or doing any business with any clients of GES; and 2) performing any work which would be in competition with GES. App., Vol. I, at APP000007-44. In support of its Motion for Preliminary Injunction, GES provided only the Declaration of Thomas Page and copies of various agreements signed by Shores, including the Noncompete Agreement. App., Vol. I, at APP000021-44.

Shores filed his opposition to GES's Motion for Preliminary Injunction on February 23, 2017, which noted in part that GES provided **no evidence** of its alleged nationwide business territory in its Motion. App., Vol. I at APP000045-70. In its Reply, GES finally provided evidence it alleged supported the nationwide territorial restriction in the Noncompete Clause. App., Vol. II, at APP000071-161. GES

attached a schedule of all events for which it had contracted from December of 2015 through the end of 2017 ("Contract List") to the Declaration of Jon Massimino. App., Vol. II, at APP000082-153. GES also provided a spreadsheet summarizing the event locations identified in the Contracts List by city ("City Spreadsheet"), attached to the Declaration of David Malley. App., Vol. II, at APP000154-161. GES's Contract List and City Spreadsheet demonstrate that GES has not contracted for any events in seventeen (17) of fifty (50) states since December 2015. App. Vol. II at APP000082-161. This evidence further demonstrates that GES has contracted for fewer than ten (10) events in only certain cities in sixteen (16) additional states. App. Vol. II at APP000082-161.

The district court heard GES's Motion for Preliminary Injunction on March 6, 2017, and granted GES's Motion for Preliminary Injunction "to the extent that [Shores] can't be the sales manager. In other words, he can't do the – do what he was doing with Global Experience Specialists." App., Vol. II, at APP000162-186.

The district court entered the Preliminary Injunction on March 23, 2017, which enjoined Shores from a broad scope of employment activities for twelve months, commencing January 1, 2017. App., Vol. II at APP000189-198. In its Preliminary Findings of Fact and Conclusions of Law the district court found that the nationwide scope of the Noncompete Clause was reasonable:

- GES presented evidence that it operates on a national scale, including evidence that between December 2015 and March 2017, GES operated

in at least 33 states, plus Washington, D.C. and Puerto Rico, and in 119 different cities.

- The relief sought by way of the present motion is an injunction to prevent Shores from soliciting or doing any business with any clients of GES and from performing any services on his own behalf or on behalf of any third party that would be similar to and/or competitive with the services he performed for GES.

- The nationwide geographic scope of the covenant not to compete contained in the Agreement is also reasonable. The Court disagrees with Shores that a nationwide restriction on employment is unreasonable as a matter of law. Rather, a nationwide restriction is reasonable if it is justified by the nationwide nature of the employer's business. (citing numerous non-Nevada cases) (citations omitted).

- Here, a nationwide restriction is reasonable based on the nationwide nature of GES' business, as well as the work Shores performed for GES with respect to events at locations across the country.

App., Vol. II at APP000192-195.

The district court further found that GES demonstrated it would suffer irreparable harm due to Shores' alleged competitive conduct, and that any hardship suffered by Shores was outweighed by the harm suffered by GES. App., Vol. II at APP000195-197.

Shores filed a Notice of Appeal in the district court on March 24, 2017 and in the Nevada Supreme Court on April 3, 2017. App., Vol. III at APP000211-212.

C. Appellant's Motion to Stay

On March 27, 2017, Shores filed a Motion to Stay Enforcement of the Preliminary Injunction on Order Shortening Time. App., Vol. III, at APP000213-236.

GES filed its Opposition on March 28, 2017, and the hearing on the Motion was held March 30, 2017. App., Vol. III, at APP000237-271. On April 6, 2017, the district court entered an order granting in part Shores' Motion to Stay Enforcement of Preliminary Injunction, issuing only a temporary fifteen-day stay. App., Vol. III, at APP000272-75.

On April 10, 2017, Shores filed a Motion to Stay the Preliminary Injunction Pending Appeal with the Nevada Supreme Court. *See* Appellant Landon Shores' Motion to Stay Preliminary Injunction Pending Appeal (on file). GES filed its Response on April 13, 2017 and Shores filed his Reply on April 21, 2017. *See* Response to Motion to Stay Preliminary Injunction Pending Appeal (on file); *see also* Appellant Landon Shores' Reply to Response to Motion to Stay Preliminary Injunction Pending Appeal (on file). On May 30, 2017, the Nevada Supreme Court granted Appellant's Motion to Stay the Preliminary Injunction, and determined that an expedited briefing schedule was warranted. *See* Order Granting Motion for Stay Pending Appeal and Setting Expedited Briefing Schedule (on file).

SUMMARY OF THE ARGUMENT

This Court must vacate the Preliminary Injunction because the district court committed error and manifestly abused its discretion by granting GES's Motion for Preliminary Injunction.

The district court's decision must be reversed because GES does not enjoy a reasonable likelihood of success on the merits. The Noncompete Clause is

unreasonably broad for a multitude of reasons and, therefore, is unenforceable under Nevada law. In addition, while Shores demonstrated that he would suffer irreparable harm if the Preliminary Injunction was entered pursuant to the terms of the unenforceable Noncompete Agreement, GES failed to establish irreparable harm. Therefore, the district court erred in finding that GES met its burden to obtain the Preliminary Injunction and the Preliminary Injunction must be vacated.

The Noncompete Clause is unreasonable for at least three different reasons, each of which is sufficient to render the Noncompete Agreement unenforceable as a matter of law.

First and foremost, the Noncompete Clause is unreasonable because its territorial scope is not limited to the areas in which GES has established customer contacts and good will. It is well settled under Nevada law that a noncompete clause cannot restrict an employee from working in a territory **in which the employer does not have established customers and goodwill**. *See Camco, Inc. v. Baker*, 936 P.2d 829, 833-34 (Nev. 1997). In determining that the nationwide territorial scope of the Noncompete was reasonable, the district court applied the incorrect legal standard. Rather than rely on the Nevada Supreme Court's clear precedent in *Camco*, the district court relied solely on non-Nevada cases in direct contradiction of applicable black letter Nevada law. As such, the district court's decision was clearly erroneous.

Under the applicable legal standard set forth in *Camco*, it is clear that the territorial restriction in the Noncompete Agreement is unreasonable. GES failed to present evidence that it had established customers and goodwill throughout the United States to justify the nationwide prohibition on Shores' future competitive

employment. Thus, the Noncompete Agreement is overbroad because its territorial restriction is not limited to territory in which GES has established customer contacts and goodwill.

The only evidence GES provided in support of its Motion for Preliminary Injunction demonstrates that GES has not contracted to provide any services in seventeen (17) of fifty (50) states since December 2015. This evidence also shows that GES has a *de minimis* presence in an additional sixteen (16) states, which is insufficient to establish customer contacts and goodwill throughout those states. Thus, there are a total of thirty-three (33) states in which GES cannot show the requisite established customers and goodwill. Under *Camco*, GES clearly failed to provide any evidence, let alone substantial evidence to support the blanket nationwide territorial restriction in the Noncompete Clause. As such, the district court abused its discretion in determining that the nationwide territorial restriction in the Noncompete Clause was reasonable.

Second, the Noncompete Clause is unreasonable as a matter of law because its scope is broader than necessary to protect GES' legitimate business interests. *See Golden Rd. Motor Inn, Inc. v. Islam*, 376 P.3d 151, 155 (Nev. 2016). Even assuming GES could demonstrate that it had established customers and goodwill in every territory in every state (which it has not done and cannot do), GES cannot show that it has a legitimate business interest in preventing Shores from performing the same or similar job functions for companies that do not compete with GES. Thus, the district court erred in determining that the Noncompete Clause was reasonable because it imposes

restraints against Shores that are broader than necessary to protect GES's potential business interests.

Third, the Noncompete Clause is unreasonable because it imposes an undue burden on Shores by seeking to preclude Shores from working in his chosen profession throughout the entire United States, which effectually forces him to leave the United States to continue working in his chosen and developed profession. Therefore, even assuming GES had a legitimate business interest in enforcing the Noncompete Agreement throughout the entire United States, which is does not, the Noncompete Agreement is unreasonable because it imposes an undue burden on Shores.

To the extent this Court considers the balance of harms, the district court abused its discretion by entering the Preliminary Injunction because a balance of the relative harms shows that GES was not entitled to a preliminary injunction. GES did not meet its burden to show irreparable harm. Conversely, Shores has shown that he will suffer irreparable harm if he is forced to comply with a Preliminary Injunction based on a noncompete agreement that is unenforceable as a matter of law.

Accordingly, the district court erred in entering the Preliminary Injunction in favor of GES and must be vacated by this Court.

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ARGUMENT

A. The district court erred by granting GES's Motion for Preliminary Injunction because GES does not enjoy a likelihood of success on the merits.

1. Preliminary Injunction Factors

"NRS 33.010(1) authorizes an injunction when it appears from the complaint that the plaintiff is entitled to the relief requested and at least part of the relief consists of restraining the challenged act." *Univ. & Cmty. Coll. Sys. of Nevada v. Nevadans for Sound Gov't*, 100 P.3d 179, 187 (Nev. 2004). A party seeking the issuance of a preliminary injunction bears the burden of establishing (1) a likelihood of success on the merits; and (2) a reasonable probability that the non-moving party's conduct, if allowed to continue, will cause irreparable harm for which compensatory damage is an inadequate remedy. *S.O.C., Inc. v. Mirage Casino-Hotel*, 23 P.3d 243, 246 (Nev. 2001). Courts also weigh the potential hardships to the relative parties and others, and the public interest. *Nevadans for Sound Gov't*, 100 P.3d at 187.

2. Standard of Review

The determination of whether to grant or deny a preliminary injunction is within the district court's sound discretion. *Nevadans for Sound Gov't*, 100 P.3d at 187. On appeal, the appellate court's review is limited to the record, and the district court's decision will be disturbed if the district court abused its discretion or if the district court's decision was based on an erroneous legal standard. *Id.* Questions of law are

reviewed de novo and factual determinations will be set aside if clearly erroneous or not support by substantial evidence. *Id.*

If the appellate court determines that the proponent of the preliminary injunction does not enjoy a likelihood of success on the merits, it need not address the issue of irreparable harm. *Camco*, 936 P.2d at 834 ("Because we conclude that Camco does not enjoy a reasonable likelihood of success on the merits we need not address the issue of irreparable harm.").

3. The district court erred as a matter of law by finding that GES enjoyed a likelihood of success on the merits because the Noncompete Clause is unreasonable and, therefore, the Noncompete Agreement is unenforceable.

a. Noncompete Agreements are only enforceable under Nevada law if they are reasonable.

To determine whether a former employer enjoys a reasonable likelihood of success on the merits of its case to enforce a noncompete covenant, the court must consider whether the provisions of the noncompete covenant will likely be found reasonable at trial. *Camco*, 936 P.2d at 832 (citing *Hansen v. Edwards*, 426 P.2d 792, 793 (Nev. 1967)).

Pursuant to Nevada public policy, noncompete covenants are restraints of trade and will not be enforced unless reasonable. *See Hansen*, 426 P.2d at 793; *see also Camco*, 936 P.2d at 834; *Golden Road*, 376 P.3d at 158. "We have been especially cognizant of the care that must be taken in drafting in contracts that are in restraint of trade." *Camco*, 376 P.3d at 158. A noncompete covenant will be upheld only if the

covenant is reasonably necessary to protect the business and good will of the employer. *Jones v. Deeter*, 913 P.2d 1272, 1275 (Nev. 1996) (citing *Hansen*, 426 P.2d at 793). Post-employment noncompete covenants are subject to increased scrutiny because "the loss of a person's livelihood is a very serious matter[.]" *Ellis v. McDaniel*, 596 P.2d 222, 224 (Nev. 1979). "A strict test for reasonableness is applied to restrictive covenants in employment cases because the economic hardship imposed on employees is given considerable weight." *Golden Road.*, 376 P.3d at 158 (citing Ferdinand S. Tinio, Annotation, *Enforceability, Insofar as Restrictions Would Be Reasonable, of Contract Containing Unreasonable Restrictions on Competition*, 61 A.L.R.3d 397, § 2b (1975)). "[L]eniency must favor the employee and the terms of the contract must be construed in the employees favor." *Id.* at 158.

A restraint of trade is unreasonable if it is broader than is required to protect the employer or imposes undue hardship on the former employee. *Hansen*, 426 P.2d at 793. The scope of the time and territorial limits and the hardship imposed on the former employee are important factors for the court to consider in determining the reasonableness of a noncompete agreement. *Jones*, 913 P.2d at 1275 (citing *Hansen*, 426 P.2d at 793). Noncompete agreements that are overbroad in duration or geographic scope, or that impose undue burdens on former employees are unreasonable and unenforceable as a matter of law. *See Camco*; 936 P.2d at 834; *see also Golden Road*, 376 P.3d at 155-56.

To be reasonable, a territorial restriction must be limited to the territory in which the employer has established customer contacts and goodwill. *Camco*, 936 P.2d at 834. (emphasis added). In *Camco*, the Nevada Supreme Court held that a territorial restriction in a noncompete covenant barring employment with a competing business within fifty (50) miles of any area that was the "target of a corporate plan for expansion" was "completely unreasonable" because it covered too broad of an area and, therefore, operated as a greater restraint on trade than was necessary to protect the employer's interests. *Id.* at 833-34. "In light of this court's acknowledgement that non-competitive covenants are restraints of trade and subject to careful scrutiny when made in an employment context," the Nevada Supreme Court determined that the covenant was overly broad because it included territory in which the employer did not have a protectable interest. *Id.* at 834. Because the noncompete clause was unreasonable in territorial scope, it was unenforceable as against Nevada public policy. *Id.* Accordingly, the Nevada Supreme Court concluded that the employer did not enjoy a likelihood of success on the merits and found that the district court properly denied injunctive relief. *Id.*

Noncompete agreements are also unreasonable if they impose restrictions that are broader than necessary to protect the employer's legitimate business interests. In *Golden Road*, the Nevada Supreme Court concluded that the subject noncompete clause prohibiting the former employee from employment, affiliation, or service with any gaming business or enterprise was overly broad because it prevented the former

employee from employment that posed little risk to the employer's actual stated business interests in enforcing the noncompete agreement. 376 P.3d at 155. Thus, noncompete clauses that preclude employment that is unlikely to harm an employer's legitimate and protectable business interests are unreasonable and will not be enforced. *See id.*

Finally, noncompete agreements are unreasonable if they impose undue hardship on the former employee, regardless of the employer's business interest in enforcing the noncompete agreement. *Hansen*, 426 P.2d at 793; *Jones*, 913 P.2d at 1275. In *Jones*, 913 P.2d at 1273, the Nevada Supreme Court determined that a noncompete clause precluding the former employee from competing for five years imposed too great of a hardship on the employee and was not necessary to protect the employer's interests, even in light of the employer's contention that developing a customer base in that particular industry was difficult. *Id.* at 1275. In *Golden Road*, the Nevada Supreme Court determined that the subject noncompete agreement's prohibition on all types of employment with gaming establishments was unduly burdensome because it restricted the former employee's ability to be gainfully employed. 376 P.3d at 155.

As the Nevada Supreme Court recently affirmed, an unreasonable noncompete clause renders the entire noncompete agreement wholly unenforceable. *Golden Road*, 376 P.3d at 156 (citing *Jones*, 913 P.2d at 1275) (holding that noncompete as a whole was unenforceable where court concluded that a particular provision was unreasonable)). In *Golden Road*, "in light of Nevada's caselaw and stated public policy

concerns," the Nevada Supreme Court unequivocally rejected the proposition that noncompete clauses can be "blue-lined" or reformed. *Id.* at 155-160. Therefore, the entire noncompete agreement must pass muster or must fail, and an unreasonable noncompete clause cannot be enforced against a former employee. *See id.*

b. The district court applied an erroneous legal standard and abused its discretion in determining that the nationwide territorial scope of the Noncompete Clause was reasonable.

In its Preliminary Findings of Fact and Conclusions of Law, the district court determined that the nationwide scope of the Noncompete Clause was reasonable based on the alleged "nationwide nature" of GES's business. App., Vol. II at APP000194-95. However, in doing so, the district court applied an erroneous legal standard. The district court did not even cite *Camco v. Baker*, and relied solely on nonbinding, non-Nevada cases that directly contradict the Nevada Supreme Court's holding in *Camco*. App., Vol. II at APP000193-95.

In *Camco*, the Nevada Supreme Court unequivocally held that to be reasonable, a territorial restriction must be limited to the territory in which the former employer has established customer contacts and goodwill. 936 P.2d at 834. Conversely, the cases the district court relied on in determining the legal standard for the reasonableness of the territorial scope, found reasonableness based solely on the nature of the employer's business, but did not require a showing of established customer contacts and goodwill, as required under Nevada law. App., Vol. II at APP000194-95. The courts in those cases determined that the territorial scope of the

noncompete agreement was reasonable in spite of the fact that the noncompete agreement included territories in which the employer had no established customer contacts and goodwill, in direct contradiction of the Nevada Supreme Court's holding in *Camco*. App., Vol. II at APP000194-95. The district court thus erred as a matter of law because it failed to apply the legal standard set forth in *Camco* to determine whether the territorial scope of the Noncompete Clause was reasonable.[1]

Under *Camco*, there can be no question that GES failed to provide any evidence, let alone substantial evidence to meet its burden to show that the nationwide territorial restriction in the Noncompete Clause was reasonable. GES had the burden to show that it was entitled to a preliminary injunction, and thus was required to demonstrate, in part, that it would likely prevail on the merits at trial in proving that the scope of the Noncompete Clause is reasonable and enforceable. *See Mirage*, 23 P.3d at 246; *see also Camco, Inc. v. Baker*, 936 P.2d at 833-34. . GES utterly failed to show that it had established customer contacts and goodwill **throughout the United States** and, therefore, the district court abused its discretion in finding that

[1] Contrary to the district court's preliminary finding, Shores does not contend that a nationwide territorial restriction in a noncompete clause is *per se* unreasonable. App., Vol. II, at APP000194-195 Instead, Shores' position is that under *Camco*, a nationwide territorial restriction could be reasonable, but only if the employer has established that has customer contacts and goodwill throughout the entire United States. Thus, here, because GES failed to make this showing, the nationwide territorial restriction in the Noncompete Clause is unreasonable.

the nationwide restriction in the Noncompete Clause was reasonable in direct contradiction of black letter Nevada law. *See Camco*, 936 P.2d at 833-34.

The only evidence GES submitted unequivocally shows that GES **does not** have established customer contacts and goodwill throughout the entire United States to justify a nationwide prohibition on Shores' future competitive employment. App., Vol II at APP000082-161; Vol. III at APP000216-219. GES's Contracts List and City Spreadsheet shows that since December of 2015, GES has not signed a contract for a trade show or event in **17 entire states** and, thus, has precisely zero customers and goodwill in these states. App., Vol II at APP000082-161; Vol. III at APP000216-219. This fact alone shows that the territorial scope of the Noncompete Clause is grossly overbroad and unenforceable as a matter of law.

In addition to GES's complete non-presence in a full 17 states, GES's evidence also proves that it has only a *de minimus* presence (contracting for 10 or fewer events) in an additional 16 states. App., Vol II at APP000082-161; Vol. III at APP000216-219. GES's limited presence in these 16 states does not justify a noncompete restriction covering **that entire state**. *See Camco*, 936 P.2d at 833-834. For example, Detroit and Huntsville are the only cities in which GES has provided its services in Michigan and Alabama, respectively, since December 2015. App. at (Reply to M for PI, at Ex. 1-B). In *Camco*, the Nevada Supreme Court determined that the fact that the employer had stores in Las Vegas and Henderson did not establish customer contacts and goodwill approximately ninety (90) miles away in Bullhead City. Similarly, here,

GES's provision of services for a few days for one convention in one city does not establish customer contacts and goodwill throughout those entire states to justify a statewide restriction. *See id.* at 830, 833-34.

In sum, here, like the noncompete clause in *Camco*, the ***nationwide*** territorial restriction in the Noncompete Clause is unreasonable and against Nevada public policy because it is not limited to the areas in which GES has established customer contacts and goodwill and thus operates as a substantially broader restraint on trade than is necessary to protect GES's interests. 936 P.2d at 833-34. GES's non-presence and *de minimis* presence in 33 states means that GES does not have a protectable interest throughout the United States to justify the nationwide restriction GES imposes upon Shores in the Noncompete Clause. GES's Noncompete Clause is not just overbroad by a radius of 50 or 100 miles. It is effectively overly broad by at least 33 states, covering thousands upon thousands of square miles across the country. Accordingly, there can be no question that the district court erred in determining that the nationwide scope of the territorial restriction in the Noncompete Clause was reasonable.

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c. The district court abused its discretion in finding that the Noncompete Clause was reasonable because it is greater than is required to protect GES's business interests and imposes undue hardship on Shores.

i. The Noncompete Clause is unreasonable because it is broader than is required to protect GES's alleged business interests.

The Noncompete Clause is also unreasonable because it imposes restraints in excess of what is necessary to protect GES's actual business interests. *See Golden Road*, 379 P.3d at 155. Specifically, the Noncompete Clause is overbroad because GES has no **actual substantive** business interest in preventing Shores from providing services similar to those he performed at GES for a company that does not compete in any way with GES. *See id.*As written, the Noncompete Clause precludes Shores from conducting the same or similar work for a company in a state or market in which GES has no presence whatsoever. App., Vol. I, at APP000037-38. For instance, the Noncompete Clause would preclude Shores from providing the same or similar services he provided to GES to a company in Maine, a state in which GES has zero presence. App., Vol. I, at APP000037-38; Vol II at APP000082-161; Vol. III at APP000216-219. Under these circumstances, Shores could not possibly lure away GES's customers or otherwise interfere with GES's legitimate protectable business interests and, therefore, GES would have no substantive interest in barring Shores from working in that market. *See Golden Road*, 376 P.2d at 155 (finding that noncompete agreement was unreasonable because it precluded employment that posed unlikely risk to employer's stated business interest in retaining customers).

Thus, as in *Golden Road*, where the Nevada Supreme Court determined that the noncompete was unreasonable because it precluded employment that posed an unlikely risk to the employer's business interests, here, the Noncompete Clause is unreasonable because it precludes employment that poses no risk to GES's legitimate business interests.

ii. The Noncompete Clause is unreasonable because it imposes undue burden on Shores.

The nationwide scope of the Noncompete Agreement is unreasonable because it imposes an undue burden on Shores by precluding him from working in his profession anywhere in the United States throughout the duration of the Noncompete Agreement. *See Golden Road*, 376 P.3d at 155; App., Vol. I, at APP000037-38. If the Noncompete Agreement is enforceable, Shores' only realistic option to remain in his chosen profession after his employment with GES is voluntarily or *involuntarily* terminated is to work outside of the United States. This burden is particularly acute in light of the fact that GES has not and cannot establish that it has any legally cognizable interest in enforcing the Noncompete Agreement against Shores throughout the entire United States, including markets in which GES has no presence or contact whatsoever.

Pursuant to the strict test for reasonableness applied to noncompete agreements in the employment context due to the economic hardship such agreements imposes on employees, and the Nevada Supreme Court's determination

that noncompete agreements must be construed in the employee's favor, there can be no question that the Noncompete Clause is unreasonable because it places undue burden on Shores. *See Golden Road*, 376 P.3d at 158. Therefore, even assuming GES provided evidence of it nationwide business interests, which it did not and cannot do, the Noncompete Clause is unreasonable. *See Jones*, 913 P.3d at 1275.

d. The Noncompete Agreement is unenforceable as a matter of law.

Under Nevada law, if a clause within a noncompete agreement is determined to be unreasonable, then the entire noncompete agreement is unenforceable as a matter of law and as against Nevada public policy. *See Golden Road*, 376 P.3d at 156, 159 (citing *Jones*, 913 P.2d at 1275); *see also Camco*, 936 P.2d at 834. Under the strict test for reasonableness applied to noncompete agreements, Shores has shown that the Noncompete Clause is unreasonable on at least three independent bases, each of which would render the Noncompete Agreement unenforceable. *See Golden Road*, 376 P.3d at 158. Therefore, because the Noncompete Agreement is unenforceable as a matter of law, GES does not enjoy a likelihood of success on the merits, and the Preliminary Injunction must be vacated.[2] Accordingly, the issue of irreparable harm is irrelevant and this Court need not address the issue. *Camco*, 936 P.2d at 834.

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[2] Although this Court has the authority to modify the scope of the Preliminary Injunction pending a decision on the merits, modification is not warranted because the nationwide territorial scope of the Noncompete Agreement is unreasonable and thus unenforceable as a matter of law. *See Hansen*, 426 P.2d at 793; *Ellis*, 596 P.2d at 233.

B. The district court abused its discretion in entering the Preliminary Injunction because the balance of harms weighs against GES.

Although this Court need not address the issue of irreparable harm because GES cannot show a likelihood of success on the merits, *see id.*, to the extent this Court does consider this issue, this factor also weights in favor of vacating the Preliminary Injunction.

GES failed to present substantial evidence in support of its Motion for Preliminary Injunction that it would suffer any irreparable harm if the district court did not enter the Preliminary Injunction. App. Vol. I, at APP000007-44; Vol. II at APP000071-161. Instead, GES relied entirely on the crutch of presumed harm and has presented no evidence of actual irreparable harm caused by Shores leaving GES to work for a competitor in a different market, which is insufficient under Nevada law. *See Excellence Cmty. Mgmt. v. Gilmore*, 951 P.3d 720, 723 (Nev. 2015).

Conversely, Shores will suffer irreparable harm if he is forced to comply with an unenforceable noncompete restriction for its duration. The Preliminary Injunction is based on a noncompete agreement that amounts to an improper ***restraint of his chosen trade*** in violation of Nevada public policy. The deprivation of Shores' right to perform his specialized job duties pursuant to an unenforceable Noncompete Clause is, in and of itself, irreparable injury to Shores. Therefore, the district court erred in determining that Shores would not suffer any undue harm as a result of the Preliminary Injunction. App., Vol. II at APP000196.

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CONCLUSION

For the foregoing reasons, Appellant Shores respectfully requests that this Court reverse the district court's decision and order the district court to vacate the Preliminary Injunction.

DATED: June 19, 2017.

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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 it has been prepared in a proportionally spaced typeface in 14-point Garamond font.

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 does not exceed 30 pages.

3. I hereby certify that I have read this appellate 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: June 19, 2017.

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CERTIFICATE OF SERVICE

Under NRAP 25(c)(1)(A), I certify that I am an employee of Kemp, Jones & Coulthard, LLP and that on this date I caused to be served, via U.S. Mail, a true copy of the Appellant's Opening Brief and a thumb drive containing Appellant's Appendix to a clerk or responsible person at the offices of the following people:

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