IN THE SUPREME COURT OF THE STATE OF NEVADA

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

APPEAL FROM JUDGMENT AFTER BENCH TRIAL
SECOND JUDICIAL DISTRICT COURT, WASHOE COUNTY, NEVADA
HONORABLE PATRICK FLANAGAN, DISTRICT JUDGE

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APPELLANT'S OPENING BRIEF REGARDING SUMONA ISLAM

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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:

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

Respectfully submitted this 29th day of August, 2014.

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INTRODUCTION[1]

Golden Road Motor Inn, Inc. dba Atlantis Casino Resort Spa ("Atlantis") is a prominent Reno hotel/casino resort that employs executive casino hosts to promote relationships with valued guests. Atlantis takes extraordinary measures to prevent hosts from stealing information stored on the internal computers to which hosts have access. Outgoing emails are screened; internet access is restricted or blocked; computer files and documents cannot be uploaded to outside web sites or servers; computer documents and data cannot be printed; and the computers are even physically altered to prevent hosts from downloading information onto flash drives, CDs or other external devices. The system is designed to be fool-proof, but there is one thing the Atlantis cannot control – the ingenuity of a casino host who really wants to steal information. Sumona Islam ("Islam") was such a host.

Islam was fully aware of Atlantis' extraordinary efforts to maintain confidentiality of guest information, and Islam was aware that she had signed contracts protecting the information. Nonetheless, Islam surreptitiously copied guest information by hand when she was not being observed, sitting in front of computer monitors and tediously writing the information into small spiral notebooks. She then hid the notebooks and snuck them out of the resort. When she finished copying the confidential information, she resigned from the Atlantis and immediately started working as a casino host for the Grand Sierra Resort ("GSR"), which is a cross-town competitor casino resort. She then uploaded the stolen Atlantis information onto the GSR's computer databases. Additionally, before she resigned from the Atlantis, Islam also changed and falsified contact information for guests in Atlantis computer database, thereby preventing the Atlantis from contacting many of its most valued guests.

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[1] For ease of reading, facts in this Introduction are being provided without appendix citations. The body of this brief will provide appropriate citations to such facts.

Atlantis eventually found out about Islam's wrongdoing, and Atlantis sued Islam and the GSR for misappropriating Atlantis trade secrets. The district court ruled in favor of Atlantis on claims against Islam, finding that she intentionally and knowingly stole protected information and altered databases. Yet the district court rejected Atlantis' similar claims against GSR, finding that GSR did not know of Islam's theft of the information, and also finding that GSR did not use the stolen information to its advantage.

In this consolidated appeal, Atlantis contends that the district court erred by refusing to enforce a valid covenant not to compete, and by failing to find in favor of Atlantis on the conversion claim. The judgment in favor of Islam, in these two respects, should be reversed. In the companion brief, Atlantis addresses the district court's error in its ruling against Atlantis on the claims against GSR and in neglecting to ensure that the information that Islam stole and provided to GSR was returned to Atlantis and not used by GSR.

JURISDICTIONAL STATEMENT

This is an appeal from a final judgment dated August 26, 2013 which forms the basis for the Nevada Supreme Court's appellate jurisdiction pursuant to NRAP 3A(b)(1). Notice of entry of this judgment was served on October 1, 2013 and this appeal was timely filed on October 30, 2013.

STATEMENT OF THE ISSUES

1. Whether the district court erred by determining that the Non-Competition/Non-Solicitation Agreement between Atlantis and Islam was overbroad and unenforceable based upon its prohibition of employment with "any gaming business or enterprise."
2. Whether the district court erred by finding in favor of Islam and against Atlantis on its conversion claim.

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STATEMENT OF THE CASE

This is a consolidated appeal of the decision of the district court following the bench trial of claims brought by Atlantis against a former employee, Sumona Islam, and her new employer, GSR, related to the misappropriation and use of Atlantis intellectual property by Islam and GSR in contravention of Nevada law and contract. 8 App. 1774-1812 and 11 App. 2357-2373. Following the 11 day trial, the district court issued a decision from the bench in favor of Atlantis and against Islam, but also issued a decision in favor of GSR on the same and related claims brought against that entity. These decisions were memorialized in two written orders. The decision in favor of Atlantis was entered August 26, 2013, and is the subject of this brief.[2] 6 App. 1295-1310 and 7 App. 1566-1586. The decision in favor of GSR and against Atlantis was entered September 27, 2013, and is addressed in the companion brief filed separately by Atlantis, pursuant to this court's order of June 20, 2014. 7 App. 1456-1462 and 7 App. 1587-1598. This appeal followed; however, additional orders have issued related to awards of costs and fees, and these are the subject of amendments to some of the existing, and now consolidated, appeals.

Atlantis contends in the consolidated appeals that the decision of the district court is internally irreconcilable, in conflict with itself, contrary to Nevada law, as well as unsupported by the undisputed facts adduced at trial.

STATEMENT OF FACTS

This action was filed by Atlantis on April 27, 2012, following the mid-January 2012 resignation of Islam from her employment as an Executive Casino Host with Atlantis, and after Atlantis had determined that, in contravention to her contractual obligations and Nevada law, she had become employed by a direct

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[2] Islam also appealed from this order. *See* 9 App. 2013-2016 and 9 App. 2029-2032.

competitor of Atlantis (GSR), had sabotaged Atlantis' marketing database, and had misappropriated trade secrets of Atlantis to GSR that GSR was using to its commercial advantage.

It is the responsibility of an Executive Casino Host to identify and capture, and then promote and cultivate, the particular gaming guests assigned to them and, insofar as appropriate, to promote and cultivate the resort's high value gaming guests generally.[3] 14 App. 2915-2924 (Islam); 13 App. 2678 (DeCarlo) and 12 App. 2506-2507 (Ringkob). While employed by Atlantis for nearly four years, Islam was one of approximately 14 Executive Casino Hosts. 13 App. 2661:18-20, 2706:7-9 (DeCarlo). Like similarly situated Atlantis employees, Islam was required, as a term of her employment, to execute a number of contracts with Atlantis which had as part, if not their exclusive intent, the protection of the intellectual property and trade secrets of Atlantis. 14 App. 2947-2951, 2956-2961, 2962-2965:4, 2968-2970 (Islam) and 19 App. 3956-3966 (Robinson) The trade secrets sought to be maintained included, specifically, information developed by Atlantis regarding the highly valued gaming guests with whom Islam had contact and whose information she had access to as a consequence of her employment and position with Atlantis. *Id*. Because of her host duties, it was a requirement that even though Islam might not have any direct interaction with a guest or be a guest's assigned host, she would have access to the proprietary data kept by Atlantis related to guests assigned to her and all guests.[4] 12 App. 2496-2497 (Ringkob) and 13 App. 2680:9-2681:1 (DeCarlo).

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[3] "Capture" is a term used in the industry for the identification of high value gaming guests and the establishment of a relationship between the casino and the guest. 13 App. 2664:19-22 (DeCarlo).

[4] In other words, due to their job duties all hosts at Atlantis have access to the database that includes all guests, not just the guests with whom they have a host relationship. The evidence at trial indicated this to be the case at GSR as well. 16 App. 3297:1-20 (Hadley).

The Contracts

In order to protect its trade secrets, Atlantis utilized four contracts, and it is these contracts upon which the action below was largely based. These contracts include the: 1) Atlantis Online Systems User Agreement - 21 App. 4264-4268; 2) Business Ethics Policy and Code of Conduct Acknowledgement and Conflicts of Interest Statement - 21 App. 4269-4283; 3) Atlantis Company Policy Regarding Company Property, Proprietary Information and Trade Secrets - 21 App. 4284-4287; and 4) Non-Compete/Non-Solicitation Agreement - 21 App. 4288-4289. During the trial, Islam confirmed that she executed each of these.[5]

(1) Through the Atlantis Online Systems User Agreement, Islam agreed to accept and comply with the important standards set forth in that agreement. 14 App. 2948. Included among those policies was the critical prohibition against disclosing trade secrets or proprietary information. 14 App. 2949, 21 App. 4266-4269. That contract defined proprietary information and trade secrets to include guest lists, prospective guest lists and identification of the services rendered to such guests. 14 App. 2950-2951, 21 App. 4266-4267. Islam understood her agreement to this policy was a term of her employment and that she would be terminated if she did not agree to the policy and comply with it. 14 App. 2961.

(2) Pursuant to the Atlantis Business Ethics Policy and Code of Conduct, which Islam signed and acknowledged annually, Islam agreed, among other things, not to disclose confidential information to any unauthorized persons, either during or after termination of her employment. 21 App. 4276 and 14 App. 2958-2959. Confidential information is defined to include "all non-public information regarding the Company's operations and business activities and those of its

[5] Atlantis Online Systems User Agreement - 14 App. 2947-2948, Business Ethics Policy and Code of Conduct - 14 App. 2956-2957, Atlantis Company Policy Regarding Company Property, Proprietary Information and Trade Secrets - 14 App. 2962-2965 and Non-Compete/Non-Solicitation Agreement - 14 App. 2968.

customers," and the examples listed included "items such as customer lists, customer information (such as player tracking or club information)" and "trade secrets." 21 App. 4276 and 14 App. 2959. Islam understood that if she had not agreed to the policy, she would probably be terminated. 14 App. 2961.

(3) By signing the third agreement, i.e., the Atlantis Company Policy Regarding Company Property, Proprietary Information and Trade Secrets, Islam agreed to not share with Atlantis the trade secret information of others nor appropriate to others, the trade secret information of Atlantis. 21 App. 4284-4287 and 14 App. 2962-2967. Further, Islam understood that her agreement to be bound by this important policy was a term of her continued employment, and if she refused her employment would have been terminated. 14 App. 2967.

(4) Material to this appeal, through the Non-Competition Agreement, Islam agreed that as a condition of her employment with Atlantis, if that employment ended, she would not "be employed by, in any way affiliated with or provide any services to, any gaming business or enterprise located within 150 miles of Atlantis Casino Resort for a period of one (1) year after the date the employment relationship between Atlantis and Team Member ends." 21 App. 4289. Further, at trial, Islam admitted that she understood, when she signed the Non-Competition Agreement, that as an at will employee, she could have simply refused to sign the agreement or could even just quit. 14 App. 2968-2969. However, she testified that she elected not to quit and instead signed the agreement. 14 App. 2969. She acknowledged her understanding of the restrictions on her employment imposed by the Non-Competition Agreement, yet she still accepted a job with a competitor of Atlantis a few hours after her resignation. 14 App. 2969-2970. Indeed, she recognized that the employment at GSR was in direct violation of the Non-Competition Agreement. 14 App. 2970.

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Non-Contractual Efforts by Atlantis to Maintain the Secrecy of its Trade Secrets

In addition to express written contracts with its employees, Atlantis developed and used additional extraordinary measures to protect its proprietary information. This included restricting access to the data, disabling the methods to copy data from computers, and the fact that the computers with access to the marketing database do not have printers. 14 App. 2941. Islam recognized the existence of these extensive measures to protect Atlantis information, and as she explained at trial, she could not use a USB port or email a guest list from an Atlantis computer, because the emails are screened to preclude transmission of such information in their content. 14 App. 2954-2955.

Atlantis developed and scrupulously maintains its state-of-the-art security system to protect the confidential information in its guest databases, as Bob Woods, the Atlantis IT security administrator and one of the technicians charged with the construction, maintenance and operation of that system, testified at trial. 16 App. 3388:18-3390:15. Woods explained the extensive IT security efforts undertaken by Atlantis to ensure the security of its confidential and proprietary information. 16 App. 3390:16-3398:6. For example, casino hosts such as Islam can access the information only at secure computers. *Id*. Woods explained that the computer system at Atlantis has built-in features that block a user from emailing or printing confidential information, uploading information to a cloud or other outside server, or downloading information to an external device such as a CD or a flash drive.[6] *Id*.

Atlantis discovered in this lawsuit, and Islam admitted, that while still employed by Atlantis, she had covertly and surreptitiously copied guest database information by hand, sitting at her computer and tediously writing the confidential information into six or more spiral notebooks that she secretly took with her after

[6] These security measures were also confirmed by other witnesses at trial.

she quit her job at Atlantis.[7] 14 App. 2973:21-2976:5, 2978:6-16, 2998:9-11, The evidence at trial demonstrated that Islam had brought the spiral notebooks with her to her new employer, GSR, and transferred the information to GSR's databases. 14 App. 2976:13-19, 2977:15-21, 2978:17-2980:9, 2981:15-18, 2990:19-23. Islam testified that she added information related to 220 guests to the GSR database. 15 App. 3063:19-22. It was further undisputed that GSR used that and other information received from Islam to market to those guests. 16 App. 3312:11-17 (Hadley). Lastly, although the damage done to Atlantis was disputed at trial, it was not disputed that the conduct of GSR and Islam resulted in Atlantis guests frequenting GSR instead of Atlantis. Indeed, GSR reports admitted into evidence set forth the revenue from these guests for the period of January 2012 through November 2012. 22 App. 4619-4626. Those reports also can be used to compare the play of those guests during the same months in the year prior to Islam's employment at GSR (many of which had no play). *Id*. Through a comparison of those reports, admitted profit enjoyed by GSR and some of the impact of GSR's and Islam's solicitation of those guests can be conclusively proven.

Islam's Misappropriation

Despite the four important contracts that Islam signed, and the additional security measures employed by Atlantis to protect its trade secret information, Islam admitted that during her employment at Atlantis, she copied by hand guest information from the Atlantis player marketing database into a series of at least six spiral notebooks. 14 App. 2973-2978. During the testimony at trial, it was disclosed that at least one spiral notebook, in addition to the five notebooks produced, was allegedly lost in the GSR offices. 14 App. 2975-2978. Islam testified that she knew that it was a violation of Atlantis policy to copy the

[7] DeCarlo testified that he had never seen a host copying information from their computer screen, that such a behavior was discouraged, and had he observed Islam doing so he would have acted. 13 App. 2758-2759:4.

information, and that she copied it by hand because there was no other way to duplicate the information. All other ways had been disabled. 14 App. 2978.

Islam further testified that after becoming employed by GSR, she brought the spiral notebooks to the GSR and transferred the information from them into the GSR marketing computer database. 14 App. 2978-2980. Indeed, she testified that virtually all of the guest information that she added to the GSR computer database came from the spiral notebooks she had copied by hand from the protected Atlantis database.[8] 14 App. 2981. In addition to adding Atlantis guest information to the GSR database, Islam testified that she reviewed the GSR database and, if she recognized a person from her employment at Atlantis, she would ask GSR to code that person to her. 14 App. 2982-2983. In this way, she was able to improperly use not only Atlantis information she had copied into the spiral notebooks, but also information she learned at Atlantis related to persons for whom she did not have the contact information, but recognized their name.

At trial, there was evidence and argument regarding the host's "book of trade." 13 App. 2685:15-2686, 2711-2713:10 (DeCarlo) and 12 App. 2537-2540 (Ringkob). Guest information which was known to the host prior to her employment, based upon her own efforts and not proprietary information of another host or prior employer, and which the host brought with her to employment is commonly referred to as that host's "book of trade." *Id*.

In association with this issue, Islam was also asked at trial to identify those guests never hosted by her whose information was contained on the spiral notebooks and who had also been added to the GSR database. 15 App. 3071-3084. Islam identified approximately 50 Atlantis guests whose information she had added to the GSR marketing database and who never had been hosted (coded)

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[8] She also claimed to have captured (acquired) one or two new players and that some persons had come with friends to the GSR. 14 App. 2981 and 2984.

by her at Atlantis.[9] In other words, Islam admitted that these approximately 50 high value Atlantis gaming guests were guests assigned to other hosts at Atlantis, but she had improperly and surreptitiously copied by hand their information from the Atlantis database and transferred it to the GSR database. 15 App. 3083. This was in addition to the guest information Islam had added for guests known to her only as a consequence of her employment at Atlantis. These persons, in addition to the approximately 50 hosted by other Atlantis hosts, were therefore admittedly not part of any book of trade Islam brought to Atlantis, yet their information was misappropriated by her when she took it from Atlantis and added it to the GSR database.

Atlantis also presented to the district court the list of 220 guests added to the GSR database cross-referenced to the Atlantis host to whom those guests were assigned at the time Islam terminated her employment, and the book of trade Islam brought with her to Atlantis. 18 App. 3652:2-20 (McNeely) and 23 App. 4884-4887. This resulted in a determination that merely 18 of the 220 guests added to the GSR database by Islam were persons that she had identified as part of her book of trade when she came to Atlantis. 18 App. 3653:11-19. Removal of these persons from the damage calculation decreased Atlantis' damage calculation by only about $11,000.[10] 18 App. 3653:20-3654:18. This evidence also demonstrated that approximately half (99) of the 202 guests forming the basis for the Atlantis damage claim had been hosted by someone other than Islam at the time of her resignation. 23 App. 4884-4887.

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[9] Islam and other witnesses explained at trial that if a guest is "coded" to you, you are deemed the host that is responsible for the relationship with that player. 14 App. 2934:15-2935:20.

[10] The Atlantis method of calculating damages was not adopted by the district court.

GSR's Hiring of Islam

In September of 2011, Islam applied for a position of Executive Casino Host at GSR. 21 App. 4352. In that process, she interviewed with GSR management, Tom Flaherty, Vice President of Casino Operations and Shelly Hadley, Executive Director of Casino Marketing. 15 App. 3033:11-24, 3035:3-21, 17 App. 3528 and 16 App. 3285-3286. During the interviews, Islam disclosed to GSR the existence of her contractual obligations to Atlantis in the form of the Non-Compete/Non-Solicitation Agreement. 15 App. 3034:12-14 (Islam); 17 App. 3530:21-3531:19 (Flaherty) and 16 App. 3288:13-23 (Hadley). Despite this disclosure, GSR offered her, and she accepted, a position as an Executive Casino Host, the same position she had at Atlantis. 14 App. 2917. Islam further obtained, as a term of that offer, the agreement of GSR that it would provide her with legal representation if Atlantis asserted its rights under the agreements between Atlantis and Islam. 15 App. 3040:12-3041:6. Specifically, her GSR offer letter stated, "Based upon your concern that your former employer might bring legal action against you we are prepared to provide you with legal representation at no cost or expense to you." 21 App. 4339.[11]

Thus, the evidence was uncontroverted that Islam was aware and concerned about her obligations pursuant to at least the Non-Compete/Non-Solicitation Agreement as she negotiated the job with GSR, and that GSR was aware of the Non-Compete/Non-Solicitation Agreement prior to making Islam an offer of employment. This evidence also confirms that GSR and Islam recognized that the employment of Islam was in violation of the Non-Compete/Non-Solicitation

[11] This language was revised from a prior iteration of the offer letter which only nebulously committed GSR's support "concerning the potential legal action by your former employer in relation to your Non-Compete Agreement." 15 App. 3041:8-3042:17 and 21 App. 4341. The revised letter was much broader, covering any legal action brought by Atlantis.

Agreement and would very likely be met by legal action brought by Atlantis seeking to enforce its contracts with Islam.

Although GSR contended that Islam had been instructed not to bring information from Atlantis, the sworn testimony was unsupportive of that position. Islam denied that she had been told that she could not bring information to GSR. 14 App. 2988. Rather, Islam testified that all but one or two of the people she had added to the GSR database were from the spiral notebooks into which she had copied information from the Atlantis database. 14 App. 2981. She estimated this to be 150 to 200 guests.[12] 14 App. 2988. This is consistent with the list of guests coded to Islam that was produced by GSR which evidenced that Islam had added approximately 220 guests to the GSR database during her employment. 21 App. 4376-4389. Once employed at the GSR, Islam began to solicit guests she had known or known of during or as a consequence of her employment at Atlantis. In doing so, she would select a solicitation offer or value that she felt would "be a good offer for them." 15 App. 3089-3091. This determination of how much to spend on the solicitation for the prospective guest would, by its nature, necessarily utilize the knowledge of the guest's worth that Islam had gained from her employment at Atlantis. 15 App. 3089-3091. The evidence was uncontroverted that knowledge of the guest rating or value of the guest is proprietary information and is critical to the decision of how much in promotional benefits a casino will reinvest in the guest. 12 App. 2507:15-2508:22 (Ringkob); 13 App. 2667:13-2672:11, 2684:8-24, 2759:15-2760:12 (DeCarlo) and 14 App. 2924:7-12 (Islam).

Tom Flaherty was the Vice President of Casino Operations for GSR who had interviewed Islam and was involved in the decision to hire her. 17 App. 3528:21-3529:5; 17 App. 3529:16-21; 17 App. 3530:1-3, 3530:14-15. He also

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[12] Later in her testimony, Islam confirmed that she had added 220 guests to the GSR database. 15 App. 3063.

supervised Shelly Hadley, Islam's direct supervisor. *Id.* Flaherty never instructed Hadley or any other staff to ensure that Islam did not bring any confidential or proprietary information to GSR. 17 App. 3535:19:24. He similarly had no conversation with Islam regarding what to bring and utilize during her employment at GSR, nor did he ask Hadley to have such a conversation. 17 App. 3537:7-14. However, in contrast to the GSR claim, Flaherty understood and knew, after Islam began working at GSR and he had conversations with her, that she was soliciting clients that she had worked with while at Atlantis. 17 App. 3537:23-3538:8. In fact, between January 25 and May 3, 2012, there came a time that Flaherty knew from talking with Islam that she was soliciting guests that she had known while working at Atlantis and he had no concern with that. 17 App. 3539:3-9. Flaherty never took any steps to determine that persons Islam was soliciting were either assigned to her as an Atlantis host or were part of her "book of trade" that she brought with her to Atlantis. 17 App. 3539:10-18.

Likewise Islam's direct supervisor, Shelly Hadley, the Executive Director of Casino Marketing who supervised all hosts[13] never had a discussion with Islam about Islam's obligation to keep confidential Atlantis' information despite knowing that GSR has its own hosts sign a confidentiality agreement for that very purpose. 16 App. 3294:12-16 and 16 App. 3308:13-18. Hadley also never had a discussion with Islam as to what she should bring and not bring to GSR, nor was Hadley aware that anyone else at GSR had such a conversation with her. 16 App. 3296:13-19. Hadley knew that Islam was adding players and information to GSR's database that was coming from Islam's Atlantis relationships and permitted Islam to do so. 16 App. 3296:5-12.

Islam estimated that when she resigned from her employment at Atlantis, approximately 600-700 active guests were coded to her and that they had an

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[13] 16 App. 3286:5-13 and 16 App. 3293:10-13.

annual gross revenue value of $3.5-4 million dollars. 14 App. 2935:10-20 and 14 App. 2936:23-2937:5. At the time of Islam's resignation from Atlantis, knowing that she would be working for GSR, she falsely informed her direct supervisor, Frank DeCarlo, that she had accepted a job in Southern California to pursue a better opportunity. 13 App. 2727:1-2728:17 (DeCarlo). Mr. DeCarlo was satisfied with her stated reason for termination, but reminded Islam of her obligations pursuant to her contracts with Atlantis, including, specifically, her obligations regarding the Non-Competition Agreement which required that she not be employed by a competitor within 150 miles of Atlantis for a period of one year. *Id* and 15 App. 3038:20-3040:6 (Islam). Islam left the premises electing not to attend her exit interview with the Director of Human Resources. 15 App. 3045:18-3046:10.

Discovery of Sabotage

Following Islam's departure, guests assigned to her were reassigned to the remaining Atlantis host employees so as to prevent a break in service and solicitations to these important guests. 17 App. 3452:9-3453:22 (Moreno). Almost immediately, these hosts began to notice that the contact information in the marketing database regarding many of the guests previously assigned to Islam was incorrect. *Id*. Based upon the report by the Atlantis casino hosts, who were now serving the guests previously hosted by Islam, that much of the information within the database for those guests was inaccurate, an investigation was undertaken. 13 App. 2731:10-2733:11 (DeCarlo) and 18 App. 3629:18-3634:23 (McNeely) An audit of the database of guests previously coded to Islam demonstrated that Islam had changed and falsified the contact information within the gaming database related to 87 guests--sabotaging the use of that information by Atlantis.[14] *Id*. Due

[14] These changes were set forth in the "Sumona Islam Audit Trail History" 21 App. 4314-4317 and the specific changes were also exhibited at trial. 21 App. 4318-4329.

to the concern that personal solicitations would be sent to incorrect addresses, the marketing solicitations to the guests assigned to Islam were suspended while the audit was conducted and verified and the inaccurate information corrected. 18 App. 3632:1-22 (McNeely). This interrupted for approximately a month and a half the majority of the marketing to the Atlantis guests that had been coded to Islam. 18 App. 3631:24-3632:22, 3638:15-3639:1 (McNeely). Fortunately, the havoc that Islam caused by intentionally sabotaging the Atlantis database was not permanent. Utilizing backup information, Atlantis staff was able to recreate an accurate database as it had existed prior to the sabotage by Islam. 18 App. 3636:7-3638:14 (McNeely). That audit and repair occurred at an expense of approximately $2,117. *Id*. *See also*, 23 App. 4897 (itemizing the expenses).

Islam's Employment with GSR

Atlantis management eventually became aware of a rumor that Islam had in fact not moved to Southern California, but was instead working for GSR as an executive casino host. 13 App. 2730:17-20 (DeCarlo). If true, this meant she was working in direct competition against Atlantis only a few miles from Atlantis. This would be, at a minimum, a violation of her non-competition obligations. 21 App. 4289 (Non-Compete Agreement). GSR Director of Human Resources, Sterling Lundgren, testified that the Atlantis Director of Human Resources had called Lundgren to confirm that GSR was indeed employing Islam. 16 App. 3376:15-3379:10 (Lundgren). Atlantis initially gave GSR the benefit of the doubt and assumed that GSR was unaware of the contractual obligations owed by Islam. Atlantis informed GSR of Islam's contractual obligations upon learning of her employment with GSR, but the evidence revealed that GSR was already aware of the Non-Competition Agreement prior to making an offer of employment to Islam. 17 App. 3530:21-3531:19 (Flaherty).

By April, 2012, Atlantis' General Counsel, Debra Robinson, had become involved and had communicated with the GSR, sending a cease and desist letter

which, among other issues, raised the concern of violation of the Uniform Trade Secret Act ("UTSA") and the transfer of proprietary information to GSR. 19 App. 3971-3973:6 (Robinson) and 21 App. 4290-4302 (Correspondence). The GSR responded though counsel on April 18, 2012, indicating that GSR had investigated the issues and categorically denied any basis for an UTSA violation by GSR or Islam. 21 App. 4300-4302. GSR went further in its response and demanded that Atlantis provide it with evidence in support of its allegations. 21 App. 4301. During trial, evidence showed that contrary to GSR's representation in its letter to Attorney Robinson, during February, March, April and even after the letter was sent, until early May, 2012 (following the filing of suit and entry of a TRO), Islam was indeed sharing Atlantis trade secret information with the GSR. 21 App. 4376-4389 (Islam coded guest list from GSR showing that she was adding guests to the database until at least April 24, 2012.) 25 App. 5413-5414 (email from Islam dated May 2, 2012 requesting additional guests be coded to her.) 25 App. 5417-5424 and 15 App. 3101:11-23. (May 2, 2012 email requesting coding of approximately 60 former Atlantis guests to her, providing guest value information she had gained at Atlantis and Islam's trial testimony, confirming these to be recommendations for offers to be made to these gaming guests, originally sent on unknown earlier date.)

It was not until a lawsuit was filed and a Temporary Restraining Order ("TRO") sought that GSR suspended Islam's employment and her known affirmative conduct finally ceased. 14 App. 2917:17-18; 15 App. 3101 (Islam); 18 App. 3838:1-3840:2 (Ambrose) and 16 App. 3323:13-19 (Hadley). However, as described further herein, GSR continued to use the information provided to it by Islam even after the receipt of the cease and desist letter from Atlantis counsel, even after the district court entered a TRO prohibiting its use, and even after an injunction was ordered. 1 App. 111-119 (5/9/12 TRO prohibiting conduct by Islam); 2 App. 280-283 (Second, 7/5/12 TRO expanding scope of prohibitions on

use to GSR.) and 2 App. 329-339 (8/24/12 Preliminary Injunction, extending prohibitions).

Despite these Orders, as discussed below, it was undisputed that with the exception of 36 guests to whom marketing efforts were at least temporarily ceased; GSR had taken no action to address the use of information provided to it by Islam. 16 App. 3332-3348 (Hadley); 18 App. 3837:14-3849:4 (Ambrose) and 22 App. 4736-4741 (email exchange between Hadley and Ambrose). Further, it was undisputed that many of the players added to the GSR database and solicited by GSR due to the information from Islam, continued to frequent the GSR. 22 App. 4619-4626 (GSR revenue report for Islam indicating net revenue through November).

Misappropriation and Use of Atlantis Trade Secrets by Islam and GSR

The protected Atlantis marketing database information that Islam shared with GSR, and Islam and GSR used, included guests' names, addresses, contact information, and rating information which Islam entered into the GSR database. 14 App. 2966:4-2967:7, 2978:22-2979:1, 2980:1-9, 2981:15-18; 15 App. 3059-3064:11, 3089:13-20, 3090:7-3093:16, 3098:4-3099:23 and 21 App. 4376-4389 (List of guests coded to Islam at GSR, including 220 guests added to GSR database by her), 25 App. 5436-26 App. 5712 (Handwritten guest list produced by Islam from Atlantis data), 21 App. 4451-22 App. 4579 (GSR Spreadsheets evidencing special offers extended by GSR based upon information provided by Islam), 22 App. 4688-4735 (GSR record of free play advanced including those from comps at Islam's direction). The testimony at trial was definitive that the amount a casino would spend or invest on a perspective guest to solicit their business was based upon the amount that the guest was likely to gamble/spend if the invitation/marketing offer was accepted. 14 App. 2924:7-12 (Islam). Islam testified that while employed by Atlantis, she learned the value that Atlantis had assigned not only to guests for whom she was the assigned host, but also for guests

assigned to the other hosts employed by Atlantis. 14 App. 2929-2930. This value was translated into a rating for each guest.

Throughout the trial one Atlantis guest in particular was frequently utilized as an exemplar. This guest, though referred to in the transcripts and evidence by his full name, will be called simply "Mark D" in these briefs.[15] Mark D was frequently utilized as the exemplar because he was an Atlantis guest unknown to Islam before her employment with Atlantis, who was hosted at Atlantis not by Islam, but by her officemate Lilia Santos, who although clearly hosted by Islam at GSR based upon the email record, was not listed as coded to her by GSR and therefore GSR did not admit to having received revenue from him through Islam's efforts.[16] For example, with relation to the value of particular Atlantis guests, Islam testified that from helping Mark D "a couple of times" at Atlantis she knew how much he would spend on a trip. 14 App. 2931:10-15. Through her employment, she learned who the valuable players at Atlantis were. 14 App. 2931-2932.

The evidence included literally volumes of Atlantis proprietary, trade secret information that had been provided to GSR by Islam. This information came in large part from the six spiral notebooks of handwritten guest information that Islam had secretly copied from the Atlantis database. 21 App. 4303-4313 and 25 App. 5436-26 App. 5712. The information contained in the 276 surviving spiral bound pages varied, but typically included the guest name, address, phone

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[15] The trial transcripts and related exhibits were sealed by the district court (19 App. 3948:12-3949:3) and those portions of the record are being filed with this court in observance of the district court orders.

[16] 14 App. 2931:10-15 (Islam); 25 App. 5417-5424; 22 App. 4581-4582; 24 App. 5212-5214; 25 App. 5352-5353(GSR emails requesting Mark D be coded to her and providing value information and requesting offer authority and providing offer advice); 21 App. 4376-4389 (GSR list of guests coded to Islam); 22 App. 4514, 4532 (GSR spreadsheets setting forth offers from GSR to Mark D) and 22 App. 4619-4626 (GSR Revenue Spreadsheets).

number, birth date, and Atlantis player rating. *Id*. The information on the spirals would also sometimes include email addresses, credit line or marker information, gaming preferences such as a preference for slots or table games, spouse information, and family information related to the guest. *Id*.

Islam admitted that she had added persons to the GSR database whose information was not already possessed by GSR. 15 App. 3110:17-24. Islam admitted that (as contended in Attorney Robinson's cease and desist letter) while working for the GSR: she had used information taken from Atlantis to contact guests, that many of the persons contacted were not part of her book of trade brought with her to Atlantis from her prior employer Harrah's, and that the value of the offers she requested and GSR extended at her request were based upon the level of play at Atlantis. 15 App. 3059-3064:11, 3071:5-2984:18, 3089:13-20, 3090:7-3093:16, 3098:4-3099:23 and 21 App. 4376-4389, 16 App. 3111:16-20, 3122:7-3154:17. Islam testified to her understanding that once she added people to the GSR database, they would start receiving solicitations from GSR. 15 App. 3117:13-18.

It is interesting to note that GSR took the position in its April 18, 2012 response to Counsel Robinson that "names of persons on the Atlantis guest list ….. are not a trade secret[.]," but that position was not supported by a single GSR executive who testified at trial. 21 App. 4301 (GSR Letter) Tom Flaherty, Shelly Hadley, and Sterling Lundgren, the management level witnesses of GSR who appeared at trial, each conceded that GSR viewed such information, when held by GSR, to be proprietary, trade secret information. 18 App. 3790:4-18 (Ambrose); 16 App. 3380:4-10 (Lundgren); 17 App. 3534:23-3535:5 (Flaherty) and 16 App. 3308:10-22 (Hadley).

Similarly, the Atlantis gaming executives all testified that they viewed such information as proprietary and trade secret information. 12 App. 2484:20-2486:15,

2490:22-2495:11 (Ringkob); 13 App. 2684:8-15, 2758-2762:1 (DeCarlo); 19 App. 3960:8-13 (Robinson) and 17 App. 3458:15-19 (Moreno).

Islam testified at trial regarding the tier level of players and how that is indicative of the value of the player. 15 App. 3158-3159. Islam testified, and emails were admitted into evidence, demonstrating her request and GSR's compliance to upgrade the tier level of certain players she was adding to the GSR database or having coded to her so that their tier level at GSR would be comparable to their tier status at Atlantis. 15 App. 3162:7-24 and 24 App. 5140-5141 (example of one such email involving 16 guests, requesting tier level and free play.)

Flaherty testified that GSR also knew, during this timeframe, that Islam was reviewing GSR's database to identify players that she knew as a result of her employment by Atlantis that were not playing up to their full capabilities. 17 App. 3539:19-3540:1. Islam told Flaherty she knew players weren't playing to their full potential because they had stronger play in other properties. 17 App. 3541:5-10. Despite this Flaherty took no steps to ensure that the information Islam utilized to make this determination was not information from Atlantis. 17 App. 3541:11-17. Flaherty also knew that at Islam's direction GSR was making offers to guests that were richer than what their play at GSR would have entitled them to. 17 App. 3553:17-21.

Hadley also explained that she knew Islam was sending targeted marketing offers to people she knew from Atlantis. 16 App. 3312:11-14. This was an effort that GSR supported. 16 App. 3312:11-17. Finally, Hadley testified that if Islam had printed a guest list from GSR and brought it to Atlantis, it would be a violation of GSR's confidentiality policy. 16 App. 3321:7-11.

Atlantis information provided by Islam to GSR included information related to guests previously hosted by Islam at Atlantis and also information about many

guests with whom Islam did not have a guest/host relationship.[17] 15 App. 3071:5-3084:18, 3122:7-3154:14 (Islam). In other words, Islam provided to GSR information about Atlantis high value gaming guests, and GSR was using the information to actively market to not only those Atlantis high value gaming guests previously assigned to Islam, but also to high value gaming guests assigned to other hosts at Atlantis. *Id*. *See also*, 17 App. 3456:13-3457:18 (Moreno) and 17 App. 3578:9-3580:3 (Santos).

The evidence included the list of approximately 220 guests which GSR admitted Islam had added to the GSR marketing database after she began work.[18] 21 App. 4383-4389. In addition to adding these persons, Islam also identified for the GSR approximately 265 guests known by her to play at high value at Atlantis whose information already resided in the GSR database, causing them to be "coded" to her.[19] 21 App. 4377-4383. Indeed, Islam testified that about half of the players she sought to add to the GSR database from the spiral notebooks were, in fact, already in the GSR database. 15 App. 3235:4-15.

While working as an executive casino host at GSR, Islam would use information she learned during her employment with Atlantis to make suggestions

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[17] Both decisions of the district court found that information related to guests of other hosts was trade secret information. 6 App. 1306:21-24 and 7 App. 1457:26-28.

[18] This list was apparently created after this suit was filed in response to an email dated May 8th from Hadley to Ambrose. 22 App. 4587. The GSR marketing database was likely one of the largest in existence and included information from the predecessor entities dating back to the late 80's. 16 App. 3296:1-4 (Hadley).

[19] In the gaming industry, a player/guest is typically assigned or coded to a particular host and that host then is responsible for cultivating the play of the identified player. 16 App. 3293:24-3294:3, 3310:24-3311:21 and 16 App. 3363:3-10 (Hadley).

and requests to the GSR as to what offer a perspective guest should receive.[20] 14 App. 2925, 15 App. 3135:19-23; 15 App. 3163:1-20 and *see e.g.*, 24 App. 5157 (February 15, 2012 email with attached spreadsheet).

Atlantis also presented evidence of the GSR marketing lists of persons who were recipients of special monthly marketing solicitations sent by GSR at the direction of Islam. 21 App. 4452-22 App. 4579. It is the policy of GSR to send a mass mailed marketing piece for each month. 18 App. 3793:22-3794:7 (Ambrose). These vary by property, but typically consist of one offer to local guests and a different offer to non-local guests. 16 App. 3341:15-20 (Hadley). The offers are further delineated based upon the value or rating the guest has, with a higher valued guest receiving an offer of higher value. 18 App. 3791:4-12, 3812:14-19 (Ambrose). An example of such a marketing piece to a local guest was admitted at trial. 23 App. 4861-4863. Islam testified that this was an example of a monthly offer and that the alleged recipient was not coded to her at Atlantis. 15 App. 3156-3157.

Christian Ambrose, the GSR Director of Planning and Analysis, explained that these offers were at the direction of GSR management and based upon information provided by Islam. 18 App. 3823:12-19 (Ambrose). He further testified that the offers had values far in excess of what the play exhibited at GSR from the players would otherwise have justified under the existing GSR business practices. 18 App. 3823:20-3824:1 (Ambrose). Thus, it was undisputed that Islam was providing proprietary Atlantis information to GSR by giving guidance as to what level of marketing offer was appropriate and would likely move that guest's business to GSR, and GSR acted upon and used that information.

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[20] Indeed, Islam testified that she could not recall an instance when she had asked GSR to provide free play, comp or airfare for a guest and it was rejected. 15 App. 3165:7-11.

Specifically, Islam testified that she provided information in the form of advice and recommendations to the GSR regarding the amount of free play which would most probably be successful if extended to particular high value gaming guests known to her from her employment at Atlantis. 15 App. 3099:8-23. This advice was used in conjunction with the monthly offers and would be advantageous to GSR given the level of play and value of those Atlantis gaming guests. 15 App. 3098-3102; 16 App. 3312:11-17; 16 App. 3315:8-3316:10 (Hadley); 18 App. 3823:12-3824:1 and 18 App. 3809:16-3810 (Ambrose). Islam explained that her requests/suggestions to GSR regarding the value of marketing offer to be extended to a given guest were based upon the level of play she had observed from those guests at Atlantis. 15 App. 3099:11-23.

The evidence was undisputed that solicitations were then made by the GSR based upon that advice and information. 18 App. 3823:12-3824:1 (Ambrose). Pursuant to the advice and recommendations of Islam, GSR initiated or modified its solicitations to approximately 216 non-local guests and approximately 272 local guests offering free play which, if accepted and redeemed, had a value of approximately $1,000,000. 21 App. 4451-22 App. 4543 (GSR offers directed by Islam for non-local guests dated April 1-23, April 24-May 23, May 24-June 19, June 20-July 17); 22 App. 4544-4579 (GSR offers directed by Islam for local guests dated April 1-23, April 24-May 23, May 24-June 19) and 18 App. 3811:14-3849:4 (Ambrose).

These offers and their amounts were derived from trade secret information known by Islam and provided by her to (and used by) GSR. It appears the first of these, although not effective until April 1, 2012, was the result of a directive and email dated February 15, 2012. 22 App. 4581-4582. The last of the special, Islam directed solicitations, had effective dates of June 20-July17. 22 App. 4513-4543.

Use of this information by the GSR was also evidenced through its admissions pursuant to NRCP 36. 28 App. 6021-6035. These admissions

referenced a series of "Exhibits," each of which was a list of guest names corresponding to the lists of information that Islam had provided to GSR. For example, GSR admitted that it had sent targeted marketing and/or solicitations to each individual in Exhibit B. The individuals on Exhibit B are the same as those persons added to the GSR database by Islam.[21] 21 App. 4376-4389. Through these requests, GSR admitted its use of Atlantis trade secret information misappropriated by Islam. Specifically, through the responses to Admissions GSR conceded that during the specific time frames addressed, it solicited the 265 players coded to Islam that were previously known to GRS (list A), the 220 players added to the GSR marketing database by Islam (list B), the players for whom Islam had provided solicitation advice per the testimony of Ambrose (lists C and D) and 57 guests that were on the lists C and D but not on the exhibit of guests coded to Islam.

The evidence established that Islam, with the assistance of GSR, in addition to the standard monthly solicitations discussed above, sent targeted letter solicitations to approximately 350 guests offering them free play at GSR. 15 App. 3165-3166 (Islam) and 25 App. 5320-5328 (April 12 emailed list to GSR counsel Steve Cohen).

Examples of these letters were admitted at trial. 21 App. 4330-4331, 4334-4335, 4336-4337. Of these perhaps 350 letters, approximately 93 Islam offers, from letters or in person, were redeemed resulting in approximately $23,600 in free play offered and paid to these former Atlantis guests by GSR. 22 App. 4694-4702, 4704-4707, 4710-4714, 4716-4735. (Log of redeemed free play) 15 App. 3122-3154 (Islam testimony). Islam was asked about this free play redemption log and these guests and was able to confirm, in many cases, that they correspond

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[21] Compare 5 App. 1003-1017 and 28 App. 6021-6049 (Admissions) to 21 App. 4376-4389 (GSR list of guests coded to Islam at GSR) and 21 App. 4451-22 App. 4579 (Ambrose Spreadsheets).

to the value of the free play offer she had caused to be extended to the player. 15 App. 3125-3154. In describing this log, Islam also pointed out that in some cases she called people or sent them a letter, but in other instances, people would just show up and ask for her.[22] 15 App. 3132:7-11.

During the course of the discussion of the free play redemption exhibited in the log, Islam again confirmed that a number of the guests were not coded to her at Atlantis and were not part of her book of trade brought by her to Atlantis. 15 App. 3125-3154. Also, as the last of these offers was redeemed on May 1, 2012, two days before her suspension by GSR, she could not confirm if further offers were redeemed. 15 App. 3154:22-3155:1. Thus, the full impact of those solicitations is not even known by Islam.

In addition to the hundreds of persons for whom trade secret information of Atlantis was misappropriated by Islam and used by and for the benefit of GSR, there was also evidence of misappropriation of trade secret information related to guests who did not appear on the list of persons GSR claimed to be coded to Islam.[23] One of these guests, in particular, was the subject of extended discussion as he was used as representative examples throughout the trial.

Mark D and his wife Shelia were Atlantis guests assigned to Atlantis host Lilia Santos. 14 App. 2998:21-22 (Islam) and 17 App. 3580:7-17 (Santos). The evidence was undisputed that Islam knew of Mark D as a consequence of her employment at Atlantis and the fact that she shared an office with Ms. Santos. 14 App. 2930. Remarkably, the Mark D did not appear on the list of guests "coded" to Islam at GSR (21 App. 4376-4389), yet without dispute, and in contravention to

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[22] Atlantis concedes the difficulty in controlling the voluntary behavior of guests and contends this phenomenon would not have occurred had the cool off period of the Non-Competition Agreement been observed.

[23] Islam testified that she had copied the information related to Mark D., an Atlantis guest hosted by her office mate, Lilia Santos, onto a spiral notebook. 14 App. 2998.

multiple Atlantis contracts and the UTSA, Islam acted as a host at the GSR for Mark D, extending GSR complementary play and other incentives to entice him and his wife to come to GSR. 15 App. 3093:20-3097:4; 22 App. 4581-4582 and 24 App. 5212-5214.

In particular, emails admitted and discussed by witnesses proved Islam's and GSR's solicitation of Mark D. In February of 2012, Islam had asked GSR marketing to send Mark D a solicitation of the highest value and that Mark D be coded to Islam. 22 App. 4581-4582. In March of 2012, Islam requested and GSR approved $1,000 free play for Mr. D and further asked that he be included in solicitations. 15 App. 3093-3096 (Islam) and 24 App. 5212-5214 (email string). Thereafter, on April 17, 2012, with Islam's assistance, a trip to bring Mark D and his wife from Iowa to Reno was planned by GSR, and the offer had been increased to $2,200 of free play, a renovated suite and food and beverage credit. 15 App. 3096-3097 (Islam) and 25 App. 5352-5353 (email string). Although Mark D was only one of hundreds of Atlantis guests whose proprietary trade secret information was misappropriated by Islam and GSR, even if he were the only guest involved the evidence related to him would require a finding against both Islam and GSR.

This Litigation and Orders of the District Court

Pursuant to the Complaint and motion filed by the Atlantis, a TRO was entered against Islam on May 9, 2012. 1 App. 116-119. Pursuant to the order, Islam was temporarily enjoined and prohibited from being employed by the 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. *Id*. Islam was further directed to return to Atlantis any confidential, proprietary, trade secret information/data of Atlantis and purge it from her files. 1 App. 118:8-10. Notably, counsel for GSR attended the TRO hearing. 1 App. 120-123.

The initial TRO was extended against Islam and an expanded TRO was entered against the GSR on July 5, 2012. 2 App. 280-283. Pursuant to the July 5th order, the provisions of the prior, May 9, 2012 order were extended and would not expire until August 27, 2012. 2 App. 282:11-13. Further, the July 5th order prohibited GSR's use of any information it had reason to believe was acquired by Islam directly 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." 2 App. 282:14-21.

The matter was set for an expedited evidentiary hearing in order to determine if a preliminary injunction was appropriate. 2 App. 283. Rather than proceed with that hearing, GSR and Islam stipulated to the imposition of a preliminary injunction which extended the terms of the July 5th order until trial or other modification. 2 App. 329-339.

Despite even stipulating to one of these orders, GSR contended at trial that GSR did not remove information from its database. 16 App. 3337:7-20 (Hadley). Consequently, with the exception of the 36 players to whom marketing solicitations were stopped in September 2012, the offers first set in motion due to Islam's suggestions continued in the face of the restraining orders and likely continue today. 22 App. 4736-4741 (email string between Ambrose and Hadley); 18 App. 3837:14-3849:9 (Ambrose) and 16 App. 3332-3348 (Hadley).[24]

Damages

Long before this litigation and long before Islam resigned, Atlantis' marketing department undertook a study in order to quantify and estimate the value of its active known gaming guests. 18 App. 3620:12- 3627:20 (McNeely) and 23 App. 4904-4922 (CLV Study). This study applied a formula developed by

[24] *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.

a Harvard business researcher to estimate the lifetime value of a customer to an enterprise. *Id*. This customer lifetime value ("CLV") study was not undertaken in anticipation of any litigation and not even for a litigation purpose. 18 App. 3620:12-3627:20 (McNeely) and 23 App. 4904-4922 (CLV Study). Rather, the CLV study was completed by Atlantis to be used in guiding its marketing strategies and deployment of marketing resources. *Id*. The CLV study conducted by Atlantis was used by Atlantis in this matter to demonstrate the value that Atlantis had placed pre-litigation on the information misappropriated to assist the district court to determine the range of damages in this case. 18 App. 3642:6-3657:19. The total CLV attributed to the involved guests was $4,584,665. 23 App. 4889.

Atlantis also proposed quantifying its past damages based upon a comparison of the play exhibited by the players added to the GSR database by Islam from the similar period a year prior to her employment at GSR, which totaled $313,174. 23 App. 4882-4895. McNeely's analysis also totaled the expense to repair the false information placed in the database by Islam, noting it to be $2,117. 23 App. 4897. He also set out the expense of a mitigation program to counter the solicitations from GSR, which carried a reimbursed expense of $10,941. 23 App. 4899.

GSR retained an economic analyst, Jeremy Aguero, to review and rebut the damage conclusions of Atlantis expert McNealy. 19 App. 3873-3875. Mr. Aguero utilized an alternative method to attempt to quantify the damages incurred by Atlantis, assuming the allegations were accurate. In examining the damage caused by falsification of the information, Aguero confirmed that 87 guests had been impacted and estimated the related damages at $56,843. 19 App. 3880:13-3883:14 and 21 App. 4425. Aguero also proposed an analysis of the 202 guests added to the GSR database by Islam. His analysis in that regard relied upon the Customer Lifetime Value ("CLV") study prepared by Atlantis the year before

Islam's resignation. 19 App. 3890:11-3894:4 and 21 App. 4427. Utilizing his methodology and applying professional judgment of the likely impact, he concluded that impact to be 30-70% and calculated resulting damages of $138,374-$322,872. *Id*. Lastly, Aguero testified to his third method of analysis which was to attribute the damage to Atlantis to be the same as the claimed gain to GSR. 19 App. 3895:13-3897:23, 3899:10-3912:18; 21 App. 4429 and 22 App. 4619-4626. Based upon the net revenue reported by GSR, he concluded the damage to be $10,814 from the guests added to the GSR database by Islam.[25] *Id*.

Decision of the trial court

The case was tried to the bench in July of 2013, and the district court issued its decision from the bench on July 18, 2013. 20 App. 4241-4262. Atlantis prevailed on most of its claims against Islam, but did not prevail on any of its claims against GSR.

Claims against Islam

The district court found that Islam had breached the three contracts related to the protection of confidential, proprietary and trade secret information. 20 App. 4241-4244. This finding hinged upon the fact that Islam intentionally and improperly downloaded proprietary Atlantis information including players' names, contact information, level of play, game preferences and other proprietary information. 20 App. 4244:16-24.

The district court examined the fourth contract, the Non-Compete Agreement, finding that it contained allowable prohibitions with regard to the geographic restriction of 150 miles and the term of one year. 20 App. 4245:19-23. However, the district court ruled that the exclusion from employment "in any role in any casino in any capacity is an unreasonable restraint" and imposes "an undue

[25] Notably the GSR records upon which Aguero relied to reach this damages amount showed only 40 of the 202 guests GSR claimed Islam had added to its database. *See* 22 App. 4621 compare to 21 App. 4376-4389.

hardship." 20 App. 4246:8-10. On that basis, the district court found the contact unenforceable, dismissing the claim against Islam for breach of that contract. 20 App. 4246:13-14.

In considering the claim against Islam for conversion, the district court acknowledged that Islam had herself admitted that she did change the addresses, telephone numbers and/or email addresses of guests that had been coded to her in the Atlantis database. 20 App. 4246:23-4247:3. However, in finding in favor of Islam, the district court noted that the information sabotaged was restored in a relatively short period of time and at a de minimus expense in comparison to the value that Islam herself had placed on her book of trade and the operation of Atlantis. 20 App. 4247-4248:21.

With respect to the fourth cause of action against Islam for tortious interference with contractual relations and prospective economic advantage, the district court found that those claims were more appropriately adjudicated under the UTSA. 20 App. 4248:22-4249:3.

The district court then turned to the consideration of the UTSA claim. The district court stated it had "culled through the testimony of all the witnesses here to try to determine if there is any consensus as to what is a trade secret in terms of customer data. Other than the agreement amongst all the witnesses that a customer with whom a host has established a relationship, that customer's name, address, contact information is not a trade secret."[26] 20 App. 4250:3-9. The court

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[26] Atlantis disputes the accuracy of this vague statement and contends that the district court misspoke and intended to indicate that such a guest's information was not a trade secret as to the host with whom the guest had the long standing relationship, and that the statement was intended to reference the concept of the host's book of trade. Indeed, as set forth above, no management witness from either casino provided testimony consistent with this assertion by the district court. The written orders failed to clarify this holding, only amplifying the conflict of whether a high value gaming customer's name, address, and contact information

adopted a definition of "book of trade" as "those names and contact information of guests that they have developed relationships throughout – through their own efforts." 20 App. 4244: 4-8. This concept of a book of trade or a book of business--a group of persons or customers with whom the defecting employee has a personal relationship--is one that is pivotal to the district court's decision and an issue of significance in this appeal.

The district court then delineated a list of nineteen non-exclusive items that the district court found to be trade secrets in the gaming industry. 20 App. 4250:10-4251:9. Included in that list was: (1) player tracking records; (2) other hosts' customers; (3) initial buy-ins; (4) level of play; (5) table games; (6) time of play; (7) customers' personal information that is personal to them, such as a Social Security number; (8) customers' casino credit; (9) customers' location, whether they're international, regional or local player; (10) marketing strategy; (11) customers' birth date, which one witness testified was critical for credit accounts; (12) tier levels, which is different than player ratings, they are more specific in terms of measurement; (13) comp information; (14) players' history; (15) players' demographics; (16) players' financial information; (17) the company's financial information; (18) the company's marketing strategy; and (19) other employees' information and customer information. *Id*. Speaking of these 19 items, the district court found that the information delineated is not known to the public and is difficult to acquire properly. 20 App. 4251:10-13. The district court similarly found the information to have been treated as confidential by Atlantis and that Atlantis properly guarded the secrecy of the information. 20 App. 4251:13-4252:1. The district court went on to find that Islam had copied and taken information from the Atlantis computer that included not just the players' names

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should be considered a trade secret. This is discussed in greater detail in the companion brief beginning on page 9.

and contact information, but also the designation of game preference, marker or credit limit and previous loss information and found that was not information open to the public. 20 App. 4252:2-13. On that basis, the court found Islam to have violated not just her contractual obligations, but also the UTSA. 20 App. 4252:14-16.

The district court found Atlantis had been damaged, and in determining the amount of those damages commented upon the damage models advanced by Atlantis employee Brandon McNeely and GSR expert Jeromy Aguero. 20 App. 4253. The district court primarily adopted the GSR model based upon the actual net win reported by the GSR for the guests added to the GSR database.[27] 20 App. 4253-4254.

The district court awarded damages in favor of Atlantis and against Islam of $10,941 and $2,119 on the breaches of contract and $10,814 on the UTSA violation. 20 App. 4254:9-14. Additionally, the district court found that punitive damages were warranted, that Islam's conduct, based in part upon admissions in her testimony, was unjustified, willful, malicious and intentional, and that Islam's conduct was intended to hurt Atlantis. 20 App. 4254:15-20 and 6 App. 1309:8-22 (Order). Largely based upon her annual salary, $20,000 in punitive damages was assessed. 20 App. 4255 and 6 App. 1309:13-23. The district court further awarded the attorney fees and litigation costs sought by Atlantis against Islam. 20 App. 4255:11-17 and 6 App. 1309:24-1310:2. Lastly, the district court imposed upon Islam a permanent injunction "prohibiting ISLAM from any further use of the trade secret information at issue until such time as the information becomes ascertainable by proper means[.]" 6 App. 1310:5-7. The district court directed

[27] Atlantis contends this conclusion, basing the damages upon the net win reported to have been enjoyed by GSR, among others, is inconsistent with the district court's determination that GSR did not use the information in question and therefore did not violate the UTSA.

that Islam destroy all customer lists originated from Atlantis, including the handwritten information copied from the Atlantis database. 6 App. 1310:8-10.

Claims against GSR

Despite the fact that the district court found that Islam improperly took and provided Atlantis' proprietary guest information to GSR, awarding damages against Islam on the basis of the profit obtained by GSR from those guests, the district court inexplicably found no use of the trade secret information by GSR and therefore no violation of the UTSA by GSR. 20 App. 4256:17-4258:23 and 4261:17-21 (Oral decision) and 7 App. 1456-1462 (Order). The district court acknowledged that Islam had input the information she had wrongfully taken from Atlantis into the GSR database. 20 App. 4258:9-14. Indeed, the court found that GSR had not committed a single wrong by: employing Islam despite knowing of her Non-Compete Agreement when she was first employed; accepting Atlantis' guest information from her; incorporating that information into its own computer database; and very aggressively marketing the GSR to known Atlantis guests, based upon the proprietary information Islam stole from Atlantis and provided to GSR. [28] The district court appeared to hinge its finding of no violation upon the determination that the GSR computers only allowed Islam to add names, addresses, telephone number and contact information to the GSR database.[29] 20 App. 4258:15-20. Yet the information GSR admitted to have used was more extensive than that scope.

The district court also found that GSR committed no tortious interference with contract. 20 App. 4259-4261:21. In reaching that decision, the court noted,

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[28] Atlantis contends this finding to be irreconcilable with the finding that GSR had not violated the UTSA.

[29] This finding ignores the information from Islam entered and used by the GSR related to tier level and player value, rating and solicitation amounts.

erroneously, that Atlantis general counsel had written to GSR management to notify it that Islam was subject to a Non-Compete Agreement.[30]

The district court also relied upon its unsupported conclusion that the Non-Compete Agreement had been provided to counsel for the GSR and counsel had approved Islam being hired, relying upon a defense of advice of counsel. 20 App. 4259:8-24 and 20 App. 4260:10-16 (Finding that GSR offered the employment to Islam in reasonable reliance of its legal counsel's advice). However, there was no evidence that GSR's counsel reviewed or advised GSR about the Non-Compete Agreement prior to GSR's employment offer to Islam. Specifically, there was no evidence of what any advice might have been or that it motivated any action. Moreover, the affirmative defense of advice of counsel was never raised pursuant to NRCP 8(c). 1 App. 227-233.

After adjourning the proceeding and leaving the room, the district judge returned, went back on the record and stated simply "[j]udgment in favor of GSR, fees and costs of litigation against the plaintiff." 20 App. 4262:7-8 (emphasis added). During the trial and argument GSR had made no request for such relief. 20 App. 4152- 4204 (GSR closing argument).

SUMMARY OF THE ARGUMENT

The district court erred in ruling that the Non-Competition/Non-Solicitation Agreement between Atlantis and Islam was overbroad and unenforceable. The district court based its ruling upon the fact that the covenant contained a prohibition of employment with "any gaming business or enterprise," finding that restriction from any position with a competitor is unnecessarily restrictive and unreasonably burdensome. The district court also erred by finding in favor of Islam and against Atlantis on its conversion claim, in light of the express

[30] In fact, that letter focused upon the UTSA and attached the Atlantis policy regarding proprietary information and trade secrets signed by Islam. 21 App. 4291-4297.

admissions by Islam that she had willfully sabotaged the Atlantis marketing database.

ARGUMENT

A. Standard of Review

A district court's conclusions of law are reviewed de novo. *Casey v. Wells Fargo Bank*, 128 Nev. __, 290 P.3d 265, 267 (2012). Contract interpretation is also subject to a de novo standard of review. *May v. Anderson*, 121 Nev. 668, 672, 119 P.3d 1254 (2005). The legal validity of a covenant not to compete, based upon the scope of the covenant, is also reviewed de novo. *E.g.*, *Hansen v. Edwards*, 83 Nev. 189, 426 P.2d 792 (1967).

B. The District Court's Determination That Atlantis' Non-Competition/Non-Solicitation Agreement Was Overbroad Is Clear Error

Although finding all other contracts (three in total) between Islam and Atlantis to have been valid and also to have been breached, the district court found that the fourth contract between Islam and Atlantis, the Non-Competition/Non-Solicitation Agreement, was overbroad and unenforceable. 6 App. 1303:25-1304:4. Although the district court found that the time and distance limitations in the contract were valid, the court concluded that the contract's complete prohibition from employment with a competitor was unreasonable. 6 App. 1303:25-26. The court therefore found the entire contract to be unenforceable. 20 App. 4252:23-4253:1; 7 App. 1460:22-27 and 6 App. 1304:2-4. The district court grounded its decision on the fact that Islam had attempted to create a career in the gaming industry and that therefore a prohibition from any role in any casino, in any capacity, was an unreasonable restraint on trade and greater than is required to protect Atlantis. 6 App. 1303:26-1304:2 and 20 App. 4246:5-14.

Atlantis contends that this determination is an erroneous application of Nevada law in that it creates a new limitation on the scope of such covenants that will largely undermine their effect and use.

1. The Non-Compete Agreement is Reasonable in Its Terms, Valid, and Should Have Been Enforced

Contractual terms prohibiting post-employment competition have long been recognized as enforceable in Nevada. The seminal case is *Hansen v. Edwards*, *supra*, which set forth the general rules applied to such contracts.[31]. *See also Jones v. Deeter*, 112 Nev. 291, 294, 913 P.2d 1272, 1274 (1996).

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

Jones, 112 Nev. at 294, 913 P.2d at 1274, citing *Hansen*, 83 Nev. at 191-92, 426 P.2d at 793.

The *Hansen* court reviewed a restriction from competition in an employment contract of a podiatrist, finding that "[t]he substantial risk of losing patients to an employee is itself an adequate basis for a reasonably designed restraint." *Hansen*, 83 Nev. at 192, 426 P.2d at 793. The court in *Hansen* did find that the covenant, which contained no time limitation and a prohibition from competition within 100 miles, was too restrictive. But the *Hansen* court itself preserved the validity of the contract by modifying the covenant, reducing the geographic scope, and applying a

[31] Nevada also has a statute that recognizes the validity of such contracts. NRS 613.200(4) permits noncompetition covenants if they are supported by valuable consideration and are reasonable in scope and duration.

length of one year. With these judicial modifications, the covenant was deemed valid and enforceable. *Id.* at 193, 426 P.2d at 794.

In *Ellis v. McDaniel*, 95 Nev. 455, 596 P.2d 222 (1979), this court considered the reasonableness of a restriction prohibiting competition in the practice of medicine as applied to an orthopedic surgeon. The restrictive covenant was a two-year restriction from competition within a radius of five miles from the city of Elko. *Id.* This court found that the terms of the covenant were reasonable with respect to the doctor's practice of general medicine, but because there were no other orthopedic specialists on staff with his old employer or in the area, it was not reasonable to prohibit his specialty practice of orthopedic surgery. The covenant was judicially modified in that regard while maintaining the time and space limitations which were upheld. *Ellis*, 95 Nev. at 459-460, 595 P.2d at 225-226. Thus, the broad and general covenant prohibiting the practice of medicine was found to be reasonable, but for public policy reasons, and due to the recognition of the need for the specialty service to the public, this court exercised its equitable powers and judicially modified the covenant to allow the practice of orthopedic surgery despite the prohibition. *Id*.

In *Camco, Inc. v. Baker*, 113 Nev. 512, 936 P.2d 829 (1997), in interpreting a restriction prohibiting any position with an enterprise engaging in the pawn or check cashing business, this court did not object to the two-year restriction imposed, but it did find the territorial limitations to be overly restraining. The territorial limit restricted competition within 50 miles of any store that was existing or under construction, or "within 50 miles of any area which was the target of a corporate plan of expansion." *Id.* at 519-520, 936 P.2d at 832-833. In determining the scope was unreasonable, this court found that "to be reasonable, the territorial restriction should be limited to the territory in which [the former employer] established customer contacts and good will." *Id.* at 521, 936 P.2d at 834.

The agreement in question has a geographic scope of a radius of 150 miles from Atlantis. The district court correctly found this scope to be appropriate, finding that Atlantis has a customer base that draws from that broad area, and further acknowledging the threat posed to local casinos by casinos in Northern California (which is within the 150-mile radius). 6 App. 1303:21-24. In this regard, it was undeniable that GSR is literally just a few miles from Atlantis. The Non-Compete Agreement's term of one year was also correctly found by the district court to be a reasonable restriction, and this finding is consistent with Nevada law. 6 App. 1303:19-20.

However, the district court erroneously found:

> the total exclusion from employment with a competitor is unreasonable. This Court finds that excluding the employment of an individual such as Ms. Islam, who has attempted to create a career in this industry from any role in any casino in any capacity is an unreasonable restraint on her and it imposes an undue hardship on Ms. Islam and it is a restraint that is greater than that required for the protection of the person for whose benefit the restraint is imposed, the Atlantis.

6 App. 1303:25-1304:2, *See also*, 20 App. 4246:6-12.

On that basis, the district court found the Non-Compete Agreement between Atlantis and Islam entirely unenforceable and dismissed the cause of action related to breach of that contract, and also found there to be no tortious interference with contract by GSR because the entire Non-Compete Agreement was invalid. 6 App. 1304:2-4; 20 App. 4246:12-14 and 7 App. 1460:22-27. *Hansen* and *Ellis* clearly indicate that the validity of a restrictive covenant should be preserved by judicial modification of provisions that are too broad. In the present case, however, the district court erred by not modifying the covenant to limit its scope, or to limit the job positions to which it would apply.

Virtually all employees who seek to defeat an otherwise sound contract containing a non-competition agreement or restrictive covenant have made a living

or are attempting to create a career in the industry of their former employer.[32] Indeed, many involve licensed professionals with advanced degrees and training making them particularly suited only for their chosen career. *See e.g.*, *Hansen, supra* (podiatrist) and *Ellis, supra* (physician). Similarly, virtually all non-compete agreements and restrictive covenants preclude employment with any direct competitor.[33] *See e.g., Jones, supra; Hansen, supra; Ellis, supra; Camco, supra; Traffic Control Services, supra; HS Supply, supra;* and *Hotel Riviera, supra*. *See also, Finkel v. Cashman,* 128 Nev. Adv. 6, 270 P.3d 1259 (2012).

Here, the facts are undisputed that GSR was a direct local competitor of Atlantis and that Islam took a job and began working at GSR as an executive casino host, which was precisely the same position and the exact same capacity in which she had worked at Atlantis. The Non-Compete Agreement between Islam and Atlantis is clearly well within the legal limits of such agreements in Nevada, and it imposes upon Islam no greater restraint on her than is reasonably necessary to protect the business and goodwill of Atlantis, nor does it impose an undue hardship on Islam. *Jones*, 112 Nev. at 294, 913 P.2d at 1274, citing *Hansen*, 83 Nev. at 191-92, 426 P.2d at 793. Rather, the restriction at issue here is consistent with the relevant Nevada statute, NRS 613.200(4), which specifically allows such agreements between employers and employees which, "upon termination of the

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[32] *See e.g.*, *Camco*, *supra* (former employees of SuperPawn seeking to open a pawn shop in Bullhead City, AZ.), *Traffic Control Services v. United Rentals*, 120 Nev. 168, 87 P.3d 1054 (2004)(employee specialized in the selling and renting of trench shoring equipment in Las Vegas area), *HS Supply v. Bymoen*, 125 Nev. 200, 210 P.3d 183 (2009)(sales representative in the maintenance, repair, and supply distribution business) and *Hotel Riviera, Inc. v. Torres*, 97 Nev. 399, 632 P.2d 1155 (1981)(gaming).

[33] The law, of course, requires that the prohibition be reasonable in time and geographic scope, which were elements that the trial court found to be satisfied in this case. There was also adequate consideration because the agreement was a condition of Islam's continued employment and she understood that to be the fact. 15 App. 3172-3173.

employment, prohibits the employee from: (a) Pursuing a similar vocation in competition with **or becoming employed by a competitor of the person, association, company or corporation;**" (emphasis added).

Additionally, if the Non-Compete Agreement were simply phrased such that Islam could not work for a competitor for a year, she would still have been in violation because GSR is indeed a competitor. If it were phrased such that she could not work as a casino host for one year, Islam would still have been in violation because she took the job at GSR and worked as a casino host for GSR until the TRO was in place.[34] However, the later hypothetical restraint is far narrower than that particularly allowed by NRS 613.200(4) and simply not broad enough to protect the business interests and good will of Atlantis, because Islam could have been hired by GSR as a VIP hostess, casino manager, or any number of other positions which would have allowed her to misappropriate information and compete unfairly with Atlantis.

Indeed, any such employment would allow the competitor to access the valuable information that she possessed, and she could be compensated accordingly for it, without regard to her title/duties. It would not matter if her title is chief dishwasher, or even if dishwashing was indeed and actually among her work responsibilities for a year. If a former employee shares valuable information with the competitor, allowing injury to the business and goodwill of Atlantis, the purpose of the covenant is defeated. She is competing with the former employer, here Atlantis, and the former employer is in such a circumstance not adequately protected.

The Non-Compete Agreement here referenced that she should not work for a gaming competitor for a year due to the valuable information she possessed, and

[34] Thus, the allegedly overbroad language had no effect on Islam and did not deter her violation of the agreement.

likewise the court found that she possessed valuable information that allowed her to work in gaming. 6 App. 1298:7-12. Finally, the limited restraint of the Non-Compete Agreement does not impose an undue hardship on Islam, because she was employable in any gaming position outside the geographic scope or inside the area of restriction in similar positions so long as the position was not related to the gaming industry. 21 App. 4288-4289. Such permitted positions would include those in management or sales, given her education and experience. 14 App. 2910:6-13. Therefore, the district court's ruling is unsupported by the undisputed facts, the current status of Nevada law, and is therefore in error. Additionally, if the district court felt the covenant was too broad, the court should have judicially modified the covenant by limiting its scope, to preserve its validity, as this court itself did in the cases discussed above.

2. <u>This issue raises important public policy concerns for the State of Nevada</u>.

At Atlantis, and at employers across Nevada, there are presumably numerous employees who are subject to the same or substantially the same type of employment covenant as was Islam; a prohibition of employment with any competitor within a reasonable geography and for a reasonable time. Consequently, this appeal raises an important public policy issue for the State of Nevada. An affirmance of the district court's decision will mark a significant change in the scope of restrictive covenants in Nevada. The determination of the district court that the Non-Compete Agreement between Atlantis and Islam is unreasonable, because it does not allow employment in any position with a competitor, will have a far reaching effect beyond the subject litigation.

Should this court uphold the decision of the district court, employees throughout the State who are subject to a blanket restriction prohibiting employment with any competitor can successfully argue that their own non-competition agreements are overbroad and therefore completely unenforceable.

Such a holding would be inconsistent with the business friendly atmosphere that the State of Nevada is intending to create, as recognized in NRS 613.200(4).

C. The District Court Committed Reversible Error in Finding in Favor of Islam and Against Atlantis on the Conversion Claim.

Conversion in Nevada is defined as "a distinct act of dominion wrongfully exerted over another's personal property in denial of, or inconsistent with his title or rights therein or in derogation, exclusion, or defiance of such title or rights." *M.C. Multi-Family Development, L.L.C. v. Crestdale Associates Ltd.*, 124 Nev. 901, 910, 196 P.3d 536 (2008) *citing Evans v. Dean Witter Reynolds, Inc.*, 116 Nev. 598, 606, 5 P.3d 1043, 1048 (2000). Conversion is applicable to intangible property such a contractor's license or internet website domain name. *M.C. Multi Family Development*, 124 Nev. at 911-912, 196 P.3d at 543. The Atlantis marketing database is deserving of the same level of protection.

At trial, Islam did not dispute that she had deliberately sabotaged and modified the Atlantis marketing database regarding contact information for 87 discrete guests. 15 App. 3047:8-3056:6, 3112:23-3113:22, 3205:8-22. Her obvious purpose was to create a roadblock and to interrupt efforts by Atlantis to contact these customers after Islam left her employment, giving her time to cultivate these customers herself during the delay. Although Atlantis did not contend that GSR had directed the sabotage, it is undisputed that GSR and Islam both benefitted by the interruption in marketing offers from Atlantis to these valued guests.[35] The district court found that the evidence presented by Islam herself and other witnesses called by Atlantis was that Islam did change the addresses, telephone numbers and/or the email addresses of guests that had been coded to her in the Atlantis' casino customer or guest database. 6 App. 1300:8-16.

[35] Interestingly, Islam testified that she had informed Tom Flaherty about the modifications she had made to the Atlantis marketing database *before* the interview on May 3, 2012, which lead to her suspension by GSR. 15 App. 3112:23-3113:22, 3115-3116.

This conduct by Islam was in direct contravention of the Online System User Agreement.[36] In this contract she agreed that Atlantis' online systems are Atlantis' property and to maintain the confidentiality of the trade secrets contained therein. 21 App. 4265-4268. Through the Business Ethics Policy and Code of Conduct Agreement she was not to profit from confidential information of Atlantis and not to make false or artificial entries in the books and records of the company for any reason. 21 App. 4270-4283.

The intended and actual result of Islam's action was to interrupt the service, business relationship and communication with the impacted Atlantis guests. 18 App. 3628:20-3632:22 (McNeely). This impact was recognized by the district court in its ruling. 6 App. 1300:17-25. Islam took control of the data of Atlantis in a fashion that was inconsistent with the property rights of Atlantis, preventing Atlantis' use of the property for a period and therefore a finding of conversion was required by law. GSR damages expert Aguero attempted to quantify the damage for that period, estimating the related damages at $56,843. 19 App. 3880:13-3883:14 and 21 App. 4425.

Instead of finding a conversion, the district court found the interference with the property rights of Atlantis was not so severe or significant in light of the value of the book of trade claimed by Islam or the operation of Atlantis. 20 App. 4248:10-21. There is no exception in Nevada law that allows a conversion to be excused because of the size or wealth of the victim, yet that is the result here. Moreover, Nevada case law does not suggest that the measure of damages is a part of the definition of conversion. *Bader v. Cerri*, 96 Nev. 352, 356, 609 P.2d 314, 317 (1980). In other words, the return of the property converted, or as relevant here, Atlantis' self-correction of the sabotage to its database once Islam's

[36] The stated purpose of this Agreement was to ensure use of Atlantis' online systems in a productive manner. 21 App. 4265.

clandestine sabotage was discovered, does not nullify the conversion but merely serves to mitigate damages. *Id.* Again, if the decision of the district court is upheld, the affirmance will represent the creation of a new defense to conversion in Nevada and a departure from current law.

D. The Relief Sought

Atlantis seeks this Court's ruling that the Non-Compete Agreement is valid and not overbroad or unenforceable, that the record establishes breach of that contract by Islam, and remanding the matter for the purpose of establishing damages owed to Atlantis related to the breach. Atlantis further requests this Court's determination that the elements of conversion have been proven, no defense to a claim of conversion exists based upon the relative wealth of the victim or the value of other property owned by the victim or in dispute, and that the matter be remanded for a determination of damages not inconsistent with the damage caused by the loss of the property.

Respectfully submitted this 29th day of August, 2014.

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ATTORNEY'S CERTIFICATE OF COMPLIANCE FOR

APPELLANT'S OPENING BRIEF REGARDING SUMONA ISLAM

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 32(a)(7) 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 12,925 words.

Finally, I hereby certify that I have read this Opening 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 29th day of August, 2014.

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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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