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STATE OF WASHINGTON

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No. 34411-4-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

DRAGONSLAYER, INC. dba The New Phoenix Casino;
And MT & m GAMING, INC., dba The Last Frontier Casino,

Plaintiffs/Appellants,

v.

WASHINGTON STATE GAMBLING COMMISSION,

Defendant/Respondent.

APPELLANT'S OPENING BRIEF

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I. INTRODUCTION

This is a first impression case about whether the State of Washington is required to produce private, audited financial statements filed by house-banked cardrooms with the Defendant/Respondent Washington State Gambling Commission (hereinafter the “Commission”) pursuant to WAC 230-40-823¹ to individuals requesting these private records under the Public Disclosure Act (hereinafter the “PDA”), RCW 42.17 *et. seq.*

While the PDA favors broad disclosure of public records, it also recognizes the need to protect the privacy and confidentiality of individuals and the trade secrets of business operations. Hence, the PDA sets forth specific exemptions for not disclosing particular records to the public, such as RCW 42.17.310(1)(tt)²:

¹ **Financial audits and reviews required – House-banking.** Each licensee operating house-banked card games shall prepare financial statements covering all financial activities of the licensee’s establishment for each business year. The following requirements shall apply. * * * **Reviewed financial statements – gross receipts of one to three million dollars.*** * * (2) Each licensee with house-banked card game gross receipts of one to three million dollars for the business year shall engage an independent, certified public accountant licensed by the Washington state board of accountancy who shall review the financial statements in accordance with the statements on standards for accounting and review services or audit the financial statements in accordance with generally accepted auditing standards. * * * **Filing with the commission.** * * * (7) A copy of the report and the financial statements shall be submitted to the director within one hundred twenty days following the end of the licensee’s business year. . . . WAC 230-40-823.

² Although the PDA was recently reorganized at RCW 42.56, *et. seq.*, all cites contained herein will reference the statutes in effect at the relevant time when this matter was commenced. Furthermore, as provided in RCW 42.56.900, “the purpose of sections 402 through 429 of this act is to reorganize the public inspection and copying exemptions in

Financial information, including but not limited to account numbers and values, and other identification numbers supplied by or on behalf of a person, firm, corporation, limited liability company, partnership, or other entity related to an application for a liquor license, gambling license or lottery retail license.

In accordance with RCW 42.17.260(1) and the Uniform Trade Secrets Act (hereinafter "UTSA"), RCW 19.108 *et seq.*, the PDA cannot be invoked to release records that contain trade secrets.

Since the requested audited financial records are related to the application process for a gambling license, the records are exempt from disclosure. Furthermore, the disclosure of the records would reveal the inner operations of privately-operated businesses, which are protected from disclosure as trade secrets. As such, the Commission must be permanently enjoined from disclosing the requested private records.

II. ASSIGNMENT OF ERROR AND ISSUES PRESENTED

A. Assignment of Error

The single inclusive assignment of error is the trial court's January 23, 2006 Order Denying Motion For Preliminary Injunction, Dissolving Temporary Restraining Order, and Dismissing Lawsuit with Prejudice,

RCW 42.17.310 through 42.17.31921 by creating smaller, discrete code sections organized by subject matter. The legislature does not intend that this act effectuate any substantive change to any public inspection and copying exemption..."

which ruled that the financial records of plaintiffs were not exempt from disclosure under the PDA, RCW 42.17 *et. seq.*

B. Issues Presented

With respect to this reversible error, the following issues are presented:

1. Whether the requested records are exempt from disclosure pursuant to RCW 42.17.310(1)(tt)³ because the audited financial statements must be filed in accordance with WAC 230-40-823, and, as such, are related to an application for a gambling license; and
2. Whether the requested information is exempt from disclosure as a trade secret.

III. STATEMENT OF THE CASE

On or about October 19, 2005, Edward Fleisher filed a public records request for “copies of the most recent audited financial statements filed by the four house banked cardrooms in La Center Wash. (WAC 230-40-823)” (CP 6). As acknowledged and accepted by the parties, Mr. Fleisher is an attorney who represents the Cowlitz Tribes. (RP 6, 22).

³ “Financial information, including but not limited to account numbers and values, and other identification numbers supplied by or on behalf of a person, firm, corporation, limited liability company, partnership, or other entity related to an application for a liquor license, gambling license or lottery retail license.” RCW 42.17.310(1)(tt).

George Teeny, owner of plaintiff/appellant businesses, received notice from the Commission of the records request on or about October 25, 2005, with a copy of the responsive records that the Commission intended to release to Mr. Fleisher. (CP 5). The notice only gave Mr. Teeny two days until October 27, 2005, to file an injunction to prevent the Commission from disclosing the records. *Id.*

Plaintiff/Appellant Dragonslayer, Inc. does business as The New Phoenix Casino and Plaintiff/Appellant MT & M Gaming, Inc. does business as The Last Frontier Casino in La Center, Washington (hereinafter collectively referred to as the “Casinos”). These cardrooms represent two of the four cardrooms in La Center, Washington, which are all the subject of the PDA request filed by Mr. Fleisher with the Commission. (CP 131).

Through counsel, Mr. Teeny filed a Complaint for a Permanent Injunction and obtained a Temporary Restraining Order (“TRO”) enjoining the Commission from disclosing the records on October 27, 2005. (CP 3-6, 23-27). A hearing to show cause why the TRO shouldn’t be converted into a preliminary injunction was initially set for November 5, 2005. (CP 23-24). Through mutual agreement of the parties and extensions of the TRO, the hearing was postponed until December 5, 2005, before Judge Barbara Johnson. (CP 37-38). The audited financial

statements were submitted by the Commission for an in camera review at the hearing on December 5, 2005, with the consent of the Casinos. (CP 87-124).⁴

Mr. Teeny seeks an injunction because the audited financial records are “extremely confidential.” (CP 54). The requested records contain information regarding Mr. Teeny’s private business operations. *Id.* The audited financial statements are only on file with the Commission because Mr. Teeny is required by law to file them in order to renew or continue his gambling license for the Casinos. *Id.* Rick Day, director of the Commission, admits that “a licensee’s failure to submit a financial statement...could result in the loss of licensure...” (CP 82, 84).

The audited financial statements provide a line-by-line accounting of the details of the business operations of the Casinos. (*See* CP 87-124). For instance, the audited financial statements detail how all money is spent on business operations, including everything from advertising to security. (CP 92, 105, 111, 113). The records contain information regarding employee compensation, 401(k) benefits, retirement plans, life insurance policies, and employee deferred compensation. (CP 95, 97, 99, 100, 105, 115, 117, 119, 120).

⁴ There are two audited financial statements at issue: (1) Last Frontier Casino (87-105); and (2) New Phoenix Casino (106-24). The formats for both audited financial statements are nearly identical. For ease of discussion, the audited financial statements will be referenced collectively.

The audited financial statements contain the name of a now former shareholder and terms of his stock redemption agreement. (CP 94, 100, 101, 110, 113, 120, 121). With respect to business development, the notes within the audited financial statements reference related party transactions, including the names of other businesses the Casinos are involved with. (CP 97, 116-117). The notes also include information regarding the Casinos operating lease agreements and obligations. (CP 98, 118).

In contrast to the detailed information found in the audited financial statements, information about a cardroom's statistics such as gross receipts, net receipts, gambling wages, gambling expenses and net gambling income can be found in Commission documents which compare this information for casinos across the state. (*See* CP 58-71). As the document title indicates, it provides the cardroom statistics according to gross receipts and is compiled on a quarterly basis. (CP 58). Quarterly reports for all of 2003 were attached to the Affidavit of George Teeny in Support of Plaintiffs' Motion for a Preliminary Injunction. (CP 58-71). Throughout the 2003 year, the Casinos were consistently among the top four producing casinos in the state. *Id.* For the last two quarters of the year, the Casinos were the top two producing casinos in the state. (CP 64-71.)

Mr. Teeny also expressed concern over these confidential records being disclosed to Mr. Fleisher because Mr. Fleisher was working for a business entity that had been involved in business negotiations with him. (CP 54). Hence, Mr. Teeny believed the records would be used to personally affect him and to facilitate profit-seeking business activity by the Cowlitz Tribes. *Id.*

Following the December 5, 2005 hearing, Judge Johnson issued a letter ruling on January 5, 2006. (CP 125-126). Judge Johnson ruled that the audited financial statements were public records and not subject to the RCW 42.17.310(1)(tt) or RCW 42.17.260(9) exemptions. *Id.*

Consequently, the records were ordered disclosed by virtue of the Order Denying Motion for Preliminary Injunction, Dissolving Temporary Restraining Order, and Dismissing Lawsuit with Prejudice. (CP129-34). The disclosure of the records has been stayed by the lower court pending this appeal. (CP 134).

IV. ARGUMENT

A. Standard of Review and Burden of Proof.

The PDA provides that review of public records requests are de novo. RCW 42.17.340(3). While RCW 42.17.340(3) references actions brought under RCW 42.17.250 through 42.17.320, the courts have extended de novo review to injunctive actions brought pursuant to RCW

42.17.330. *Spokane Police Guild v. Washington State Liquor Control Board*, 112 Wn.2d 30, 35, 36, 769 P.2d 283 (1989). Where, as here, the underlying record of the proceedings is based solely on memorandum of law, affidavits and other written evidence, the appellate court review is also de novo. *Id.*; *Progressive Animal Welfare Soc’y v. University of Wash* (“PAWS II”), 125 Wn.2d 243, 252, 884 P.2d 592 (1994).

The Washington Supreme Court permits parties to argue new legal theories relating to public records requests when the parties had little time or opportunity to develop its legal position and where review is de novo. *Id.* at 253; *Confederated Tribes of Chehalis Reservation v. Johnson*, 135 Wn.2d 734, 744, 958 P.2d 260 (1998). Furthermore, a reviewing court is not bound by the trial court’s findings. *PAWS II*, 125 Wn.2d at 253.

When attempting to prevent the disclosure of public records, the burden of proof lies upon the party seeking the injunction. *Spokane Police Guild*, 112 Wn.2d at 35.

B. Washington State Law Does Not Permit Disclosure of Public Records if the Records Consist of Financial Information Related to a Gambling License Application.

The PDA, RCW 42.17 *et seq.*, approved by the voters in 1972, requires state agencies to disclose any public record upon request, unless the record falls within an exemption. *O'Connor v. Washington State Dept.*

of Social and Health Serv., 143 Wn.2d 895, 905, 25 P.3d 426 (2001).

Generally, courts construe the act broadly and its exemptions narrowly.

Hearst Corp. v. Hoppe, 90 Wn.2d 123, 128, 580 P.2d 246 (1978).

In 2000, Substitute House Bill 2792 adding exception (tt) to RCW 42.17.310(1) passed by unanimous vote of both the House and Senate without floor discussion. Final Bill Report on Substitute House Bill 2792, 52nd Leg. (2000), at 1. Section (tt) of the PDA exempts the following information from disclosure:

Financial information, including but not limited to account numbers and values, and other identification numbers supplied by or on behalf of a person, firm, corporation, limited liability company, partnership, or other entity related to an application for a liquor license, gambling license or lottery retail license.

RCW 42.17.310(1)(tt). (Emphasis added).

As discussed more fully below, this is a very broad exemption that prevents “financial information” that is “related to” a gambling license application from being disclosed. The Casinos suggest that it is a mistake to narrowly construe a broadly worded exemption. That was the trial court’s fundamental mistake in this case. Because the information to be disclosed is financial information related to an application for a gambling license, the records are exempt from disclosure.

1. The audited financial statements are financial information related to an application for a gambling license.

When interpreting a statute, the primary duty of the court is to give effect to the legislature's intent. *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003). Where a statute is unambiguous, the court assumes the legislature means what it says and will not engage in statutory construction past the plain meaning of the words. *Davis v. Dept. of Licensing*, 137 Wn.2d 957, 963-64, 977 P.2d 554 (1999). If an unambiguous term is not statutorily defined, it is defined by its dictionary meaning. *State v. Fjermestad*, 114 Wn.2d 828, 835, 791 P.2d 897 (1990).

“Application” is not defined by statute for purposes of the PDA and is an unambiguous term that should be defined by its dictionary meaning. An “application” is an “appeal,” “request” or “petition.” *Stone v. Chelan County Sheriff's Dept.*, 110 Wn.2d 806, 811, 756 P.2d 736 (1988) (citing *Webster's Third New International Dictionary* and finding that an enforcement officer transferred to a new position at the sheriffs office was “making a new ‘application’ for employment.”). “Application” is also defined by *Blacks Law Dictionary* as “[a] request or petition.” *Black's Law Dictionary* (8th ed. 2004).

The records in question are required by WAC 230-40-823 as an “appeal,” “request” or “petition” for a gambling license. Without filing

this information with the Commission, Mr. Teeny would not possess a gambling license. Accordingly, not only is it “related to” a gambling license, it is required to maintain a gambling license.

Yet, without any significant analysis or discussion of what an “application” is, the Superior Court held that appellants’ renewal application for a gambling license was not part of the license application process. (CP 125-126). The court’s ruling was conclusory, not based in fact and counters the plain meaning of the word “application” or “related to an application.”

Pursuant to WAC 230-040-823, a house-banked card house must present the audited financial statement in question. Nowhere in the statute, express or implied, is any reference that something can only be “applied for” once and that subsequent renewals are not, in fact, “applications.” In fact, Mr. Teeny knew that the audited financial statements were essential to maintaining his license. (CP 54). It is part of an on-going process. Mr. Day, the director of the Commission, admits in his declaration that this is true. (See CP 84). Thus, the Commission must admit that these private financial records are related to Mr. Teeny’s gambling license for the Casinos.

- 2. If the Washington legislature meant that only the initial “application” would be protected, they would have said it.**

The court does not “add words or clauses to an unambiguous statute when the legislature has chosen not to include that language.” *State v. Delgado*, 148 Wn.2d 723, 727, 63 P.3d 792 (2003). The Washington legislature could have specified that only sensitive financial information in the *initial* application was exempt from disclosure, but did not do so.

The trial court erred in effectively adding the words “initial application” to the statute despite the fact that the Washington legislature has used the term “initial application” when it meant “initial application” over 20 times.⁵ This court need not look any further than the plain

⁵ The Washington Legislature has used the term ‘initial application’ 21 times. *See, e.g.*, (1) RCW 15.36.081: “The ‘initial application’ for a dairy technician’s license must be accompanied by a license fee of ten dollars. The fee for renewal of the license is five dollars”; (2) RCW 15.83.020: “The director shall approve the ‘initial application’ or renewal” in a statute regulating agricultural fair practices; (3) RCW 18.06.140: Mandating that every licensed acupuncturist shall develop a written plan which “shall be submitted with the ‘initial application’ for licensure”; (4) RCW 18.88A.100: Statute providing waiver of examination for “initial applications” of nursing assistants in some cases; (5) RCW 18.122.120: Statute providing waiver of examination for “initial applications” of certain medical professionals; (6) RCW 19.105.411: Statue requiring “a fee for the ‘initial application’” for each camping resort; (7) RCW 24.06.410: Statute allowing nonprofit corporations to amend the information on their “initial application”; (8) RCW 28A.410.010: Statute mandating that the Education Board shall require a record check in candidates “initial application” for certification; (9) RCW 38.42.060: Authorizing a temporary stay of a civil action for armed service personnel when the request is made by the “service member or his or her dependent at the time of the ‘initial application’”; (10) RCW 46.16.30901: Statute requiring firefighters to show proof of eligibility at time of “initial application and subsequent renewals” to receive a special vehicle license; (11) RCW 46.16.30920: Statute requiring armed forces personnel to show proof of eligibility at time of “initial application” to receive a special vehicle license; (12) RCW 46.72A.090: Requiring chauffeurs to file a physician’s certification “[u]pon ‘initial application’ and every three years thereafter”; (13) RCW 49.44.120: Permitting narrow circumstances in which a lie detector test can be used as part of an

language of the statute to see that the legislature meant “application,” not “initial application,” when they drafted exception (tt).

3. The content and structure of the regulations governing gambling licenses support the contention that a renewal application is an “application” for purposes of exception (tt).

WAC 230-04-005 governs the gambling license certification and re-certification program in Washington. The statute states:

230-04-005. Gambling license certification program.

The gambling license certification program is an investigative licensing process in which all applicants are assessed and evaluated against the standards and requirements contained in chapter 9.46 RCW. All applicants that meet the qualifications for licensing will be certified by the Commission for an initial license and are subject to recertification by the Commission on an annual basis.

“initial application for employment”; (14) RCW 50.04.020: Setting forth process whereby unemployment can request “wage information for the last completed calendar quarter if it has not been reported at the time of ‘initial application’”; (15) RCW 50.04.030: Permitting the commissioner to backdate “an ‘initial application’ at the request of the claimant either for the convenience of the department”; (16) RCW 50.20.240: Implementing a job search monitoring program “[t]o ensure that following the ‘initial application’ for benefits, an individual is actively engaged in searching for work”; (17) RCW 84.36.560: Setting forth conditions in which not-profit, low income housing property can be eligible for a property tax exemption when it is unoccupied at time of ‘initial application’; (18) RCW 84.36.815: Requiring soil and water conservation districts shall file an ‘initial application’ on or before March 31 with the state department of revenue to maintain tax exempt status; (19) RCW 84.36.825: Requiring “an application fee of thirty-five dollars for each ‘initial application’ and eight dollars and seventy-five cents for each annual renewal declaration” for property tax exemption; (20) RCW 88.16.070: Stating that Pilotage Act “fees for ‘initial applications’ and for renewals shall be established by rule”; (21) King County Superior Court Local Rule 40: “For other writs (pre-judgment garnishment, attachment, replevin, restitution, assistance) the ‘initial application’ shall be presented to the Ex Parte Department or the assigned judge.”

WAC 230-04-005. (Emphasis added). The above statute supports the inevitable conclusion that those who apply for “recertification by the Commission” are, in fact, applicants. The word “applicant” includes those who must be recertified by the Commission on an annual basis. It is all part of the ongoing licensing application process, and, therefore, is related to a gambling license and is exempt from disclosure.

The first sentence of WAC 230-04-005 states that the licensing process is one in which “all applicants” are assessed under and references RCW 9.46. RCW 9.46.070 expounds upon the powers and duties of the Commission and makes it very explicit that the scope of the Commission’s powers extends to granting applications that last only for one year. RCW 9.46.070(1)-(4). This applies to any group that is engaged in any type of gambling activity from charitable to commercial purposes. *Id.*

The statute in question gives the Commission authority:

[T]o authorize and issue licenses for a period not to exceed one year to any person, association, or organization operating a business primarily engaged in the selling of items of food or drink for consumption on the premises, approved by the commission meeting the requirements of this chapter and any rules and regulations adopted pursuant thereto permitting said person, association, or organization to utilize punch boards and pull-tabs and to conduct social card games as a commercial stimulant in accordance with the provisions of this chapter.

RCW 9.46.070(2). (Emphasis added). Consequently, at the end of the year any previously licensed casino owner must necessarily reapply for a license because, absent reapplication, the license must expire. As a licensee, the applicant must provide the Commission with new financial information to maintain or recertify his license. Disclosure of this private information to the general public, and in particular to competitors, remains exempt.

In addition, RCW 9.46.070(5), which is referenced in the last sentence of WAC 230-04-055, authorizes the Commission “[t]o establish a schedule of annual license fees for carrying on specific gambling activities.” RCW 9.46.070(5). (Emphasis added). It goes on to provide that “all licensing fees shall be submitted with an application.” *Id.*

The second sentence of WAC 230-04-005 also supports the Casinos’ conclusion that renewal applicants remain “applicants” for purposes of section (tt). The second sentence notes that the licensing certification process is repeated annually for “all applicants.” The statute, in lumping initial applicants together with renewal/recertification applicants, suggests that those who are recertified remain “applicants.” Consequently, the audited financial statements are financial information related to an “application” for a gambling license and are exempt under section (tt).

If the trial court was correct and section (tt) does not apply to renewal applications, one could simply let their initial application expire and then file a brand new application thereby circumventing sending in audited financial statements altogether. This ludicrous result, while comports with the court's reasoning, would better protect the Casinos but would frustrate the purpose of the Commission's goals. The trial court's interpretation would permit the Casinos, who are among the top four profitable casinos in the state, to keep business practices private from prying competitors wishing to piggyback on the Casinos' success resulting from Mr. Teeny's years of experience. (CP 58-71).

Furthermore, if the trial court and Commission are correct and the renewal application for a gambling license is not an "application" for a gambling license, it would appear that the Commission acts beyond its scope in asking for any annual licensing fees after the initial application, since RCW 9.46.070(5) only authorizes "annual" licensing fees when submitted with an "application." The word "annual" suggests that the "application" and corresponding fees shall be submitted yearly, and supports the Casinos' position that a renewal application is an application for purposes of section (tt) of the PDA. It is all part of an on-going process that is related to obtaining and maintaining a gambling license.

4. Documents submitted to maintain a license are still documents “related to” the initial “application” for a gambling license.

Alternately, if this Court finds that the renewal application is not an “application,” appellant respectfully submits that the audited financial statements are still “related” to the initial application and therefore exempt from disclosure. “Legally and in common usage, the term ‘related’ is defined as having an undetermined relationship, connection, or association.” *David v. Donovan*, 698 F.2d 1057, 1059 (9th Cir. 1983) (citing *Black's Law Dictionary* 1158 (5th ed. 1979) and *The American Heritage Dictionary* 1097 (New College ed. 1980)). The audited financial statements “relationship, connection, or association” to the initial application is manifest because they would not be created but for the initial application. As a result, in addition to being integral to the renewal application, the documents are “related to” the initial application for a gambling license.

While the legislative history of section (tt) is meager, it is clear that the focus of the committee discussions was on the potential harm of the information getting into the wrong hands, not on whether the harm would occur upon initial application as opposed to on subsequent renewal applications. *See generally*, SHB 2792: Hearing before the House Committee on State Government, 56th Leg. (February 1, 2000); SHB

2792: Hearing before the Senate Committee on Commerce, Trade, Housing & Financial Institutions, 56th Leg. (February 17, 2000).⁶ The trial court's strained reading of the statute does not comport with the plain meaning of the statute and stretches the PDA's broad policy in favor of disclosure too far. It is also in direct conflict with a broadly worded exemption that was intended to protect those involved in this system from having to make 'public,' private financial information.

C. Washington State Law Does Not Permit Disclosure of Public Records if the Information is a Trade Secret.

At the trial court, the Casinos emphasized the confidential nature of the audited financial statements. The confidentiality of the audited financial statements was argued in reference to the commercial purpose exemption. The trial court rejected this argument because the audited financial statements did not contain lists of names. RCW 42.17.260(9). The Casinos do not disagree with this contention but point out that the private financial records contain confidential information regarding the Casinos' business operations. The disclosure would personally affect the Casinos' owner and his business activity by revealing the inner workings

⁶ Please note that these sources are not, to the best of plaintiff's knowledge, available in print form. Audio files of the House hearings can be found at <http://www.tvw.org/search/sitesearch.cfm?keywords=House%20State%20Government&Date=2000&CFID=9163927&CFTOKEN=64544958>. Audio files of the Senate hearings can be found at <http://www.tvw.org/search/sitesearch.cfm?keywords=Senate%20State&Date=2000&CFID=9163927&CFTOKEN=64544958>.

of his business success to the public. At the heart of this argument is protecting the confidential documents that outline the inner workings of a private business. Needless to say, Mr. Teeny does not want his detailed financial records examined by his present or future competition. This fundamental principle was not grasped by the trial court. The confidential nature of these documents is not changed when they are submitted in connection to maintain a license as opposed to an initial application. Even if these arguments do not fit within the confines of RCW 42.17.260(9), the substance of the argument supports exemption of the audited financial statements as trade secrets.

Regardless if the Commission finds this argument unrelated to those presented at the lower court, the *de novo* review standards and the policy of Washington State permit new legal arguments on appeal. *PAWS II*, 125 Wn.2d at 252; *Confederated Tribes*, 135 Wn.2d at 744. Consequently, the Casinos request that this Court consider the facts of this case under the trade secrets laws. The information in question is exempt from disclosure because it is protected as a trade secret.

The UTSA makes trade secrets confidential. RCW 19.108, *et. seq.* The PDA excuses disclosure where ‘other statutes’ exempt or prohibit disclosure of specific records. RCW 42.17.260(1). The PDA may not be

used to acquire knowledge of a trade secret because the UTSA binds the PDA. *PAWS II*, 125 Wn.2d at 262. A “trade secret” is defined as:

[I]nformation, including a formula, pattern, compilation, program, device, method, technique, or process that:

- (a) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and
- (b) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

RCW 19.108.010(4). The audited financial statements meet this definition. As such, the audited financial statements are trade secrets exempt from disclosure under the PDA in accordance with RCW 42.17.260(1).

It should also be noted that the legislature has recognized that the PDA is an improper means to attempt to obtain a trade secret.

The legislature...recognized that protection of trade secrets, other confidential research, development, or commercial information concerning products or business methods promotes business activity and prevents unfair competition. Therefore, the legislature declares it a matter of public policy that the confidentiality of such information be protected and its unnecessary disclosure be prevented.

PAWS II, 125 Wn.2d at 262-63 (*citing* Laws of 1994, ch. 42, § 1, p.130). The legislature has clearly recognized the need to keep

commercial information concerning business practices confidential as exemplified by the broad authority given to courts to protect trade secrets. *PAWS II*, 125 Wn.2d at 262 (citing RCW 19.108.010(4)). This is directly in line with the protection of trade secrets.

1. The information in question derives independent economic value from not being generally known.

The first criteria for being categorized as a trade secret is that the information must "derive some independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by other persons who can obtain economic value from its disclosure or use." RCW 19.108.010(4). In other words, it must be "novel in the sense that the information must not be readily ascertainable from another source." *Spokane Research & Defense Fund v. City of Spokane*, 96 Wash.App. 568, 578, 983 P.2d 676 (1999). The audited financial statements meet this standard.

Allowing the audited financial statements to be disclosed is tantamount to giving the Casinos' competitors the keys, or a business plan outline, to what are consistently two of the most successful gambling businesses in the state. (CP 58-71). No part of the audited financial statements are public. Mr. Teeny, the owner and sole shareholder of the

Casinos, refers to the audited financial statements as extremely confidential and personally affecting him. (CP 53, 54; RP 23). The harm entails disclosure of the amount of and nature of the Casinos expenses on nearly every aspect of the Casinos' business operations; a business model refined by Mr. Teeny that has resulted in two of the top producing casinos in the state. (See CP 58-71; 87-124). With this backdrop, it is not surprising that competitors would like to review these private records.

The audited financial statements show the amounts of long term and short term debts, accounts payable and accounts receivable, including the identity of the debtor or creditor and the general terms of loans or other agreements. (CP 91, 92, 97, 100, 101, 110, 111, 113, 116, 117, 120, 121). This information directly overlaps with insight into the Casinos' business development that is found throughout the financial records, such as in the notes referencing related party transactions, including the names of other businesses the Casinos are involved with. (CP 97, 116, 117). The financial statements itemize anticipated future rents for the next several years. (CP 98, 118). The records contain information regarding employee compensation, 401(k) information, retirement plans, life insurance policies and deferred compensation. (CP 95, 97, 99, 100, 105, 115, 117, 119, 120). The financial statements even identify amounts paid for armored car services, to employees for salaries and for uniforms and laundry. (CP 92,

105, 111). The information in the audited financial statements is not merely a balance sheet. Every imaginable expense is laid out in detail. The confidentiality and importance of the document to the inner workings of the Casinos speaks for itself. This information is even more valuable to a competitor of a renewal applicant than to a new “initial” applicant.

As can be seen in the audited financial statements, the depth of information concerning the Casinos commercial business activity is enormous. The audited financial statements’ balance sheets are followed by detailed notes. The information found in the audited financial statements is so detailed that it is obvious that the information could not be readily ascertainable by other means.

The information contained in the audited financial statements is in sharp contrast to the information about a cardroom’s statistics found in Commission documents comparing the information for casinos across the state, which provides cardroom statistics ranked by gross receipts and is compiled on a quarterly basis. (CP 58-71). Throughout the 2003 year, the Casinos were consistently among the top four producing casinos in the state. *Id.* For the last two quarters of the year, the Casinos were the top two producing Casinos in the state. (CP 64-71). The general public can obtain information about the Casinos that shows the state is monitoring

gambling activity without revealing the secrets of the Casinos' business operations.

The information in the audited financial statements derives economic value from not being readily available to third parties because they are the tried and true blueprints for running a successful casino. As acknowledged and accepted by the parties at the hearing on December 5, 2005, Mr. Fleisher, who requested this information, is one of the attorneys for the Cowlitz Tribes. (CP 6; RP 6). Mr. Fleisher made this request on behalf of the Cowlitz Tribes. (RP 22). Although the Commission denied knowing the purpose of Mr. Fleisher's request, the Commission conceded knowing Mr. Fleisher was an attorney and never objected to knowing that the request was made on behalf of Mr. Fleisher's client. *Id.*

In his affidavit, Mr. Teeny stated that Mr. Fleisher was working for an entity involved in business negotiations with the Casinos. (CP 54). Although the Commission objected that Mr. Teeny's statements were not sufficient evidence, the statements in his affidavit were never disputed. When these facts are all read together, it's clear that the information sought was not for the concerned citizen the legislature had in mind when it passed the PDA; rather, it is the commercial business information that the legislature intended to protect in order to promote business activity and prevent unfair competition.

2. The information in question is the subject of reasonable efforts to maintain its secrecy.

The second criteria for being categorized as a trade secret is that the particular information must be "the subject of efforts that are reasonable under the circumstances to maintain its secrecy." The audited financial statements also meet this standard. (CP 54).

"Trade secrets law protects the [information]...if [it] possess some novelty and [is] undisclosed or disclosed only on the basis of confidentiality." *Boeing v. Sierracin Corp.*, 108 Wn.2d 38, 49, 738 P.2d 665 (1987). The audited financial statements are "novel" as indicated above. The audited financial statements are only on file with the Commission because the filing is mandated by WAC 230-40-823. Needless to say, no individual other than the Casino's attorneys, the accountants who prepared the documents, and the court have access to these audited financial statements. The records were filed under court seal. Reasonable efforts have been made to keep the information private as a trade secret.

The filing of the audited financial statements with the Commission does not destroy the confidential and private nature of the audited financial statements. The Casinos could not get relicensed on an annual basis without the filing of this very confidential and private financial

information. This is the private proprietary information of a business that is not open to the public. This is particularly true, as it relates to Mr. Teeny's competitors, who seek this information for financial gain.

Finally, the subject litigation is the ultimate example of the efforts Mr. Teeny expends on maintaining the confidential or secret nature of his private financial records.

3. This court can follow the *Confederated Tribes* court's reasoning as a roadmap and find that the trade secret exemption for public records applies to this case.

Although there is apparently no Washington case law regarding the audited financial statements of casinos, the issues raised in *Confederated Tribes* are instructive to this court regarding the issue of whether the information is protected as a trade secret. *Confederated Tribes*, 135 Wn.2d 734.

In *Confederated Tribes*, plaintiff tribal casino owners sought to enjoin defendant Johnson from access to information appearing in public records regarding "community contributions" that the tribes were required to make in the amount of 2 percent of their "net win." *Id.* at 741. The money went to the state for distribution to help defray the costs of the impact that the casinos have on the local community resources and were required by the Tribe's compact with the State. *Id.* at 748. Plaintiff Tribes

argued that competitors would get an advantage over them if the contributions were disclosed and that, as a result, the information derived economic value from being secret. *Id.* at 749. The court disagreed because others were able to gauge the amount of contributions by visiting their website, talking to employees or tribal members, or speaking directly to recipients of the contributions. As a result, the court found that the information did not derive independent economic value from not being known, as it was information that was easily ascertainable from other sources. *Id.*

The present case is distinguishable from the reasoning in *Confederated Tribes* because the audited financial information is not available from any other public source and therefore derives actual or potential value from not being generally known. The *Confederated Tribes* court was correct that the information was not “novel” because the 2 percent contribution of net win could have been ascertained by talking to any of the people mentioned by the court. In fact, reservations at the time regularly disclosed the names and sometimes even the amount of community contributions as a marketing tool. In addition, knowing the amount of the 2 percent net win contribution only allowed competitors to estimate the casino’s gross revenues, it would not have revealed the inner operations of the casino.

The information potentially disclosed in the present case is significantly more granular, private and damaging than mere information that helps determine the gross revenue of the casino. There is no one, other than the Casinos' sole owner, who has access to the information in question. The information in the audited financial statements doesn't just show net or gross bottom line numbers. They offer minutia on the day-to-day workings of two casinos that cannot be ascertained by any other source. The notes in the audited financial statements also provide great detail of business operations as discussed above. The confidentiality of the audited financial statements speaks for itself. We urge the Court to carefully review the audited financial statements and reach its own conclusions whether this information is invaluable to our client's competitors.

V. CONCLUSION

This case seeks to prevent the disclosure of records that the PDA intends to keep private. The detailed, audited financial statements do not contain information that is of vital governmental interest to the public. The audited financial statements do contain information that is exempt from disclosure pursuant to RCW 42.17.310(1)(tt) and the UTSA, RCW 19.108 *et seq.* The audited financial statements contain confidential

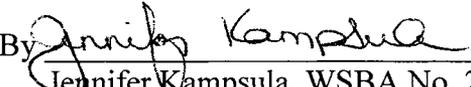
information concerning commercial business activities that must be protected to ensure fair business activity between competitors.

For all the reasons cited herein, the Casinos ask this Court to:

- (1) Reverse the trial court's dismissal of Plaintiffs' Complaint for Permanent Injunction;
- (2) Reverse the trial court's denial of Plaintiffs' Motion for a Temporary Injunction;
- (3) Reverse the trial court's order dissolving the Temporary Restraining Order; and
- (4) Enter a Permanent Injunction preventing Defendant from disclosing Plaintiffs' audited financial statements.

DATED: August 17, 2006

KELL, ALERMAN & RUNSTEIN, LLP

By 
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CERTIFICATE OF SERVICE

I certify that I served the foregoing APPELLANT'S BRIEF on the following recipient:

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by placing a copy in an envelope addressed to said recipient at the above-listed address and depositing the envelope, with postage prepaid, in the United States Postal Service in Portland, Oregon, by overnight mail.

DATED: August 17, 2006

KELL, ALTERMAN & RUNSTEIN, L.L.P.

By *Jennifer Kampsula*
Jennifer Kampsula, WSBA No. 29508
Thomas R. Rask, III, Pro Hac Vice
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I hereby certify that the foregoing copy of said document is a true copy of the original.

KELL, ALTERMAN & RUNSTEIN, L.L.P.

By _____
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