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STATE OF WASHINGTON

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**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

DRAGONSLAYER, INC., dba The New Phoenix Casino; and
MT&M GAMING, INC., dba The Last Frontier Casino,

Appellants,

v.

WASHINGTON STATE GAMBLING COMMISSION,

Respondent.

BRIEF OF RESPONDENT

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I. INTRODUCTION

Appellants Dragonslayer, Inc. and MT&M, Inc. (collectively “the Casinos”) have failed to prove that the audited financial statements they seek to enjoin from disclosure are subject to a statutory exemption under the Public Disclosure Act (“the Act”), Chapter 42.56 RCW,¹ or that they constitute legally protectable trade secrets under Washington’s Uniform Trade Secret Act (“the UTSA”), Chapter 19.108 RCW. Accordingly, this Court should uphold the superior court’s ruling denying the Casinos’ motion for injunctive relief.

II. COUNTER-STATEMENT OF THE ISSUES

This case concerns audited financial statements submitted by the Casinos pursuant to WAC 230-40-823, and whether the statements are subject to disclosure under Washington’s Public Disclosure Act, RCW 42.56. The Appellants’ Brief presents three issues:

1. Are the audited financial statements, which house-banked card rooms must submit as part of the Commission’s monitoring and enforcement duties, “financial records” “related to an application for a . . .

¹ The statutes governing the disclosure of public records that formerly appeared in RCW 42.17 were recodified effective June 1, 2006, and now appear in RCW 42.56. Because the briefing at the trial court level cited to the earlier codification, citations to RCW 42.56 will be followed by footnotes setting forth the former citation under RCW 42.17.

gambling license” and, therefore, exempt from disclosure pursuant to RCW 42.56.270(10)(a)?²

2. May the Casinos argue for the first time on appeal that the audited financial statements constitute legally protectable trade secrets under the UTSA?

3. Have the Casinos satisfied their burden of establishing that the audited financial statements are protected trade secrets under the UTSA?

III. COUNTER-STATEMENT OF THE CASE

A. Procedural History

The procedural history set forth by the Casinos is largely accurate. On or about October 19, 2005, the Commission received a Request for Public Disclosure seeking copies of “the most recent audited financial statements filed by the four house-banked card rooms in LaCenter, Wash.” CP 14-15. Documents sought as part of this request included the audited financial statements for Dragonslayer, Inc., doing business as the New Phoenix Casino, and MT&M Gaming, Inc., doing business as the Last Frontier Casino.³ Both corporations are owned by George Teeny. CP 17.

² Former RCW 42.17.310(1)(tt).

³ The public records request was submitted by Edward Fleisher. CP 26. In their brief, the Casinos assert that Mr. Fleisher is an attorney who represents the Cowlitz Tribes. Appellants’ Brief (“App. Br.”) at 3. This assertion, however, is not supported by the superior court record. Indeed, Casinos’ counsel conceded as much when the Commission objected. *See* Report of Proceedings (“RP”) 22.

On October 20, 2005, the Commission notified the Casinos that it had received a public records request for the audited financial statements. CP 19-20. On October 27, 2005, the Casinos sought and received a temporary restraining order and filed a complaint for a permanent injunction in Clark County Superior Court. CP 23-24; 50-52.

Subsequently, the parties agreed to reschedule the hearing on the motion for injunctive relief from November 4, 2005 to December 2, 2005. CP 37-38. As a consequence, the Casinos had several weeks to prepare their motion for a preliminary injunction, which they ultimately filed on November 22, 2005. CP 45-49. The Commission filed its response brief on November 29, 2005. CP 73-79.

In their pleadings and at oral argument, the Casinos asserted that the court should enjoin disclosure pursuant to two statutory exemptions. First, they contended that the financial statements were exempt from disclosure under RCW 42.56.270(10)(a),⁴ which applies to financial records “related to” “an application for a . . . gambling license.” CP 51. Second, they argued the documents were being sought for commercial purposes and, therefore, were exempt from disclosure under RCW 42.56.070(9),⁵ which prohibits disclosure of “lists of individuals

⁴ Former RCW 42.17.310(1)(tt).

⁵ Former RCW 42.17.260(9).

requested for commercial purposes.” CP 51. At oral argument, they also contended that the Act was inapplicable because the audited financial statements did not constitute “public records,” as that term is defined in RCW 42.17.020(41).⁶ CP 25; RP 6-10.

Following the December 4, 2005 hearing, the trial court issued a written ruling denying the motion on January 5, 2006. CP 125-26. In its ruling, the court determined that (1) the financial statements were “public records” and therefore subject to regulation under the Act; (2) the financial records were “not related to the application process, and therefore, are not within exemption [RCW 42.56.270(10)(a)];”⁷ and (3) the exemption in RCW 42.56.070(9)⁸ was inapplicable because the financial statements did not contain “lists of names” sought for commercial purposes. CP 125-26. On appeal, the Casinos have abandoned arguments (1) and (3). *See* App. Br. at 3 and 18.

A final order was filed on January 23, 2006. CP 129-34. On February 9, 2006, the Casinos filed a timely notice of appeal. CP 136-37.

⁶ RCW 42.56.010 provides that the definitions that appear in RCW 42.17.020 are applicable to terms used in RCW 42.56.

⁷ Former RCW 42.17.310(1)(tt).

⁸ Former RCW 42.17.260(9).

B. Regulatory Framework And Factual Background

The Commission is charged with monitoring and regulating gambling operations and ensuring that they comply with the laws and regulations governing the gambling industry in the State of Washington. RCW 9.46.070, .090, .210; CP 130-31. It also oversees the licensing of gambling establishments, like the house-banked card rooms in this case. RCW 9.46.070(2), (5), (7).

The Commission's monitoring and regulation function is separate and distinct from its licensing function. CP 84. For example, the regulations governing the operation of card rooms and the regulations governing the procedure for applying for a house-banked card room license appear in separate chapters of the Washington Administrative Code. Licensing procedures are found in Chapter 230-04 WAC, while the regulations governing the operation of house-banked card rooms are found in Chapter 230-40 WAC. CP 83-84.

In furtherance of its monitoring and enforcement mission, the Commission, at the urging of the card rooms themselves, adopted WAC 230-40-823, which requires that house-banked card rooms⁹ submit audited financial statements to the Commission within 120 days of the

⁹ A "house-banked cardroom" is an establishment where card players play against the house, as opposed to one another. WAC 230-40-010(2). Blackjack, where play is against the dealer, is an example of a house-banked card game.

close of the licensee's "business year." CP 83. WAC 230-40-823 was initially adopted by the Commission in 2000. *See* Appendix A. On February 13, 2004, its scope was substantially expanded at the urging of the card rooms. Wash. State Reg. 04-06-058. The order adopting the 2004 amendment was accompanied by the following statement of purpose:

Audits and reviews of house-banked card rooms: This amendment requires house-banked card rooms with gross receipts over three million to submit audited financial statements to commission staff This rule was originally brought forward at the request of the card room industry as a way to show the overall status of their business. Additionally, these reports will assist commission staff in recognizing undisclosed substantial interest holders and loans due to the footnote disclosures that are required as part of an audit or review. It also allows for an independent party to review and test the financial data of the licensees.

Wash. State Reg. 04-06-058.

Consistent with this stated purpose, the Commission reviews financial statements to ensure the card rooms are complying with state gambling laws and regulations, and posts information contained in the statements on the Commission website for third party review. CP 58-71, 83. In 2003, the Commission posted the following categories of information from the Casino's financial statements on the Internet: gross receipts, special prizes, net receipts, gambling wages, reported local tax, other gambling expenses, and net gambling income. CP 58-71.

In the past, the Commission has received public records requests for financial statements from the legislature, local governments, and the licensees themselves. CP 83. This information is of particular interest to local governments, who have authority to tax gambling revenues. CP 83; *see* RCW 9.46.110. Because the Commission relies upon information contained in these documents to perform its regulatory function, the financial statements constitute public records that are subject to disclosure under the Public Disclosure Act. *See* RCW 42.17.020(41).¹⁰

As mentioned earlier, the Commission also oversees licensing of gambling personnel and establishments, including house-banked card rooms. *See* RCW 9.46.070; CP 82. The Commission's licensing duties include investigating and evaluating initial license applications and license renewal applications. WAC 230-04-064. After being initially licensed, a house-banked card room must renew its license on a yearly basis. RCW 9.46.070(2).

The laws and regulations governing license applications and license renewals appear in RCW 9.46.0325, .070, .075; WAC 230-04.

¹⁰ RCW 42.56.010 provides that the definitions that appear in RCW 42.17.020 are applicable to RCW 42.56. RCW 42.17.020(41) defines a "public record" for purposes of the PDA as follows:

[A]ny writing containing information relating to the conduct of government or the performance of any governmental or proprietary function prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics.

These laws and regulations require an applicant seeking a house-banked card room license to disclose certain financial information, including articles of incorporation and bylaws, all lease or rental agreements, franchise agreements, management agreements, names and identification information for all employees and agents, and detailed information regarding all substantial interest holders. WAC 230-02-022. In addition to this financial information, house-banked card room license applicants must also submit a detailed description of their internal accounting and administrative controls, as well as a detailed diagram of their physical layout. WAC 230-04-207. Significantly, none of the laws or regulations governing gambling license applications or renewals require house-banked card rooms to disclose audited financial statements as part of the initial license application or renewal application process. In short, house-banked card rooms are not required to submit audited financial statements as part of the licensing process.¹¹ CP 83.

¹¹ Contrary to the Casinos' assertions, there is no correlation between the end of a card room's "business" year and the renewal of its gambling license. *See* App. Br. at 5, 16. For example, a card room's gambling license may be up for renewal in October, while its fiscal year may end in December. While there may be instances where submission of the audited financial statements occurs in the same month as the card room renews its gambling license, submission of the financial statements is not part of the application process. *Compare* WAC 230-04-190(3) (application to renew license due prior to license expiration date), and WAC 230-40-823(7) (generally, audited financial statements due within 120 day after the end of the house-banked card room's fiscal year).

IV. STANDARD OF REVIEW

The Public Disclosure Act (“Act”), Chapter 42.56 RCW, is “a strongly worded mandate for broad disclosure of public records.” *Spokane Police Guild v. Liquor Control Bd.*, 112 Wn.2d 30, 33, 769 P.2d 283 (1989). To affect this purpose, the Act is liberally construed in favor of disclosure and its exemptions are narrowly construed. *Confederated Tribes v. Johnson*, 135 Wn.2d 734, 745-46, 958 P.2d 260 (1998); RCW 42.56.030.¹²

To this end, the Act requires disclosure of public records upon request, unless the records are exempted. *PAWS v. University of Washington*, 125 Wn.2d 243, 258, 884 P.2d 592 (1994). Superior courts are authorized to issue injunctions to persons objecting to disclosure of documents under the Act pursuant to RCW 42.56.540.¹³ To prevail, the party seeking to enjoin disclosure of public records must prove that the requested documents fall within one of the Act’s statutory exemptions or are protected by another statute that precludes disclosure. *Confederated Tribes*, 135 Wn.2d at 746; RCW 42.56.070(1).¹⁴

¹² See RCW 42.17.010(11).

¹³ Former RCW 42.17.330.

¹⁴ Former RCW 42.17.260(1).

When the case below is decided solely upon submission of documentary evidence and legal argument, appellate review is *de novo*. *Confederated Tribes*, 135 Wn.2d at 744. Parties seeking protection from disclosure under the UTSA bear the burden of establishing that an exemption applies or that a trade secret exists. *Id.* at 749.

V. ARGUMENT

A. **Because The Casinos' Financial Statements Are "Related To" The Commission's Monitoring And Enforcement Function, Not License Applications, They Are Not Exempt From Disclosure Under RCW 42.56.270(10)(a).**¹⁵

WAC 230-40-823 requires that house-banked card rooms submit the financial statements to the Commission at the end of the **licensee's** business year, not with their license application. Upon receipt, the Commission analyzes the information contained in the statements to ensure that the licensee is complying with state gambling laws and regulations and posts some of the information on its website as a service to legislators, the media and the public. CP 83-84. The Commission does not require house-banked card rooms to submit their audited financial statements as part of the license application or license renewal process. *Id.*

¹⁵ Former RCW 42.17.310(1)(tt).

The Casinos contend that the audited financial statements are subject to RCW 42.56.270(10)(a),¹⁶ which exempts financial information “related to an **application** for a . . . gambling license” from the Act’s disclosure requirements. (Emphasis added). The Casinos, however, are not required to submit audited financial statements as part of the license application process. Indeed, WAC 230-04-022 and -207, which govern gambling license applications for house-banked card games, require applicants for a house-banked card room license to submit numerous financial documents as part of their application, but make no mention of audited financial statements.¹⁷

The Casinos contend that the term “related to” should be interpreted broadly to mean “undetermined relationship, connection, or association,” citing *David v. Donovan*, 698 F.2d 1057, 1059 (9th Cir. 1983). *See* App. Br. at 17-18. The definition of “related to” in *David*, however, was subject to a legislative intent that called for an expansive construction in favor of providing benefits to employees whose jobs were impacted by the expansion of the Redwood National Park. In this case, just the opposite interpretation is required; “related to” must be narrowly

¹⁶ Former RCW 42.56.310(1)(tt).

¹⁷ As part of the license application process, WAC 230-04-022 and -207 require house-banked card rooms to disclose lease and rental agreements, franchise agreements, management agreements, and a variety of sensitive information regarding employees, agents and substantial interest holders.

construed in favor of disclosure. Accordingly, this Court should refrain from applying *David's* broad and expansive definition of "related to" when construing RCW 42.56.270(10)(a).¹⁸

Adopting the Casinos' overly broad definition of "related to" would also relegate the word "application" to mere surplusage or a nullity. One basic tenet of statutory construction is that meaning should be given to all statutory language. *State v. Roggenkamp*, 153 Wn.2d 614, 624, 106 P.3d 196 (2005). Had the legislature intended the exemption to apply to all financial information submitted by a gambling licensee, it easily could have drafted language to that effect. That it chose to limit the exception to financial information "related to" "license applications" indicates an intent to delineate a narrower set of documents.

The Casinos also contend that RCW 42.56.270(10)(a) applies because a card room's failure to submit the financial statements in violation of WAC 230-40-823 could conceivably lead to an enforcement action against the card room's gambling license. *See* App. Br. at 5, 11. Such an interpretation, however, is strained and, once again, contrary to

¹⁸ The mandate that the Act be liberally interpreted in favor of disclosure requires that the term "related to" be narrowly construed. *Webster's II New Riverside Univ. Dictionary* at 992 (1984), for example, defines "related" as "connected; associated." *Black's Law Dictionary* at 1452 (4th ed. 1957) has a similar definition: "standing in relation; connected; allied; akin." These standard dictionary definitions of "related" are narrower than the broad definition applied in *David* and would be appropriate to apply in this case.

the mandate that the Act be liberally interpreted in favor of disclosure and that exemptions be narrowly construed. *Dawson v. Daly*, 120 Wn.2d 782, 788-89, 845 P.2d 995 (1993). While a licensee's failure to submit a financial statement, or irregularities contained within such a statement, could result in an enforcement action that might result in loss of licensure, this type of action is "related" to the Commission's monitoring and enforcement functions and bears no relationship to the license application process. To rule otherwise would cause the license application exemption to encompass the entire universe of financial documentation submitted to or considered by the Commission, regardless of whether the information was collected as part of the application process or some other regulatory process unrelated to license application submittals. In short, adoption of such a rule would turn the Act's directive that exemptions be narrowly construed in favor of disclosure on its head.

For these reasons, the Court should affirm the trial court's determination that the financial statements are not exempt from disclosure under RCW 42.56.270(10)(a).¹⁹

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¹⁹ Former RCW 42.17.310(1)(tt).

B. Allowing The Casinos To Raise A Claim That The Documents Are Covered By The Uniform Trade Secrets Act (“UTSA”) For The First Time On Appeal Unduly Prejudices The Commission.

The Casinos raise their Uniform Trade Secrets Act argument for the first time on appeal. By doing so, the Casinos have unduly prejudiced the Commission by denying it the opportunity to develop a meaningful evidentiary record before the superior court. Rule of Appellate Procedure (“RAP”) 2.5(a) prohibits parties from raising errors for the first time on appeal for this very reason. *See* Tegland, 2A Wash. Practice, *Rules of Appeal* at 192 (6th ed. 2004) (“[T]he opposing party should have an opportunity at trial to respond to possible claims of error, and to shape their cases to issues and theories, at the trial level, rather than facing newly-asserted errors or new theories and issues for the first time on appeal”). This rule furthers judicial economy by ensuring that the trial court has an opportunity to consider and correct any alleged error, thereby avoiding unnecessary appeals. *State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d 492 (1988); *see Heath v. Uraga*, 106 Wn. App. 506, 520, 24 P.3d 413 (2001) (refusing to review argument not raised in before the trial court), *review denied*, 145 Wn.2d 1016 (2002). Although RAP 2.5(a) provides

for certain narrow exceptions to this general rule, none are applicable here.²⁰

Nonetheless, the Casinos contend that the UTSA is timely raised, arguing that their situation is analogous to *PAWS*, 125 Wn.2d at 252, and *Confederated Tribes*, 135 Wn.2d at 744 (reviewing courts allowed the parties to argue Act exemptions that were not raised below). The rationale for granting review in both cases, however, involved the short time within which the parties had to develop their legal theories below. In *PAWS*, for example, the court observed that the University had only two business days in which to develop and communicate its basis for withholding disclosure of certain documents. *PAWS*, 125 Wn.2d at 253. The *Confederated Tribes* court found that the tribes had been forced to develop their legal arguments under similar time constraints and, therefore, were entitled to similar treatment as the University in *PAWS*. *Confederated Tribes*, 135 Wn.2d at 744.

The exigent circumstances present in *PAWS* and *Confederated Tribes* are simply not present here. The Casinos had nearly a month to

²⁰ RAP 2.5(a) contains the following exceptions:

The appellate court may refuse to review any claim of error which was not raised in the trial court. However, a party may raise the following claimed errors for the first time in the appellate court: (1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, and (3) manifest error affecting a constitutional right.

develop their legal arguments and theories. They initiated the action on October 27, 2005, when they sought and received a temporary restraining order and filed a complaint for a permanent injunction. CP 23-24; 50-52. The Casinos did not file their memorandum in support of their request for injunctive relief until November 22, 2005. CP 49. Unlike *Confederated Tribes* and *PAWS*, the Casinos had sufficient time to develop and present their legal theories below.

In anticipation of this argument from the Commission, the Casinos contend that the Commission had ample opportunity to develop the evidentiary record because the Casinos raised confidentiality issues when they argued that the audited financial statements were exempt from disclosure under RCW 42.56.070(9).²¹ CP 4; *see* App. Br. at 18-21. However, the factual issues relative to establishing an exemption under RCW 42.56.070(9), which exempts lists of names from being disclosed for commercial purposes, are far different from facts necessary to establish a legally protectable trade secret under the UTSA. *See* Section C, *infra*. Indeed, the Commission easily defeated the arguments raised under RCW 42.56.070(9) by simply noting that the financial statements do not contain lists of names and, therefore, the exemption was inapplicable. *See*

²¹ Former RCW 42.17.260(9).

CP 77, 126, 133. Accordingly, the issue of whether the information was confidential, let alone secret, was never litigated.

By failing to provide timely notice of the UTSA claim, the Casinos denied the Commission an opportunity to develop an adequate evidentiary record below. They also denied the superior court the opportunity to rule on the issue and avoid an unnecessary appeal. None of the exceptions in RAP 2.5(a) apply. *See Almquist v. Finley School Dist. No. 53*, 114 Wn. App. 395, 401-03, 57 P.2d 1191 (2002), *review denied*, 149 Wn.2d 1035 (2003) (school district could not argue that lunches were “not products” for purposes of the Products Liability Act where the district failed to raise the issue in the trial court); *Lindblad v. Boeing*, 108 Wn. App. 198, 206-07, 31 P.3d 1 (2001) (appellate court refuses to hear disparate treatment theory where employee only argued reasonable accommodation theory before the trial court). For all of these reasons, this Court should refrain from accepting the Casinos’ untimely invitation to consider its UTSA argument.

C. The Financial Statements Do Not Meet The Definition Of A Trade Secret And, Therefore, Are Not Subject To Protection Under The Uniform Trade Secret Act.

In any event, even if the Court reached the trade secrets argument, there is no evidence in the record capable of establishing that the

information within the audited financial statements constitutes a legally protectable trade secret. RCW 19.108.010(4) defines a “trade secret” as:

information, 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.

In addition to requiring proof that the information derives economic value from its secrecy, section (a) to the definition requires that a legally protectable trade secret be “novel,” i.e., the information must not be ascertainable from any other source. *Spokane Research & Defense Fund v. Spokane*, 96 Wn. App. 568, 983 P.2d 676 (1999), *review denied*, 140 Wn.2d 1001 (2000).

Examples of reasonable efforts to maintain secrecy include “advising employees of the existence of a trade secret, limiting access to a trade secret, limiting access to a trade secret on a ‘need to know basis,’ and controlling plant access.” Uniform Trade Secrets Act § 1 comment, 14 U.L.A. 439 (1990), *quoted in Machen, Inc. v. Aircraft Design, Inc.*, 65 Wn. App. 319, 327, 828 P.2d 73 (1992). Information found to meet the trade secret definition includes aircraft window designs, *Boeing Co. v. Sierracin Corp.*, 108 Wn.2d 38, 738 P.2d 665 (1987); and customer lists,

Ed Nowgrowski Ins., Inc. v. Rucker, 137 Wn.2d 427, 971 P.2d 936 (1999). Examples of items found not to be a legally protectable trade secrets under this definition include restaurant recipes and a company's employee manual, *Buffets, Inc. v. Klinke*, 73 F.3d 965 (9th Cir. 1996); and a commercial lease and *pro forma* credit and financial studies, *Spokane Research & Defense Fund v. City of Spokane*, 96 Wn. App. 568, 983 P.2d 676 (1999), *review denied*, 140 Wn.2d 1001 (2000).

The person seeking trade secret protection bears the burden of proving that there is a legally protectable trade secret. *Confederated Tribes*, 135 Wn.2d at 749. Declarations supporting trade secret status must contain more than conclusory factual assertions. *Spokane Research*, 96 Wn. App. at 578; *cf. Overton v. Consolidated Ins. Co.*, 145 Wn.2d 417, 430-31, 38 P.3d 322 (2002) (opinion regarding ultimate facts, conclusions of fact, and conclusory statements of fact are not sufficient to raise issue of material fact on summary judgment).

The only evidence offered by the Casinos in support of the UTSA claim is the audited financial statements themselves and the following conclusory paragraphs from Mr. Teeny's declarations. His first declaration provides:

4. I **believe** specific legal exemptions apply that prohibit Defendant from releasing the documents requested in the request for public disclosure.

5. Further, the person making the request is presently working for an entity that has been involved in business negotiations with Plaintiffs, and I **believe** the information requested will be used to “personally affect” me, and I am an individual identified in the request records. Further, I **believe** the records are being sought to facilitate a “profit-seeking business activity.”

6. I **believe** that if the Defendant is not restrained from releasing the requested documents, I will suffer irreparable injury, loss, and damage, in that the records will be produced and the harm suffered cannot be remedied, because the records will be released to the public.

CP 18 (Emphasis added). In a second declaration offered in support of Plaintiffs’ Motion for a Preliminary Injunction, Teeny states:

6. In addition to the records personally affecting me, the records sought consist of audited financial records which are extremely confidential. The records contain information regarding my private business operations.

7. I must file the requested audited financial records with the Washington State Gambling Commission on an annual basis to keep my gambling license. Consequently, these records are related to my application for a gambling license.

CP 54. Mr. Teeny’s statements establish at best, his *belief* (1) that the financial statements contain valuable information, (2) that this information is not generally known, and (3) that he has taken reasonable steps under the circumstances to protect the information from disclosure. These conclusory factual assertions, however, do not provide a competent factual basis establishing that the financial statements contain trade secrets. *See*

Spokane Research, 96 Wn. App. at 578 (trade secret status must be based on something more than conclusory factual assertions).

Nor do the audited financial statements meet the burden of proof. While they clearly contain information regarding the Casinos' finances, there is nothing within these documents upon which one could reasonably conclude that they contain trade secrets. They are not even stamped "Confidential."²²

The record does not support the Casinos' contention that the audited financial statements constitute legally protectable trade secrets. The record is silent as to whether or not the information is novel. There is no evidence that the financial records have independent economic value by not being generally available from other sources. The Casinos do not

²² A trade secret cannot arise unless the originator of the information informs the recipient of its intent that the information be kept secret. *Pacific Title v. Pioneer Nat'l Title*, 33 Wn. App. 874, 879-80, 658 P.2d 684, review denied, 99 Wn.2d 1020 (1983). This holds true regardless of whether the information is being disclosed for business purposes or in response to government imposed regulatory requirements.

As a routine practice, business should take certain precautions when submitting trade secret or confidential commercial information to any governmental body, either federal or state, regardless of whether the state has specific protections for trade secrets in its Open Records Law. These precautions include clearly marking "Confidential, Proprietary Information" on each page of documents containing trade secret or other commercially sensitive information, communicating requested information orally if possible, obtaining nondisclosure or confidentiality agreements with relevant state agency, and requesting return of sensitive material when the agency has finished with it.

Linda B. Samuels, *Protecting Confidential Business Information Supplied to State Governments: Exempting Trade Secrets from Open Record Laws*, 27 Am. Bus. L. J. 467, 480 (1989).

offer any examples of the steps they have taken to maintain the secrecy of the information, let alone whether such steps are reasonable under the circumstances.

In their brief, the Casinos contend that it is self-evident that the documents contain private business information of a highly confidential nature.²³ *See* App. Br. at 23. Notably absent, however, is any citation to legal authority or the evidentiary record supporting such assertions. Having failed to offer any competent evidence that the financial statements meet the definition of a trade secret as set forth in RCW 19.108.010(4), the Casinos' contention that the financial statements are protectable trade secrets that are exempt from disclosure necessarily fails.

²³ The following passage from the Appellants' Brief at 23 is unsupported by any citation to the record below.

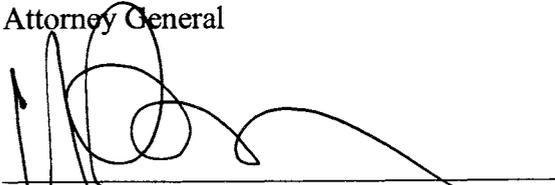
The information potentially disclosed in the present case is significantly more granular, private and damaging than the mere information that helps determine the gross revenue of the casino. There is no one, other than the Casinos' sole owner, who has access to the information in question. The information 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.** (Emphasis added).

VI. CONCLUSION

For the reasons set forth above, the Commission respectfully requests that the Court affirm the superior court's ruling denying the Casinos' motion for injunctive relief.

RESPECTFULLY SUBMITTED this 18th day of October, 2006.

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Attorney General



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Assistant Attorney General
Attorneys for the State of Washington

WAC 230-40-823

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:

Audited financial statements - gross receipts over three million dollars.

(1) Each licensee with house-banked card game gross receipts in excess of three million dollars for the business year shall engage an independent, certified public accountant licensed by the Washington state board of accountancy who shall audit the licensee's financial statements in accordance with generally accepted auditing standards.

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.

Compiled financial statements - gross receipts of less than one million dollars.

(3) Each licensee with house-banked card game gross receipts of less than one million dollars for the business year shall engage an independent, certified public accountant licensed by the Washington state board of accountancy who shall compile the financial statements in accordance with the statements on standards for accounting and review services in accordance with generally accepted accounting principles, including all required footnotes or disclosures on an accrual basis of accounting.

Financial statement presentation.

(4) The financial statements must be presented in the following manner:

(a) Financial statements shall be submitted on a comparative basis: Provided, That the first year may be submitted for the current business year only; and

(b) Gross revenues from each licensed activity should be reported by activity and separate and apart from all other revenues.

Consolidated financial statements.

(5) Consolidated financial statements may be filed by commonly owned or operated establishments. These statements must include consolidated schedules presenting separate financial statements for each licensed card room location.

Change in business year.

(6) If a licensee changes its business year, they shall notify the director within thirty days. The licensee shall submit financial statements for the period covering the end of the previous business year to the end of the new business year.

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. The director may authorize a sixty-day extension if a licensee submits a written request explaining the need for the extension.

Effective date.

(8) This rule will be effective for business years ending on or after July 1, 2004.

[Statutory Authority: RCW 9.46.070. 04-06-058 (Order 426), § 230-40-823, filed 3/1/04, effective 4/1/04; 00-09-052 (Order 383), § 230-40-823, filed 4/14/00, effective 5/15/00.]

FILED
COURT OF APPEALS
TENTH DISTRICT

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NO. 34411-4-II

STATE OF WASHINGTON

COURT OF APPEALS FOR DIVISION II BY _____
STATE OF WASHINGTON DEPUTY

DRAGONSLAYER, INC., dba The
New Phoenix Casino; and MT & M
GAMING, INC., dba The Last Frontier
Casino,

Appellants,

v.

WASHINGTON STATE GAMBLING
COMMISSION,

Respondent.

CERTIFICATE OF
SERVICE

I certify that on October 18, 2006, I caused the Brief of Respondent, in the above-captioned matter to be served upon the parties herein, as indicated below:

Jennifer Kampsula
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- U.S. Mail
 State Campus Mail
 Hand Delivered
 Overnight Express
 By Fax:

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 18th day of October, 2006.


JEANETTE BALUYUT
Legal Assistant

ORIGINAL