

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

\* \* \*

FLS TRANSPORTATION SERVICES  
(USA) INC., a Delaware foreign corporation,  
  
Plaintiff,  
  
v.  
  
ARLIEN CASILLAS, an individual and  
OPEN ROAD TRANSPORTATION, INC.,  
an Oregon foreign corporation,  
  
Defendants.

Case No. 3:17-cv-00013-MMD-VPC

ORDER

(Def.'s Motion to Dismiss – ECF No. 11;  
Def.'s Motion to Dismiss – ECF No. 18).

**I. SUMMARY**

Before the Court are Defendant Arlien Casillas's Motion to Dismiss ("Casillas's Motion") (ECF No. 11) and Defendant OpenRoad Transportation, Inc.'s ("OpenRoad") Motion to Dismiss ("OpenRoad's Motion") (ECF No. 18). The Court has reviewed Plaintiff FLS Transportation Services (USA) Inc.'s ("FLS") responses to both motions (ECF Nos. 20, 24) and Defendants' respective replies (ECF No. 27, 29). Both motions raise overlapping arguments and will be addressed collectively.

The Court denies both of Defendants' Motions to Dismiss for the reasons discussed below.

**II. BACKGROUND**

The following facts are taken from the Complaint. (ECF No. 1.)

FLS is in the logistics business. It connects customers (retailers and manufacturers who need to ship things) with carriers (trucking companies and rail companies that can ship them). FLS alleges that one of its former employees conspired with a competitor,

1 OpenRoad, to appropriate FLS's customers, carriers, and employees in violation of duties  
2 imposed by contract and common law.

3 The trouble began when an FLS branch office operating in Reno suddenly failed in  
4 September 2016. The branch director—Arlie Casillas—resigned, and some of the long-  
5 term customers for whom Casillas was the principal FLS contact ceased nearly all of their  
6 business with FLS immediately. Berenisa Orozco and Cindy Dillard, employees of the FLS  
7 Reno branch office, also resigned.

8 About a month later, FLS's Reno office was reborn (in the same office space), but  
9 under the name of OpenRoad, another third-party logistics business and competitor to  
10 FLS. OpenRoad had no other offices in Nevada at the time, and this was only its second  
11 office outside the Pacific Northwest. FLS alleges the office is a near replica of its own—it  
12 is staffed by former FLS employees, patronized by former FLS customers, and provides  
13 services through former FLS carriers. The former FLS employees include Arlie Casillas,  
14 Berenisa Orozco, Cindy Dillard, and Melia Shively (an individual who worked for FLS from  
15 2010 to 2016). The former FLS customers are those who stopped doing business with  
16 FLS when Casillas resigned. The former FLS carriers include those who provided services  
17 to FLS's long-term customers.

18 FLS further alleges that this reincarnation was a product of conspiracy, not  
19 happenstance. FLS surmises that Casillas began preparing for and implementing this  
20 transition (with OpenRoad's assistance) while still working for FLS, partly because the  
21 customers Casillas and OpenRoad purportedly appropriated "relied on FLS for a  
22 significant and complex volume of shipping needs. Enabling a seamless transition of their  
23 business from FLS to a competitor, like OpenRoad, would have taken weeks, if not  
24 months, of preparation." (ECF No. 1 at ¶ 55.) FLS alleges that the conduct of Casillas and  
25 OpenRoad has caused it to lose hundreds of thousands of dollars in profits.

26 **A. FLS's Business Model**

27 FLS connects customers and carriers through its employees, called brokers, who  
28 determine customer needs and find carriers who can meet those needs. The brokers solicit

1 long-term customers through the use of proprietary information, such as carriers' specific  
2 routes, specific equipment, or price structures. The brokers execute contracts with  
3 customers on behalf of FLS. The brokers also execute contracts with carriers ("Carrier  
4 Contracts") on behalf of FLS. The Carrier Contracts prohibit carriers from cutting out the  
5 middleman (here, FLS):

6         During the term of this Contract and for a period of one (1) year following its  
7 termination, Carrier shall not provide transportation services or related  
8 services to any of [FLS's] customers for which Carrier has provided services  
9 under this Contract, unless the shipments are tendered by [FLS]; provided,  
however, this provision shall not apply if Carrier has conducted business with  
such customer during the two years before [FLS] first tendered shipments to  
Carrier for such customer.

10 (ECF No. 1 at ¶ 58.)

11         FLS alleges that Casillas and OpenRoad induced FLS's carriers to violate this  
12 contractual provision, contending that former FLS carriers are providing services to former  
13 FLS customers with OpenRoad acting as the middleman.

14         **B. Casillas's Employment at FLS**

15         FLS employed Defendant Arlien Casillas as the branch director of its Reno office  
16 beginning in September 2006. Casillas coordinated and managed the services that FLS  
17 provided through that office. She also managed and supervised other employees in the  
18 office, including Berenisa Orozco and Cindy Dillard. Casillas and her colleagues in the  
19 Reno branch office were the primary or exclusive contacts for several of FLS's large  
20 customers, and they used confidential information to do their jobs.

21         FLS and Casillas executed an agreement ("Casillas Employment Agreement")  
22 about confidentiality and solicitation of FLS employees several years into her employment,  
23 on or around October 11, 2013. The "Confidentiality Provision" of that agreement prohibits  
24 Casillas from disclosing certain information deemed confidential:

25         Any information relating to our policies, processes, structures,  
26 operations, customers, or other employees acquired by you in  
27 the course of, or as a result of, your employment with [FLS] is  
28 considered confidential. Such information shall be treated as  
confidential, and may not be disclosed by you to any other  
person, firm or company during your employment or after  
without prior written authorization. Confidential information or

1 material includes but is not limited to financial information,  
2 plans, strategies, corporate information and any other  
information deemed “confidential”, unless information is  
available to the general public or in the public domain.

3 (ECF No. 1 at ¶ 23.) The “Non-Solicitation Provision” of that agreement prohibits Casillas  
4 from encouraging any FLS employees to leave FLS:

5 It is a term of this offer that you agree that during your  
6 employment, and for a period of 6 months following the  
7 termination of such employment for any reason whatsoever,  
8 you shall not either individually or in partnership or conjunction  
9 with any person or persons, firms, association, syndicate,  
company or corporation as principal, employee, contractor,  
shareholder or agent, directly or indirectly encourage any  
[FLS] employee to leave employment with [FLS].

10 (*Id.* at ¶ 24.)

11 Casillas voluntarily resigned from FLS about three years later. She first went on  
12 medical leave on September 8, 2016, then resigned “due to illness and inability to perform  
13 her duties at FLS” on September 26, 2016. (ECF No. 1 at ¶ 30.) FLS sent a letter to  
14 Casillas reminding her to comply with the Casillas Employment Agreement, including the  
15 Confidentiality and Non-Solicitation Provisions.

16 FLS alleges that, while still working for FLS, Casillas disclosed FLS’s confidential  
17 information to OpenRoad and solicited FLS customers and carriers to do business with  
18 OpenRoad, all with OpenRoad’s assistance, cooperation, and inducement.

19 **C. Orozco and Dillard’s Employment at FLS**

20 Berenisa Orozco and Cindy Dillard both resigned from FLS in September, shortly  
21 before Casillas resigned. Orozco was a relatively new FLS employee, having started in  
22 November 2015. Dillard had been working for FLS longer, having started in July 2010.  
23 Both “were entrusted with confidential, proprietary, and strategic information concerning  
24 FLS’s services and business and its relationships with customers and carriers.” (ECF No.  
25 1 at ¶ 40.) When Orozco and Dillard resigned, FLS executed “Separation Agreements”  
26 with both of them that prohibited them from disclosing confidential information:

27 Employee shall not use for any purpose or disclose to any  
28 person or entity any confidential information acquired during  
the course of employment with [FLS]. Employee shall not,

1 directly or indirectly, copy, take, or remove from [FLS's]  
2 premises any of [FLS's] books, records, customer lists, or any  
3 other documents or materials. The term "confidential  
4 information" as used in this Agreement includes, but is not  
5 limited to, records, lists, and knowledge of [FLS's] customers,  
suppliers, methods of operation, processes, trade secrets,  
methods of determination of prices, financial condition, profits,  
sales, net income, and indebtedness, as the same may exist  
from time to time.

6 (ECF No. 1 at ¶ 42.)

7 FLS alleges that Casillas (with OpenRoad's assistance) "encouraged, recruited,  
8 and induced" Orozco and Dillard to leave FLS while all three were still working for FLS.

9 (ECF No. 1 at ¶¶ 43, 44.) FLS further alleges that Casillas and OpenRoad encouraged  
10 Orozco and Dillard "to use or disclose FLS's confidential information" in violation of the  
11 Separation Agreements. (ECF No. 1 at ¶ 43.)

#### 12 **D. OpenRoad's Website Posts**

13 OpenRoad posted on its website twice about the Reno branch office. One article,  
14 titled "Reno Office Added to OpenRoad's Roster," notes that "[t]he Reno team started up  
15 in the fall of 2016." (ECF No. 1 at ¶ 46.) This article was published on November 4, 2016.  
16 Another article, titled "Arlien Casillas Leading OpenRoad Reno's Hot Start," attributes  
17 "[t]he early success of the office . . . to the leadership of Arlien Casillas and her  
18 experienced team of transportation professionals." (ECF No. 1 at ¶ 47.) This article was  
19 published on December 8, 2016.

### 20 **III. LEGAL STANDARD**

21 A court may dismiss a plaintiff's complaint for "failure to state a claim upon which  
22 relief can be granted." Fed. R. Civ. P. 12(b)(6). A properly pleaded complaint must provide  
23 "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed.  
24 R. Civ. P. 8(a)(2); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). While Rule 8  
25 does not require detailed factual allegations, it demands more than "labels and  
26 conclusions" or a "formulaic recitation of the elements of a cause of action." *Ashcroft v.*  
27 *Iqbal*, 556 U.S. 662, 678 (2009) (citing *Twombly*, 550 U.S. at 555). "Factual allegations  
28 must be enough to raise a right to relief above the speculative level." *Twombly*, 550 U.S.

1 at 555. Thus, to survive a motion to dismiss, a complaint must contain sufficient factual  
2 matter to “state a claim to relief that is plausible on its face.” *Id.* at 570.

3 In *Iqbal*, the Supreme Court clarified the two-step approach district courts are to  
4 apply when considering motions to dismiss. First, a district court must accept as true all  
5 well-pleaded factual allegations—but not legal conclusions—in the complaint. *Id.* at 678.  
6 Mere recitals of the elements of a cause of action, supported only by conclusory  
7 statements, do not suffice. *Id.* Second, a district court must consider whether the factual  
8 allegations in the complaint allege a plausible claim for relief. *Id.* at 679. A claim is facially  
9 plausible when the plaintiff’s complaint alleges facts that allow a court to draw a reasonable  
10 inference that the defendant is liable for the alleged misconduct. *Id.* at 678. Where the  
11 complaint does not permit the court to infer more than the mere possibility of misconduct,  
12 the complaint has alleged—but has not shown—that the pleader is entitled to relief. *Id.* at  
13 679. When the claims in a complaint have not crossed the line from conceivable to  
14 plausible, the complaint must be dismissed. *Twombly*, 550 U.S. at 570.

#### 15 **IV. DISCUSSION**

##### 16 **A. Breach of Duty of Loyalty and Fiduciary Duties**

17 Casillas argues that FLS’s claim for breach of duty of loyalty and fiduciary duties  
18 should be dismissed for three reasons: FLS failed to plead facts sufficient to support the  
19 claim; the claim is subsumed by FLS’s breach of contract claim under the economic loss  
20 doctrine; and employees do not breach their duty of loyalty by preparing to compete with  
21 their employers. (ECF No. 11 at 9-11.) The Court disagrees with Casillas and denies her  
22 motion as to FLS’s claim for breach of duty of loyalty and fiduciary duties.

##### 23 **1. Adequacy of Factual Allegations**

24 FLS adequately pleaded its claim for breach of duty of loyalty and fiduciary duties  
25 in its complaint. The claim has three elements: “(1) existence of a fiduciary duty; (2) breach  
26 of the duty; and (3) the breach proximately caused the damages.” *New England Life Ins.*  
27 *Co. v. Lee*, No. 2:14-cv-1797-JCM-NJK, 2015 WL 1413391, at \*6 (D. Nev. Mar. 27, 2015)

28 ///

1 (quoting *Klein v. Freedom Strategic Partners, LLC*, 595 F. Supp. 2d 1152, 1162 (D. Nev.  
2 2009)).

3 FLS satisfies the first element—existence of a duty—by alleging that an agency  
4 relationship existed between FLS and Casillas. Specifically, FLS alleges that it employed  
5 Casillas as the branch director of FLS’s branch office in Reno, Nevada from September  
6 2006 to September 26, 2016. (ECF No. 1 at ¶¶ 21, 25.) An employment relationship gives  
7 rise “to a duty not to compete with the principal concerning the subject matter of his  
8 agency.” Restatement (Second) of Agency § 393 (1958).

9 FLS satisfies the second element—breach—by alleging facts from which the Court  
10 can reasonably infer breach of the duty not to compete. FLS alleges that its long-term  
11 customers stopped doing business with FLS when Casillas (their sole contact at FLS)  
12 resigned, only to become customers of OpenRoad about a month later. (ECF No. 1 at ¶¶  
13 46, 48, 50.) Plaintiff alleges that this transition, “would have taken weeks, if not months, of  
14 preparation.” (*Id.* at ¶ 55.) The coinciding departures of Casillas and FLS customers, along  
15 with the speed at which the same customers began patronizing OpenRoad, leads to the  
16 reasonable inference that Casillas began laying the groundwork for OpenRoad while she  
17 was employed by FLS.

18 FLS satisfies the third element—damages—by alleging that it lost “hundreds of  
19 thousands of dollars in profits” as a result of losing the customers Casillas purportedly  
20 appropriated for OpenRoad. (ECF No. 1 at ¶¶ 48-50.)

## 21 **2. Economic Loss Doctrine**

22 The Court cannot conclude at this early stage of litigation that the economic loss  
23 doctrine bars FLS’s claim for breach of duty of loyalty and fiduciary duties. The economic  
24 loss doctrine bars unintentional tort actions when plaintiffs seek to recover purely  
25 economic losses, as opposed to damages involving physical harm to person or property.  
26 *Giles v. Gen. Motors Acceptance Corp.*, 494 F.3d 865, 879 (9th Cir. 2007); *Terracon*  
27 *Consultants W., Inc. v. Mandalay Resort Grp.*, 206 P.3d 81, 86 (Nev. 2009) (en banc).  
28 Intentional torts, by contrast, “are not barred by the economic loss doctrine.” *Halcrow, Inc.*

1 v. *Eighth Judicial Dist. Court*, 302 P.3d 1148, 1154 n.2 (Nev. 2013), as corrected (Aug.  
2 14, 2013). This Court has repeatedly declined to apply the economic loss doctrine to  
3 dismiss intentional torts, including breach of fiduciary duty. See, e.g., *Bank of Am. v.*  
4 *Bailey*, No. 2:14-cv-885-JCM-GWF, 2016 WL 3410174, at \*5 (D. Nev. June 15, 2016)  
5 (holding that economic loss doctrine did not bar claim for breach of fiduciary duty).<sup>1</sup>

6 Nevertheless, the economic loss doctrine does bar a subset of intentional torts—  
7 those that duplicate breach of contract claims. See, e.g., *Kenny v. Trade Show*  
8 *Fabrications W., Inc.*, No. 2:15-cv-00410-JCM-VCF, 2016 WL 697110, at \*5 (D. Nev. Feb.  
9 18, 2016) (dismissing claim of conversion for failure to pay compensation when such  
10 failure amounted to a breach of contract).<sup>2</sup> The Nevada Supreme Court has suggested it  
11 would take the same position. See *Davis v. Beling*, 278 P.3d 501, 514 (Nev. 2012) (“The  
12 economic loss doctrine does not, however, bar the recovery of purely economic losses  
13 when the defendant intentionally breaches a duty that is imposed *independently* of the  
14 obligations arising from contract.”) (emphasis added). The Court cannot determine how  
15 ///

---

16 <sup>1</sup>See also *Gaming v. Trustwave Holdings, Inc.*, No. 2:15-cv-02464-GMN-PAL, 2016  
17 WL 5799300, at \*5 (D. Nev. Sept. 30, 2016) (holding that economic loss doctrine did not  
18 bar claim of fraud); *Las Vegas Metro. Police Dep’t v. Harris Corp.*, No. 2:13-cv-01780-  
19 GMN-VCF, 2014 WL 3474278, at \*2 (D. Nev. July 11, 2014) (holding that economic loss  
20 doctrine did not bar claim of fraudulent misrepresentation); *First Nat. Bank of Ely v.*  
21 *Progressive Cas. Ins. Co.*, No. 3:11-cv-00859-RCJ-WGC, 2012 WL 5944847, at \*6 n.2 (D.  
22 Nev. Nov. 27, 2012) (holding that economic loss doctrine did not bar claim of fraud); *Silver*  
23 *State Broad., LLC v. Beasley FM Acquisition Corp.*, No. 2:11-cv-01789-MMD-CWH, 2012  
24 WL 4049481, at \*5 (D. Nev. Sept. 12, 2012) (holding that economic loss doctrine did not  
25 bar claims of intentional torts including breach of fiduciary duty); *Fuoroli v. Westgate Planet*  
26 *Hollywood Las Vegas, LLC*, No. 2:10-cv-2191-JCM-GWF, 2011 WL 1871236, at \*5 (D.  
27 Nev. May 16, 2011) (holding that economic loss doctrine did not bar claim of fraudulent  
28 misrepresentation); *Menalco v. Buchan*, No. 2:07-cv-01178-PMP-PAL, 2010 WL 428911,  
at \*31 (D. Nev. Feb. 1, 2010) (holding that economic loss doctrine did not bar claim of  
fraud).

<sup>2</sup>See also *First Magnus Fin. Corp. v. Rondeau*, No. 2:07-cv-132-JCM-PAL, 2012  
WL 607563, at \*2 (D. Nev. Feb. 24, 2012) (“The economic loss doctrine further bars breach  
of fiduciary duty claims premised on a contractual relationship.”); *G.K. Las Vegas Ltd.*  
*P’ship v. Simon Prop. Grp., Inc.*, 460 F. Supp. 2d 1246, 1260 (D. Nev. 2006) (concluding  
that a claim for breach of duty of loyalty was “subject to dismissal pursuant to the economic  
loss doctrine” if the defendant’s conduct were prohibited by contract). The Ninth Circuit  
has barred a tort claim that amounted to a breach of contract claim, though the tort was  
negligent rather than intentional. *GCM Air Grp., LLC v. Chevron U.S.A., Inc.*, 386 F. App’x  
717, 718 (9th Cir. 2010).



1 much FLS's claim for breach of contract overlaps its tort claim for breach of duty of loyalty  
2 and fiduciary duties at this stage of litigation, though the tort claim may be subject to  
3 dismissal under the economic loss doctrine if it ultimately duplicates the contract claim.<sup>3</sup>

### 4 **3. Preparations to Compete**

5 The privilege workers enjoy to prepare to compete with their employers does not  
6 bar any claim at this stage of litigation. Workers do not breach a duty by making  
7 preparations *during* their jobs to compete after *leaving* their jobs. *White Cap Indus. v.*  
8 *Ruppert*, 67 P.3d 318, 319 (Nev. 2003); *see also* Restatement (Second) of Agency § 393  
9 cmt. e (1958). There are certain restrictions, however. An agent preparing to compete  
10 "cannot properly use confidential information peculiar to his employer's business and  
11 acquired therein." Restatement (Second) of Agency § 393 cmt. e. Nor can an agent "solicit  
12 customers for such rival business before the end of his employment [or] properly do other  
13 similar acts in direct competition with the employer's business." *Id.*

14 Accepting FLS's allegations as true, Casillas engaged in conduct the Restatement  
15 prohibits. Casillas used confidential information acquired through her employment at FLS  
16 to appropriate FLS's customers, carriers, and employees for OpenRoad while still  
17 employed by FLS. (ECF No. 1 at ¶ 68.) Therefore, FLS has plead a colorable claim for  
18 breach of the duty of loyalty and fiduciary duties.

### 19 **B. Breach of Contract**

20 Casillas argues that FLS failed to adequately plead facts sufficient to support its  
21 breach of contract claim. (ECF No. 11 at 12.) Casillas also argues that the contract is  
22 unenforceable. (*Id.*) The Court disagrees with Casillas's first argument and declines to  
23 consider her second argument at this stage of litigation.

### 24 **1. Adequacy of Factual Allegations**

25 Plaintiffs must show four elements to succeed on claims for breach of contract: "(1)  
26 formation of a valid contract; (2) performance or excuse of performance by the plaintiff; (3)

---

27 <sup>3</sup>Moreover, dismissing the tort claim would be premature at this stage of litigation  
28 when Defendants argue the contracts in question are either unenforceable (ECF No. 11  
at 12-15; ECF No. 18 at 7-9) or invalid (ECF No. 11 at 3 n.3).

1 material breach by the defendant; and (4) damages.” *Laguerre v. Nevada Sys. of Higher*  
2 *Educ.*, 837 F. Supp. 2d 1176, 1180 (D. Nev. 2011).

3 Casillas disputes that FLS adequately pleaded the third element—material  
4 breach—with respect to both the Confidentiality and Non-Solicitation Provisions of the  
5 Casillas Employment Agreement. (ECF No. 11 at 15-16.)

6 **a. Confidentiality Provision**

7 FLS pleads breach of the Confidentiality Provision by alleging that Casillas  
8 disclosed FLS’s confidential information to OpenRoad. (ECF No. 1 at ¶¶ 52, 69, 75.) FLS  
9 supports this conclusion by alleging that FLS customers, carriers, and employees  
10 seamlessly transitioned from FLS to OpenRoad over the same, impossibly short, time  
11 period. (*Id.* at ¶¶ 38, 40, 48, 50, 54-56.) The Court can reasonably infer that Casillas  
12 enabled this seamless transition by disclosing confidential information to OpenRoad.

13 **b. Non-Solicitation Provision**

14 FLS pleads breach of the Non-Solicitation Provision by alleging that Casillas  
15 encouraged, recruited, and induced other FLS employees to work at OpenRoad, all while  
16 she was still employed by FLS. (*Id.* at ¶¶ 43-44, 68, 75.) FLS has alleged facts that make  
17 these assertions plausible. FLS alleges that Casillas, Orozco, and Dillard resigned in the  
18 same month (ECF No. 1 at ¶¶ 30, 39), only to find themselves working together in the  
19 same office space for OpenRoad about a month later (*Id.* at ¶¶ 35, 38, 46). Coupled with  
20 the seamless transition of FLS’s long-term customers and carriers to OpenRoad (which  
21 necessitated previously laid groundwork), it is reasonable to infer that Casillas recruited  
22 Orozco and Dillard while still working for FLS in violation of the Non-Solicitation Provision.

23 Casillas also contends that the information she allegedly divulged was not  
24 confidential (ECF No. 11 at 16), but FLS alleges it was (ECF No. 1 at ¶¶ 52, 69, 75). The  
25 Court must accept FLS’s allegations as true at this stage of the litigation. *Ashcroft v. Iqbal*,  
26 556 U.S. 662, 678-79 (2009).

27 ///

28 ///

1                                   **2. Contract Enforceability**

2           Casillas argues that the Confidentiality and Non-Solicitation Provisions of the  
3 Casillas Employment Agreement are unenforceable because they are unreasonable.  
4 (ECF No. 11 at 12-15.) Restrictive covenants must be “reasonable under the  
5 circumstances.” *Sheehan & Sheehan v. Nelson Malley & Co.*, 117 P.3d 219, 224 (Nev.  
6 2005). “A restrictive covenant on employment will be upheld only if it is reasonably  
7 necessary to protect the business and goodwill of the employer. The amount of time the  
8 covenant lasts, the territory it covers, and the hardship imposed upon the person restricted  
9 are factors for the court to consider in determining whether such a covenant is  
10 reasonable.” *Jones v. Deeter*, 913 P.2d 1272, 1275 (Nev. 1996) (internal citation omitted).

11           This standard invites resolution of factual questions—such as the circumstances  
12 surrounding the agreement and hardship imposed upon Casillas—that are not  
13 appropriately addressed at this stage of litigation. *See Boart Longyear, Inc. v. Nat’l EWP,*  
14 *Inc.*, No. 2:11-cv-2106-JCM-RJJ, 2012 WL 1985293, at \*3 (D. Nev. June 4, 2012) (“At the  
15 motion to dismiss stage, the court is not inclined to weigh the reasonableness of the non-  
16 competition agreement.”); *see also Yarn v. Hamburger Law Firm, LLC*, No. 1:12-03096,  
17 2014 WL 2964986, at \*4 (D. Md. June 30, 2014) (“The issue of enforceability is not  
18 grounds to grant a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6).”).  
19 Consequently, the Court declines to consider the reasonableness of the Confidentiality  
20 and Non-Solicitation Provisions of the Casillas Employment Agreement at this stage of  
21 litigation.

22                                   **C. Intentional Interference with Contractual Relations**

23           FLS alleges that Casillas and OpenRoad intentionally interfered with several  
24 different contracts. Against Casillas, FLS alleges intentional interference with the  
25 Separation Agreements binding Orozco and Dillard as well as unspecified Carrier  
26 Contracts. (ECF No. 1 at ¶ 82.) Casillas argues that FLS failed to plead facts showing that  
27 Casillas acted with intent. (ECF No. 11 at 16.) Casillas further argues that the competitor’s  
28 privilege bars FLS’s claim. (*Id.*)

1           Against OpenRoad, FLS alleges intentional interference with the following  
2 contracts: the Casillas Employment Agreement, the Separation Agreement between FLS  
3 and Orozco, the Separation Agreement between FLS and Dillard, and the Carrier  
4 Contracts. (ECF No. 1 at ¶ 82.) OpenRoad argues that FLS failed to plead facts showing  
5 that breach of these contracts occurred (ECF No. 18 at 9-11); that the competitor’s  
6 privilege bars FLS’s claim (*Id.* at 11); and that the contract provisions OpenRoad allegedly  
7 disrupted are unenforceable (*Id.* at 7-9).

8           The Court finds Defendants’ arguments for dismissing FLS’s claim for intentional  
9 interference with contractual relations unpersuasive.

10                           **1. Adequacy of Factual Allegations**

11           The elements of an intentional interference with contractual relations claim are: “(1)  
12 a valid and existing contract; (2) the defendant’s knowledge of the contract; (3) intentional  
13 acts intended or designed to disrupt the contractual relationship; (4) actual disruption of  
14 the contract; and (5) resulting damage.” *New England Life Ins. Co. v. Lee*, No. 2:14-cv-  
15 1797-JCM-NJK, 2015 WL 1413391, at \*9 (D. Nev. Mar. 27, 2015) (quoting *J.J. Indus., LLC*  
16 *v. Bennett*, 71 P.3d 1264, 1267 (Nev. 2003)). Casillas argues that FLS failed to plead the  
17 third element—intent. (ECF No. 11 at 16-17.) OpenRoad argues that FLS failed to plead  
18 the fourth and fifth elements—breach and damage. (ECF No. 18 at 9-12; ECF No. 29 at  
19 8-9.)

20   **a. Intent**

21           Casillas argues that FLS failed to plead facts showing that Casillas acted with intent  
22 to disrupt the Separation Agreements and the Carrier Contracts. (ECF No. 11 at 16-17.)  
23 With respect to the Separation Agreements, it is reasonable to infer that Casillas acted  
24 with intent from the fact that FLS customers, carriers, and employees seamlessly  
25 transitioned from FLS to OpenRoad over the same, impossibly short, time period. (*Id.* at  
26 ¶¶ 38, 40, 48, 50, 54-56.) It is reasonable to infer that this chain of events was the product  
27 of intent rather than chance.

28    ///

1 With respect to the Carrier Contracts (which prohibited carriers from cutting out the  
2 middleman and selling their shipping services directly to customers), it is reasonable to  
3 infer that Casillas acted with intent from the fact that FLS customers (for whom Casillas  
4 was the primary or exclusive FLS contact) transitioned to OpenRoad during the same,  
5 impossibly short, time period as Casillas. (*Id.* at ¶¶ 27, 48, 50.) It is reasonable to infer that  
6 hundreds of thousands of dollars' worth of business migrated from FLS to OpenRoad (*Id.*  
7 at ¶ 49-50) at the same time as Casillas because she acted with the intent to cause that  
8 result. It is less reasonable to chalk it up to coincidence.

9 **b. Breach**

10 OpenRoad argues that FLS failed to adequately allege breach of the confidentiality  
11 provisions contained in the Casillas Employment Agreement and the Separation  
12 Agreements, the Non-Solicitation Provision of the Casillas Employment Agreement, and  
13 the Carrier Contracts. (ECF No. 18 at 9-11.)

14 With respect to the Confidentiality Provision of the Casillas Employment Agreement  
15 and the Separation Agreements, OpenRoad argues that the information Casillas, Orozco,  
16 and Dillard allegedly shared with OpenRoad was not confidential and that the Complaint  
17 fails to specify what confidential information was shared. (*Id.* at 10.) But at this point in the  
18 litigation, the Court must accept FLS's factual allegations that the information was indeed  
19 confidential (ECF No. 1 at ¶ 52) as true. *Ashcroft v. Iqbal*, 566 U.S. 662, 678-79 (2009). It  
20 is not necessary at this stage of litigation for FLS to specify what confidential information  
21 was shared. It is sufficient that FLS has alleged facts from which a reasonable inference  
22 can be drawn that Casillas, Orozco, and Dillard shared confidential information. The facts  
23 that support this inference are: (1) Casillas, Orozco, and Dillard had access to confidential  
24 information such as knowledge of FLS's customers (ECF No. 1 at ¶¶ 28, 40); (2) Casillas  
25 opened a new branch office for OpenRoad in the same office space where she operated  
26 the branch office for FLS (*Id.* at ¶¶ 35, 37); (3) Orozco and Dillard worked there with  
27 Casillas (*Id.* at ¶ 38); and (4) FLS employees and long-term customers left FLS for  
28 OpenRoad around the same time that Casillas, Orozco, and Dillard left FLS for OpenRoad

1 (*Id.* at ¶¶ 40, 48, 50). It is reasonable to infer from these facts that Casillas shared  
2 “information relating to [FLS’s] policies, processes, structures, operations, customers, or  
3 other employees” with OpenRoad. (*Id.* at ¶ 23.) It is also reasonable to infer that Orozco  
4 and Dillard shared confidential information including “records, lists, and knowledge of  
5 [FLS’s] customers” with OpenRoad. (*Id.* at ¶ 42.)

6 With respect to the Non-Solicitation Provision of the Casillas Employment  
7 Agreement, OpenRoad argues that FLS failed to allege facts from which the Court can  
8 reasonably infer that Casillas solicited Orozco and Dillard to work for her at Open Road  
9 (likely a breach of the Non-Solicitation Provision). (ECF No. 18 at 10-11.) OpenRoad  
10 seems to contend that it would be unreasonable to infer that Casillas solicited Orozco and  
11 Dillard to work for her at OpenRoad for two reasons.

12 First, OpenRoad argues, Casillas was on leave when Orozco and Dillard left. (*Id.*  
13 at 10.) But it is reasonable to infer that Casillas was working with OpenRoad to make plans  
14 for the new office before or while she was on medical leave. The factual basis for this  
15 inference is the inconsistency between her words and her actions. She resigned from FLS  
16 “due to illness and inability to perform her duties at FLS,” yet she reconstituted FLS’s Reno  
17 branch office for OpenRoad about a month later. (ECF No. 1 at ¶¶ 30, 46, 47.)

18 Second, OpenRoad argues, Orozco, and Dillard resigned from FLS before Casillas.  
19 (ECF No. 18 at 10.) But it is reasonable to infer that Casillas induced Orozco and Dillard  
20 to resign because they all resigned in the same month (ECF No. 1 at ¶¶ 30, 39), only to  
21 find themselves working together in the same office space for OpenRoad about a month  
22 later (*Id.* at ¶¶ 35, 38, 46). The proximity—not the sequence—of the resignations is what  
23 grounds the inference. Moreover, Casillas was as good as gone when Orozco and Dillard  
24 left because she was presumably on medical leave (from which she never returned). (*See*  
25 *id.* at ¶¶ 29, 30, 40.)

26 With respect to the Carrier Contracts, OpenRoad argues that the contract only  
27 prevents the carriers from contacting FLS’s competitors—not vice versa. (ECF No. 18 at  
28 11.) While this seems to be true from the short excerpt of the Carrier Contracts that

1 appears in the Complaint, FLS alleges a different kind of breach. The Carrier Contracts  
2 forbid carriers from providing services to “any of [FLS’s] customers for which Carrier has  
3 provided services under this Contract, unless the shipments are tendered by [FLS].” (ECF  
4 No. 1 at ¶ 58.) FLS alleges that carriers have provided services to FLS customers with the  
5 shipments being tendered by OpenRoad (*Id.* at ¶ 57), an apparent violation of the plain  
6 language of the contract. Consequently, FLS has sufficiently pleaded breach.

7 **c. Damage**

8 OpenRoad argues that FLS has failed to allege any damages resulting from  
9 OpenRoad’s purported interference with the Separation Agreements. (ECF No. 29 at 8-  
10 9.) This is incorrect. FLS alleges that it lost business worth hundreds of thousands of  
11 dollars (ECF No. 1 at ¶ 49) when OpenRoad (and Casillas) induced Orozco and Dillard to  
12 disclose confidential information in violation of the Separation Agreements (*Id.* at ¶ 43.)

13 **2. Competitor’s Privilege**

14 Casillas and OpenRoad both argue that the competitor’s privilege bars FLS’s claim  
15 for intentional interference with the Carrier Contracts. (ECF No. 11 at 17-18; ECF No. 18  
16 at 11.) “[A] competitor is privileged to divert business to itself by all fair and reasonable  
17 means.” *Custom Teleconnect, Inc. v. Int’l Tele-Servs., Inc.*, 254 F. Supp. 2d 1173, 1181  
18 (D. Nev. 2003). If FLS’s allegations are true (that Casillas and OpenRoad conspired to  
19 appropriate FLS’s customers, carriers, and employees in violation of duties imposed by  
20 contract and common law), then Casillas and OpenRoad failed to divert business by “fair  
21 and reasonable means.” Accepting FLS’s allegations as true, the Court cannot dismiss  
22 FLS’s claim based on the competitor’s privilege at this stage of litigation.

23 **3. Contract Enforceability**

24 OpenRoad argues that the confidentiality and non-solicitation provisions of the  
25 Casillas Employment Agreement are overly broad and unenforceable and that the  
26 confidentiality provisions (identical) in the Separation Agreements are overly broad and  
27 unenforceable. (ECF No. 18 at 7-9.) The Court will not consider these arguments at this  
28 stage of litigation. *See supra* Section IV.B.ii.

1           **D. Breach of Implied Covenants of Good Faith and Fair Dealing**

2           Casillas argues that FLS’s claim for breach of implied covenants of good faith and  
3 fair dealing must be dismissed because it duplicates FLS’s claim for breach of contract.  
4 (ECF No. 11 at 19.) “A contractual breach of the implied covenant of good faith and fair  
5 dealing occurs when the terms of a contract are literally complied with, but where the  
6 defendant takes some action to deprive the plaintiff of his benefit under the contract.”  
7 *Romm v. Hartford Ins. Co. of the Midwest*, No. 2:12-cv-01412-RCJ-PAL, 2012 WL  
8 4747137, at \*3 (D. Nev. Oct. 2, 2012). FLS’s breach of contract claim concerns breach of  
9 the Confidentiality and Non-Solicitation Provisions of the Casillas Employment Agreement.  
10 (See ECF No. 1 at ¶ 75.) FLS’s breach of implied covenant claim is different. It includes  
11 FLS’s “justified expectations under her employment agreement [that she would not work]  
12 with a competing company during her employment.” (ECF No. 20 at 19-20.) It is  
13 conceivable that Casillas literally complied with the terms of the Casillas Employment  
14 Agreement but still deprived FLS of its justified expectations that she would not work with  
15 OpenRoad while she worked for FLS. Thus, the Court finds that the claims are sufficiently  
16 distinct to preclude dismissal at this stage.

17           **E. Unjust Enrichment**

18           Casillas and OpenRoad both argue that FLS’s unjust enrichment claim must be  
19 dismissed because FLS alleges breach of express, written contracts. (ECF No. 11 at 19;  
20 ECF No. 18 at 11-12.) Such a contract usually precludes a claim of unjust enrichment.  
21 *LeasePartners Corp. v. Robert L. Brooks Tr.*, 942 P.2d 182, 187 (Nev. 1997). The Court  
22 agrees with FLS, however, that it is too early to rule out unjust enrichment when  
23 Defendants argue the contracts in question are either unenforceable (ECF No. 11 at 12-  
24 15; ECF No. 18 at 7-9) or invalid (ECF No. 11 at 3 n.3). *Liggio v. Weigner*, No. 2:15-cv-  
25 01973-APG-CWH, 2016 WL 5661906, at \*3 (D. Nev. Sept. 28, 2016) (finding that  
26 dismissal of the plaintiffs’ claim for unjust enrichment would be “premature” when the  
27 defendant “denie[d] that the promissory notes [were] enforceable contracts”); *Hydrotech*,  
28 ///



1 *Inc. v. Ames Constr., Inc.*, No. 3:12-cv-00262-LRH-WGC, 2013 WL 551510, at \*2 (D. Nev.  
2 Feb. 12, 2013) (same).

3 OpenRoad additionally argues that FLS has “failed to allege or demonstrate any  
4 benefit which FLS conferred on Defendant OpenRoad.” (ECF No. 18 at 12.) “Unjust  
5 enrichment is the unjust retention of a benefit to the loss of another, or the retention of  
6 money or property of another against the fundamental principles of justice or equity and  
7 good conscience.” *Topaz Mut. Co. v. Marsh*, 839 P.2d 606, 613 (Nev. 1992) (quoting  
8 *Nevada Indus. Dev., Inc. v. Benedetti*, 741 P.2d 802, 804 n.2 (Nev. 1987)). “The essential  
9 elements of unjust enrichment ‘are a benefit conferred on the defendant by the plaintiff,  
10 appreciation by the defendant of such benefit, and acceptance and retention by the  
11 defendant of such benefit.” *Id.* (quoting *Unionamerica Mortg. & Equity Tr. v. McDonald*,  
12 626 P.2d 1272, 1273 (Nev. 1981)). OpenRoad contends that the only benefit FLS alleged  
13 to have conferred upon OpenRoad was “a benefit . . . in the form of revenues derived from  
14 customer and carrier and employee relationships and infrastructure that . . . OpenRoad  
15 improperly diverted from FLS.” (ECF No. 18 at 12.) OpenRoad basically argues that the  
16 lost revenue was never FLS’s to give. This is beside the point, however. Unjust enrichment  
17 includes “the unjust retention of a benefit to the loss of another.” *Coury v. Robison*, 976  
18 P.2d 518, 521 (Nev. 1999) (quoting *Nevada Indus. Dev., Inc. v. Benedetti*, 741 P.2d 802,  
19 804 n.2 (Nev. 1987)). Here, FLS alleges that OpenRoad received the benefit of something  
20 that was undoubtedly FLS’s to lose—its long-term customers that Casillas recruited to  
21 OpenRoad. (ECF No. 1 at ¶¶ 53-56.) In addition, OpenRoad fails to acknowledge that FLS  
22 alleged OpenRoad received the benefit of FLS’s confidential information to FLS’s  
23 detriment. (*Id.* at ¶¶ 52, 68.) Accepting FLS’s allegations as true, as this Court must at the  
24 motion to dismiss stage, FLS has adequately pleaded a claim for unjust enrichment.

25 **F. Aiding and Abetting Breaches of Contractual and Legal Duties**

26 Defendants first argue that FLS’s aiding and abetting claim is barred because the  
27 underlying claims fail. (ECF No. 11 at 20; ECF No. 18 at 12-13.) The Court cannot dismiss

28 ///

1 FLS's claim on this ground because the Court cannot yet conclude that FLS's underlying  
2 claims fail as a matter of law.

3 OpenRoad argues in the alternative that FLS has failed to plead facts from which  
4 the Court can reasonably infer that the elements of the claim are satisfied. (ECF No. 18 at  
5 12-13.) Under Nevada law, "liability attaches for civil aiding and abetting if the defendant  
6 substantially assists or encourages another's conduct in breaching a duty to a third  
7 person." See *Dow Chem. Co. v. Mahlum*, 970 P.2d 98, 112 (Nev. 1998), *overruled in part*  
8 *on other grounds by GES, Inc. v. Corbitt*, 21 P.3d 11, 15 (Nev. 2001). Thus, FLS must  
9 allege facts showing that (1) Casillas breached her contractual or legal duties to FLS; (2)  
10 OpenRoad was aware of its role in assisting or encouraging the breach; and (3) OpenRoad  
11 knowingly and substantially assisted Casillas. See *G.K. Las Vegas Ltd. P'ship v. Simon*  
12 *Prop. Grp., Inc.*, 460 F. Supp. 2d 1246, 1261 (D. Nev. 2006).

13 FLS has alleged facts from which the Court can reasonably infer each of these  
14 elements. FLS satisfies the first element—breach—by alleging that Casillas recruited  
15 customers to OpenRoad while employed by FLS using confidential information in violation  
16 of the Casillas Employment Agreement. (ECF No. 1 at ¶¶ 50-52.) This conclusion is  
17 supported by the fact that long-term FLS customers transitioned to OpenRoad at the same  
18 time as Casillas (and over an impossibly short time period). (*Id.* at ¶¶ 54-56.) FLS also  
19 satisfies the first element by alleging that Casillas recruited FLS employees to OpenRoad  
20 in violation of the Non-Solicitation Provision of the Casillas Employment Agreement. (*Id.*  
21 at ¶¶ 43-44.) This conclusory allegation is supported by the fact that Orozco and Dillard  
22 resigned from FLS when Casillas did (*Id.* at ¶ 40) and joined OpenRoad when Casillas did  
23 (*See id.* at ¶ 38).

24 FLS satisfies the second element—knowledge—by alleging that Casillas went to  
25 work for OpenRoad, taking FLS's customers, carriers, and employees with her. (*Id.* at ¶¶  
26 38, 48, 50, 54-57.) It is reasonable to infer that OpenRoad knew that Casillas was using  
27 confidential information to secure former FLS customers, carriers, and employees for  
28 OpenRoad.

1 FLS satisfies the third element—substantial assistance—by alleging that  
2 OpenRoad hired Casillas. (*Id.* at ¶ 35.) Accepting as true the fact that Casillas used  
3 confidential information to recruit customers from FLS to OpenRoad, it is reasonable to  
4 infer that OpenRoad’s employment of Casillas constituted substantial assistance in  
5 helping her accomplish that act.

6 **G. Civil Conspiracy**

7 Defendants challenge the sufficiency of the factual allegations in the Complaint.  
8 (ECF No. 11 at 20; ECF No. 18 at 13-14.) “An actionable conspiracy consists of a  
9 combination of two or more persons who, by some concerted action, intend to accomplish  
10 an unlawful objective for the purpose of harming another, and damage results from the act  
11 or acts.” *Hilton Hotels Corp. v. Butch Lewis Prods., Inc.*, 862 P.2d 1207, 1210 (Nev. 1993)  
12 (quoting *Sutherland v. Gross*, 772 P.2d 1287, 1290 (Nev. 1989)). FLS alleges details in  
13 the Complaint that reasonably give rise to the inference that conspiracy occurred. FLS  
14 alleged that FLS customers, carriers, and employees all moved from FLS to OpenRoad in  
15 the same, impossibly short, time period. (*Id.* at ¶¶ 38, 40, 48, 50, 54-56.) It is reasonable  
16 to infer that Casillas and OpenRoad worked together to make that happen. Casillas  
17 attributes the change to competition (ECF No. 27 at 11), but that theory fails to account  
18 for the speed and scope of the transition.

19 **V. CONCLUSION**

20 The Court notes that the parties made several arguments and cited to several cases  
21 not discussed above. The Court has reviewed these arguments and cases and determines  
22 that they do not warrant discussion as they do not affect the outcome of either of  
23 Defendants’ Motions.

24 ///

25 ///

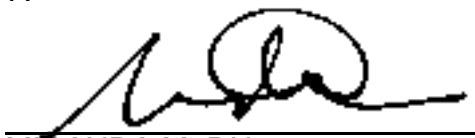
26 ///

27 ///

28 ///

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

It is therefore ordered that Casillas's Motion to Dismiss (ECF No. 11) is denied.  
It is further ordered that OpenRoad's Motion to Dismiss (ECF No. 18) is denied.  
DATED THIS 18<sup>th</sup> day of September 2017.



---

MIRANDA M. DU  
UNITED STATES DISTRICT JUDGE