IN THE SUPREME COURT OF THE STATE OF NEVADA

GOLDEN ROAD MOTOR INN, INC., a Nevada Corporation d/b/a ATLANTIS CASINO RESORT SPA,
Appellants/Cross-Respondent,
vs.
SUMONA ISLAM, an individual,
Respondent/Cross-Appellant,
and
MEI-GSR HOLDINGS, LLC, a Nevada limited liability company d/b/a GRAND SIERRA RESORT WHICH CLAIMS TO BE THE SUCCESSOR IN INTEREST TO NV-GS, LLC,
Respondent.
_____/

Case No. 64349

SUMONA ISLAM, an individual,
Appellant
vs.
GOLDEN ROAD MOTOR INN, INC., a Nevada Corporation d/b/a ATLANTIS CASINO RESORT SPA,
Respondent. _____/

Case No. 64452

MEI-GSR HOLDINGS LLC, a Nevada limited liability company d/b/a GRAND SIERRA RESORT,
Appellant/Cross-Respondent,
vs.
GOLDEN ROAD MOTOR INN, INC., a Nevada Corporation d/b/a ATLANTIS CASINO RESORT SPA,
Respondent/Cross-Appellant. _____/

Case No. 65497

RESPONDENT AND CROSS APPELLANT ISLAM'S COMBINED ANSWERING BRIEF AND OPENING BRIEF

NRAP 26.1 DISCLOSURE STATEMENT

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a) and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

1. All parent corporations and publicly-held companies owning 10% or more of the party's stock: None. Sumona Islam is an individual.
2. Names of all firms whose attorneys have appeared for the party or amicus in this case (including proceedings in the district court or before an administrative agency) or are expected to appear in this court: Mark Wray.
3. If litigant is using a pseudonym, the litigant's true name: None.

Respectfully submitted this 5th day of December, 2014.

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I

JURISDICTIONAL STATEMENT

These are timely appeals from final judgments. Jurisdiction arises under NRAP 3A(b)(1).

The order initially appealed from by Golden Motor Road Inn, Inc. dba The Atlantis Casino Resort Spa ("Atlantis") is the Findings of Fact and Conclusions of Law and Order entered August 26, 2013. *6 App. 1295.* Notice of entry was served October 1, 2013. *7 App. 1566.* The Atlantis appealed October 30, 2013. *8 App. 1774.* Respondent and Cross-Appellant Sumona Islam ("Islam") cross-appealed pursuant to NRAP 4(a)(2) on November 8, 2013. *9 App. 2013.*

The additional order appealed from by Islam is the order awarding attorneys fees to the Atlantis filed November 8, 2013. *9 App. 2017.* On November 15, 2013, Islam filed an Amended Notice of Appeal from the order awarding fees. *9 App. 2029.*

II

ISSUES PRESENTED FOR REVIEW

The issues raised by the Atlantis on appeal are as follows:

(1) Whether the district court properly ruled the non-compete agreement was unenforceable.

(2) Whether the district court properly found against the Atlantis on its conversion claim.

Islam has reconsidered the findings of the district court and the evidence in support of those findings and has decided not to argue her cross-appeal from the court's Findings of Fact and Conclusions of Law and Order entered Aug. 26, 2013.

The only issue Islam raises on appeal is whether the district court's order awarding $308,711 in attorneys fees to the Atlantis violated Due Process in that the district court refused to require that the Atlantis serve Islam with the evidence that the Court would rely upon in rendering the fee award.

III

STATEMENT OF THE CASE

Islam is not satisfied with the statement of the case presented in the Atlantis opening brief and therefore provides the following statement. NRAP 28(b).

A. Nature of the Case

The unworthy aim of the Atlantis in this costly litigation was to prevent MEI-GSR Holdings, LLC dba Grand Sierra Resort ("Grand Sierra") from using the same business practice as the Atlantis; namely, hiring casino hosts from other casinos to obtain their books of business.

In 2008, while Islam was a casino host at Harrah's, the Atlantis hired Islam away from Harrah's so that the gaming patrons with whom she had a relationship at Harrah's would follow her to the Atlantis.

In 2012, the Grand Sierra hired Islam away from the Atlantis for the business of the players who would follow her to the Grand Sierra.

The trial judge held against the Atlantis, finding that the Grand Sierra was only engaging in the same lawful business practice as the Atlantis; namely, hiring casino hosts away from other casinos to garner the business relationships between those hosts and their players.

Although it lost against the Grand Sierra, the Atlantis won against Islam on claims for breach of employee confidentiality agreements and misappropriation of trade secrets. Claims for (1) breach of the non-compete agreement and (2) conversion were dismissed. The Atlantis appealed the dismissals of these claims, apparently because the Atlantis is trying to set precedents for other cases against employees, because a reversal as to the claims for breach of the non-compete and conversion would add nothing to the recovery against Islam.

B. Course of the Proceedings

The Atlantis brought claims against Islam for breach of contract, conversion, interference with contract and prospective economic advantage, and violations of the Trade Secret Act. *1 App. 0001.*

The Atlantis obtained a temporary restraining order, *1 App. 0107,* and preliminary injunction, *2 App. 0338,* which stopped Islam from continuing to work at the Grand Sierra until the non-compete agreement expired. *Id.*

The bench trial before the Hon. Patrick Flanagan, District Judge, lasted 10 days. *6 App. 1295.*

C. Disposition Below

The Atlantis prevailed against Islam as to certain breach of contract claims arising out of employee confidentiality agreements. The Atlantis also prevailed on its trade secret claims. The Atlantis lost on all other claims, including the claim for breach of the non-compete agreement and the claim for conversion. *6 App. 1295.*

Damages for breach of the employee confidentiality agreements were assessed by the district court at $10,941 plus $2,119 for costs of repairing the database. Damages for trade secret act violations were assessed at $10,814. Punitive damages were awarded in the amount of $20,000. *6 App. 1309.*

The Atlantis was awarded attorneys fees against Islam of $308,711. Costs were an additional $17,070.61.

The judgment against Islam breaks down to $23,874 in compensatory damages, $20,000 in punitive damages, and $325,781.61 in attorneys fees and costs. Approximately 88% of the judgment is attorneys fees and costs.

IV

STATEMENT OF FACTS

By 2008, after spending 12 years working for casinos in Reno, Islam had risen to the position of casino host for Harrah's Casino in Reno. *14 App. 2911-14; 15 App. 3175-76; 16 App. 3246-48.* Hosts create and develop relationships with

frequent gamblers, serving players' needs with the aim of promoting further gambling at the host's casino. *14 App. 2915-23, 2932-34; 15 App. 3092, 3232-33; 17 App. 3449; Exhibit 20.* Hosts develop a "book of business" consisting of players' names, addresses and contact information. *12 App. 2602, 2610; 16 App. 3260-63; 17 App. 3448-49.*

On or about April 15, 2008, Islam was hired away from Harrah's to work for the Atlantis as an executive casino host. *12 App. 2549, 2573, 2600, 2609.* The Atlantis hired Islam to get her players to move with her from Harrah's to the Atlantis. The Corporate Director of Slot Operations for the Atlantis is Steve Ringkob, who testified:

> Q. Casinos like the Atlantis and the Grand Sierra Resort, they maintain lists of players, right?
>
> A. Yes.
>
> Q. And they get players on these lists by hiring casino hosts from other casinos?
>
> A. That's one of the ways, yes.
>
> Q. The casino hosts at these each of these casinos know the players, because that's their job is to host them and to cultivate relationships with them?
>
> A. Yes.
>
> Q. And when a casino host leaves one casino to work at another, they bring with them to their new jobs their existing relationships with the players?
>
> A. If they are competent hosts, yes.
>
> Q. The system of hiring casino hosts from other casinos to take advantage of their relationships with their players is a well-established practice, isn't it?
>
> A. Yes.

Q. The Atlantis hires casino hosts away from other casinos for the express purpose of acquiring the players that the host brings with her?

A. That's one of the purposes, yes.

Q. And in this action, you're asserting that the information you acquire about players by hiring away these casino hosts from other casinos is proprietary once it gets on the Atlantis database?

A. My assertion is that as long as that it belongs to host's book of trade, it stays within their book of trade. Any additional information, may become proprietary.

Q. Okay. So in seeking an injunction in this particular case from this Court, the Atlantis wouldn't say the player contact information is confidential, because that came to the Atlantis from other casinos, right? That wouldn't be part of an injunction?

A. As long as it was within her book of trade.

Q. Or one of the other hosts like Ms. Santos, Mr. Law or anyone else, right? It's not confidential.

A. As long as it's within their book of trade.

Q. Okay. So things that you can prevent, you think you can prevent another casino from using would not include player contact information, necessarily, if it came from another casino, right?

A. Say again, please.

Q. You see, we're trying to, as I was objecting earlier when your attorney was asking you questions, to find what we're talking about when we say information when we say confidential or proprietary or trade secret information.
We're trying to give some meaning to that and I'm trying to say, information in some form came from other casinos to the Atlantis through casino hosts being hired, right?

A. Yes.

Q. What I'm saying is that information includes who these players are, where they live, what their e-mail is, right?

A. Yes.

Q. It gets uploaded on to the Atlantis computer. I'm trying to get to a point where you can tell me where that information became confidential and proprietary to the Atlantis. Obviously, you didn't make it up, it came from another casino.

A. Provided it's in the casino host's book of trade, it is not proprietary to the Atlantis. The host can apply their book of trade going elsewhere observing the noncompete provisions of the Atlantis if they signed one.

12 App. 2600-2602.

At the time that the Atlantis hired Islam, she had existing confidentiality and non-compete agreements with Harrah's. *14 App. 2945-46.* The existence of these agreements did not stop the Atlantis from hiring her to obtain her players. Again, from the testimony of Mr. Ringkob:

Q. Exhibit 3, first page, last paragraph -- well, second to last paragraph. Furthermore, Atlantis does not accept or use information from employees or others. Really?
Really? Is that true?

A. If it's a casino host book of trade, the guests that they have relationships with, guests that they have developed.

Q. Well, that's information from others, right? And it's specifically information about her players from Harrah's, isn't it?

A. Yes.

Q. And isn't that the stuff you told us earlier the Atlantis considers trade secrets?

A. Not in regards to her book of trade.

Q. Now, in all seriousness, I want you to be serious with me, do you really think that this issue is about, you know, semantics? Do you think that calling it her book of trade means it's not information coming from the Atlantis? Is that what you believe, really?

A. You mean information coming from Harrah's?

Q. When you keep saying -- yes, Harrah's. Do you think it's not information coming from Harrah's, because you called it her book of trade?

A. It is information from Harrah's, but it is guests she has personal relationships with or alleged to be so.

Q. Now, that's a form over substance, isn't it? You know the information comes from Harrah's? You know it's their players, right?

A. It's players that reside in their database, yes.

Q. That's what Exhibit 75 is, for crying out loud, right?

A. Which was the list of her alleged book of trade, correct.

Q. So when you say, well, it's her book of trade, it's okay for us to take it from her, it's not the Atlantis' property, I'm not understanding that. Can you explain that to me? Why is that okay?

A. It is guests she has developed, that she has personal relationships with.

Q. Okay. And so when Mr. Dotson was asking earlier, it was because of that, you have to concede, well, whatever she took to Grand Sierra that was people that she had relationships with is not something you can complain about at Atlantis, can you?

A. I don't know who she took to Grand Sierra.

Q. No, but you know in general she had players at Harrah's and you asked about them at the interview, right?

A. Yes.

Q. And she brought them over and uploaded them on the Atlantis system, right?

A. Yes.

Q. And now you're suing the Grand Sierra, complaining that the Grand Sierra hired Ms. Islam, took away this player information from the Atlantis, right? Isn't that what you're suing them for, these people?

A. Was it her book of trade that was taken over to the Grand Sierra?

Q. That's why I go back to the question. You keep saying, well, it's her book of trade when it comes from Harrah's. Isn't it her book of trade when it goes to Grand Sierra?

A. No. As long as it's the same list of guests she has relationships with.

12 App. 2590-93.

Thus, when Islam came to the Atlantis, she brought with her a personal book of trade, containing names and contact information for her players at Harrah's, which the Atlantis uploaded into its database. *12 App. 2602-2605, 2609; 13 App. 2779-2780; 2790-2793; 2799-2802; 2813-2822; 2836, 2842, 2858-2868; 2874-2876; Trial Exhibit 75, 24 App. 5037.*

While still employed at the Atlantis, Islam changed contact information on her computer for 87 of her players, requiring the Atlantis to spend $2,117.10 to correct the database with the right information after she left. *21 App. 4314-17; Trial Exhibit 59; 28 App. 4864.*

On January 29, 2012, Islam accepted a job offer from the Grand Sierra as an executive casino host. *14 App. 2970; 16 App. 3377.* While at the Atlantis, Islam had signed confidentiality and non-compete agreements similar to what she had signed with Harrah's. *21 App. 4288.* When she was hired by the Grand Sierra, its legal counsel reviewed the non-compete and had the opinion it was overbroad and unenforceable. *15 App. 3528, 3033-36.*

The district court found Islam liable for breaching her confidentiality agreement with the Atlantis and for violating the trade secret law and invited the Atlantis to file a motion for attorneys fees. *6 App. 1295.* The Atlantis filed a motion. *6 App. 1227.* The motion was supported by an affidavit of counsel, *6 App. 1261*, stating that detailed itemizations of services were in existence and would be submitted to the court for *in camera* review if the court so directed. *Id.* No itemizations of services were filed with the motion. The affidavit of counsel contained 17 pages of "bill summaries" containing only monthly dollar totals of fees and costs. *6 App. 1273-1288.*

Islam opposed the motion. *6 App. 1319.* She argued, *inter alia,* that NRCP 54(d)(2)(B) states that a motion for attorney's fees must include "documentation concerning the amount of fees claimed." She cited cases confirming this requirement. *See, e.g., Sandy Valley Assocs. v. Sky Ranch Estates Owners Ass'n,* 117 Nev. 948, 956, 35 P.2d 964, 969 (confirming the procedure of providing documentation as to the amount sought to be awarded); *Beattie v. Thomas*, 99 Nev. 579, 589, 668 P.2d 268, 274 (1983) (finding it is an abuse of discretion to award the full amount of requested attorney fees without making findings based on evidence that the attorney's fees sought are reasonable and justified).

Islam pointed out that in counsel's affidavit attached to the Atlantis motion, counsel for the Atlantis provided bill summaries for the time spent by his firm, consisting only of dollar amounts, posted on a monthly basis, without any itemization of any fees incurred. The rationale for providing only total dollar amounts was that the invoices contain information that is "attorney-client communications and work product and have therefore not been produced." *6 App. 1262.*

In her opposition, Islam objected to being required to file an opposition to a motion for attorneys fees where the only supporting "evidence" was a conclusory and summary affidavit of counsel with dollar totals. She argued that if the

Atlantis wished to shield alleged attorney-client and work product information in its attorneys billings from disclosure to the other side, the Atlantis could do so, by not seeking an award of fees. In seeking an award of fees, Islam argued, the Atlantis was obligated to produce documentary evidence in support of that claim, and the Atlantis deliberately refused to do so. The Atlantis had no right to be awarded attorneys fees without producing evidence. *6 App. 1322,* citing NRCP 54(d)(2)(B). Islam therefore objected to the motion based on failure to produce the requisite admissible and competent documentary evidence.

Islam argued that it was no solution for the Atlantis to provide the itemization to the Court for *in camera* review, because she was entitled to contest fees that were unreasonable, which she could not do if she was prevented from seeing the itemization. *6 App. 1322.*

Islam contended that the Court obviously was not in the same position as Islam to determine which fees were reasonable in amount and which were not. *6 App. 1323.* Islam would know, or have reason to know, from having participated in this case, whether certain fee claims were improper. *Id.* In particular, the Atlantis was asserting that the claims against Islam and the claims against the Grand Sierra were so "intertwined" that the fees devoted to work on matters against the Grand Sierra versus matters against Islam could not be separated. *6 App. 1231.* The allegation that the matters were so "intertwined" that no separation was possible obviously could not be tested where zero documentation was produced by the Atlantis to support that argument. *6 App. 1323.* Islam argued that Due Process required more than the naked assertion by the Atlantis that its "intertwining" argument was right. The rules required the Atlantis to produce evidence to support its assertion, or else the motion should not have been filed in the first place. *See 6 App. 1323-1324,* citing NRCP 54(d)(2).

Apparently, the district court and the Atlantis had some communication about the fee motion, because on October 1, 2013, the Atlantis filed a "Notice of

Submission of Documents In Camera In Support of Plaintiff's Motion for Costs and Attorneys Fees." *7 App. 1563.* The notice stated that the Atlantis was lodging its itemization of fees with the court. *Id.* It further stated:

> These documents are not a part of the file in this case and are only being provided to the Court in camera pursuant to its request so as not to waive privilege.

The following day, Islam filed an written objection to the notice, stating she had the right to examine the evidence against her and that the motion for fees should be denied for failure to produce evidence. *7 App. 1599.* Islam's objection was never ruled upon.

On November 8, 2013, the district court issued its order awarding $308,711 in attorneys fees to the Atlantis. *9 App. 2017.* Despite the argument of the Atlantis that the fees were so "intertwined" as to matters involving the Grand Sierra and Islam that no distinction was possible, the district court apportioned 84.71% of all attorneys fees incurred by the Atlantis toward the claims asserted by the Atlantis against Islam, which allegedly resulted in the $308,711 figure. The Court did not otherwise explain the apportionment that it reached.

On November 13, 2013, Islam filed a motion asking the district court to direct the Clerk to file and maintain as official records of the Court the attorneys fees billings and other information of the Atlantis that had been submitted for *in camera* review before the Court issued its order awarding fees on November 8, 2013. Islam argued that Due Process involves notice and an opportunity to be heard. *J.D. Constr., Inc. v. IBEX Int'l Group, LLC,* 240 P.3d 1033, 1040 (Nev. 2010) (in determining whether a procedure meets the due process requirements of notice and an opportunity to be heard, due process is flexible and calls for such procedural protections as the particular situation demands); *Mathews v. Eldridge,* 424 U.S. 319, 349, 96 S.Ct. 893, 47 L.Ed. 18 (1976) (due process is satisfied by giving both parties a meaningful opportunity to present their case). Islam

contended that in any appeal concerning the subject of attorneys fees, Islam would need to have as complete a record as possible regarding how the *ex parte* fee motion was handled, and to have available for review the evidence that Islam was deprived of when the award of attorneys fees was made against her. *9 App. 2023.*

Islam pointed out that she had tried to preserve the record of the proceedings and defend her rights by objecting to the submission of the Atlantis billing records for *in camera* review, on grounds that copies of the records were never provided to Islam so that she could respond to the alleged "evidence" against her. The Court's order of November 8, 2013 had stated that the Court considered the "objections" filed by Islam, yet the Court's order had not ruled on the objections specifically.

In addition, Islam pointed out, there were no findings in the record of the existence of any alleged attorney-client privilege as to any billings records, and no findings as to why the *alleged* attorney-client matters could not be redacted. In short, Islam argued, she had been deprived of the opportunity to view the evidence against her without any justification.

Islam added that her concern was heightened by the fact that the notice of submission of the billings records by the Atlantis on October 1, 2013 stated that the billings "are not part of the file in this case and are only being provided to the Court in camera pursuant to its request so as not to waive privilege." The Atlantis expected that the billings were to be reviewed by the Court but not made a part of the file.

Compounding these concerns, Islam stated, the Court's order of November 8, 2013 did not state whether the billings statements were admitted as evidence, were made part of the records of the Court, or were even kept in the possession of the Court. In the event of an appeal of the order awarding fees, Islam pointed out, Islam could be in the position of arguing against alleged "evidence" she never saw, that was never admitted and that is not in the record. Failing to make the attorney

billings part of the record, so that they would be available on appeal, would exacerbate the unfair prejudice to Islam.

The Atlantis opposed Islam's motion, claiming a blanket claim of privilege as to all billings. The Atlantis "vehemently" objected to the motion and maintained that it would be a "travesty of justice" for the evidence to be preserved. *10 App. 2098.*

Islam filed a reply to the opposition. 10 App. 2111. In her reply, Islam pointed out that attorneys fees billings are not automatically subject to a blanket privilege. Indeed, blanket assertions of privilege are "extremely disfavored" and "[t]he privilege must ordinarily be raised as to each record sought to allow the court to rule with specificity." See, *Clarke v. American Commerce National Bank*, 974 F.2d 127, 129 (9th Cir. 1992). The identity of the client, the case name for which the payment was made, the amount of the fee and the general nature of the services performed are not privileged. *Id.* at 130.

Likewise, Islam said, the district court had made no order, and issued no findings, about any finding of any attorney-client privilege.

On December 24, 2013, the district court issued a written order denying Islam's motion, *10 App. 2129,* on grounds that making the itemized billings part of the public record of the case would "necessarily invade the attorney-client privilege." The district court nonetheless ordered the Atlantis to provide Islam with a redacted version of the billings within 30 days. *Id.* The purpose of providing Islam a redacted version of the fee itemization was not explained. Islam already had appealed the award of fees to this Court on November 15, 2013. *9 App. 2029.*

Despite Islam's best efforts, the itemization of attorneys fees that the Atlantis apparently provided to the district court is not part of the record. It is unknown whether the fee itemization was even preserved by the district court. Because no redacted or unredacted version of the Atlantis attorneys billings was part of the record below, no fee itemization is part of the record on this appeal.

V

SUMMARY OF ARGUMENT

Under any standard of review, the district court's dismissal of the Atlantis claims for alleged breach of the non-compete agreement and for conversion should be affirmed.

The district court weighed the evidence as to the non-compete and properly applied controlling precedent to find that the non-compete did not withstand muster as an unenforceable restraint on trade. The decision was based on substantial evidence and was not clearly erroneous. In addition, as a matter of *de novo* review, the ruling on the non-compete agreement accurately applied Nevada law.

The dismissal of the conversion claim was based on a finding that there was no interference with property rights significant enough to require payment of the full value of property, in that the interference was temporary, *de miniums,* and easily rectified. This decision was supported by substantial evidence and was not clearly erroneous.

The award of attorneys fees to the Atlantis was the result of a manifest error of law in refusing to require the Atlantis first to provide to Islam the evidence upon which the Court relied in making the fee award. The award of fees should be reserved as a violation of Due Process.

VI

ARGUMENT

A. Standard of Review

The district court's factual findings are given deference and will be upheld if not clearly erroneous and if supported by substantial evidence. *International Fid. Ins. v. State of Nevada*, 122 Nev. 39, 42, 126 P.3d 1133, 1134-35 (2006).

This Court reviews a district court's conclusions of law de novo. *Grosjean v. Imperial Palace*, 125 Nev. 349, 359, 212 P.3d 1068, 1075 (2009). The

interpretation of a contract is reviewed de novo. *Dobron v. Bunch,* 125 Nev. 460, 463, 215 P.3d 35, 37 (2009).

Generally, the district court's decision regarding attorney fees is reviewed for an abuse of discretion. *Albios v. Horizon Cmtys., Inc.*, 122 Nev. 409, 417, 132 P.3d 1022, 1028 (2006) . When the fee award implicates a question of law, however, this court reviews de novo. *Valley Elec. Ass'n v. Overfield,* 121 Nev. 7, 9, 106 P.3d 1198, 1199 (2005).

B. The Court Properly Could Find the Non-Competition Agreement Was Unenforceable

The Atlantis challenges the district court's finding that the non-compete agreement, *21 App. 4288*, was overbroad and unenforceable because it purports to prevent a former employee from working in *any* capacity at another gaming property after departing from the Atlantis. *6 App. 1303; 15 App. 3039.*

The issue of the validity of the non-compete is moot, as far as Islam is concerned, because she had to stop working at the Grand Sierra until the expiration of the non-compete in 2013. *1 App. 0107; 2 App. 0338.* The court's later decision that the non-compete was unenforceable did not help Islam in any way.

Obviously, however, the Atlantis must feel that the ability to enforce the same non-compete against other employees makes a difference. The Atlantis apparently wants this Court's blessing that the non-compete is valid because it will be a powerful tool for the Atlantis to use in the future against other employees who try to leave the Atlantis.

Judge Flanagan found the agreement to be too draconian, ruling that the non-compete was both unreasonable and unnecessary to protect the business interests of the Atlantis. *1 App. 54; 7 App. 1579-80, 1596; 20 App. 4046.*

Although the issue is academic from the standpoint of Islam, Islam does not wish to confess error by not responding to one of the Atlantis arguments. *In re Parental Rights as to A.L.,* 130 N.A.O. 91 (Nov. 13, 2014). Islam urges that the

district court's decision should be affirmed. The district court based its decision on factual findings, which are entitled to deference. *International Fid. Ins. v. State of Nevada*, supra, 122 Nev. at 42, 126 P.3d at 1134 (2006). Even if the district court's decision is reviewed under the *de novo* standard, *Dobron v. Bunch,* supra, 125 Nev. at 463, 215 P.3d at 37, the reasoning of the district court is sound as a matter of law.

In its decision, the district court stated that the law presumes that all parties have the freedom to contract and establish the terms of employment between themselves. *Hansen v. Edwards,* 83 Nev. 189, 192, 426 P.2d 792, 793 (1967). However, the public has an interest in seeing that competition is not unreasonably limited or restricted. *Id.; see also:* NRS 613.200(4) (an agreement preventing a person from pursuing a similar vocation in competition with or becoming employed by a competitor must be supported by valuable consideration and be reasonable in its scope and duration). The determination of the validity of such a contract as written is governed by whether or not it imposes upon the employee any greater restraint than is reasonably necessary to protect the business and the goodwill of the employer. *Hansen,* 83 Nev. at191, 426 P.2d at 793. A restraint of trade is unreasonable if it is greater than that required to protect the person for whose benefit the restraint is imposed or imposes an undue hardship on the person restricted. *Jones v. Deeter,* 112 Nev. 291, 294, 913 P.2d 1272, 1274 (1996). Thus, the amount of time the covenant lasts, the territory it covers, and the hardship imposed upon the person restricted are factors for the court to consider in determining whether such a covenant is reasonable. *Hansen,* 83 Nev. 191, 426 P.2d at 793.

In the instant case, the district court took into consideration all these factors. The district court held:

> 9. In the instant matter, this Court finds that the term restricting employment for a period of one year is reasonable and necessary to protect the interests of the ATLANTIS.

10. This Court finds that the term restricting employment within 150 miles from ATLANTIS is reasonable. It encompasses the markets of Sacramento and the evidence supports the threat that Thunder Valley and indeed other Northern California casinos pose to the casinos of Northern Nevada.

11. The Court finds, however, that the total exclusion from employment with a competitor is unreasonable. This Court finds that excluding the employment of an individual such as Ms. ISLAM, who has attempted to create a career in this industry from any role in any casino in any capacity is an unreasonable restraint on her and it imposes an undue hardship on Ms. ISLAM and it is a restraint that is greater than that required for the protection of the person for whose benefit the restraint is imposed, the ATLANTIS. Therefore, the Court finds the Non-Competition contract unenforceable and dismisses the second cause of action related to breach of that contract.

Notably, due to a non-compete agreement with Harrah's (*22 App. 4680*) when Islam was hired by the Atlantis from Harrah's in 2008, the Atlantis initially gave Islam a job with a title other than "casino host"; she was "concierge manager" for the six-month non-compete period. *14 App. 2999; 15 App. 3196.* Harrah's nonetheless complained that Islam's employment by the Atlantis violated the non-compete. *22 App. 4628, 4643.* In response, the Atlantis took the position that as long as Islam was not working as a casino host, she was not violating a non-compete with Harrah's. The Atlantis thus is seeking to enforce a non-compete against Islam that is far more restrictive than the non-compete that Harrah's sought to enforce.

In order to succeed on its claim for breach of the non-compete agreement, the Atlantis was required to show "(1) the existence of a valid contract, (2) a breach by the defendant, and (3) damage as a result of the breach." *Saini v. Int'l Game Tech.,* 434 F. Supp. 2d 913, 919-920 (D. Nev. 2006), citing *Richardson v. Jones,* 1 Nev. 405, 405 (1865). Here, the district court found that the first element

of a claim for breach of contract – the existence of a valid contract – was not supported by the evidence.

Accordingly, the district court properly dismissed the claim for breach of the non-compete and its decision should be affirmed. The Atlantis can readily fashion a better non-compete agreement that is more tailored to serve the necessities of its business and less of a restraint on a person's right to earn a living.

C. The District Court's Judgment on the Conversion Claim Is Supported by Substantial Evidence and Was Not Clearly Erroneous

The third claim for relief of the Atlantis complaint was for conversion. *1 App. 0001.* As to the conversion claim, the Atlantis alleged that Islam modified information on the database of the Atlantis by making address or email changes to guest data she knew to be false "which resulted in a taking, use or interference with Atlantis property." *Id.* ¶¶*38, 39.*

In its decision, the district court held that the elements of conversion are that a defendant exercises an act of dominion wrongfully exerted over the personal property of another in denial of or inconsistent with title rights therein, or in derogation, exclusion or defiance of such rights. *6 App. 1304*, citing *M.C. Multi-Family Dev., L.L.C.* v. *Crestdale Assocs. Ltd,* 124 Nev. 901, 910, 193 P.3d 536 (2008), citing *Evans* v. *Dean Witter Reynolds, Inc.,* 116 Nev. 598, 606, 5 P.3d 1043, 1048 (2000).

The district court further held that conversion generally is limited to those severe, major and important interferences with the right to control personal property that justify requiring the actor to pay the property's full value. *6 App. 1034; see also: Edwards v. Emperor's Garden Rest.,* 122 Nev. 317, 328, 130 P.3d 1280, 1287 (2006). Thus, conversion deprives a person of his or her property permanently or for an indefinite time. *See Lopez v. Corral,* 2010 Nev. LEXIS 69 (Nev. 2010), citing 18 Am. Jur. 2d Conversion § 1 (2004).

The district court's decision recognizes that if conversion claims are not limited to severe, major and important interferences that justify paying the property's full value, then the courts would have to treat every inconsequential, temporary interference with another's property as a conversion, which is not the intended purpose of the tort of conversion. *6 App. 1034.*

After setting forth the elements of conversion, including the holding from *Edwards,* the district court made the following findings of fact:

> The Court finds that the evidence adduced shows that the interference with the property of the ATLANTIS was not severe, that the information, although altered, was not lost and was easily restored. One measure of that is the fact that the damages sought for the restoration expense is de minimus in light of the value of not only Ms. ISLAM's book of trade, which she estimated at $3.5 to $4 million, but the operation of the ATLANTIS itself. Therefore, this Court finds that the Plaintiff has failed to establish the elements of conversion and the third cause of action is therefore dismissed.

The dismissal of the conversion claim thus was based on the district court's factual findings from the evidence at trial. The district court's findings are given deference and will be upheld if not clearly erroneous and supported by substantial evidence. *International Fid. Ins. v. State of Nevada*, supra, 122 Nev. at 42, 126 P.3d at 1134.

The court's findings should be given deference because they are not clearly erroneous and they are supported by substantial evidence. Ample trial evidence showed that information was not lost and was easily restored. *See: 14 App. 2936-2937; 18 App. 3740-3745;18 App. 3936-3968; Trial Exhibit 59, 23 App. 4897, the itemization of alleged repair costs).* Even including the outlandish *15 hours* at $50.88 per hour that Frank DeCarlo claimed that he spent in an alleged review of the information compiled by others, *see 23 App. 4897,* the sum total of the repair damages claimed by the Atlantis was only $2,117.10, compared to Islam's book of

business that generated $4 million in revenue for the Atlantis annually. The interference was *de minimus* and did not warrant paying the property's full value.

The Atlantis does not argue that the district court lacked substantial evidence to support its decision. The Atlantis argues simply that the district court should have found conversion occurred because there was interference with Atlantis property. The district court correctly rejected that argument. As this Court made clear in *Edwards,* mere interference is not enough. The interference must be so severe that it warrants requiring the defendant to pay the full value of the property.

The Atlantis brief also incorrectly argues that the district court based its findings on the size and wealth of the victim. To the contrary, as a measure of the severity of the interference, the district court compared the value of the database information in the operations of the Atlantis to the amount spent to remedy the interference, finding that the interference with the database was *de minimus.* This analysis considered the value of the property, not the wealth of the victim. The district court's analysis was perfectly appropriate under the holding of *Edwards.*

In summary, the dismissal of the conversion claim should be affirmed, but once again, the appeal is curious. The repair damages claimed by the Atlantis were $2,117.10. The district court awarded the Atlantis these repair damages as an additional element of damages on the breach of contract claim. *6 App. 1303.* Thus, even if a reversal on appeal was warranted, which it is not, it would not lead to the Atlantis obtaining more damages. The repair damages already have been awarded. *Elyousef v. O'Reilly & Ferrario, LLC,* 245 P.3d 547, 549 (Nev. 2010) (a plaintiff cannot recover damages twice for the same injury simply because it has two legal theories). The appeal of the dismissal of the conversion claim has no effect on the recovery against Islam, but the Atlantis is appealing anyway.

D. <u>The District Court's Attorneys Fees Award Violated Due Process</u>

Under NRCP 43(c), "when a motion is based on facts not appearing of record the court may hear the matter on affidavits presented by the respective

parties, but the court may direct that the matter be heard wholly or partly on oral testimony or depositions." Under this rule, where facts regarding attorney's fees are not already in the record, the district court has discretion to hear the matter on affidavits under NRCP 43(c). *James Hardie Gypsum, Inc. v. Inquipco*, 112 Nev. 1397, 929 P.2d 903, 909 (1996), overruled on other grounds, *Sandy Valley Assocs. v. Sky Ranch Estates Owners Ass'n,* 117 Nev. 948, 955, 35 P.3d 964, 968 fn. 6 (2001). These rules assume, however, that both sides get to see the evidence.

NRCP 5 and NRCP 54(d)(2) require documentation in support of a fee request to be both served on an opposing party and filed with the Court. Neither service on the opposing party nor filing with the district court occurred in this case.

The attorneys fees itemizations are not part of the record on this appeal, even though the size of the attorneys fees award dwarfs the size of the compensatory damage award. Due Process is offended when 88% of the judgment against Islam is based on evidence she never was allowed to see, let alone challenge. Nor can the law allow *ex parte* submissions of evidence to district courts as occurred in this case.

Under NRCP 1, all the rules are to be construed to effect a *just* determination of every action. Rule 54(d)(2) can only be fairly and justly construed as requiring documentation on attorneys fees to be served and filed on the opposing party against whom fees are sought. These are basic principles of fairness to all litigants and to the integrity of the judicial process.

At a minimum, on an attorneys fees motion, every litigant should have the right to notice and an opportunity to be heard, starting with the requirement that the moving party serve on all parties a copy of the billings lodged with the Court. *See, e.g., MGIC Indemnity Corp. v. Weisman*, 803 F.2d 500, 505 (9th Cir. 1986). Refusing to provide any billing records to the opposing side to review as part of the defense of a motion for fees denies notice and opportunity to be heard and should be treated as a waiver of the right to recover fees. See, e.g., *United States v.*

$1,379,789.09 Seized of Bank of Am., 374 Fed.Appx. 709, 711 (8th Cir. 2010). Blanket claims of privilege as to attorneys fees billings should not be entertained. *Clarke v. American Commerce National Bank*, 974 F.2d 127, 129 (9th Cir. 1992).

The district court abused its discretion when it awarded attorneys fees of $308,711 based on an *in camera* review of billing records without requiring those records to be served on Islam. In this instance, the abuse of discretion is particularly plain, because the district court somehow determined, based on whatever it reviewed, that 84.71% of the Atlantis attorneys fees should be apportioned to Islam. The Atlantis did not spend hundreds of thousands of dollars on lawyers trying to prove up a case against a judgment-proof working woman. The Atlantis spent those hundreds of thousands of dollars investing in a lawsuit to attempt to keep the Grand Sierra from engaging in the same business practice as the Atlantis; hiring away casinos hosts to obtain the players that they bring with them. The reason nearly a million dollars was spent on legal fees in this case is because the Atlantis and the Grand Sierra are in a power struggle over how much each of them can restrain trade and monopolize player information.

The apportionment of 84.71% of the Atlantis fees to Islam is doubly incomprehensible because the amount that the Atlantis had to spend to prove its claims against her was minimal. She admitted her liability. *See 6 App. 1300* (district court's decision of August 26, 2013 referring to evidence testified to by Islam herself). The Atlantis needed nothing other than Islam's own testimony to prove its claims against her. There is no way that the Atlantis spent $308,711 in attorneys fees to accumulate evidence that Islam freely gave up herself.

The award of an amount of attorneys fees is within the Court's discretion, but this discretion cannot be exercised contrary to guiding legal principles. *Bergmann v. Boyce,* 109 Nev. 670, 674, 856 P.2d 560 (1993). Factors to be considered in an award include the qualities of the advocate, the character of the work done, the work actually performed, and the result. *Brunzell v. Golden Gate*

Nat'l Bank, 85 Nev. 345, 349, 455 P.2d 31, 33 (1969). As to the character of the work and work actually done, there is no evidence in the record to support findings as required by *Brunzell.*

The amount of attorneys fees awarded is with a court's discretion, but the exercise of that discretion is to be tempered by reason and fairness. *Shuette v. Beazer Homes Holdings Corp.,* 121 Nev. 837, 864-865, 124 P.3d 530, 548 (2005), citing *University of Nevada v. Tarkanian*, 110 Nev. 581, 594, 591, 879 P.2d 1180, 1188 (1994). To meet anyone's standard of fairness and reasonableness, the judgment in favor of the Atlantis for attorneys fees should be reversed.

VII

CONCLUSION

It is respectfully urged that this Honorable Court affirm the judgment of the district court in Case No. 64349 as to both the claim for breach of the non-compete agreement and for conversion and reverse the judgment in Case No. 64452 awarding attorneys fees to the Atlantis.

DATED: December 5, 2014 LAW OFFICES OF MARK WRAY

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CERTIFICATION OF COUNSEL

I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular N.R.A.P. 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

[X] This brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point font and type style Times New Roman.

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3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to

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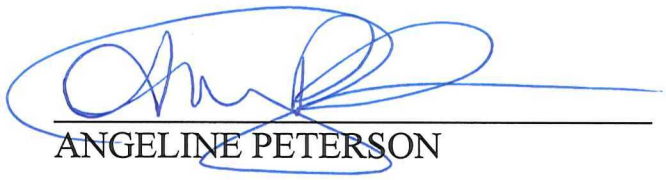

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