IN THE SUPREME COURT OF THE STATE OF NEVADA

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

RESPONDENT'S ANSWERING BRIEF AND APPELLANT'S REPLY BRIEF REGARDING SUMONA ISLAM

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NRAP 26.1 DISCLOSURE

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

1. All parent corporations and publicly-held companies owning 10% or more of the party's stock: This disclosing party identifies that Monarch Casino & Resort Inc. is its parent corporation, that Monarch Casino & Resort Inc. is publicly held, trading on the NASDAQ under the ticker symbol (MCRI) and that Golden Road Motor Inn, Inc. d/b/a Atlantis Casino Resort Spa is a wholly owned subsidiary.

2. Names of all firms whose attorneys have appeared for the party or amicus in this case (including proceedings in the district court or before an administrative agency) or are expected to appear in this court:

Laxalt & Nomura, Ltd.

Lemons, Grundy & Eisenberg

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

Respectfully submitted this 2nd day of March, 2015.

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INTRODUCTION

In her combined Answering and Opening brief, Islam properly elected to concede the propriety of the district court's determination that she violated the Uniform Trade Secret Act ("UTSA") and her contractual obligations to Atlantis. However, she continues to dispute application of the fourth contract forming the basis of this suit, the Non-Competition Agreement. Notably, she does not dispute the fact that if enforceable, her actions violate the terms of that agreement. Thus, with regard to that issue, there appears to be no dispute that the question before this Court is whether the agreement prohibiting her employment with "any gaming business or enterprise" is in fact overbroad, as the district court found. Atlantis stands by its position that to affirm the district court's decision will significantly change Nevada law and conflict with the plain reading of the current statute and cases on point.

With regard to the appropriateness of the district court's ruling on the conversion claim, Islam continues to dispute that her sabotage of the Atlantis database constituted conversion under Nevada law. However, if the destruction of intellectual property so that it cannot be used by its owner is not a distinct act of dominion inconsistent with Atlantis' right to that personal property, it is difficult to understand how conversion could ever be applied to intellectual property. Islam again requests this Court to affirm a decision which will change Nevada law.

Lastly, Islam's brief appeals the award of attorney fees not on the basis that those fees were unjustified under the law or even that they were unreasonable in amount. Rather, Islam objects to the district court's refusal to order Atlantis to waive its attorney client privilege in pursuance of those fees. As described herein, Atlantis met or exceeded every requirement in Nevada for the award of attorney fees under these circumstances and therefore the award is appropriate and should not be disturbed on appeal. Indeed, in seeking reversal, Islam is again seeking a change in the law of Nevada which could have broad impact.

FACTS

Islam sets forth and cites to certain purported facts in her brief that misstate or are unsupported by the record or misinform the Court as to the issues of the case. Some of those facts are as follows:

Islam is clearly dissatisfied with the fact that in Nevada we have elected to allow non-competition agreements and indeed have codified that in NRS 613.200(4). In an effort to distract from her clear and lawful contractual obligations to Atlantis under the Non-Compete Agreement, both at trial and now on appeal, Islam elects to focus upon the transition from her initial gaming employer, Harrah's, to Atlantis, rather than discussing her obligations to Atlantis pursuant to the relevant agreement. This effort is misplaced for a number of reasons.

First, Harrah's is not a party to this suit. It was neither the former, nor new employer involved. Second, the contracts are not remotely similar in their terms and requirements. This case should not be determined based upon the terms of a contract which is not the contract sought to be enforced. Harrah's determined what restrictions in future employment it should seek from its hosts, and Atlantis was well aware of and observed those restrictions. Although Islam wishes to ignore this fact, the fact is that the language and terms of a contract, even a non-compete agreement, matters. Just because Islam's former employer elected to utilize a non-compete and related contracts that allowed immediate future employment with a competitor does not mean Atlantis and Islam are precluded from agreeing to a more stringent contract, or that they must limit the scope of their contract.

Additionally, Islam attempts to engage in a slight of hand through her application of the concept of a "book of trade." Atlantis has consistently presented the position that a host may have a "book of trade" or proprietary information known to a host prior to her employment with Atlantis, based upon her own efforts, which does not contain the proprietary information of another host or

employer. This is a concept consistent with black letter property law. If it is the host's property, the host has the right to elect to share it with a new employer and take it with them when they leave. The district court found a "book of trade" to be "those names and contact information of guest that they [the host] have developed relationships throughout – through their own efforts." 20 App. 4244: 4-8. In other words, it cannot be information developed by other hosts or the employer that the host has access to as a consequence of her employment.[1] In this case a "book of trade" is a list of casino guests with whom the host had a relationship before she came to work at Atlantis. Atlantis maintains that Islam can take the information she brought to Atlantis with her to any future employer she chooses. Those names and contact information remain her property and she therefore has the right to take that information with her if she leaves the employment of Atlantis. However, Atlantis will also treat that information as a trade secret and protect its disclosure to competitors and to the public at large.

Atlantis also invests enormous effort, utilizes proprietary methods and formulas, and expends significant human and economic capital in cultivating additional information about such guests and that information is proprietary and not part of any host's book of trade, and the district court so found. 7 App. 1573:24-27, 1574:13-16,1578:24-1579:2, 1582:19-1583:26. Thus, it is improper and a violation of the UTSA for a host or any employee to copy or misappropriate that information.

Due to the terms of employment of a host at Atlantis, there is also no ability to expand a book of trade while working at Atlantis. 7 App. 1572:24-1573:3. The various air-tight contracts signed by Atlantis employees, including the Atlantis Company Policy Regarding Company Property, Proprietary Information, and

[1] This is consistent with the district court's list of nineteen trade secrets in the gaming industry and its finding of violation of the UTSA by Islam. *See*, 20 App. 4250: 10 – 4251:9 and 20 App. 4252:14 - 16.

Trade Secrets, the Online User Agreement and the Business Ethics Policy and Code of Conduct, all prohibit the employees from obtaining ownership of the information that they are exposed to or develop while employed by Atlantis. Just as a person working at Google cannot legally take the trade secrets they learn or develop from their employment with that entity to Apple, the terms of employment at Atlantis do not allow the transfer of trade secret information to its competitors. Yet that is precisely what occurred in this case and that is why the district court found Islam to have violated those contracts and the UTSA.[2] The concept of a book of trade is not a safe harbor under the facts of this case. In this instance, Islam did not transfer to GSR her "book of trade"; indeed she apparently did not even keep a copy of it. 14 App. 2980:11-17.

Islam contends that her hire at GSR was based upon a review by GSR legal counsel.[3] However, Islam's citation to the record does not support that proposition. Rather, 17 App. 3528 simply states who Tom Flaherty is and 15 App. 3033-36 makes it clear that Islam provided GSR with the Atlantis Non-Compete Agreement and that Islam does not remember what was said about it. 15 App. 3036:4-7. This hearsay statement is not a basis for an affirmative defense of advice of counsel and indeed it is clear Islam did not even speak to GSR's counsel. This evidence does not establish that anyone had even spoken to counsel, much less received a legal opinion, nor what the opinion or advice of counsel might have been.

Finally, Islam incorrectly represents that Atlantis' claim for tortious interference with prospective economic advantage was defeated in district court. Rather, those claims were considered under the UTSA, and a willful violation of

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[2] Notably, Islam now concedes those findings and has withdrawn her appeal of that portion of the district court's decision.

[3] Islam Brief at 8:26-28.

that Act was found. 20 App. 4298:22-4299:3 (Decision of Court) 7 App. 1580:25-1581:16 (FFCL).

ARGUMENT

A. The Non-Competition Agreement Should Have Been Found Valid and Enforced by the District Court

Atlantis sought to enforce a Non-Competition contract between it and Islam which precluded her employment with another gaming business within 150 miles for one year. Despite signing that contract, Islam elected to accept employment with GSR, and GSR elected to hire her to perform exactly the same job at its casino just a short distance away from Atlantis. Under these circumstances, the district court erred by striking the contract as unreasonably restrictive.[4]

In support of the district court decision, Islam fails to address the terms of the operative contract and instead illogically argues that Atlantis should be required to abide by the terms of the non-compete contract that Islam had with Harrah's when Atlantis hired her.[5] However, the Non-Compete between Islam and Atlantis is the only relevant contract. Indeed, even if the district court was influenced by the terms of the contract between Harrah's and Islam, that would be clear error as there is obviously no privity with Atlantis. As Islam contends, it is true that the contract between Islam and Atlantis is "far more restrictive" than the non-compete contract she entered with Harrah's.[6] That was not an accident and Atlantis is legally entitled to enforce the terms of its own contract.[7]

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[4] 7 App. 1579:25-1580:4 (FFCL).
[5] Islam Brief at 17:6-23.
[6] Islam Brief at 17:22.
[7] Atlantis notes that although the Non-Competition Agreement in question is more restrictive than the agreement Islam had with Harrah's, the geographic restriction of 150 miles and the period of 1 year are likely not the maximum allowable under Nevada law and therefore the contract here does not represent the most restrictive yet enforceable contract of this nature. *See, for example, Camco, Inc. v. Baker*, 113 Nev. 512, 936 P.2d 829 (1997), finding a 2 year covenant appropriate.

As Islam notes, a court must determine a breach of contract based upon the valid contract between the parties.[8] Here, the non-compete agreement between the parties was valid and is the operative document. There is no dispute about the privity of that document or the elements required to be proven to establish a breach of the contract. The question presented is the validity of that contract under Nevada law. Other than arguing that the terms are too restrictive because they are far more restrictive than a 2005 contract drafted by Islam's former employer, Islam advances no arguments or legal authority to counter those raised by Atlantis.

In contrast, Atlantis' position is that the ruling of the district court clearly represents an erroneous application of Nevada law.[9] The district court found the Non-Compete Agreement's prohibition of employment in any position with a competitor to be an unreasonable restraint; however, that is precisely the restraint allowed under Nevada case law and statute. In Nevada, employers are allowed to contract with their employees, restraining trade, when that restraint is reasonable. *Jones v. Deeter*, 112 Nev. 291, 294, 913 P.2d 1272, 1274 (1996). In particular §NRS 613.200(4) allows:

> negotiating, executing and enforcing an agreement with an employee of the person, association, company or corporation which, upon termination of the employment, prohibits the employee from: (a) Pursuing a similar vocation in competition with *or becoming employed by a competitor of the person, association, company or corporation*; or (b) Disclosing any trade secrets, business methods, lists of customers, secret formulas or processes or confidential information learned or obtained during the course of his or her employment with the person, association, company or corporation, if the agreement is supported by valuable consideration and is otherwise reasonable in its scope and duration. (Emphasis supplied)

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[8] Islam Brief at 17:25.

[9] Atlantis contends the appropriate standard of review to be de novo. *Casey v. Wells Fargo Bank*, 128 Nev. __, 290 P.3d 265, 267 (2012), *May v. Anderson*, 121 Nev. 668, 672, 119 P.3d 1254 (2005) and *Hansen v. Edwards*, 83 Nev. 189, 426 P.2d 792 (1967).

That is precisely the scope of restriction sought by Atlantis from this contract. If it was the intent of the legislature to allow a former employee to work for a competitor, so long as the position was different or under certain restrictions or circumstances, the statute would read far differently.

NRS 613.200 and case law of Nevada set forth a bright line rule allowing post-employment restrictive covenants which prohibit a former employee from becoming employed by a competitor and thereby competing with and disclosing the trade secrets, business methods, lists of customers and confidential information learned by the employee from her former employer.[10] However, in this instance, the district court struck such a contract, thereby authorizing such an employee to disclose to her new employer the trade secrets, business methods, lists of customers and confidential information she obtained through her employment with Atlantis. Amazingly, the district court found that precisely that type of information was illegally appropriated by Islam when she took it with her from Atlantis to GSR, yet it struck the Non-Competition Agreement which, had it been observed, would have acted to legally prevent that conduct.[11]

In this case there is no dispute that the Non-Competition Agreement was supported by valuable consideration and was reasonable in geographic scope and duration.[12] The question before this Court is whether it is appropriate to preclude all employment with a competitor and whether the failure to allow any employment with a competitor renders such an agreement void. In the circumstances of this case, the evaluation must include that fact that the subsequent employment at GSR was as a Casino Host, which is in precisely the same capacity in which Islam was employed at Atlantis. Atlantis contends that a blanket

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[10] NRS 613.200(4)(b) is particularly telling as it describes precisely the type of harm visited upon the Atlantis here.

[11] Atlantis submits NRS 613.200(4)(b) reflects precisely that statutory purpose.

[12] 6 App. 1303:7-24 (FFCL).

prohibition of employment with a competitor is the only logical scope for such a covenant and is specifically the scope endorsed by the Nevada Legislature.

Even if for some reason this Court finds the Non-Competition Agreement here to have been too restrictive, the district court still committed error in failing to adjust the restriction as this Court has allowed in *Ellis v. McDaniel*, 95 Nev. 455, 596 P.2d 222 (1979) and *Hansen v. Edwards*, 83 Nev. 189, 426 P.2d 792 (1967). Had the district court adjusted the scope in this instance to only preclude employment in the same positon, the Non-Competition Agreement still would have been breached by Islam's employment with GSR.

B. Islam's Actions Constituted Conversion

Islam admitted and the district court found that she had committed acts which constituted conversion. Despite those admissions and the finding of the district court, it declined to find that Islam had committed conversion. This constitutes reversible error.

Responding to Atlantis' positon on appeal, Islam cites to the same authority as Atlantis for the standards of conversion, but argues that her actions are not sufficiently severe to constitute conversion because her sabotage of intellectual property could be and was repaired after a period of time.[13] The issue presented is then: in Nevada, are such circumstances, claimed relative severity and ability to repair, a defense to a claim of conversion?

There is no factual dispute and Islam concedes below and in her answering brief that she committed the actions forming the basis for the claim. It is also relatively undisputed that it cost over $2,100 to repair the damage caused and that Atlantis was without the use of that part of its marketing database for a period of

[13] Islam Brief at pages 18-20, citing to *M.C. Multi-Family Development, L.L.C. v. Crestdale Associates Ltd.*, 124 Nev. 901, 910, 196 P.3d 536 (2008) and *Evans v. Dean Witter Reynolds, Inc.*, 116 Nev. 598, 606, 5 P.3d 1043, 1048 (2000).

approximately six weeks.[14] The question is purely one of law. Should the finder of fact in a claim for conversion consider the wealth of the victim and the relative value of the involved property or cost to repair the damage done? Atlantis submits there is no valid reason to allow the wealth of the victim to be a defense to such a claim. Equal treatment under the law is a basic premise of the legal system in this country.[15] Although there may be some value which is so de minimus as not to support a claim of conversion, Atlantis submits that sum must be far less than the value of the database sabotaged by Islam in this instance and similarly far less than the $2,100 expense to repair it.

If adopted by this Court, the defense applied by the district court and as advocated by Islam would significantly change the law of conversion. For example under Islam's and the district court's application of the law of conversion, if someone takes $2,000 worth of outdoor lighting from a multimillion dollar building, and if it takes only six weeks to replace the lighting, there is no conversion because when compared the value of the building, the expense to repair the item taken was de minimus. Atlantis respectfully contends that affirmance of such a holding would make bad law and would not be reflective of the public policy and constitutional right to equal treatment under the law.

The *Edwards* case cited by Islam dealt with the argument that the act of sending unsolicited facsimile advertisements stole the paper, toner and ink of the recipient, an act of conversion. *Edwards v. Emperor's Garden Restaurant,* 122 Nev. 317, 328, 130 P.3d 1280 (2006). The *Edwards* Court found that it had not been demonstrated that the facsimile paper and toner had been intentionally destroyed or radically damaged. *Id.* at 329. "The mere damage that may have occurred to Edwards' paper and toner when his personal facsimile machine printed

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[14] 6 App.1300:8-25, 1303:5 (FFCL), 18 App. 3629:18-3638:14, 23 App. 4879:13 and 4897.

[15] United States Constitution - Amendment XIV.

the one unwelcomed advertisement falls short of destruction or material alteration." The court noted that any such damage was technical and so inconsiderable as to be *de minimus*. *Id.* The court did recognize that in extreme circumstances, transmitting unauthorized facsimile advertisements may constitute conversion but a single one-page facsimile was not extreme. *Id.* at 330.

Here, it was not one guest's information that Islam converted in the database, but the information of 87 guests.[16] Thus, it was error for the district court to find no conversion based upon the district court's view that Atlantis' restoration expense was de minimus when the damages caused to Atlantis were not.

The case of *Lopez v. Corral*, 2010 Nev. LEXIS 69 (2010), cited by Islam, supports Atlantis' position on conversion that a deprivation of the right to use property need not be permanent but can occur even if only for an indefinite time. In *Lopez*, the court affirmed a finding of conversion by holding that there was intent by attorney Lopez to deprive a treating chiropractor of some of his funds pursuant to a lien on settlement proceeds for an indeterminate time. The court held that the lower court could have reasonably inferred that Lopez wrongfully exerted dominion over the chiropractor's money, in derogation of the chiropractor's rights in the proceeds. Here, it is clear that Islam intended to and did deprive Atlantis of the right to use its database for an indefinite time until Atlantis discovered and eventually corrected the sabotage of Islam. Atlantis should not be punished for being diligent and correcting the sabotage in six weeks.

Finally, Nevada law provides support for the argument that Atlantis' restoration of its database did not nullify Islam's conversion but only mitigated the consequential damages of Atlantis. *Evans v. Dean Witter Reynolds, Inc.*, 116 Nev. 598, 5 P.3d 1043, 1049 (2000) *(*quoting and overturning on other grounds, *Bader v.*

[16] 18 App.3633:1-13.

Cerri, 96 Nev. 352, 609 P.2d 314, 317 (1980)). Again, Islam should not benefit from Atlantis' swift action to mitigate her sabotage of its database once it was discovered to have occurred.

Islam argues that the cost to repair was awarded to Atlantis as damages for the breach of contract. That appears accurate.[17] However, as noted in the opening brief, GSR's expert attributed $58,000 in damages to the acts of conversion based upon value of the loss of use of the database for six weeks rather than focusing on the expense of repair. Also, regardless of the fact that the reversal may not modify the amount to the judgment, a determination to be made by the district court on remand, the erroneous ruling and affirmance of it would create inaccurate precedent.

C. The Award of Attorney Fees Was Based Upon Due Process

Islam in her Cross-appeal is asking this Court to impose a new requirement and expand NRCP 54 to necessitate the submission of detailed time entries in support of a request for and eventual award of attorney's fees. Such is not the standard in Nevada. Nevada law clearly sets out the requirements for a motion and award of fees and nowhere is there a requirement either that detailed time entries be submitted or that a party must waive the attorney client privilege in order to pursue such an award.

Islam acknowledges the application of NRCP 54.[18] NRCP 54 and Nevada case law require that a request for fees as a "cost" be supported by: a citation to the legal basis for the award, the amount sought or a fair estimate of it, and counsel's affidavit swearing the fees were actually and necessarily incurred and were reasonable, documentation of the amount of the fees claimed, and points and

[17] 6 App. 1303:5 (FFCL).
[18] Islam Brief at 21:8-21.

authorities addressing the appropriate factors to be considered. In this instance, the record is clear that all of these requirements have been met.

Islam does not even dispute that most of these requirements have been met. Rather, she complains on appeal that she has not seen the unredacted detailed billing invoices sent by counsel for Atlantis and that she did not have the opportunity, initially, to review the redacted invoices.[19] Thus, her appeal focuses primarily upon the documentation requirement. Nevertheless, Atlantis will address each of the NRCP 54(d)(2)(B) requirements of such an award.

1. The Motion Must Be Made Not Later Than 20 Days After Notice of Entry of Judgment is Served.

The Atlantis motion was filed on August 21, 2013.[20] The Notice of Entry of the applicable judgment was served over a month later on October 1, 2014.[21] Thus, the motion was timely. The timeliness of the motion was not challenged by Islam below or on appeal, but the chronology of the various motions related pleadings and Orders is relevant to Islam's documentation concern.

Atlantis' motion seeking attorney's fees was filed in August of 2103, as was an affidavit of counsel which included copies of the monthly summary billing statements actually submitted to Atlantis, constituting documentation of the legal expense incurred by Atlantis.[22] At its close, the motion offered the submission of the detailed backup for the summary invoices to be submitted *in camera*.[23] Islam opposed the motion for fees on September 3, 2013.[24] She argued that the summary invoices were inadequate and that if Atlantis wished to protect its attorney-client

[19] Islam Brief pages 20-23.
[20] 6 App. 1227-1260 (Motion for Fees).
[21] 7 App. 1560-1586 (Notice of Entry).
[22] 6 App. 1260-1294.
[23] 6 App. 1231:15-17.
[24] 6 App. 1319-1325.

information, the Atlantis could do so by withdrawing its request for fees.[25] Thus, her Opposition was then and is now an unabashed attempt to gain access to privileged communications. On September 10, 2013, Atlantis filed its Reply in support of the fees sought.[26] That Reply addressed this issue indicating Atlantis was unwilling to waive the attorney-client privilege, again offering the *in camera* review and further pointing out that as these fees were presented as both a cost and a damage, evidence of the fee expense had been presented at trial through the testimony of Atlantis' General Counsel and Islam had, at trial, enjoyed the opportunity to cross-examine her regarding the legal expenses incurred by Atlantis.[27]

The staff of the district court requested and Atlantis lodged the detailed entries with the district court for *in camera* review.[28] The district court did not rule until November 8, 2013.[29] On that same date, Islam filed her first Notice of Appeal.[30] A few days later on November 13, 2013, Islam filed a motion for Order seeking to have the fee records of Atlantis filed in the court record.[31] On November 15, 2013, Islam filed her Amended Notice of Appeal.[32] On November 21, 2013, Atlantis sought clarification of the district court's Order regarding fees and costs.[33] The district court retained jurisdiction to determine this motion or any other motion related to the attorney fees despite the November 15, 2013 Islam notice of appeal, pursuant to NRCP 54 (d)(2)(A).

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[25] 6 App. 1322:18-22.
[26] 6 App. 1383-1391.
[27] 6 App. 1388:5-15. *See also*, App. (Robinson).
[28] 8 App. 1771-1773.
[29] 9 App. 2017-2022.
[30] 9 App. 2013-2014.
[31] 9 App. 2023-2028.
[32] 9 App2029-2030
[33] 10 App. 2089-2092.

On November 21, 2013, Atlantis filed its response to Islam's motion seeking an Order making the privileged records, reviewed *in camera*, to be made public.[34] In that response, Atlantis suggested the alternatives that the submission be transmitted to the appellate court *in camera* or that Atlantis be allowed to redact the invoices for privilege before public disclosure. On November 30, 2013, Islam filed her Reply in support of her motion seeking to have the Atlantis fee records made public, contending that the *in camera* review was Atlantis' opportunity to redact and now it was too late.[35] On December 4, 2013, Islam filed her Opposition to the Atlantis motion for clarification.[36] On December 10, 2013 Atlantis filed a Reply in support of the request for clarification.[37]

On December 24, 2013, the district court exercised its discretion by denying Islam's request that it publicly file the Atlantis fee records submitted *in camera*, finding that to do so would invade the attorney-client privilege.[38] However, acknowledging that it had reviewed the billings to determine allocation, the district court ordered Atlantis to provide a redacted copy of those records to Islam's counsel.[39] This is acknowledged by Islam in her brief although she claims ignorance as to why the redacted records were provided to her, as she had already appealed the fee order on November 15, 2013.[40] Islam's statement in her brief is belied by her actions and her own dissertation of events set forth therein. If she thought the district court was without jurisdiction, why did she continue to file pleadings related to the issue of fees? Although her reasoning is unknown, Islam elected to do nothing with the fee records and therefore they were never filed with

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[34] 10 App. 2098-2102.
[35] 10 App. 2111-2114.
[36] 10 App. 21117-2120.
[37] 10 App. 2121-2124.
[38] 10 App. 2129-2131.
[39] 10 App. 2130:6-9.
[40] Islam brief at 13:20-23.

the court. It can be surmised she took no further action as the records further supported the district court's decision.

On January 3, 2014, the district court granted Atlantis' motion for clarification.[41] On March 10, 2014, the district court filed its First Amended Order related to fees and costs.[42] Although not directly related to this part of the consolidated appeal, on March 14, 2014, the district court ruled on the GSR renewed motion for fees.[43] Thus, it was known to Islam that even in mid-March the district court was still ruling on recently submitted and related fee motions.

At no point after the receipt of the redacted Atlantis billing records did Islam elect to file any motion seeking reconsideration or modifying the fee award or the judgment.

2. The Award of Fees Was Supported By A Favorable Judgment And Statute.

The basis for the award of fees is not disputed by Islam. NRS 600A.060(3) gives the district court discretion to award reasonable attorney's fees to a plaintiff who has prevailed in a trade secret case and proven the defendant willfully and maliciously misappropriated trade secrets. That was the finding of the district court and on that basis, fees were awarded.[44]

3. The Request Stated The Amount Sought and Provided A Fair Estimate Of It, Supported By Counsel's Conforming Affidavit.

There is no dispute regarding this factor as the motion sought $330,490.50 in fees and was supported by the affidavit of Robert Dotson conforming to the requirements of Nevada law.[45]

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[41] 10 App. 2144-2146.
[42] 11 App. 2307-2312.
[43] 11 App. 23252330.
[44] Islam has elected to abandon her appeal of the UTSA holding. Islam brief at 1: 22-24.
[45] 9 App. 1231:13-15 and 1261-1294 (Affidavit of Counsel).

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4. Documentation Concerning The Amount Of Fees Claimed Was Available To Islam.

The documentation factor forms the primary basis of Islam's appeal claiming a denial of due process. However, as described herein, Islam was provided due process and the fees, even before the redacted individual entries were provided to Islam, were appropriately documented.

What Islam claims was a denial of her due process is actually the adequacy of the documentation in support of the amount of the claimed fees. As to that point, Islam contends that Atlantis was required to waive its right to the attorney client privilege and provide her with copies of the unredacted, detailed, individual entries provided *in camera* by Atlantis. Atlantis' request for fees was supported with appropriate documentation--the first page summary invoice showing the summary of the fees and costs incurred by it for each month of the litigation which was the "bill" sent to Atlantis. This summary included the number of hours expended by lawyers and paralegals at Laxalt & Nomura and the amount owed.[46] This documentation was authenticated and augmented by the affidavit of the lead counsel on the case, Robert Dotson.[47] That affidavit provided further documentation in that it provided the precise number of hours each biller had spent working on the matter.[48] Lastly, in order to further aid the expedient review of the fees claimed, the affidavit of counsel was accompanied by a spreadsheet of the monthly fee expenses[49]

Islam argues this is inadequate and seeks to require Atlantis to submit the detailed, unredacted, individual entry backup for the invoices. Nevada law does

[46] 9 App. 1273-1288.
[47] 9 App. 1261- 1263.
[48] 9 App. 1262:4-12.
[49] 9 App. 1290.

not even require that the invoices be submitted.[50] Nevertheless, here the district court had the actual summary bills and affidavit of counsel even before it requested the *in camera* review of the individual entries. Additionally, there was evidence of the legal fee expenses and the issue of the legal fee expense incurred to enforce the UTSA was presented in Atlantis' case and chief.[51] Thus Atlantis has met both the cost and damage basis for an award of attorney's fees as set forth in *Sandy Valley Assoc. v. Sky Ranch Estates Owners Ass'n*, 117 Nev. 948, 35 P.3d 964 (2001). To require unredacted, detailed and privileged records be provided to opposing counsel, waiving the claimed attorney client privilege, is a requirement beyond the current standard of Nevada law and beyond that supported by due process or sound public policy.

In Nevada, there is no requirement that detailed billing records be submitted in support of a fee request. Notwithstanding the Nevada case of *Sandy Valley , supra*, Islam referred to non-Nevada cases to support her claim that the unredacted individual time entries must be provided to her. Even these cases, however, do not support her contention. For example, Islam cites to *MGIC Indemnity Corp. v. Weisman*, 803 F.2d 500 (9th Cir.1986) in support of this proposition.[52] That case involved an FRCP 11 award where there had been an *in camera* review of billings. The case is further distinguished as there is no mention of documentation except what was provided *in camera*. In this case sufficient documentation had already been provided before the *in camera* submission. Secondly, on remand, despite that no claim to privilege was apparently made below, the court was instructed to withhold any privileged information. *Id.* at 505.

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[50] *See for example, James Hardie Gypsum Inc. v. Inquipco*, 112 Nev. 1397, 929 P.2d 903 (1996), affirming fee award on affidavit and *Brunzell v. Golden Gate National Bank*, 85 Nev. 345, 455 P.2d 31 (1969), affirming fee award on testimony of counsel without hourly bills.

[51] 19App. 3972:21-3975:24. (Testimony of General Counsel Robinson)

[52] Islam brief at 21:25.

The same can be said of *United States v. $1,379,789.09 Seized of Bank of Am*, 374 Fed. Appx. 709 (9th Cir. 2010), which is an unpublished case appealed from the Northern District of California.[53] Like *MGIC*, which it cites, there is no indication that any documentation was provided in support of the fee request except *in camera* and again the remand directed redaction for privilege. Lastly, Islam cites to *Clark v. American Commerce National Bank*, 974 F.2d 127 (9th Cir. 1992) in support of her contention.[54] However, *Clark* does not even involve a fee award. Rather this case, also arising from California, involved a response to a subpoena brought as part of a criminal investigation. Moreover, the invoices reviewed *in camera* were provided to the appellate court *in camera*. Further, the *Clark* court recognized that time records that reveal motive, litigation strategy or the specific nature of the services provided, fall within the privilege. *Id.* at 129. Thus, even though the circumstance is inapplicable, the holding would still protect these detailed entries from disclosure.

5. The *Beattie/ Brunzell* Factors Were Considered and Applied By The District Court Based Upon Information Available To It.

Contrary to the assertions of Islam, the district court properly applied the last factor required by NRCP 54 and case law. Indeed, the case cited by Islam, *Brunzell v. Golden Gate National* Bank. 85 Nev. 345, 455 P.2d 31 (1969), involved the affirmance of a fee award when there was admittedly no hourly record of the services performed which formed the basis of the work for which fees were sought. *Id* at 349. Nevertheless, this court affirmed the award. As noted by the district court here, Judge Flanagan, like Judge Gabrielli in *Brunzell*, presided over virtually the entire case and as the judge in this matter, he was particularly well positioned to understand the quality and character of the work performed as well as

[53] Islam brief at 21:28-22:1.
[54] Islam brief at 22:2-3.

the results of those efforts.[55] Thus, Islam's contention that there is no record supporting a determination of the character of the work done is without merit.[56]

The record in this proceeding supports that the district court was well positioned to evaluate the character of the work performed as it reviewed the pleadings and received the evidence and argument in the many hearings and trial. The pleadings and transcript of this trial demonstrate this case to have been a complex matter involving relatively novel and complicated legal theories including the UTSA. Additionally, because of the intense nature of this litigation, the district court was particularly aware of the work and effort that was involved in the presentation of this case. Virtually every action was required to be supported by motion and the court convened multiple hearings and eventually a trial that spanned over the fourth of July holiday and much of the month of July. Although Islam plays lip service to this factor, Atlantis submits it cannot genuinely be in dispute based upon the evidence before the district court supporting its finding.

Islam also suggests that the amount of the award violates standards of fairness and reasonableness. This related factor similarly finds no support in the record. As shown in the documentation provided initially, this work was completed at an average hourly rate of $260.25.[57] For the reasons stated above, the district court is in the best position to judge the appropriateness of the hourly rate as well as the total fee award. Moreover, the case authority cited by Islam is unsupportive of her positon. For example, *University of Nevada v. Tarkanian*, 110 Nev. 581,593-597, 879 P.2d 1180, 1187-1191 (1994), supports the affirmance of an award of 100% of the fee award when the defendant parties acted together to cause the harm visited upon the Plaintiff. Here, the district court reduced the award to only 87% of the total relevant expense. The *Shuette v. Beazer Homes*

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[55] 11 App. 2310:16-20.

[56] Islam brief at 23:1-3.

[57] $364,422.00 ÷ 1,400.3 hours = $260.25. 6 App. 1262, 1273-1288 and 1290.

Holdings Corp., 121 Nev. 837, 124 P.3d 530 (2005) case is similarly inapposite to the position advanced by Islam. In *Shuette* this Court confirmed the responsibility of the district court to determine the amount of an award of fees pursuant to statutory provision, such as the provision here, and further acknowledged the discretion granted to the district court in its method for determining such an award.[58] Here the district court specifically considered the factors enunciated in *Shuette* in reaching its decision. The award of attorney fees should be affirmed.

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[58] *Id* at 864-865.

CONCLUSION

Contrary to Islam's argument (Islam Brief at 22:19), she did not admit liability. If she had, the only issue for the Court would have been damages. Instead, she put up a vigorous defense arguing that she was not liable on any of the claims that Atlantis pled against her. Moreover, she opposed Atlantis' Motion for Summary Judgment and filed her own summary judgment motion. If she had stipulated to liability, she could have saved Atlantis (and eventually herself) much in the way of fees and expenses. Instead, she disputed both liability and damages throughout the proceeding forcing Atlantis to put on evidence for each claim against her. The facts simply belie this untenable argument. Atlantis seeks not only the affirmance of the award of attorney's fees but also the reversal of the district court's rulings related to the Non-Competition Agreement and the dismissal of the Conversion claim.

Dated this 2nd day of March, 2015.

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ATTORNEY'S CERTIFICATE OF COMPLIANCE FOR RESPONDENT'S ANSWERING BRIEF AND APPELLANT'S REPLY BRIEF REGARDING SUMONA ISLAM

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

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

I further certify that this brief complies with the page or type-volume limitations of NRAP 28.1(e)(2)(A)(i) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points, and contains 5,891 words.

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

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I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

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CERTIFICATE OF SERVICE

I certify that on this date, I served a copy of the foregoing document upon all counsel of record by:

☒ Mail on all parties in said action, by placing a true copy thereof enclosed in a sealed envelope in a designated area for outgoing mail, addressed as set forth below. At the Law Offices of Laxalt & Nomura, mail placed in that designated area is given the correct amount of postage and is deposited that same date in the ordinary course of business, in a United States mailbox in the City of Reno, County of Washoe, Nevada.

☒ By electronic service by filing the foregoing with the Clerk of Court using the E-Flex system, which will electronically mail the filing to the following individuals at the email addresses set for the below.

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