

# IN THE SUPREME COURT OF THE STATE OF NEVADA

## INDICATE FULL CAPTION:

MEI-GSR HOLDINGS, LLC, a Nevada Limited Liability Company, d/b/a/ GRAND SIERRA RESORT;  
Appellants,

vs.

PEPPERMILL CASINO, INC., a Nevada Corporation, d/b/a/  
PEPPERMILL CASINO; RYAN TORS, an individual;  
Respondents.

No. **70319** Electronically Filed  
May 25 2016 08:42 a.m.  
DOCKETING SECTION  
CIVIL APPEALS  
Tara K. Lindeman  
Clerk of Supreme Court

## GENERAL INFORMATION

All appellants not in proper person must complete this docketing statement. NRAP 14(a). The purpose of the docketing statement is to assist the Supreme Court in screening jurisdiction, classifying cases for en banc, panel, or expedited treatment, compiling statistical information and identifying parties and their counsel.

## WARNING

This statement must be completed fully, accurately and on time. NRAP 14(c). The Supreme Court may impose sanctions on counsel or appellant if it appears that the information provided is incomplete or inaccurate. *Id.* Failure to fill out the statement completely or to file it in a timely manner constitutes grounds for the imposition of sanctions, including a fine and/or dismissal of the appeal.

A complete list of the documents that must be attached appears as Question 26 on this docketing statement. Failure to attach all required documents will result in the delay of your appeal and may result in the imposition of sanctions.

This court has noted that when attorneys do not take seriously their obligations under NRAP 14 to complete the docketing statement properly and conscientiously, they waste the valuable judicial resources of this court, making the imposition of sanctions appropriate. See KDI Sylvan Pools v. Workman, 107 Nev. 340, 344, 810 P.2d 1217, 1220 (1991). Please use tab dividers to separate any attached documents.

1. Judicial District Second Department B7  
County Washoe Judge Patrick Flanagan  
District Ct. Case No. CV13-01704

**2. Attorney filing this docketing statement:**

Attorney H. Stan Johnson Telephone (702) 823-3500  
Firm Cohen Johnson Parker Edwards  
Address 255 E. Warm Springs Road, Suite 100  
Las Vegas, Nevada 89119

Client(s) Appellants

If this is a joint statement by multiple appellants, add the names and addresses of other counsel and the names of their clients on an additional sheet accompanied by a certification that they concur in the filing of this statement.

**3. Attorney(s) representing respondents(s):**

Attorney Kent R. Robison Telephone (775) 239-3151  
Firm Robison Belaustegui Sharp & Low  
Address 71 Washington Street  
Reno, NV 89503

Client(s) Respondents

Attorney \_\_\_\_\_ Telephone \_\_\_\_\_  
Firm \_\_\_\_\_  
Address \_\_\_\_\_

Client(s) \_\_\_\_\_

(List additional counsel on separate sheet if necessary)

**4. Nature of disposition below (check all that apply):**

- |   |   |
|---|---|
| <input type="checkbox"/> Judgment after bench trial             | <input type="checkbox"/> Dismissal:                                     |
| <input checked="" type="checkbox"/> Judgment after jury verdict | <input type="checkbox"/> Lack of jurisdiction                           |
| <input type="checkbox"/> Summary judgment                       | <input type="checkbox"/> Failure to state a claim                       |
| <input type="checkbox"/> Default judgment                       | <input type="checkbox"/> Failure to prosecute                           |
| <input type="checkbox"/> Grant/Denial of NRCP 60(b) relief      | <input type="checkbox"/> Other (specify): _____                         |
| <input type="checkbox"/> Grant/Denial of injunction             | <input type="checkbox"/> Divorce Decree:                                |
| <input type="checkbox"/> Grant/Denial of declaratory relief     | <input type="checkbox"/> Original <input type="checkbox"/> Modification |
| <input type="checkbox"/> Review of agency determination         | <input type="checkbox"/> Other disposition (specify): _____             |

**5. Does this appeal raise issues concerning any of the following? n/a**

- ☐ Child Custody
- ☐ Venue
- ☐ Termination of parental rights

**6. Pending and prior proceedings in this court.** List the case name and docket number of all appeals or original proceedings presently or previously pending before this court which are related to this appeal:

N/A

**7. Pending and prior proceedings in other courts.** List the case name, number and court of all pending and prior proceedings in other courts which are related to this appeal (e.g., bankruptcy, consolidated or bifurcated proceedings) and their dates of disposition:

N/A

**8. Nature of the action.** Briefly describe the nature of the action and the result below:

This case involves Peppermill Casinos, Inc.'s unlawful and admitted theft of GSR's slot machine settings. On June 12, 2013, Peppermill employee Ryan Tors was caught red handed stealing this information on Peppermill's orders. Peppermill's theft of GSR's trade secrets was part of a long-time practice to gain a market advantage, beginning by at least 2011. The Gaming Control Board filed a complaint against Peppermill, after which Peppermill admitted to its misconduct and agreed to pay a \$1 million fine for its illicit activities.

GSR filed a complaint against Peppermill and Tors asserting a claim for theft of GSR's trade secrets. Along with other pre-trial errors, the district court refused to instruct the jury correctly with regard to the GSR's claim for misappropriation of trade secrets. At the conclusion of the trial, district court failed to instruct the jury that "even if the information which is asserted to be a trade secret could have been duplicated by other proper means, the information is not readily ascertainable if in fact it was acquired by improper means," even though this rule had been firmly established by more than 100 years of precedent under both the common law and the Uniform Trade Secrets Act. The district court also improperly instructed the jury about "reverse engineering" as a defense to a trade secret claim, even though Peppermill had admitted that it acquired GSR's slot machine settings by theft and not by any so called reverse engineering, thus confusing the jury into believing that Peppermill had acquired GSR's trade secrets by proper means. Due to these and other improper instructions, the jury wrongly concluded that GSR's slot machine settings were readily ascertainable by proper means and therefore were not trade secrets. The district

**9. Issues on appeal.** State concisely the principal issue(s) in this appeal (attach separate sheets as necessary):

1. Whether the district court erred in refusing to instruct the jury that information that: "Even if the information which is asserted to be a trade secret could have been duplicated by other proper means, the information is not readily ascertainable if in fact it was acquired by improper means," when more than one hundred years of precedent under the common law and the Uniform Trade Secrets Act supports such an instruction.
2. Whether the district court erred in refusing to instruct the jury that a "trade secret is not readily ascertainable when the means of acquiring the information falls below the generally accepted standards of commercial morality and reasonable conduct, even if means of obtaining the information violated no government standard, did not breach any confidential relationship, and did not involve any fraudulent or illegal conduct," when the National Conference of Commissioners on Uniform State Laws, when drafting the Uniform Trade Secrets Act adopted by Nevada, expressly adopted such a rule and courts interpreting the Uniform Trade Secret Act have reached the same conclusion.
3. Whether the district court erred in refusing to instruct the jury that information to "be readily ascertainable, the information asserted to be a trade secret must be ascertained quickly, or so self-revealing to be ascertainable at a glance." (continued on attached )

**10. Pending proceedings in this court raising the same or similar issues.** If you are aware of any proceedings presently pending before this court which raises the same or similar issues raised in this appeal, list the case name and docket numbers and identify the same or similar issue raised:

Unknown.

**11. Constitutional issues.** If this appeal challenges the constitutionality of a statute, and the state, any state agency, or any officer or employee thereof is not a party to this appeal, have you notified the clerk of this court and the attorney general in accordance with NRAP 44 and NRS 30.130?

☒ N/A

☐ Yes

☐ No

If not, explain:

**12. Other issues.** Does this appeal involve any of the following issues?

☐ Reversal of well-settled Nevada precedent (identify the case(s))

☐ An issue arising under the United States and/or Nevada Constitutions

☐ A substantial issue of first impression

☐ An issue of public policy

☐ An issue where en banc consideration is necessary to maintain uniformity of this court's decisions

☐ A ballot question

If so, explain:

**13. Trial.** If this action proceeded to trial, how many days did the trial last? 10 days

Was it a bench or jury trial? Jury trial.

**14. Judicial Disqualification.** Do you intend to file a motion to disqualify or have a justice recuse him/herself from participation in this appeal? If so, which Justice?

No.

## TIMELINESS OF NOTICE OF APPEAL

15. Date of entry of written judgment or order appealed from 4/11/2016

If no written judgment or order was filed in the district court, explain the basis for seeking appellate review:

16. Date written notice of entry of judgment or order was served 4/12/2015

Was service by:

☐ Delivery

☒ Mail/electronic/fax

17. If the time for filing the notice of appeal was tolled by a post-judgment motion (NRCP 50(b), 52(b), or 59)

(a) Specify the type of motion, the date and method of service of the motion, and the date of filing.

☐ NRCP 50(b) Date of filing \_\_\_\_\_

☐ NRCP 52(b) Date of filing \_\_\_\_\_

☒ NRCP 59 Date of filing 4/14/2016

**NOTE: Motions made pursuant to NRCP 60 or motions for rehearing or reconsideration may toll the time for filing a notice of appeal. See AA Primo Builders v. Washington, 126 Nev. \_\_\_\_, 245 P.3d 1190 (2010).**

(b) Date of entry of written order resolving tolling motion (pending)

(c) Date written notice of entry of order resolving tolling motion was served (pending)

Was service by:

☐ Delivery

☐ Mail

**18. Date notice of appeal filed** 4/26/2016

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If more than one party has appealed from the judgment or order, list the date each notice of appeal was filed and identify by name the party filing the notice of appeal:

**19. Specify statute or rule governing the time limit for filing the notice of appeal, e.g., NRAP 4(a) or other**

NRAP 4(a)

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### **SUBSTANTIVE APPEALABILITY**

**20. Specify the statute or other authority granting this court jurisdiction to review the judgment or order appealed from:**

(a)

☒ NRAP 3A(b)(1)

☐ NRS 38.205

☐ NRAP 3A(b)(2)

☐ NRS 233B.150

☐ NRAP 3A(b)(3)

☐ NRS 703.376

☐ Other (specify) \_\_\_\_\_

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(b) Explain how each authority provides a basis for appeal from the judgment or order:

The district court entered a final judgment following a jury verdict on April 11, 2016. See NRAP 3A (b)(1).

**21. List all parties involved in the action or consolidated actions in the district court:**

(a) Parties:

MEI-GSR Holdings, LLC dba Grand Sierra Resort, Plaintiff

Peppermill Casino, Inc. dba Peppermill Casino., Defendant

Ryan Tors, Defendant

(b) If all parties in the district court are not parties to this appeal, explain in detail why those parties are not involved in this appeal, *e.g.*, formally dismissed, not served, or other:

**22. Give a brief description (3 to 5 words) of each party's separate claims, counterclaims, cross-claims, or third-party claims and the date of formal disposition of each claim.**

-Plaintiff filed claims for: Violation of NRS 600A.010, et seq. (Nevada's Uniform Trade Secret Act) and Vicarious Liability/Respondeat Superior; against both Defendants.

-There were no counterclaims or crossclaims filed by other parties in the case.

- Plaintiff filed a motion to amend seeking to assert additional claims for civil conspiracy; Unlawful Acts Regarding Computers (NRS 205.4765 and .477); Unfair Trade Practices (NRS 603.050 and .080); Deceptive Trade Practices (NRS 598.0903); Common Law Unfair Competition; Unjust Enrichment, and; Permanent Injunction. The motion to amend was denied.

**23. Did the judgment or order appealed from adjudicate ALL the claims alleged below and the rights and liabilities of ALL the parties to the action or consolidated actions below?**

☒ Yes

☐ No

**24. If you answered "No" to question 23, complete the following:**

(a) Specify the claims remaining pending below:

N/A



(b) Specify the parties remaining below:

N/A

(c) Did the district court certify the judgment or order appealed from as a final judgment pursuant to NRCP 54(b)?

☐ Yes

☒ No

(d) Did the district court make an express determination, pursuant to NRCP 54(b), that there is no just reason for delay and an express direction for the entry of judgment?

☐ Yes

☒ No

**25. If you answered "No" to any part of question 24, explain the basis for seeking appellate review (e.g., order is independently appealable under NRAP 3A(b)):**

Order is independently appealable under NRAP 3A(b)(1).

**26. Attach file-stamped copies of the following documents:**

- The latest-filed complaint, counterclaims, cross-claims, and third-party claims
- Any tolling motion(s) and order(s) resolving tolling motion(s)
- Orders of NRCP 41(a) dismissals formally resolving each claim, counterclaims, cross-claims and/or third-party claims asserted in the action or consolidated action below, even if not at issue on appeal
- Any other order challenged on appeal
- Notices of entry for each attached order

## VERIFICATION

I declare under penalty of perjury that I have read this docketing statement, that the information provided in this docketing statement is true and complete to the best of my knowledge, information and belief, and that I have attached all required documents to this docketing statement.

MEI-GSR HOLDINGS, LLC, d/b/a/ GRAND SIERRA RESORT

\_\_\_\_\_  
Name of appellant

5/23/2016

\_\_\_\_\_  
Date

H. Stan Johnson, Esq.

\_\_\_\_\_  
Name of counsel of record

/s/ H. Stan Johnson

\_\_\_\_\_  
Signature of counsel of record

Nevada, Clark County

\_\_\_\_\_  
State and county where signed

## CERTIFICATE OF SERVICE

I certify that on the 24th day of May, 2016, I served a copy of this completed docketing statement upon all counsel of record:

☐ By personally serving it upon him/her; or

☐ By mailing it by first class mail with sufficient postage prepaid to the following address(es): (NOTE: If all names and addresses cannot fit below, please list names below and attach a separate sheet with the addresses.)

X Service of the Docketing Statement was made in accordance with Nevada Electronic Filing and Conversion Rules ("NEFCR") and NRAP 25(c)(1)(D)

Dated this 24th day of May, 2016

/s/ C.J. Barnabi

\_\_\_\_\_  
Signature

**9. Issues on appeal.** State concisely the principal issue(s) in this appeal (continued):

4. Whether the district court erred in instructing the jury as to reverse engineering when Peppermill admitted to stealing GSR's slot machine settings, and did not acquire those trade secrets by reverse engineering.

5. Whether the district court erred in awarding Defendants' attorney fees, pursuant to an offer of judgment, when Defendants could not and did not show that GSR acted in bad faith, which showing is required under the Nevada Trade Secrets Act, and when Defendants' failed to show that they meet the requirements to secure attorney fees pursuant to an offer of judgment.

6. Whether the district court erred in granting Ryan Tor's motion to dismiss, based on Peppermill's agreement to indemnify Tors, when Tors admitted to stealing GSR's slot machine settings and GSR never agreed to release Tors from liability.

7. Whether the district court erred in refusing to compel Peppermill to respond to GSR's discovery requests even though Peppermill had waived any objection and had admitted failed to produce tens of thousands of relevant documents.

8. Whether the district court erred in granting Peppermill's motions in limine, without providing GSR an opportunity to respond, and which improperly excluded evidence showing theft and use of slot machine settings and evidence of Peppermill's profits necessary to establish unjust enrichment damages provided by the Nevada Trade Secrets Act.

Code No. 1422  
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**IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**  
**IN AND FOR THE COUNTY OF WASHOE**

MEI-GSR HOLDINGS, LLC, a Nevada  
Corporation, d/b/a GRAND SIERRA RESORT,

Plaintiff,

v.

PEPPERMILL CASINOS, INC., a Nevada  
Corporation, d/b/a PEPPERMILL CASINO;  
RYAN TORS, an individual; JOHN DOES I-X  
and JANE DOES I-X; and ABC  
CORPORATIONS I-X,

Defendants.

Case No.: CV13-01704

Dept. No.: B7

BUSINESS COURT DOCKET

**COMPLAINT FOR DAMAGES**

COMES NOW Plaintiff, MEI-GSR HOLDINGS, LLC, d/b/a GRAND SIERRA RESORT, by and through its counsel of record, Cohen-Johnson, LLC, and alleges the following Complaint against Defendants PEPPERMILL CASINOS, INC., d/b/a PEPPERMILL CASINO, a Nevada Corporation, RYAN TORS, an individual, JOHN DOES I-X and JANE DOES I-X, and ABC CORPORATIONS I-X as follows:

**I.**

**PARTIES AND JURISDICTION**

1. Plaintiff MEI-GSR HOLDINGS, LLC, d/b/a GRAND SIERRA RESORT (GRAND SIERRA RESORT), is a Nevada corporation with its principal place of business in the City of Reno, County of Washoe, State of Nevada.

2. Defendant PEPPERMILL CASINOS, INC., d/b/a PEPPERMILL CASINO (PEPPERMILL CASINO), is a Nevada corporation with its principal place of business in the City of Reno, County of Washoe, State of Nevada.

3. GRAND SIERRA RESORT alleges, on information and belief, that at all times relevant to this Complaint PEPPERMILL CASINO was the employer of Defendant and ratified the conduct, as more particularly described below, of its said employee.

4. Defendant RYAN TORS is, on information and belief, an individual residing in the County of Washoe, State of Nevada and was at all times relevant to this Complaint employed by PEPPERMILL CASINO as a Corporate Analyst and acting in the course and scope of his employment.

5. GRAND SIERRA RESORT does not know the true names and capacities or involvement, whether individual, corporate or otherwise, of the Defendants fictitiously named herein as JOHN DOES I-X and JANE DOES I-X, and ABC CORPORATIONS I-X, inclusive. GRAND SIERRA RESORT is informed and believes, and upon such information and belief alleges, that each of the Defendants designated herein as JOHN DOES I-X and JANE DOES I-X, and/or ABC CORPORATIONS I-X is legally responsible in some manner for the events and happenings referred to herein, and that each negligently or otherwise caused the injuries or damages proximately suffered by the GRAND SIERRA RESORT, as more particularly alleged herein. GRAND SIERRA RESORT is informed and believes, and upon such information and belief alleges, that JOHN DOES I-X and JANE DOES I-X, and/or ABC CORPORATIONS I-X engaged in the operation of gaming at the premises commonly known as the PEPPERMILL CASINO. GRAND SIERRA RESORT prays leave to amend this Complaint to show said fictitious parties' true names and capacities when the same have been finally determined.

6. The actions of the Defendants and their employees and/or agents, whether or not within the scope of their employment or agency, were ratified by the other remaining individual, corporate or partnership Defendants.

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7. This Court has subject matter jurisdiction over the Complaint in this matter due to and because the allegations complained of below occurred in the County of Washoe, State of Nevada.

## II.

8. At all times mentioned herein, Defendant RYAN TORS was an employee of Defendant PEPPERMILL CASINO and was acting within the scope of his employment and at the direction of his employer.

14. Defendant RYAN TORS further stated that this was not an isolated instance, but that he had been doing so at various casinos for the past year and especially at the GRAND SIERRA RESORT.

15. After being interviewed by a Nevada Gaming Control Board Agent, Defendant RYAN TORS was escorted from the premises of GRAND SIERRA RESORT and informed that if he returned to the property he would be trespassing under NRS 207.200 and would be prosecuted.

16. On or about July 12, 2013, and at other times, the exact date(s) to be determined, Defendant RYAN TORS illegally accessed the data and/or diagnostics contained within the following machines on the GRAND SIERRA RESORT casino floor:

#951 stand 061109 Sun & Moon (video)

#440 stand 040403 Ducks in a Row (video)

#855 stand 104604 Buffalo (video)

#486 stand 104603 Wings over Olympus (video)

#1646 stand 101607 Miss Red (video)

#20042 stand 102201 Hex Breaker

17. Defendant RYAN TORS also had a list showing that, had he not been detained, he would have also accessed the following machines:

#20375 stand 091007 Ducks in a Row

#20050 stand 103304 Enchanted Unicorn

#127 stand 011802 Cats

18. The diagnostic screens and payback percentage information contained in each machine is proprietary and confidential and access is not permitted to any persons other than certain employees of the GRAND SIERRA RESORT and requires that said person have a key which would allow access to the information.

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III.

FIRST CLAIM FOR RELIEF

(Violation of Uniform Trade Secret Act, NRS 600.A.010, *et seq.*)

19. GRAND SIERRA RESORT repeats, realleges and incorporates herein each and every allegation set forth in paragraphs 1-18 of its Complaint, as if fully set forth herein.

20. At all times mentioned herein, there was a Nevada Statute, NRS 600.A.010, *et seq.*, commonly known as the Nevada Trade Secret Act, which provides in pertinent part:

5. "Trade secret" means information, including, without limitation, a formula, pattern, compilation, program, device, method, technique, product, system, process, design, prototype, procedure, computer programming instruction or code that:

(a) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by the public or any other persons who can obtain commercial or economic value from its disclosure or use; and

(b) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

21. Defendant RYAN TORS breached the above statute by accessing and taking confidential information and intellectual property owned by GRAND SIERRA RESORT at the direction of and to provide an advantage to his employer Defendant PEPPERMILL CASINO and to the detriment of GRAND SIERRA RESORT.

22. Said confidential information of the GRAND SIERRA RESORT constitutes trade secrets, as it derives independent economic value, actual or potential, from it not being generally known to and not being readily ascertainable by proper means by the public or any other persons who can obtain commercial or economic value from its disclosure or use and GRAND SIERRA RESORT took reasonable efforts to maintain its secrecy.

23. Upon information and belief, Defendant PEPPERMILL CASINO, by and through the acts of its managerial employee RYAN TORS, and/or other managerial employees, through improper means, specifically theft of information by RYAN TORS, have in the past and will likely continue to misappropriate the trade secrets of GRAND SIERRA RESORT.

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1 24. NRS 600A.035 provides in pertinent part:

2 A person who, with intent to injure an owner of a trade secret or  
3 with reason to believe that his or her actions will injure an owner  
4 of a trade secret, without limitation:

5 1. Steals, misappropriates, takes or conceals a trade secret or  
6 obtains a trade secret through fraud, artifice or deception;

7 2. Wrongfully copies, duplicates, sketches, draws, photographs,  
8 alters, destroys, photocopies, replicates, transmits, delivers, sends,  
9 mails, communicates or conveys a trade secret;

10 3. Receives, buys or possesses a trade secret with knowledge or  
11 reason to know that the trade secret was obtained as described in  
12 subsection 1 or 2;

13 4. Attempts to commit an offense described in subsection 1, 2 or 3;

14 5. Solicits another person to commit an offense described in  
15 subsection 1, 2 or 3; or

16 6. Conspires to commit an offense described in subsection 1, 2 or  
17 3, and one of the conspirators performs an act to further the  
18 conspiracy,

19 25. Upon information and belief, on July 12, 2013, Defendant PEPPERMILL  
20 CASINO, by and through its managerial employees Defendant RYAN TORS, JOHN DOES I-X  
21 and JANE DOES I-X, and/or ABC CORPORATIONS I-X did conspire to steal, take,  
22 misappropriate, or obtain trade secrets from GRAND SIERRA RESORT by providing said  
23 agents and employees with a key which allowed them to access the diagnostic, inner workings  
24 and data contained in slot machines located on the premises of the GRAND SIERRA RESORT.

25 26. Defendant RYAN TORS in furtherance of the conspiracy did wrongfully copy the  
26 trade secrets of GRAND SIERRA RESORT by writing the information down after wrongfully  
27 accessing multiple slot machines which were the property of the GRAND SIERRA RESORT.

28 27. Upon information and belief, Defendant RYAN TORS had on previous occasions  
also conspired with PEPPERMILL CASINO, through its agents and employees JOHN DOES I-  
X and JANE DOES I-X, and/or ABC CORPORATIONS I-X, and did wrongfully steal, take,  
misappropriate, and obtain trade secrets belonging to GRAND SIERRA RESORT.

28 28. Upon information and belief, as a direct, proximate and foreseeable result of  
Defendants PEPPERMILL CASINO'S, RYAN TORS', JOHN DOES' I-X and JANE DOES' I-

1 X, and/or ABC CORPORATIONS' I-X attempted and past successful misappropriations of  
2 GRAND SIERRA RESORT'S trade secrets, GRAND SIERRA RESORT has suffered general  
3 and special damages in an amount in excess of Ten Thousand Dollars (\$10,000).

4 29. At all times material hereto, the Defendants, and each of them, acted with willful,  
5 wanton and reckless behavior in misappropriating the trade secrets of the GRAND SIERRA  
6 RESORT such as to justify the assessment of exemplary damages in an amount not exceeding  
7 twice the award for the misappropriation.

8 30. GRAND SIERRIA RESORT has been required to retain the services of an  
9 attorney to prosecute its claims against Defendants PEPPERMILL CASINO, RYAN TORS,  
10 JOHN DOES I-X and JANE DOES I-X, and/or ABC CORPORATIONS I-X and is entitled to  
11 reasonable attorney's fees and costs of suit incurred herein.

12 WHEREFORE, Plaintiff GRAND SIERRA RESORT pleads for judgment against  
13 Defendants, and each of them, as more fully set forth below.

14 **IV.**

15 **SECOND CLAIM FOR RELIEF**

16 **(Vicarious Liability/Respondeat Superior)**

17 31. GRAND SIERRA RESORT repeats, realleges and incorporates herein each and  
18 every allegation set forth in paragraphs 1-30 of its Complaint, as if fully set forth herein.

19 32. That at all times mentioned herein RYAN TORS was a corporate analyst for  
20 PEPPERMILL CASINO and as part of his employment duties would visit other gaming  
21 establishments to obtain information concerning the marketing strategies of those casinos.

22 33. That on July 12, 2013, RYAN TORS entered onto the premises of GRAND  
23 SIERRA RESORT to obtain information to use as part of his job as a corporate analyst by  
24 illegally accessing slot machines to note and record the payback level setting for those  
25 machines..

26 34. That PEPPERMILL CASINO is vicariously liable for all tortious conduct  
27 committed by RYAN TORS during the course of his employment and during his visits to  
28 GRAND SIERRA RESORT and other gaming properties.

35. Upon information and belief, as a direct, proximate and foreseeable result of Defendants PEPPERMILL CASINO'S, RYAN TORS', JOHN DOES' I-X and JANE DOES' I-X, and/or ABC CORPORATIONS' I-X attempted and past successful misappropriations of GRAND SIERRA RESORT'S trade secrets, GRAND SIERRA RESORT has suffered general and special damages in an amount in excess of Ten Thousand Dollars (\$10,000).

36. At all times material hereto, the Defendants, and each of them, acted with willful, wanton and reckless behavior in misappropriating the trade secrets of the GRAND SIERRA RESORT such as to justify the assessment of exemplary damages in an amount not exceeding twice the award for the misappropriation.

37. GRAND SIERRIA RESORT has been required to retain the services of an attorney to prosecute its claims against Defendants PEPPERMILL CASINO, RYAN TORS, JOHN DOES I-X and JANE DOES I-X, and/or ABC CORPORATIONS I-X and is entitled to reasonable attorney's fees and costs of suit incurred herein.

WHEREFORE, Plaintiff GRAND SIERRA RESORT pleads for judgment against Defendants, and each of them, as more fully set forth below.

**V.**

**THIRD CLAIM FOR RELIEF**

**(Injunctive Relief as to Defendants Peppermill Casino and Ryan Tors)**

38. GRAND SIERRA RESORT repeats, realleges and incorporates herein each and every allegation set forth in paragraphs 1-37 of its Complaint, as if fully set forth herein.

39. GRAND SIERRA RESORT has an interest in protecting confidential and proprietary information and trade secrets related to its business.

40. In an effort to protect its confidential and proprietary matters related to its business, GRAND SIERRA RESORT limits access to the inner workings and data contained within its slot machines to authorized employees of GRAND SIERRA RESORT, only while the employee remains employed at GRAND SIERRA RESORT and, therefore, GRAND SIERRA RESORT requests injunctive relief in the form of an order barring Defendant RYAN TORS from ever entering onto the premises of GRAND SIERRA RESORT and ordering Defendants

1 PEPPERMILL CASINO and RYAN TORS to return to GRAND SIERRA RESORT any and all  
2 information ever obtained through unauthorized access of slot or other gaming devices located  
3 on the premises of the GRAND SIERRA RESORT and enjoining said Defendants from ever  
4 using said information now or in the future.

5 41. GRAND SIERRA RESORT also requests that Defendant PEPPERMILL  
6 CASINO be ordered to cease and desist any and all future attempts to obtain access to  
7 confidential and proprietary data, or to receive or utilize confidential and proprietary data,  
8 contained in slot machines or other gaming devices on the premises of GRAND SIERRA  
9 RESORT, either through Defendant RYAN TORS or other agents or employees of  
10 PEPPERMILL CASINO.

11 42. Defendants PEPPERMILL CASINO and RYAN TORS are subject to injunctive  
12 relief pursuant to NRS 600A.040, due to their actual or threatened misappropriation or use of the  
13 trade secrets of GRAND SIERRA RESORT.

14 43. GRAND SIERRIA RESORT has been required to retain the services of an  
15 attorney to prosecute its claims against Defendants PEPPERMILL CASINO, RYAN TORS,  
16 JOHN DOES I-X and JANE DOES I-X, and/or ABC CORPORATIONS I-X and is entitled to  
17 reasonable attorney's fees and costs of suit incurred herein.

18 WHEREFORE, Plaintiff GRAND SIERRA RESORT pleads for judgment against  
19 Defendants, and each of them, as more fully set forth below.

#### 20 PRAYER FOR RELIEF

21 WHEREFORE, Plaintiff GRAND SIERRA RESORT, while expressly reserving its right  
22 to amend this Complaint up to and including the time of trial to include additional Defendants,  
23 additional theories of recovery, and items of damage not yet ascertained, demands judgment  
24 against the Defendants, and each of them, as follows:

- 25 A. General damages in excess of \$10,000;
- 26 B. Special damages in excess of \$10,000;
- 27 C. Punitive or exemplary damages in excess of \$10,000;
- 28 D. For a temporary restraining order;

- E. For temporary and permanent injunctive relief;
- F. For pre- and post-judgment interest;
- G. For reasonable attorney's fees and costs of suit; and
- H. For such other and further relief as the Court deems to be just and appropriate.

**AFFIRMATION PURSUANT TO NRS 239B.030**

The undersigned does hereby affirm that the preceding document does not contain the social security number of any person.

DATED this 31st day of July, 2013.

COHEN-JOHNSON, LLC

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*Grand Sierra Resort*

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*and*

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**IN THE SECOND JUDICIAL DISTRICT FOR THE STATE OF NEVADA**

**IN AND FOR THE COUNTY OF WASHOE**

MEI-GSR HOLDINGS, LLC, a Nevada Limited  
 Liability Company, d/b/a/ GRAND SIERRA  
 RESORT,

Plaintiffs,

vs.

PEPPERMILL CASINO, INC., a Nevada  
 Corporation, d/b/a/ PEPPERMILL CASINO;  
 RYAN TORS, an individual; JOHN DOES I-X  
 AND CORPORATIONS I-X,

Defendant(s).

**Case No.: CV13-01704**

**Dept. No.: B7**

**BUSINESS COURT DOCKET**

**PLAINTIFF'S MOTION FOR A NEW  
 TRIAL**

Plaintiff, MEI-GSR HOLDINGS, LLC, d/b/a GRAND SIERRA RESORT ("GSR"), by  
 and through its counsel of record, COHEN|JOHNSON|PARKER|EDWARDS, moves for a new

1 trial, pursuant to Rule 59(a) of the Nevada Rules of Civil Procedures, and for reversal of  
2 judgment entered in favor of Defendant Peppermill Casino's Inc. and Defendant Ryan Tors  
3 ("Tors").

4 This motion is made and based upon pleadings and other papers on file, the evidence  
5 presented at trial, the attached Memorandum of Points and Authorities, as well as the arguments  
6 and evidence presented at any hearing convened to consider these motions.

7  
8 Dated this 14<sup>th</sup> day of April 2016.

9 **COHEN|JOHNSON|PARKER|EDWARDS**

10  
11 By: /s/ H. Stan Johnson  
12 H. STAN JOHNSON, ESQ.  
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20 *Attorneys for MEI-GSR Holdings, LLC.,*  
21 *d/b/a GRAND SIERRA RESORT*

22 **MEMORANDUM OF POINTS AND AUTHORITIES**

23 **I. INTRODUCTION**

24 The Nevada Supreme Court has repeatedly held that a new trial is mandated when the  
25 court has declined to offer instructions supported by the law and evidence **or** when an  
26 unsupported jury instruction is given. Both reasons justify a new trial.

27 Courts interpreting the Uniform Trades Secrets Act have overwhelmingly held that  
28 information is "**not being readily ascertainable by proper means**" so as to deemed a trades  
secret, as set forth in NRS 600A.030(5), when the information is actually acquired by improper  
means, when the means proffered to acquire trade secrets fall below the accepted standards of

commercial morality, or when the information is so self-revealing to be ascertainable at a glance. Despite this clear authority, the Court regrettably declined instructing the jury as to these vital issues of law, even though Defendant Peppermill Casino, Inc. (“Peppermill”) and Defendant Ryan Tors (“Tors”) admitted that they only acquired the slot machine settings of Plaintiff MEI-GSR HOLDINGS, LLC, d/b/a GRAND SIERRA RESORT (“GSR”) by *theft*, and not by any other means. The undisputed facts also showed that the schemes devised by Peppermill to spy on GSR, concocted only to justify Peppermill’s theft after the fact, amounted to nothing more than espionage, which the Nevada Trade Secrets Act prohibits, and could not have revealed GSR’s slot machine settings “at a glance,” in any event.

Courts have equally held that claims of reverse engineering should be excluded when trade secrets have not been acquired by proper means, but instead were acquired by improper means; or employ means that fall below the accepted standard of commercial morality; or when the information is not so self-revealing as to be ascertainable at a glance. The Court, however, unfortunately twice instructed the jury on reverse engineering, even though the facts indisputably showed that each and every one of these concerns had been established at trial.

Because the jury was improperly instructed, the jury erroneously found that GSR’s slot machine settings were readily ascertainable and not trade secrets. Such a verdict, however, would be impossible if the jury had been properly instructed and is unsupportable under authority interpreting the Uniform Trade Secrets Acts. A new trial is therefore mandated and therefore the Court should grant this motion and reverse the judgment entered in favor of Peppermill.

## II. BACKGROUND

This Court is fully aware of the egregious nature of Defendants’ misconduct. On July 12, 2013, GSR caught Tors red handed using his unauthorized key to steal information from GSR’s



1 slot machines on orders from Peppermill. *See* Trial Ex. 112(a), NGC Settlement, ¶ 1; Trial Ex.  
2 12(a), NGC Complaint, ¶¶ 12-16; *see* Exhibit 1 Trial Tr., Tors Testimony at 215. Peppermill  
3 admitted that “over a period of time beginning in at least 2011” until “July 12, 2013,” Peppermill  
4 “knew of, approved of, and directed” Ryan Tors to use “a slot machine ‘reset’ key to obtain  
5 theoretical hold percentage information from slot machines belonging to . . . the Grand Sierra  
6 Resort and Casino,” along with “numerous” other casinos. *See* Trial Ex. 112 (a), NGC  
7 Settlement, ¶ 1; Trial Ex.12(a), NGC Complaint, ¶¶ 12-18. Peppermill admitted that this  
8 egregious conduct violated NGCR 5.011 and NRS 463.170(8), “was an unsuitable method of  
9 operation” and justified sanctions “in the total amount of ONE MILLION DOLLARS and NO  
10 CENTS (\$1,000,000.00).” *See* Trial Ex. 112(a), NGC Settlement, ¶ 1, 3; Trial Ex. 12(a), NGC  
11 Complaint, at ¶¶ 23-27, 32-36, 41-46.

12  
13 Beginning on January 12, 2016, a trial was held on GSR’s complaint against Peppermill  
14 for misappropriation of trade secrets. At trial, the undisputed facts demonstrated that Peppermill  
15 blatantly stole GSR’s slot machine settings. No evidence was offered or could be offered to  
16 show that Peppermill acquired GSR’s slot machine settings by any proper means. Instead,  
17 Peppermill offered testimony by experts that, rather than steal GSR’s trade secrets, Peppermill  
18 could have devised unethical schemes to secretly take GSR’s slot machine settings. All of the  
19 schemes required Peppermill to misuse confidential information from slot machine  
20 manufacturer’s concerning the available par settings on GSR’s slot machines, admittedly  
21 unknown to the public and are themselves trade secrets governed by strict confidentiality  
22 agreements. *See* Trial Exhibit 55, Friedman Expert Report, ¶¶ 73, 77, 86, 95, 108, 112; Exhibits  
23 196, 218, and 227 Slot Manufacturers’ Confidentiality Agreements. All of the schemes also  
24 required Peppermill to send spies into GSR’s casinos to repeatedly play and/or photograph  
25 GSR’s slot machines and then resort to elaborate mathematical calculations to determine GSR’s  
26  
27  
28

1 pars. *See* Trial Exhibit 55, Friedman Expert Report, ¶¶ 77, 81, 85, 94, 103, 109, 116. Under  
2 established law, none of these methods of corporate espionage is a proper mean. *See* NRS  
3 600A.030(1) (“‘Improper means’ includes, without limitation . . . (f) Espionage through  
4 electronic or other means.”).

5 At the conclusion of trial, however, the Court unfortunately declined to instruct the jury  
6 as to the legal significance of these facts. GSR specifically requested that the jury be instructed,  
7 in pertinent part, that:  
8

9 To be readily ascertainable, the information asserted to be a trade secret must be  
10 ascertained quickly, or so self-revealing to be ascertainable at a glance.

11 A trade secret is not readily ascertainable when the means of acquiring the  
12 information falls below the generally accepted standards of commercial morality  
13 and reasonable conduct, even if means of obtaining the information violated no  
14 government standard, did not breach any confidential relationship, and did not  
15 involve any fraudulent or illegal conduct. Even if the information which is  
16 asserted to be a trade secret could have been duplicated by other proper means,  
17 the information is not readily ascertainable if in fact it was acquired by improper  
18 means.

19 *See* Plaintiff’s Offered and Rejected Jury Instructions No. 2 and No. 3, filed January 1, 2016.

20 This instruction was rejected despite the fact that this instruction was overwhelmingly supported  
21 by cases interpreting the Uniform Trade Secrets Act, the drafters of the Uniform Trade Secrets  
22 Act, and the undisputed facts of the case. These instructions were vital to GSR’s theory of the  
23 case that (1) its trade secrets were “*not being readily ascertainable by proper means*” at the time  
24 Peppermill admittedly stole GSR’s slot machine settings; that (2) even if Peppermill had used  
25 spies to misappropriate GSR’s slot machine settings instead of acquiring GSR’s trade secrets by  
26 theft, such use of spies would fallen well below the commercial standards of morality; and (3)  
27 even if Peppermill could have devised a scheme to acquire GSR’s slot machine settings that did  
28 not amount to espionage, GSR’s slot machine were not readily ascertainable because they were  
not so self-revealing to be ascertainable at a glance.

1           Instead of providing these proper instructions, the Court, over GSR's proper objection,  
2 twice instructed the jury on reverse engineering as follows:

3           If the information is in fact obtained through reverse engineering, however, the  
4 actor is not subject to liability, because the information has not been acquired  
5 improperly. Information is ascertainable if it is available in trade journals,  
6 reference books or published materials.

6 Jury Instructions, Instruction No. 27, at 2, ll. 5 -10.

7           A trade secret may not be readily ascertainable by proper means. Proper  
8 means include:

- 9           1. Discovery by independent invention;
- 10           2. Discovery by "reverse engineering" that is, by starting with the known  
11 product and working backward to find the method by which it was developed.  
12 The acquisition of the known product (a par setting) must, of course, be by fair  
13 and honest means;
- 14           3. Discovery under a license from the owner;
- 15           4. Observation of the information in public use or display; and
- 16           5. Obtaining the trade secret information from published literature.

17           The ease or difficulty with which the information may be acquired determines  
18 whether a trade secret is readily ascertainable.

19 Jury Instructions, Instruction No. 31; *see also* Objection to Peppermill's Proposed Interim Jury  
20 Instructions filed on January 22, 2016, at pp. 5:7 – 9:26. These instructions were provided even  
21 though Peppermill offered no evidence that Peppermill actually used any of these means or any  
22 type of reverse engineering to acquire GSR's slot machine settings and the Nevada Supreme  
23 Court has held that unsupported jury instruction should not be given because they will mislead  
24 and confuse the jury.

25           Due solely to the fact that the jury was improperly instructed, on January 26, 2016, the  
26 jury rendered a verdict 6-2, on the limited grounds that GSR's slot machine settings were readily  
27 ascertainable by proper means. *See* Verdict filed January 26, 2016. If the jury had been properly  
28 instructed, the jury could not have found that GSR's slot machine settings were "***being readily  
ascertainable by proper means***" because the undisputed evidence showed that GSR's slot  
machine settings were only acquired by theft; that after the theft schemes devised by Peppermill

amounting to espionage, which even if legal, are not proper means; and that GSR's slot machine were not readily ascertainable by any means because they were not so self-revealing to be ascertainable at a glance. As the failure to properly instruct the jury led to an unsupportable jury verdict, this Court should grant GSR's motion for a new trial.

### III. LAW AND ARGUMENT

#### A. A New Trial Is Required Because the Jury Was *NOT* Properly Instructed that a Trade Secret Is Not Readily Ascertainable when Acquired by Improper Means.

A new trial is warranted because this Court declined to instruct the jury that: "Even if information which is asserted to be a trade secret could have been duplicated by other proper means, the information is not readily ascertainable if in fact it was acquired by improper means."

Rule 59(a) of the Nevada Rules of Civil Procedures provides that:

A new trial may be granted to all or any of the parties and on all or part of the issues for any of the following causes or grounds materially affecting the substantial rights of an aggrieved party: (1) Irregularity in the proceedings of the court, jury, master, or adverse party, or any order of the court, or master, or abuse of discretion by which either party was prevented from having a fair trial; (2) Misconduct of the jury or prevailing party; (3) Accident or surprise which ordinary prudence could not have guarded against; (4) Newly discovered evidence material for the party making the motion which the party could not, with reasonable diligence, have discovered and produced at the trial; (5) Manifest disregard by the jury of the instructions of the court; (6) Excessive damages appearing to have been given under the influence of passion or prejudice; or, (7) Error in law occurring at the trial and objected to by the party making the motion.

In *Lewis v. Sea Ray Boats, Inc.*, 119 Nev. 100, 106-08, 65 P.3d 245, 249-50 (2003), the Nevada Supreme Court held that the "district court's failure to instruct the jury" on a theory of the case that is supported by the evidence "mandates reversal for a new trial." The Court reasoned that "a party is entitled to have the jury instructed on all of his theories of the case that are supported by the evidence, and that general, abstract or stock instructions on the law are insufficient if a proper request for a specific instruction on an important point has been duly proffered to the court." *Id.* at 106, 65 P.3d at 249.

Here, the Court failed to instruct the jury on very issue which would have prevented the jury from erroneously entering a verdict for Peppermill, whether GSR's slot machine settings were "***not being readily ascertainable by proper means***" so as to be deemed a trades secret. *See* NRS 600A.030(5)<sup>1</sup> (emphasis added). When interpreting the Uniform Trade Secrets Act phrase "***not being readily ascertainable by proper means***," courts have consistently held the fact that "information can be ultimately discerned by others—whether through independent investigation, accidental discovery, or reverse engineering—does not make it unprotectable" because "[e]ven if information potentially could have been duplicated by other proper means, it is no defense to claim that one's product could have been developed independently of plaintiff's, if in fact it was developed by using plaintiff's proprietary designs." *AvidAir Helicopter Supply, Inc. v. Rolls-Royce Corp.*, 663 F.3d 966, 973 (8th Cir. 2011). Applying this rule, in *AvidAir*, the Eighth Circuit found, under the "Uniform Trade Secrets Acts of Indiana and Missouri," that revised helicopter overhaul specifications approved by the FAA were trade secrets and "not being readily ascertainable by proper means," even though the revision was a "relatively minor" update from publicly available information and the defendant could have received "FAA approval for a procedure that [was] based on only publicly available information," because defendant's "repeated attempts to secure the revised [overhaul information] without [plaintiff's] approval

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<sup>1</sup> NRS 600A.030(5), (emphasis added), provides in full:

"Trade secret" means information, including, without limitation, a formula, pattern, compilation, program, device, method, technique, product, system, process, design, prototype, procedure, computer programming instruction or code that:

(a) Derives independent economic value, actual or potential, from not being generally known to, and ***not being readily ascertainable by proper means*** by the public or any other persons who can obtain commercial or economic value from its disclosure or use; and

(b) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

1 belies its claim that the information in the documents was readily ascertainable or not  
2 independently valuable.” *Id.* at 969-75.

3       The rule that “even if information could have been duplicated by other proper means, the  
4 information is not readily ascertainable if in fact it was acquired by improper means” has been  
5 repeatedly affirmed by courts interpreting the Uniform Trade Secrets Act. *See Quantum Sail*  
6 *Design Grp., LLC v. Jannie Reuvers Sails, Ltd.*, Case No. 1:13-CV-879, 2015 WL 404393, at \*7  
7 (W.D. Mich. Jan. 29, 2015) (holding under Michigan Uniform Trade Secret Act that “even if all  
8 of the information contained in a trade secret can be obtained through investigation and research  
9 of publicly-available information, such does not negate the secrecy of such information if a party  
10 acquires the secret information through unfair or improper means”); *CheckPoint Fluidic Sys.*  
11 *Int’l, Ltd. v. Guccione*, 888 F. Supp. 2d 780, 797 (E.D. La. 2012) (holding under Louisiana  
12 Uniform Trade Secret Act that “protection will be accorded to a trade secret holder against  
13 disclosure or unauthorized use gained by improper means, even if others might have discovered  
14 the trade secret by legitimate means”); *U.S. Land Servs., Inc. v. U.S. Surveyor, Inc.*, 826 N.E.2d  
15 49, 64 (Ind. Ct. App. 2005) (holding under Indiana’s Uniform Trade Secrets Act that “even if  
16 information potentially could have been duplicated by other proper means, it is no defense to  
17 claim that one’s product could have been developed independently of plaintiff’s, if in fact it was  
18 developed by using plaintiff’s proprietary designs” ); *In re Wilson*, 248 B.R. 745, 750 (M.D.N.C.  
19 2000) (holding under North Carolina Uniform Trade Secret Act that “even if information  
20 potentially could have been duplicated by other proper means, it is no defense to claim that one’s  
21 product could have been developed independently of plaintiff’s, if in fact it was developed by  
22 using plaintiff’s proprietary designs”); *DPT Labs., Ltd. v. Bath & Body Works, Inc.*, Case No.  
23 CIV.SA-98-CA-664-JWP, 1999 WL 33289709, at \*4 (W.D. Tex. Dec. 20, 1999) (holding under  
24 the Ohio Uniform Trade Secrets Act that the “theoretical ability of others to ascertain  
25  
26  
27  
28

[Plaintiff’s] lotion formula from [another] lotion that was previously available on the market does not preclude protection as a trade secret” because “protection will be accorded to a trade secret holder against disclosure or unauthorized use gained by improper means, even if others might have discovered the trade secret by legitimate means”); *Reingold v. Swiftships, Inc.*, 126 F.3d 645, 652 (5th Cir. 1997) (holding under Louisiana Uniform Trade Secret Act that “protection will be accorded to a trade secret holder against disclosure or unauthorized use gained by improper means, even if others might have discovered the trade secret by legitimate means”); *Pyro Spectaculars N., Inc. v. Souza*, 861 F. Supp. 2d 1079, 1090 (E.D. Cal. 2012) (rejecting, under California’s Uniform Trade Secrets Act, a claim that the information on [plaintiff’s] Booking Forms is readily available” because “[i]f the information is truly that readily available to the public, it raises the question of why it was necessary for defendant to surreptitiously download, retain, and funnel the Booking Forms and other [plaintiff] information to his new employer in the first place”); *Home Pride Foods, Inc. v. Johnson*, 634 N.W.2d 774, 782 (Neb. 2001) (holding, under the Nebraska Uniform Trade Secrets Act, that customer list was a trade secret that was “not being ascertainable by proper means” because “if the information was readily available, why did the [defendants] pay \$800 for a stolen list?”).

These holdings fully comport with the plain language of Nevada’s Uniform Trade Secrets Act. Under the Act, information is a trade secret when the information is “not **being** readily ascertainable by proper means. . . .” *See* 600A.030(5) (emphasis added). Accordingly, to be deprived trade secret status it is **not** enough that information may be readily ascertainable by proper means, but instead, at the time of misappropriation, the information must “not **being** readily ascertainable by proper means.” *See Merriam–Webster Dictionary*, Present Participle, <http://www.merriam-webster.com/dictionary/present-participle> (last visited April 4, 2016) (defining a present participle as “a verb form that ends in ‘-ing’ and that is used with ‘be’ to refer

1 to action that is happening at the time of speaking or a time spoken of”); *see also Mangarella v.*  
2 *State*, 117 Nev. 130, 133, 17 P.3d 989, 991 (2001) (explaining that “[s]tatutes should be given  
3 their plain meaning” and “there is a presumption that every word, phrase, and provision in the  
4 enactment has meaning”). While Peppermill introduced evidence that of various surreptitious  
5 schemes that might have discovered GSR’s slot machine settings, Peppermill offered absolutely  
6 *no* evidence that GSR’s slot machine setting were actually *being* readily ascertainable by  
7 Peppermill by proper means at the time of Peppermill’s admitted misappropriation of GSR’s slot  
8 machine settings. To the contrary, the fact that Peppermill acquired GSR’s slot machine settings  
9 by improper means is not in dispute.

11 On July 12, 2013, GSR caught Tors red handed using his unauthorized key to steal  
12 information from GSR’s slot machines on orders from Peppermill. *See* Trial Ex. 112(a), NGC  
13 Settlement, ¶ 1; Trial Ex. 12(a), NGC Complaint, ¶¶ 12-16; *see* Exhibit 1 Trial Tr., Tors  
14 Testimony at 215. Peppermill admitted that “over a period of time beginning in at least 2011”  
15 until “July 12, 2013,” Peppermill “knew of, approved of, and directed” Ryan Tors to use “a slot  
16 machine ‘reset’ key to obtain theoretical hold percentage information from slot machines  
17 belonging to . . . the Grand Sierra Resort and Casino,” along with “numerous” other casinos. *See*  
18 Trial Ex. 112 (a), NGC Settlement, ¶ 1; Trial Ex. 12(a), NGC Complaint, ¶¶ 12-18. Peppermill  
19 admitted that this egregious conduct violated NGCR 5.011 and NRS 463.170(8), “was an  
20 unsuitable method of operation” and justified sanctions “in the total amount of ONE MILLION  
21 DOLLARS and NO CENTS (\$1,000,000.00).” *See* Trial Ex. 112(a), NGC Settlement, ¶ 1, 3;  
22 Trial Ex. 12(a), NGC Complaint, at ¶¶ 23-27, 32-36, 41-46.

25 Despite the clear Uniform Trade Secret Rule that “even if information could have been  
26 duplicated by other proper means, the information is not readily ascertainable if in fact it was  
27 acquired by improper means,” and the undisputed fact that Peppermill acquired GSR’s slot  
28



1 machine settings by improper means, this Court declined to provide an instruction offered by  
2 GSR that: “Even if the information which is asserted to be a trade secret could have been  
3 duplicated by other proper means, the information is not readily ascertainable if in fact it was  
4 acquired by improper means.” *See* Plaintiff’s Offered and Rejected Jury Instructions No. 2 and  
5 No. 3, filed January 1, 2016. By rejecting this instruction, the Court ignored overwhelming legal  
6 authority and the undisputed facts supporting the instruction. If the instruction had been  
7 appropriately given, the jury could not have reached the verdict that GSR’s slot machine settings  
8 were readily ascertainable.

10 For example, in *K & G Oil Tool & Serv. Co. v. G & G Fishing Tool Serv.*, 314 S.W.2d  
11 782, 785-88 (Tex. 1958), the Texas Supreme Court held that the design of a magnetic fishing  
12 tool was entitled to protection as a trade secret, even though the jury found that the tool could be  
13 reverse-engineered “by an examination of the tool without disassembling it,” because defendant  
14 “did not learn how to make the [plaintiff’s] tool or a device similar thereto by observing it in an  
15 assembled or unbroken condition, but learned of its internal proportions, qualities and  
16 mechanisms by taking it apart despite an agreement that it would not do so.” The court  
17 reasoned that the “fact that a trade secret is of such a nature that it can be discovered by  
18 experimentation or other fair and lawful means does not deprive its owner of the right to  
19 protection from those who would secure possession of it by unfair means.” *Id.* at 603.

21 Accordingly, in *K & G Oil*, the court concluded, as a matter of law, that information remains a  
22 trade secret, despite the ability to ascertain the information by proper means, when the  
23 information was actually secured by unfair means.

25 Peppermill has wrongly argued that *K & G Oil* is not applicable because it was decided  
26 under the common law and not the Uniform Trade Secrets Act. The argument, however, has no  
27 force when numerous courts, as set forth above, have applied the same rule under the Uniform  
28

Trade Secrets Act. The argument ignores the purpose of the Uniform Trade Secrets Act, as “codifying the basic principles of common law trade secret protection.” *MAI Sys. Corp. v. Peak Computer, Inc.*, 991 F.2d 511, 520 (9th Cir. 1993); *see also Frantz v. Johnson*, 116 Nev. 455, 466, 999 P.2d 351, 358 (2000) (holding that Nevada’s Uniform Trade Secrets Act “merely codifies the common law elements of misappropriation of confidential information”); *Uniform Laws Annotated*, Vol. 14 at p. 434 (“The Uniform Act codifies the basic principles of common law trade secret protection”). The rule that even if information could have been duplicated by other proper means, the information is not readily ascertainable if in fact it was acquired by improper means was firmly entrenched at the time the Uniform Trade Secrets Act was drafted. *See Pioneer Hi-Bred Int’l v. Holden Found. Seeds, Inc.*, 35 F.3d 1226, 1237 (8th Cir. 1994) (explaining that “[m]any courts have held that the fact that one ‘could’ have obtained a trade secret lawfully is not a defense if one does not actually use proper means to acquire the information”).<sup>2</sup>

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<sup>2</sup> *Norbrook Labs. Ltd. v. G.C. Hanford Mfg. Co.*, 297 F. Supp. 2d 463, 485-86 (N.D.N.Y. 2003), *aff’d*, 126 F. App’x 507 (2d Cir. 2005) (explaining it “is no defense in an action of this kind that the process in question could have been developed independently, without resort to information gleaned from the confidential relationship” because “the defendant had no right to obtain it by unfair means”); *Tabs Associates, Inc. v. Brohawn*, 475 A.2d 1203, 1212 (Md. App 1984) (“The mere fact that the means by which a discovery is made are obvious, that experimentation which leads from known factors to an ascertainable but presently unknown result may be simple, we think cannot destroy the value of the discovery to one who makes it, or advantage the competitor who by unfair means . . . obtains the desired knowledge”); *CPG Products Corp. v. Mego Corp.*, Case No. C-1-79-582, 1981 WL 59413, at \*12 (S.D. Ohio Jan. 12, 1981) (“When information in the nature of a trade secret is procured by improper means, the fact that the information conceivably could have been obtained by lawful means is irrelevant”); *Nat’l Instrument Labs., Inc. v. Hycel, Inc.*, 478 F. Supp. 1179, 1183 (D. Del. 1979) (“The fact that a trade secret is of such a nature that it can be discovered by experimentation or other fair and lawful means does not deprive its owner of the right to protection from those who would secure possession of it by unfair means . . . obtains the desired knowledge”); *Kubik, Inc. v. Hull*, 224 N.W.2d 80, 89 (Mich. App 1974) (“Even conceding . . . that all the trade secret information, acquired by the Defendants could have been legally obtained through investigation, research and the like, this does not negate . . . their culpability, for they failed to employ legal, proper and fair means in learning these trade secrets”); *E. I. duPont de Nemours & Co. v. Christopher*, 431 F.2d 1012, 1015 (5th Cir. 1970) (even though the “means by which the discovery is made may be obvious . . . these facts do not destroy the value of the discovery and will not advantage a competitor who by unfair means obtains the knowledge”); *Standard Brands, Inc. v. Zumpe*, 264 F. Supp. 254, 263 (E.D. La. 1967) (“because this discovery may be possible by fair means, it would not justify a discovery by unfair means”); *Imperial Chem. Indus. Ltd. v. Nat’l Distillers & Chem. Corp.*, 342 F.2d 737, 743 (2d Cir. 1965) (holding that although “anyone is at liberty to discover the secret

1 Nevada has merely codified this rule when it adopted the Uniform Trade Secret Act. In  
2 fact, Texas has now adopted the Uniform Trade Secrets Act and continues to follow the rule set  
3 forth in *K & G Oil*. See Herbert J. Hammond, *Texas Uniform Trade Secrets Act*, State Bar of  
4 Texas 27th Annual Advanced Intellectual Property Law Course, at p. 14 & n. 177 (2014)  
5 (explaining that “[l]iability under TUTSA turns on the use of improper means” and therefore,  
6 pursuant to *K & G Oil*, “the mere possibility that a trade secret may be discovered independently  
7 by fair means does not deprive the owner of the right to protection from a person who, in fact,  
8 secures the secret by improper means”).

10 Both the overwhelming legal authority and the admitted facts support giving the  
11 instruction that: “Even if information which is asserted to be a trade secret could have been  
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13 and use it thereafter with impunity, that fact does not excuse the obtaining of a secret by improper  
14 means”); *Grepke v. Gen. Elec. Co.*, 280 F.2d 508, 512 (7th Cir. 1960) (“The fact that a trade secret is of  
15 such a nature that it can be discovered by experimentation or other fair and lawful means does not deprive  
16 its owner of the right to protection from those who would secure possession of it by unfair means”);  
17 *Sperry Rand Corp. v. Rothlein*, 241 F. Supp. 549, 562 (D. Conn. 1964) (“It is no defense in an action of  
18 this kind that the process in question could have been developed independently [when] the defendant had  
19 no right to obtain it by unfair means”); *Minnesota Min. & Mfg. Co. v. Tech. Tape Corp.*, 684, 192  
20 N.Y.S.2d 102, 118 (Sup. Ct. 1959), aff’d, 226 N.Y.S.2d 1021 (1962) (“The fact that a trade secret is of  
21 such a nature that it can be discovered by experimentation or other fair and lawful means does not deprive  
22 its owner of the right to protection from those who would secure possession of it by unfair means”); *Head  
23 Ski Co. v. Kam Ski Co.*, 158 F. Supp. 919, 923 (D. Md. 1958) (“The mere fact that the means by which a  
24 discovery is made are obvious, that experimentation which leads from known factors to an ascertainable  
25 but presently unknown result may be simple, we think cannot destroy the value of the discovery to one  
26 who makes it, or advantage the competitor who by unfair means . . . obtains the desired knowledge”);  
27 *Franke v. Wiltschek*, 209 F.2d 493, 495 (2d Cir. 1953) (even though “defendants could have gained their  
28 knowledge from a study of the expired patent and plaintiffs’ publicly marketed product. The fact is that  
they did not. Instead they gained it from plaintiffs via their confidential relationship, and in so doing  
incurred a duty not to use it to plaintiffs’ detriment”); *Smith v. Dravo Corp.*, 203 F.2d 369, 375 (7th Cir.  
1953) (“The fact that a trade secret is of such a nature that it can be discovered by experimentation or  
other fair and lawful means does not deprive its owner of the right to protection from those who would  
secure possession of it by unfair means”); *A.O. Smith Corp. v. Petroleum Iron Works Co. of Ohio*, 73  
F.2d 531, 538-39 (6th Cir. 1934), (holding the “mere fact that the means by which a discovery is made are  
obvious . . . cannot . . . advantage the competitor who by unfair means . . . obtains the desired  
knowledge”); *Pressed Steel Car Co. v. Standard Steel Car Co.*, 210 Pa. 464, 60 A. 4 (1904) (holding that  
even though “engineers and draftsmen . . . should have been able to measure the cars made by the  
company, and to produce in a short time detailed and practical drawings from which the cars could be  
constructed. They did not do this, for the obvious reason that blue prints of drawings were available and  
were accurate” and therefore affirmed protection for the company’s secret construction design for railroad  
cars); *Tabor v. Hoffman*, 23 N.E. 12, 13 (N.Y. 1889) (“But, because this discovery may be possible by  
fair means, it would not justify a discovery by unfair means”).

1 duplicated by other proper means, the information is not readily ascertainable if in fact it was  
2 acquired by improper means.” *See In Bancservices Grp., Inc. v. Strunk & Associates, L.P.*, Case  
3 No. 14-03-00797-CV, 2005 WL 2674985, at \*2 (Tex. App. Oct. 20, 2005) (instructing the jury  
4 that the “fact that a trade secret can be discovered by experimentation and other lawful means  
5 does not deprive its owner of protection from those acquiring it by unfair means”). Because the  
6 Court did not instruct the jury on this vital issue supported by the evidence, a new trial is  
7 mandated.  
8

9 **B. A New Trial Is Required Because the Jury Was *NOT* Properly Instructed that the**  
10 **Means of Acquiring a Trade Secret Are Improper If They Fall Below the Standards of**  
11 **Commercial Morality, Even If They Did Not Involve Fraudulent or Illegal Conduct.**

12 A new trial is warranted because the district court declined to instruct the jury that: “A  
13 trade secret is not readily ascertainable when the means of acquiring the information falls below  
14 the generally accepted standards of commercial morality and reasonable conduct, even if means  
15 of obtaining the information violated no government standard, did not breach any confidential  
16 relationship, and did not involve any fraudulent or illegal conduct.” This instruction comes from  
17 the seminal case of *E. I. duPont deNemours & Co. v. Christopher*, 431 F.2d 1012, 1015 (5th Cir.  
18 1970). In *Christopher*, the Fifth Circuit held that “aerial photography of plant construction [to  
19 determine another’s secret manufacturing process] is an improper means of obtaining another’s  
20 trade secret, even though defendant “violated no government aviation standard, did not breach  
21 any confidential relation, and did not engage in any fraudulent or illegal conduct” because such  
22 conduct falls “bellow the generally accepted standards of commercial morality and reasonable  
23 conduct.” 431 F.2d at 1014-16. The court reasoned that “[w]e should not require a person or  
24 corporation to take unreasonable precautions to prevent another from doing that which he ought  
25 not to do in the first place.” *Id.* at 1017. The court then pronounced the commandment “thou  
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1 shall not appropriate a trade secret through deviousness under circumstances in which  
2 countervailing defenses are not reasonably available.” *Id.*

3       The National Conference of Commissioners on Uniform State Laws, when drafting the  
4 Uniform Trade Secrets Act, expressly adopted the holding of *Christopher*. In Comment to  
5 Section 1 of the Uniform Trade Secrets Act, which are the same definitions adopted by Nevada,  
6 the Commissioners cited *Christopher* and concluded that: “Improper means could include  
7 otherwise lawful conduct which is improper under the circumstances; e.g., an airplane overflight  
8 used as aerial reconnaissance to determine the competitor's plant layout during construction of  
9 the plant.” 14 Uniform Laws Annot. Uniform Trade Secrets Act with 1985 Amendments § 1,  
10 comment, p. 538-539 (citing *E. I. du Pont de Nemours & Co., Inc. v. Christopher*, 431 F.2d 1012  
11 (CA5, 1970), *cert. den.*, 400 U.S. 1024 (1970)). The Commissioners reasoned that “[o]ne of the  
12 broadly stated policies behind trade secret law is ‘the maintenance of standards of commercial  
13 ethics.’” *Id.* (quoting *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470 (1974)). Not surprisingly,  
14 courts have readily adopted this standard when interpreting the Uniform Trade Secrets Act. *See*  
15 *Pocahontas Aerial Spray Servs., L.L.C. v. Gallagher*, Case No. 14-0690, 2015 WL 576161, at \*7  
16 (Iowa Ct. App. Feb. 11, 2015) (quoting *Christopher*, *supra*, and holding, under Iowa Uniform  
17 Trade Secrets Act, that “‘improper means’ does not need to mean that the trade secret was  
18 acquired, disclosed, or used in a way that was illegal,” but “also means the method in which the  
19 trade secret was acquired ‘falls below the generally accepted standards of commercial morality  
20 or reasonable conduct’”); *Halliburton Energy Servs., Inc. v. Axis Techs., LLC*, 444 S.W.3d 251,  
21 255 (Tex. App. 2014) (“‘Improper means’ are means that fall below the generally accepted  
22 standards of commercial morality and reasonable conduct” and the “mere fact that knowledge of  
23 a product might be acquired through lawful means such as inspection, experimentation, and  
24 analysis does not preclude protection from those who would secure the knowledge by unfair  
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means”); *Fujitsu Ltd. v. Tellabs Operations, Inc.*, Case No. 12 C 3229, 2013 WL 5587086, at \*4 (N.D. Ill. Oct. 10, 2013) (relying upon *Christopher*, supra, and holding that “‘improper means’” broadly includes ‘means which fall below the generally accepted standards of commercial morality and reasonable conduct’” and “[u]ltimately, it is unlawful for a defendant to appropriate its competitor's trade secrets ‘through deviousness’”); *DSMC, Inc. v. Convera Corp.*, 479 F. Supp. 2d 68, 79 (D.D.C. 2007) (quoting *Christopher*, supra, and holding, under District of Columbia Uniform Trade Secrets Act, that “‘improper means’ has been defined as those means that ‘fall below the generally accepted standards of commercial morality and reasonable conduct’”); *CDI Int'l, Inc. v. Marck*, Case No. CIV.A. 04-4837, 2005 WL 146890, at \*6 (E.D. Pa. Jan. 21, 2005) (“Improper means refers to those means which fall below the generally accepted standards of commercial morality and reasonable conduct”); *Q-Tech Labs. Pty Ltd. v. Walker*, Case No. CIV.A.01-RB-1458(CBS, 2002 WL 1331897, at \*12 (D. Colo. June 4, 2002) (relying upon *Christopher*, supra, and explaining, under the Colorado Uniform Trade Secrets Act, that a “complete catalogue of improper means is not possible. In general, they are means which fall below the generally accepted standards of commercial morality and reasonable conduct”); *System 4, Inc. v. Landis & Gyr, Inc.*, 8 F. App'x 196, 200 (4th Cir. 2001) (quoting *Christopher*, supra, and holding, under Maryland Uniform Trade Secrets Act, that a “complete catalogue of improper means is not possible. In general, they are means which fall below the generally accepted standards of commercial morality and reasonable conduct”); *Coll. Watercolor Grp., Inc. v. William H. Newbauer, Inc.*, 360 A.2d 200, 205 (Pa. 1976) (finding that spying on plaintiff's operations “for the primary purpose of gathering information” was improper means to acquire a trade secret because “those means which fall below the generally accepted standards of commercial morality and reasonable conduct”).

1 The schemes proposed by Peppermill's expert are far more "devious" than legally flying  
2 over a construction site to take pictures, which was found improper in *Christopher*. Peppermill's  
3 schemes of using confidential information from slot machine manufacturer's concerning the  
4 available par settings on GSR's slot machines, available only to legitimate gaming enterprises,  
5 and then sending spies to secretly and repeatedly play and/or photograph GSR's slot machines to  
6 calculate GSR's par information cannot be viewed as proper commercial ethics.  
7

8 Again, both the overwhelming legal authority and the admitted facts support giving the  
9 instruction that a "trade secret is not readily ascertainable when the means of acquiring the  
10 information falls below the generally accepted standards of commercial morality and reasonable  
11 conduct, even if means of obtaining the information violated no government standard, did not  
12 breach any confidential relation, and did not involve any fraudulent or illegal conduct." Because  
13 the Court did not instruct the jury on this vital issue supported by the evidence, a new trial is  
14 mandated.  
15

16 **C. A New Trial Is Required Because the Jury Was *NOT* Properly Instructed That to Be**  
17 **Readily Ascertainable Information Must Be Ascertainable at a Glance.**

18 A new trial is warranted because this Court declined to instruct the jury that: "To be  
19 readily ascertainable, the information asserted to be a trade secret must be ascertained quickly, *or*  
20 *so self-revealing to be ascertainable at a glance.*" When instructing the jury, the Court refused  
21 to include the last phrase "or so self-revealing to be ascertainable at a glance." This excluded  
22 phrase however is amply supported by the courts. *See Motorola, Inc. v. Lemko Corp.*, Case No.  
23 08 C 5427, 2012 WL 74319, at \*19 (N.D. Ill. Jan. 10, 2012) (holding that information was  
24 protected as a trade secret where it "did not involve self-revealing information that any user or  
25 passer-by sees at a glance"); *Stewart & Stevenson Servs., Inc. v. Serv-Tech, Inc.*, 879 S.W.2d 89,  
26 111 (Tex. App. 1994) (to be a protected trade secret, "the trade secret must not be generally  
27 known to or used by the industry or a matter completely disclosed or ascertainable at a glance");  
28

1 *National Instrument Labs*, 478 F. Supp. at 1182 (to lose protection, the trade secret must be  
2 “ascertainable at a glance”); *Smith*, 203 F.2d at 375 (holding that cargo container, available on  
3 the open market and accessible to defendant for inspection, was a protectable trade secret  
4 because there was no evidence that the “construction of which was ascertainable at a glance”); *K*  
5 *& G Oil*, 314 S.W.2d at 786-90 (holding that a magnetic fishing tool was entitled to protection as  
6 a trade secret, even though the jury found that the tool could be duplicated “by an examination of  
7 the tool without disassembling it,” because the construction of the tool was not “ascertainable at  
8 a glance”).

10 Using the word “quickly” without including the phrase “at a glance” was error because  
11 the meaning of the word “quickly” is relative. For example, in *Metro. Life Ins. Co. v. Ward*, 470  
12 U.S. 869, 889 (1985), the United States Supreme Court found that “the Congress moved  
13 **quickly**,” when it acted “within a year.” However, in *In re Cree, Inc.*, Case No. 2015-1365, 2016  
14 WL 1085247, at \*8 n.1 (Fed. Cir. Mar. 21, 2016), the Federal Circuit found that an electron acts  
15 “quickly” when it “returns to the ground state and emits a photon” within “ $10^{-9}$  [0.000000001]  
16 seconds. The phrase, “at a glance” gives meaning to the word “quickly.” At a glance connotes  
17 mere seconds. See *Merriam–Webster Dictionary*, <http://www.merriam->  
18 [webster.com/dictionary/glance](http://www.merriam-webster.com/dictionary/glance) (last visited April 4, 2016) (defining “Glance” as a “swift  
19 movement of the eyes; a quick or cursory look”). None of the post-hoc schemes supposedly  
20 devised by Peppermill’s experts involved a mere glance.

23 Again, both legal authority and the underlying facts support giving the instruction that:  
24 “To be readily ascertainable, the information asserted to be a trade secret must be ascertained  
25 quickly, or so self-revealing to be ascertainable at a glance.” If the jury had been properly  
26 instructed, the jury could not have found that GSR’s slot machine settings were readily  
27 ascertainable. Because the Court did not properly instruct the jury on this vital issue supported  
28



1 by the evidence, a new trial is mandated. *See Lewis*, 119 Nev. at 106-08, 65 P.3d at 249-50  
2 (holding that the “district court's failure to instruct the jury” on a theory of the case that is  
3 supported by the evidence “mandates reversal for a new trial”).

4 **D. A New Trial Is Required Because the Jury Was Improperly Instructed Provided an**  
5 **Instruction on Reverser Engineering When the Admitted Facts Demonstrated that**  
6 **Peppermill Did NOT reverse engineer GSR’s Slot Machine Settings.**

7 This Court, also should not have given any instruction concerning reverse engineering, as  
8 Peppermill did not offer any evidence to support such an instruction. To the contrary,  
9 Peppermill admitted to stealing GSR’s slot machine settings, and did not acquire those trade  
10 secrets by reverse engineering. Jury Instruction No. 27 improperly included the following:

11 If the information is in fact obtained through reverse engineering, however, the  
12 actor is not subject to liability, because the information has not been acquired  
13 improperly. Information is ascertainable if it is available in trade journals,  
reference books or published materials.

14 Jury Instructions, Instruction No. 27, at 2, ll. 5 -10. Additionally, Jury Instruction 31 was  
15 entirely improper, which stated:

16 A trade secret may not be readily ascertainable by proper means.

17 Proper means include:

- 18 1. Discovery by independent invention;
- 19 2. Discovery by “reverse engineering” that is, by starting with the  
20 known product and working backward to find the method by which it was  
21 developed. The acquisition of the known product (a par setting) must, of  
course, be by fair and honest means;
- 22 3. Discovery under a license from the owner;
- 23 4. Observation of the information in public use or display; and
- 24 5. Obtaining the trade secret information from published literature.

25 The ease or difficulty with which the information may be acquired  
26 determines whether a trade secret is readily ascertainable.

27 Jury Instructions, Instruction No. 31.

28 In *Allan v. Levy*, 109 Nev. 46, 49-50, 846 P.2d 274, 276 (1993), the Nevada  
Supreme Court held that an “unsupported jury instruction . . . constitutes a sufficiently  
serious source of jury confusion and misunderstanding to mandate reversal . . . for a new

1 trial.” The Court reasoned that “if a jury instruction relating to a litigant's theory of  
2 complaint or defense is not supported by the trial evidence, the instruction should not be  
3 given.” *Id.*

4       Peppermill did not offer any evidence to support any such instruction on reverse  
5 engineering. To the contrary, Peppermill has admitted that it acquired GSR’s slot machine  
6 settings by theft, and did not acquire those trade secrets by reverse engineering.

7 Instructing the jury on reversing engineering only mislead and confused the jury into  
8 believing that such a defense was proper. Peppermill improperly requested instructions  
9 about reverse engineering to confuse the jury and convince them that Peppermill used  
10 some other proper method to ascertaining GSR’s trade secrets which is contrary to the  
11 established facts of this case. Courts have universally rejected allowing proof of  
12 alternative means of discovering trade secrets, when in fact the trade secrets were  
13 misappropriated by improper means. *See AvidAir Helicopter Supply*, 663 F.3d at 973  
14 holding the fact that “information can be ultimately discerned by others—whether through  
15 independent investigation, accidental discovery, or reverse engineering—does not make it  
16 unprotectable” because “[e]ven if information potentially could have been duplicated by  
17 other proper means, it is no defense to claim that one’s product could have been developed  
18 independently of plaintiff’s, if in fact it was developed by using plaintiff’s proprietary  
19 designs”).

20       For example, in *Reingold v. Swiftships, Inc.*, 126 F.3d 645, 650-52 (5th Cir. 1997),  
21 the Fifth Circuit held that a boat hull mold was entitled to protection as a trade secret  
22 under the Uniform Trade Secret Act and was “not readily ascertainable by proper means,”  
23 even though defendant “could have reverse engineered a mold from an existing hull,”  
24 because defendant did not create the infringing mold from an existing hull, but instead  
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1 “misappropriated the trade secret” by improper means. The court reasoned that  
2 “protection will be accorded to a trade secret holder against disclosure or unauthorized use  
3 gained by improper means, even if others might have discovered the trade secret by  
4 legitimate means.” *Id.* at 652; *see also DPT Labs., Ltd. v. Bath & Body Works, Inc.*, Case  
5 No. CIV.SA-98-CA-664-JWP, 1999 WL 33289709, at \*4 (W.D. Tex. Dec. 20, 1999)  
6 (holding under the Ohio Uniform Trade Secrets Act that the “theoretical ability of others  
7 to ascertain [Plaintiff’s] lotion formula from [another] lotion that was previously available  
8 on the market does not preclude protection as a trade secret” because “protection will be  
9 accorded to a trade secret holder against disclosure or unauthorized use gained by  
10 improper means, even if others might have discovered the trade secret by legitimate  
11 means”). These few cases represent a long line of cases, as previously set forth, that  
12 reverse engineering is not a defense when the trade secret was actually acquired by  
13 improper means.  
14

15  
16 Even if Peppermill had offered proof that it had acquired GSR’s slot machine  
17 setting through one or more of the devious schemes devised by Peppermill’s experts,  
18 allowing a reverse engineering instruction would still be error. Under NRS  
19 600A.030(5)(a), only “proper means” can be used to ascertain trade secrets. As already  
20 set forth, the schemes offered by Peppermill’s experts fall far below the standards of  
21 commercial morality. If legally flying over a construction site to take pictures was  
22 condemned by the courts in *Christopher* and by the Commissioners that drafted the  
23 Uniform Trade Secrets Act, then Peppermill’s schemes of using confidential information  
24 from slot machine manufacturer’s concerning the available par settings on GSR’s slot  
25 machines, available only to legitimate gaming enterprises, and then sending spies to  
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secretly and repeatedly play and/or photograph GSR's slot machines to calculate GSR's par cannot be viewed as proper commercial ethics.

Accordingly, as Peppermill admittedly acquired GSR's slot machine setting, *not* by reverse engineering, but by theft, and Peppermill's after-the-fact schemes violate commercial ethics as a matter of law, the Court erred in instructing the jury about reverse engineering. Because the Court did not instruct the jury on the effect of Peppermill's admitted theft of GSR's slot machine setting, but instead confused the jury by instructing them on reverse engineering, which was contrary to the facts of this case, a new trial is mandated.

#### IV. CONCLUSION

Based on the foregoing points and authorities, this Court should grant GSR's Motion for a New Trial and reverse the judgment granted in favor of Peppermill.

#### AFFIRMATION PURSUANT TO NRS 239B.030

The undersigned does hereby affirm that the preceding document does not contain the social security number of any person.

DATED this 14<sup>th</sup> day of April 2016.

COHEN|JOHNSON|PARKER|EDWARDS

By: /s/ H. Stan Johnson

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d/b/a GRAND SIERRA RESORT

**CERTIFICATE OF SERVICE**

Pursuant to NRCP 5(b), I certify that I am an employee of COHEN|JOHNSON|PARKER  
|EDWARDS, and that on this date I caused to be served a true and correct copy of the  
**PLAINTIFF'S MOTION FOR A NEW TRIAL** on all the parties to this action by the  
method(s) indicated below:

\_\_\_\_\_ by placing an original or true copy thereof in a sealed envelope, with sufficient  
postage affixed thereto, in the United States Mail, Las Vegas, Nevada and  
addressed to:

  X   by using the Court's CM/ECF Electronic Notification System addressed to:

ROBISON, BELAUSTEGUI, SHARP & LOW  
c/o Kent R. Robison, Esq.  
71 Washington Street  
Reno, Nevada 89503  
krobison@rbsllaw.com  
*Attorney for the Defendants Peppermill and Ryan Tors*

\_\_\_\_\_ by electronic email addressed to the above:  
\_\_\_\_\_ by personal or hand/delivery addressed to:  
\_\_\_\_\_ by facsimile(fax) addresses to:  
\_\_\_\_\_ by Federal Express/UPS or other overnight delivery addressed to:

DATED the 14<sup>th</sup> day of April, 2016.

/s/ Sarah Gondek  
An employee of Cohen-Johnson, LLC

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6 **IN THE SECOND JUDICIAL DISTRICT FOR THE STATE OF NEVADA**  
7 **IN AND FOR THE COUNTY OF WASHOE**  
8

9 MEI-GSR HOLDINGS, LLC, a Nevada  
10 Corporation, d/b/a/ GRAND SIERRA RESORT,

11 Plaintiff,

12 vs.

13 PEPPERMILL CASINOS, INC., a Nevada  
14 Corporation, d/b/a/ PEPPERMILL CASINO,

15 Defendant.  
16 \_\_\_\_\_/

**CASE NO.: CV13-01704**

**DEPT. NO.: B7**

**BUSINESS COURT DOCKET**

17 **JUDGMENT ON JURY VERDICT**

18 This matter having been tried to a jury from January 11, 2016, to and including January 26,  
19 2016, the parties having presented evidence and argument to the jury, and the jury having returned  
20 its Verdict For Defendant against the Plaintiff, judgment is entered in favor of Defendant,  
21 Peppermill Casinos, Inc. against the Plaintiff, MEI-GSR Holdings, LLC, a Nevada corporation,  
22 dba Grand Sierra Resort. This judgment is subject to further consideration, modification or  
23 amendments based upon post-trial motions as permitted by Rule 54 of the Nevada Rules of Civil  
24 Procedure.

25 Judgment is hereby entered in favor of Defendant against Plaintiff.

26 DATED this 25 day of MARCH, 2016.

27   
28 DISTRICT JUDGE

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Kent Robison, Esq., for Peppermill Casinos, Inc.;

H. Johnson, Esq. and Mark Wray, Esq. for MEI-GSR Holdings, LLC;

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**IN THE SECOND JUDICIAL DISTRICT FOR THE STATE OF NEVADA**

**IN AND FOR THE COUNTY OF WASHOE**

MEI-GSR HOLDINGS, LLC, a Nevada  
Corporation, d/b/a/ GRAND SIERRA RESORT,

Plaintiff,

vs.

PEPPERMILL CASINOS, INC., a Nevada  
Corporation, d/b/a/ PEPPERMILL CASINO;

Defendant.

**CASE NO.: CV13-01704**

**DEPT. NO.: B7**

**BUSINESS COURT DOCKET**

**NOTICE OF ENTRY OF AMENDED JUDGMENT ON JURY VERDICT**

TO: All parties herein and their respective attorneys of record:

PLEASE TAKE NOTICE that on the 11th day of April, 2016, the Court entered an Amended Judgment on Jury Verdict in favor of the Defendant Peppermill Casinos, Inc. against the Plaintiff, a copy of which is attached hereto.

**AFFIRMATION**  
**Pursuant to NRS 239B.030**

The undersigned does hereby affirm that this document does not contain the social security

///

///

///



1 number of any person.

2 DATED this 12<sup>th</sup> day of April, 2016.

3 ROBISON, BELAUSTEGUI, SHARP & LOW  
4 A Professional Corporation  
5 71 Washington Street  
6 Reno, Nevada 89503

7 

8 KENT R. ROBISON  
9 SCOTT L. HERNANDEZ  
10 THERESE M. SHANKS  
11 Attorneys for Defendant  
12 Peppermill Casinos, Inc., d/b/a Peppermill Casino  
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IN THE SECOND JUDICIAL DISTRICT FOR THE STATE OF NEVADA  
IN AND FOR THE COUNTY OF WASHOE

MEI-GSR HOLDINGS, LLC, a Nevada  
Corporation, d/b/a/ GRAND SIERRA RESORT,

Plaintiff,

vs.

PEPPERMILL CASINOS, INC., a Nevada  
Corporation, d/b/a/ PEPPERMILL CASINO,

Defendant.

CASE NO.: CV13-01704

DEPT. NO.: B7

BUSINESS COURT DOCKET

**AMENDED JUDGMENT ON JURY VERDICT**

This matter having been tried to a jury from January 11, 2016, to and including January 26, 2016, the parties having presented evidence and argument to the jury, and the jury having returned its Verdict For Defendant against the Plaintiff, judgment is entered in favor of Defendant, Peppermill Casinos, Inc. against the Plaintiff, MEI-GSR Holdings, LLC, a Nevada corporation, dba Grand Sierra Resort. On April 5, 2016, the Court entered its Order granting Defendant's *Motion for Costs and Attorneys' Fees*. Based on the Court's Order, the Judgment on Jury Verdict is amended and judgment is entered in favor of Peppermill for \$534,370.27 for costs and \$963,483.00 for attorneys' fees. The total of this Amended Judgment on Jury Verdict is \$1,497,853.27, which amount shall bear interest at the legal rate from the date hereof until satisfied.

DATED this 11 day of April, 2016.

  
DISTRICT JUDGE

**CERTIFICATE OF SERVICE**

Pursuant to NRCP 5(b), I certify that I am an employee of ROBISON, BELAUSTEGUI, SHARP & LOW, and that on this date I caused to be served a true copy of the **NOTICE OF ENTRY OF AMENDED JUDGMENT ON JURY VERDICT** on all parties to this action by the method(s) indicated below:

by placing an original or true copy thereof in a sealed envelope, with sufficient postage affixed thereto, in the United States mail at Reno, Nevada, addressed to:

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*Attorneys for Plaintiff*

by facsimile (fax) addressed to:

by Federal Express/UPS or other overnight delivery addressed to:

DATED: This 12<sup>th</sup> day of April, 2016.

  
Employee of Robison, Belaustegui, Sharp & Low

1 **CODE 2540**  
2 **GUNDERSON LAW FIRM**  
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9 Telephone: 775.829.1222  
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11 Attorneys for Ryan Tors

12  
13 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

14 IN AND FOR THE COUNTY OF WASHOE

15 MEI-GSR HOLDINGS, LLC, a Nevada Corporation, d/b/a GRAND SIERRA RESORT,

Case No. CV13-01704

Dept. No. B7

16 Plaintiff,

17 vs.

BUSINESS COURT DOCKET

18 PEPPERMILL CASINOS, INC., a Nevada Corporation, d/b/a PEPPERMILL CASINO;  
19 RYAN TORS, an individual; JOHN DOES I-X  
20 and JANE DOES I-X, and ABC  
21 CORPORATIONS I-X,

22 Defendant.  
23 \_\_\_\_\_/

24 **NOTICE OF ENTRY OF ORDER**

25 PLEASE TAKE NOTICE that an *Order* on the *Motion to Dismiss Plaintiff's Complaint*  
26 *Against Ryan Tors Without Prejudice* was entered on March 9, 2015, a copy of which is attached as  
27 Exhibit "1."

28 **AFFIRMATION**

The undersigned does hereby affirm that the preceding document **NOTICE OF ENTRY OF ORDER**, filed in the Second Judicial District Court of the State of Nevada, County of Washoe,

///

1 does not contain the social security number of any person.

2 DATED this 10 day of March, 2015.

3 GUNDERSON LAW FIRM

4  
5 By: Mark H. Gunderson

6 Mark H. Gunderson, Esq.  
7 Nevada State Bar No. 2134  
8 John R. Funk, Esq.  
9 Nevada State Bar No. 12372  
10 Attorneys for Ryan Tors  
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1 **CERTIFICATE OF SERVICE**

2 I certify that I am an employee of the law office of GUNDERSON LAW FIRM, and on the  
3 10 day of March, 2015 I e-filed the **NOTICE OF ENTRY OF ORDER** and a copy will be  
4 electronically mailed by the Second Judicial District Court through the ECF system to the  
5 following:

6  
7 H. Stan Johnson, Esq.  
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21   
22 \_\_\_\_\_  
23 Cindy Stockwell

## **EXHIBIT LIST**

Exhibit #	Description	No. of Pages
Exhibit 1	Order	4

**Exhibit “1”**

**Exhibit “1”**



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6 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA  
7 IN AND FOR THE COUNTY OF WASHOE  
8

9 MEI-GSR HOLDINGS, LLC, a  
10 Nevada corporation, dba GRAND  
SIERRA RESORT,

Case No.: CV13-01704

Dept. No.: 7

11 Plaintiff,

12 vs.

13 PEPPERMILL CASINOS, INC., a  
14 Nevada corporation, dba  
PEPPERMILL CASINO; RYAN  
15 TORS, an individual; et al.,

16 Defendants.  
17

18 ORDER

19 Before the Court is Defendant Ryan Tors' *Motion to Dismiss Plaintiff's*  
20 *Complaint Against Ryan Tors without Prejudice*, filed February 2, 2015. Plaintiff  
21 MEI-GSR HOLDINGS, LLC (hereafter "GSR") filed an *Opposition* on February 20,  
22 2015. Defendant filed a *Reply* and submitted the matter for decision on March 2,  
23 2015. This *Order* follows.

24 Factual History

25 On August 2, 2013, GSR filed a *Complaint* against Tors and his former  
26 employer PEPPERMILL CASINOS, INC. (hereafter "Peppermill") alleging 1)  
27 violation of the Uniform Trade Secret Act; 2) vicarious liability / respondeat  
28 superior; 3) injunctive relief. Peppermill has since acknowledged that all of Tors'

1 actions giving rise to the instant suit were committed exclusively in the scope of his  
2 employment with Peppermill. To that end, Peppermill has accepted responsibility  
3 for the full extent of Tors' alleged liability and has agreed to indemnify him for any  
4 judgment that might be obtained against him in this case. Tors now moves to be  
5 dismissed from the case without prejudice.

6 Analysis

7 The Nevada Rules of Civil Procedure "shall be construed and administered to  
8 secure the just, speedy, and inexpensive determination of every action." NRCP 1.  
9 Tors offers that dismissal without prejudice of a party whose joinder has become  
10 immaterial is included within the unenumerated "inherent" powers of a Court to  
11 secure that aim. *See Blackjack Bonding v. City of Las Vegas, Mun. Ct.*, 116 Nev.  
12 1213, 1218, 14 P.3d 1275, 1279 (2000). GSR does not dispute this. Instead, GSR  
13 argues that it would be prejudiced by Tors' dismissal in several ways, including that  
14 Tors might seek attorney's fees against GSR and that GSR will lose their assurance  
15 of Tors' cooperation with discovery and appearance at trial. To this end, Tors notes  
16 that he is already subject to a trial subpoena which will guarantee his appearance  
17 as a witness. Further, he has agreed to waive any claim for attorney's fees and  
18 costs upon dismissal.

19 As Tors points out, Peppermill has assumed the full extent of his alleged  
20 legal liability in this matter and the issue of injunctive relief is moot as he is no  
21 longer a Peppermill employee. There appear to be no practical reasons to require  
22 him to maintain a defense in this action. Therefore, good cause appearing, GSR's  
23 claims against Ryan Tors are **DISMISSED** without prejudice.

24 **IT IS HEREBY ORDERED.**

25 DATED this 9 day of March, 2015.

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28 PATRICK FLANAGAN  
District Judge

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA  
IN AND FOR THE COUNTY OF WASHOE

MEI-GSR HOLDINGS, LLC, a  
Nevada corporation, dba GRAND  
SIERRA RESORT,

Case No.: CV13-01704

Dept. No.: 7

Plaintiff,

vs.

PEPPERMILL CASINOS, INC., a  
Nevada corporation, dba  
PEPPERMILL CASINO; et al.,

Defendants.

**ORDER**

Before the Court is Plaintiff MEI-GSR HOLDINGS, LLC's (hereafter "GSR")  
*Motion for Leave to File Amended Complaint on Order Shortening Time*, filed March  
2, 2015. Defendant PEPPERMILL CASINOS, INC. (hereafter "Peppermill") filed  
an *Opposition* on March 11, 2015. GSR filed a *Reply* on March 13, 2015 and  
submitted the matter for decision.

GSR seeks leave to file an amended complaint pursuant to NRCP 15(a).<sup>1</sup> The  
original *Complaint*, filed August 2, 2013, alleged three claims for relief: violation of  
Uniform Trade Secrets Act, NRS 600A.010 *et seq.*; vicarious liability / respondeat  
superior; and injunctive relief. GSR now proposes to add seven new claims for

<sup>1</sup> A party may amend a pleading after the filing of a responsive pleading only by leave of court or by  
written consent of the adverse party. NRCP 15(a).

1 relief: (1) civil conspiracy, (2) unlawful acts regarding computers, (3) unfair trade  
2 practices, (4) infringement of trade secrets in violation of NRS 600.050 and NRS  
3 600.080; (5) deceptive trade practices, (6) common law unfair competition, and (7)  
4 unjust enrichment. They also seek to add a new Defendant, John Hanson, former  
5 General Manager of the Peppermill, and reassert claims against Ryan Tors, who  
6 was dismissed from this action without prejudice on March 9, 2015. They argue  
7 that the new claims are based on recent discovery, and that any delays in bringing  
8 the instant motion were the result of the Peppermill's failure to conduct discovery in  
9 good faith. They further argue that Peppermill will not be prejudiced by the  
10 amended complaint because little additional discovery will be required and because  
11 there is "ample" time to conduct such discovery if needed.

12 Peppermill opposes the *Motion*. It argues that the new claims will require  
13 them to retain new experts, address new discovery issues, and file costly motions to  
14 dismiss. It states that it will be significantly prejudiced as a result. It further  
15 argues that the motion is merely an improper attempt to delay the proceedings,  
16 noting that the procedural deadlines in this case may have to be extended if the  
17 motion is granted.

18 Leave to amend shall be freely given where justice so requires. NRCP 15(a).  
19 Sufficient reasons to deny a motion to amend a pleading include undue delay, bad  
20 faith or dilatory motives on the part of the movant, and undue prejudice. *See Kantor*  
21 *v. Kantor*, 116 Nev. 886, 891 (2000); *In re Western States Wholesale Natural Gas*  
22 *Antitrust Litigation*, 715 F.3d 716, 738 (9th Cir. 2013). The Nevada Rules of Civil  
23 Procedure, on the whole, are to be construed and administered to secure the just,  
24 speedy, and inexpensive determination of every action. NRCP 1.

25 The discovery deadline is April 16, 2015. This case is scheduled to go to trial  
26 July 6, 2015. At this late stage of the litigation, the addition of John Hanson as a  
27 Defendant, alone, would likely place the trial date in jeopardy. Mr. Hanson would  
28 need to obtain counsel, who would in turn need the opportunity to review the

1 evidence in this case, file responsive pleadings, and conduct discovery. Further, the  
2 addition of seven new claims would almost certainly necessitate further discovery  
3 and dispositive motion practice by Peppermill. GSR's argument that no new  
4 discovery would be necessary is unpersuasive. The new causes of action present  
5 new elements, new theories of liability, and new issues as to damages. Peppermill  
6 and the proposed additional defendants must be afforded adequate opportunity to  
7 defend themselves on each claim.

8       It must be determined, then, whether "justice requires" that leave to amend  
9 be granted in this case. GSR argues that support for its new claims arises from the  
10 recent admissions of Mr. Tors in his September and December 2014 depositions. It  
11 also argues, however, that all its claims (including its new claims) stem from the  
12 same set of alleged transactions: Mr. Tors gained unauthorized access to GSR slot  
13 machine par values as a Peppermill employee and Peppermill thereafter used that  
14 information. It appears that these core facts, elicited from Mr. Tors during  
15 deposition, have remained mostly unchanged throughout the proceedings. They  
16 were generally conceded by the Defendants in the pleadings. Further, the same  
17 facts were evident from records of the Nevada Gaming Commission's proceedings  
18 against Peppermill arising from this same transaction. In light of this it appears  
19 that all of GSR's new claims, as well as its theory of liability for Mr. Hanson, a  
20 Peppermill officer, could have been alleged much earlier.

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1 Based on the above, GSR has failed to demonstrate that its need to amend its  
2 complaint outweighs the cost and delay that such an amendment would likely  
3 cause. Both parties have already undertaken significant expense in litigating this  
4 matter. Both parties have been apprised of the basic operative facts underlying all  
5 of the allegations, old and new, for some time. In the interests of securing the just,  
6 speedy, and inexpensive determination of this action, Plaintiff's *Motion for Leave to*  
7 *File Amended Complaint* must be **DENIED**.

8 **DATED** this 24 day of March, 2015.

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11 PATRICK FLANAGAN  
12 District Judge  
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Kent Robison, Esq., for Peppermill Casinos, Inc.;

H. Johnson, Esq. and Mark Wray, Esq. for MEI-GSR Holdings, LLC;

John Funk, Esq., for Ryan Tors;

I deposited in the Washoe County mailing system for postage and mailing with the United States Postal Service in Reno, Nevada, a true copy of the attached document addressed to:

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA  
IN AND FOR THE COUNTY OF WASHOE

MEI-GSR HOLDINGS, LLC, a  
Nevada corporation, dba GRAND  
SIERRA RESORT,

Case No.: CV13-01704

Dept. No.: 7

Plaintiff,

vs.

PEPPERMILL CASINOS, INC., a  
Nevada corporation, dba  
PEPPERMILL CASINO; et al.,

Defendants.

**ORDER**

Before the Court are Plaintiff MEI-GSR HOLDINGS, LLC's (hereafter "GSR") *Motion to Compel Disclosure of Documents Pursuant to Requests for Production*, filed March 4, 2015; Defendant PEPPERMILL CASINOS INC.'s (hereafter "Peppermill") *Motion to Disclose and Use Confidential Evidence*, filed March 5, 2015; Plaintiff's *Motion for Leave to File a Motion for Reconsideration of the Dismissal of Ryan Tors without Prejudice*; and Defendant's *Motion for Protective Order re: Expert Witness Notices*, filed April 6, 2015. On March 19, 2015, Plaintiff filed an *Opposition to the Motion to Disclose and Use Confidential Evidence*. On March 23, 2015, Defendants filed an *Opposition to the Motion to Compel* and a *Reply* in support of the *Motion to Disclose* on March 23, 2015. On March 30, Plaintiff filed a *Reply* in support of the *Motion to Compel*. On April 1, 2015,

1 Defendant filed an *Opposition* to the *Motion for Reconsideration* and on April 8,  
2 2015, Plaintiff filed a *Reply* in support thereof. On April 20, 2015, the Court heard  
3 oral arguments on the *Motion to Compel* and the *Motion to Disclose*. On April 21,  
4 2015, Defendant filed a request for submission and proposed order regarding the  
5 *Motion for Protective Order re: Expert Witness Disclosures*. That same day, Plaintiff  
6 filed a *Motion to Strike* that request for submission. This *Order* follows.

### 7 Summary

8 The facts of this case have been well-briefed. GSR brought suit against  
9 Peppermill alleging that Peppermill, through its agent Ryan Tors, surreptitiously  
10 accessed trade secret par values contained in gaming machines at the GSR and  
11 thereafter used that information to its advantage in violation of the uniform trade  
12 secret act. On March 9, 2015, the Court granted Peppermill's motion to dismiss  
13 Ryan Tors from the action without prejudice. The close of discovery was April 16,  
14 2015.

### 15 Analysis

#### 16 **1. Motion for Protective Order**

17 Upon close review of the docket, it appears that Plaintiff's time to oppose the  
18 Defendant's *Motion for Protective Order re: Expert Witness Notices*, filed April 6,  
19 2015, has not yet expired. While the Court had indicated at the April 20, 2015,  
20 hearing that it was prepared to rule on the motion, it will forgo disposition until the  
21 matter is fully briefed. Plaintiff has until April 23, 2015, to file a response pursuant  
22 to WDCR 13(3). Plaintiff's *Motion to Strike* Defendant's request for submission of  
23 the *Motion for Protective Order*, filed April 21, 2015, is granted.

#### 24 **2. Motion to Compel Disclosure of Documents Pursuant to Requests** 25 **for Production**

26 At hearing on the *Motion to Compel*, it was apparent that the parties might  
27 come to some agreement as to what has and has not already been disclosed in this  
28 case and as to what might constitute reasonable disclosures within the parameters

1 of the discovery rules. The parties are directed to meet and confer within ten days  
2 of this order and to clarify and narrow the requests at issue so as to enable  
3 Defendant to promptly comply therewith. The discovery period will be reopened for  
4 ten days following the meet and confer for the limited purpose of allowing those  
5 disclosures. The Court notes that Plaintiff's counsel Mr. Johnson's recent  
6 unavailability may impede communication on these issues. The parties are strongly  
7 encouraged to arrange the meet and confer so as to include him if at all possible.

8 The Court further notes that Defendant received the First Request for  
9 Production of Documents at issue on November 10, 2014. Responses were due on  
10 December 15, 2014. Defendant did not respond to the requests until January 21,  
11 2015. At the hearing, counsel for Defendant was asked to address the untimeliness  
12 of the disclosures but no explanation was offered. Absent that delay, this matter  
13 might have been resolved earlier, saving everyone time and expense. In recognition  
14 of this, Defendant is hereby ordered to pay \$2,500 to the Plaintiff as a sanction  
15 pursuant to NRCP 37(a)(4).

### 16 **3. Motion to Disclose and Use Confidential Evidence**

17 On March 4, 2015, the General Manager of the GSR inadvertently emailed a  
18 17 page PDF containing sensitive financial information to the private email of an  
19 acquaintance now working as Corporate Executive Director of Marketing for the  
20 Peppermill. On March 5, 2015, Peppermill filed a motion asking that it be allowed  
21 to disclose and use that information in the instant case. It argues that the financial  
22 information is probative of GSR's practices with respect to protecting sensitive  
23 business information, including the par values that GSR contends constitute trade  
24 secrets in this case.<sup>1</sup>

25 Under NRS 48.035, even relevant evidence is not admissible if its probative  
26 value is substantially outweighed by the danger of unfair prejudice, confusion of the  
27

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28 <sup>1</sup> In establishing that the par values are trade secrets, Plaintiff will be required to show that they are  
"subject to reasonable efforts to maintain [their] secrecy."

1 issues, or of misleading the jury. Two items are at issue here: 1) the fact that  
2 financial information was sent to the wrong email address, and 2) the information  
3 itself. Here, neither is particularly relevant, and both (particularly the latter) pose  
4 a significant risk of creating undue prejudice and confusion. At issue in this case  
5 are the steps GSR took to protect the par values stored within its slot machines.  
6 NRS 600A.030(5)(b). Other than this recent incident, there is no evidence of a  
7 pattern of such revelations by Plaintiff. To permit the jury to receive evidence of  
8 this isolated incident to the jury would be very prejudicial to the Plaintiff.  
9 Additionally, any discussion of unrelated financial information and the fact of a  
10 single inadvertent disclosure thereof is minimally probative, at best. Weighing the  
11 competing interests, the court will bar this evidence. NRS 48.035. Defendant's  
12 *Motion to Use and Disclose Confidential Evidence* is denied.

#### 13 **4. Motion to Reconsider the Dismissal of Ryan Tors**

14 GSR asks that the Court reconsider its March 9, 2015 order dismissing Ryan  
15 Tors from this case without prejudice. A decision may be reconsidered only in those  
16 rare instances in which substantially different evidence is subsequently introduced  
17 or the decision is clearly erroneous. *Masonry & Tile Contractors Ass'n of S. Nevada*  
18 *v. Jolley, Urga, & Wirth*, 113 Nev. 737 (1997). In the Court's prior order, it  
19 determined that Peppermill's indemnification agreement with Ryan Tors rendered  
20 his participation in the suit meaningless and that, in the interests of judicial  
21 economy pursuant to NRCP 1, he should be dismissed. GSR now argues that that  
22 holding was clearly in error. It argues that Peppermill is now attempting to evade  
23 liability for Tors' conduct and that the original indemnification agreement is  
24 illusory. It also argues that Tors' dismissal amounts to an unjust forced settlement.

25 The Court's original findings do not appear to be clearly erroneous. Contrary  
26 to GSR's assertions, Peppermill has not attempted to take positions contrary to its  
27 earlier agreement that it was liable for Tors' actions under *respondeat superior*.  
28 Moreover, GSR's arguments that the dismissal amounts to a forced settlement or

1 that the indemnification agreement is illusory are unpersuasive.

2 Tors' continuing presence in this case would benefit none of the parties and  
3 only serve to consume additional resources for all involved. The Court has  
4 authority to manage cases before it in the interests of economy and efficiency under  
5 NRC 1. GSR has presented no new evidence or arguments indicating that the  
6 exercise on that discretion on this issue was in error. Accordingly, GSR's *Motion for*  
7 *Reconsideration of the Dismissal of Ryan Tors without Prejudice* is denied.

8 **CONCLUSION**

9 Based on the foregoing, Plaintiff's *Motion to Strike* the request for submission  
10 of the *Motion for Protective Order re: Expert Witness Disclosures* is **GRANTED**.  
11 Defendant's *Motion to Use and Disclose Confidential Evidence* is **DENIED**.  
12 Plaintiff's *Motion to Reconsider the Dismissal of Ryan Tors without Prejudice* is  
13 **DENIED**. As to Plaintiff's *Motion to Compel Disclosure of Documents Pursuant to*  
14 *Request for Production*, the parties are ordered to meet and confer on the matter  
15 within ten days of this order to clarify and narrow the requests so as to enable  
16 Defendant to produce all relevant information as requested. The discovery deadline  
17 will be opened for an additional ten days beyond the date of the meet and confer for  
18 the limited purpose of allowing Defendant to produce documents in response to  
19 those requests. Defendant is further ordered to pay \$2,500 to Plaintiff in sanction  
20 for failure to timely respond to a discovery request.

21 **IT IS SO ORDERED.**

22 **DATED** this 23 day of April, 2015.

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25 **PATRICK FLANAGAN**  
26 District Judge  
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Kent Robison, Esq., for Peppermill Casinos, Inc.;  
H. Johnson, Esq., for MEI-GSR Holdings, LLC;  
Mark H. Gunderson, Esq., for Ryan Tors;

Kathryn Lino  
Judicial Assistant

1 CODE NO. 1945

2  
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5  
6 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

7 IN AND FOR THE COUNTY OF WASHOE

8 \* \* \*

9 MEI-GSR HOLDINGS, LLC, a Nevada corporation,  
10 d/b/a GRAND SIERRA RESORT,

11 Plaintiff,

Case No. CV13-01704

12 vs.

Dept. No. B7

13 PEPPERMILL CASINOS, INC., a Nevada  
corporation, d/b/a PEPPERMILL CASINO, et al.,

14 Defendants.  
15 \_\_\_\_\_/

16 **RECOMMENDATION FOR ORDER**

17 The background of this action is set forth in greater detail in previous decisions from the  
18 Court. Presently before the Court is a *Counter-Motion to Compel Discovery of Emails*, filed on  
19 November 20, 2015, by Plaintiff MEI-GSR Holdings, LLC.<sup>1</sup> *Peppermill's Opposition to GSR's*  
20 *Counter-Motion to Compel Discovery of Emails* was filed on December 11, 2015, by Defendant  
21 Peppermill Casinos, Inc. Plaintiff's *Reply in Support of Plaintiff's Counter-Motion to Compel*  
22 *Discovery of Emails* was filed on December 14, 2015, and the motion was submitted for decision on  
23 December 15, 2015.

24 \_\_\_\_\_  
25 <sup>1</sup> The full title of the document filed by Plaintiff is *Opposition to Defendant's Motion to Compel Electronically*  
26 *Stored Information Search and Counter-Motion to Compel Discovery of Emails*. The referenced motion to compel has  
been fully briefed and submitted for decision. However, in light of the impending trial, Defendant Peppermill Casinos, Inc.,  
informed the Court on December 22, 2015, that it is withdrawing that motion, subject to its right to resubmit the motion if  
trial is continued.

1           A.     Background

2           This action arises out of allegations that Ryan Tors, acting on behalf of Defendant, entered  
3 Plaintiff's premises for the specific purpose of accessing the diagnostic and payback percentages of  
4 certain slot machines. On July 12, 2013, the date that Mr. Tors was detained on Plaintiff's premises,  
5 the Nevada Gaming Control Board ("GCB") initiated an investigation into these allegations. In a  
6 letter to Defendant dated July 15, 2015, GCB requested that Defendant produce, inter alia, "[a]ll  
7 internal and external electronic (email) correspondence in which employee Ryan Tors was the  
8 author, recipient or 'copied to' recipient, from July 15, 2012 to present."<sup>2</sup> On July 17, 2013, a  
9 compact disc containing documents from Mr. Tors' email account from July 2012 to July 2013 was  
10 provided to GCB.

11           On July 31, 2013, GCB representatives provided Defendant with a letter containing the  
12 following request:

13           You are requested to provide the email data for the following individuals:

14                 Mr. Ryan Tors, Corporate Analyst  
15                 Mr. John Hanson, Casino General Manager  
16                 Mr. Dave McHugh, Slot Director  
                  Mr. Dave Halabuk, Marketing Director (former)  
                  Mr. William Paganetti, Jr., Licensee  
                  Mr. William Paganetti, Director of Marketing

17           The email correspondence for the above named individuals shall be provided for the  
18 19 month period from January 1, 2012 to July 25, 2013. This will be in .PST format if  
applicable and will include all attachments, task list, and the recursive folder structure  
and archived content. If the network email structure is not an MS Exchange Server,  
then the equivalent format and content shall be provided.

19           The collected information shall be copied to external media provided by the NGCB.  
20           The collection of data shall be under the direct supervision of the NGCB Agent  
presenting this document.

21           On July 31, 2013, and August 2, 2013, GCB acquired the requested email data by downloading it to  
22 an external hard drive.

23           As a result of its investigation, GCB filed a complaint (initiating a proceeding designated as  
24 "NGC 13-23") against Defendant (and others) with the Nevada Gaming Commission ("NGC"),  
25 alleging various violations of Nevada gaming laws relating to Mr. Tors' conduct at Plaintiff's property

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26           <sup>2</sup> GCB had already obtained access to Mr. Tors' office on July 12, 2013, and they took Mr. Tors' computer on July 13, 2013.



1 and several other gaming establishments in Nevada. In a “Stipulation for Settlement and Order”  
2 entered into on February 13, 2014, Defendant admitted each allegation of the GCB complaint and  
3 agreed to pay a substantial fine. NGC approved this settlement on February 20, 2014.

4 This lawsuit was commenced on August 2, 2013. On June 16, 2014, Plaintiff filed a *Motion*  
5 *for Order Directing the Nevada Gaming Control Board to Produce All Documents and Other*  
6 *Evidence Pertaining to NGC 13-23*. Essentially, Plaintiff sought from GCB all documents and  
7 electronically stored information (“ESI”) created or obtained in the course of the investigation  
8 described above. The motion was opposed by Defendant, GCB, and NGC, and the Court ultimately  
9 denied that request in its order of October 7, 2014, confirming a *Recommendation for Order* filed on  
10 September 26, 2014. That motion was denied based upon an analysis of various factors. With  
11 regard to one factor—the relevance of information obtained by GCB—the Court recognized that  
12 GCB investigatory materials undoubtedly contained relevant information. But it also observed that  
13 some materials obtained by GCB might not be discoverable: “In the course of its investigation, the  
14 GCB might have requested and obtained information, documents, and ESI that fall outside the  
15 scope of discovery under NRCP 26(b)(1), or that might be protected from disclosure in civil litigation  
16 for various reasons.”

17 On November 10, 2014, Plaintiff served Defendant with a request for production of  
18 documents which included a request for “[a]ll documents provide[d] to the Nevada Gaming Board  
19 and/or Nevada Gaming Commission as part of the investigation of NGC 13-23.” The deadline for  
20 service of Defendant’s written response to that request was December 15, 2014; however, no  
21 response was served on or before that deadline, and no extension of time for service of that  
22 response was either provided by Plaintiff or granted by the Court.<sup>3</sup> On January 7, 2015, Plaintiff’s  
23 counsel sent an email to Defendant’s counsel about the need for a discovery dispute conference.

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24 <sup>3</sup> Defendant observes that after receiving Plaintiff’s request for production, its counsel presented to Plaintiff’s  
25 counsel the idea of creating and implementing an ESI protocol as an alternative to costly and contentious piecemeal  
26 document requests. Defendant also represents that Plaintiff’s counsel seemed receptive to the idea. However, no writing  
has been provided to the Court in which Plaintiff directly or indirectly agreed to extend the deadline for service of  
Defendant’s written response to the request for production. In that regard, the Court will not enforce any purported  
agreement by the parties “unless the same shall, by consent, be entered in the minutes in the form of an order, or unless  
the same shall be in writing subscribed by the party against whom the same shall be alleged, or by his attorney.” See DCR  
16.

1 On the subject of the request for production, Plaintiff's counsel stated that "[t]here is no need for  
2 discussion concerning the Peppermill's responses to the request for production since the responses  
3 were due on December 15, 2014 and no response has been served to date, thereby waiving all  
4 objections to the same." Nevertheless, on January 21, 2015, Defendant served its response to the  
5 first request for production. In its objections to the request quoted above, Defendant complained  
6 that the request encompassed information about other casinos in Northern Nevada, and that GCB  
7 obtained much information that has no bearing on any issue in this action.

8 On March 4, 2015, Plaintiff filed *Plaintiff's Motion to Compel Disclosure of Documents*  
9 *Pursuant to Requests for Production*. Plaintiff argued, inter alia, that Defendant's failure to serve a  
10 timely response waived all objections to its requests. In its opposition, Defendant argued the merits  
11 of its objections, in addition to other points. On April 6, 2015, the Court ordered a hearing on this  
12 motion, which took place on April 20, 2015. In its written order of April 23, 2015, the Court observed  
13 that Defendant failed to timely respond to the request for production, and sanctioned Defendant in  
14 the amount of \$2,500. Significantly, however, the Court did not find that Defendant's objections  
15 were waived. Instead, it ruled, in pertinent part, as follows:

16 At hearing on the *Motion to Compel*, it was apparent that the parties might come to  
17 some agreement as to what has and has not already been disclosed in this case and  
18 as to what might constitute reasonable disclosures within the parameters of the  
19 discovery rules. The parties are directed to meet and confer within ten days of this  
20 order and to clarify and narrow the requests at issue so as to enable Defendant to  
21 promptly comply therewith. . . .

22 Thus, the Court expressly directed that the requests be clarified and narrowed, rather than finding  
23 that all objections were waived and simply directing Defendant to produce all requested documents.<sup>4</sup>

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24 <sup>4</sup> This directive was in keeping with a concern raised by the Court during the hearing, regarding the breadth of  
25 Plaintiff's requests (found at Pages 6-7 of the hearing transcript):

26 Well, one of the concerns, I think, anybody would have, if you look at the definitions, and I'm looking at  
information, it includes, quote, any information of any nature obtained by Ryan Tors or any other  
employee or agent of the defendant in which Ryan Tors accessed any gaming machines of any casino in  
the last five years to obtain par or other information through the diagnostic screen or other means of  
access, excluding any machines owned by—excluding the Peppermill's machines. The request for any  
information of any nature seems rather broad, doesn't it?

1 On May 1, 2015, counsel conferred about the request for production. In an emailed letter to  
2 Plaintiff's counsel dated May 4, 2015, Defendant's counsel stated that the parties had reached  
3 apparent agreement regarding Defendant's need to produce additional documents in response to  
4 various categories of that request. Apparently, no agreement was reached on the need to produce  
5 documents regarding the request for "[a]ll documents provide[d] to the Nevada Gaming Board and/or  
6 Nevada Gaming Commission as part of the investigation of NGC 13-23."<sup>5</sup> During a conference call  
7 between counsel and the Court on May 4, 2015, Defendant's counsel stated that the parties had  
8 agreed on the production of documents, aside from whether Defendant must produce highly  
9 sensitive information to Plaintiff involving other casinos not involved in this litigation (according to the  
10 Court minutes of that conference call). The parties were told that a hearing would be held on May 8,  
11 2015, to allow the Court to receive expert testimony regarding this request. On May 7, 2015,  
12 however, the Court was contacted and advised by counsel that the hearing could be vacated.

13 Thereafter, counsel for both sides explored the possibility that they might agree upon a  
14 protocol to search Defendant's email servers for documents sought by Plaintiff. In that regard, the  
15 initial protocol proposed by Defendant's counsel was deemed too narrow by Plaintiff. At a discovery  
16 dispute conference on July 10, 2015, Plaintiff's counsel agreed to provide Defendant's counsel with  
17 an alternative word search protocol.

18 In an emailed letter to Plaintiff's counsel dated July 23, 2015, Defendant's counsel  
19 represented that Defendant could replicate the process followed by GCB when it originally obtained  
20 Defendant's emails in 2013, and thereby compile all emails that were obtained by GCB. Counsel  
21 reiterated concerns raised previously that the emails obtained by GCB—that is, all emails to and  
22 from six individuals—would "include and pertain to matters completely unrelated to this litigation."  
23 To that end, he reasserted the need for a word search protocol to obtain discoverable information.

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24 <sup>5</sup> In that letter, Defendant's counsel states as follows with regard to this request:

25 Denise Vessie [i.e., Defendant's Executive Vice President] testified that documents were not "provided"  
26 to the Nevada Gaming Control Board as part of its investigation of NGC 13-23. She testified that the  
Gaming Control Board took computers and later returned them. There was no exercise by the  
Peppermill of providing copies of anything to the NGCB.

1 In a letter to Defendant's counsel dated July 31, 2015, Plaintiff's counsel provided a word  
2 search protocol. Defendant's counsel found several of the proposed terms to be too broad, and  
3 counsel held another discovery dispute conference on August 11, 2015. In a letter to Plaintiff's  
4 counsel of that same date, Defendant's counsel again stated his concerns that some of the emails  
5 obtained by GCB are beyond the scope of discovery, and added that those emails might also raise  
6 confidentiality concerns of nonparties. He offered to allow Plaintiff's counsel to review the email  
7 collection in native (i.e., .pst) format at the offices of Defendant's counsel. After Plaintiff's counsel  
8 identified specific emails for production, those emails would be reviewed by Defendant's counsel for  
9 responsiveness and privileged status. Ultimately, requested emails would be produced, with any  
10 necessary objections and redactions, and an accompanying privilege log.

11 In a letter faxed to Defendant's counsel on August 13, 2015, Plaintiff's counsel maintained  
12 that information about other casinos is not beyond the scope of discovery, and that Defendant lacks  
13 standing to raise privacy objections on behalf of nonparties. He also sought clarity on whether the  
14 email collection represented all emails obtained by GCB, or just certain emails selected by  
15 Defendant. In a response letter emailed on August 17, 2015, Defendant's counsel confirmed that  
16 the parties had reached agreement on a process for inspecting the email, and stated his belief that  
17 the collection includes all emails obtained by GCB in 2013. He continued to oppose the request for  
18 emails concerning other casinos and those raising privacy concerns of nonparties. Plaintiff's  
19 counsel faxed a response letter to Defendant's counsel on August 26, 2015, in which he maintained  
20 that all objections have been waived. He also maintained that Plaintiff is entitled to data pertaining  
21 to Defendant's "customers, employees, vendors, personal matters, and banking activities, so long as  
22 the material is reasonably calculated to lead to the discovery of admissible evidence." Finally, he  
23 disavowed any agreement that emails would be reviewed at the offices of Defendant's counsel.

24 The email collection was available for review by Plaintiff's counsel in September 2015.  
25 Presumably because he believed that those emails should be provided directly to him (rather than  
26 made available for his review at the offices of Defendant's counsel), Plaintiff's counsel did not review

1 those emails in September or October. However, on November 4, 2015, Plaintiff's counsel spent  
2 approximately one hour reviewing the emails at the offices of Defendant's counsel, and taking notes  
3 about emails he thought were relevant. After Defendant filed a motion to compel (on November 2,  
4 2015), Plaintiff brought this countermotion to compel on November 20, 2015.

5 B. Discussion

6 In this motion, Plaintiff maintains that it is entitled to all of the .pst email files, and any other  
7 documents or ESI, taken by or provided to GCB in the course of its investigation concerning NGC  
8 13-23. Without question, the scope of discovery is broad—it potentially extends to any matter, not  
9 privileged, which is relevant to the subject matter involved in the pending action. See NRCP  
10 26(b)(1). But notwithstanding the broad scope of NRCP 26(b)(1), “discovery, like all matters of  
11 procedure, has ultimate and necessary boundaries.” See Oppenheimer Fund, Inc. v. Sanders, 437  
12 U.S. 340, 351 (1978); Hickman v. Taylor, 329 U.S. 495, 507 (1947). “Where it is sought to discover  
13 information which can have no possible bearing on the determination of the action on its merits, it  
14 can hardly be within the rule.” Washoe Cnty. Bd. of Sch. Trs. v. Pirhala, 84 Nev. 1, 5, 435 P.2d 756,  
15 758 (1968) (quoting Jeppesen v. Swanson, 68 N.W.2d 649, 657 (Minn. 1955)); see also Schlatter v.  
16 Dist. Court, 93 Nev. 189, 192, 561 P.2d 1342, 1343-44 (1977) (“Respondent court . . . exceeded its  
17 jurisdiction by ordering disclosure of information neither relevant to the tendered issues nor leading  
18 to discovery of admissible evidence”). In fact, a court may properly deny a party access even to  
19 relevant and nonprivileged material under appropriate circumstances. See NRCP 26(b)(2), (c).

20 GCB's requests for materials from Defendant were not subject to or restricted by NRCP  
21 26(b)(1). Because GCB obtained all emails from the six individuals described above for a nineteen-  
22 month period, without regard to subject matter, GCB certainly obtained emails (and perhaps other  
23 documents and ESI) that are outside the scope of discovery established by NRCP 26(b)(1).  
24 Significantly, the Court previously raised relevancy concerns when Plaintiff attempted to obtain  
25 investigatory materials directly from GCB, and during the hearing on April 20, 2015. Manifestly,  
26 Plaintiff is not entitled to materials that fall outside the scope of discovery.

1 Plaintiff has consistently emphasized that Defendant waived any objection to this request  
2 when it failed to serve a timely response.<sup>6</sup> This argument was raised in connection with Plaintiff's  
3 motion to compel of March 4, 2015, and at the hearing on April 20, 2015. Notwithstanding the oral  
4 and written points and authorities presented by Plaintiff, the Court did not rule that Defendant had  
5 waived all objections to the request for production, or that it was required to produce the materials  
6 requested by Plaintiff; indeed, the Court did not grant Plaintiff's motion.<sup>7</sup> Moreover, as stated above,  
7 the Court expressed concern about the breadth of Plaintiff's requests.

8 To be sure, a party who fails to assert timely objections generally waives its right to assert  
9 those objections.<sup>8</sup> Further, an objection based upon relevance can be waived. See, e.g., Snyder Oil  
10 Corp. v. Samedan Oil Corp., 208 F.3d 521, 527 n.8 (5th Cir. 2000); Fifty-Six Hope Road Music, Ltd.  
11 v. Mayah Collections, Inc., No. 2:05-cv-01059-KJD-GWF, 2007 WL 1726558, at \*10 (D. Nev. June

12 <sup>6</sup> In addition, Plaintiff argues that Defendant was affirmatively required by NRCP 16.1(a)(1)(B) to produce all  
13 materials provided to or taken by GCB in its investigation. For reasons explained at Pages 8-12 in the *Recommendation*  
14 *for Order* filed on September 19, 2014 (which, in part, concerned a request for "documents concerning Ryan Tors which  
15 were produced to the Gaming Board"), the Court rejects that argument. As explained therein, the Court construes NRCP  
16 16.1(a)(1) as requiring a party to identify or produce only information and documents that it may use in the case. In any  
17 event, as explained in the text, GCB's requests for materials from Defendant were not subject to or restricted by NRCP  
18 26(b)(1), and they therefore encompassed materials that are beyond the scope of discovery established by NRCP  
19 26(b)(1). In that regard, no interpretation of NRCP 16.1(a)(1) has ever required a party to produce or identify documents  
20 that are beyond the scope of NRCP 26(b)(1).

21 <sup>7</sup> In its countermotion to compel, Plaintiff states that "[o]n April 23, 2015, this Court granted GSR's first motion to  
22 compel discovery." That statement is not correct. The Court's order of April 23, 2015, addressed four pending matters. In  
23 the "Conclusion" of that order, the Court expressly granted a motion to strike; denied a motion to use and disclose  
24 confidential evidence; and denied a motion for reconsideration. With regard to the motion to compel, the Court did not  
25 grant or deny the motion; rather, it stated as follows:

26 As to Plaintiff's *Motion to Compel Disclosure of Documents Pursuant to Request for Production*, the  
parties are ordered to meet and confer on the matter within ten days of this order to clarify and narrow  
the requests so as to enable Defendant to produce all relevant information as requested. The discovery  
deadline will be opened for an additional ten days beyond the date of the meet and confer for the limited  
purpose of allowing Defendant to produce documents in response to those requests. Defendant is  
further ordered to pay \$2,500 to Plaintiff in sanction for failure to timely respond to a discovery request.

<sup>8</sup> On May 22, 2015, the Discovery Commissioner issued a *Recommendation for Order* regarding a motion for  
protective order filed by Defendant on April 10, 2015. That decision addressed Defendant's request for an order barring  
Plaintiff from discovery of "any information or documents relevant to the time period before GSR was issued a gaming  
license," based on the argument that Plaintiff could not recover damages for misappropriation of trade secrets to the extent  
that the alleged wrongful acts occurred before Plaintiff obtained its gaming license. In that regard, the only discovery  
request identified by Defendant as giving rise to a need for protection was Plaintiff's first request for production of  
documents. In part, Defendant's motion was denied on the ground that "[t]he failure to serve a timely written response to  
the request for production generally constitutes a waiver of any objection to the categories of that request." But the  
Discovery Commissioner was not asked to address the parties' dispute regarding the request for "[a]ll documents  
provide[d] to the Nevada Gaming Board and/or Nevada Gaming Commission as part of the investigation of NGC 13-23"—  
an entirely different question from the one presented, and one that might therefore have resulted in a different outcome.  
As explained in the text, *infra*, a party's waiver of the right to assert objections does not necessarily require the court to  
enforce the underlying discovery request.

11, 2007). But notwithstanding a party's waiver of all objections through the failure to serve a timely written response, the Court may decline to enforce requests that it finds to be patently objectionable. See, e.g., Meche v. Maintenance Dredging, Inc., Civil Action No. 10-3653, 2012 WL 519882, at \*2 (E.D. La. Feb. 16, 2012); Fifty-Six Hope Road Music, 2007 WL 1726558, at \*4; Rintchen v. Walker, No. CIV. A. 95-CV-6861, 1996 WL 238701, at \*1 (E.D. Pa. May 7, 1996); Krewson v. City of Quincy, 120 F.R.D. 6, 7 (D. Mass. 1988); Williams v. Krieger, 61 F.R.D. 142, 145 (S.D.N.Y. 1973). While parties generally should expect to bear the consequences when they fail to assert timely objections to discovery requests, the Court need not give the requesting parties an improper and unfair discovery windfall, particularly when the discovery requests may implicate the rights of nonparties.

Had the Court accepted Plaintiff's position that it was entitled to all emails and other materials obtained by or provided to GCB in the course of its investigation, it could have simply granted Plaintiff's motion to compel in the order of April 23, 2015. Instead, the parties were directed to confer "to clarify and narrow the requests so as to enable Defendant to produce all relevant information as requested" (emphasis added). This directive is a clear indication that the Court found Plaintiff's request for these materials to be beyond the bounds of proper discovery.<sup>9</sup> Indeed, the Court is constrained to reject the proposition that every email to or from the six individuals identified previously, that was received or sent during the nineteen-month period specified in GCB's request, is necessarily relevant to this action irrespective of subject matter or context. Likewise, it cannot accept that every conceivable mention of other casinos and nonparties is relevant. Because ESI obtained by GCB was not constrained by NRCP 26(b)(1), and certainly encompassed matters that are beyond the scope of discovery, the Court is not required to enforce Plaintiff's request, notwithstanding Defendant's waiver of objections.<sup>10</sup>

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<sup>9</sup> This conclusion is supported by the Court's recent order (entered on December 22, 2015) granting a motion in limine filed by Defendant to preclude and prevent testimony concerning the par values of other casinos.

<sup>10</sup> In its reply brief, Plaintiff also emphasizes that Defendant's concerns about confidentiality and privacy are completely unfounded, in light of the parties' confidentiality agreement of July 17, 2014. But an agreement to safeguard the confidentiality of information provided in discovery proceedings presupposes that the information produced will fall within the scope of NRCP 26(b)(1). The fact that information will be protected does not create a right of access to irrelevant information. In addition, Plaintiff suggests that any right to withhold emails containing confidential or private material was lost when Defendant allowed Plaintiff's counsel to review the entire collection of emails. But Plaintiff

1 Of course, GCB undoubtedly obtained much material from Defendant in 2013 that is relevant  
2 to this action. But as the party requesting discovery, Plaintiff was obligated to state its request with  
3 reasonable particularity. See NRCP 34(b)(1)(A). As explained above, the request for all materials  
4 obtained by or provided to GCB in connection with its investigation was not stated with reasonable  
5 particularity. Although the party responding to a request for production must permit inspection of  
6 requested documents to the extent that the request is not objectionable, see id. 34(b)(2)(C),  
7 Defendant has complied with this requirement. Since December 2014, Defendant has proposed  
8 using ESI experts and a word search protocol to locate relevant emails, which would then be  
9 produced to the extent that they are not protected from disclosure.

10 The Court appreciates that Plaintiff perceived Defendant's proposed word search protocol as  
11 too narrow. Assuming, arguendo, that Plaintiff's perception was correct, Plaintiff was obligated to  
12 present this dispute to the Court for resolution in a timely manner. The proper course would have  
13 been to contact the Court in August 2015 to advise it that the parties were not able to resolve their  
14 disagreement over whether Defendant must produce irrelevant and sensitive information to Plaintiff  
15 regarding nonparties, including other casinos, and to request a hearing so that the dispute could be  
16 resolved. Yet the record shows that Plaintiff waited approximately three months to file a motion on  
17 this issue, and that the countermotion was only filed after Defendant filed its own motion to compel.  
18 No sufficient explanation has been provided to explain this delay, which was significant in light of the  
19 impending trial date.<sup>11</sup>

20  
21 concedes that its counsel saw only a tiny fraction of that collection, and Plaintiff has not identified any particular email seen  
22 by its counsel that Defendant maintains is protected from disclosure. More important, the decision to allow Plaintiff's  
counsel to see an irrelevant email does not thereby entitle Plaintiff to an order compelling production of that irrelevant  
email, or any other irrelevant emails.

23 <sup>11</sup> In fact, in the *Stipulation and Order to Continue Trial and Amend Pretrial and Scheduling Orders* entered on  
24 July 20, 2015, the Court ordered that "[a]ny motions which would be addressed prior to trial . . . shall be served, filed and  
25 submitted for decision no later than Friday, December 11, 2015." Plaintiff's countermotion was not submitted until  
26 December 15, 2015, in violation of this order. The countermotion was also filed in violation of WDCR 10(9), which provides  
that "[a]ny motion, opposition, reply, etc., must be filed as a separate document unless it is pleaded in the alternative." The  
relief sought in Plaintiff's countermotion is not an "alternative" to its opposition to Defendant's motion to compel filed on  
November 2, 2015; it is a separate request for relief, and was therefore required to be filed separately. The Court routinely  
denies motions that are filed in violation of WDCR 10(9) (although typically the denial is without prejudice to a party's ability  
to refile the motion separately).



1 Based upon the foregoing, the Court finds that the materials sought by Plaintiff in its  
2 countermotion to compel contain information that is beyond the scope of permissible discovery  
3 under NRCP 26(b)(1). Notwithstanding Defendant's waiver of objections to Plaintiff's request for  
4 production, the Court finds that Plaintiff is not entitled to that irrelevant information. To the extent  
5 that the materials sought by Plaintiff contain relevant information, the Court finds that Plaintiff has  
6 had ample opportunity by discovery in this action to obtain the information sought, and it therefore  
7 declines to order Defendant's production of that information with trial only nine business days away.  
8 See NRCP 26(b)(2)(ii).

9 ACCORDINGLY, Plaintiff's *Counter-Motion to Compel Discovery of Emails* should be  
10 DENIED.

11 DATED: This 28<sup>th</sup> day of December, 2015.

12  
13   
14 WESLEY M. AYRES  
15 DISCOVERY COMMISSIONER  
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1 **CERTIFICATE OF SERVICE**

2 CASE NO. CV13-01704

3 I certify that I am an employee of the SECOND JUDICIAL DISTRICT COURT of the STATE  
4 OF NEVADA, COUNTY OF WASHOE; that on the 28<sup>th</sup> day of December, 2015, I electronically filed  
5 the **RECOMMENDATION FOR ORDER** with the Clerk of the Court by using the ECF system.

6 I further certify that I transmitted a true and correct copy of the foregoing document by the  
7 method(s) noted below:

8 **Electronically filed with the Clerk of the Court by using the ECF system which will send a**  
9 **notice of electronic filing to the following:**

10 H. STAN JOHNSON, ESQ. for MEI-GSR HOLDINGS, LLC

11 MARK DOUGLAS WRAY, ESQ. for MEI-GSR HOLDINGS, LLC

12 KENT RICHARD ROBISON, ESQ. for PEPPERMILL CASINOS, INC.

13 KEEGAN GRAHAM LOW, ESQ. for PEPPERMILL CASINOS, INC.

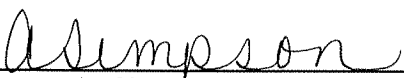
14 THERESE M. SHANKS, ESQ. for PEPPERMILL CASINOS, INC.

15 SCOTT L. HERNANDEZ, ESQ. for PEPPERMILL CASINOS, INC.

16 **Deposited in the Washoe County mailing system for postage and mailing with the United**  
17 **States Postal Service in Reno, Nevada:**

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25   
26 Annemarie Simpson  
Administrative Secretary

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA  
IN AND FOR THE COUNTY OF WASHOE

MEI-GSR HOLDINGS, LLC, a  
Nevada corporation, dba GRAND  
SIERRA RESORT,

Case No.: CV13-01704

Dept. No.: B7

Plaintiff,

vs.

PEPPERMILL CASINOS, INC., a  
Nevada corporation, dba  
PEPPERMILL CASINO, et al.,

Defendants.

**ORDER**

**Procedural History**

On November 25, 2015, Plaintiff, MEI-GSR HOLDINGS, LLC, dba GRAND SIERRA RESORT, hereafter Grand Sierra Resort (GSR), filed its *Motion for Case Concluding Sanctions for Violation of Discovery Orders (Pursuant to NRCP 37)*. On December 11, 2015, Defendant, PEPPERMILL CASINOS, INC., dba PEPPERMILL CASINO, filed its *Opposition to GSR's Motion for Case Concluding Sanctions for Violation of Discovery Orders (Pursuant to NRCP 37)*. On December 15, 2015, GSR filed its *Reply* and submitted the matter for decision.

Having reviewed the papers and pleadings on file herein, and good cause appearing,

**IT IS HEREBY ORDERED** that:

GSR's *Motion for Case Concluding Sanctions for Violation of Discovery Orders (Pursuant to NRCP 37)* is hereby **DENIED**.

**DATED** this 23 day of December, 2015.

Patrick Flanagan  
PATRICK FLANAGAN  
District Judge


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2  
3 **CERTIFICATE OF SERVICE**

4 Pursuant to NRCP 5(b), I hereby certify that I am an employee of the Second  
5 Judicial District Court of the State of Nevada, County of Washoe; that on this  
6 23 day of December, 2015, I electronically filed the following with the Clerk of  
7 the Court by using the ECF system which will send a notice of electronic filing to  
8 the following:

9 Stan Johnson, Esq. for MEI-GSR Holdings, LLC;

10 Kent Robison, Esq. for Peppermill Casinos, Inc.; and

11 I deposited in the County mailing system for postage and mailing with the  
12 United States Postal Service in Reno, Nevada, a true copy of the attached document  
13 addressed to:

14  
15   
16 Judicial Assistant  
17  
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28

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA  
IN AND FOR THE COUNTY OF WASHOE

MEI-GSR HOLDINGS, LLC, a  
Nevada corporation, dba GRAND  
SIERRA RESORT,

Case No.: CV13-01704

Dept. No.: 7

Plaintiff,

vs.

PEPPERMILL CASINOS, INC., a  
Nevada corporation, dba  
PEPPERMILL CASINO; et al.,

Defendants.

**ORDER**

**Procedural History**

On August 2, 2013, Plaintiff, MEI-GSR HOLDINGS, LLC, filed a *Complaint* against Defendant, PEPPERMILL CASINOS, INC., alleging among other claims, violations of the Uniform Trade Secret Act. On January 11, 2016, through January 26, 2016, a jury trial was held in this court. On January 26, 2016, the jury returned a verdict in favor of Defendant. On February 11, 2016, Defendant filed a *Motion for Costs and Attorneys' Fees* and a *Memorandum of Costs and Disbursements*. On February 22, 2016, Plaintiff filed a *Motion to Retax Defendants' Verified Memorandum of Costs*. On February 26, 2016, Defendant filed an *Opposition to Plaintiff's Motion to Retax Defendants' Verified Memorandum of Costs*. On March 1, 2016, Defendant filed an *Opposition to Defendants' Motion for Costs and*

1 *Attorney Fees*. On March 7, 2016, Plaintiff filed a *Reply in Support of Motion to*  
2 *Retax Defendants' Verified Memorandum of Costs*. On March 8, 2016, Plaintiff's  
3 *Motion to Retax Defendants' Verified Memorandum of Costs* was submitted for  
4 decision. On March 10, 2016, Plaintiff filed a *Reply to Defendant's Opposition to*  
5 *Peppermills Motion for Costs and Attorney's Fees*.

## 6 **ARGUMENTS**

7 Peppermill seeks an award of attorneys' fees pursuant to NRCP 68 because  
8 GSR rejected Peppermill's Offer of Judgment, yet failed to recover a more favorable  
9 judgment. Alternatively, Peppermill seek recovery of their fees and expenses  
10 pursuant to NRS 18.010(2)(b) arguing this action was brought in bad faith, without  
11 legal support and maintained only to harass Peppermill. Additionally, Peppermill  
12 also seeks to recover its costs of defense pursuant to NRS 18.020.

13 GSR opposes the award of fees under any other provision than that of Nevada  
14 Trade Secrets Act. NRS 600A.060. GSR avers that Peppermill's Offer of Judgment  
15 was invalid because it was conditioned upon GSR giving up the right to pursue  
16 Ryan Tors and Peppermill jointly and severally. Finally, GSR argues that its suit  
17 was brought in good faith and not solely to harass Peppermill.

## 18 **ANALYSIS**

19 An offeree who declines to accept an Offer of Judgment and receives a  
20 judgment less favorable than the offer may be required to pay the offeror's post-offer  
21 costs and reasonable attorneys' fees.<sup>1</sup> NRCP 68(f)(2). On February 13, 2015,  
22 Peppermill offered to have judgment entered against it in the amount of \$100,000.  
23 GSR never responded. On January 26, 2016, after a multi-week trial, the jury  
24 returned its verdict in favor of Peppermill.

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28 <sup>1</sup> *Drummond v. Mid-W. Growers Co-op. Corp.*, 91 Nev. 698, 712, 542 P.2d 198, 208 (1975); NRCP 68;  
NRS 17.115.

1 In deciding whether to award attorney fees and the reasonableness of those  
2 fees, this court must apply the four factors announced in *Beattie v. Thomas*.<sup>2</sup> Those  
3 factors are: 1) whether plaintiff's claim was brought in good faith, 2) whether the  
4 Offer of Judgment was reasonable and in good faith in both its timing and amount,  
5 3) whether the decision to reject the offer and proceed to trial was grossly  
6 unreasonable or in bad faith, and 4) whether the fees sought by the offeror are  
7 reasonable and justified in amount.<sup>3</sup> No single *Beattie* factor is controlling, and the  
8 decision of whether to award attorney fees rests within the discretion of this court.<sup>4</sup>

9 In this case, it is undisputed that Plaintiff never accepted Defendant's offer of  
10 judgment and that Defendant prevailed at trial. Nevertheless, Plaintiff argues that  
11 Defendant is ineligible to recover their attorneys' fees on a number of grounds.  
12 First, since this was an action involving misappropriation of trade secrets, Plaintiff  
13 argues that attorneys' fees are only available under NRS 600A.060.<sup>5</sup> This court  
14 disagrees.

15 There is nothing in NRS 600A.060 to suggest that it is the sole means of  
16 recovering attorney fees in misappropriation of trade secrets cases, nor does  
17 Plaintiff cite to any case that stands for this assertion. This court then turns to an  
18 analysis of the reasonableness of the attorney fee award using the factors set forth  
19 in *Brunzell v. Golden Gate National Bank*<sup>6</sup> and *Beattie v. Thomas*.<sup>7</sup> These factors  
20 are all met in this case.

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<sup>2</sup> 99 Nev. 579, 668 P.2d 268 (1983).

24 <sup>3</sup> *Id.* at 588–89, 668 P.2d at 274.

25 <sup>4</sup> *Yamaha Motor Co. v. Arnoult*, 114 Nev. 233, 252, 955 P.2d 661, 673 n.16 (1998).

26 <sup>5</sup> This provides that if “[a] claim of misappropriation is made in bad faith ... the court may award  
reasonable attorney's fees to the prevailing party”.

27 <sup>6</sup> 85 Nev. 345, 349, 455 P.2d 31, 33 (1969).

28 <sup>7</sup> *See, Nelson v. Peckham Plaza Partnerships*, 110 Nev. 23, 26, 866 P.2d 1138, 1140 (1994); *Albios v.*  
*Horizon Communities, Inc.*, 122 Nev. 409, 425, 132 P.3d 1022, 1033 (2006); *See also, LVRC Holdings,*  
*LLC v. Brekka*, No. 58164, 2012 WL 6685658, at \*3 (Nev. Dec. 21, 2012).



1       This court has reviewed the affidavit of Counsel, the billing records and the  
2 exhibits attached to the *Motion for Costs and Attorneys' fees*. This court has  
3 presided over this litigation and is familiar with these fine lawyers and the quality  
4 of their work; these attorneys have appeared before this court in many complex  
5 cases and have always demonstrated the highest level of competence and  
6 professionalism. In reaching its determination of the amount of fees to be awarded  
7 Peppermill, this court has considered the applicable *Brunzell, Beattie* and *Yamaha*  
8 factors. Accordingly, this court finds the attorneys' fees to be reasonable.

9       Because our decision to award reasonable attorney's fees rests upon NRC  
10 68, this court need not address this claim under NRS 18.010(2)(b).

#### 11 **Costs**

12       Pursuant to NRS 18.005 and NRS 18.020, Peppermill and Ryan Tors seek  
13 recovery of their costs in defending this lawsuit. GSR argues that NRS 18.005 does  
14 not allow for some of the expenses Peppermill incurred (e.g., jury consultants and  
15 courtroom media presentations of testimony and arguments). GSR rests upon the  
16 venerable *Bergmann v. Boyce*<sup>8</sup> to support its argument that Defendant's expenses  
17 in utilizing Trial Science<sup>9</sup> and e-Depositions for focus groups, jury selection and  
18 courtroom media should not be recovered. This argument reveals its age.

19       In *Bergmann*, the Nevada Supreme Court held that similar expenses were  
20 not recoverable at that time.<sup>10</sup> However, the Nevada Supreme Court noted that "at  
21 some future time, the practice of law will develop to a point where litigation  
22 attorneys necessarily incur such expenses as a matter of course."<sup>11</sup> This court  
23 believes that time arrived long ago.

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26 <sup>8</sup> 109 Nev. 670, 856 P.2d 560 (1993).

27 <sup>9</sup> Trial Science is a nationally-recognized trial preparation and trial consulting and litigation support  
28 firm headed by Daniel Dugan, Phd., well-known to this court as an expert in the fields of focus  
groups and jury selection.

<sup>10</sup> *Id.* at 683, 856 P.2d at 568.

<sup>11</sup> *Id.* at 682, 856 P.2d at 568.

1 While it is true that these technologies and litigation support services are  
2 not specified by statute, services like courtroom media and expert jury consultants  
3 are common in civil and criminal litigation. Allowance of their costs lies squarely  
4 within every court's discretion.<sup>12</sup> The definition of 'reasonable' is expansive.<sup>13</sup>

5 Defendant utilized litigation resources which were readily available to  
6 Plaintiff. The technology used during the course of this trial was not 'cutting edge',  
7 extraordinary or exorbitant. It was grounded in the evidence presented, the  
8 governing law and clearly assisted the jury in reaching its verdict.

9 This was a complex case involving interesting legal issues, dueling expert  
10 opinions and many witnesses in a three-week trial. It involved contentious  
11 questions whether the "par values" were trade secrets and, if they were, their fair  
12 market value. This case involved factual and legal issues arising from Nevada's  
13 Uniform Trade Secret Act, legislation with little Nevada appellate interpretation.  
14 In this multi-week trial, witnesses testified live, through depositions and video  
15 appearances. Expert witnesses offered complex mathematical damage  
16 computations.

17 If we are to expect jurors to fairly and adequately judge the facts and apply  
18 the law in these types of cases, they must be given the proper tools to accomplish  
19 that purpose. It is evident that modern civil litigation necessarily requires these  
20 types of litigation resources. Literature counsels trial courts, lawyers and litigants  
21 to expect the use of these resources.<sup>14</sup> Therefore, this court rejects the complaints  
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24 <sup>12</sup> *Bobby Berosini, Ltd. v. People for the Ethical Treatment of Animals*, 114 Nev. 1348, 1352, 971  
P.2d 383, 386 (1998).

25 <sup>13</sup> "Fair, proper or moderate under the circumstances." *Black's Law Dictionary*, (9<sup>th</sup> ed.).

26 <sup>14</sup> *See Generally*, Chief District Judge David Barker, *High-Tech Trends in Nevada Courtrooms: New*  
27 *Technology and Good, Old-Fashioned Collaboration Raise the Bar for Our Courts*, Nev. Lawyer,  
October 2015, at 22; James R. Moncus, III, *The iPad: Litigation and Trial in A New Digital World*,  
28 75 Ala. Law. 48 (2014); Jackson, Darla W. *Can Lawyers Be Luddites? Adjusting to the Modification*  
*of the ABA Model Rules of Professional Conduct Regarding Technology*, 84 Oklahoma Bar Journal  
2637 (2013); Park, Jaihyun, and Neal Feigenson, *Effects of a visual technology on mock juror*

1 of Plaintiff to the expenses and fees incurred and finds them to be reasonable and  
2 justified and necessarily incurred.

3  
4 **CONCLUSION**

5 This court is familiar with the quality of the lawyers and has benefited from  
6 their skill and advocacy. This court offers its appreciation to the fine attorneys on  
7 both sides for their professionalism and presentations.

8 This court has reviewed the Affidavit of Counsel seeking recovery of  
9 attorney's fees and the Memorandum of Costs. This court has considered the  
10 required factors outlined in *Beattie* and *Brunzell* and concludes that the attorney's  
11 fees are reasonable and the costs justified and necessarily incurred.<sup>15</sup> Therefore,  
12 IT IS HEREBY ORDERED that:

13 MEI-GSR's *Motion to Retax Defendants' Memorandum of Costs* is **DENIED**.

14 Peppermill's *Motion for Costs and Attorneys' Fees* is **GRANTED**.

15 Peppermill is awarded \$534,370.27 in costs;

16 Peppermill is awarded \$963,483.00 in attorney's fees.

17 **IT IS SO ORDERED.**

18 **DATED** this 5 day of April, 2016.

19  
20   
21 **PATRICK FLANAGAN**  
22 District Judge  
23  
24

25 *decision making*, Applied Cognitive Psychology 27.2 (2013): 235-246; Aresty, Jeff, Daniel Rainey, and  
26 James Cormie. *State Courts and the Transformation to Virtual Courts*, Litigation 39 (2013).

27 <sup>15</sup> See *MRO Communications, Inc. v. AT&T Co.*, 197 F.3d 1276, 1284 (9th Cir. 1999)(where affidavits  
28 and exhibits submitted in support, and in opposition to, the motion for attorney's fees were sufficient  
to enable a court to consider each of the four factors outlined in *Beattie* and conclude the amount of  
fees was reasonable and justified, the court did not abuse its discretion in awarding attorney's fees  
without making specific findings on the four factors).

**CERTIFICATE OF SERVICE**

Pursuant to NRCP 5(b), I hereby certify that I am an employee of the Second Judicial District Court of the State of Nevada, County of Washoe; that on this 5 day of April, 2016, I electronically filed the following with the Clerk of the Court by using the ECF system which will send a notice of electronic filing to the following:

Kent Robison, Esq., for Peppermill Casinos, Inc.;

H. Johnson, Esq. and Mark Wray, Esq. for MEI-GSR Holdings, LLC;

  
Judicial Assistant