

## **Exhibit 1**

## **Exhibit 1**

1                   **IN THE SUPREME COURT OF THE STATE OF NEVADA**

2  
3                   MEI-GSR HOLDINGS, LLC, a  
4                   Nevada Limited Liability Company,  
5                   d/b/a/ GRAND SIERRA RESORT,

6                                   Appellant,

7                   vs.

8                   PEPPERMILL CASINO, INC., a  
9                   Nevada Corporation, d/b/a/  
10                  PEPPERMILL CASINO; RYAN  
11                  TORS, an individual,

12                                  Respondents.

Supreme Court No. 70319

District Court Case No.: CV13-01704

13                                   **APPELLANT’S OPENING BRIEF**

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1 **I. DISCLOSURE STATEMENT**

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

6 1. Appellant-Plaintiff, MEI-GSR HOLDINGS, LLC, has no parent  
7 corporations and no publicly held company owns 10% or more of its stock.

8 2. The follow are the law firms, whose partners or associates have  
9 appeared for Appellant-Plaintiff, or are expected to appear in this case:

- 10 a) Cohen|Johnson|Parker|Edwards, formerly Cohen-Johnson, LLC  
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20

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#### IV. JURISDICTIONAL STATEMENT

This Court has jurisdiction pursuant to Nev. R. App. P. 3A(b). Notice of Entry of Order dismissing GSR's claims against Defendant-Respondent Ryan Tors was filed and served on March 10, 2015. APP 867-54, v.4. Notice of Entry of Judgment granting judgment favor of Defendant-Respondent Peppermill Casino Inc. ("Peppermill"), on all claims brought by Plaintiff-Appellant MEI-GSR Holdings, d/b/a/ Grand Sierra Resort ("GSR), was filed and served on March 28, 2016. APP 6817-21, v.29. Notice of Entry of Order denying GSR's motion for a new trial was filed and served on June 6, 2016. APP 6967-71, v.30. On April 5, 2016, an order granting Peppermill's motion for attorney fees and costs was filed. APP 6827-33, v. 29. Notice of Entry of Amended Judgment which included that award of attorney fees and costs was filed and served on April 12, 2016. APP 6834-37, v. 29. Appellant-Plaintiff timely filed a notice of appeal on April 26, 2016, and an amended notice of appeal on June 17, 2016. APP 6862-6919, v.29; APP 6972-7037, v.30. GSR's Notices of Appeal are therefore timely pursuant to Nev. R. App. P. 4(a) and 26(c).

#### V. ROUTING STATEMENT

This matter is presumptively retained by the Nevada Supreme Court pursuant to Nev. R. App. P. 17(a)(1) as this case does not involve a case category

1 that is presumptively assigned to the Nevada Court of Appeals under Nev. R.  
2 App. P. 17(b).

3 This matter is also presumptively retained by the Nevada Supreme Court  
4 pursuant to Nev. R. App. P. 17(a)(10), as this case originated in business court,  
5 and Nev. R. App. P. 17(a)(14) as this case involves issues of first impression in  
6 the interpretation of Nevada's Uniform Trade Secrets Act, NRS Chapter 600A,  
7 which is a question of statewide public importance.

## 8 **VI. STATEMENT OF ISSUES**

9 1. Whether the district court erred in refusing to instruct the jury that:  
10 "Even if the information which is asserted to be a trade secret could have been  
11 duplicated by other proper means, the information is not readily ascertainable if in  
12 fact it was acquired by improper means," when more than one hundred years of  
13 precedent supports such an instruction.

14 2. Whether the district court erred in refusing to instruct the jury that a  
15 "trade secret is not readily ascertainable when the means of acquiring the  
16 information falls below the generally accepted standards of commercial morality  
17 and reasonable conduct, even if means of obtaining the information violated no  
18 government standard, did not breach any confidential relationship, and did not  
19 involve any fraudulent or illegal conduct," when the National Conference of  
20 Commissioners on Uniform State Laws, when drafting the Uniform Trade Secrets

1 Act adopted by Nevada, expressly adopted such a rule and courts interpreting the  
2 Uniform Trade Secret Act have reached the same conclusion.

3 3. Whether the district court erred in refusing to instruct the jury that  
4 for information to “be readily ascertainable, the information asserted to be a trade  
5 secret must be ascertained quickly, or so self-revealing to be ascertainable at a  
6 glance.”

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

11 5. Whether the district court erred in awarding Peppermill’s attorney  
12 fees, pursuant to an offer of judgment, when Peppermill could not and did not  
13 show that GSR acted in bad faith, which showing is required under the Nevada  
14 Trade Secrets Act, and when Peppermill failed to show that it meets the  
15 requirements to secure attorney fees pursuant to an offer of judgment.

16 6. Whether the district court erred in refusing to compel Peppermill to  
17 respond to GSR’s discovery requests even though Peppermill had waived any  
18 objection and had admittedly failed to produce tens of thousands of relevant  
19 documents.

1           7.     Whether the district court erred in denying GSR’s motion for case  
2 concluding sanctions without making any findings, when Peppermill admittedly  
3 and intentionally withheld tens of thousands of requested documents.

4           8.     Whether the district court erred in granting Peppermill’s motion in  
5 limine, without providing GSR an opportunity to respond, and which improperly  
6 excluded evidence showing the theft and use of slot machine hold percentage  
7 settings from ten other casinos in the Northern Nevada area, which was obtained  
8 during the same time period and as part of the same scheme as when Peppermill  
9 misappropriated GSR’s slot machine hold percentage settings.

10          9.     Whether the district court erred in denying the GSR’s motion to  
11 amend its complaint when the motion was timely filed according to the district  
12 court’s scheduling order.

## VII. STATEMENT OF THE CASE

On August 15, 2013, GSR filed its complaint against Peppermill for misappropriating GSR's trade secrets, based on Peppermill's admitted theft of GSR's slot machine hold percentage settings. APP 1-10, v.1. Because the district court improperly instructed the jury, on January 26, 2016, the jury rendered a verdict 6-2, on the limited grounds that GSR's slot machine hold percentage settings were reasonably ascertainable by proper means. APP 6461-64, v.28. The district court also erroneously granted Peppermill's motion for attorney fees in an order dated April 5, 2016, without the analysis required to grant a motion for attorney fees. APP6827-33, v.29. Notice of Entry of Amended Judgment which included that award of attorney fees and costs was filed and served on April 12, 2016. APP 6834-37, v.29. GSR timely filed a notice of appeal on April 26, 2016, and an amended notice of appeal on June 17, 2016. APP 6862-6918, v.29; APP 6972-7037, v.30. GSR's Notices of Appeal are therefore timely pursuant to Nev. R. App. P. 4(a) and 26(c).

## VIII. STATEMENT OF FACTS

### A. Peppermill Blatantly and Admittedly Misappropriated GSR's Confidential Slot Machine Hold Percentage Settings.

Appellant-Plaintiff MEI-GSR HOLDINGS, LLC ("GSR"), acquired Grand Sierra Resort and Casino (the "Resort") in April 2011, and since that date has

1 become one of the premier casinos in northern Nevada. APP 4202:22 – 4203:2,  
2 4205:9-12, v.18; APP 6282, v.27. By no later than December 2011, John Hansen,  
3 Peppermill's General Manager, ordered Ryan Tors, Peppermill's Slot Director, in  
4 violation of Nevada law, to wrongfully and without authorization access GSR  
5 gaming machines by use of a re-set key supplied by the manufacturers to access  
6 certain non-public diagnostic screens to determine where the GSR set confidential  
7 hold percentages or pars<sup>1</sup> on certain types of slot machines. This trade secret  
8 information was used by the Peppermill to gain a competitive advantage to  
9 increase profits or attract additional players. APP 6171-80, v.26; APP 4387:17-  
10 22, 4402:1-22, 4413:22 – 4417:12; APP 6168-69. Upon learning about Tors'  
11 theft of GSR's confidential hold percentages, William Paganetti, Peppermill's  
12 president, pressed Tors to continue to steal such information. APP 4135:7 -  
13 4136:3; 4142:21-23, 4163:13 – 4164:16, 4411:5 – 4413:2, 4418:23 – 4419:10,  
14 4476:4-9, 4515:15-17, 4535:4-8, v. 18-19. Paganetti, who has been a casino  
15 operator for more than forty-three (43) years, did so knowing that such egregious  
16 misconduct was in violation of Nevada law and could possibly result in the

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17  
18  
19 <sup>1</sup> Hold percentage is the theoretical percentage of what the casino should retain  
20 from the money played on a particular machine; this is also referred to as the par  
setting of a particular slot machine. Operators can set gaming machines at  
different par settings to change the percentage held by the machine in order to be  
more competitive in the marketplace or increase revenue.

1 revocation of Peppermill's License. APP 6174-80, v.26; APP 3024:1-11, v.13;  
2 APP 3124:11-19, v.14.

3 On July 12, 2013, GSR caught Tors read-handed stealing information from  
4 GSR's slot machines. APP 6174-75, 6180, v.26; APP 4389:6 – 4390:17,  
5 4400:15-20, v.19. Tors was detained and turned over to gaming authorities. APP  
6 4419:19-22, 4474:18-20, 4493:2-6. Tors admits he "knowingly and willfully"  
7 stole GSR's slot machine hold percentage settings, at the request of numerous  
8 Peppermill employees, to whom the stolen information was disclosed. APP  
9 4411:5 – 4413:21, 4418:23 – 4419:10, 4493:18-23, v.19.

10 **B. The Nevada Gaming Control Board Fined Peppermill \$1 Million**  
11 **Based on Its Theft of GSR's Confidential Slot Machine Hold**  
12 **Percentage Settings.**

13 After the Nevada Gaming Control Board ("NGCB") completed its  
14 investigation, Peppermill admitted that "over a period of time beginning in at  
15 least 2011" until "July 12, 2013," Peppermill "knew of, approved of, and  
16 directed" Ryan Tors to use "a slot machine 'reset' key to obtain theoretical hold  
17 percentage information from slot machines belonging to . . . the Grand Sierra  
18 Resort and Casino," along with at least ten other casinos. APP 6174-75, 6180,  
19 v.26. Peppermill admitted that this egregious misconduct violated NGCR 5.011  
20 and NRS 463.170(8), and "was an unsuitable method of operation" and justified

1 sanctions “in the total amount of ONE MILLION DOLLARS and NO CENTS  
2 (\$1,000,000.00).” APP 6174-80, v.26.

3 **C. Peppermill Waived Any Objection to GSR’s Discovery Requests Due**  
4 **to Its Untimely Responses.**

5 On August 15, 2013, GSR filed its complaint against Peppermill for  
6 misappropriating GSR’s trade secrets. APP 1-10, v.1. On April 15, 2014, the  
7 district court entered its Scheduling Order requiring that all discovery be  
8 completed by April 16, 2015. APP 11-14, v.1. After the district court refused to  
9 compel Peppermill to serve full initial disclosures, GSR served its First Request  
10 for Production of Documents upon Defendant Peppermill Casino on November  
11 10, 2014. APP 1127-37, v.5. Peppermill, however, responded 1 ½ months late,  
12 and therefore waived any objection to the production of any requested documents.  
13 Peppermill’s untimely responses did *not* produce the majority of the documents  
14 requested. APP 1141-1213, v.5-6.

15 **D. Peppermill Admittedly and Inappropriately Withheld Tens of**  
16 **Thousands of Relevant Emails Requested in GSR’s Discovery**  
17 **Requests.**

18 Eighteen (18) of the twenty-one (21) requests in that set involved requests  
19 for emails, including Request No. 9 which requested a “back up of each of your  
20 email servers for the period from December 31, 2009 through the present.”  
APP 1127-37, v.5. Despite waiving its objections, Peppermill did not provide a  
backup of all its emails but only provided five (5) emails. APP 1141-1201, v.5-6.

1 More troubling, GSR specifically requested “All documents provided to the  
2 Nevada Gaming Board or Nevada Gaming Commissions as part of the  
3 investigation NGC 13-23.” APP 1135:3-5, v.5. Frank Schrek, attorney for  
4 Peppermill, represented that there are “literally thousands of e-mails that were  
5 obtained by the investigators in this case.” APP 3078:4-5, v.13. Denise Vessie,  
6 an administrative assistant to Peppermill’s president, testified that approximately  
7 80,000 emails were turned over to the NGCB. APP 3348, v.14.

8 Furthermore, Mr. Nathan Estes, Peppermill’s Corporate IT Director of  
9 Network Systems, testified that when someone at Peppermill sends an email it is  
10 saved “using an archiving system,” and the “archive retention is three years.”  
11 APP 7091:23-25, 7100:17-24, 7103:6-13, v.30. Further, due to GSR’s request for  
12 a litigation hold in April 2014, Peppermill forever retains the emails, with their  
13 attachments, along with all other electronic data, on the server for the three years  
14 prior to April 2014, to the present. APP 7103:9-13, 7105:5-16, 7106:4-10,  
15 7107:25 – 7109:16, 7110:5-6, 7119:8-11, 7120:15-20, 7125:2-6, v.30. Mr. Estes  
16 further testified that “to meet the requirements of the litigation-hold, [Peppermill  
17 put aside] a **backup** at that time of all the information and we stored it,” which  
18 preserved it without alteration. APP 7121:9 – 7122:3, v.30 (emphasis added).  
19 Mr. Estes confirmed that “[a]s long the information was being saved [that the  
20 employee] was producing on the server, then yes it was backed up.

1 APP 712639:14-16 (emphasis added). Finally, Estes testified that though he had  
2 been given a list of search criteria to use regarding the emails “haven’t done  
3 anything with that.” APP 7122:24 – 7123:3.

4 Instead of producing the tens of thousands of required emails and other  
5 documents, Peppermill’s responses were littered with numerous unsupportable  
6 and groundless objections, despite having waived these objections due to its  
7 untimely responses. APP 709-846, v3-4; APP 1096-1105, v.5.

8 **E. Peppermill Served an Invalid Offer of Judgment.**

9 Peppermill served an invalid offer of judgment on February 13, 2015. The  
10 offer was invalid because it was conditional. APP 6485:23-24, v.28(conditioning  
11 that judgment “be taken jointly, not severally, for the sum of One Hundred  
12 Thousand Dollars (\$100,000)”). Peppermill’s offer also was unreasonable as to  
13 timing and amount. The offer was less than one-half (½) percent of the damages  
14 sought by GSR, 10% of the value Peppermill placed GSR’s slot machine hold  
15 percentage settings, and hundreds of thousands of dollars less than the costs and  
16 attorney fees the parties had expended up to that point. APP 3422, v.15; APP  
17 6731, v.29; APP 6704-05, v.28. The timing of the offer was unreasonable  
18 because GSR only had three (3) days to evaluate the offer after Peppermill served  
19 its expert reports, and had to do so without tens of thousands of documents that  
20

1 Peppermill was improperly withholding. APP 502-708, v.3. Because the offer  
2 was unreasonable, GSR in good faith in rejected Peppermill's offer of judgment.

3 **F. The District Court Improperly Denied GSR's Timely Motion to**  
4 **Amend Its Complaint.**

5 While GSR did not wish to amend its complaint until after Peppermill  
6 complied with its obligation to provide complete discovery responses, GSR  
7 moved to amend its complaint on March 2, 2015 ("Motion to Amend"), in order  
8 to meet the deadline set in the district court's scheduling order. APP 470-501,  
9 v.2-3. GSR sought to amend its to add claims of civil conspiracy, unlawful acts  
10 regarding a computer, unfair or deceptive trade practices, and unjust enrichment,  
11 along with adding a new defendant, John Hanson, who was discovered to have  
12 ordered Tors to first steal GSR's trade secrets. APP 479-500, v.2-3. The only  
13 basis for denying GSR's motion to amend was district court's finding that "all of  
14 GSR's new claims, as well as its theory of liability for Mr. Hanson, a Peppermill  
15 officer, could have been alleged much earlier." APP 1093:18-20, v.5.

16 **G. Despite the Overwhelming Evidence that Peppermill Was Improperly**  
17 **Withholding Tens of Thousands of Documents, the District Court**  
18 **Erroneously Refused to Compel the Production of these Documents.**

19 On March 4, 2015, GSR filed a motion to compel discovery responses  
20 based on the tens of thousands of documents improperly withheld. APP 709-846,  
v.3-4. In an order dated April 23, 2015, the district court sanctioned Peppermill,  
in the amount of \$2500.00, for its refusal to provided requested documents. APP

1 1327:19-20, v.6. Instead of compelling the production of these improperly  
2 withheld documents, the district court ordered the parties to meet and confer “to  
3 clarify and narrow the requests so as to enable Defendant to promptly comply.”  
4 APP 1325:1-3, v.6. The district court erroneously did so, even though the district  
5 court specifically found that Peppermill had no explanation for the untimeliness  
6 of its responses to GSR’s first request for production of documents. APP 1325:8-  
7 12, v.6. As a result of this order, on May 5, 2015, Peppermill served a  
8 consolidated supplemental response to GSR’s document request which still failed  
9 to produce tens of thousands of relevant documents. APP 2298-2314, v.10; APP  
10 7121:9 – 7122:3, 7126, v.30.

11 **H. The District Court Granted GSR’s Motion to Extend Discovery and**  
12 **to Continue Trial, Despite the Court Previous Refusal when Denying**  
13 **GSR’s Motion to Amend.**

14 Previously, on April 16, 2015, GSR moved to continue trial and the  
15 discovery deadlines based on Peppermill’s refusal to comply with GSR’s  
16 discovery requests. APP 1106 -1319, v.5-6. Peppermill claimed any such  
17 extension would be prejudicial, even though Peppermill delayed discovery by  
18 more than five (5) months and failed to provide any substantive response to  
19 GSR’s discovery requests. APP 1356-1440, v.6. The district court granted  
20 GSR’s motion, in an order dated July, 1 2015, extending discovery until  
September 4, 2015, and continuing trial until October 5, 2015. APP 1967-69, v.7.

1 Once the district confirmed that discovery would be extended, Peppermill  
2 abandoned any pretense that an extension of discovery was prejudicial. In a  
3 telephonic discovery dispute conference held on July 10, 2015, Peppermill  
4 requested that discovery be extended until September - October 2015, with trial  
5 continued until early January 2016. APP 7085, v.30. The parties, with court  
6 approval, eventually stipulated to extend discovery until November 25, 2015, and  
7 to continue trial until January 11, 2016. APP 1971-74, v.9.

8 **I. The District Court Ruled that Peppermill Waived Any Objection to**  
9 **GSR's Discovery Requests.**

10 Previously, on May 22, 2015, when denying Peppermill's motion for a  
11 protective order attempting in part to avoid producing documents required by  
12 GSR's document requests, the discovery commissioner imposed an additional  
13 \$1500.00 sanction against Peppermill, and specifically found that that "Defendant  
14 waived its objections to the first request for production by failing to serve a  
15 timely response to that request." APP 1536:15-17, 1537:7-9, v.7. The district  
16 court confirmed the discovery commissioner's Recommendation in an order filed  
17 June 18, 2015. APP 1965-66, v.9.

18 **J. Despite Waiving All Objections and Court Imposed Sanctions,**  
19 **Peppermill Continued to Wrongly Withhold Tens of Thousands of**  
20 **Documents.**

Since that date, GSR pursued no less than three (3) discovery dispute  
conferences and sent no less than eleven (11) letters and emails to Peppermill

1 repeatedly attempting to secure the tens of thousands of emails which Peppermill  
2 was required to provide without objection. APP 3356, v.14. Peppermill,  
3 however, continued to stall by imposing unreasonable conditions on the  
4 production of those emails which conditions would involve thousands of hours of  
5 attorney time and by otherwise refusing to provide the required emails without  
6 objection. APP 3356, 3380-81, 3390-92, v. 14-15.

7 **K. GSR Discovers, Beyond Doubt, that the Documents Improperly**  
8 **Withheld by Peppermill Include Documents Establishing the Theft**  
9 **and Use of GSR's Trade Secrets.**

10 On November 4, 2015, when counsel for GSR was present in Mr.  
11 Robison's office for the deposition of a witness, counsel reviewed the emails in  
12 question for several hours. Due to Peppermill's unreasonable conditions, counsel  
13 was only allowed to examine some of the emails and take manual notes regarding  
14 their content. An inspection of the emails showed that there were not 80,000  
15 emails, but there were 238,548 emails. APP 2129:20-26, v.9; APP 2199:13-14,  
16 v.10.

17 In the short time that counsel could inspect the emails at opposing  
18 counsel's office, several very important emails were unearthed that were  
19 previously undisclosed. A December 4, 2012 email from Ryan Tors to:  
20 NBPartners; John Hanson; David McHugh; Billy Paganetti stated: "There have  
been no par changes- guaranteed. Atlantis pars.xls." APP 2130:11-15; APP

1 2199:13-14, v.10. The “Atlantis par.xls” appears to be an excel spread sheet  
2 contained the keyed pars obtained by Tors. This email from Tors generated a  
3 response from Billy Paganetti dated December 7, 2012, to Ryan Tors;  
4 NBPartners; John Hanson and David McHugh, which stated:

5 Thanks Ryan good to know.

6 I guess our frequent guests are starting to feel how loose our slots are  
7 making it seem like the Atlantis has tightened theirs, even though  
8 they really haven’t! Over the years, they would frequently say quote  
9 we win more at the Atlantis, you guys have tight slots”. Now with  
10 them feeling like they win more here vs the Atlantis, they will start  
11 saying, “we win more at the Peppermill the Atlantis has tightened  
12 their slots”. With us being over 20%<sup>2</sup> looser on the pennies I expect  
13 this feeling among locals will continue to grow stronger.

14 Thanks

15 Billy

16 APP 2130:21-28, v.9; APP 2199:13-14, v.10. This previously undisclosed email  
17 shows that Peppermill was using the stolen information obtained by Tors and  
18 altered their operations as a result of the information, in order to position  
19 themselves in the market place to maximize their profits and to gain market share.  
20 Another email dated June 24, 2013, from David McHugh to Ryan Tors, stated:

21 We are going to have some more to do-Bill just sent me this text.

22 Dave, I want to make some more adjustments to Wendover and Reno  
23 slot pars. Reno-25 cent reels to 6.5, \$ reels to 4.00%, \$5 reels to

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<sup>2</sup> Peppermill knew that it was 20% looser than its competitor from the information stolen by Tors. This information was used by them to position themselves in the very competitive Reno marketplace to maximize profits and attract customers.

1 4.00%, Wendover 25 cent reels to 6.75%, \$ reels to 4.25%, \$5 reels to  
2 4.00%. I spent time this weekend studying the abstract, we are still  
3 way more liberal than the competition. With smart Marketing we can  
still grow cash handle, I feel very comfortable with these %'s let's do  
these ASAP. Call me when you get on property, thanks.

4 APP 2139:12-16, v. 9, APP 2199:13-14, v.10. This email reveals two incredibly  
5 important facts for the first time. First, this emails references texts between Billy  
6 Paganetti and his managers concerning the theft of pars, demonstrating that  
7 Peppermill used texts to communicate about business issues which are directly  
8 relevant to the issues in this case. Peppermill, however, has not produced a single  
9 text, despite GSR's repeated discovery requests seeking all electronic  
10 information, including texts. Second, this email shows one of Peppermill's  
11 methods used to set pars and its strategy to position Peppermill in the market  
12 place to maximize cash handle. These are just a few of the damaging emails  
13 which were not produced by Peppermill until discovery was over and which  
14 should have been produced a year and a half earlier in response to the discovery  
15 requests as electronically stored information. ("ESI") APP 2138:10 -2140:16, v.  
16 9, APP 2199:13-14, v.10.

17 **L. For the Second Time, the District Court Erred in Refusing to Compel**  
18 **the Production of Tens of Thousands of Documents Improperly**  
**Withheld by Peppermill.**

19 Based on the outrageous actions of the Peppermill, GSR filed a Counter-  
20 Motion to Compel Discovery of Emails on November 20, 2015. APP 1985-2130,

1 v.9. The discovery commissioner, in his recommendation for order dated  
2 December 28, 2015, wrongly denied GSR’s motion to compel. APP 3838-40,  
3 v.16. On January 8, 2016, GSR timely filed its objection to the discovery  
4 commissioner’s recommendation. APP 3875-97, v.17. The district court orally  
5 confirmed the discovery commissioner’s recommendation. APP 4961:20 -  
6 4964:16, v.21.

7 **M. The District Court Erred in Refusing to Impose Case Concluding**  
8 **Sanctions without Explanation.**

9 Based on Peppermill’s repeated and unjustified refusal to provide tens of  
10 thousands of relevant emails and other documents, GSR filed a motion for case  
11 concluding sanctions on November 25, 2015. APP 2131-73, v. 9. This 43-page  
12 motion, not only outlined the discovery abuses set forth above, but also outlined  
13 the full extent of Peppermill’s “willful” misconduct which halted the normal  
14 adversarial process. The district court, however, failed hold a hearing on GSR’s  
15 motion, or even make any findings which are necessary for any appellate court to  
16 review the reasons for the granting or denial of the case concluding motion. *See*  
17 *Bahena v. Goodyear Tire & Rubber Co.*, 126 Nev. 243, 235 P.3d 592 (2010).  
18 Instead, the district court merely ruled that “GSR’s *Motion for Case Concluding*  
19 *Sanctions for Violation of Discovery Orders (Pursuant to NRCP 37)* is hereby  
20 **DENIED.”** APP 3835-36, v.16.

1 **N. The District Court Improperly Granted Peppermill's Motions in**  
2 **Limine Without Providing GSR an Opportunity to Oppose Those**  
3 **Motions.**

4 On December 7<sup>th</sup> and 9<sup>th</sup>, 2015, Peppermill served its motions in limine,  
5 Nos. 1 – 17. APP 2443-2807, v. 11-12. Motions No. 4 and 8 improperly sought  
6 to preclude evidence of the theft of slot machine hold percentage settings from the  
7 other ten casinos and how Peppermill used that information to provide Peppermill  
8 an unfair competitive advantage, despite the fact that all of the thefts were part of  
9 common scheme or plan. APP 2533-36, 2636-41, v.11-12.

10 While GSR diligently worked to timely oppose these motions, on  
11 December 22, 2015 without explanation and prior to the deadline to oppose these  
12 motions in limine, the district court, ex parte, granted Peppermill's motion to  
13 exclude evidence of the theft of slot machine hold percentage settings from  
14 casinos other than GSR. APP 3831-34, v.16. On December 28, 2015, GSR  
15 filed a motion to clarify the court's order and permit GSR to offer evidence of  
16 Peppermill's entire scheme to steal the slot machine hold percentage settings from  
17 GSR and other casinos. APP 3850-69, v.17. In a hearing held on January 6,  
18 2016, the district court confirmed that it would exclude evidence of Peppermill's  
19 admitted theft of slot machine hold percentage settings from casinos other than  
20 GSR. APP 7070:23 - 7071:7, v.30.

**O. The District Court Improperly Instructed the Jury.**

Beginning on January 12, 2016, a trial was held on GSR's complaint against Peppermill for misappropriation of trade secrets. At trial, the undisputed facts demonstrated that Peppermill blatantly stole GSR's slot machine hold percentage settings. No evidence was offered or could be offered to show that Peppermill acquired GSR's slot machine hold percentage settings by any proper means. Instead, Peppermill offered testimony by experts that, rather than steal GSR's trade secrets, Peppermill could have devised unethical schemes to secretly take GSR's slot machine hold percentage settings. All of these hypothetical schemes require Peppermill to misuse confidential information from slot machine manufacturer's concerning the available par settings on GSR's slot machines, which par settings are unknown to the public and are themselves trade secrets governed by strict confidentiality agreements. APP 6216-33, v. 26; 6262-79, v.27. All of the schemes also require Peppermill to send spies into GSR's casinos to repeatedly play and/or photograph GSR's slot machines and then resort to elaborate mathematical calculations to determine GSR's slot machine hold percentage settings. APP 6216-33, v.26. Under established law, none of these methods of corporate espionage is a proper means. *See* NRS 600A.030(1) ("‘Improper means’ includes, without limitation . . . (f) Espionage through electronic or other means.”).

1 At the conclusion of trial, however, the district court unfortunately declined  
2 to instruct the jury that:

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

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

10 APP 6410-14, v.27.

11 Instead of providing this proper instruction, the district court, over GSR's  
12 proper objection, twice instructed the jury on reverse engineering as follows:

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

16 APP 6443, v.27, Jury Instructions, Instruction No. 27, at 2:5 -10.

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

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

1           5. Obtaining the trade secret information from published  
2 literature.

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

5 APP 6446, Jury Instructions, Instruction No. 31; *see also* APP 6362:7 - 6366:26,  
6 v.27. These instructions were provided even though Peppermill offered no  
7 evidence that Peppermill actually used any of these means or any type of reverse  
8 engineering to acquire GSR's slot machine hold percentage settings.

9           Due to the fact that the jury was improperly instructed, on January 26,  
10 2016, the jury rendered a verdict 6-2, on the limited grounds that GSR's slot  
11 machine hold percentage settings were reasonably ascertainable by proper means.  
12 APP 6461-64, v.27.

13           Based on the faulty jury instructions, on April 14, 2014, GSR filed a timely  
14 motion for a new trial. APP 6838-61, v.29. In an order dated June 10, 2016, the  
15 district court erroneously denied the motion. APP 69667-70, v.29.

16 **P. The District Court Improperly Granted Peppermill's Motion for**  
17 **Attorney Fees.**

18           Previously, on February 11, 2016, Peppermill filed a motion for costs and  
19 attorney fees. APP 6465-6705, v.27-28. The motion was based, in part, on  
20 Peppermill's invalid offer of judgment, pursuant to Nev. R. Civ. P. 68, which was  
filed and served on February 13, 2015. The motion did not seek attorney fees  
pursuant to NRS 600A.060, which provides the only means to obtain attorney

1 fees in a trade secrets case. The motion also failed to provide any admissible  
2 evidence showing that the fees claimed were reasonable or warranted. Despite  
3 the lack of support for Peppermill's motion, the district court granted  
4 Peppermill's motion for attorney fees in an order dated April 5, 2016, without the  
5 analyses required to grant a motion for attorney fees. APP 6827-33, v.29.

## 6 **IX. SUMMARY OF THE ARGUMENT**

7 It is undisputed that Peppermill stole the confidential and proprietary hold  
8 percentages of gaming machines of GSR and ten other local casinos from at least  
9 2011 to July 2013, when Peppermill's employee Ryan Tors was caught in the act.  
10 Peppermill's main defense to this blatant illegal and outrageous misconduct is to  
11 argue that the purloined information could have been independently developed or  
12 reverse engineered, even though Peppermill admits that never happened. The  
13 Peppermill did not independently develop or reverse engineer the information  
14 they admittedly stole, in violation of both criminal and civil law, the confidential  
15 trade secrets of the GSR and ten other casinos.

16 How this court decides this case will determine whether in Nevada a  
17 business can blatantly without authorization enter a competitor's business and  
18 steal confidential trade secrets; use that information to its advantage and  
19 knowledge; and then escape liability by claiming they could have obtained the  
20 information properly. The entire purpose of the trade secret law is to protect

1 “against the breach of faith and reprehensible means of learning another’s secret.”

2 *See* Restatement of Torts section 757, comment b.

3       Unfortunately, the district court permitted Peppermill to tell the jury that  
4 theft is perfectly acceptable conduct as long Peppermill could have hypothetically  
5 acquired the information properly, but intentionally chose misconduct instead.  
6 Courts interpreting the Uniform Trades Secrets Act have overwhelmingly held that  
7 information is a protectable trade secret, when the information is actually  
8 acquired by improper means, even though the information could have been  
9 acquired by proper means. Despite this clear authority, the district court  
10 regrettably declined instruct the jury as to this firmly established principal of law.

11       The district court also mistakenly permitted Peppermill to hire a Harvard  
12 educated Ph.D. to develop, after the fact, several devious schemes, which amount  
13 to nothing less than corporate espionage, as a refuge for Peppermill’s admittedly  
14 illegal actions. Such schemes have been condemned by the courts and the  
15 drafters of the Uniform Trade Secrets Act because the primary policy behind  
16 trade secret law is to promote the standards of commercial ethics. The district  
17 court, however, declined to instruct the jury as to the standards of commercial  
18 morality, but twice improperly instructed the jury on reverse engineering, even  
19 though Peppermill admitted that it acquired GSR’s trade secrets by theft, and not  
20 by reverse engineering. Because the jury was improperly instructed, the jury

1 erroneously found that GSR's slot machine hold percentage settings were  
2 reasonably ascertainable and not trade secrets.

3 The district court unfortunately committed numerous other errors  
4 throughout this case. The district court first erred when it failed to "freely"  
5 permit GSR to amend its complaint. Amending the complaint would have  
6 prejudiced no one, while denying the motion to amend prejudice GSR's ability to  
7 try all of its claims on the merits.

8 The district court next erred by refusing to compel Peppermill to produce  
9 tens of thousands of relevant documents, not only once, but twice, even though  
10 Peppermill waived any objection to producing these documents. Not only should  
11 the district court have compelled the production of these documents based on  
12 these two (2) timely motions to compel, the district should also have granted  
13 GSR's motion for case concluding sanctions due to the enormity of Peppermill's  
14 intentional misconduct.

15 The district court also erred by excluding relevant evidence of  
16 Peppermill's theft and use of slot machine hold percentage settings from other  
17 casinos. Such evidence is "certain, satisfying, and persuasive" circumstantial  
18 evidence of Peppermill theft and use of GSR's trade secrets, which is admissible  
19 under common-plan-or-scheme exception of NRS 48.045(2).  
20

1 Finally, the district court erroneously award Peppermill its attorney fees.  
2 Pursuant to NRS 600A.060, attorney fees are unavailable because GSR's claim  
3 for misappropriation of trade secret was brought in good faith as a matter of law.  
4 Even if NRS 600A.060 did not require a showing of bad faith to award attorney  
5 fees, the district court failed to properly consider the factors required by *Beattie*  
6 and *Brunzell*. Any proper analysis of these factors would result in a denial of  
7 attorney fees to Peppermill.

8 Accordingly, this Court should reverse the district court in all respects.  
9 This Court should order the district court to strike Peppermill's Answer as a  
10 sanction for its egregious discovery abuses, and permit GSR to prove up its  
11 damages. At a minimum, this Court should require the district court: (1) to  
12 compel Peppermill to produce the tens of thousands of documents withheld; (2) to  
13 appropriately sanction Peppermill for its misconduct; (3) to reverse the award of  
14 attorney fees; (4) to order a new trial; (5) to admit evidence of Peppermill's theft  
15 and use of slot machine hold percentage settings from other casinos; and (6) to  
16 properly instruct the jury.

## 17 **X. ARGUMENT**

### 18 **A. A New Trial Is Required Because the Jury Was NOT Properly 19 Instructed.**

20 This Court "review[s] de novo whether a jury instruction accurately states  
Nevada law." *D & D Tire v. Ouellette*, 131 Nev. Adv. Op. 47, 352 P.3d 32, 37

1 (2015). This Court “review[s] a decision to admit or refuse jury instructions for  
2 an abuse of discretion or judicial error.” *Id.*

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

6 A new trial is warranted because the district court declined to instruct the  
7 jury that: “Even if information which is asserted to be a trade secrete could have  
8 been duplicated by other proper means, the information is not readily  
9 ascertainable if in fact it was acquired by improper means.” APP 6410-14, v.27.  
10 In *Lewis v. Sea Ray Boats, Inc.*, 119 Nev. 100, 106-08, 65 P.3d 245, 249-50  
11 (2003), this Court held that the “district court's failure to instruct the jury” on a  
12 theory of the case that is supported by the evidence “mandates reversal for a new  
13 trial.” The Court reasoned that “a party is entitled to have the jury instructed on  
14 all of his theories of the case that are supported by the evidence, and that general,  
15 abstract or stock instructions on the law are insufficient if a proper request for a  
16 specific instruction on an important point has been duly proffered to the court.”  
*Id.* at 106, 65 P.3d at 249.

17 Here, the district court failed to instruct the jury on the very issue which  
18 would have prevented the jury from erroneously entering a verdict for Peppermill,  
19 based on whether GSR’s slot machine hold percentage settings were “*not being*  
20 *readily ascertainable by proper means*” so as to be deemed a trade secret. *See*

1 NRS 600A.030(5)<sup>3</sup> (emphasis added). When interpreting the Uniform Trade  
2 Secrets Act phrase “*not being readily ascertainable by proper means*,” courts  
3 have consistently held the fact that “information can be ultimately discerned by  
4 others—whether through independent investigation, accidental discovery, or  
5 reverse engineering—does not make it unprotectable” because “[e]ven if  
6 information potentially could have been duplicated by other proper means, it is no  
7 defense to claim that one’s product could have been developed independently of  
8 plaintiff’s, if in fact it was developed by using plaintiff’s proprietary designs.”  
9 *AvidAir Helicopter Supply, Inc. v. Rolls-Royce Corp.*, 663 F.3d 966, 973 (8th Cir.  
10 2011). Applying this rule, in *AvidAir*, the Eighth Circuit found, under the  
11 “Uniform Trade Secrets Acts of Indiana and Missouri,” that revised helicopter  
12 overhaul specifications approved by the FAA were trade secrets, even though the  
13 information might have been obtained through “publicly available information,”

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14 <sup>3</sup> NRS 600A.030 (5), (emphasis added), provides in full:

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

18 (a) Derives independent economic value, actual or potential, from not  
19 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

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

1 because defendant's "repeated attempts to secure the revised [overhaul  
2 information] without [plaintiff's] approval belies its claim that the information in  
3 the documents was readily ascertainable or not independently valuable." *Id.* at  
4 969-75. This rule has been repeatedly affirmed by courts interpreting the  
5 Uniform Trade Secrets Act. *See Reingold v. Swiftships, Inc.*, 126 F.3d 645, 652  
6 (5th Cir. 1997) (holding under Louisiana Uniform Trade Secret Act that  
7 "protection will be accorded to a trade secret holder against disclosure or  
8 unauthorized use gained by improper means, even if others might have  
9 discovered the trade secret by legitimate means").<sup>4</sup>

10 These holdings fully comport with the plain language of Nevada's Uniform  
11 Trade Secrets Act. Under the Act, information is a trade secret when the  
12 information is "not *being* readily ascertainable by proper means. . . ." *See* NRS  
13 600A.030(5) (emphasis added). Accordingly, to be deprived trade secret status it  
14 is *not* enough that information may be readily ascertainable by proper means, but  
15 instead, at the time of misappropriation, the information must "not *being* readily  
16 ascertainable by proper means." *See Merriam-Webster Dictionary*, Present  
17 Participle, [http://www.merriam-webster.com/dictionary/present participle](http://www.merriam-webster.com/dictionary/present%20participle) (last

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18  
19 <sup>4</sup> *See also* APP 6846-47, v.29, GSR's Motion for a New Trial, at 9:3 – 10:19  
20 (quoting cases throughout the United States which hold, pursuant to the Uniform  
Trades Secrets Act, that even if information could have been duplicated by other  
proper means, information is not readily ascertainable if in fact it was acquired by  
improper means).

1 visited April 4, 2016) (defining a present participle as “a verb form that ends in  
2 ‘-ing’ and that is used with ‘be’ to refer to action that is happening at the time of  
3 speaking or a time spoken of”); *see also Mangarella v. State*, 117 Nev. 130, 133,  
4 17 P.3d 989, 991 (2001) (explaining that “[s]tatutes should be given their plain  
5 meaning” and “there is a presumption that every word, phrase, and provision in  
6 the enactment has meaning”). While Peppermill introduced evidence of various  
7 surreptitious schemes which might have discovered GSR’s slot machine hold  
8 percentage settings, Peppermill offered absolutely *no* evidence that GSR’s slot  
9 machine hold percentage settings were actually *being* readily ascertained by  
10 Peppermill by proper means at the time of Peppermill’s admitted theft of GSR’s  
11 slot machine hold percentage settings. To the contrary, the fact that Peppermill  
12 acquired GSR’s slot machine hold percentage settings by improper means is not  
13 in dispute, as Peppermill admits that it was caught, red handed, stealing GSR’s  
14 slot machine hold percentage settings and paid a \$1 million fine based on its  
15 misconduct. APP 6174-81, v.26; APP 4389:6 – 4390:17, 4400:15-20, v.19.

16 Despite this clear Uniform Trade Secret Rule that “even if information  
17 could have been duplicated by other proper means, the information is not readily  
18 ascertainable if in fact it was acquired by improper means,” and the undisputed  
19 fact that Peppermill acquired GSR’s slot machine hold percentage settings by  
20

1 improper means, the district court declined to provide such an instruction which  
2 was offered by GSR. APP 6410-14, v.27. If the instruction had been  
3 appropriately given, the jury could not have reached the verdict that GSR's slot  
4 machine hold percentage settings were readily ascertainable.

5 For example, in *K & G Oil Tool & Serv. Co. v. G & G Fishing Tool Serv.*,  
6 314 S.W.2d 782, 785-88 (Tex. 1958), the Texas Supreme Court held that the  
7 design of a magnetic fishing tool was entitled to protection as a trade secret, even  
8 though the jury found that the tool could be reverse-engineered "by an  
9 examination of the tool without disassembling it," because defendant "did not  
10 learn how to make the [plaintiff's] tool or a device similar thereto by observing it  
11 in an assembled or unbroken condition, but learned of its internal proportions,  
12 qualities and mechanisms by taking it apart despite an agreement that it would not  
13 do so." The court reasoned that the "fact that a trade secret is of such a nature  
14 that it can be discovered by experimentation or other fair and lawful means does  
15 not deprive its owner of the right to protection from those who would secure  
16 possession of it by unfair means." *Id.* at 603. Accordingly, in *K & G Oil*, the  
17 court concluded, as a matter of law, that information remains a trade secret,  
18 despite the ability to ascertain the information by proper means, when the  
19 information was actually secured by unfair means.<sup>5</sup>

20 \_\_\_\_\_  
<sup>5</sup> Peppermill has wrongly argued that *K & G Oil* is not applicable because it was

1 Both the overwhelming legal authority and the admitted facts support  
2 giving the instruction that: “Even if information which is asserted to be a trade  
3 secret could have been duplicated by other proper means, the information is not  
4 readily ascertainable if in fact it was acquired by improper means.” *See In*  
5 *Bancservices Grp., Inc. v. Strunk & Associates, L.P.*, Case No. 14-03-00797-CV,  
6 2005 WL 2674985, at \*2 (Tex. App. Oct. 20, 2005) (approving of such an  
7 instruction). Because the district court did not instruct the jury on this vital issue,  
8 a new trial is mandated.

9  
10  
11  
12 decided under the common law and not the Uniform Trade Secrets Act. This  
13 argument has no merit as numerous courts, as set forth above, have applied the  
14 same rule under the Uniform Trade Secrets Act, and because the Uniform Trade  
15 Secrets Act “merely codifies” the basic principles of common law trade secret  
16 protection.” *Frantz v. Johnson*, 116 Nev. 455, 466, 999 P.2d 351, 358 (2000)  
17 (holding that Nevada’s Uniform Trade Secrets Act “merely codifies the common  
18 law elements of misappropriation of confidential information”); *see also First*  
19 *Financial Bank v. Lane*, 130 Nev. Adv. Op. 96, 339 P.3d 1289, 1293 (2014)  
20 (ruling that “this court will not read a statute to abrogate the common law without  
clear legislative instruction to do so”); APP 6850, v.29, Motion for New Trial at  
13 n.2, 13:16-28, 14:13-28 (quoting cases involving more than one-hundred (100)  
years of precedent throughout the United State establishing the firmly entrenched  
rule that even if information could have been duplicated by other proper means,  
information is not readily ascertainable if in fact it was acquired by an improper  
means); APP 6947-52, v.29, Reply in Support of Motion for New Trial, at 7:19 -  
12:6 (quoting cases through the United States holding that the Uniform Trade  
Secrets Act has retained the common law distinctions).

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

6           A new trial is also warranted because the district court declined to instruct  
7           the jury that: “A trade secret is not readily ascertainable when the means of  
8           acquiring the information falls below the generally accepted standards of  
9           commercial morality and reasonable conduct, even if means of obtaining the  
10          information violated no government standard, did not breach any confidential  
11          relationship, and did not involve any fraudulent or illegal conduct.” APP 6410-  
12          14, v.27. In *E. I. duPont deNemours & Co. v. Christopher*, 431 F.2d 1012, 1014-  
13          16 (5th Cir. 1970), the Fifth Circuit held that “aerial photography of plant  
14          construction [to determine another’s secret manufacturing process] is an improper  
15          means of obtaining another's trade secret, even though defendant “violated no  
16          government aviation standard, did not breach any confidential relation, and did  
17          not engage in any fraudulent or illegal conduct” because such conduct falls  
18          “below the generally accepted standards of commercial morality and reasonable  
19          conduct.” The court reasoned that “[w]e should not require a person or  
20          corporation to take unreasonable precautions to prevent another from doing that  
            which he ought not to do in the first place.” *Id.* at 1017. The court then  
            pronounced the commandment “thou shall not appropriate a trade secret through

1 deviousness under circumstances in which countervailing defenses are not  
2 reasonably available.” *Id.*

3 The National Conference of Commissioners on Uniform State Laws, when  
4 drafting the Uniform Trade Secrets Act, expressly adopted the holding of  
5 *Christopher*. See 14 Uniform Laws Annot. Uniform Trade Secrets Act with 1985  
6 Amendments § 1, comment, p. 538-539 (relying upon *Christopher*, supra). The  
7 Commissioners reasoned that “[o]ne of the broadly stated policies behind trade  
8 secret law is ‘the maintenance of standards of commercial ethics.’” *Id.* (quoting  
9 *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470 (1974)). Not surprisingly, courts  
10 have readily adopted this standard when interpreting the Uniform Trade Secrets  
11 Act.<sup>6</sup>

12 The schemes proposed by Peppermill’s expert are far more “devious” than  
13 legally flying over a construction site to take pictures, which was found improper  
14 in *Christopher*. Peppermill’s schemes of using confidential information from slot  
15 machine manufacturer’s concerning the available par settings on GSR’s slot  
16 machines, available only to legitimate gaming enterprises, and then sending spies  
17 to secretly and repeatedly play and/or photograph GSR’s slot machines to

18  
19 <sup>6</sup> See also APP 6853:14 – 6854:27, v.29, GSR’ Motion for a New Trial, at 16:14-  
20 17:27 (quoting cases throughout the United States relying on *Christopher* to hold  
that improper means includes even lawful conduct which falls below the  
generally accepted standards of commercial morality and reasonable conduct).

1 calculate GSR's par cannot be viewed as proper commercial ethics. APP 6216-  
2 33, v.26; APP 6262-79, v.27.

3 Again, both the overwhelming legal authority and the admitted facts  
4 support giving the instruction on commercial morality. Because the district court  
5 did not instruct the jury on this vital issue, a new trial is again mandated.

6 **3. A New Trial Is Required Because the Jury Was NOT Properly**  
7 **Instructed That to Be Readily Ascertainable Information Must Be**  
8 **Ascertainable at a Glance.**

9 A new trial is warranted because the district court declined to instruct the  
10 jury that: "To be readily ascertainable, the information asserted to be a trade  
11 secret must be ascertained quickly, *or so self-revealing to be ascertainable at a*  
12 *glance.*" APP 6410-14, v.27. When instructing the jury, the district court refused  
13 to include the last phrase "or so self-revealing to be ascertainable at a glance."  
14 This excluded phrase however is amply supported by the courts. *See Motorola,*  
15 *Inc. v. Lemko Corp.*, Case No. 08 C 5427, 2012 WL 74319, at \*19 (N.D. Ill. Jan.  
16 10, 2012) (holding that information was protected as a trade secret where it "did  
17 not involve self-revealing information that any user or passer-by sees at a  
18 glance"); *Stewart & Stevenson Servs., Inc. v. Serv-Tech, Inc.*, 879 S.W.2d 89, 111  
19 (Tex. App. 1994) (to be a protected trade secret, "the trade secret must not be  
20

1 generally known to or used by the industry or a matter completely disclosed or  
2 ascertainable at a glance”).<sup>7</sup>

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

16 Again, both legal authority and the underlying facts support giving the “at a  
17 glance” instruction. Because the district court did not properly instruct the jury on  
18 these vital issues, a new trial is mandated, and the district court’s decision to the

19  
20 <sup>7</sup> See also APP 6855-56, v.19, GSR’s Motion for a New Trial, at 18:21-19:9  
(quoting cases throughout the United States holding that to lose protection, the  
trade secret must be “ascertainable at a glance”).

1 contrary should be reversed. *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  
3 case that is supported by the evidence “mandates reversal for a new trial”).

4 **4. A New Trial Is Required Because the Jury Was Improperly**  
5 **Instructed on Reverse Engineering When the Admitted Facts**  
6 **Demonstrated that Peppermill Did NOT Reverse Engineer GSR’s**  
7 **Slot Machine Hold Percentage Settings.**

8 The district court also erred by giving instructions concerning reverse  
9 engineering, even though Peppermill did not offer any evidence to support such  
10 instructions. APP 6443-44, 6446, v.27. To the contrary, Peppermill admitted to  
11 stealing GSR’s slot machine hold percentages, and did not acquire those trade  
12 secrets by reverse engineering.

13 In *Allan v. Levy*, 109 Nev. 46, 49-50, 846 P.2d 274, 276 (1993), this Court  
14 held that an “unsupported jury instruction . . . constitutes a sufficiently serious  
15 source of jury confusion and misunderstanding to mandate reversal . . . for a new  
16 trial.” The Court reasoned that “if a jury instruction relating to a litigant's theory  
17 of complaint or defense is not supported by the trial evidence, the instruction  
18 should not be given.” *Id.*

19 Instructions on reverse engineering should not have been given because  
20 Peppermill admitted that it acquired GSR’s slot machine hold percentage settings  
by theft and not by reverse engineering. Instructing the jury on reversing  
engineering only mislead and confused the jury into believing Peppermill had

1 used a proper method to ascertaining GSR's trade secrets which is contrary to the  
2 established facts of this case. Courts have universally rejected allowing proof of  
3 alternative means of discovering trade secrets, when in fact the trade secrets were  
4 misappropriated by improper means.

5 Even a process consisting entirely of generally known elements is  
6 protectable as a trade secret, the value of trade secrets would be lost if a defendant  
7 could obtain the process, learn thereby the important choices made by the trade  
8 secret owner, use the information gained for its benefit, and avoid liability by then  
9 saying the particular information used is published or already known. *See Rohn*  
10 *and Haas Co. v. Adco Chem. Co.*, 689 F.2d 424, 433-434 (3<sup>rd</sup> Cir. 1982).  
11 example,

12 For example, in *Reingold*, the Fifth Circuit held that a boat hull mold was  
13 entitled to protection as a trade secret under the Uniform Trade Secret Act and  
14 was "not readily ascertainable by proper means," even though defendant "could  
15 have reverse engineered a mold from an existing hull," because defendant did not  
16 create the infringing mold from an existing hull, but instead "misappropriated the  
17 trade secret" by improper means. 126 F.3d at 650-52. The court reasoned that  
18 "protection will be accorded to a trade secret holder against disclosure or  
19 unauthorized use gained by improper means, even if others might have  
20 discovered the trade secret by legitimate means." *Id.* at 652; *see also DPT Labs.*,

1 *Ltd. v. Bath & Body Works, Inc.*, Case No. CIV.SA-98-CA-664-JWP, 1999 WL  
2 33289709, at \*4 (W.D. Tex. Dec. 20, 1999) (holding under the Ohio Uniform  
3 Trade Secrets Act that the “theoretical ability of others to ascertain [Plaintiff’s]  
4 lotion formula from [another] lotion that was previously available on the market  
5 does not preclude protection as a trade secret” because “protection will be  
6 accorded to a trade secret holder against disclosure or unauthorized use gained by  
7 improper means, even if others might have discovered the trade secret by  
8 legitimate means”). These few cases represent a long line of cases, as previously  
9 set forth, that reverse engineering is not a defense when the trade secret was  
10 actually acquired by improper means.

11 Even if Peppermill had offered proof that it had acquired GSR’s slot  
12 machine hold percentage settings through one or more of the devious schemes  
13 devised by Peppermill’s experts, allowing a reverse engineering instruction would  
14 still be error. Under NRS 600A.030(5)(a), only “proper means” can be used to  
15 ascertain trade secrets. As already set forth in *Christopher* and by the  
16 Commissioners that drafted the Uniform Trade Secrets Act, the schemes offered  
17 by Peppermill’s experts fall far below the standards of commercial morality.  
18 Accordingly, as Peppermill admittedly acquired GSR’s slot machine hold  
19 percentage settings, not by reverse engineering, but by theft, and Peppermill’s  
20

1 after-the-fact schemes violate commercial ethics as a matter of law, the district  
2 court erred in instructing the jury about reverse engineering.

3 **B. The District Court Erred in Refusing to Compel the Production of**  
4 **Tens of Thousands of Documents Improperly Withheld.**

5 A district court's ruling on a motion to compel discovery is reviewed for  
6 "an abuse of discretion." *See Kerley v. Aetna Cas. & Sur. Co.*, 94 Nev. 710, 711,  
7 585 P.2d 1339, 1340 (1978). In *Marx v. Kelly, Hart & Hallman, P.C.*, 929 F.2d  
8 8, 12 (1st Cir. 1991), the First Circuit held that district court properly compelled  
9 the production of documents, and appropriately ruled that all objections had been  
10 waived, including any objection based on attorney-client privilege, when the  
11 responding party failed to timely file his discovery responses. The court reasoned  
12 that all objections were waived because "Fed. R. Civ. P. 34(b) [just like Nev. R.  
13 Civ. P. 34] requires that a party upon whom a request for discovery is served  
14 respond within thirty days, either stating its willingness to comply or registering  
15 its objections." *Marx*, 929 F.2d at 12. The court concluded that due to the  
16 "failure to respond to the production request," the responding party "withheld the  
17 privileged documents at his own peril." *Id.*

18 The district court, by affirming the discovery commissioner's  
19 recommendation, expressly ruled "Defendant waived its objections to the first  
20 request for production by failing to serve a timely response to that request."

1 APP 1536:15-17, v.7; APP 1965, v.9.<sup>8</sup> Eighteen (18) of the twenty-one (21)  
2 requests in that set involved requests for emails, including Request No. 9 which  
3 requested a “back up of each of your email servers for the period from December  
4 31, 2009 through the present.” APP 1125-37, v.5. Peppermill, however, failed to  
5 timely respond, and therefore waived any objection to the production of any  
6 emails. Despite waiving its objections, Peppermill did not provide a backup of all  
7 its emails but only provided five (5) emails. APP 1141-1213, v. 5-6. More  
8 troubling, GSR specifically requested “All documents provided to the Nevada  
9 Gaming Board or Nevada Gaming Commissions part of the investigation NGC  
10 13-23.” APP 1135:3-5, v.5. Peppermill repeatedly affirmed that that tens of  
11 thousands of emails were turned over to the NGCB. APP 1229:4-8, v.6; APP  
12 3348, v.14.

13 Furthermore, Mr. Estes, Peppermill’s Corporate IT Director of Network  
14 Systems, testified that since Peppermill emails and other electronic data are stored  
15 on a server, that information has been archived for three year and is presently  
16 backed up due to litigation hold which therefore has preserved such data from the

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17  
18 <sup>8</sup> When orally confirming the discovery commissioner’s recommendation denying  
19 GSR’s motion to compel, the district court erroneously “found that there’s never  
20 been a waiver by the defendant to any of the objections to the request for  
production.” APP 4963:22-24. To the contrary, the district court found precisely  
the opposite, that “Defendant waived its objections to the first request for  
production by failing to serve a timely response to that request.” This error alone  
is grounds for reversing the district court’s denial of GSR’s motion to compel.

1 Spring of 2011. APP 7100:17-24, 7103:6-13, 7105:5-16, 7106:4-10, 7107:25 –  
2 7109:16, 7110:5-6, 7119:8-11, 7120:15-20, 7121:9 – 7122:2, 7125:2-6, 7126:14-  
3 16, v.30. Finally, Mr. Estes testified that though he had been given a list of  
4 search criteria to use regarding the emails “haven’t done anything with that.”  
5 APP 7122:24 – 7123:3, v.30. Accordingly, out of these 80,000 emails,  
6 Peppermill only produced five (5). As Peppermill waived any objection to  
7 producing all requested documents, including all emails from December 31, 2009  
8 through the present, the district court erred by in refusing to compel Peppermill to  
9 produce such documents. The district court furthered erred by failing to order  
10 Peppermill to pay monetary sanctions in an amount adequate to compensate GSR  
11 for the hundreds of hours expended in attempting to secure these documents.

12 **1. Peppermill Waived All Objections to GSR’s Discovery Requests by**  
13 **Failing to Timely Respond and Such Waiver Is Inexcusable.**

14 The district court denial of GSR’s motion to compel was almost entirely on  
15 the notion that even though a party may waive all objections through the failure to  
16 serve timely discovery response, a court may excuse such waiver. APP 3845:8 –  
17 3846:22, v. 17; APP 4961:20 -4864:16, v. 21. While in certain extreme situations  
18 the court may excuse wavier of objections, such power is not unlimited and  
19 certainly does not apply in this case.

20 For example, in *Rintchen v. Walker*, Case No. CIV. A. 95-CV-6861, 1996  
WL 238701, at \*1 (E.D. Pa. May 7, 1996), relied upon by the district court, the

1 court found that only “objections based on *strong public policies* which would  
2 preclude disclosure of the information requested should not be deemed waived.”  
3 In *Meche v. Maint. Dredging, Inc.*, Case No. CIV.A. 10-3653, 2012 WL 519882,  
4 at \*2 (E.D. La. Feb. 16, 2012), the court only refused to waive objection with  
5 respect to “highly sensitive personal information of non-party individual  
6 employees. . . .” Finally, in *Williams v. Krieger*, 61 F.R.D. 142, 145 (S.D.N.Y.  
7 1973), the court refused to find waiver when “certain of the interrogatories are so  
8 totally improper that no useful purpose will be served by either forcing defendant  
9 to respond. . . .” None of these circumstances are now present.

10 The district court could not and did not find anything improper about  
11 GSR’s discovery request for documents that Peppermill provided to the NGCB,  
12 as the Board seized those documents when investigating the exact same egregious  
13 misconduct by Peppermill that is at issue in issue in this case. The discovery  
14 commissioner even acknowledged that the “GCB undoubtedly obtained *much*  
15 *material* from Defendant in 2013 that *is relevant* to this action.” APP 3846:1 –  
16 3847:2, v.17. The district court merely speculated that some of the material  
17 obtained by the NGCB may not have been relevant. APP 3846:15-19, v.17. Such  
18 speculation is clear error.

19 First, the district court’s argument is circular. While the district court  
20 acknowledged that “a party who fails to assert timely objections generally waives

1 its right to assert those objections” including “objections based on relevance”  
2 (APP 3845:8-9, v.17), the district court refused to enforce such waiver if some of  
3 the documents requested might not be relevant. Under such reasoning, there can  
4 be no waiver of the objection of relevancy, because the waiver would only apply  
5 if all documents requested were relevant.

6 Second, simply because a specific document may not be relevant is  
7 insufficient grounds to refuse production. Even non-relevant documents must be  
8 produced if they reasonably could lead to the production of relevant documents.  
9 *See Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978) (holding the  
10 discovery requirement of relevancy “has been construed broadly to encompass  
11 any matter that bears on, or that reasonably could lead to other matter that could  
12 bear on, any issue that is or may be in the case”).

13 Originally, Peppermill produced only five (5) emails in response to GSR’s  
14 request for such emails, out of the more than 80,000 emails Peppermill admittedly  
15 handed over to the GCB. APP 1993-94, v.9. GSR, however, discovered, after  
16 significant effort, that Peppermill had withheld emails demonstrating that  
17 Peppermill used stolen slot machine hold percentage settings from GSR and other  
18 casinos, in order to gain a competitive advantage, which Peppermill had long  
19 denied. APP 2138-40, v.9. By concealing these vital emails, Peppermill  
20 conclusively shown that it could not be trusted to choose which documents were

1 relevant and which were not. *See Freddie v. Marten Transport*, 428 Fed. Appx.  
2 801, 804 (10th Cir.2011) (the “withholding of evidence substantially prejudices  
3 an opposing party by casting doubt on the veracity of all of the culpable party's  
4 submissions throughout litigation”). Due to Peppermill’s egregious misconduct,  
5 the only possible way to insure the production of all relevant emails is to require  
6 the production of all emails provided to the GCB, “much” of which the district  
7 court acknowledged “is relevant to this action” and therefore is reasonably  
8 calculated to lead to the production of other relevant documents. APP 3846:1 –  
9 3847:2, v.17.

10 Finally, even if certain emails are not within the scope of discovery as the  
11 district court speculates, the burden of determining which documents are not  
12 within the scope of discovery should be placed on Peppermill, the party that  
13 waived its objection by not timely responding to GSR’s discovery requests in the  
14 first place, and not GSR. *See Ohntrup v. Makina Ve Kimya Endustrisi Kurumu*,  
15 760 F.3d 290, 297 n.6 (3d Cir. 2014) (“the party objecting to the discovery . . .  
16 bear[s] the burden of persuasion”). In *Fifty-Six Hope Rd. Music, Ltd.*, again the  
17 very case relied upon by the discovery commissioner, the court held that it is the  
18 responding party’s “obligation to review its records and produce relevant, non-  
19 privileged documents and information.” 2007 WL 1726558, at \*9. The court the  
20 refused to shift to this expense and burden to the propounding party in reviewing

1 the email communications to determine if the documents should be produced. *Id.*  
2 The district court, however, improperly placed all the burden and expense in  
3 identifying relevant documents on GSR.

4       Peppermill admittedly refused to release any emails unless GSR first went  
5 to opposing counsel's office and identified the emails it found responsive. APP  
6 3769, v.16. Counsel for the GSR specifically objected to this improper  
7 production of the emails and pointed out that to inspect 80,000 admittedly  
8 withheld emails at an average of two minutes per email it would require 2,666  
9 hours, which is the equivalent of one and a half years of attorney time just to sit at  
10 counsel's office and inspect the emails manually as dictated by Defendant's  
11 counsel. APP 3769, v.16. Apparently recognizing that this improperly imposed  
12 an immense burden on GSR to sift through the relevant documents, the district  
13 court erroneously concluded that Peppermill met its obligation to permit GSR to  
14 "inspect" and "copy" documents required by NRCP 34, by proposing the use of  
15 an "ESI expert and a word search protocol to locate relevant emails. . . ." APP  
16 3847:7-9, v.17. The district court, however, ignored the fact GSR provided an  
17 actual word search protocol which was rejected by Peppermill. APP 1977:17 -  
18 1978:5, v.9. Accordingly, Peppermill's proposed word search protocol was not  
19 genuine, but merely an effort to delay discovery.

20       Even if Peppermill's proposed word search protocol had not been illusory,

1 the proposal to conduct a word search protocol does not meet its obligation under  
2 NRCP 34(b)(2)(C) to actually provide GSR with all documents to which  
3 Peppermill has no specific objection. Further, NRCP 34(b)(2)(E)(i)(ii) requires  
4 that a party must “produce documents as they are kept in the usual course of  
5 business” and “a party must produce it in a form or forms in which it is ordinarily  
6 maintained....” *See United States v. Reeves*, Case No. 2:12-CV-01916-JAD, 2013  
7 WL 5523815, at \*1 (D. Nev. Oct. 3, 2013) (holding “a discovery response which  
8 merely promises to produce the requested information at some unidentified time  
9 in the future, without offering a specific time, place and manner is treated as a  
10 failure to answer or respond”).<sup>9</sup> While Peppermill generally claims that certain  
11 emails are generally privileged, confidential or not relevant, Peppermill has not  
12 and cannot state that it has conducted the necessary review to find and produce all  
13 relevant emails. Peppermill cannot make such a claim because, when counsel for  
14 GSR was given the brief opportunity to review these tens of thousands of emails,  
15 counsel quickly discovered highly relevant emails withheld by Peppermill. APP

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17 <sup>9</sup> *See Kinetic Concepts, Inc. v. ConvaTec Inc.*, 268 F.R.D. 226, 240-41 (M.D.N.C.  
18 2010) (holding “a response to a request for production of documents which  
19 merely promises to produce the requested documents at some unidentified time in  
20 the future, without offering a specific time, place and manner, is not a complete  
answer as required by Rule 34(b) and, therefore, pursuant to [the provision now  
codified at Rule 37(a)(4)] is treated as a failure to answer or respond”); *see also*  
*Best Buy Stores, L.P. v. Manteca Lifestyle Ctr., LLC*, Case No. 2:10-CV-0389-  
WBS-KJN, 2011 WL 2433655, at \*9 (E.D. Cal. June 14, 2011) (“where an  
objection applies to only a portion of the documents requested, the responding

1 1238-40, v.9. As Peppermill has withheld thousands of relevant documents, this  
2 Court should reverse the district court, and compel the production of the tens of  
3 thousands of relevant emails that it has admittedly and improperly withheld, and  
4 sanction Peppermill accordingly.

5 **2. Plaintiff's Counter-Motion to Compel Was Timely.**

6 The district court apparently concluded that GSR's second motion to  
7 compel was untimely because "Plaintiff [GSR] waited approximately three  
8 months to file a motion on this issue. . . ." APP 3847:16-17, v. 17. The district  
9 court simply ignores that it should have compelled the production of these  
10 documents months before, when GSR previously moved to compel these same  
11 improperly withheld documents. The district court further ignored GSR's  
12 repeated Herculean efforts to secure these withheld emails without court  
13 intervention as set forth in GSR's Motion for Case Concluding Sanctions.  
14 APP 2141-54, v.9; APP 2199:13-14, v.10.

15 As previously set forth, the district court improperly required the parties to  
16 reach an agreement as to reasonable disclosures, even though the court found that  
17 Peppermill had no excuse for its improper refusal to provide documents. APP  
18 1327:13-20, v.16. Instead, the district court should have compelled their  
19 production when GSR originally moved to compel production of those documents  
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party must produce the remainder of the documents").

1 on March 4, 2015. GSR endeavored to avoid any accusation by the district court  
2 that it did not make every attempt to reach an agreement because the district court  
3 apparently, albeit wrongly, believed that GSR's initial effort to secure those  
4 documents without court assistance was insufficient. GSR has pursued no less  
5 than three (3) discovery dispute conferences and sent no less than eleven (11)  
6 letters and emails to Peppermill repeatedly attempting to secure the tens of  
7 thousands of emails which the district court found had not been provided. APP  
8 3356, v.14. Peppermill, however, continued to stall by agreeing to provide the  
9 emails, but then refused to do so unless GSR agreed to some unreasonable  
10 conditions on the production of those emails, which conditions would involve  
11 thousands of hours of attorney time. APP 2136-37, v.9; APP 2199:13-14, v.10;  
12 APP 3356, v.14. Despite this misconduct, the district court unreasonably blamed  
13 GSR for Peppermill's refusal to provide thousands of relevant documents.

14 Contrary to the district court's ruling, courts almost universally agree that  
15 motions to compel filed within the discovery deadline, such as GSR's motion, are  
16 timely. *See Clark v. Capital Credit & Collection Servs., Inc.*, 460 F.3d 1162,  
17 1179 (9th Cir. 2006) (explaining that motion to compel filed during the discovery  
18 period would rarely be considered untimely). Even when filed after the discovery  
19 period, motions to compel are considered timely when any delay is attributable to  
20 the parties attempt to resolve the discovery dispute within the discovery deadline.

1 *See Lurie v. Mid-Atlantic Permanente Med. Group*, 262 F.R.D. 29, 31  
2 (D.D.C.2009) (holding that even a motion to compel filed after the discovery  
3 period ended was timely where the time of filing the motion to compel was  
4 attributable to the parties' failure to settle the discovery dispute within the  
5 discovery period). GSR's Motion to Compel was clearly timely, especially in  
6 light of Peppermill's repeated promises to produce emails that it ultimately  
7 withheld. Accordingly, as there can be no doubt that Peppermill withheld  
8 thousands of essential emails and that GSR's motion to compel was timely filed  
9 within the discovery period, this Court should reverse the district court's order to  
10 the contrary, and require the district court to compel Peppermill to produce all  
11 requested documents without objection.

12 **C. The District Court Erred when Denying GSR's Motion for Case**  
13 **Concluding Sanctions based on Peppermill's Repeated Intentional**  
14 **Misrepresentations Concerning Its Discovery Responses.**

15 In *Watson Rounds v. Eighth Jud. Dist. Ct.*, 131 Nev. Adv. Op. 79, 358 P.3d  
16 228, 233 (2015), this Court ruled that a district court "abuses its discretion" by  
17 ruling on a motion for sanctions "without including in its order sufficient  
18 reasoning and findings in support of its ultimate determination." When ruling on  
19 GSR's motion for case concluding sanctions, the district court made no findings  
20 whatsoever. Instead, the district court merely ruled that "GSR's *Motion for Case*  
*Concluding Sanctions for Violation of Discovery Orders (Pursuant to NRCP 37)*

1 is hereby **DENIED.**” APP 3836:1-2, v.16. When the district court fails to make  
2 finding on a motion for sanctions, this Court should review the motion de novo.  
3 *See Adriana Int'l Corp. v. Thoeren*, 913 F.2d 1406, 1408 (9th Cir. 1990) (“If the  
4 district court fails to make factual findings, the decision on a motion for sanctions  
5 is reviewed de novo”)

6 In *Picon v. Ryon*, 99 Nev. 801, 802, 671 P.2d 1133, 1134 (1983), this  
7 Court held that a when a party’s “failure to provide discovery information was  
8 unexplained and unwarranted,” and *not* “accidental or involuntary,” which  
9 “unresponsive conduct halted the normal adversarial process,” then the party’s  
10 conduct is “sufficiently willful” so as to warrant case concluding sanctions. *See*  
11 *also Foster v. Dingwall*, 126 Nev. 56, 65, 227 P.3d 1042, 1048 (2010) (explaining  
12 that case concluding sanctions are appropriate “where litigants are unresponsive  
13 and engage in abusive litigation practices that cause interminable delays”). This  
14 Court in *Picon* reached this result even though the district court did not find that  
15 the party “failed to comply with discovery orders.” *Id.* at 801, 671 P.2d at 1133.  
16 *See also Stubli v. Big D Int'l Trucks, Inc.*, 107 Nev. 309, 313, 810 P.2d 785, 788  
17 (1991) (affirming case concluding sanctions even though “no court order  
18 compelling discovery had been entered and thus violated” by the offending  
19 party). In fact, case concluding sanctions “need not be preceded by other less  
20

1 severe sanction.” *Young v. Johnny Ribeiro Bldg., Inc.*, 106 Nev. 88, 92, 787 P.2d  
2 777, 780 (1990).

3 Here, Peppermill’s discovery abuses are too great to fully set forth in this  
4 brief, but are fully set forth in GSR’s forty-three (43) page motion for case  
5 concluding sanctions. APP 2131-73, v.9-10. As already set forth, Peppermill  
6 admitted that it failed to provide tens of thousands of emails and other documents,  
7 including the critical documents that Peppermill turned over to the Nevada  
8 Gaming Control Board. The failure to provide these documents can in no way be  
9 deemed mistake, but was a calculated attempt to thwart GSR from establishing its  
10 case.

11 The fraudulent nature of Peppermill’s discovery abuses is clear from  
12 Peppermill’s consolidated supplemental responses to GSR’s requests for  
13 production of documents. APP 2298-2313, v.10. When responding to GSR’s  
14 request for a backup of Peppermill’s email server, Peppermill misrepresented that  
15 a “no[n]-incremental backup does not exist.” APP 2302:17, v.10. Peppermill  
16 further misrepresented that “Peppermill does not backup its email servers.” APP  
17 2303:1-2, v.10. Peppermill knew these answer were *false* when given as Mr.  
18 Estes, Peppermill’s Corporate IT Director of Network Systems, expressly testified  
19 that testified that emails were archived for three years on the server and were  
20 backed up forever due to the litigation hold. APP 7100:17-24, 7103:6-13,

1 7105:5-16, 7106:4-10, 7107:25 – 7109:16, 7110:5-6, 7119:8-11, 7120:15-20,  
2 7121:9 – 7122:2, 7125:2-6, 7126:14-16, v.30.

3 When responding to GSR's request for all documents provided to the  
4 Nevada Gaming Board and or the Nevada Gaming Commission, Peppermill  
5 misrepresented that:

6 Computers were seized and taken by the Nevada Gaming Control  
7 Board. Peppermill did not provide documents to the Nevada Gaming  
8 Control Board other than simply providing computers that it  
9 requested.

10 APP 2305:16-19, v.10. Peppermill, likewise, knew this answer was *false* when  
11 given because the Gaming Control Board did not simply seize computers, but  
12 made a request, in a letter dated July 31, 2013, which stated:

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

15 Ryan Tors, Corporate analyst  
16 John Hanson, Casino General Manager  
17 Dave McHugh, Slot Director  
18 Dave Halabuk, Marketing Director  
19 William Paganetti Jr., Licensee  
20 William Paganetti, Director of Marketing

The email correspondence for the above-named individuals shall be  
provided from the 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 lists, and their 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.

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

3 APP 2177, v.10 (emphasis added). Peppermill knew exactly what emails and  
4 other information was taken because the NGCB letter specifically described the  
5 information. Peppermill response can only be viewed as an intentional attempt to  
6 withhold the 80,000 email Denise Vessie testified were provided by Peppermill to  
7 the NGCB. APP 3348, v.14.

8 In GSR's Requests Nos. 11 -17, GSR specifically requested "emails" and  
9 "other written or electronic memorialization" concerning various aspects of  
10 Peppermill's admit theft of slot machine hold percentage settings from GSR and  
11 other casinos. APP 1160-62, v.5. Peppermill nevertheless misrepresented that  
12 the information had already been provided or that "*None exists.*" APP 1160-62, v.  
13 5, Peppermill's Supplemental Response to Request Nos. 11 -17 (emphasis added).  
14 Such responses were *false* when made because, as set forth above, during the  
15 limited time counsel for GSR had available to manually search the emails  
16 provided, counsel discovered numerous responsive, but unproduced, emails  
17 showing the misappropriation and use of these stolen slot machine hold  
18 percentage settings by Peppermill. Additionally, the emails clearly indicated that  
19 Peppermill employees were using texts to convey similar messages, which texts  
20

1 were never produced. More than likely, hundreds, of similar emails and texts, if  
2 not thousands, remain un-produced.

3 In order to justify its refusal to provide emails and texts, as late as August  
4 17, 2015, Peppermill continued its charade that it did not know what emails the  
5 NGCB had taken, but indicated that the NGCB search had to be “replicated,”  
6 when in fact the NGCB letter specifically outlined which emails were provided  
7 by Peppermill. APP 2215, v.10. Even after claiming to “replicate” the emails  
8 provided to the NGCB, Peppermill still did not provide the emails. Instead,  
9 Peppermill imposed the unreasonable condition that GSR manually review each  
10 email at counsel for Peppermill’s office, select the email GSR wanted to be  
11 produced, after which Peppermill would determine whether the production was  
12 objectionable. APP 2215, v.10. The emails on Peppermill’s counsel’s  
13 computers, however, were not 80,000 emails estimated by Ms. Vessie, but  
14 238,548 emails. APP 2137:23-26, v.9; APP 2199:13-14, v.10. Even if each  
15 email took only two (2) minutes to review, the review would take 7,933 hours, or  
16 approximately 4.5 years of attorney time.

17 Such unreasonable conditions, along with Peppermill’s 16-month delay in  
18 admitting that the emails even existed, is the very “willful” and “unresponsive  
19 conduct [which] halts the normal adversarial process,” and which this Court in  
20 *Picon* determined justified case concluding sanctions. 99 Nev. at 801-02, 671

P.2d at 1133-34. In light of Peppermill’s repeated and continued abuses, ultimate sanctions are necessary to demonstrate to Peppermill and future litigants that they are not free to delay and act with “wayward disregard” of the rules of discovery. *See Foster*, 126 Nev. at 66, 227 P.3d at 1049. GSR was forced to depose Peppermill’s key witnesses with only token responses to its written discovery requests, and then proceed to trial with a very incomplete picture of the evidence. The award of case concluding sanctions is appropriate because the only alternative is to restart the case from scratch, an expense no litigant should be required to bear. Even if the case were restarted, considering the full extent of Peppermill’s past misconduct, it is highly unlikely that Peppermill will ever comply with GSR’s discovery requests. Instead, Peppermill will continue to withhold, or has otherwise destroyed, critical information about its scheme to steal and use GSR’s trade secrets. As the district court refused to make the necessary findings, this Court should do so de novo, and order that Peppermill’s Answer be stricken.

**D. The District Court Erred When Denying GSR’s Motion to Amend.**

In *Phillips v. Parker*, 106 Nev. 415, 418, 794 P.2d 716, 718 (1990), this Court explained that a district court’s decision with respect to a motion to amend is reviewed for an “abuse of discretion.” In *Marschall v. City of Carson*, 86 Nev. 107, 112, 464 P.2d 494, 498 (1970), this Court decreed that “Rule 15(a) declares

1 that leave to amend shall be freely given when justice so requires; this mandate is  
2 to be heeded.”” Quoting *Foman v. Davis*, 371 U.S. 178, 182 (1962). The district  
3 court refused to follow this mandate and denied GSR’s motion to amend, even  
4 though the motion was timely filed pursuant to the court’s scheduling order.

5 On March 2, 2015, GSR sought to amend its complaint to add claims and a  
6 new defendant who was discovered to have ordered Tors to first steal GSR’s trade  
7 secrets. APP 479-501, v.2-3. The only basis for denying GSR’s motion to amend  
8 was district court’s finding that “all of GSR’s new claims, as well as its theory of  
9 liability for Mr. Hanson, a Peppermill officer, could have been alleged much  
10 earlier.” APP 1093:18-20, v.5. Such a finding, however, is insufficient to  
11 support the denial of a motion to amend, especially in light of the fact that the  
12 district court’s own scheduling order set the deadline to “[f]ile motions to amend  
13 pleadings or add parties” as “March 2, 2015.” APP 12:4-5, v.1.

14 In *Bergenfield v. BAC Home Loans Servicing*, 131 Nev. Adv. Op. 68, 354  
15 P.3d 1282, 1284 (2015), this Court explained that “in the absence of any apparent  
16 or declared reason—such as undue delay, bad faith or dilatory motive on the part  
17 of the movant, the district court should grant a party's motion for leave to amend.”  
18 Contrary to the district court’s conclusion, delay is an insufficient justification for  
19 denying a motion to amend, but rather denial requires a showing of “undue  
20 delay.”

1 In *Howey v. United States*, 481 F.2d 1187, 1189-90 (9th Cir. 1973), the  
2 Ninth Circuit held that the district court abused its discretion in denying a motion  
3 to amend a third party complaint, even though the motion was made on the  
4 second day of trial, five years after the original third-party complaint was filed,  
5 and the third party plaintiff “gave no reason for its lengthy delay.” The Ninth  
6 Circuit, in *Howey*, found that “[w]hile it is true that the motion was made five  
7 years after the third-party complaint had been filed, we know of no case where  
8 delay alone was deemed sufficient grounds to deny a Rule 15(a) motion to  
9 amend.” *Id.* at 1190. The court reasoned that “[w]here there is a lack of  
10 prejudice to the opposing party and the amended complaint is obviously not  
11 frivolous, or made as a dilatory maneuver in bad faith, it is an abuse of discretion  
12 to deny such a motion” because the “purpose of the litigation process is to  
13 vindicate meritorious claims.” *Id.*

14 The district court found no prejudice, but instead found that the “new  
15 causes of action present new elements, new theories of liability, and new issues as  
16 to damages,” and concluded that “Peppermill and the proposed additional  
17 defendants must be afforded adequate opportunity to defend themselves.” APP  
18 1093:4-7, v.5. The district court was apparently concerned that defendants would  
19 have an inadequate opportunity because the discovery deadline was a month and  
20 a half (1 ½) months away. APP 1092:25-27, v.5.

1 In *Buder v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 644 F.2d 690, 694  
2 (8th Cir. 1981), the Eighth Circuit reversed the district court’s denial of a motion  
3 to amend where the district court “placed great reliance on the two and one-half  
4 year delay between the filing of the complaint and plaintiffs’ request for leave to  
5 amend” to support its finding of prejudice because “it is well-settled that delay  
6 alone is not a sufficient reason for denying leave.” The Court reasoned: “Where  
7 the facts on which a previously unasserted claim is based are all known or  
8 available to all parties, *there is no prejudice* in allowing an amended complaint.”  
9 *Id.* (emphasis added). The court concluded that to “the extent that some  
10 additional discovery may be necessary, it is well within the district court’s power  
11 to alleviate the resulting burden on the defendants by granting a continuance”  
12 because “there is nothing in the record or the parties’ briefs to indicate that the  
13 defendants are less able to conduct any necessary additional discovery at this time  
14 than they would have been if the plaintiffs’ motion to amend had been filed  
15 earlier.” *Id.*

16 Similarly, in *Eagle River Mobile Home Park, Ltd. v. Dist. Court In & For*  
17 *Eagle Cty.*, 647 P.2d 660, 663 (Colo. 1982), the Colorado Supreme Court  
18 *unanimously en banc* reversed the trial court’s denial of a motion to amend when  
19 “the single overriding consideration which prompted the trial court to deny the  
20 motion to amend was the court’s desire to maintain the scheduled trial date.” The

1 court reasoned “[w]here the prejudice suffered by the opposing party is lack of  
2 adequate time to prepare his case, this hardship may be avoided by granting a  
3 continuance of the trial date” because “it is preferable to allow the amendment  
4 subject to any conditions necessary to avoid prejudice to the opposing parties.”  
5 *Id.* at 663–64 citing 6 C. Wright & A. Miller, Federal Practice and Procedure, §  
6 1488 at 440-44 (1971).

7 Here, the district court acknowledged that the additional claims are based  
8 on the same “core facts” which have been known to Peppermill since the  
9 beginning of the case, and therefore Peppermill cannot claim the prejudice  
10 necessary to support a finding of undue delay as only the legal theories have  
11 changed. *See* APP 1093:14-16, v.5; *Davis v. Piper Aircraft Corp.*, 615 F.2d 606,  
12 613 (4th Cir. 1980) (holding prejudice was lacking to deny motion to amend  
13 when “defendant was from the outset made fully aware of the events giving rise  
14 to the action, an allowance of the amendment could not in any way prejudice the  
15 preparation of defendant's case” because “[d]elay alone . . . without any  
16 specifically resulting prejudice . . . should not suffice as reason for denial”).  
17 Long ago, the United States Supreme Court held that denying a motion to amend  
18 is error when “the amendment would have done no more than state an alternative  
19 theory for recovery.” *Foman*, 371 U.S. at 182.<sup>10</sup> Neither the district court nor  
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<sup>10</sup> *See also Harrison v. Rubin*, 174 F.3d 249, 252–53 (D.C. Cir. 1999) (reversing

1 Peppermill point to anything which would have prevented Peppermill from  
2 conducting any necessary discovery, other than the impending discovery deadline  
3 which was 1½ months away. If additional time for discovery would have been  
4 required, nothing prevented the district court from simply extending the discovery  
5 deadline, which had not previously been extended. In fact, the district court  
6 ultimately did extend the discovery deadline to November 25, 2015, by approving  
7 a stipulation at Peppermill's request. APP 1974:1-4, v.9. If the discovery  
8 deadline had been extended at the time the district court ruled on GSR's motion  
9 to amend, the extension would have provided more than eight (8) months of  
10 discovery.

11 While Peppermill would have suffered no prejudice as a result of  
12 amending, as evidenced by its request to extend discovery, the district court did  
13 not even consider the prejudice to GSR by denying the motion to amend. GSR  
14 was denied the ability to pursue valid claims, which was not disputed by the  
15 district court. *See Buder*, 644 F.2d at 694-95 (holding denying a motion to amend  
16 instead of continuing discovery deadline prejudiced plaintiffs by "deny[ing] a  
17 trial on merits" on the newly asserted claims). As the district court wrongly

18  
19 district court's denial of motion to amend based on the lower court's finding that  
20 "[t]wo years have passed since the filing of plaintiff's complaint," that the "case  
is nearing trial, and the parties have almost concluded their pre-trial discovery"  
because "[w]here an amendment would do no more than clarify legal theories . . .  
we have consistently held that delay, without a showing of prejudice, is not a

1 determined that moving the trial date, which prejudiced no one, outweighed the  
2 very real prejudice of denying GSR a trial on the merits of all its valid claims, the  
3 district court erred in denying GSR's motion to amend.

4 Even if delay alone was the standard, rather than "undue delay," GSR did  
5 not delay in bringing its motion to amend. GSR can hardly be faulted for filing  
6 its motion to amend on the deadline set by the district court when Peppermill, by  
7 withholding relevant documents, was primarily responsible for any delay. *See*  
8 *Velocity Press v. Key Bank, NA*, 570 F. App'x 783, 789 (10th Cir. 2014) (holding  
9 that delay could not justify denial of motion to amend where delay was the result  
10 of "discovery disputes continuing into the months preceding trial"). As there was  
11 no delay in bringing the motion to amend, let alone "undue delay" required to  
12 deny such a motion, the district court erred in denying GSR's motion to amend,  
13 and that decision should be reversed.

14 **E. The District Court Erred when Granting Peppermill's Motions In**  
15 **Limine to Exclude Evidence of Peppermill's Admitted Theft Slot**  
**Machine Hold Percentage Settings from Numerous Other Casinos.**

16 In *Rish v. Simao*, 132 Nev. Adv. Op. 17, 368 P.3d 1203, 1205 (2016), this  
17 Court held where the district court improperly excluded evidence, "the district  
18 court's order granting the motion in limine was in error as a matter of law." This  
19 Court reasoned when "the district court abuses its discretion in determining  
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sufficient ground for denying the motion").

1 whether to admit or exclude evidence,” this court will overturn the district court's  
2 determination.” *Id.* at 1205. Here, the district court plainly erred by granting  
3 Peppermill’s motions in limine on December 22, 2015, without any opposition by  
4 GSR, when GSR’s response was not due until December 28, 2015. *See Callie v.*  
5 *Bowling*, 123 Nev. 181, 183, 160 P.3d 878, 879 (2007) (holding that due process  
6 requires notice and an opportunity to be heard). Because GSR was not provided  
7 an opportunity to respond prior to the district court issuing its ruling, this Court  
8 should reverse the district court’s ruling on that ground alone.

9       Notwithstanding the lack of due process, when granting Peppermill’s  
10 Motion In Limine Nos. 4 and 8, the district court wrongly precluded evidence of  
11 the theft of slot machine hold percentage settings from other casinos and how  
12 Peppermill used that information to provide Peppermill an unfair competitive  
13 advantage. Throughout this litigation, Peppermill has repeatedly argued that,  
14 even though it stole GSR’s slot machine hold percentage settings and thereby  
15 risked its entire operation, it did not use that information to its benefit.  
16 Peppermill further claims that it took such an enormous risk only to steal a few  
17 discreet par settings, rather than what actually happened, -- a systematic scheme  
18 to repeatedly steal GSR’s trade secrets. APP 2810:6-20, v.12. While Peppermill  
19 has repeatedly thwarted GSR’s lawful attempts to discover the full extent of its  
20 wrong doing, a practice that is common among trade secret thieves, evidence of

1 its theft and use of slot machine hold percentage settings from other casinos is  
2 persuasive circumstantial evidence of the extent of its theft and use of GSR's slot  
3 machine hold percentage settings.

4 In *Frantz v. Johnson*, 116 Nev. 455, 469, 999 P.2d 351, 360 (2000), this  
5 Court expressly held that "circumstantial evidence" is "sufficient" to support  
6 finding that defendants "misappropriated trade secrets." In *Uhlig LLC v. Shirley*,  
7 Case No. 6:08-CV-01208-JMC, 2012 WL 2923242, at \*7 (D.S.C. July 17, 2012),  
8 court held, even though a former employer "did not present much if any direct  
9 evidence of use of the compilation trade secrets," the former employer "did  
10 provide the jury with substantial circumstantial evidence from which it could  
11 have determined that [the employee] actually used the information." The court,  
12 quoting the *United States Supreme Court in Desert Palace, Inc. v. Costa*, 539  
13 U.S. 90, 100 (2003), ruled the "'reason for treating circumstantial and direct  
14 evidence alike is both clear and deep rooted: Circumstantial evidence is not only  
15 sufficient, but may also be more certain, satisfying and persuasive than direct  
16 evidence.'" *Uhlig*, 2012 WL 2923242, at \*7. Courts have routinely reached  
17 similar conclusions with respect to the need for circumstantial evidence in  
18 proving theft of trade secrets. See *Pioneer Hi-Bred Int'l*, 35 F.3d at 1239  
19 (explaining that "direct evidence of industrial espionage is rarely available and  
20 not required" and holding that "[w]rongful taking of a trade secret can be found

1 based on circumstantial evidence”).<sup>11</sup> Evidence that Peppermill stole and used the  
2 slot machine hold percentage settings of other casinos is “certain, satisfying and  
3 persuasive” circumstantial evidence that Peppermill similarly stole and used  
4 GSR’s trade secrets.

5 While the district court was not clear in its reasons for excluding this  
6 highly relevant evidence, the court appeared to be excluding the evidence as prior  
7 bad acts. APP 7070:23-7071:7, v.30. NRS 48.045(2) provides that “[e]vidence  
8 of other crimes, wrongs or acts . . . may, however, be admissible for other  
9 purposes, such as proof of motive, opportunity, intent, preparation, plan,  
10 knowledge, identity, or absence of mistake or accident.” In *Fields v. State*, 125  
11 Nev. 776, 783, 220 P.3d 724, 728 (2009), this Court held that “[p]rior bad act  
12 evidence is admissible pursuant to the common-plan-or-scheme exception of NRS  
13 48.045(2) when both the prior bad act evidence and the crime charged [or in this  
14 case the wrongdoing alleged] constitute an integral part of an overarching plan  
15 explicitly conceived and executed by the defendant.” In *McLellan v. State*, 124  
16 Nev. 263, 270–71, 182 P.3d 106, 111–12 (2008), this Court held where the other  
17 bad acts is “proven by clear and convincing evidence” showing similar conduct

18  
19 <sup>11</sup> See also APP 3858-59, v.17, GSR’s Motion to Clarify Court’s Order Re:  
20 Peppermill’s Motions in Limine, at 9:15 – 10:7 (quoting cases throughout the  
United States holding that that wrongful taking of a trade secret can be found  
based on circumstantial evidence because direct evidence of industrial espionage  
is rarely available).

1 which is “part of a common scheme or plan,” the evidence of the other acts is  
2 “not unduly prejudicial because of its high probative value revealing  
3 [defendant’s] motivation and plan” to commit the wrongful acts alleged.

4 Here, evidence of Peppermill’s theft of the slot machine hold percentage  
5 settings from the numerous other casinos is not in dispute because Peppermill has  
6 admitted to this misconduct. There can be no doubt that the theft of these slot  
7 machine hold percentage settings is part of Peppermill’s common scheme or plan  
8 to obtain an economic advantage over its competitors, as the thefts from other  
9 casinos happened at the same time period, using the same means Peppermill  
10 employed against GSR. Accordingly, the evidence of the theft and use slot  
11 machine hold percentage settings from other casinos is *not* prejudicial, but highly  
12 probative evidence of Peppermill’s theft and use of GSR’s slot machine hold  
13 percentage settings. *See United States v. Hanjuan Jin*, 833 F. Supp. 2d 957, 967  
14 (N.D. Ill. 2011) (holding evidence of prior misappropriation and use of trade  
15 secrets “can be admitted as evidence that [defendant] obtained and used the  
16 information . . . without authorization” in a case alleging misappropriation of  
17 trade secrets); *Giesecking v. Thomas*, 358 B.R. 754, 776 (Bankr. S.D. Ill. 2007)  
18 (explaining that “plaintiff may submit evidence that a defendant has stolen trade  
19 secrets in the past to show that the defendant had a motive to lie about stealing  
20

1 trade secrets in the present case”). Accordingly, this Court should reverse the  
2 district court ruling, order a new trial, and mandate that the district court admit  
3 evidence of the theft and use of slot machine hold percentage settings from other  
4 casinos.

5 **F. The District Court Erred in Awarding Peppermill’s Attorney Fees.**

6 In *Beattie v. Thomas*, 99 Nev. 579, 589, 668 P.2d 268, 274 (1983), this  
7 Court ruled that a district court’s decision to award attorney fees pursuant to an  
8 offer of judgment is reviewed for “an abuse of discretion. This Court, however,  
9 will not defer to a district court decision that is based on “legal error.” See *AA*  
10 *Primo Builders, LLC v. Washington*, 126 Nev. 578, 589, 245 P.3d 1190, 1197  
11 (2010). In *Allianz Ins. Co. v. Gagnon*, 109 Nev. 990, 993, 860 P.2d 720, 722-23  
12 (1993), this Court explained that “where a district court exercises its discretion in  
13 clear disregard of the guiding legal principles, this action may constitute an abuse  
14 of discretion.” As the judgment of the district court should be reversed based on  
15 the errors set forth above, the district court also erred in awarding attorney fees  
16 and costs to Defendant. See *Schwabacher & Co. v. Zobrist*, 97 Nev. 97, 98, 625  
17 P.2d 82, 82 (1981) (reversing award to defendant for attorney fees and costs when  
18 “the basis for the order no longer exists”).  
19  
20

1           **1. Attorney Fees in Trade Secret Case May Only Be Awarded**  
2           **Pursuant to NRS 600A.060, and District Court Could Not and Did**  
3           **Not Find that GSR’s Claims Were Brought in Bad Faith Which is**  
4           **Necessary to Award Attorney Fees Under that Provision.**

5           The district court improperly awarded attorney fees pursuant to Nev. R.  
6           Civ. P. 68, based on GSR’s proper refusal of an offer of judgment. Rule 68,  
7           however, is not applicable to trade secret actions. NRS 600A.060 provides, in  
8           pertinent part, that if a “claim of misappropriation [of trade secret] is made in bad  
9           faith . . . the court may award reasonable attorney’s fees to the prevailing party.”  
10          Pursuant to the plain language of NRS 600A.060(1), defendants, in a trade secret  
11          action, may only recover attorney fees if a “claim of misappropriation is made in  
12          bad faith.” Peppermill, however, did not even mentioned NRS 600A.060 when  
13          seeking attorney fees, much less show the required “bad faith” necessary to  
14          secure such fees in this trade secret action. The district court certainly did not  
15          make a finding of bad faith. *See* APP 6828:9-10, 6830:9-10, v.29 (declining to  
16          award attorney fees under NRS 18.010(2)(b), which requires a finding that claims  
17          were “brought maintained without reasonable ground or to harass the prevailing  
18          party”). Accordingly, Peppermill is not entitled to attorney fees.

19          In *In re Steven Daniel P.*, 129 Nev. Adv. Op. 73, 309 P.3d 1041, 1044  
20          (2013) (emphasis added), this Court construed a Nevada statute which provided  
21          that the juvenile court “*may* . . . dismiss the petition without prejudice and refer  
22          the child to the probation officer for informal supervision pursuant to” certain

1 statutory requirements. The Court held “under the plain language of the statute,”  
2 that by using the word “may,” the legislature meant that “the juvenile court may  
3 dismiss the State’s petition and refer the juvenile for informal supervision *only*  
4 upon the juvenile court’s determination that the [statutory requirements] have  
5 been met.” *Id.* (emphasis in original). The Court explained that this “court  
6 avoids statutory interpretation that renders language meaningless or superfluous”  
7 and “we construe statutes to preserve harmony among them.” *Id.* at 1043-44.

8 Likewise, to allow attorney fees without the required showing of “bad  
9 faith” would render NRS 600A.060 both meaningless and superfluous. For  
10 example, NRS 18.010(2)(b) already provided that “the court may make an  
11 allowance of attorney’s fees to a prevailing party . . . when the court finds that  
12 the claim . . . was brought or maintained without reasonable ground or to harass  
13 the prevailing party.” In *Allianz Ins.*, this Court explained that a party’s “bad  
14 faith” provided an “even stronger ” basis for recovery of attorney fees than that  
15 which is required under NRS 18.010(2)(b). 109 Nev. at 995-96, 860 P.2d at 724.  
16 If NRS 18.010(2)(b) applied to trade secret claims, the more restrictive “bad  
17 faith” requirement of NRS 600A.060 would be unnecessary, as attorney fees  
18 would already be available under the less restrictive “without reasonable  
19 grounds” standard found in NRS 18.010(2)(b). These statutes can only be  
20 harmonized so as not to render NRS 600A.060 meaningless or superfluous, if

1 NRS 600A.060 is construed to mean that the court may *only* award attorney fees  
2 to the prevailing party in a trade secret case when the “claim of misappropriation  
3 is made in bad faith.” *See In re Resort at Summerlin Litig.*, 122 Nev. 177, 185,  
4 127 P.3d 1076, 1081 (2006) (holding “the more specific statute, NRS 108.239(6),  
5 controls over the general costs provisions of NRS Chapter 18” because “where a  
6 general statutory provision and a specific one cover the same subject matter, the  
7 specific provision controls”); *Refractory Serv. Corp. v. Shaw Refractories, Inc.*,  
8 Case No. 2:06CV073 PS, 2007 WL 118780, at \*3 (N.D. Ind. Jan. 9, 2007)  
9 (explaining that providing attorney fees in a trade secret case under a provision  
10 other than the trade secret act’s attorney fee provision would “render superfluous  
11 [that provision], which explicitly deals with attorney's fees in trade secret cases”).  
12 As no finding of bad faith has or could be made by the district court, the court  
13 erred in awarding Peppermill its attorney fees.

14 The “bad faith” requirement of NRS 600A.060 likewise prevents  
15 Peppermill from recovering attorney fees for refusal of an offer of judgment  
16 pursuant to Rule 68. In *Jones v. United Space All., L.L.C.*, 494 F.3d 1306, 1310-  
17 11 (11th Cir. 2007), the Eleventh Circuit held that the attorney fee provision of  
18 the Florida Civil Rights Act, which provides that the court may allow the  
19 prevailing defendant attorney fees when the “claim was frivolous, unreasonable  
20 or without foundation,” “prevents the recovery of attorneys' fees” under the

1 Florida offer of judgment statute. The Court reasoned that a defendant could not  
2 recovery attorney fees, “even though he had filed an otherwise valid offer of  
3 judgment because the underlying civil rights action limited attorneys’ fees to  
4 frivolous suits.” *Id.* at 1310.

5 As already set forth, pursuant to NRS 600A.060, prevailing defendants  
6 cannot recover attorney fees in trade secret cases unless the claim is made in bad  
7 faith. Even if Peppermill’s offer of judgment were otherwise valid, Peppermill  
8 cannot recover attorney fees under Rule 68 because they have not shown that  
9 GSR’s claim of misappropriation was “made in bad faith.” *See Harbor Motor*  
10 *Co. v. Arnell Chevrolet-Geo, Inc.*, 265 F.3d 638, 645 (7th Cir. 2001) (holding that  
11 defendant, in copyright action, was not entitled to attorney fees under offer of  
12 judgment rule, even though plaintiff obtained a judgment against the defendant  
13 that is less favorable than the offer, because the Copyright Act mandates “that  
14 only the prevailing party is permitted to recover its attorney's fees”); *Clayton v.*  
15 *Bryan*, 753 So. 2d 632, 634 (Fla. Dist. Ct. App. 2000) (holding that that federal  
16 and state fair debt collection practices acts which provided that when an action is  
17 “brought in bad faith and for the purpose of harassment, the court may award to  
18 the defendant attorney's fees” prevents awarding attorney fees to the prevailing  
19 defendant under the Florida offer judgment statute); *O'Brien v. City of Greens*  
20 *Ferry*, 873 F.2d 1115, 1120 (8th Cir. 1989) (reversing district court’s award of

1 attorney fees pursuant to an offer of judgment in a civil rights action because “a  
2 defendant in a civil rights case may recover attorney's fees from the plaintiff only  
3 if the action was frivolous, unreasonable, or without foundation”). Accordingly,  
4 district court erroneously awarded attorney fees to Peppermill because NRS  
5 600A.060 mandates a finding of bad faith to award such fees, and the district  
6 court could not and did not find the required bad faith. This Court should  
7 therefore reverse the district court’s order granting Peppermill’s motion for  
8 attorney fees.

9 **2. Even If Nevada’s Offer of Judgment Rule Applied To Trade Secret**  
10 **Actions, Which It Does NOT, Peppermill’s Offer Was Invalid And**  
11 **Peppermill’s Motion for Fees Was Deficient as a Matter of Law.**

12 Even if Peppermill’s claim for attorney fees pursuant to Nev. R. Civ. P. 68  
13 were *not* barred by the attorney fee provision of Nevada’s Trade Secret Act,  
14 Peppermill’s offer of judgment was invalid. In *Stockton Kenworth, Inc. v.*  
15 *Mentzer Detroit Diesel, Inc.*, 101 Nev. 400, 404, 705 P.2d 145, 148 (1985), this  
16 Court held that an offer of judgment “was not valid under NRCP 68 because it  
17 was conditional.” Peppermill served a conditional offer of judgment on February  
18 13, 2015. Its offer was conditioned that judgment “be taken jointly, not severally,  
19 for the sum of One Hundred Thousand Dollars (\$100,000).” APP 6485:23-24,  
20 v.28. By conditioning the offer to joint liability, Peppermill was attempting to  
preclude GSR’s right to recover damages from Peppermill and Tors, jointly and

1 severally. *See Hardy v. Gulf Oil Corp.*, 949 F.2d 826, 829 (5th Cir.1992) (under  
2 “jointly and severally liable,” each party is fully responsible for the liability or  
3 obligation at issue, but a plaintiff may sue any or all of them in one suit at his or  
4 her option). Peppermill’s conditional offer of judgment is therefore invalid.  
5 Accordingly, this Court should reverse the district court’s order awarding attorney  
6 fees to Rule 68, because Peppermill’s offer of judgment was improperly  
7 conditioned on GSR forgoing its right to pursue judgment jointly and severally  
8 against Defendants.

9 Even if the offer of judgment had not been conditional, attorney fees would  
10 still be unavailable under the factors set forth in *Beattie v. Thomas*, 99 Nev. 579,  
11 668 P.2d 268 (1983). In *Beattie*, this Court reversed an award of attorney fees  
12 where the district court failed to “carefully evaluate the following factors: (1)  
13 whether the plaintiff’s claim was brought in good faith; (2) whether the  
14 defendants’ offer of judgment was reasonable and in good faith in both its timing  
15 and amount; (3) whether the plaintiff’s decision to reject the offer and proceed to  
16 trial was grossly unreasonable or in bad faith; and (4) whether the fees sought by  
17 the offeror are reasonable and justified in amount.” 99 Nev. at 588-89, 668 P.2d  
18 at 274. This Court reasoned that the purpose of the offer of judgment rules is “to  
19 encourage settlement, it is *not to force plaintiffs unfairly to forego legitimate*  
20 *claims.*” *Id.* at 588, 668 P.2d at 274 (emphasis added). This Court concluded

1 “where the court has failed to consider these factors, and has made no findings  
2 based on evidence that the attorney's fees sought are reasonable and justified, it is  
3 an abuse of discretion for the court to award the full amount of fees requested.”  
4 *Id.* at 589, 668 P.2d at 274. Under a proper analysis of these factors, attorney fees  
5 should never have been awarded.

6 While the district court stated that it “has considered the applicable  
7 *Brunzell*, *Beattie* and *Yamaha* factors,” it made absolutely no findings with  
8 respect to those facts, other than to make the conclusory finding that Peppermill’s  
9 attorney fees were “reasonable.” APP 6830:6-8, v.29. Such finding at best only  
10 addresses the last *Beattie* factor, and certainly cannot show that the district court  
11 “carefully evaluate[d]” the factors required by this Court in *Beattie*. 99 Nev. at  
12 588-89, 668 P.2d at 274. While this Court explained, in *Wynn v. Smith*, 117 Nev.  
13 6, 13, 16 P.3d 424, 428-29 (2001), that “the district court's failure to make  
14 explicit findings [with respect to the *Beattie* factors] with is not a per se abuse of  
15 discretion,” but such lack of findings is only permissible “[i]f the record clearly  
16 reflects that the district court properly considered the *Beattie* factors.” The  
17 district court’s order provides no basis whatsoever for determining whether the  
18 district court “properly” considered any *Beattie* factor, but instead supports the  
19 opposite. *See State Drywall, Inc. v. Rhodes Design & Development*, 122 Nev.  
20 111, 119 n.18, 127 P.3d 1082, 1088 n.18 (2006) (finding that the district court did

1 not properly consider the *Beattie* factors where the “record does not reflect what,  
2 if any, analysis was made by the district court,” and holding that the record must  
3 reflect this analysis to support an award of attorney fees); *Schwartz v. Estate of*  
4 *Greenspun*, 110 Nev. 1042, 1050, 881 P.2d 638, 643 (1994) (cautioning “the trial  
5 bench to provide written support under the *Beattie* factors for awards of attorney's  
6 fees made pursuant to offers of judgment even where the award is less than the  
7 sum requested”).

8 First, there can be no doubt that GSR’s claim for misappropriation of trade  
9 secret was brought in good faith, as the set forth district court’s own findings.  
10 The district court found that:

11 This was a complex case involving interesting legal issues, dueling  
12 expert opinions and many witnesses in a three-week trial. In involved  
13 contentious questions whether the “par values” were trade secrets and,  
14 if they were, their fair market value. This case involved factual and  
15 legal issues arising from Nevada’s Uniform Trade Secret act,  
16 legislation with little Nevada appellate interpretation.

17 APP 6831:9-16, v.29. The district court then “offer[ed] its appreciation to the  
18 fine attorneys on both sides for their professionalism and presentations.” APP  
19 6832:5-7, v.29. Such findings support only on conclusion that GSR’s claims  
20 were brought in good faith based on the facts of the case and the state of the law.

Likewise, the district court previously found that GSR’s “contention that  
Defendant would not have acted as improperly as they did here if they were not  
after a protected trade secret is a *compelling argument*, and raises an interesting

1 question of fact that the jury will need to answer.” APP 3873:6-14, v.17. How  
2 could the GSR’s argument be “compelling” if its claims were not made in good  
3 faith? A cursory review of the arguments and evidence found in GSR’s  
4 oppositions to Peppermill’s multiple motions for summary judgment,  
5 demonstrates GSR’s good faith. APP 2802-45, v.12; APP 3447-87, v.15.  
6 Peppermill admitted to stealing GSR’s slot machine hold percentage settings,  
7 admitted that this amounts to egregious misconduct, which can only support a  
8 finding that GSR brought its claims in good faith.

9 Second, the offer of judgment was not reasonable in either timing or  
10 amount, and therefore GSR declined the offer in good faith. The \$100,000.00  
11 amount offered was not even 10% of the value Peppermill, themselves place of  
12 GSR’s slot machine hold percentage settings, as represented by the \$1 million  
13 fine to which Peppermill readily agreed. The amount offered was less one-half  
14 (½) percent of the \$24 million of the compensatory *and punitive damages* that  
15 could have been awarded to GSR based on Mr. Agüero’s more conservative \$8  
16 million reasonable royalty damage opinion. APP 3422, v.15. The \$100,000.00  
17 offer did not even come close to covering the more than \$290,000.00 in attorney  
18 fees and costs already incurred by GSR in pursuing its trade secret claim. APP  
19 6731, v.29. The \$100,000.00 offered was less than 13% of the nearly  
20 \$750,000.00 in attorney fees Defendants’ had incurred at that point to defend

1 their admitted egregious misconduct. APP 6704, v.28. The \$100,000.00 offer  
2 was not even half the almost \$250,000.00 that Peppermill paid its experts Lucas  
3 and Friedman to devise supposedly proper schemes to ascertain GSR's slot  
4 machine hold percentage settings. APP 6705, v.28. Considering these sizable  
5 fees Peppermill had already incurred to avoid liability, along with sizable fees  
6 Peppermill was willing to expend to show that GSR's slot machine hold  
7 percentage settings were readily ascertainable by proper means when in fact they  
8 were admittedly stolen, Peppermill's offer could hardly been deemed reasonable  
9 or in good faith.

10 The timing of the offer was also unreasonable. Peppermill served their  
11 offer on February 13, 2015, which was required to be accepted by March 5, 2015.  
12 Peppermill's entire defense that GSR's slot machine hold percentage settings  
13 were reasonably ascertainable by proper means rested on the shoulder of  
14 Peppermill's experts, Lucas and Friedman. Peppermill, however, did not disclose  
15 the reports of these experts until, March 2, 2015. APP 502-708, v.3. GSR,  
16 therefore, only had three (3) days to evaluate whether the schemes these experts  
17 had devised to ascertain GSR's slot machine setting were feasible and proper.  
18 Additionally, when Defendants made their offer, Peppermill failed to provide tens  
19 of thousands of documents necessary for GSR to evaluate its claim, thousands of  
20 which were identified by GSR's damage expert as essential to offer an opinion.

1 APP 1108-12, v.5. Accordingly, GSR had no basis to calculate damages or  
2 evaluate the merits of its claim, which was Peppermill’s design all along. *See*  
3 *Certified Fire Prot. Inc. v. Precision Constr.*, 128 Nev. Adv. Op. 35, 283 P.3d  
4 250, 258 (2012) (finding that the district court appropriately denied attorney fees  
5 as unreasonable in timing and amount when defendant offered only \$7,501.00 for  
6 a claim of \$25,185.04 and was made before plaintiff had “a fair opportunity to  
7 assess its claim through discovery”). As the offer was unreasonable in timing and  
8 amount, GSR acted in good faith when rejecting Peppermill’s offer of judgment.

9 Finally, Peppermill failed to show that the fees they seek “are reasonable  
10 and justified in amount.” This fourth *Beattie* factor can only be established by  
11 analyzing the factors found in *Brunzell v. Golden Gate Nat’l Bank*, 85 Nev. 345,  
12 349, 455 P.2d 31, 33 (1969). *See Shuette v. Beazer Homes Holdings Corp.*, 121  
13 Nev. 837, 864–65, 124 P.3d 530, 548–49 (2005); *Schouweiler v. Yancey Co.*, 101  
14 Nev. 827, 833-34, 712 P.2d 786, 790 (1985) (holding that the *Brunzell* factors  
15 apply to awards of attorney fees under Rule 68). The *Brunzell* factors include  
16 “(1) the qualities of the advocate: his ability, his training, education, experience,  
17 professional standing and skill; (2) the character of the work to be done: its  
18 difficulty, its intricacy, its importance, time and skill required, the responsibility  
19 imposed and the prominence and character of the parties where they affect the  
20 importance of the litigation; (3) the work actually performed by the lawyer: the

1 skill, time and attention given to the work; (4) the result: whether the attorney was  
2 successful and what benefits were derived.” 85 Nev. at 349, 455 P.2d at 33.  
3 While the district court cites *Brunzell*, neither the district nor Peppermill  
4 mentioned any of these factors, much less provide the required analysis.

5 Even if the district court had actually mentioned the *Brunzell* factors, the  
6 court could not have made any findings with respect to those factors because  
7 Peppermill failed to provide any admissible evidence establishing these factors in  
8 its motion for attorney fees. In *Miller v. Wilfong*, 121 Nev. 619, 623-24, 119 P.3d  
9 727, 730 (2005) (emphasis added), this Court held that parties seeking attorney  
10 fees “must support their fee request *with affidavits or other evidence* that meets  
11 the factors in *Brunzell*” before attorney fees may be awarded. In *LVMPD v.*  
12 *Yeghiazarian*, 129 Nev. Adv. Op. 81, 312 P.3d 503, 510 (2013), this Court held  
13 that attorney fees could not be awarded where the court “failed to evaluate  
14 whether [the associate attorney’s], the paralegals', or the office staff's hourly rates  
15 were reasonable” under the *Brunzell* factors.

16 While Peppermill sought almost \$1 million in attorney fees since its offer  
17 of judgment, Peppermill attached almost no competent evidence to support those  
18 fees. APP 6704, v.26. Peppermill claims \$130,079.50 in fees from the firm  
19 Brownstein Hyatt Farber Schreck, \$52,612.50 in fees from the firm Cotton Driggs  
20 Walch Holley Wolson & Thompson, and \$11,832.50 from the O’Mara Law Firm.

1 Peppermill, however, have failed to provide any billings from these firms, or any  
2 other information which would allow the district court to evaluate the underlying  
3 attorney's professional qualities, the work they performed, or how they impacted  
4 the result, as required by *Brunzell*. For example, Frank Schreck was employed to  
5 defend Peppermill before the Nevada Gaming Commission and has never made  
6 an appearance in this case. Peppermill therefore wants GSR to not only pay for  
7 their attorney fees accrued in this case, but also to pay their fees incurred as a  
8 result of admittedly violating Nevada gaming laws. All \$194,524.50 of these  
9 alleged fees should have been disallowed.

10 Peppermill also claim \$205,400.40 in fees from the Gunderson Law Firm,  
11 but only provide \$61,142.50 in billing, and provide no other information would  
12 allowed the district court to evaluate the *Brunzell* factors. Accordingly, all of the  
13 \$205,400.40 in fees should be disallowed. APP 6660-90, 6704, v.28. In fact, the  
14 only reference to any professional qualifications of any attorney are those in the  
15 curriculum vitae of Mr. Robison, which is inadmissible hearsay. APP 6692-96,  
16 v.28; *see also State, Dep't of Health & Welfare, ex rel. Osborn v. Altman*, 842  
17 P.2d 683, 687-88 (Idaho 1992) (holding curriculum vitae is inadmissible hearsay).  
18 Even if the district court were permitted to consider such inadmissible hearsay,  
19 Mr. Robison's professional qualifications have no bearing on the professional  
20 qualifications of any other attorney in this action, of his staff, or the staff of any

1 other attorney. *See Yeghiazarian*, 129 Nev. Adv. Op. 81, 312 P.3d at 510  
2 (refusing to impute the reasonableness of fees charge by one attorney to other  
3 attorneys, the paralegals, or to the office staff). Accordingly, the district court  
4 should have found that none of *Brunzell* factors were met due to the lack of  
5 admissible evidence.

6 Even if this Court were to ignore the lack of admissible evidence, the  
7 district court further erred because documentation provided would not support an  
8 award of attorney fees. In *Welch v. Metro. Life Ins. Co.*, 480 F.3d 942, 948 (9th  
9 Cir. 2007), the Ninth Circuit held that applicant for attorney fees failed to carry  
10 her burden of documenting of documenting the appropriate hours expended in the  
11 litigation when the attorney relies on block billing. Applying this rule in *Vail v.*  
12 *Country Mut. Ins. Co.*, Case No. 2:13-CV-02029-SI, 2016 WL 684039, at \*3 (D.  
13 Or. Feb. 19, 2016), the court ruled that due to inherently “vague nature of block  
14 billing, “block-billed time requested over the three-hour maximum will be  
15 reduced by fifty percent.”

16 All of the billings by the Robison firm are in block billing form, and the  
17 vast majority of Mr. Robison’s entries are in blocks of more than the three (3)  
18 hour maximum. While Peppermill is not entitled to any attorney fees, the district  
19 court also erred in refusing to discount the award of fees based on inadequate  
20

1 documentation. Accordingly, this Court should reverse the district court's award  
2 of attorney fees.

### 3 **XI. CONCLUSION**

4 Based on the foregoing, this Court should reverse the district court in all  
5 respects. This Court should order the district court strike Peppermill's Answer as  
6 a sanction for its egregious discovery abuses, and permit GSR to prove up its  
7 damages. At a minimum, this Court should require the district court: (1) to  
8 compel Peppermill to produce the tens of thousands of documents withheld; (2) to  
9 appropriately sanction Peppermill for its misconduct; (3) to reverse the award of  
10 attorney fees; (4) to order a new trial; (5) to admit evidence of Peppermill's theft  
11 and use of slot machine hold percentage settings from other casinos; and (6) to  
12 properly instruct the jury.

### 13 **XII. CERTIFICATE OF COMPLIANCE**

14 I hereby certify that this brief complies with the formatting requirements of  
15 Nev. R. App. P. 32(a)(4), the typeface requirements of Nev. R. App. P. 32(a)(5)  
16 and the type style requirements of Nev. R. App. P. 32(a)(6) because this brief has  
17 been prepared in a proportionally spaced typeface using Microsoft Word 2013,  
18 font size 14-point, Times New Roman. This brief, however, does not comply  
19 with the page- or type-volume limitations of Nev. R. App. P. 32(a)(7) because,  
20 excluding the parts of the brief exempted by Nev. R. App. P. 32(a)(7)(C), it

1 contains 18,184 words, but by motion seeks permission to exceed this limitation  
2 pursuant to Nev. R. App. P. 23(a)(7)(D). Finally, I hereby certify that I have read  
3 the attached appellate brief, and to the best of my knowledge, information, and  
4 belief, it is not frivolous or interposed for any improper purpose. I further certify  
5 that this brief complies with all applicable Nevada Rules of Appellate Procedure,  
6 except as otherwise stated, in particular Nev. R. App. P. 28(e)(1), which requires  
7 every assertion in the brief regarding matters in the record to be supported by a  
8 reference to the page and volume number, if any, of the transcript or appendix  
9 where the matter relied on is to be found. I understand that I may be subject to  
10 sanctions in the event that the accompanying brief is not in conformity with the  
11 requirements of the Nevada Rules of Appellate Procedure.

12 Dated this 3rd day of January 2017

13 COHEN|JOHNSON|PARKER|EDWARDS

14  
15 By: /s/ H. Stan Johnson \_\_\_\_\_

16 H. Stan Johnson, Esq.

Nevada Bar No. 00265

17 Chris Davis, Esq.

Nevada Bar No. 06616

255 E. Warm Spring Road, Suite 100

Las Vegas, Nevada 89119

18 Attorneys for Appellant-Plaintiff  
19  
20

**CERTIFICATE OF SERVICE**

I certify that on 3<sup>rd</sup> of January, 2016, pursuant to N.E.F.R. 7, I caused the **APPELLANT’S OPENING BRIEF** and the **EXCERPT OF RECORD** to be filed electronically with the Clerk of the Nevada Supreme Court. Pursuant to N.E.F.R. 9, notice of an electronically filed document by the Court “shall be considered as valid and effective service of the document” on the below listed persons who are registered users.

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 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:

Ryan Tors  
3095 Idlewild Drive  
Reno, Nevada 89509

DATED the 3rd day of January, 2016.

/s/ Kevin Johnson  
An employee of  
COHEN|JOHNSON|PARKER|EDWARDS

1                   **IN THE SUPREME COURT OF THE STATE OF NEVADA**

2  
3           MEI-GSR HOLDINGS, LLC, a  
4           Nevada Limited Liability Company,  
5           d/b/a/ GRAND SIERRA RESORT,

6                                   Appellants,

7           vs.

8           PEPPERMILL CASINO, INC., a  
9           Nevada Corporation, d/b/a/  
10          PEPPERMILL CASINO; RYAN  
11          TORS, an individual,

12                                   Respondents.

Supreme Court No. 70319

District Court Case No.: CV13-01704

Electronically Filed  
Jan 04 2017 04:15 p.m.  
Elizabeth A. Brown  
Clerk of Supreme Court

13                   **APPELLANT'S MOTION FOR PERMISSION**  
14                   **TO FILE AN OVER-LENGTH OPENING BRIEF**

15                                   COHEN|JOHNSON|PARKER|EDWARDS

16                                   H. STAN JOHNSON, ESQ.

17                                   Nevada Bar No. 00265

18                                   sjohnson@cohenjohnson.com

19                                   CHRIS DAVIS, ESQ.

20                                   Nevada Bar No. 6616

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Las Vegas, Nevada 89119

Telephone: (702) 823-3500

Facsimile: (702) 823-3400

Attorneys for Appellant

1 **I. MOTION**

2 Appellant MEI-GSR HOLDINGS, LLC (“GSR”), by and through its  
3 counsel of record, hereby moves, pursuant to Nev. R. App. P. 32(a)(7)(D), for  
4 permission to file Appellant’s Opening Brief, attached as Exhibit 1, which  
5 exceeds the applicable page limit and/or type-volume limitation. This motion is  
6 supported by the Declaration of Chris Davis, Esq., and the points and authorities  
7 that follow.

8 Dated this 3<sup>rd</sup> day of January 2017

9 COHEN|JOHNSON|PARKER|EDWARDS

10 By: /s/ Chris Davis

11 H. Stan Johnson, Esq.

12 Nevada Bar No. 00265

13 Chris Davis, Esq.

14 Nevada Bar No. 06616

15 255 E. Warm Spring Road, Suite 100

16 Las Vegas, Nevada 89119

17 Attorneys for Appellant-Plaintiff

18 **II. DECLARATION OF CHRIS DAVIS**

19 I, CHRIS DAVIS, ESQ., declare under penalty of perjury that the  
20 following is true and correct of my own personal knowledge and if called to  
testify in this matter would testify as follows:

1. I am an attorney, duly licensed to practice law in the State of Nevada  
and represent Appellant in the foregoing matter.

1           2.     I put a great deal of effort into drafting Appellant's Opening Brief,  
2 attached as Exhibit 1, which includes issues from the very beginning of this  
3 thirty-two (32) month long case until its conclusion. The length of the brief is, in  
4 part, due to the novelty, in Nevada, of the issues under Nevada's Uniform Trade  
5 Secrets Act. This appeal should resolve significant issues about defining trade  
6 secrets and awarding attorney fees in trade secret cases. Because this case  
7 involves a Uniform Act, briefing required a survey of cases throughout the United  
8 States in order to insure uniformity of decision. As a result, I needed to devoted  
9 considerable attention to the analysis of these cases. Without such an analysis,  
10 this Court would not have a clear insight as to how the district court erred when  
11 ruling on the trade secret issues raised in this case, which have not yet been  
12 considered by this Court in any prior appeal.

13           4.     The length of the brief is also due to the numerous issues of law  
14 raised throughout case, which include: amending pleading, compelling discovery  
15 responses, waiver of discovery objections, offers of judgment, imposition of case  
16 concluding sanctions, exclusion of relevant evidence, proper jury instructions in a  
17 trade secret case, granting a new trial, awarding attorney fees in a trade secrets  
18 case, and analyzing the factors necessary to award attorney fees. Each of these  
19 issues was the subject of extensive motion practice which included hundreds of  
20 pages of briefing.

1           5.     The challenge in drafting Appellant's Opening Brief was to  
2 condense these numerous arguments of these moving papers into one coherent  
3 opening brief. In doing so, I spent long hours repeatedly revising Appellant's  
4 Opening Brief, and diligently attempted to eliminate any language and/or  
5 argument which was not absolutely essential to a clear understanding of  
6 Appellant's position on appeal.

7           6.     The following is a list of the motions, the word length of the relevant  
8 supporting papers, and the extent at which these motions were condensed:

9               a.     GSR's reply in support of its motion to amend, which  
10 comprised the bulk of GSR's arguments, was 4733 words long. In Appellant's  
11 Opening Brief, this argument was condensed to 1523 words.

12              b.     GSR filed two (2) motions to compel discovery, and an  
13 objection to the discovery commissioner's report and recommendation. The first  
14 motion to compel was 7507 words long. The reply in support of the second  
15 motion to compel, which only included arguments concerning the second motion  
16 to compel, was 1719 words long. The objection, which responded to arguments  
17 made by the discovery commissioner, was 3128 words long. These papers have  
18 been condensed to only 2563 words in Appellant's Opening Brief.

19  
20

1 c. GSR's motion for case concluding sanctions was 13,805 word  
2 long, which argument has been condensed to only 1374 words in Appellant's  
3 Opening Brief.

4 d. GSR's motion to motion to clarify court's order re:  
5 Peppermill's motions in limine was 6286 words long, which argument has been  
6 condensed to only 1072 words in Appellant's Opening Brief.

7 e. GSR's motion for a new trial was 7099 words long, which  
8 argument has been condensed to 3126 words, in Appellant's Opening Brief.

9 f. GSR's opposition to motion for attorney fees was 8132 word  
10 long, which argument has been condensed to 3668 words, in Appellant's Opening  
11 brief.

12 7. In total, Appellant has condensed the principal arguments of seven  
13 motions, containing 52,407 words, to just 13,326 words in Appellant's Opening  
14 Brief, or just over a quarter (1/4) of its original size, or in other words a three-  
15 quarters (3/4) reduction. This only represents only one supporting brief for each  
16 motion. Many of these motions included two or more supporting briefs, which if  
17 included would show even a much more dramatic compression of Appellant's  
18 Opening Brief.

19 8. Additionally, in order for the court to understand the context of these  
20 motion, I was required to provide a lengthy procedural history which involved

1 3711 word. When drafting the procedural history, I included only the procedural  
2 history that was essential to the issues raised on appeal.

3 9. This is the first time that I have ever requested to file an over-length  
4 appellate brief. Based on my twenty plus years of appellate practice, any further  
5 compression of these arguments would undermine the integrity of the arguments  
6 presented in Appellant's Opening Brief and compromise this Court's ability to  
7 thoughtfully consider the issues presented.

8 10. The argument and procedural history set forth above, along with parts  
9 not exempted by Nev. R. App. P. 32(a)(7)(C), total 18,084 words. Appellant  
10 therefore request to file a brief in which exceeds the 14,000 word limit by  
11 approximately 4,084 words.

12 Dated this 3<sup>rd</sup> day of January 2017

13 COHEN|JOHNSON|PARKER|EDWARDS

14 By: /s/ Chris Davis

15 H. Stan Johnson, Esq.

16 Nevada Bar No. 00265

17 Chris Davis, Esq.

18 Nevada Bar No. 06616

19 255 E. Warm Spring Road, Suite 100

20 Las Vegas, Nevada 89119

Attorneys for Appellant-Plaintiff

1 **III. POINTS AND AUTHORITIES**

2 Rule 32(a)(7)(A)(ii), of the Nevada Rules of Appellate Procedure provides,  
3 in pertinent part: “An opening or answering brief is acceptable if it contains no  
4 more than 14,000 words. . . .” Rule 32(a)(7)(D)(i), however, provides that a  
5 “motion to file a brief that exceeds the applicable page limit or type-volume  
6 limitation will be granted only upon a showing of diligence and good cause.”  
7 Appellant MEI-GSR HOLDINGS, LLC (“GSR”), based on its diligence and good  
8 cause seeks approval to file a 18,084 word brief.

9 Appellant’s Opening Brief raises no less than thirteen (13) significant  
10 issues, including sub-issues, involving nine (9) separate lengthy motions before  
11 the district court, and included an eleven (11) day trial. Appellant’s Opening  
12 Brief deals with significant issues of first impression in Nevada involving  
13 Nevada’s Uniform Trade Secrets Act. It calls upon the Court to determine four  
14 separate issues with respect to determining whether information is deemed to be a  
15 trade secret. In the district court below, this issue was litigated in three (3)  
16 separate motions involving hundreds of pages of briefing. It also involves the  
17 very significant issue of the award of attorney fees in trade secret cases, which  
18 also involved lengthy briefs, as Respondent Peppermill was improperly awarded  
19 almost \$1 million in attorney fees. Because these issues involve a Uniform Act,  
20 briefing required a survey of cases in order to insure uniformity of decision. *See*

1 *Karcher Firestopping v. Meadow Valley Contractors, Inc.*, 125 Nev. 111, 113,  
2 204 P.3d 1262, 1263 (2009) (explaining that when construing a Uniform Act,  
3 “consideration must be given to the need to promote uniformity of the law with  
4 respect to its subject matter among states that enact it”). As a result, Appellant’s  
5 Opening Brief devotes considerable attention to an analysis of these cases.  
6 Without such an analysis, this Court would not have a clear insight as to how the  
7 district court erred when ruling on the trade secret issues raised in this case.  
8 Nevertheless, counsel for GSR successfully condensed the hundreds of pages of  
9 briefing on Trade Secret law to just 3126 words.

10 In addition to the significant issues involving Nevada’s Uniform Trade  
11 Secrets Act, Appellant’s Opening Brief also raises issue with regard to each  
12 aspect of this thirty-two (32) month long case, which include: amending pleading,  
13 compelling discovery responses, waiver of discovery objections, offers of  
14 judgment, imposition of case concluding sanctions, exclusion of relevant  
15 evidence, and the award attorney fees. These issues were raised in six (6)  
16 separate motions, each involving lengthy briefing before the district court. Each  
17 of these issues was chosen because they involve material aspects of this case,  
18 which if not corrected will result in substantial prejudice to GSR.

19 Counsel for GSR was able to condense these argument through multiple  
20 drafts and by selecting to cite only those case which were directly on point.

1 Counsel made diligent effort to eliminate any language and/or argument which is  
2 not absolutely essential to a clear understanding of GSR's position on appeal. In  
3 order to further condense the brief, the Court is often referred to briefs filed  
4 before the district court, which briefs provide greater insight if needed by the  
5 Court. Additionally, GSR abandoned numerous issues which constituted error,  
6 but which GSR determined were not significant enough to warrant lengthening  
7 the brief further.

8 Due to counsel's diligent efforts, GSR has condensed the principal  
9 arguments of seven motions, containing 52,407 words, to just 13,326 words in  
10 Appellant's Opening Brief, or just over a quarter (1/4) of its original size, or in  
11 other words a three-quarters (3/4) reduction. This only represents only one  
12 supporting brief for each motion. Many of these motions included multiple  
13 additional briefs, which if included would show even a much more dramatic  
14 compression of Appellant's Opening Brief.

15 Additionally, in order for the court to understand the context of these  
16 motion, Counsel for GSR was required to provide a lengthy procedural history  
17 which involved 3711 words. When drafting the procedural history counsel  
18 included only the procedural history that was essential to the issues raised on  
19 appeal.  
20

1 The argument and procedural history set forth above, along with parts not  
2 exempted by Nev. R. App. P. 32(a)(7)(C), total 18,084 words. While this exceeds  
3 the 14,000 word limit by 4,084 words, considering the importance and number of  
4 issues raised, which include every aspect of this 23 month-long case, the Opening  
5 Brief concisely addresses those issues due to counsel for GSR's diligent efforts.

#### 6 **IV. CONCLUSION**

7 Based on the foregoing, GSR respectfully requests that this Court find that  
8 counsel for GSR has acted diligently and that good cause is present to exceed the  
9 14,000 word limit by approximately 4,084 words, and permit GSR to file its  
10 18,084 word brief, attached as Exhibit 1.

#### 11 **V. CERTIFICATE OF COMPLIANCE**

12 I hereby certify that the attached appellate brief complies with the  
13 formatting requirements of Nev. R. App. P. 32(a)(4), the typeface requirements of  
14 Nev. R. App. P. 32(a)(5) and the type style requirements of Nev. R. App. P.  
15 32(a)(6) because this brief has been prepared in a proportionally spaced typeface  
16 using Microsoft Word 2013, font size 14-point, Times New Roman. This brief,  
17 however, does not comply with the page- or type-volume limitations of Nev. R.  
18 App. P. 32(a)(7) because, excluding the parts of the brief exempted by Nev. R.  
19 App. P. 32(a)(7)(C), it contains 18,084 words, but by this motion seeks  
20 permission to exceed this limitation pursuant to Nev. R. App. P. 23(a)(7)(D).

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

11 Dated this 3<sup>rd</sup> day of January 2017

12 COHEN|JOHNSON|PARKER|EDWARDS

13 By: /s/ Chris Davis

14 H. Stan Johnson, Esq.

15 Nevada Bar No. 00265

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18 255 E. Warm Spring Road, Suite 100

19 Las Vegas, Nevada 89119

20 Attorneys for Appellant-Plaintiff

**CERTIFICATE OF SERVICE**

I certify that on 3<sup>rd</sup> of January, 2016, pursuant to N.E.F.R. 7, I caused the APPELLANT'S MOTION FOR PERMISSION TO FILE AN OVER-LENGTH OPENING BRIEF to be filed electronically with the Clerk of the Nevada Supreme Court. Pursuant to N.E.F.R. 9, notice of an electronically filed document by the Court "shall be considered as valid and effective service of the document" on the below listed persons who are registered users.

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 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:

Ryan Tors  
3095 Idlewild Drive  
Reno, Nevada 89509

DATED the 3<sup>rd</sup> day of January, 2017.

/s/ Sarah Gondek  
An employee of  
COHEN|JOHNSON|PARKER|EDWARDS