

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.: CV13-01504

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13 **APPELLANT'S OPENING BRIEF**

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I. DISCLOSURE STATEMENT

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

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

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

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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

1 which included that award of attorney fees and costs was filed and served on
2 April 12, 2016. APP 6834-37, v. 29. Appellant-Plaintiff timely filed a notice of
3 appeal on April 26, 2016, and an amended notice of appeal on June 17, 2016.
4 APP 6862-6919, v.29; APP 6972-7037, v.30. GSR's Notices of Appeal are
5 therefore timely pursuant to Nev. R. App. P. 4(a) and 26(c).

6 **V. ROUTING STATEMENT**

7 This matter is presumptively retained by the Nevada Supreme Court
8 pursuant to Nev. R. App. P. 17(a)(1) as this case does not involve a case category
9 that is presumptively assigned to the Nevada Court of Appeals under Nev. R.
10 App. P. 17(b).

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

16 **VI. STATEMENT OF ISSUES**

17 1. Whether the district court erred in refusing to instruct the jury that:
18 "Even if the information which is asserted to be a trade secret could have been
19 duplicated by other proper means, the information is not readily ascertainable if in
20

1 fact it was acquired by improper means,” when more than one hundred years of
2 precedent supports such an instruction.

3 2. Whether the district court erred in refusing to instruct the jury that a
4 “trade secret is not readily ascertainable when the means of acquiring the
5 information falls below the generally accepted standards of commercial morality
6 and reasonable conduct, even if means of obtaining the information violated no
7 government standard, did not breach any confidential relationship, and did not
8 involve any fraudulent or illegal conduct,” when the National Conference of
9 Commissioners on Uniform State Laws, when drafting the Uniform Trade Secrets
10 Act adopted by Nevada, expressly adopted such a rule and courts interpreting the
11 Uniform Trade Secret Act have reached the same conclusion.

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

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

19 5. Whether the district court erred in awarding Peppermill’s attorney
20 fees, pursuant to an offer of judgment, when Peppermill could not and did not

1 show that GSR acted in bad faith, which showing is required under the Nevada
2 Trade Secrets Act, and when Peppermill failed to show that it meets the
3 requirements to secure attorney fees pursuant to an offer of judgment.

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

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

11 8. Whether the district court erred in granting Peppermill's motion in
12 limine, without providing GSR an opportunity to respond, and which improperly
13 excluded evidence showing the theft and use of slot machine settings from nine
14 other casinos in the Northern Nevada area, which was obtained during the same
15 time period and as part of the same scheme as when Peppermill misappropriated
16 GSR's slot machine settings.

17 9. Whether the district court erred in denying the GSR's motion to
18 amend its complaint when the motion was timely filed according to the district
19 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 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 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. APP6827-33, v.29.

VIII. STATEMENT OF FACTS

A. Peppermill Admittedly Misappropriated GSR's Confidential Slot Machine Settings.

Appellant-Plaintiff MEI-GSR HOLDINGS, LLC ("GSR"), acquired Grand Sierra Resort and Casino (the "Resort") in April 2011. APP 4202:22 – 4203:2, 4205:9-12, v.18; APP 6282, v.27. By December 2011, John Hansen, Peppermill's General Manager, ordered Ryan Tors, Peppermill's Slot Director, to use a manufacturer supplied key to steal confidential hold percentages or pars¹ that GSR set on its slot machines. Peppermill used this secret information to gain

¹ Hold percentage (or par) is the theoretical percentage of what the casino should retain from the money played on a particular 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 a competitive advantage to increase profits or attract additional players. APP
2 6171-80, v.26; APP 4387:17-22, 4402:1-22, 4413:22 – 4417:12; APP 6168-69.
3 Upon learning about Tors’ theft from GSR, William Paganetti, Peppermill’s
4 president, pressed Tors to continue to steal such information. APP 4135:7 -
5 4136:3; 4142:21-23, 4163:13 – 4164:16, 4411:5 – 4413:2, 4418:23 – 4419:10,
6 4476:4-9, 4515:15-17, 4535:4-8, v. 18-19.

7 On July 12, 2013, GSR caught Tors stealing GSR’s slot settings and turned
8 him over to gaming authorities. APP 6174-75, 6180, v.26; APP 4389:6 –
9 4390:17, 4400:15-20, APP 4419:19-22, 4474:18-20, 4493:2-6, v.19 Tors admits
10 he “knowingly and willfully” stole GSR’s slot machine settings, at the request of
11 numerous Peppermill employees. APP 4411:5 – 4413:21, 4418:23 – 4419:10,
12 4493:18-23, v.19.

13 **B. The NGCB Fined Peppermill \$1 Million for Its Theft of GSR’s**
14 **Confidential Slot Machine Settings.**

15 After the Nevada Gaming Control Board (“NGCB”) completed its
16 investigation, Peppermill admitted that “over a period of time beginning in at
17 least 2011” until “July 12, 2013,” Peppermill “knew of, approved of, and
18 directed” Ryan Tors theft of “theoretical hold percentage information” from
19 GSR’s slot machines, along with at least nine other casinos. APP 6174-75, 6180,
20 v.26. Peppermill admitted that this theft violated Nevada law and justified

1 sanctions “in the total amount of ONE MILLION DOLLARS (\$1,000,000.00).”
2 APP 6174-80, v.26.

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

5 GSR served its First Request for Production of Documents upon Defendant
6 Peppermill Casino on November 10, 2014. APP1127-37, v.5. Peppermill,
7 however, responded 1 ½ months late, and therefore waived any objection to the
8 request.

9 **D. Peppermill Admittedly and Inappropriately Withheld Tens of**
10 **Thousands of Relevant Documents.**

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

16 More troubling, GSR specifically requested “All documents provided to the
17 Nevada Gaming Board. . . .” APP 1135:3-5, v.5. Peppermill’s attorney
18 represented that “literally thousands of e-mails” were provide to investigators.
19 APP 3078:4-5, v.13. The assistant to Peppermill’s president testified that 80,000
20 emails were provided to the NGCB. APP 3348, v.14.

1 Furthermore, Nathan Estes, Peppermill's IT Director, testified that due to
2 the litigation hold requested by GSR, Peppermill has "backed up" all electronic
3 data on their server for the three years prior to April 2014, to the present. APP
4 7091:23-25, 7100:17-24, 7103:6-13, 7105:5-16, 7106:4-10, 7107:25 – 7109:16,
5 7110:5-6, 7119:8-11, 7120:15-20, APP 7121:9 – 7122:3, 7125:2-6, 7126:14-16,
6 v.30. Estes also indicated that he was given criteria to search for emails, but
7 testified I "haven't done anything with that." APP 7122:24 – 7123:3.

8 Instead of producing these tens of thousands of emails, Peppermill made
9 numerous groundless objections, despite waiving these untimely objections. APP
10 709-846, v3-4; APP 1096-1105, v.5.

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

12 Peppermill served an invalid conditional offer of judgment on February 13,
13 2015. APP 6485:23-24, v.28 (conditioning that judgment "be taken jointly, not
14 severally"). Because Peppermill's \$100,000 offer was unreasonable as to timing
15 and amount, GSR in good faith in rejected Peppermill's offer of judgment. APP
16 502-708, v.3; APP 3422, v.15; APP 6731, v.29; APP 6704-05, v.28.

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

19 GSR moved to amend its complaint on the court's deadline of March 2,
20 2015. APP 470-501, v.2-3. GSR's proposed amendment added claims of civil
conspiracy, unlawful acts regarding a computer, unfair or deceptive trade

practices, and unjust enrichment, and a new defendant, John Hanson, who ordered Tors to first steal GSR's trade secrets. APP 479-500, v.2-3. The district court wrongly denied the motion based solely on its finding that "all of GSR's new claims . . . could have been alleged much earlier." APP 1093:18-20, v.5.

G. Despite Peppermill's Withholding Tens of Thousands of Documents, the District Court Erroneously Refused to Compel the Production of these Documents.

On March 4, 2015, GSR filed a motion to compel discovery based Peppermill's improper refusal to provide tens of thousands of documents. APP 709-846, v.3-4. In an order dated April 23, 2015, the district court sanctioned Peppermill, in the amount of \$2500.00, based on this refusal. APP 1327:19-20, v.6. Instead of compelling the production of these improperly withheld documents, the district court ordered the parties "to clarify and narrow the requests," even though the district court found that Peppermill had no explanation for the untimeliness of its discovery responses. APP 1325:1-12, v.6. Peppermill served supplemental responses, but still failed to produce tens of thousands of relevant documents. APP 2298-2314, v.10; APP 7121:9 – 7122:3, 7126, v.30.

H. The District Court Granted GSR's Motion to Extend Discovery and to Continue Trial, Despite the Court Previous Refusal when Denying GSR's Motion to Amend.

On April 16, 2015, GSR moved to continue trial and the discovery deadlines based on Peppermill's refusal to comply with GSR's discovery

1 requests. APP 1106 -1319, v.5-6. Peppermill claimed any such extension was
2 prejudicial, even though Peppermill delayed discovery by more than five (5)
3 months and failed to substantively respond to GSR's discovery requests. APP
4 1356-1440, v.6. The district court granted GSR's motion. APP 1967-69, v.7.

5 Once the district court extended discovery, Peppermill abandoned any
6 pretense that the extension was prejudicial, but requested that discovery be further
7 extended until September - October 2015, setting trial for January 2016. APP
8 7085, v.30. The Court approved the parties' stipulation to extend discovery until
9 November 25, 2015, and to continue trial until January 11, 2016. APP 1971-74,
10 v.9.

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

13 On May 22, 2015, when denying Peppermill's motion for a protective
14 order, the discovery commissioner imposed an additional \$1500.00 sanction
15 against Peppermill, and specifically found that that "Defendant waived its
16 objections to the first request for production by failing to serve a timely response
17 to that request." APP 1536:15-17, 1537:7-9, v.7. The district court confirmed the
18 discovery commissioner's Recommendation in an order filed June 18, 2015. APP
19 1965-66, v.9.
20

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

Since that date, GSR pursued three (3) discovery dispute conferences and sent eleven (11) letters and emails to Peppermill in an attempt to secure the tens of thousands of emails which Peppermill was required to provide without objection. APP 3356, v.14. Peppermill, however, continued to stall by imposing unreasonable conditions on the production of those emails and by otherwise refusing to provide the required emails without objection. APP 3356, 3380-81, 3390-92, v. 14-15.

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

On November 4, 2015, counsel for GSR was given limited access to review Peppermill's emails. Counsel was not allowed to copy, print or download any of the emails, but could only take manual notes regarding their content. APP 2129:20-26, 2138:10 -2140:16, v.9; APP 2199:13-14, v.10.

In the short time given to counsel, several very important emails were unearthed that were previously undisclosed. A December 4, 2012 email from Ryan Tors to Billy Paganetti stated: "There have been no par changes-guaranteed. Atlantis pars.xls." APP 2130:11-15; APP 2199:13-14, v.10. The

1 “Atlantis par.xls” appears to be an excel spread sheet contained the stolen pars
2 obtained by Tors. Billy Paganetti responded in an email dated December 7, 2012:

3 Thanks Ryan good to know.

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

12 Thanks

13 Billy

14 APP 2130:21-28, v.9; APP 2199:13-14, v.10. This previously undisclosed email
15 shows that Peppermill was using the stolen information obtained by Tors to gain
16 market share and maximize their profits. Another email dated June 24, 2013,
17 from David McHugh to Ryan Tors, stated:

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

19 Dave, I want to make some more adjustments to Wendover and Reno
20 slot pars. Reno-25 cent reels to 6.5, \$ reels to 4.00%, \$5 reels to
4.00%, Wendover 25 cent reels to 6.75%, \$ reels to 4.25%, \$5 reels to
4.00%. I spent time this weekend studying the abstract, we are still
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.

1 APP 2139:12-16, v. 9, APP 2199:13-14, v.10. Not only does this email reference
2 texts which Peppermill never produced despite GSR's requests, this email shows
3 Peppermill used stolen pars to maximize "cash handle" or profits.

4 **L. For the Second Time, the District Court Erred in Refusing to Compel
Peppermill to Produce Tens of Thousands of Documents.**

5 GSR filed a second motion to compel on November 20, 2015. APP 1985-
6 2130, v.9. The discovery commissioner wrongly denied GSR's motion to
7 compel, which the district court orally confirmed over GSR timely objection.
8 APP 3838-40, v.16; APP 3875-97, v.17; APP 4961:20 - 4964:16, v.21.

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

11 Based on Peppermill's intentional and improper withholding of documents,
12 GSR filed a motion for case concluding sanctions on November 25, 2015. APP
13 2131-73, v. 9. This 43-page motion, not only outlined the discovery abuses set
14 forth above, but also outlined the full extent of Peppermill's "willful" misconduct
15 which halted the normal adversarial process. The district court, however, failed
16 hold a hearing on GSR's motion, or make the required findings. Instead, the
17 district court merely "**DENIED**" the motion. 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 7th and 9th, 2015, Peppermill moved in limine. APP 2443-
5 2807, v. 11-12. Motions Nos. 4 and 8 improperly sought to preclude evidence of
6 the theft of slot machine settings from the other nine casinos and how Peppermill
7 used that information to obtain an unfair competitive advantage. APP 2533-36,
8 2636-41, v.11-12.

9 Prior to the deadline to oppose these motions, the district court, ex parte,
10 granted Peppermill's motion to exclude evidence of the theft of slot machine
11 settings from other casinos. APP 3831-34, v.16. GSR moved for
12 reconsideration to permit GSR to offer evidence of Peppermill's entire scheme to
13 steal the slot machine settings from GSR and the other casinos. APP 3850-69,
14 v.17. The district court denied GSR's motion. APP 7070:23 - 7071:7, v.30.

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

16 At trial, the undisputed facts demonstrated that Peppermill blatantly stole
17 GSR's slot machine settings. No evidence was offered or could be offered to
18 show that Peppermill acquired GSR's slot machine settings by any proper means.
19 Instead, Peppermill offered expert testimony that, rather than steal GSR's trade
20 secrets, Peppermill could have devised unethical schemes to secretly take GSR's
slot machine settings. These hypothetical schemes were simply corporate

1 espionage which misused information from slot machine manufacturers, protected
2 by confidentiality agreements, and required sending spies into GSR's casinos to
3 repeatedly play and/or photograph GSR's slot machines and then resort to
4 elaborate mathematical calculations to determine GSR's slot machine settings.
5 APP 6216-33, v.26. APP 6216-33, v. 26; 6262-79, v.27.

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

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

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

20 APP 6410-14, v.27.

Instead of providing this required instruction, the district court, over GSR's
proper objection, twice instructed the jury on reverse engineering. APP 6443,
v.27, Jury Instructions, Instruction No. 27, at 2:5 -10; APP 6446, Jury
Instructions, Instruction No. 31; *see also* APP 6362:7 - 6366:26, v.27. The Court

1 issued these instructions even though Peppermill offered no evidence that it
2 acquired GSR's slot machine settings by reverse engineering.

3 Because the jury was improperly instructed, the jury rendered a verdict 6-2,
4 on the limited grounds that GSR's slot machine settings were reasonably
5 ascertainable by proper means. APP 6461-64, v.27. Based on the faulty jury
6 instructions, GSR filed a timely motion for a new trial, which the district court
7 wrongly denied. APP 6838-61, 69667-70, v.29.

8 **P. The District Court Improperly Granted Peppermill's Motion for**
9 **Attorney Fees.**

10 After the verdict, Peppermill filed a motion for attorney fees. APP 6465-
11 6705, v.27-28. The motion was based, in part, on Peppermill's previous invalid
12 offer of judgment. The motion did not seek attorney fees pursuant to NRS
13 600A.060, which requires a showing of bad faith, and is the exclusive means to
14 obtain attorney fees under the UTSA. Despite the lack of support for
15 Peppermill's motion, the district court wrongly granted Peppermill's motion.
16 APP 6827-33, v.29.

17 **IX. SUMMARY OF THE ARGUMENT**

18 Peppermill admits that it stole the confidential slot machine settings of
19 GSR and nine other local casinos from 2011 to July 2013. Peppermill defends
20 this outrageous misconduct by arguing that the purloined information could have
been reverse engineered, even though Peppermill admits that never happened.

1 Unfortunately, the district court permitted Peppermill to tell the jury that theft is
2 perfectly acceptable conduct as long Peppermill could have hypothetically
3 acquired the information properly, but intentionally chose misconduct instead.

4 Courts interpreting the Uniform Trades Secrets Act (“UTSA”) have
5 overwhelming held that information is a protectable trade secret, when the
6 information is actually acquired by improper means, even though the information
7 could have been acquired by proper means. Despite this clear authority, the
8 district court regrettably declined instruct the jury as to this firmly established
9 principle of law.

10 The district court also mistakenly permitted Peppermill to hire a Harvard
11 educated Ph.D.s to develop several, after the fact, devious schemes, which
12 amount to nothing less than corporate espionage, as a refuge for Peppermill’s
13 admittedly illegal actions. Such schemes have been repeatedly condemned
14 because the primary policy behind UTSA is to promote the standards of
15 commercial ethics.

16 The district court, however, declined to instruct the jury as to the standards
17 of commercial morality, but twice improperly instructed the jury on reverse
18 engineering, even though Peppermill admitted that it acquired GSR’s trade secrets
19 by theft, and not by reverse engineering. Only because the jury was improperly
20

1 instructed, the jury erroneously found that GSR's slot machine settings were
2 reasonably ascertainable and not trade secrets.

3 The district court also erred when it failed to "freely" permit GSR to amend
4 its complaint. Amending the complaint would have prejudiced no one, while
5 denying the motion to amend prejudice GSR's ability to try all of its claims on the
6 merits.

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

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

18 Finally, the district court erroneously awarded Peppermill its attorney fees,
19 even though Peppermill did not attempt to show that GSR's trade secrets claims
20 were brought in bad faith as required by NRS 600A.060. Additionally, the

1 district court failed to consider the factors required by *Beattie* and *Brunzell*. Any
2 proper analysis of these factors would result in a denial of attorney fees to
3 Peppermill. Accordingly, this Court should reverse the district court in all
4 respects.

5 **X. ARGUMENT**

6 **A. A New Trial Is Required Because the Jury Was NOT Properly
7 Instructed.**

8 This Court “review[s] de novo whether a jury instruction accurately states
9 Nevada law” and “review[s] a decision to admit or refuse jury instructions for an
10 abuse of discretion or judicial error.” *D & D Tire v. Ouellette*, 131 Nev. Adv. Op.
11 47, 352 P.3d 32, 37 (2015).

12 **1. The Jury Was NOT Properly Instructed that a Trade Secret Is Not
13 Readily Ascertainable when Acquired by Improper Means.**

14 The district court declined to instruct the jury that: “Even if information
15 which is asserted to be a trade secrete could have been duplicated by other proper
16 means, the information is not readily ascertainable if in fact it was acquired by
17 improper means.” APP 6410-14, v.27. In *Lewis v. Sea Ray Boats, Inc.*, 119 Nev.
18 100, 106-08, 65 P.3d 245, 249-50 (2003), this Court held that the “district court's
19 failure to instruct the jury” on a theory of the case that is supported by the
20 evidence “mandates reversal for a new trial.”

1 Here, the district court failed to instruct the jury on the very issue which
2 would have prevented the jury from erroneously entering a verdict for Peppermill,
3 whether GSR's slot machine settings were "*not being readily ascertainable by*
4 *proper means*" so as to be deemed a trade secret. See NRS 600A.030(5)²
5 (emphasis added). When interpreting the UTSA phrase "*not being readily*
6 *ascertainable by proper means*," courts have consistently held the fact that
7 "information can be ultimately discerned by others—whether through
8 independent investigation, accidental discovery, or reverse engineering—does not
9 make it unprotectable" because "[e]ven if information potentially could have been
10 duplicated by other proper means, it is no defense to claim that one's product
11 could have been developed independently of plaintiff's, if in fact it was developed
12 by using plaintiff's proprietary designs." *AvidAir Helicopter Supply, Inc. v. Rolls-*
13 *Royce Corp.*, 663 F.3d 966, 973 (8th Cir. 2011). Applying this rule, in *AvidAir*,
14 the Eighth Circuit found, under the UTSA "of Indiana and Missouri," that even
15 though confidential information might have been obtained through "publicly
16 available information," defendant's "repeated attempts to secure the [confidential
17 information] without [plaintiff's] approval belies its claim that the information in

18 ² NRS 600A.030 (5), (emphasis added), provides in in pertinent part: "Trade
19 secret means information" that "[d]erives independent economic value, actual or
20 potential, from not being generally known to, and *not being readily ascertainable*
by proper means"

1 the documents was readily ascertainable or not independently valuable.” *Id.* at
2 969-75. This rule has been repeatedly affirmed by courts interpreting the UTSA.
3 *See Reingold v. Swiftships, Inc.*, 126 F.3d 645, 652 (5th Cir. 1997) (*infra*).³

4 These holdings fully comport with the plain language of Nevada’s UTSA.
5 Under the Act, information is a trade secret when the information is “not **being**
6 readily ascertainable by proper means. . . .” *See* NRS 600A.030(5) (emphasis
7 added). Accordingly, to be deprived trade secret status it is **not** enough that
8 information may be readily ascertainable by proper means, but instead, at the time
9 of misappropriation, the information must “not **being** readily ascertainable by
10 proper means.” *See Merriam–Webster Dictionary*, Present Participle,
11 [http://www.merriam-webster.com/dictionary/present participle](http://www.merriam-webster.com/dictionary/present%20participle) (visited April 4,
12 2016) (defining a present participle as “a verb form that ends in ‘-ing’ and that is
13 used with ‘be’ to refer to action that **is happening at the time of speaking** or a
14 time spoken of”); *see also Mangarella v. State*, 117 Nev. 130, 133, 17 P.3d 989,
15 991 (2001) (explaining that “[s]tatutes should be given their plain meaning” and
16 “there is a presumption that every word, phrase, and provision in the enactment
17 has meaning”). While Peppermill introduced evidence of various surreptitious

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19 ³ *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 UTSA,
information is not readily ascertainable if in fact it was acquired by improper
means).

1 schemes which might have discovered GSR's slot machine settings, Peppermill
2 offered absolutely *no* evidence that GSR's slot machine setting were actually
3 *being* readily ascertained by Peppermill by proper means, but instead admits that
4 it acquired GSR's slot machine settings by theft. APP 6174-81, v.26; APP
5 4389:6 – 4390:17, 4400:15-20, v.19.

6 Despite the clear UTSA rule that Peppermill's admitted theft of GSR's slot
7 machine settings bars any defense that the information could have been
8 duplicated by other proper means, the district court declined to issue the proper
9 instruction offered by GSR. APP 6410-14, v.27. If the instruction had been
10 appropriately given, the jury could not have reached the verdict that GSR's slot
11 machine settings were readily ascertainable.

12 For example, in *K & G Oil v. G & G Fishing Tool Serv.*, 314 S.W.2d 782,
13 785-88 (Tex. 1958), the Texas Supreme Court held that the design of a magnetic
14 fishing tool was entitled to protection as a trade secret, even though the jury found
15 that the tool could be reverse-engineered "by an examination of the tool without
16 disassembling it," because defendant "did not learn how to make the [plaintiff's]
17 tool or a device similar thereto by observing it in an assembled or unbroken
18 condition, but learned of its internal proportions, qualities and mechanisms by
19 taking it apart despite an agreement that it would not do so." In *K & G Oil*, the
20 court concluded, as a matter of law, that information remains a trade secret,

1 despite the ability to discover the information by “fair and lawful means,” when
2 the information was actually secured by “unfair means.”⁴ *Id.* at 603.

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

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12
13 ⁴ Peppermill has wrongly argued that *K & G Oil* is not applicable because it was
14 decided under the common law and not the UTSA. This argument has no merit as
15 numerous courts, as set forth above, have applied the same rule under the UTSA,
16 and because the Act “merely codifies” the basic principles of common law trade
17 secret protection.” *Frantz v. Johnson*, 116 Nev. 455, 466, 999 P.2d 351, 358
18 (2000) (holding that Nevada’s UTSA “merely codifies the common law elements
19 of misappropriation of confidential information”); *see also First Financial Bank*
20 *v. Lane*, 130 Nev. Adv. Op. 96, 339 P.3d 1289, 1293 (2014) (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 establishing 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 holding that the UTSA has retained
the common law distinctions).

1 **2. The Jury Was NOT Properly Instructed that Acquiring a Trade**
2 **Secret Is Improper when the Acquisition Falls Below the Standards**
3 **of Commercial Morality.**

4 The district court declined to instruct the jury that: “A trade secret is not
5 readily ascertainable when the means of acquiring the information falls below the
6 generally accepted standards of commercial morality and reasonable conduct,
7 even if means of obtaining the information violated no government standard, did
8 not breach any confidential relationship, and did not involve any fraudulent or
9 illegal conduct.” APP 6410-14, v.27. In *E. I. duPont deNemours & Co. v.*
10 *Christopher*, 431 F.2d 1012, 1014-16 (5th Cir. 1970), the Fifth Circuit held that
11 “aerial photography of plant construction . . . is an improper means of obtaining
12 another's trade secret, even though defendant “violated no government aviation
13 standard, did not breach any confidential relation, and did not engage in any
14 fraudulent or illegal conduct” because such conduct falls “below the generally
15 accepted standards of commercial morality and reasonable conduct.” The court
16 pronounced the commandment “thou shall not appropriate a trade secret through
17 deviousness under circumstances in which countervailing defenses are not
reasonably available.” *Id.* at 1017.

18 The drafters of the UTSA expressly adopted the holding of *Christopher*.
19 See 14 Uniform Laws Annot. UTSA with 1985 Amendments § 1, comment, p.
20 538-539 (relying upon *Christopher*, supra). The Commissioners reasoned that

1 “[o]ne of the broadly stated policies behind trade secret law is ‘the maintenance
2 of standards of commercial ethics.’” *Id.* (quoting *Kewanee Oil Co. v. Bicron*
3 *Corp.*, 416 U.S. 470 (1974)). Not surprisingly, courts have readily adopted this
4 standard when interpreting the UTSA.⁵

5 The schemes proposed by Peppermill’s expert are far more “devious” than
6 legally flying over a construction site to take pictures, which was found improper
7 in *Christopher*. Peppermill’s schemes of using confidential information from slot
8 machine manufacturer’s concerning the available par settings on GSR’s slot
9 machines, available only to legitimate gaming enterprises, and then sending spies
10 to secretly and repeatedly play and/or photograph GSR’s slot machines to
11 calculate GSR’s par cannot be viewed as proper commercial ethics. APP 6216-
12 33, v.26; APP 6262-79, v.27. The district court therefore erred when it failed to
13 give such an instruction on commercial morality.

14 **3. The Jury Was NOT Properly Instructed That to Be Readily**
15 **Ascertainable Information Must Be Ascertainable at a Glance.**

16 The district court declined to instruct the jury that: “To be readily
17 ascertainable, the information asserted to be a trade secret must be ascertained
18 quickly, *or so self-revealing to be ascertainable at a glance.*” APP 6410-14,
19 v.27. The excluded “*at a glance*” phrase, however, is amply supported by the

20 ⁵ See also APP 6853:14 – 6854:27, v.29, GSR’ Motion for a New Trial, at 16:14-
17:27 (quoting cases throughout the United States adopting *Christopher*).

1 courts. *See Motorola, Inc. v. Lemko Corp.*, Case No. 08 C 5427, 2012 WL
2 74319, at *19 (N.D. Ill. Jan. 10, 2012) (holding that information was protected as
3 a trade secret where it “did not involve self-revealing information that any user or
4 passer-by sees at a glance”).⁶

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

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20 ⁶ *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 **4. The Jury Was Improperly Instructed on Reverse Engineering.**

2 The district court also erred by giving instructions concerning reverse
3 engineering. In *Allan v. Levy*, 109 Nev. 46, 49-50, 846 P.2d 274, 276 (1993), this
4 Court ruled that “if a jury instruction relating to a litigant's theory of complaint or
5 defense is not supported by the trial evidence, the instruction should not be
6 given,” which if given “mandate[s] reversal . . . for a new trial.”

7 Instructions on reverse engineering should not have been given because
8 Peppermill admitted to acquiring GSR’s slot machine settings by theft, and not by
9 reverse engineering. APP 6443-44, 6446, v.27. The reversing engineering
10 instructions only mislead and confused the jury into believing Peppermill had
11 properly acquired GSR’s trade secrets, when the opposite is true. Courts have
12 universally rejected reliance on alternative means of discovering trade secrets,
13 when the trade secrets were misappropriated.

14 In *Reingold*, the Fifth Circuit held that a boat hull mold was entitled to
15 protection as a trade secret under the UTSA and was “not readily ascertainable by
16 proper means,” even though defendant “could have reverse engineered a mold
17 from an existing hull,” because defendant did not create the infringing mold from
18 an existing hull, but instead “misappropriated the trade secret.” 126 F.3d at 650-
19 52. The court reasoned that “protection will be accorded to a trade secret holder
20 against disclosure or unauthorized use gained by improper means, even if others

1 might have discovered the trade secret by legitimate means.” *Id.* at 652; *see also*
2 *DPT Labs., Ltd. v. Bath & Body Works, Inc.*, Case No. CIV.SA-98-CA-664-JWP,
3 1999 WL 33289709, at *4 (W.D. Tex. Dec. 20, 1999) (holding under the Ohio
4 UTSA that the “theoretical ability of others to ascertain [Plaintiff’s] lotion
5 formula from [another] lotion that was previously available on the market does
6 not preclude protection as a trade secret” because “protection will be accorded to
7 a trade secret holder against disclosure or unauthorized use gained by improper
8 means, even if others might have discovered the trade secret by legitimate
9 means”). These represent a long line of cases, as previously set forth, that reverse
10 engineering is not a defense when the trade secret was actually acquired by
11 improper means.

12 Even if Peppermill had offered proof that it had acquired GSR’s slot
13 machine setting through the devious schemes devised by Peppermill’s experts,
14 allowing a reverse engineering instruction would still be error. Under NRS
15 600A.030(5)(a), only “proper means” can be used to ascertain trade secrets. As
16 already set forth in *Christopher* and by the drafters of the UTSA, the schemes
17 concocted by Peppermill’s experts fall far below the standards of commercial
18 morality. As Peppermill admittedly acquired GSR’s slot machine setting by theft
19 and *not* reverse engineering, and Peppermill’s after-the-fact schemes violate
20

1 commercial ethics, the district court erred in instructing the jury about reverse
2 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 attorney-client privilege objections, when the party failed to
11 timely serve his discovery responses. The court reasoned that all objections were
12 waived because "Fed. R. Civ. P. 34(b) [just like Nev. R. Civ. P. 34] requires that
13 a party upon whom a request for discovery is served to respond within thirty days,
14 either stating its willingness to comply or registering its objections." *Marx*, 929
15 F.2d at 12.

16 The district court expressly ruled "Defendant waived its objections to the
17 first request for production by failing to serve a timely response to that request."

18 APP 1536:15-17, v.7; APP 1965, v.9.⁷ Eighteen (18) of the twenty-one (21)

19 ⁷ When orally confirming the discovery commissioner's recommendation denying
20 GSR's motion to compel, the district court erroneously "found that there's never
been a waiver by the defendant to any of the objections to the request for
production." APP 4963:22-24. As the court actually found the opposite, this

1 requests sought emails, including Request No. 9 which requested a “back up of
2 each of your email servers. . . .” APP 1125-37, v.5. Peppermill, however, failed
3 to timely respond, and therefore waived any objection to the production of emails.
4 Despite waiving its objections, Peppermill did not provide a backup of its emails.
5 APP 1141-1213, v. 5-6. More troubling, GSR specifically requested “All
6 documents provided to the Nevada Gaming Board. . . .” APP 1135:3-5, v.5.
7 Peppermill repeatedly affirmed that that tens of thousands of emails were turned
8 over to the NGCB, but failed to provide these emails. APP 1229:4-8, v.6; APP
9 3348, v.14.

10 Furthermore, Mr. Estes, Peppermill’s IT Director, testified that
11 Peppermill’s emails are stored on a server and presently backed up due to
12 litigation hold, preserving such data from the Spring of 2011. APP 7100:17-24,
13 7103:6-13, 7105:5-16, 7106:4-10, 7107:25 – 7109:16, 7110:5-6, 7119:8-11,
14 7120:15-20, 7121:9 – 7122:2, 7125:2-6, 7126:14-16, v.30. Finally, Mr. Estes
15 confirmed that he was given criteria to search for emails, but testified I “haven’t
16 done anything with that.” APP 7122:24 – 7123:3, v.30. As Peppermill waived
17 any objection, the district court erred by refusing to compel Peppermill to produce
18 these tens of thousands of documents, and by failing to order Peppermill to pay
19

20 error alone is grounds for reversing the district court’s denial of GSR’s motion to compel.

monetary sanctions which would compensate GSR for the hundreds of hours expended when seeking those documents.

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

The district court denied GSR’s motion to compel based on the notion that, although a party may waive all objections through an untimely discovery response, a court may excuse such waiver. APP 3845:8 – 3846:22, v. 17; APP 4961:20 -4864:16, v. 21. While in certain extreme situations the court may excuse wavier of objections, such power is not unlimited and does not apply in this case.

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

1 The district court could not and did not find anything improper about
2 GSR's discovery request for documents provided by Peppermill to the NGCB, as
3 the Board seized those documents when investigating the exact same misconduct
4 by Peppermill that is at issue in issue in this case. The discovery commissioner
5 even acknowledged that the "GCB undoubtedly obtained *much material* from
6 Defendant in 2013 that *is relevant* to this action." APP 3846:1 – 3847:2, v.17.
7 The district court merely speculated that some of the material obtained by the
8 NGCB may not have been relevant. APP 3846:15-19, v.17. Such speculation is
9 clear error.

10 First, the district court's argument is circular. While the district court
11 acknowledged that "a party who fails to assert timely objections generally waives
12 its right to assert those objections" including "objections based on relevance"
13 (APP 3845:8-9, v.17), the district court refused to enforce such waiver if some of
14 the documents requested might not be relevant. Under such reasoning, there can
15 be no waiver of the objection of relevancy, because the waiver would only apply
16 if all documents requested were relevant.

17 Second, simply because a specific document may not be relevant is
18 insufficient grounds to refuse production. Even non-relevant documents must be
19 produced if they reasonably could lead to the production of relevant documents.
20 *See Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978) (holding the

1 discovery requirement of relevancy “has been construed broadly to encompass
2 any matter that bears on, or that reasonably could lead to other matter that could
3 bear on, any issue that is or may be in the case”).

4 Originally, Peppermill produced only five (5) emails in response to GSR’s
5 request for such emails, out of the more than 80,000 emails Peppermill admittedly
6 handed over to the NGCB. APP 1993-94, v.9. After great effort, GSR
7 discovered that Peppermill had withheld emails demonstrating that Peppermill
8 used stolen slot machine settings from GSR and other casinos in order to gain a
9 competitive advantage, which Peppermill had long denied. APP 2138-40, v.9.
10 By concealing these vital emails, Peppermill conclusively shown that it could not
11 be trusted to choose which documents were relevant and which were not. *See*
12 *Freddie v. Marten Transport*, 428 Fed. Appx. 801, 804 (10th Cir.2011) (the
13 “withholding of evidence substantially prejudices an opposing party by casting
14 doubt on the veracity of all of the culpable party's submissions throughout
15 litigation”). Due to Peppermill’s misconduct, compliance may only be assured by
16 requiring the production of all emails provided to the NGCB. APP 3846:1 –
17 3847:2, v.17.

18 Finally, even if certain emails are not within the scope of discovery as the
19 district court speculates, Peppermill, the party that waived its objection due to its
20 untimely response, should bear the burden of determining which documents are

1 not within the scope of discovery, and not GSR, the innocent party. *See Ohntrup*
2 *v. Makina Ve Kimya Endustrisi Kurumu*, 760 F.3d 290, 297 n.6 (3d Cir. 2014)
3 (“the party objecting to the discovery . . . bear[s] the burden of persuasion”). In
4 *Fifty-Six Hope Rd. Music, Ltd.*, also relied upon by the discovery commissioner,
5 the court held that the responding party has the “obligation to review its records
6 and produce relevant, non-privileged documents and information” and refused to
7 shift to this burden to the propounding party. 2007 WL 1726558, at *9. The
8 district court, however, improperly placed all the burden and expense in
9 identifying relevant documents on GSR.

10 Peppermill admittedly refused to release any emails unless GSR first went
11 to opposing counsel’s office and identified the emails it found responsive. APP
12 3769, v.16. Counsel for the GSR specifically objected to this improper
13 production of the emails and pointed out that to inspect 80,000 admittedly
14 withheld emails at an average of two minutes per email it would require 2,666
15 hours, which is the equivalent of one and a half years of attorney time just to sit at
16 counsel’s office and inspect the emails manually as dictated by Peppermill. APP
17 3769, v.16. Recognizing that this improperly imposed an immense burden on
18 GSR to sift through these emails, the district court erroneously concluded that
19 Peppermill met its obligation to permit GSR to “inspect” and “copy” documents
20 required by NRCP 34, by proposing the use of an “ESI expert and a word search

1 protocol to locate relevant emails. . . .” APP 3847:7-9, v.17. The district court,
2 however, ignored the fact GSR provided an actual word search protocol which
3 was rejected by Peppermill, who failed to propose an alternative. APP 1977:17 -
4 1978:5, v.9. Accordingly, Peppermill’s proposed word search protocol was not
5 genuine, but merely an effort to delay discovery.

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

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

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

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

14 As previously set forth, the district court improperly required the parties to
15 reach an agreement as to reasonable disclosures, even though the court found that
16 Peppermill had no excuse for its improper refusal to provide documents. APP
17 1327:13-20, v.16. To avoid any accusation by the district court that GSR did not
18 make every attempt to reach an agreement, GSR pursued three (3) discovery
19 dispute conferences and sent eleven (11) letters and emails to Peppermill
20 attempting to secure the tens of thousands of emails which the district court found

1 had not been provided. APP 3356, v.14. Peppermill, however, continued to stall
2 by agreeing to provide the emails, but then refused to do so unless GSR agreed to
3 some unreasonable conditions which would have involved thousands of hours of
4 attorney time. APP 2136-37, v.9; APP 2199:13-14, v.10; APP 3356, v.14.

5 Despite this misconduct, the district court unreasonably blamed GSR for
6 Peppermill's refusal to provide thousands of relevant documents.

7 Contrary to the district court's ruling, courts universally agree that motions
8 to compel filed within the discovery deadline, such as GSR's motion, are timely.
9 *See Clark v. Capital Credit & Collection Servs., Inc.*, 460 F.3d 1162, 1179 (9th
10 Cir. 2006) (explaining that motion to compel filed during the discovery period
11 would rarely be considered untimely). Even when filed after the discovery
12 period, motions to compel are considered timely when any delay is attributable to
13 the parties attempt to resolve the discovery dispute within the discovery deadline.
14 *See Lurie v. Mid-Atlantic Permanente Med. Group*, 262 F.R.D. 29, 31
15 (D.D.C.2009). GSR's Motion to Compel was clearly timely, especially in light of
16 Peppermill's repeated promises to produce emails that it ultimately withheld.
17 Accordingly, this Court should reverse the district court's order denying GSR's
18 motion to compel.
19
20

1 **C. The District Court Erred when Denying GSR’s Motion for Case**
2 **Concluding Sanctions.**

3 In *Watson Rounds v. Eighth Jud. Dist. Ct.*, 131 Nev. Adv. Op. 79, 358 P.3d
4 228, 233 (2015), this Court ruled that a district court “abuses its discretion” by
5 ruling on a motion for sanctions “without including in its order sufficient
6 reasoning and findings in support of its ultimate determination.” When ruling on
7 GSR’s motion for case concluding sanctions, the district court made no findings
8 whatsoever. Instead, the district court merely “DENIED” the motion. APP
9 3836:1-2, v.16. Due to the lack of findings, this Court should review the motion
10 for sanctions de novo. *See Adriana Int’l Corp. v. Thoeren*, 913 F.2d 1406, 1408
11 (9th Cir. 1990).

12 In *Picon v. Ryon*, 99 Nev. 801, 802, 671 P.2d 1133, 1134 (1983), this
13 Court held when a party’s “failure to provide discovery information was
14 unexplained and unwarranted,” and *not* “accidental or involuntary,” which
15 “unresponsive conduct halted the normal adversarial process,” then the party’s
16 conduct is “sufficiently willful” so as to warrant case concluding sanctions, even
17 though district court did not find that the party “failed to comply with discovery
18 orders.” *See also Foster v. Dingwall*, 126 Nev. 56, 65, 227 P.3d 1042, 1048
19 (2010) (explaining that case concluding sanctions are appropriate “where litigants
20 are unresponsive and engage in abusive litigation practices that cause
interminable delays”). *See also Stubli v. Big D Int’l Trucks, Inc.*, 107 Nev. 309,

1 313, 810 P.2d 785, 788 (1991) (affirming case concluding sanctions even though
2 “no court order compelling discovery had been entered and thus violated”). Case
3 concluding sanctions “need not be preceded by other less severe sanction.”
4 *Young v. Johnny Ribeiro Bldg., Inc.*, 106 Nev. 88, 92, 787 P.2d 777, 780 (1990).

5 Here, Peppermill’s discovery abuses are too great to fully set forth in this
6 brief, but are fully set forth in GSR’s forty-three (43) page motion for case
7 concluding sanctions. APP 2131-73, v.9-10. As already set forth, Peppermill
8 admittedly failed to provide tens of thousands of emails, including those turned
9 over to the NGCB. Peppermill refused to provide these documents as a
10 calculated attempt to thwart GSR from establishing its case.

11 The fraudulent nature of Peppermill’s discovery abuses is clear from
12 Peppermill’s consolidated supplemental responses to GSR’s document requests.
13 APP 2298-2313, v.10. When responding to GSR’s request for a backup of
14 Peppermill’s email server, Peppermill misrepresented that a “no[n]-incremental
15 backup does not exist.” APP 2302:17, v.10. Peppermill further misrepresented
16 that “Peppermill does not backup its email servers.” APP 2303:1-2, v.10.
17 Peppermill knew these answer were *false* when given as Mr. Estes, Peppermill’s
18 IT Director, expressly testified that testified that Peppermill’s emails were backed
19 up due to the litigation hold. APP 7100:17-24, 7103:6-13, 7105:5-16, 7106:4-10,
20

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

3 When responding to GSR's request for all documents provided to the
4 NGCB, Peppermill misrepresented that:

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

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

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

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

20 The email correspondence for the above-named individuals shall be
provided from the 19 month period from January 1, 2012 to July 25,
2013.

* * * * *

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

APP 2177, v.10 (emphasis added). Peppermill knew exactly what emails and
other information was taken because the NGCB letter specifically described the

1 information. Peppermill response can only be viewed as an intentional attempt to
2 withhold the 80,000 email Denise Vessie testified were provided by Peppermill to
3 the NGCB. APP 3348, v.14.

4 In GSR's Requests Nos. 11 -17, GSR specifically requested "emails" and
5 "other written or electronic memorialization" concerning various aspects of
6 Peppermill's admit theft of slot machine settings from GSR and other casinos.
7 APP 1160-62, v.5. Peppermill nevertheless misrepresented that the information
8 had already been provided or that "*None exists.*" APP 1160-62, v. 5, Peppermill's
9 Supplemental Response to Request Nos. 11 -17 (emphasis added). Such
10 responses were *false* when made because, as set forth above, during the limited
11 time counsel for GSR had available to manually search the emails provided,
12 counsel discovered numerous responsive, but unproduced, emails showing the
13 misappropriation and use of stolen slot machine settings by Peppermill.
14 Hundreds of similar emails, if not thousands, likely remain un-produced.

15 In order to justify its refusal to provide emails, as late as August 17, 2015,
16 Peppermill continued its charade that it did not know what emails the NGCB had
17 taken, but indicated that the NGCB search had to be "replicated," when in fact the
18 NGCB letter specifically outlined which emails were provided by Peppermill.
19 APP 2215, v.10. Even after claiming to "replicate" the emails provided to the
20 NGCB, Peppermill still did not provide the emails. Instead, Peppermill imposed

1 the unreasonable condition that GSR manually review each email at counsel for
2 Peppermill's office, select the email GSR wanted to be produced, after which
3 Peppermill would determine whether the production was objectionable. APP
4 2215, v.10. The emails on Peppermill's counsel's computers, however, were not
5 80,000 emails estimated by Ms. Vessie, but 238,548 emails. APP 2137:23-26,
6 v.9; APP 2199:13-14, v.10. Even if each email took only two (2) minutes to
7 review, the review would take 7,933 hours, or approximately 4.5 years of attorney
8 time.

9 Such unreasonable conditions, along with Peppermill's 16-month delay in
10 admitting that the emails even existed, is the very "willful" and "unresponsive
11 conduct [which] halts the normal adversarial process," and which this Court in
12 *Picon* determined justified case concluding sanctions. 99 Nev. at 801-02, 671
13 P.2d at 1133-34. In light of Peppermill's repeated and continued abuses, ultimate
14 sanctions are necessary to demonstrate to Peppermill and future litigants that they
15 are not free to delay and act with "wayward disregard" of the rules of discovery.
16 *See Foster*, 126 Nev. at 66, 227 P.3d at 1049. GSR was forced to depose
17 Peppermill's key witnesses with only token responses to its written discovery
18 requests, and then proceed to trial with a very incomplete picture of the evidence.
19 The award of case concluding sanctions is appropriate because the only
20 alternative is to restart the case from scratch, an expense no litigant should be

1 required to bear. Even if the case were restarted, considering the full extent of
2 Peppermill's past misconduct, it is highly unlikely that Peppermill will ever
3 comply with GSR's discovery requests. Instead, Peppermill will continue to
4 withhold, or has otherwise destroyed, critical information about its scheme to
5 steal and use GSR's trade secrets. As the district court refused to make the
6 necessary findings, this Court should do so de novo, and order that Peppermill's
7 Answer be stricken.

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

9 In *Phillips v. Parker*, 106 Nev. 415, 418, 794 P.2d 716, 718 (1990), this
10 Court explained that decisions on a motion to amend is reviewed for an "abuse of
11 discretion." In *Marschall v. City of Carson*, 86 Nev. 107, 112, 464 P.2d 494, 498
12 (1970), this Court decreed that "'Rule 15(a) declares that leave to amend shall be
13 freely given when justice so requires; this mandate is to be heeded.'" Quoting
14 *Foman v. Davis*, 371 U.S. 178, 182 (1962). The district court refused to follow
15 this mandate.

16 On March 2, 2015, GSR moved to amend its complaint to add claims and a
17 new defendant who ordered Tors to first steal GSR's trade secrets. APP 479-501,
18 v.2-3. The district court wrongly denied GSR's motion solely based on finding
19 that "all of GSR's new claims, as well as its theory of liability for Mr. Hanson, a
20 Peppermill officer, could have been alleged much earlier." APP 1093:18-20, v.5.

1 Such a finding, however, is insufficient to support the denial of a motion to
2 amend, especially when the court set “March 2, 2015” as the deadline to amend.
3 APP 12:4-5, v.1.

4 In *Bergenfield v. BAC Home Loans Servicing*, 131 Nev. Adv. Op. 68, 354
5 P.3d 1282, 1284 (2015), this Court explained that “in the absence of any apparent
6 or declared reason—such as undue delay, bad faith or dilatory motive on the part
7 of the movant, the district court should grant a party's motion for leave to amend.”
8 Accordingly, delay alone cannot support the denial of a motion to amend, but
9 requires a showing of “undue delay.”

10 In *Howey v. United States*, 481 F.2d 1187, 1189-90 (9th Cir. 1973), the
11 Ninth Circuit held that the district court abused its discretion in denying a motion
12 to amend, even though the motion was made on the second day of trial, five years
13 after the original third-party complaint was filed, and the third party plaintiff
14 “gave no reason for its lengthy delay.” The Ninth Circuit, reasoned that while
15 “the motion was made five years after the third-party complaint had been filed,
16 we know of no case where delay alone was deemed sufficient grounds to deny a
17 Rule 15(a) motion to amend” because the “purpose of the litigation process is to
18 vindicate meritorious claims.” *Id.* at 1190.

19 The district court found no prejudice, but instead found that the “new
20 causes of action present new elements, new theories of liability, and new issues as

1 to damages,” and concluded that “Peppermill and the proposed additional
2 defendants must be afforded adequate opportunity to defend themselves.” APP
3 1093:4-7, v.5. The district court was apparently concerned that defendants would
4 have an inadequate opportunity because the discovery deadline was a month and
5 a half (1 ½) months away. APP 1092:25-27, v.5.

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

19 Similarly, in *Eagle River Mobile Home Park, Ltd. v. Dist. Court In & For*
20 *Eagle Cty.*, 647 P.2d 660, 663 (Colo. 1982), the Colorado Supreme Court

1 *unanimously en banc* reversed the trial court’s denial of a motion to amend when
2 “the single overriding consideration which prompted the trial court to deny the
3 motion to amend was the court's desire to maintain the scheduled trial date.” The
4 court reasoned “[w]here the prejudice suffered by the opposing party is lack of
5 adequate time to prepare his case, this hardship may be avoided by granting a
6 continuance of the trial date.” *Id.* at 663–64.

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”). The United States Supreme Court held that denying a motion to
15 amend is error when “the amendment would have done no more than state an
16 alternative theory for recovery.” *Foman*, 371 U.S. at 182. Neither the district
17 court nor Peppermill point to anything which would have prevented Peppermill
18 from conducting any necessary discovery, other than the impending discovery
19 deadline which was 1½ months away. If additional time for discovery was
20 required, the district court should have extended the discovery deadline, which

1 had not previously been extended. In fact, the district court ultimately did extend
2 the discovery deadline to November 25, 2015, by approving a stipulation at
3 Peppermill's request. APP 1974:1-4, v.9. If the discovery had been similarly
4 extended when ruling on GSR's motion to amend, more than eight (8) months of
5 discovery would have been provided to Peppermill.

6 While Peppermill would have suffered no prejudice as a result of
7 amending, denying the motion to amend severely prejudiced GSR's ability to
8 pursue valid claims. *See Buder*, 644 F.2d at 694-95 (holding denying a motion to
9 amend instead of continuing discovery deadline prejudiced plaintiffs by
10 "deny[ing] a trial on merits" on the newly asserted claims). As the district court
11 wrongly determined that moving the trial date, which prejudiced no one,
12 outweighed the very real prejudice of denying GSR a trial on the merits of all its
13 valid claims, the district court erred in denying GSR's motion to amend.

14 Additionally, GSR can hardly be faulted for filing its motion to amend on
15 the last day of the court's deadline when Peppermill, by withholding relevant
16 documents, was primarily responsible for any delay. *See Velocity Press v. Key*
17 *Bank, NA*, 570 F. App'x 783, 789 (10th Cir. 2014) (holding that delay could not
18 justify denial of motion to amend where delay was the result of "discovery
19 disputes continuing into the months preceding trial"). The district court therefore
20 erred in denying GSR's motion to amend.

E. The District Court Erred by Excluding Evidence of Peppermill's Admitted Theft Slot Machine Settings from Other Casinos.

In *Rish v. Simao*, 132 Nev. Adv. Op. 17, 368 P.3d 1203, 1205 (2016), this Court held when “the district court abuses its discretion in determining whether to admit or exclude evidence,” this Court will “overturn the district court's determination.” Here, the district court plainly erred by granting Peppermill's motions in limine on December 22, 2015, without any opposition by GSR, when GSR's response was not due until December 28, 2015. *See Callie v. Bowling*, 123 Nev. 181, 183, 160 P.3d 878, 879 (2007) (holding that due process requires notice and an opportunity to be heard). This Court should reverse the district court's ruling on due process grounds alone.

Notwithstanding the lack of due process, the district court wrongly excluded evidence of the theft of slot machine settings from other casinos and how Peppermill used that information to provide Peppermill an unfair competitive advantage. Throughout this litigation, Peppermill has repeatedly argued that, even though it stole GSR's slot machine settings and thereby risked its entire operation, it did not use that information to its benefit. Peppermill further claims that it took such an enormous risk only to steal a few discreet par settings, rather than what actually happened, -- a systematic scheme to repeatedly steal GSR's trade secrets. APP 2810:6-20, v.12. While Peppermill has repeatedly thwarted GSR's lawful attempts to discover the full extent of its wrong

1 doing, a practice that is common among trade secret thieves, evidence of its theft
2 and use of slot machine settings from other casinos is persuasive circumstantial
3 evidence of the extent of its theft and use of GSR's slot machine settings.

4 In *Frantz v. Johnson*, 116 Nev. 455, 469, 999 P.2d 351, 360 (2000), this
5 Court held that "circumstantial evidence" is "sufficient" to support finding that
6 defendants "misappropriated trade secrets." In *Uhlig LLC v. Shirley*, Case No.
7 6:08-CV-01208-JMC, 2012 WL 2923242, at *7 (D.S.C. July 17, 2012), court
8 held, even though a former employer "did not present much if any direct evidence
9 of use of the compilation trade secrets," the former employer "did provide the
10 jury with substantial circumstantial evidence from which it could have
11 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. See *Pioneer Hi-Bred Int'l*, 35 F.3d at 1239 (explaining that
18 "direct evidence of industrial espionage is rarely available and not required" and
19 holding that "[w]rongful taking of a trade secret can be found based on
20

1 circumstantial evidence”).⁸ Evidence that Peppermill stole and used the slot
2 machine settings of other casinos is “certain, satisfying and persuasive”
3 circumstantial evidence that Peppermill similarly stole and used GSR’s trade
4 secrets.

5 The district court appeared to exclude this highly relevant evidence as prior
6 bad acts. APP 7070:23-7071:7, v.30. NRS 48.045(2), however, provides that
7 “[e]vidence of other crimes, wrongs or acts . . . may, however, be admissible for
8 other purposes, such as proof of motive, opportunity, intent, preparation, plan,
9 knowledge, identity, or absence of mistake or accident.” In *Fields v. State*, 125
10 Nev. 776, 783, 220 P.3d 724, 728 (2009), this Court held that “[p]rior bad act
11 evidence is admissible pursuant to the common-plan-or-scheme exception of NRS
12 48.045(2) when both the prior bad act evidence and the crime charged [or in this
13 case the wrongdoing alleged] constitute an integral part of an overarching plan
14 explicitly conceived and executed by the defendant.” In *McLellan v. State*, 124
15 Nev. 263, 270–71, 182 P.3d 106, 111–12 (2008), this Court held where the other
16 bad acts is “proven by clear and convincing evidence” showing similar conduct
17 which is “part of a common scheme or plan,” the evidence of the other acts is

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19 ⁸ 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 “not unduly prejudicial because of its high probative value revealing
2 [defendant’s] motivation and plan” to commit the wrongful acts alleged.

3 Here, Peppermill admitted to the theft of the slot machine settings from the
4 numerous other casinos. This theft is part of Peppermill’s common scheme or
5 plan to obtain an economic advantage over its competitors, as the thefts from
6 other casinos happened at the same time period, using the same means Peppermill
7 employed against GSR. Accordingly, the evidence of the theft and use slot
8 machine setting from other casinos is *not* prejudicial, but highly probative
9 evidence of Peppermill’s theft and use of GSR’s slot machine settings. *See*
10 *United States v. Hanjuan Jin*, 833 F. Supp. 2d 957, 967 (N.D. Ill. 2011) (holding
11 evidence of prior misappropriation and use of trade secrets “can be admitted as
12 evidence that [defendant] obtained and used the information . . . without
13 authorization” in a case alleging misappropriation of trade secrets); *Giesecking v.*
14 *Thomas*, 358 B.R. 754, 776 (Bankr. S.D. Ill. 2007) (explaining that “plaintiff may
15 submit evidence that a defendant has stolen trade secrets in the past to show that
16 the defendant had a motive to lie about stealing trade secrets in the present case”).
17 Accordingly, the district court erred in excluding evidence of the theft and use of
18 slot machine settings from other casinos.
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20

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

2 In *Beattie v. Thomas*, 99 Nev. 579, 589, 668 P.2d 268, 274 (1983), this
3 Court ruled that a district court’s decision to award attorney fees pursuant to an
4 offer of judgment is reviewed for “an abuse of discretion. This Court, however,
5 will not defer to a district court decision that is based on “legal error.” See *AA*
6 *Primo Builders, LLC v. Washington*, 126 Nev. 578, 589, 245 P.3d 1190, 1197
7 (2010). As the judgment of the district court should be reversed based on the
8 errors set forth above, the district court also erred in awarding attorney fees and
9 costs to Peppermill. See *Schwabacher & Co. v. Zobrist*, 97 Nev. 97, 98, 625 P.2d
10 82, 82 (1981) (reversing award to defendant for attorney fees and costs when “the
11 basis for the order no longer exists”).

12 **1. Awarding Attorney Fees in this Trade Secret Case Was Error**
13 **because the District Court Did NOT Find Bad Faith Required by**
14 **NRS 600A.060.**

15 The district court improperly awarded attorney fees pursuant to Nev. R.
16 Civ. P. 68, based on GSR’s proper refusal of an offer of judgment. Rule 68,
17 however, is not applicable to trade secret actions. NRS 600A.060 provides that if
18 a “claim of misappropriation [of trade secret] is made in bad faith . . . the court
19 may award reasonable attorney’s fees to the prevailing party.” Under the plain
20 language of NRS 600A.060(1), defendants, in a trade secret action, may only
recover attorney fees if a “claim of misappropriation is made in bad faith.”

1 Peppermill, however, did not even mentioned NRS 600A.060 or its “bad faith”
2 requirement when seeking attorney fees, and the district court certainly did not
3 make a finding of bad faith. *See* APP 6828:9-10, 6830:9-10, v.29 (declining to
4 award attorney fees under NRS 18.010(2)(b), which requires a finding that claims
5 were “brought maintained without reasonable ground or to harass the prevailing
6 party”). Accordingly, Peppermill is not entitled to attorney fees.

7 In *In re Steven Daniel P.*, 129 Nev. Adv. Op. 73, 309 P.3d 1041, 1044
8 (2013) (emphasis added), this Court construed a Nevada statute which provided
9 that the juvenile court “*may* . . . dismiss the petition without prejudice,” upon
10 meeting certain statutory requirements. The Court held “under the plain language
11 of the statute,” that by using the word “may,” the legislature meant that “the
12 juvenile court may dismiss the State’s petition . . . *only* upon the juvenile court’s
13 determination that the [statutory requirements] have been met.” *Id.* (emphasis in
14 original). The Court explained that this “court avoids statutory interpretation that
15 renders language meaningless or superfluous” and “we construe statutes to
16 preserve harmony among them.” *Id.* at 1043-44.

17 Likewise, to allow attorney fees without the required showing of “bad
18 faith” would render NRS 600A.060 both meaningless and superfluous. For
19 example, NRS 18.010(2)(b) already provided that “the court may make an
20 allowance of attorney’s fees” when a claim was maintained “without reasonable

1 ground or to harass the prevailing party.” In *Allianz Ins.*, this Court explained
2 that a party’s “bad faith” provided an “even stronger ” basis for recovery of
3 attorney fees than that which is required under NRS 18.010(2)(b). 109 Nev. at
4 995-96, 860 P.2d at 724. If NRS 18.010(2)(b) applied to the UTSA, the more
5 restrictive “bad faith” requirement of NRS 600A.060 would be unnecessary, as
6 attorney fees would already be available under the less restrictive “without
7 reasonable grounds” standard found in NRS 18.010(2)(b). These statutes can
8 only be harmonized so as not to render NRS 600A.060 meaningless or
9 superfluous, if NRS 600A.060 is construed to mean that the court may *only* award
10 attorney fees in a trade secret case when the “claim of misappropriation is made
11 in bad faith.” See *In re Resort at Summerlin Litig.*, 122 Nev. 177, 185, 127 P.3d
12 1076, 1081 (2006) (holding “the more specific statute, NRS 108.239(6), controls
13 over the general costs provisions of NRS Chapter 18” because “where a general
14 statutory provision and a specific one cover the same subject matter, the specific
15 provision controls”); *Refractory Serv. Corp. v. Shaw Refractories, Inc.*, Case No.
16 2:06CV073 PS, 2007 WL 118780, at *3 (N.D. Ind. Jan. 9, 2007) (explaining that
17 providing attorney fees in a trade secret case under a provision other than the
18 UTSA’s attorney fee provision would “render superfluous [that provision], which
19 explicitly deals with attorney's fees in trade secret cases”). As no finding of bad
20

1 faith has or could be made by the district court, the court erred in awarding
2 Peppermill its attorney fees.

3 The “bad faith” requirement of NRS 600A.060 likewise prevents
4 Peppermill from recovering attorney fees for refusal of an offer of judgment
5 pursuant to Rule 68. In *Jones v. United Space All., L.L.C.*, 494 F.3d 1306, 1310-
6 11 (11th Cir. 2007), the Eleventh Circuit held that the attorney fee provision of
7 the Florida Civil Rights Act, which provides that the court may allow the
8 prevailing defendant attorney fees when the “claim was frivolous, unreasonable
9 or without foundation,” “prevents the recovery of attorneys' fees” under the
10 Florida offer of judgment statute. The Court reasoned that a defendant could not
11 recovery attorney fees, “even though he had filed an otherwise valid offer of
12 judgment because the underlying civil rights action limited attorneys’ fees to
13 frivolous suits.” *Id.* at 1310.

14 As already set forth, pursuant to NRS 600A.060, prevailing defendants
15 cannot recover attorney fees in trade secret cases unless the claim is made in bad
16 faith. Even if Peppermill’s offer of judgment were otherwise valid, Peppermill
17 cannot recover attorney fees under Rule 68 because it has not shown that GSR’s
18 claim of misappropriation was “made in bad faith.”⁹ Accordingly, district court

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20 ⁹ See also APP 6712-13, v.28, Opposition to Defendants’ Motion for Costs and Attorney Fees, at 7:18 – 8:13 (quoting cases interpreting the Copyright Act, fair debt collection practices acts, and civil rights acts, all imposing similar

erroneously awarded attorney fees to Peppermill because NRS 600A.060 mandates a finding of bad faith to award such fees.

2. Peppermill’s Offer of Judgment Was Invalid and Peppermill’s Motion for Fees Was Deficient as a Matter of Law.

Even if Peppermill’s claim for attorney fees were *not* barred by NRS600A.060, Peppermill’s offer of judgment was invalid. In *Stockton Kenworth, Inc. v. Mentzer Detroit Diesel, Inc.*, 101 Nev. 400, 404, 705 P.2d 145, 148 (1985), this Court held that an offer of judgment “was not valid under NRCPC 68 because it was conditional.” Peppermill’s offer was conditioned that judgment “be taken jointly, not severally, for the sum of One Hundred Thousand Dollars (\$100,000).” APP 6485:23-24, 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 severally. *See Hardy v. Gulf Oil Corp.*, 949 F.2d 826, 829 (5th Cir.1992) (under “jointly and severally liable,” each party is fully responsible for the liability or obligation at issue, but a plaintiff may sue any or all of them in one suit at his or her option). Peppermill’s conditional offer of judgment is therefore invalid.

Even if the offer had not been conditional, attorney fees would still be unavailable under the factors set forth in *Beattie v. Thomas*, 99 Nev. 579, 668

requirements to obtain attorney fees which were all held to bar an award of attorney fees pursuant to an offer of judgment).

1 P.2d 268 (1983). In *Beattie*, this Court reversed an award of attorney fees where
2 the district court failed to “carefully evaluate the following factors: (1) whether
3 the plaintiff's claim was brought in good faith; (2) whether the defendants' offer
4 of judgment was reasonable and in good faith in both its timing and amount; (3)
5 whether the plaintiff's decision to reject the offer and proceed to trial was grossly
6 unreasonable or in bad faith; and (4) whether the fees sought by the offeror are
7 reasonable and justified in amount.” 99 Nev. at 588-89, 668 P.2d at 274. This
8 Court reasoned that the purpose of the offer of judgment rules is “to encourage
9 settlement, it is *not to force plaintiffs unfairly to forego legitimate claims.*” *Id.*
10 at 588, 668 P.2d at 274 (emphasis added). This Court concluded “where the court
11 has failed to consider these factors, and has made no findings based on evidence
12 that the attorney's fees sought are reasonable and justified, it is an abuse of
13 discretion for the court to award the full amount of fees requested.” *Id.* at 589,
14 668 P.2d at 274. Under a proper analysis of these factors, attorney fees should
15 never have been awarded.

16 While the district court stated that it “has considered the applicable
17 *Brunzell*, *Beattie* and *Yamaha* factors,” it made absolutely no findings with
18 respect to those facts, other than to make the conclusory finding that Peppermill’s
19 attorney fees were “reasonable.” APP 6830:6-8, v.29. Such finding at best only
20 addresses the last *Beattie* factor, and certainly cannot show that the district court

1 “carefully evaluate[d]” the factors required by this Court in *Beattie*. 99 Nev. at
2 588-89, 668 P.2d at 274. While this Court explained, in *Wynn v. Smith*, 117 Nev.
3 6, 13, 16 P.3d 424, 428-29 (2001), that “the district court's failure to make
4 explicit findings [with respect to the *Beattie* factors] is not a per se abuse of
5 discretion,” the Court ruled that such lack of findings is only permissible “[i]f the
6 record clearly reflects that the district court properly considered the *Beattie*
7 factors.” The district court’s order provides no basis whatsoever for determining
8 whether the district court “properly” considered any *Beattie* factor, but instead
9 supports the opposite. *See State Drywall, Inc. v. Rhodes Design & Development*,
10 122 Nev. 111, 119 n.18, 127 P.3d 1082, 1088 n.18 (2006) (finding that the district
11 court did not properly consider the *Beattie* factors where the “record does not
12 reflect what, if any, analysis was made by the district court,” and holding that the
13 record must reflect this analysis to support an award of attorney fees).

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

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

1 APP 6831:9-16, v.29. The district court then “offer[ed] its appreciation to the
2 fine attorneys on both sides for their professionalism and presentations.” APP
3 6832:5-7, v.29. Such findings support only on conclusion that GSR’s claims
4 were brought in good faith based on the facts of the case and the state of the law.

5 Likewise, the district court previously found that GSR’s “contention that
6 Defendant would not have acted as improperly as they did here if they were not
7 after a protected trade secret is a *compelling argument*, and raises an interesting
8 question of fact that the jury will need to answer.” APP 3873:6-14, v.17. How
9 could the GSR’s argument be “compelling” if its claims were not made in good
10 faith? A review of the arguments and evidence found in GSR’s oppositions to
11 Peppermill’s multiple motions for summary judgment, demonstrates GSR’s good
12 faith. APP 2802-45, v.12; APP 3447-87, v.15. Peppermill admitted to stealing
13 GSR’s slot machine settings, admitted that this amounts to egregious misconduct,
14 which can only support a finding that GSR brought its claims in good faith.

15 Second, the offer of judgment was not reasonable in either timing or
16 amount, and therefore GSR declined the offer in good faith. The \$100,000.00
17 amount offered was not even 10% of the value Peppermill, themselves place of
18 GSR’s slot machine settings, as represented by the \$1 million fine to which
19 Peppermill readily agreed. The amount offered was less one-half (½) percent of
20 the \$24 million of the compensatory *and punitive damages* that could have been

1 awarded to GSR based on Mr. Aguero's more conservative \$8 million reasonable
2 royalty damage opinion. APP 3422, v.15. The \$100,000.00 offer did not even
3 come close to covering the more than \$290,000.00 in attorney fees and costs
4 already incurred by GSR in pursuing its trade secret claim. APP 6731, v.29. The
5 \$100,000.00 offered was less than 13% of the nearly \$750,000.00 in attorney fees
6 Defendants' had incurred at that point to defend their admitted egregious
7 misconduct. APP 6704, v.28. The \$100,000.00 offer was not even half the
8 almost \$250,000.00 that Peppermill paid its experts to devise supposedly proper
9 schemes to ascertain GSR's slot machine settings. APP 6705, v.28. Considering
10 these sizable fees Peppermill had already incurred to avoid liability, along with
11 sizable fees Peppermill was willing to expend to show that GSR's slot machine
12 settings were readily ascertainable by proper means when in fact they were
13 admittedly stolen, Peppermill's offer could hardly been deemed reasonable or in
14 good faith.

15 The timing of the offer was also unreasonable. Peppermill served their
16 offer on February 13, 2015, which was required to be accepted by March 5, 2015.
17 Peppermill's entire defense that GSR's slot machine settings were reasonably
18 ascertainable by proper means rested on the shoulder of Peppermill's experts.
19 Peppermill, however, did not disclose the reports of these experts until, March 2,
20 2015. APP 502-708, v.3. GSR, therefore, only had three (3) days to evaluate

1 whether the schemes these experts had devised to ascertain GSR's slot machine
2 setting were feasible and proper. Additionally, when Peppermill made its offer,
3 Peppermill failed to provide tens of thousands of documents necessary for GSR to
4 evaluate its claim, thousands of which were identified by GSR's damage expert as
5 essential to offer an opinion. APP 1108-12, v.5. Accordingly, GSR had no basis
6 to calculate damages or evaluate the merits of its claim, which was Peppermill's
7 design all along. *See Certified Fire Prot. Inc. v. Precision Constr.*, 128 Nev.
8 Adv. Op. 35, 283 P.3d 250, 258 (2012) (finding that the district court
9 appropriately denied attorney fees as unreasonable in timing and amount when
10 defendant offered only \$7,501.00 for a claim of \$25,185.04 and was made before
11 plaintiff had "a fair opportunity to assess its claim through discovery"). As the
12 offer was unreasonable in timing and amount, GSR acted in good faith when
13 rejecting Peppermill's offer of judgment.

14 Finally, Peppermill failed to show that the fees they seek "are reasonable
15 and justified in amount." This fourth *Beattie* factor can only be established by
16 analyzing the factors found in *Brunzell v. Golden Gate Nat'l Bank*, 85 Nev. 345,
17 349, 455 P.2d 31, 33 (1969). *See Shuette v. Beazer Homes Holdings Corp.*, 121
18 Nev. 837, 864–65, 124 P.3d 530, 548–49 (2005). The *Brunzell* factors include
19 "(1) the qualities of the advocate: his ability, his training, education, experience,
20 professional standing and skill; (2) the character of the work to be done: its

1 difficulty, its intricacy, its importance, time and skill required, the responsibility
2 imposed and the prominence and character of the parties where they affect the
3 importance of the litigation; (3) the work actually performed by the lawyer: the
4 skill, time and attention given to the work; (4) the result: whether the attorney was
5 successful and what benefits were derived.” 85 Nev. at 349, 455 P.2d at 33.
6 While the district court cites *Brunzell*, neither the district nor Peppermill
7 mentioned any of these factors.

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

17 While Peppermill sought almost \$1 million in attorney fees since its offer
18 of judgment, Peppermill attached almost no competent evidence to support those
19 fees. APP 6704, v.26. Peppermill claims \$130,079.50 in fees from the firm
20 Brownstein Hyatt Farber Schreck, \$52,612.50 in fees from the firm Cotton Driggs

1 Walch Holley Wolson & Thompson, and \$11,832.50 from the O'Mara Law Firm.
2 Peppermill, however, have failed to provide any billings from these firms, or any
3 other information which would allow the court to evaluate the required *Brunzell*
4 factors. For example, Frank Schreck was employed to defend Peppermill before
5 the NGC and has not appeared in this case. Peppermill therefore wants GSR to
6 not only pay for their attorney fees accrued in this case, but also to pay their fees
7 incurred as a result of admittedly violating Nevada gaming laws. All \$194,524.50
8 of these alleged fees should have been disallowed.

9 Peppermill also claim \$205,400.40 in fees from the Gunderson Law Firm,
10 but only provide \$61,142.50 in billing, and provide no other information would
11 allowed the district court to evaluate the *Brunzell* factors. Accordingly, all of the
12 \$205,400.40 in fees should be disallowed. APP 6660-90, 6704, v.28. In fact, the
13 only reference to any professional qualifications of any attorney are those in the
14 curriculum vitae of Mr. Robison, which is inadmissible hearsay. APP 6692-96,
15 v.28; *see also State, Dep't of Health & Welfare, ex rel. Osborn v. Altman*, 842
16 P.2d 683, 687-88 (Idaho 1992) (curriculum vitae is inadmissible hearsay). Even
17 ignoring the valid hearsay objection, Mr. Robison's professional qualifications
18 have no bearing on the professional qualifications of any other attorney in this
19 action, of his staff, or the staff of any other attorney. *See Yeghiazarian*, 129 Nev.
20 Adv. Op. 81, 312 P.3d at 510 (refusing to impute the reasonableness of fees

1 charge by one attorney to other attorneys, the paralegals, or to the office staff).
2 Accordingly, the district court should have found that none of *Brunzell* factors
3 were met due to the lack of admissible evidence.

4 Additionally, in *Welch v. Metro. Life Ins. Co.*, 480 F.3d 942, 948 (9th Cir.
5 2007), the Ninth Circuit held that applicant for attorney fees failed to carry her
6 burden of documenting of documenting the appropriate hours expended in the
7 litigation when the attorney relies on block billing. Applying this rule in *Vail v.*
8 *Country Mut. Ins. Co.*, Case No. 2:13-CV-02029-SI, 2016 WL 684039, at *3 (D.
9 Or. Feb. 19, 2016), the court ruled that due to inherently “vague nature of block
10 billing, “block-billed time requested over the three-hour maximum will be
11 reduced by fifty percent.”

12 All of the billings by the Robison firm are in block billing form, and the
13 vast majority of Mr. Robison’s entries are in blocks of more than the three (3)
14 hour maximum. While Peppermill is not entitled to any attorney fees, the district
15 court also erred in refusing to discount the award of fees based on inadequate
16 documentation. Accordingly, this Court should reverse the district court’s award
17 of attorney fees.

18 **XI. CONCLUSION**

19 Based on the foregoing, this Court should reverse the district court in all
20 respects. This Court should order the district court strike Peppermill’s Answer as

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

8 **XII. CERTIFICATE OF COMPLIANCE**

9 I hereby certify that this brief complies with the formatting requirements of
10 Nev. R. App. P. 32(a)(4), the typeface requirements of Nev. R. App. P. 32(a)(5)
11 and the type style requirements of Nev. R. App. P. 32(a)(6) because this brief has
12 been prepared in a proportionally spaced typeface using Microsoft Word 2013,
13 font size 14-point, Times New Roman. I further certify that this brief complies
14 with the page- or type-volume limitations of Nev. R. App. P. 32(a)(7) because,
15 excluding the parts of the brief exempted by Nev. R. App. P. 32(a)(7)(C), it is
16 proportionately spaced, has a typeface of 14 points or more, and contains exactly
17 13,989 words. Finally, I hereby certify that I have read the attached appellate
18 brief, and to the best of my knowledge, information, and belief, it is not frivolous
19 or interposed for any improper purpose. I further certify that this brief complies
20 with all applicable Nevada Rules of Appellate Procedure, except as otherwise

1 stated, in particular Nev. R. App. P. 28(e)(1), which requires every assertion in
2 the brief regarding matters in the record to be supported by a reference to the page
3 and volume number, if any, of the transcript or appendix where the matter relied
4 on is to be found. I understand that I may be subject to sanctions in the event that
5 the accompanying brief is not in conformity with the requirements of the Nevada
6 Rules of Appellate Procedure.

7 Dated this 2nd day of March, 2017

8 COHEN|JOHNSON|PARKER|EDWARDS

9
10 By: /s/ H. Stan Johnson

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CERTIFICATE OF SERVICE

I certify that on 2nd of March, 2017, pursuant to N.E.F.R. 7, I caused the **APPELLANT’S 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.

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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:

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DATED the 2nd day of March, 2017.

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