

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

2
3
4 MEI-GSR HOLDINGS, LLC, a Nevada
5 limited liability company, d/b/a GRAND
6 SIERRA RESORT,

7 Appellant,

8 vs.

9 PEPPERMILL CASINOS, INC., a
10 Nevada corporation, d/b/a/
11 PEPPERMILL CASINO;

12 Respondent.

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District Ct.
Case No. CV13-01704

13 **RESPONDENT PEPPERMILL CASINOS, INC.'S**

14 **ANSWERING BRIEF**

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3 **NRAP 26.1 DISCLOSURE STATEMENT**


4 The undersigned counsel of record certifies that the following are
5 persons and entities described in NRAP 26.1(a), and must be disclosed.

6 These representations are made in order that the justices of the Court may
7 evaluate possibly disqualifications or recusal.

8 Respondent Peppermill Casinos, Inc. is a Nevada corporation which is
9 owned by various private individuals and/or trusts. It does not have a parent
10 company or any publicly held corporation as an owner. The undersigned
11 counsel appeared on behalf of this Respondent before the District Court, and
12 is expected to appear on behalf of Respondent on appeal.
13
14

15 Dated this 19th day of May, 2017.

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JURISDICTIONAL STATEMENT

Because Respondent agrees with Appellants' jurisdictional and routing statements, and statement of the issues, Respondent does not include these portions in its answering brief. NRAP 28(b)(1)-(4).

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STATEMENT OF THE CASE

This appeal follows a jury verdict in favor of Respondent Peppermill Casinos, Inc. (“Peppermill”) on appellant MEI-GSR Holdings, LLC’s (“GSR”) claim for misappropriation of trade secrets. The jury found that GSR’s alleged trade secret – a par setting on a slot machine – was not a trade secret under NRS 600A.030(5) because pars are readily ascertainable by proper means.

GSR now appeals and asks this Court to rewrite Nevada’s Uniform Trade Secrets Act (“NTSA”) so that an act of misappropriation will automatically establish that the information obtained was a trade secret. GSR must make this request because it was unable to present any evidence at trial that its pars qualify as trade secrets under NRS 600A.030(5), or that GSR suffered any damage as a result of Peppermill’s conduct. All that GSR can plausibly argue is that Peppermill obtained GSR’s pars without GSR’s permission. That is not enough to prevail on a trade secret claim.

GSR also challenges the District Court’s rulings on discovery motions, motions in limine, and a motion to amend. These arguments overlook the overwhelming futility of GSR’s appeal: Because GSR’s pars do not qualify as a trade secret, no amount of discovery or evidence about other casino’s pars could have salvaged GSR’s lawsuit against the Peppermill. The District

1 Court should be affirmed in all respects.
2

3 **STATEMENT OF THE FACTS**¹
4

5 **I. FACTUAL BACKGROUND**

6 **A. “PARS” AND “KEYING”**

7 The trial below concerned whether a slot machine’s par setting (a
8 “par”) is a trade secret under NRS 600A.030.² A “par” is a gaming industry
9 term that refers to a slot machine setting which establishes the percentage of
10 money played by the gambler that the casino theoretically “holds” (i.e,
11 keeps). See 8 Respondent’s Appendix (“RA”) 1886. Thus, if the par is set at
12 6%, the machine theoretically holds \$6 of every \$100 played. *Id.*
13
14
15

16 Peppermill’s former general manager John Hansen informed former
17 Peppermill employee Ryan Tors that all casinos “key” competitors’ slot
18 machines to “shop” for pars. See 19 Appellant’s Appendix (“AA”) 4402.
19 Tors, acting within the course and scope of his employment, used a 2341 key
20
21

22 ¹ Peppermill’s statement of the facts includes only those pertinent facts
23 missing from GSR’s opening brief, and does not recite the entire factual and
24 procedural background of this case.

25 ² A “trade secret” is information that (1) has independent economic value
26 because (2) the information is not readily ascertainable by proper means by
27 the public or competitors, of which (3) the owner took reasonable measures to
28 protect its confidentiality. NRS 600A.030(5). If a “trade secret” is
misappropriated, damages are allowed if the information was used or
disclosed by the misappropriator. NRS 600A.050.

1 to access one diagnostic screen of slot machines at various casinos. *Id.* at
2
3 4480, 4546. Each slot machine comes with two 2341 keys from the
4 manufacturer, which can be used to access any video slot machine. *Id.* at
5 4367-68. 2341 keys access various diagnostic screens within the slot
6 machine that display data concerning the machine's performance, the
7 frequency of its pay outs, history of play, and the par. 2 AA 370. The par is
8 on a different screen than the other diagnostic screens that 2341 keys can
9 access. 18 AA 4111.

12 Tors fabricated reports which purportedly reflected his keying
13 activities, and emailed these false reports to Peppermill executives. 19 AA
14 4457-58. On December 23, 2011, Tors fabricated a report about pars on
15 several GSR slot machines. *Id.* at 4436. Not only did Tors testify that he did
16 not key GSR's machines on that date, but the pars he reported were for par
17 values that could not be set on those particular machines. 18 AA 4093-94.

19 This is what Tors' fabricated "par sheet" looked like:

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Grand Sierra

12/29/2011

1	04-15-08	440	91.83	8.17	Buffalo
2	04-15-07	21016	91.83	8.17	Buffalo
Aristocrat		55722	average	8.17	
1	04-15-08	440	93.99	6.01	Ducks In a Row
2	04-15-07	21016	94.03	5.97	Cleopatra
3	04-15-05	571	94.03	5.97	Money Strom
4	05-25-02	50060	93.98	6.02	Texas Tea
5	05-25-03		94.98	5.02	Munsters
6	05-25-01		94.00	6.26	Dbl Dia 2000
7	03-25-04	358	93.97	6.03	Lil Lady
IGT			average	5.90	
overall average				6.40	

*all machines that I can key quickly were flagged as having been loosened, some had the dangler pulled off

26 AA 6169.

However, this appeal only concerns six pars Tors obtained from the GSR on June 14, 2012. 1 AA 3; 19 AA 4414, 4556. He reported those pars to Peppermill management. 19 AA 4414, 4556. This is the only keying activity Tors conducted on GSR's slot machines that resulted in Peppermill obtaining any pars from the GSR. *Id.* Tors' par sheet with the actual and only pars Peppermill obtained from the GSR looked like this:

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					6/14/2012
Grand Sierra					
1	04-07	20375	93.99	6.01	Ducks in a Row
2	04-18	1011	91.82	8.18	Buffalo
3	04-10	20050	94.06	5.94	Enchanted Unicorn
4	01-07	127	94.01	5.99	Cats
5	10-47	246	93.99	6.01	Horoscope
6	05-26	937	92.51	7.49	Wolf Run
			average	6.60	

14 RA 3282.

Reading from left to right, this par sheet shows (1) the bank of slot machines where the subject machines were located, (2) the number of the machine keyed, (3) the “pay-back percentage” (i.e., what is returned to the player), (4) the par, and (5) the theme or name of the machine keyed. The pay-back percentage and par always total 100.

Tors keyed GSR’s slot machines again on July 12, 2013 but was caught in the act. 1 AA 3. Peppermill did not obtain these pars. *Id.* In Tors’ interview with the Nevada Gaming Control Board (“NGCB”) regarding the incident, he claimed he keyed GSR’s slot machines because he believed GSR falsely advertised its pars. 19 AA 4423.

After an exhaustive investigation, the NGCB found *no evidence* that Peppermill used the pars obtained by Tors from any casino, including the GSR. 18 AA 4112-13. Contrary to GSR’s assertions, neither Peppermill nor

1 the District Court view Peppermill's activities as "perfectly acceptable."
2
3 Peppermill conceded to the NGCB that keying is improper. *Id.* at 4097. In
4 fact, Peppermill agreed to pay a \$1,000,000 fine to NGCB. *Id.* However,
5 Peppermill's payment of a regulatory fine is not proof that GSR's pars are
6 trade secrets, because the NGCB investigation did not concern trade secrets,
7 and payment of the fine does not establish that GSR's pars are valuable or
8 non-ascertainable.
9
10

11 **B. EVIDENCE OF PARS AT TRIAL**

12
13 There was no evidence at trial that GSR's pars are protectable trade
14 secrets. All of GSR's management witnesses, who include Craig Robinson
15 (the NRCP 30(b)(6) witness on independent economic value), Slot Director
16 Terry Vavra, Slot Supervisor Toby Taylor, former Slot Director Tom
17 Sullivan, and General Manager Tracy Mimno, conceded that pars have no
18 independent economic value. 23 AA 5492-93, 5496; 24 AA 5747-48; 22 RA
19 5376-84, 5399-13, 5444-50. Owners of competitor casinos, including John
20 Farahi (Atlantis), Gary Carano (Eldorado/Silver Legacy), Jeff Siri (Cal Neva),
21 John Ensign (Wendover Casinos), John Ascuaga (Sparks Nugget), Mitch
22 Gardner (Bordertown), Tom Sullivan (Boomtown), and Russ Sheltra
23 (Bonanza), stated to Peppermill's experts that pars have no independent
24 economic value. 23 AA 5329; 24 AA 5532-45. In sum, a competitor's pars
25
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28

1 are worthless information. All experts agreed that the pars Tors obtained
2 from GSR have no independent economic value. 22 AA 5049-50, 5071,
3 5078-79; 24 AA 5755, 5749, 5756.

4
5 Pars are readily ascertainable by proper means, according to GSR's
6 witnesses John Stone and Michael Draeger, and GSR's experts Rex Carlson,
7 Tom Sullivan, and Charles Lombardo. 18 AA 4111; 23 AA 5498; 24 AA
8 5317-20; 22 RA 5414-21. GSR expert Rex Carlson testified:
9

10
11 Q: In determining pars can be readily ascertained?

12 A: Yes. In a fairly short amount of time.

13 Q: Inexpensively?

14 A: Yes.

15 Q: But there's no question in this case now that pars are readily
16 ascertainable by means other than using a key.

17 A: In this case, the case where the comp system works the way it
18 does.

18 ...

19 Q: We agree given the comp system used at the GSR for many
20 years, pars are readily ascertainable; correct?

21 A: Yes.

22 12 AA 2668-69; *see also* 27 AA 6121-22 (Carlson's testimony as read to the
23 jury at trial). This testimony was confirmed by Peppermill's witness Aaron
24 Robyns, and Peppermill's experts Stacy Friedman, Michelle Salazar and Dr.
25 Anthony Lucas. 20 AA 4828; 23 AA 5424.

26
27 GSR's expert Charles Lombardo testified that GSR failed to take
28 adequate measures to protect the alleged secrecy of its pars. 24 AA 5745.

1 All witnesses, including GSR's experts and designated NRCP 30(b)(6)
2 witness, agreed that there was no evidence that Peppermill used or disclosed
3 the pars Peppermill obtained from GSR. 18 AA 4152, 4199; 19 AA 4351-54;
4 20 AA 4566-67, 4570, 4786-88; 21 AA 4847; 22 AA 5110-11, 5115-19,
5 5140-41, 5188-91; 24 AA 5737, 5773. Indeed, the NGCB found no evidence
6 of use after its exhaustive investigation of Peppermill. 18 AA 4112-13.
7

8
9 GSR did not present evidence on damages based upon the market value
10 of pars. GSR's expert's damage model was inaccurately based on "net pars,"
11 which are the actual hold of a machine adjusted for points, free play, perks
12 and benefits awarded to the player. 22 AA 5098. The pars Tors obtained
13 were not "net pars." The NGCB publishes net pars for the community each
14 month. *Id.* at 5151. Publicly-held casinos publish their net pars in their 10-Q
15 and 10-K SEC filings. *Id.* GSR never presented evidence of damages caused
16 by, or the value of, the six pars Tors obtained from GSR's machines.
17
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20

21 **II. PROCEDURAL BACKGROUND**

22 **A. GSR'S DISCOVERY ABUSES**

23
24 Although GSR filed its complaint in August 2013, it refused to provide
25 a damage computation for over one year. 1 AA 10; 1 RA 1-4. When GSR
26 finally provided a damage computation, the expert who computed it conceded
27 that he could formulate no plausible damage theory nor provide a
28

1 computation of damages. 4 RA 773, 794. David Schwartz, GSR's then-
2 damage expert, conceded that damages were impossible to determine. *Id.* As
3 a result, GSR was sanctioned \$26,565.00. 7 RA 1507.

4
5 GSR designated Gregory Gale as a rebuttal expert, but Gale testified
6 that he had never been hired as a rebuttal expert, had not prepared a rebuttal
7 expert and had not seen Peppermill's expert reports. 12 RA 2786-90. Gale
8 further testified that he was not qualified to be an expert on either trade
9 secrets or damages, and that he was not rebutting any expert opinion. *Id.* at
10 2790-91. GSR was sanctioned \$16,267.85 for this abuse. 14 RA 3259.

11
12 GSR demanded production of all marketing records for a six year
13 period. 7 AA 1488, 15 AA 3541. Peppermill produced over 800,000 pages
14 for GSR's inspection at Peppermill's warehouse. 15 AA 3541. GSR spent
15 less than one hour looking at the documents provided for inspection, and
16 never requested physical production of the documents. *Id.*

17 18 19 20 21 **B. THE NGCB EMAILS**

22 In November 2014, GSR requested Peppermill produce all emails
23 obtained by the NGCB in its investigation of Peppermill. 4 AA 740, 743.
24 The NGCB obtained all emails to and from six Peppermill executives during
25 a set time period that were not limited to topic, subject or content. 16 AA
26 3839. Peppermill did not timely respond to GSR's request. *Id.* at 3840.
27
28

1 However, in August 2015, Peppermill made all of the NGCB emails
2
3 available to GSR for its inspection. *Id.* at 3843. The emails were stored on a
4 computer to which GSR was given unfettered access for over four months.
5
6 *Id.* GSR refused to inspect the documents, but instead demanded physical
7 production of the approximately 120,000 NGCB emails. *Id.*; 9 AA 1985-
8 2130. Thousands of those emails had nothing to do with pars, keying, or the
9 issues involved in the case.
10

11 On November 4, 2015 GSR finally spent two hours reviewing the
12 computer. 16 AA 3844. Peppermill complied with GSR's request that it
13 produce several emails contained on the computer. 15 AA 3538-3600.
14
15 Several of these emails were admitted into evidence at trial. 22 RA 5349-50,
16 5354-60. After having access to these emails for four months, GSR renewed
17 its demand for production of physical copies of all NGCB emails one day
18 before the close of discovery in its counter-motion to compel. 9 AA 1985-
19 2130.
20
21

22 **SUMMARY OF THE ARGUMENT**

23
24 In its argument on jury instructions, GSR asks this Court to re-write
25 NTSA to remove the requirement that information must qualify as a "trade
26 secret" to be protected because GSR did not have any evidence that its pars
27 are trade secrets. A "trade secret" is information that (1) has independent
28

1 economic value because (2) the information is not readily ascertainable by
2 proper means by the public or competitors, of which (3) the owner took
3 reasonable measures to protect its confidentiality.
4

5 GSR's witnesses and experts all agreed that the six pars Peppermill
6 obtained had no independent economic value. This was confirmed by
7 Peppermill's witnesses and experts.
8

9 The jury found that GSR's pars are readily ascertainable by proper
10 means because GSR's experts conceded that video slot machine pars are
11 readily ascertainable. GSR's general manager and its former slot director
12 conceded that pars are readily ascertainable. This testimony was confirmed
13 by Peppermill's witnesses and experts.
14

15 GSR's consultant, John Stone, exposed GSR's hypocrisy when he
16 testified that GSR hired him to "shop" the Peppermill to obtain its pars, pars
17 are readily ascertainable, and "shopping" for pars is common in the gaming
18 industry. Stone admitted that he obtained Peppermill's pars through "social
19 engineering," which is a fancy name for deceitful conduct.
20

21 GSR failed to prove that it took reasonable efforts to protect the
22 confidentiality of its pars. Charles Lombardo, GSR's only expert on slot
23 machines, informed the jury that GSR's employees essentially disclosed the
24 pars to players by telling the player their "theoretical win," which could then
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1 be easily used to calculate the par. Because this automatically enabled
2
3 players to determine pars, GSR failed to protect the confidentiality of its pars.

4 GSR failed to present evidence of damages at trial. It admitted it lost
5 no revenue or patrons due to Tors' keying. It admitted Peppermill did not
6 make money or gain patrons from obtaining GSR's pars. The only damages
7 GSR could plausibly seek under NRS 600A.050 was a reasonable royalty,
8 which requires proof of use or disclosure. GSR did not prove either. All of
9 GSR's witnesses, including its experts and NRCP 30(b)(6) witnesses
10 conceded that there was no evidence that Peppermill used or disclosed GSR's
11 pars.
12

13
14
15 Unable to prove its pars are "trade secrets" under NRS 600A.030(5),
16 GSR asks this Court to re-write NTSA so that an act of misappropriation will
17 automatically establish that the information obtained was a trade secret. In its
18 arguments on jury instructions, GSR relies on authority derived from the First
19 Restatement of Torts, which was superseded by the Uniform Trade Secrets
20 Act ("UTSA"). Adopting GSR's interpretation of the NTSA requires this
21 Court to insert additional elements into the statutory definition of a trade
22 secret. Accordingly, the District Court did not err in its rulings on jury
23 instructions regarding whether pars are readily ascertainable.
24
25
26

27
28 GSR next resorts to a misleading discovery issue. The District Court

1 did not abuse its discretion in denying GSR's motions to compel and motion
2
3 for case concluding sanctions. These motions are based on GSR's demands
4 for physical production of each email given to the NGCB. Peppermill gave
5 the NGCB over 100,000 emails to and from six Peppermill executives,
6
7 regardless of topic and subject matter. The District Court properly exercised
8 its discretion to decline to compel Peppermill to produce irrelevant emails.
9

10 Regarding relevant emails, Peppermill made *all* of the emails available
11 to GSR for inspection in August 2015. GSR failed to inspect the emails for
12 four months, and instead again moved to compel Peppermill to provide hard
13 copies of the emails. Thus, the District Court properly refused to compel
14 Peppermill to physically print relevant emails which it had already made
15 available for inspection. Because GSR's motion for case concluding
16 sanctions is based on the same requests, the District Court also properly
17 denied that motion.
18
19

20
21 The District Court did not abuse its discretion in denying GSR's
22 motion to amend its complaint to add seven new claims and one new
23 defendant, where that motion was made one month before the close of
24 discovery and four months before the then-trial date. Although trial was
25 eventually continued, GSR never renewed its motion to amend.
26
27

28 The District Court did not abuse its discretion in granting the motion in

1 limine excluding evidence of Tors' keying activities at other casinos. GSR's
2 argument that this evidence was needed to establish "habit and custom" fails
3 because Peppermill ***admitted*** to obtaining the six pars without GSR's consent
4 or authority. Since Tors admitted that he fabricated some of the keying
5 incidents and pars obtained from those incidents, this evidence would have
6 resulted in multiple mini-trials to determine if the keying occurred, if the
7 other casinos' pars were trade secrets which the casinos kept confidential, and
8 if Peppermill used or disclosed those pars.
9

12 Finally, the District Court did not abuse its discretion in awarding
13 Peppermill attorney fees under Rule 68. NRS 600A.060 does not preclude an
14 award of attorney fees under NRCP 68. The District Court was not required
15 to make specific findings for each *Beattie* factor because the record
16 establishes that the District Court considered the factors. Peppermill's offer
17 of judgment was reasonable because, when it served its offer eighteen months
18 after the complaint was filed, GSR knew that it had no case. GSR was
19 sanctioned over \$27,000 for not providing a damage computation, it was
20 publishing pars on billboards and websites, and its experts conceded in
21 depositions that pars have no independent economic value and are readily
22 ascertainable. Alarming, GSR's owner testified that he would never settle,
23 he wanted more than \$80,000,000 in damages, and he intended to go to 60
24
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1 Minutes to humiliate Peppermill. A clearer case of bad faith litigation is
2
3 unimaginable.

4 5 **ARGUMENT**

6 7 **I. THE DISTRICT COURT DID NOT ERR IN ITS RULINGS ON** 8 **JURY INSTRUCTIONS.**

9 **A. STANDARD OF REVIEW**

10 The primary issue in this appeal is not whether the pars were
11
12 misappropriated, but whether GSR's pars qualify as a trade secret. This Court
13 reviews "a decision to admit or refuse jury instructions for an abuse of
14 discretion or judicial error." *D&D Tire, Inc. v. Ouellette*, 131 Nev., Adv. Op.
15 47, 352 P.3d 32, 37 (2015). This Court reviews de novo whether a proposed
16 jury instruction by a party is warranted or supported by Nevada law. *Id.*; *see*
17 *also* NRCP 51(a)(1). The jury instructions at issue in this appeal require
18 interpretation of the NTSA, an issue this Court also reviews de novo. *Silver*
19 *State Elec. Supply Co. v. State*, 123 Nev. 80, 84, 157 P.3d 710, 713 (2007).³

20 21 **B. BECAUSE THE PARS ARE NOT A TRADE SECRET, IT** 22 **IS IRRELEVANT HOW THEY WERE OBTAINED.**

23
24
25 ³ The interpretation of NTSA in this appeal is an issue of first impression in
26 Nevada. A published opinion on this issue would not only be helpful to
27 Nevada practitioners, but would also likely have substantial precedential
28 value nationwide given the current confusion among the courts of the
interplay between the First Restatement and the UTSA, as shown in this brief.

1. Early Trade Secret Law

GSR relies upon legal authority that is based on an inapplicable body of law arising from the Restatement (First) of Torts (1939) (the “First Restatement”). *See* AOB 22-34. Based on principles of torts, early trade secret common law initially focused on the wrongfulness of the defendant’s conduct, rather than the nature of the trade secret. Sharon K. Sandeen, *The Evolution of Trade Secret Law and Why Courts Commit Error When They Do Not Follow the Uniform Trade Secrets Act*, 33 Hamline L. Rev. 493, 495 (2010) (hereinafter “*The Evolution of Trade Secret Law*”);⁴ *see also* Restatement (Second) of Torts, Introductory Note (1979). Early courts would only afford relief for trade secret misappropriation if the plaintiff proved that the competitor’s actions were inherently “unfair.” *The Evolution of Trade Secret Law*, p. 495. Thus, many early cases focused solely on the **conduct** of the defendant, and not on the existence of a trade secret.⁵

⁴ This law review article provides an excellent background of the evolution of trade secret law in the United States, and is worth reading in its entirety.

⁵ *See, e.g., A.O. Smith Corp. v. Petroleum Iron Works Co. of Ohio*, 73 F.2d 531, 538-39 (6th Cir. 1934) (“The mere fact that the means by which a discovery is made are obvious . . . cannot . . . advantage the competitor who by unfair means, or as the beneficiary of broken faith, obtains the desired knowledge himself without paying the price in labor, money or machines expended by the discoverer.”); *Tabor v. Hoffman*, 23 N.E. 12, 13 (N.Y. 1889) (holding that the defendant “had no right to obtain [the secret] by unfair means, or to use it after it was thus obtained”); *Pressed Steel Car Co. v.*

1 This “conduct” approach was incorporated into the First Restatement,
2 which provided liability for *use* of commercial information that “was
3 discovered by improper means.” *Id.* at §§ 757, 759 (1939). As the drafters
4 stated:
5

6 [T]he rule stated in this Section rests not upon a view of trade secrets
7 as physical objects of property but rather upon abuse of confidence or
8 impropriety in learning the secret. Such abuse or impropriety may exist
9 also where the information is not a trade secret and may equally be a
10 basis for liability.

11 *Id.* at § 757, cmt. c.

12 **2. The UTSA Superseded the First Restatement.**

13 By 1979, the year the UTSA was first published, unfair trade practice
14 law had evolved away from the traditional tort principles espoused in the First
15 Restatement. *See* Restatement (Second) of Torts, Introductory Note. Thus,
16 the drafters of the Second Restatement expressly declined to include
17 misappropriation of trade secrets in the Second Restatement of Torts. *Id.*
18

19 Despite recognizing that § 757 of the First Restatement contained “the
20 most widely accepted rules of trade secret law,” the UTSA drafters *did not*
21 *include* the First Restatement’s provisions imposing liability when
22 information was acquired by improper means. *See* Unif. Trade Secrets Act, §
23

24
25
26
27 *Standard Steel Car Co.*, 60 A. 4 (Pa. 1904) (“Broadly stated, it is that a court
28 of equity will not permit any one to take unfair advantage of a position in
which he has been placed through any relation of confidence or trust . . .”).

1 1. Instead, the UTSA separates the “improper means” element from the
2 definition of “trade secret.” Thus, the UTSA requires that a “trade secret
3 must exist” **and** “use of the trade secret must be improper” before liability
4 arises. *Id.* at Refs & Annos. No claim arises under the UTSA for information
5 that is not a trade secret.
6

7
8 The Restatement (Third) of Unfair Competition compiles the principles
9 of modern trade secret statutory and common law that have arisen since the
10 enactment of the UTSA by the various states. *See* Restatement (Third) of
11 Unfair Competition, Intro. Note (1995). The Restatement of Unfair
12 Competition also provides that there is no liability for misappropriation of
13 information “unless the information qualifies for protection as a trade
14 secret[.]” *Id.* at § 43, cmt. d.
15
16

17
18 The Restatement of Unfair Competition contradicts GSR’s arguments
19 on appeal and explains, “[i]nformation that is readily ascertainable by proper
20 means is not protectable as a trade secret, . . . **and the acquisition of such**
21 **information even by improper means is therefore not actionable”** *Id.*
22 (Emphasis added). Under modern trade secret law, how the information was
23 actually obtained is not determinative of whether the information constitutes a
24 trade secret.
25
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3 **3. GSR Relies On the Wrong Body of Law.**

4 The NTSA is identical to the UTSA and was enacted in 1987, well after
5 trade secret law had evolved away from the traditional tort principles
6 embodied in the First Restatement. *See* NRS 600A.010. However, virtually
7 *all* of GSR's legal authority in support of its argument is either outdated
8 precedent, or cases that fail to consider the evolution of trade secret law and
9 simply cite to the now-inapplicable precedent.⁶
10

11 Professor Sandeen cautions against reliance on this body of authority.
12 Noting that the UTSA is the "predominant body of law governing trade
13 secrets in the United States," she states:
14

15 Unfortunately, . . . many attorneys and judges continue to rely upon the
16 Restatement First version of trade secret law as if it is gospel. This not
17 only results in the application of the incorrect body of law, but also
18 gives undue credit to the Restatement series that is, at best, only
19 secondary authority of applicable law. It also fails to recognize that the
20 Restatement (Second) of Torts excluded all sections concerning unfair
21 competition and that the trade secret provisions of the Restatement First
22 were subsequently replaced in 1998 by sections of the Restatement
23 (Third) of Unfair Competition.

24 *The Evolution of Trade Secret Law*, at 538-39.

25 ⁶ *See e.g., K&G Oil Tool & Serv. Co. v. G&G Fishing Tool Serv.*, 314 S.W.2d
26 782 (Tex. 1958) (relying on *Smith v. Dravo Corp.*, *Pressed Steel*, and *A.O.*
27 *Smith*); *E.I. DuPoint deNemours & Co. v. Christopher*, 431 F.2d 1012 (5th
28 Cir. 1970) (relying on the Restatement (First) of Torts, § 757). GSR
improperly directs this Court to its briefing on the motion for a new trial for
additional authorities. *See* NRAP 28(e)(2). Upon request, Peppermill can
provide this Court with citations to those authorities demonstrating that they
all come from this line of authority.

1 The obvious flaw in GSR's argument is its failure to understand that
2
3 the UTSA **replaced** the common law when it codified it. But by "codifying"
4 the common law, the UTSA did not adopt all theories contained in the
5 common law. As Professor Sandeen explains:

6
7 The point is that where a statute defines the requirements and
8 parameters of a tort, judges cannot substitute their view for that of
9 state legislators, even if their view finds widespread support in the
10 common law. Rather, in the same way that case precedence can be
11 overruled by the courts, courts should consider the extent to which
12 a statute overrules case precedent.

13 *Id.* at 542.

14 One of the main ways in which the UTSA overrules the common law is
15 by including a specific and separate definition for both "trade secret" and
16 "misappropriation," and requiring that **both** be shown before a claim for
17 misappropriation can be brought. *See* Unif. Trade Secret Act, §§ 2, 4. As
18 seen from the authority relied upon by GSR, "some courts did not always
19 insist that a plaintiff in a trade secret case prove the existence of a trade
20 secret." *Evolution of Trade Secret Law*, at 529-30; *see also, e.g., A.O. Smith*
21 *Corp.*, 73 F.2d at 538-39; *Smith v. Dravo Corp.*, 203 F.2d 369 (7th Cir. 1953).
22 In contrast, under the UTSA, if a plaintiff cannot prove any of the three
23 factors encompassed in the definition of "trade secret," "then he or she does
24 not own a trade secret and cannot bring a successful claim for trade secret
25 misappropriation." *The Evolution of Trade Secrets*, at 542. GSR
26 purposefully confuses the issues to avoid its duty to prove these three factors.
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4. GSR's Authority is Directly Contradicted by the NTSA.

The District Court did not err in declining to instruct the jury on GSR's proposed instructions because those instructions ignore the statutory elements of a trade secret misappropriation claim under the NTSA and contradict the plain language of the statute. This Court construes statutes as a whole, "with effect given to each word and phrase." *Williams v. United Parcel Servs.*, 129 Nev., Adv. Op. 41, 302 P.3d 1144, 1147 (2013). "When a statute is clear and unambiguous, [this Court] give[s] effect to the plain and ordinary meaning of the words." *Id.* (Internal quotations omitted).

A "trade secret" is information that:

- (a) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by the public or any other persons who can obtain commercial or economic value from its disclosure or use; and
- (b) Is the subject of independent efforts that are reasonable under the circumstances to maintain its secrecy.

NRS 600A.030(5).

Nowhere in NRS 600A.030(5)'s definition of "trade secret" do the phrases "improper means," "commercial morality," or "at-a-glance" appear. *See id.* Nowhere in NRS Chapter 600A is there any statement that proof of acquisition by improper means or commercial immorality presumptively

1 proves that the trade secret has independent economic value and is not readily
2 ascertainable by proper means. And, nowhere in NRS Chapter 600A is there
3 any statement that proof of actual misappropriation by “improper means” or
4 by conduct which falls below the standards of “commercial morality”
5 automatically precludes evidence that the information does not meet the
6 statutory definition of a trade secret.
7

8
9 Adopting GSR’s interpretation of the NTSA would require this Court
10 to insert additional elements into the definition of a trade secret that the
11 Legislature chose not to include. However, this Court’s “duty is to interpret
12 the statutory language; this duty does not include expanding upon or
13 modifying the statutory language because such acts are the Legislature’s
14 function.” *Williams*, 129 Nev. at ___, 302 P.3d at 1147. Thus, this Court
15 cannot and should not insert these additional elements into the NTSA.
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19 **C. THE DISTRICT COURT DID NOT ABUSE ITS**
20 **DISCRETION IN ISSUING JURY INSTRUCTIONS.**

21 **1. The District Court Did Not Abuse Its Discretion in**
22 **Declining to Instruct the Jury with GSR’s “Improper**
23 **Means” Instruction.**

24 Given the above, the District Court did not abuse its discretion in
25 declining to instruct the jury that “[e]ven if information which is asserted to
26 be a trade secret could have been duplicated by other proper means, the
27 information is not readily ascertainable if in fact acquired by improper
28

1 means.” 27 AA 6410-14. As the District Court explained in its order denying
2
3 GSR’s motion for a new trial, “GSR’s fixation on Peppermill’s employee
4 ‘keying’ its slot machines to obtain the machine’s par settings is myopic”
5
6 because GSR “must prove that its par settings are a legally protected trade
7 secret” before the jury should consider “any misappropriation.” 30 AA 6968.

8 The main authority upon which GSR relies in support of its “improper
9 means” instruction is authority that is derived directly from the First
10 Restatement, and not the UTSA.⁷ Thus, this authority is not applicable to the
11 NTSA.
12

13
14 GSR also relies heavily upon *Reingold v. Swiftships, Inc.*, 126 F.3d 645
15 (5th Cir. 1997). However, the *Reingold* court misapplied the Restatement
16 (Third) of Unfair Competition to reach its holding that “protection will be
17 accorded to a trade secret holder against *disclosure* of unauthorized *use*
18 gained by improper means, even if others might have discovered the trade
19
20

21 ⁷ The court in *AvidAir Helicopter Supply, Inc. v. Rolls-Royce Corp.*, 663 F.3d
22 966 (8th Cir. 2011), based its holding on language contained in the Indiana
23 Supreme Court case of *Amoco Prod. Co. v. Laird*, 622 N.E.2d 912 (Ind.
24 1993). See 663 F.3d at 973-74. The *Amoco* court erroneously turned to the
25 First Restatement of Torts, rather than the Restatement of Unfair
26 Competition, in interpreting Indiana’s UTSA. 622 N.E.2d at 918. Similarly,
27 the *K&G Oil Tool & Serv. Co.* court based its holding upon the First
28 Restatement. 314 S.W.2d at 789. The jury instruction approved in
Bancservices Grp., Inc. v. Strunk & Assoc., L.P., Case No. 14-03-00797-CV,
2005 WL 2674985, at *2 (Tex. App. Oct. 20, 2005) are derived directly from
K&G Oil.

1 secret by legitimate means.” *Id.* at 652. The court cited to § 39 of the
2
3 Restatement, which defines a trade secret, while ignoring § 43 of the
4 Restatement, which expressly states that “[i]nformation that is readily
5 ascertainable by proper means is not protectable as a trade secret, . . . and the
6 acquisition of such information even by improper means is therefore not
7 actionable[.]”⁸ *Id.*; *see also* Restatement (Third) of Unfair Competition, at §
8
9 43, cmt. d.
10

11 As noted, the NTSA does not include GSR’s “improper means”
12 language in the definition of trade secret. *See* NRS 600A.030(5). Cases
13 interpreting the UTSA hold that the “readily ascertainable” prong of the trade
14 secret definition must be determined *separately* from the issue of whether
15 information was misappropriated. *See AmeriGas Propane, L.P. v. T-Bo*
16 *Propane, Inc.*, 972 F. Supp. 685, 699 (S.D. Ga. 1997) (holding that “it does
17 not matter whether Defendants actually utilized proper means to obtain the
18 subject information”). As the *AmeriGas* court observed, the plain language of
19
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22

23 ⁸ The *Reingold* court also misquoted the Louisiana Trade Secret Act. *See* 126
24 F.3d 652. That act does not automatically provide that evidence of improper
25 means of acquisition defeats evidence that the trade secret is readily
26 ascertainable by proper means, as the holding in *Reingold* suggests. Instead,
27 the Louisiana Legislature noted that in order for reverse engineering to be a
28 “proper means” of discovery, the process used for the reverse engineering
itself cannot include any “improper means.” *See* La. Stat. Ann. § 51:1431, at
cmt. a(2).

1 the UTSA makes it clear “that the focus is not upon the action of Defendants
2 but upon the nature of the information.” *Id.* Thus, in determining whether
3 information is “readily ascertainable:”
4

5 [I]f the information could be (as opposed to was) readily ascertainable
6 by proper means, the circumstances surrounding its alleged
7 misappropriation is, quite simply, irrelevant. It does not matter if the
8 offender engaged in a Watergate type burglary to get the list or if the
9 offender innocently found the list laying on a church pew wrapped in a
10 purple ribbon with a pink bow The inquiry simply boils down to
11 the question: was information truly a *secret*?

12 *Id.* at 699-700 (emphasis in original).

13 Courts which properly rely solely on the language of the statute agree
14 with the *AmeriGas* court. *See, e.g., Abraham Zion Corp. v. Lebow*, 593 F.
15 Supp. 551, 570 (S.D.N.Y. 1984) (holding that the defendants’ alleged
16 improper acquisition of information was irrelevant since the information was
17 not “secret” and “available generally through public sources”); *Defiance*
18 *Button Mach. Co. v. C&C Metal Prod. Corp.*, 759 F.2d 1053, 1063 (2d Cir.
19 1985) (holding that even if the defendant “obtained [the information] by
20 improper means . . . any such impropriety does not create liability” because
21 the information was not a trade secret); *Vigoro Indus., Inc. v. Crisp*, 82 F.3d
22 785, 789 (8th Cir. 1996) (holding that a defendant who gained access to
23 customer information by improper and unethical means did not violate
24 Arkansas’ UTSA because the information was readily ascertainable).
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Because GSR’s proposed jury instruction places the emphasis on the

1 defendant's conduct, rather than on the nature of the alleged trade secret, the
2 District Court did not abuse its discretion in declining to instruct the jury with
3 GSR's "improper means" instruction.
4

5
6 **2. The District Court Did Not Abuse Its Discretion in**
7 **Instructing the Jury on Reverse Engineering.**

8 GSR again overlooks the distinction between the definitions of "trade
9 secret" and "misappropriation" under the NTSA to argue that Jury
10 Instructions 27 and 31 "confused the jury into believing Peppermill had used
11 a proper method to ascertain GSR's trade secrets." AOB, 32-33. These
12 instructions informed the jury that: (1) there is no liability under the NTSA if
13 the information was actually obtained through proper means, such as reverse
14 engineering, trade journals, reference books or published materials (Jury
15 Instruction No. 27); and (2) what constitutes "proper means" under the NTSA
16 (Jury Instruction No. 31). 27 AA 6442-43, 6446.
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19
20 As shown, it is irrelevant how Peppermill actually obtained the
21 information if the information does not qualify as a "trade secret."
22 Information that is "readily ascertainable through proper means" does not
23 qualify as a trade secret. *See* NRS 600A.030(5)(a). Jury Instruction No. 31
24 states, verbatim, the UTSA's definition of "proper means." *See* Unif. Trade
25 Secrets Act, § 1 at Comment; 27 AA 6446. Similarly, Jury Instruction No. 27
26 is an accurate statement of the law, which comes directly from the UTSA.
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1 See Unif. Trade Secrets Act, § 1 at Comment; 27 AA 6442-43. Thus, the jury
2
3 instructions were properly supported by both the law and evidence at trial.

4 Once again, GSR relies entirely on case law citing to the First
5 Restatement in support of its jury instruction. See *Rohm & Haas Co. v. Adco*
6 *Chem. Co.*, 689 F.2d 424, 431 (3d Cir. 1982). Nothing in the UTSA or NTSA
7 preclude evidence of reverse engineering on the issue of whether information
8 is “readily ascertainable” even if there is evidence of “improper means” of
9 acquisition. Accordingly, the District Court did not err in instructing the jury
10 on reverse engineering.
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14 **3. The District Court Did Not Abuse Its Discretion in**
15 **Declining to Instruct the Jury with GSR’s**
16 **“Commercial Morality” Instruction.**

17 The District Court did not abuse its discretion in declining to instruct
18 the jury with GSR’s proposed jury instruction on “commercial morality.” 27
19 AA 6410-14. GSR’s proposed jury instruction is based on legal authority
20 interpreting the definition of “misappropriation;” however, the phrase “readily
21 ascertainable” is not included in the definition of misappropriation under the
22 NTSA. Thus, the District Court properly declined to issue GSR’s jury
23 instruction.⁹
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26

27 ⁹ GSR again cites to cases which rely upon the First Restatement of Torts. See
28 *E.I. DuPont deNemours & Co.*, 431 F.2d at 1015-16.

1 The authority upon which GSR relies are cases in which a trade secret
2
3 was already found to have existed, and the court was merely analyzing
4 whether the trade secret was misappropriated by “improper means.” For
5 example, in *E.I. DuPont deNemours & Co. v. Christopher*, 431 F.2d 1012
6 (5th Cir. 1970), there is no discussion of whether the information obtained
7 was actually a trade secret. *Id.* at 1015. Instead, the court addressed the
8 question of whether appropriation by aerial photography could constitute
9 “misappropriation by improper means.” *See id.* at 1015-16. Nowhere in that
10 case is there any holding that acquiring information by means which fall
11 below the “accepted standards of commercial morality” automatically means
12 that the information is not readily ascertainable. *See id.*

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16 Similarly, the UTSA drafters do not cite to *Christopher* for the
17 provision of the UTSA discussing whether readily ascertainable information
18 is a “trade secret.” Instead, the UTSA drafters cite to *Christopher* for
19 assistance in defining what constitutes “improper means” under the definition
20 of misappropriation. Unif. Trade Secrets Act, § 1 at cmt. a.

21
22
23 GSR’s proposed jury instruction overlooks the separate definitions of
24 “trade secret” and “misappropriation,” and again asks this Court to interject
25 language into the NTSA which does not currently exist. Not only is this
26 improper, *see Williams*, 129 Nev. at ___, 302 P.3d at 1147, but GSR’s jury
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1 instruction misinterprets and misapplies the law upon which it does rely.

2
3 Accordingly, the District Court did not abuse its discretion in declining to
4 issue GSR's "commercial morality" jury instruction.

5
6 **4. The District Court Did Not Abuse Its Discretion in**
7 **Declining to Instruct the Jury on GSR's "At-A-**
8 **Glance" Jury Instruction.**

9 The District Court did not abuse its discretion in declining to instruct
10 the jury that, in order to be readily ascertainable, information must "be so
11 self-revealing as to be ascertainable at a glance." 27 AA 6410-14. Nothing in
12 the NTSA limits "readily ascertainable" information to information that is
13 "readily ascertainable at a glance." *See* NRS Chapter 600A.

14
15 Under both the NTSA and the UTSA, information does not qualify as a
16 trade secret if it is "readily ascertainable by proper means." *See* NRS
17 600A.030(5)(a); Unif. Trade Secrets Act, § 1(4)(i). The UTSA specifically
18 states that "proper means" of ascertaining a trade secret include, among other
19 things, "[d]iscovery by independent invention," or "discovery by 'reverse
20 engineering.'" Unif. Trade Secrets Act, § 1, Comment. By their nature, both
21 independent invention and reverse engineering take some time to accomplish.
22 Thus, the UTSA drafters clearly contemplated that a trade secret did not need
23 to be readily ascertainable "at a glance." To incorporate GSR's language into
24 the NTSA would require this Court to insert language the act does not
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1 contain, and to limit the scope of the act in a manner which was not
2 contemplated by its drafters.

3
4 The authority upon which GSR relies is, once again, authority which
5 bases its holding off of the First Restatement and not the UTSA.

6
7 Furthermore, the cases which GSR cites in its brief do not stand for the
8 proposition that information must be ascertainable at a glance in order to
9 defeat a finding of trade secret; instead, these cases analyze whether
10 information which is ascertained at a glance satisfies the *confidentiality*
11 requirement of the definition of trade secret. *See Motorola, Inc. v. Lemko*
12 *Corp.*, No. 08 C 5427, 2012 WL 74319, at *18-20 (N.D. Ill. Jan. 10, 2012)
13 (rejecting the defendants' argument that the information was not the subject
14 of reasonable efforts by the plaintiff to keep confidential because it was not
15 ascertainable at a glance).¹⁰ Thus, the District Court did not abuse its
16 discretion in declining to include GSR's proposed "at-a-glance" language in
17 the jury instruction, because this language is an inaccurate statement of
18 Nevada law. This Court should affirm the District Court's rulings.

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23 **D. ANY ERROR WAS HARMLESS.**

24
25 Even if this Court disagrees, the District Court should still be affirmed
26 because any error was harmless. The issuance of jury instructions is reviewed

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28 ¹⁰ *In re Cree, Inc.*, 818 F.3d 694 (Fed. Cir. 2016), is a patent law case which
does not address trade secret law.

1 for harmless error. NRCP 61; *see also Nev. Power Co. v. 3 Kids, LLC*, 129
2 Nev., Adv. Op. 47, 302 P.3d 1155, 1157 (2013). Harmless error occurs when
3 the moving party cannot demonstrate that the error “substantially affects the
4 party’s rights,” so that “but for the error, a different result might have been
5 reached.” *Id.* (internal quotations omitted). GSR cannot point to any
6 evidence in the record that a different result might have been reached by the
7 jury.
8

11 1. GSR’s Theory of Trade Secret Law

12 Under GSR’s inaccurate theory of trade secret law, GSR only needs to
13 prove: (1) Peppermill misappropriated GSR’s pars (which *per se* establishes
14 that GSR’s pars are a trade secret); (2) GSR’s pars were confidential; and (3)
15 damages. However, GSR did not present any evidence at trial that (1) its
16 pars are confidential, or (2) it suffered damages as a result of Peppermill’s
17 conduct.
18

21 a. There Was No Evidence That Pars Are Confidential.

22 GSR’s own witnesses confirmed that GSR’s pars were not confidential.
23 Alex Meruelo, GSR’s owner, Christopher Abraham, GSR’s vice president of
24 marketing, and Scott Bean, a marketing consultant for GSR, all testified that
25 GSR published its pars on billboards and in publicly distributed gaming
26 revenue reports from the Gaming Control Board, that this practice was
27
28

1 customary in the gaming industry, and that the advertisements made it easy
2
3 for a competitor (or player) to determine the pars of the advertised machines.
4 18 AA 4251; 19 AA 4330; 20 AA 4685-86, 4700-02; 21 4850-53; 22 AA
5 5201.¹¹
6

7 Charles Lombardo, GSR's gaming expert, and GSR's slot director both
8 testified that the 2341 key which Tors used to access the slot machines at the
9 GSR was easily obtained by any casino in the market. 24 AA 5745; 20 AA
10 4634. Lombardo further testified that simply locking the machine was not
11 enough to protect the pars because it is "the same thing everybody does." 24
12 AA 5745. Ken McHugh, Peppermill's director of slots, and Tors also both
13 testified that 2341 keys are plentiful and easy to access. 19 AA 4367-68; 19
14 AA 4546, 4548. Thus, the jury heard ample evidence that GSR's pars were
15 not confidential.
16
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18

19 **b. There Was No Evidence of Damages.**
20

21 Furthermore, GSR was unable to provide the jury with any evidence of
22 damages. Under NRS 600A.050(1) (which GSR does not ask this Court to
23 rewrite), a trade secret plaintiff may recover damages under three theories: (1)
24 "loss caused by the misappropriation;" (2) "unjust enrichment caused by the
25

26 ¹¹ Peppermill's experts also confirmed that pars are not confidential. Stacey
27 Friedman was able to demonstrate to the jury how easily one could figure out
28 a par through nine different methods. 23 AA 5295. Tom Sullivan confirmed
that he saw GSR's billboards advertising their pars. 23 AA 5455.

1 misappropriation;" and/or (3) "the imposition of liability for a reasonable
2 royalty for a misappropriator's unauthorized disclosure or use of a trade
3 secret." GSR failed to present evidence of damages under any of these
4 theories.
5

6
7 Meruelo could not identify any lost revenue as a result of Tors'
8 conduct. 18 AA 4294-96. GSR's slot director had no evidence of lost
9 customers. 20 AA 4649-50. GSR's damages expert, Jeremy Aguero, testified
10 that he could not find evidence of any lost customers, revenue or profit as a
11 result of Tors' conduct. 21 AA 5014. Michelle Salazar, Peppermill's
12 financial expert, confirmed that "[t]here's no evidence of damages caused."
13
14 24 AA 5652.
15

16
17 Similarly, Meruelo could not identify any evidence indicating that
18 Peppermill made money from obtaining GSR's pars. 18 AA 4296. Aguero,
19 GSR's damages expert, testified that he could not find any unjust enrichment
20 derived by the Peppermill. 21 AA 5015.
21

22 In light of this lack of evidence, GSR focused heavily on the
23 "reasonably royalty" theory of damages. However, that theory requires proof
24 of "use or disclosure," *see* NRS 600A.050(1), and there was no evidence of
25 use or disclosure at trial.
26

27 Scott Bean, GSR's witness designated as the person most
28

1 knowledgeable on the issue of how or if the Peppermill used the pars, testified
2 that he had no knowledge or evidence that the pars were ever used or
3 disclosed by the Peppermill. 22 AA 5188-91. Agüero, GSR's expert hired to
4 calculate a reasonable royalty, and Lombardo, GSR's expert, testified that
5 they had not seen any evidence of use or disclosure. 22 AA 5110-11, 5115-
6 19, 5140-41; 24 AA 5737, 5773.¹² Peppermill's financial expert Salazar
7 confirmed that she was unable to find any evidence of use after viewing the
8 financial records of the Peppermill. 24 AA 5557, 5646. Thus, GSR did not
9 present any evidence sufficient for the jury to find any damages suffered by
10 the GSR.

15 2. NTSA

16 Any error in the instructions is also harmless under the plain language
17 of the NTSA, because GSR did not present any evidence that its pars had
18 independent economic value to qualify as a trade secret. *See* NRS
19 600A.030(5). GSR's owner testified that he had never paid anything to
20 purchase a par. 18 AA 4305. GSR's financial experts Agüero and
21 Lombardo both testified that pars do not have any independent value. 22 AA
22 5049-50, 5071, 5078-79; 24 AA 5755, 5749, 5756. All of GSR's
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27 ¹² This is consistent with the testimony of Peppermill's witnesses who all
28 testified that Peppermill did not use the par information. *See* 18 AA 4152,
4199; 19 AA 4351-54; 20 AA 4566-67, 4570, 4786-88; 21 AA 4847

1 management witnesses conceded that pars have no independent economic
2 value. 23 AA 5492-93, 5496; 24 AA 5747-48; 22 RA 5376-84, 5399-13,
3 5444-50.
4

5 GSR's testimony was confirmed by the testimony from Peppermill's
6 experts. Gaming experts Stacy Friedman and Tom Sullivan (who is GSR's
7 former Director of Slot Operations), and financial expert Salazar all testified
8 that individual pars have no independent economic value. 23 AA 5283-84,
9 5325, 5509, 5461-62; 24 AA 5532-38. As part of their analysis, Friedman
10 and Salazar considered statements from local casino owners, including Gary
11 Carano (Eldorado/Silver Legacy), Jeff Siri (Cal-Neva), John Farahi (Atlantis),
12 Russ Sheltra (Bonanza), Mitch Gardner (Bordertown), David Ensign
13 (Wendover Casinos), and John Ascuaga (Sparks Nugget). 23 AA 5329; 24
14 AA 5532-45. All of these casino owners also unequivocally stated that an
15 individual par, including the ones obtained by Tors, had no independent
16 economic value to them, and they would not pay to obtain these pars. *Id.*
17 Thus, there was *no evidence* that a par has independent economic value.
18 Accordingly, this Court should affirm the District Court's ruling on jury
19 instructions.
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1 **II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION**
2 **IN ITS DISCOVERY ORDERS.**

3
4 **A. THE DISTRICT COURT DID NOT ABUSE ITS**
5 **DISCRETION IN DENYING GSR'S MOTIONS TO**
6 **COMPEL.**

7
8 Peppermill made all of the NGCB emails available to GSR for its
9 inspection. Accordingly, the District Court did not abuse its discretion in
10 declining to compel Peppermill to produce hard copies of the NGCB emails.
11 *See Okada v. Eighth Jud. Dist. Ct.*, 131 Nev., Adv. Op. 83, 359 P.3d 1106,
12 1110 (2015) (holding that discovery orders are reviewed for an abuse of
13 discretion). Peppermill does not dispute that failure to provide a timely
14 written response to a discovery request may waive its objections. *See Poulos*
15 *v. Naas Foods, Inc.*, 959 F.2d 69, 74 (7th Cir. 1992). However, the District
16 Court still has discretion to “decline to compel production of requested
17 documents even if a timely objection has not been made,” if “the request far
18 exceeds the bounds of fair discovery.” *Krewson v. City of Quincy*, 120 F.R.D.
19 6, 7 (D. Mass. 1988) (interpreting FRCP 34, NRCP 34’s federal
20 counterpart).¹³ Because the District Court found that GSR’s request sought
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25 ¹³ “Federal cases interpreting the Federal Rules of Civil Procedure are strong
26 persuasive authority, because the Nevada Rules of Civil Procedure are based
27 in large part upon their federal counterparts.” *Exec. Mgmt., Ltd. v. Ticor Title*
28 *Ins. Co.*, 118 Nev. 46, 53, 38 P.3d 872, 876 (2002) (internal quotations
omitted).

1 irrelevant information, and that Peppermill complied with the requests to the
2
3 extent they sought relevant information by providing the emails to GSR for
4 inspection, the District Court did not abuse its discretion.

5 The dispositive issue is not whether Peppermill waived its objections,
6
7 but whether the District Court had discretion to decline to compel Peppermill
8
9 to produce hard copies of irrelevant documents. Unlike GSR's discovery
10 requests, the NGCB's investigation was not governed by NRCP 26. Thus, the
11 NGCB received hundreds of thousands of emails which represented *all* emails
12 sent to or received from six Peppermill employees for a period of nineteen
13 months irrespective of topic or context. 16 AA 3839. The emails may have
14 included employee health information, and personal and financial
15 information, and personal and financial
16 information.
17

18 Aware of this fact, the District Court did not grant or deny GSR's
19
20 original motion to compel. Instead, it found that GSR's request for *all* emails
21 provided to the NGCB was too broad, and ordered GSR to meet and confer
22 with Peppermill "to clarify and narrow the requests so as to enable Defendant
23 to produce all relevant information as requested." *Id.* at 3841.
24

25 At Peppermill's suggestion, the parties proceeded to discuss a potential
26 ESI discovery plan of the NGCB emails. *Id.* at 3842-43. GSR rejected
27
28

1 Peppermill's proposed ESI protocols, but refused to provide Peppermill with
2 an alternative. *Id.* So, in August 2015, Peppermill produced a computer
3 containing all of the emails available to GSR for its unfettered inspection with
4 the caveat that GSR must inform Peppermill which emails GSR wanted
5 produced so that Peppermill could ensure GSR was not seeking irrelevant,
6 confidential information relating to third-parties which may be contained in
7 the emails. 16 AA 3642, 3646-47. The computer sat at Peppermill's
8 counsel's office for over four months before GSR finally performed a cursory
9 review, lasting approximately one hour, on November 4, 2015. *Id.* at 3651.
10 Peppermill immediately provided copies of the emails which GSR demanded
11 be produced as a result of its inspection. GSR then waited until late
12 November 2015, less than two months before trial and the day before the
13 discovery cut-off date, to file its procedurally improper Counter-Motion to
14 compel discovery of all of the emails. 9 AA 1985-2130. GSR did not
15 conduct the meet and confer required by NRCP 26(c) prior to filing the
16 counter-motion.
17

18 Consistent with the Discovery Commissioner's recommendation, the
19 District Court denied GSR's counter-motion. 21 AA 4964. The District
20 Court agreed with the Discovery Commissioner that GSR's request for all
21 emails provided to the NGCB was overbroad and sought irrelevant
22

1 information; thus, the District Court held that Peppermill did not waive its
2 right to object to GSR seeking *irrelevant* information. *Id.*

3
4 The District Court's finding was not an abuse of discretion. Under
5 NRCP 26(b)(2), the District Court "may act upon its own initiative" to limit
6 discovery if it determines that the information sought does not comport with
7 the scope of NRCP 26(b)(1). Moreover, "it is advisable to examine the
8 discovery sought," because the court has discretion under Rule 26 to decline
9 to compel disclosure of irrelevant information, even if a timely objection has
10 not been asserted. *Shenker v. Sportelli*, 83 F.R.D. 365, 367 (E.D. Pa. 1979);
11 *see also Krewson*, 120 F.R.D. at 7. Thus, the District Court did not abuse its
12 discretion in declining to compel the disclosure of *irrelevant* information.
13

14
15 Nor did the District Court abuse its discretion in finding that, to the
16 extent GSR's requests sought relevant information, Peppermill complied with
17 its obligations under Rule 34 by providing the computer containing all of the
18 emails for inspection. 21 AA at 4964. Although GSR contends that
19 Peppermill should have physically printed the emails, GSR's document
20 requests did not specify a particular format of production. 4 AA 740, 743.
21
22 Thus, Peppermill was only required to produce the emails "as they are kept in
23 the usual course of business." NRCP 34(b)(2)(E)(i). Furthermore, "[a] party
24 need not produce the same electronically stored information in more than one
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1 form.” NRCp 34(b)(2)(E)(iii). Because Peppermill provided the emails for
2
3 inspection, Peppermill was not required to also physically print the emails.

4 Finally, the District Court did not abuse its discretion in finding that
5 GSR’s countermotion to compel was untimely. 21 AA 4964. Although GSR
6 technically filed its counter-motion before the close of discovery, the District
7 Court nevertheless had discretion to limit GSR’s discovery upon a finding
8 that GSR “has had ample opportunity by discovery in the action to obtain the
9 information sought.” NRCp 26(b)(2)(ii). Because the computer had been
10 available to GSR for months for its inspection, the District Court reasoned
11 that GSR could not “be heard to complain now that they were unavailable or
12 that they have the inability to review these documents prior to trial.”¹⁴ 21
13 AA 4964. Accordingly, the District Court did not abuse its discretion in
14 declining to compel Peppermill to physically produce the NGCB emails and
15 its orders should be affirmed.¹⁵
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22 ¹⁴ The computer was available through trial for GSR’s inspection, but it never
23 inspected the computer. GSR’s conduct demonstrates it is more interested in
24 creating a discovery issue than it was in obtaining evidence.

25 ¹⁵ This Court need not consider GSR’s arguments relating to Mr. Estes’
26 testimony, because his complete deposition transcript, included in Appellant’s
27 Appendix, was not part of the record before the District Court. *See Mack v.*
28 *Estate of Mack*, 125 Nev. 80, 91, 206 P.3d 98, 106 (2009) (“On appeal, a
court can only consider those matters that are contained in the record made by
the court below[.]”).

1 **B. THE DISTRICT COURT DID NOT ABUSE ITS**
2 **DISCRETION IN DENYING GSR'S MOTION FOR CASE-**
3 **CONCLUDING SANCTIONS.**

4 The District Court did not abuse its discretion in denying GSR's
5 motion for case concluding sanctions because the motion was based on the
6 same facts as GSR's counter-motion to compel. *See* 9 AA 2131-73. Orders
7 refusing to award discovery sanctions are reviewed for an abuse of discretion.
8 *Stubbs v. Strickland*, 129 Nev., Adv. Op. 15, 297 P.3d 326, 330 (2013).
9

10 GSR erroneously contends that the District Court abused its discretion
11 because the District Court did not include specific findings of fact in it is
12 order.¹⁶ Failure to include specific findings is not an abuse of discretion. "In
13 the absence of express findings of fact and conclusions of law by the trial
14 court, this court must rely on an examination of the record to see if the trial
15 court's decision constitutes an abuse of discretion." *Schouweiler v. Yancey*
16 *Co.*, 101 Nev. 827, 831, 712 P.2d 786, 789 (1985). This Court will "affirm a
17 correct result even if the reasoning of the lower court is not clear." *Union*
18 *Pac. R.R. Co. v. Harding*, 114 Nev. 545, 549 n.2, 958 P.2d 87, 90 n.2 (1998).
19
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21

22 The basis of GSR's motion for case concluding sanctions was GSR's
23 allegation that Peppermill failed to comply with GSR's requests for the
24
25

26 ¹⁶ Although this Court prefers written decisions detailing the grounds for
27 **granting** case-concluding sanctions, *Stubli v. Big D Int'l Trucks, Inc.*, 107
28 Nev. 309, 313, 810 P.2d 785, 787 (1991), there is no a reciprocal requirement
 for orders **denying** these sanctions.

1 NGCB emails. *See* 9 AA 2133-2154. In its ruling from the bench
2
3 confirming the Discovery Commissioner's Recommendation for Order on
4 these emails, the District Court clearly articulated its reasoning that (1) GSR's
5 requests were improper to the extent they sought irrelevant information, and
6
7 (2) Peppermill had complied by producing the computer containing the emails
8 for inspection. 21 AA 4961-64. Although this ruling was made after the
9
10 District Court denied GSR's motion for case-concluding sanctions, the
11 District Court's reasoning clearly demonstrates that Peppermill's conduct did
12 not warrant case-concluding sanctions. Accordingly, the District Court did
13
14 not abuse its discretion in denying GSR's motion for case-concluding
15 sanctions. The District Court's discovery orders should be affirmed.
16

17 **III. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION**
18 **IN DENYING GSR'S MOTION TO AMEND.**

19 The District Court did not abuse its discretion in denying GSR's
20 motion to amend to its complaint to add seven new claims for relief and an
21 additional defendant, where the motion was made one month before the close
22 of discovery and four months before the then-scheduled trial date. *Burnett v.*
23 *C.B.A. Sec. Serv., Inc.*, 107 Nev. 787, 789, 820 P.2d 750, 752 (1991)
24
25 (reviewing a district court order denying leave to amend for an abuse of
26 discretion). "Delay, bad faith or a dilatory motive are all sufficient reasons to
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1 deny a motion to amend a pleading.” *Id.* The District Court found bad faith,
2 undue delay and prejudice to Peppermill because: (1) Peppermill would need
3 to conduct additional discovery; (2) the addition of the new defendant “would
4 likely place the trial date in jeopardy;” and (3) all of GSR’s new theories were
5 based on the same facts GSR had known since the date of the original
6 complaint. 5 AA 1092.

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10 Contrary to GSR’s assertion, the District Court did find that Peppermill
11 would be prejudiced by the amendment even if it did not use that specific
12 word. Prejudice to the opposing party is the most significant factor in
13 determining whether to grant leave to amend. *Scognamillo v. Credit Suisse*
14 *First Boston, LLC*, 587 F. Supp. 2d 1149, 1155 (N.D. Cal. 2008). It “is
15 heightened when a Plaintiff seeks to amend a complaint late in litigation” to
16 add new “claims based on different legal theories,” and intolerable prejudice
17 is often found when “plaintiffs have sought to add defendants a month before
18 the close of discovery[.]” *Id.* (Internal quotations omitted).

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22 Here, the District Court found that Peppermill would be forced to
23 engage in further discovery and motion practice due to the addition of the
24 seven new claims that presented “new elements, new theories of liability, and
25 new issues as to damages.” 5 AA 1093. The District Court also found
26 that Peppermill would be prejudiced by the addition of a new defendant
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1 whose presence would “place the trial date in jeopardy” because he would
2 “need to obtain counsel,” “file responsive pleadings,” and “conduct
3 discovery.” *Id.* at 1092-93. Seeking to add a new defendant one month
4 before the close of discovery is clearly prejudicial to the opposing party.¹⁷
5
6 *Scognamillo*, 587 F. Supp. 2d at 1155.

7
8 GSR also overlooks the fact that the District Court found bad faith.
9
10 “Bad faith may be shown when a party seeks to amend late in the litigation
11 process with claims which were, or should have been, apparent early.”
12 *Mendia v. Garcia*, 165 F. Supp. 3d 861, 873 (N.D. Cal. 2016). Here, the
13 District Court found that “all of GSR’s new claims . . . could have been
14 alleged much earlier” because GSR admitted that its new claims “stem from
15 the same set of alleged transactions” as GSR’s original claims, i.e., Tors’
16 keying GSR’s slot machines. 5 AA 1093. The District Court further found
17 that “these core facts . . . have remained mostly unchanged throughout the
18 proceedings,” were conceded by Peppermill in its answers, and were “evident
19 from the records of the” NGCB investigation upon which GSR relied in
20 bringing the action. *Id.*

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26 ¹⁷ Although GSR argues that the District Court should have granted GSR’s
27 motion to amend and simply extended the discovery deadlines and continued
28 trial, GSR did not request a continuance of either of these in its motion.
Instead, it expressly argued that *no* additional discovery or trial continuance
was needed. 2 AA 470-475; 4 AA 926.

1 GSR ignores these findings, and focuses solely on the District Court's
2 ruling that GSR was dilatory in seeking amendment. *See* AOB, p. 40-41.
3
4 GSR's argument that delay is insufficient to deny amendment is based upon
5 federal law. *Id.* However, Nevada law is clear that undue delay is sufficient
6 ground to deny leave to amend. *See Connell v. Carl's Air Conditioning*, 97
7 Nev. 436, 439, 634 P.2d 673, 675 (1981) (affirming denial of leave to amend
8 "[i]n light of appellant's dilatory conduct in waiting until the eve of trial to
9 seek an amendment"); *Stephens v. S. Nev. Music Co.*, 89 Nev. 104, 106, 507
10 P.2d 138, 139 (1973) (affirming denial of a motion to amend made during
11 trial because the plaintiff's conduct "was dilatory").
12
13
14

15 While GSR argues to this Court that GSR's delay was caused by
16 Peppermill's alleged failure to produce documents, GSR argued to the District
17 Court that it had not received those documents as of the date it made its
18 motion to amend. *See* 2 AA 474; AOB, p. 43. Thus, its motion could not
19 have been based upon information contained in the documents. GSR's
20 motion to amend was, instead, based upon testimony elicited during Tors'
21 deposition, which the District Court found was consistent with the evidence
22 and facts in GSR's possession at the inception of the case. 2 AA 470-75; 5
23 AA 1093.
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28 Finally, if GSR was actually "severely prejudiced" by its inability to

1 pursue its new claims, GSR should have renewed its motion to amend once
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3 the discovery and trial deadlines were ultimately continued. In *Stephens*, this
4 Court rejected that contention that an appellant was unfairly prejudiced by the
5 denial of a motion to amend because “appellant did not renew the motion nor
6 make any effort to enlarge her pleadings” once trial was delayed for an
7 additional year. 89 Nev. at 106, 507 P.2d at 139. Here, trial was postponed
8 for six months, but ***GSR never renewed its motion to amend.*** GSR cannot
9 now ask this Court to correct GSR’s own mistakes. See *Horoshko v.*
10 *Citibank, N.A.*, 373 F.3d 248, 249-50 (2d Cir. 2004) (“The . . . contention that
11 the District Court abused its discretion in not permitting an amendment that
12 was never requested is frivolous.”).¹⁸ The District Court’s order should be
13 affirmed.
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18 **IV. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION**
19 **BY EXCLUDING EVIDENCE REGARDING OTHER CASINOS.**

20
21 **A. GSR WAS NOT DENIED DUE PROCESS.**

22 GSR was not denied due process because GSR was given ample
23 opportunity to respond to the motion in limine. Due process only requires
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26 ¹⁸ GSR’s conduct again demonstrates that it wanted to create procedural issues
27 rather than resolve substantive ones. It never renewed its motion to amend or
28 sued the new defendant in a separate action. Gamesmanship permeates
GSR’s arguments.

1 that a party be given notice and an opportunity to be heard. *Callie v. Bowling*,
2 123 Nev. 181, 183, 160 P.3d 878, 879 (2007).

3
4 GSR was indisputably given notice and an opportunity to be heard
5 when it filed its motion to clarify the District Court's summary ruling on the
6 motions in limine, in which it presented many of the arguments contained in
7 its brief.¹⁹ 17 AA 3850-59. On January 8, 2016, the District Court held a
8 hearing on GSR's motion to clarify, at which GSR argued against the grant of
9 the motion in limine. 30 AA 7038, 7057-71. The District Court then issued
10 its ruling from the bench. *Id.* at 7070-71.

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14 It was not until the District Court issued its ruling from the bench (after
15 GSR was given opportunity to be heard) that any alleged error could have
16 occurred. Pretrial rulings on motions in limine are advisory and not
17 conclusive. *Richmond v. State*, 118 Nev. 924, 930, 59 P.3d 1249, 1253
18 (2002). Appealable error only occurs once "the admission or exclusion of
19 evidence at trial is in harmony with the order in limine." *Bayerische Motoren*
20 *Werke Aktiengesellschaft v. Roth*, 127 Nev. 122, 136-37, 252 P.3d 649, 659
21 (2011). Thus, any alleged error arose *after* GSR was given an opportunity to
22 be heard. Therefore, GSR was not denied due process.

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28 ¹⁹ GSR chose not to file a motion for reconsideration, which would have also
afforded GSR due process.

1 **B. THE DISTRICT COURT DID NOT ABUSE ITS**
2 **DISCRETION.**

3 This Court reviews a district court's grant of a motion in limine for an
4 abuse of discretion. *Whisler v. State*, 121 Nev. 401, 406, 116 P.3d 59, 62
5 (2005). GSR sought to use evidence of Peppermill's alleged keying incidents
6 at other casinos as proof of Peppermill's "theft" and "use" of GSR's pars. *See*
7 AOB, p. 45. Because of the obvious confusion this evidence would cause, the
8 District Court properly excluded evidence of Peppermill keying other casinos
9 under NRS 48.045, 48.025, 48.035, and 48.059. 30 AA 7061, 7070-71.

10 **1. NRS 48.045.**

11 GSR waived its right to argue the admissibility of this evidence under
12 NRS 48.045(2). When the District Court initially considered the admissibility
13 of this evidence under NRS 48.045, GSR specifically stated that "the statute
14 we propound is relevant is 48.059, it's the habit, routine, practice evidence."
15 *Id.* at 7061. The arguments that GSR raises in its brief regarding the
16 admissibility of this evidence under NRS 48.045(2) were not argued by GSR
17 to the District Court in either its motion or at oral argument. *See* 17 AA
18 3850-59; 30 AA 7057-71. Thus, GSR waived its right to make this argument
19 on appeal. *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983
20 (1981) ("A point not urged in the trial court . . . is deemed to have been
21 waived and will not be considered on appeal.").

1 Regardless, the District Court did not abuse its discretion in excluding
2
3 this evidence under NRS 48.045(1). GSR did not need circumstantial
4 evidence to prove Peppermill's "theft" of the pars, because Peppermill
5 *admitted* to obtaining GSR's pars. 1 RA 231. Furthermore, the fact that
6
7 Peppermill keyed other casinos does not, in any way, prove "use" of the pars
8 obtained from those casinos or from GSR. Thus, the evidence had very little
9 probative value.
10

11 Instead, the District Court properly found that GSR was seeking to
12 have this evidence admitted as improper character evidence. GSR admitted
13 that it sought the admission of this evidence to show "the lengths that the
14 Peppermill would go to and key these machines as part of their method of
15 doing business and gathering business and it shows their pattern of practice."
16
17 30 AA 7059. The District Court properly found that GSR was simply trying
18 to prove that Peppermill was "bad people," and that the evidence was
19 "propensity evidence" prohibited by NRS 48.045(1). Accordingly, the
20 District Court did not abuse its discretion.
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23 **2. NRS 48.035**

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25 The District Court also properly excluded evidence of Peppermill's
26 keying other casinos because it would have created confusion, wasted the
27 jury's time, and delayed trial. Relevant evidence is not admissible if its
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1 probative value is substantially outweighed by danger of “confusion of the
2 issue or of misleading the jury,” or it will result in “undue delay, waste of
3 time or needless presentation of cumulative evidence.” NRS 48.035(1)-(2).
4

5 The District Court correctly found that this evidence had very little
6 probative value. Because Peppermill admitted to obtaining GSR’s pars
7 without its permission, circumstantial evidence was not needed to prove
8 misappropriation. 1 RA 231. Furthermore, Peppermill’s keying of other
9 casinos does not, in any way, prove “use” of the pars obtained from those
10 casinos or from GSR. Admission of this evidence would have resulted in a
11 “needless presentation of cumulative evidence” that would have unfairly
12 prejudiced the jury. NRS 48.035(1)-(2).
13

14 The District Court also correctly found that this evidence would
15 confuse the jury and unduly delay the trial by requiring “15 different mini
16 trials.” 30 AA 7059-61. Although not yet addressed by this Court, the
17 exclusion of evidence to avoid having a “trial within a trial” is proper under
18 Federal Rule of Evidence 403, NRS 48.035’s federal counterpart.²⁰ See
19 *Chism v. CNH Am. LLC*, 638 F.3d 637, 641-42 (8th Cir. 2011) (“The district
20 court may also consider and choose to avoid a trial within a trial for each
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27 ²⁰ Interpretations of the Nevada rules of evidence’s federal counterparts are
28 persuasive. *L.V. Dev. Assocs. v. Eighth Jud. Dist. Ct.*, 130 Nev., Adv. Op. 37,
325 P.3d 1259, 1265 (2014).

1 previous incident, because the parties may seek to establish similarities or
2 lack of similarities and contest the culpability for each incident.”); *Beastie*
3 *Boys v. Monster Energy Co.*, 983 F. Supp. 2d 354, 358 (S.D.N.Y. 2014)
4 (excluding evidence of prior similar acts that would “require the ‘trial within
5 a trial’ that Rule 403 disfavors”). Federal courts reason that allowing
6 evidence of prior similar acts “would present a substantial risk of trial delay
7 and confusion, and the jury could well lose focus on the distinct episode at
8 issue in this case,” which would in turn “outweigh the slight probative value.”
9 *Beastie Boys*, 983 F. Supp. 2d at 359.

10 Similarly, here, evidence of keying other casinos would create undue
11 delay, prejudice and confusion. The record is clear that Tors fabricated many
12 of the keying incidents at other casinos. 11 AA 2534-35; 13 AA 2938-40; 19
13 AA 4550, 4557-68, 4565. In order for GSR to prove “use” through the past
14 similar incidents, the jury would first need to find whether the incidents
15 actually occurred. As the District Court reasoned, “[i]f somebody said, he
16 keyed the slots at Boomtown, and someone else says no he didn’t . . . but he
17 admitted it, but there’s mitigating evidence, I think the jury would become
18 distracted.” 30 AA 7061. Since casinos all treat their pars differently, this
19 would also have required multiple mini-trials on whether the pars from other
20 casinos were adequately protected. Given that GSR’s experts agreed that pars

1 are ethically and easily “readily ascertainable,” the keying of other casinos is
2 irrelevant evidence. The two week trial would have been lengthened
3 exponentially due to uncertain and minimally probative evidence. The
4 District Court did not abuse its discretion in excluding this evidence.
5

6 7 3. NRS 48.059

8 Finally, the District Court properly excluded this evidence under NRS
9 48.059. Evidence of the habit or “routine practice of an organization . . . is
10 relevant to prove that the” organization acted in conformity with that habit or
11 routine on a particular occasion. NRS 48.059(1). However, this Court
12 cautions against the admission of habit evidence because of the risk that it
13 will be used as propensity evidence. *Thomas v. Hardwick*, 126 Nev. 142,
14 150, 231 P.3d 1111, 1116-17 (2010). The purpose of “habit evidence” “is to
15 fill a gap in direct evidence about what an organization did on a specific
16 occasion,” by providing the jury with “circumstantial evidence sufficient to
17 reasonably allow one to conclude that the organization probably acted in
18 conformity with its usual pattern on the occasion in question.” *York Int’l*
19 *Corp. v. Liberty Mut. Ins. Co.*, 140 F. Supp. 3d 357, 362 (M.D. Pa. 2015)
20 (internal quotations and alterations omitted). If direct evidence of what
21 actually occurred is available, habit evidence is properly excluded as
22 cumulative. *See U.S. v. Bowe*, 360 F.2d 1, 16 (2d Cir. 1966).
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1 Because Peppermill admitted that it keyed the GSR, there was no need
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3 for circumstantial evidence to prove that Peppermill had a “habit” of keying
4 casinos. Thus, it was properly excluded as cumulative. *Bowe*, 360 F.2d at 16.

5 Furthermore, habit evidence is only admissible if there is proof of
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7 “specific instances of conduct sufficient in number to warrant a finding that
8 the habit existed or that the practice was routine.” NRS 48.059(2). To be
9 admissible, “an adequate foundation [must be] laid” which demonstrates that
10 “specific, recurring stimuli have produced the same response often and
11 invariably enough to qualify as habit or routine.” *Thomas*, 126 Nev. at 151,
12 231 P.3d at 1117. This requires proof of a “uniform response” that is “more
13 than a mere ‘tendency’ to act in a given manner, but rather, conduct that is
14 ‘semi-automatic’ in nature.” *Nelson v. City of Chicago*, 810 F.3d 1061, 1073
15 (7th Cir. 2016) (internal quotations omitted).

16 The District Court found that there were not “sufficient numbers of
17 specific incidents to warrant a finding that this was the habit of the Peppermill
18 or that the practice was routine.” 30 AA 7067-68. Keying a few other
19 casinos in a limited time period does not establish “semi-automatic” conduct.
20 Given the minimal probative value of this evidence, the District Court did not
21 abuse its discretion in excluding it.

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1 **C. ANY ERROR WAS HARMLESS.**

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3 Should this Court disagree, the District Court’s ruling must still be
4 affirmed because any error was harmless. *See Sanders v. Sear-Page*, 131
5 Nev., Adv. Op. 50, 354 P.3d 201, 213 (Nev. App. 2015). GSR’s argument
6 that this evidence should have been admitted to prove “theft” and “use”
7 overlooks the fact that evidence of “theft” goes to the element of
8 misappropriation under NRS 600A.030(2), while evidence of “use” goes to
9 whether the plaintiff is entitled to reasonable royalty damages under NRS
10 600A.050. Because the jury found that GSR’s par settings were not trade
11 secrets as defined by NRS 600A.030(5), it did not need to determine whether
12 the pars were misappropriated or used. 27 AA 2462-63. Since the jury’s
13 verdict never reached either of these issues and this evidence does not deal
14 with the existence of a trade secret, any error was harmless. *See Wyeth v.*
15 *Rowatt*, 126 Nev. 446, 465, 244 P.3d 765, 778 (2010) (holding that an error is
16 harmless if there would not have been a different result).²¹ Accordingly, the
17 District Court’s order should be affirmed.
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26 ²¹ Furthermore, the District Court’s ruling actually worked to GSR’s advantage
27 by resulting in the admission of several exhibits which were redacted to
28 remove the names of other casinos. *See* 22 RA 5349-50, 5354-60. GSR was
able to insinuate that those keying incidents took place at the GSR in its
closing argument to the jury. *See* 26 AA 6049-50.

1 **V. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION**
2 **IN AWARDING ATTORNEY FEES**

3 **A. NRS 600A.060 DOES NOT PREEMPT NRCP 68.**
4

5 The District Court did not abuse its discretion in awarding attorney fees
6 to Peppermill under NRCP 68. *See Frazier v. Drake*, 131 Nev., Adv. Op. 64,
7 357 P.3d 365, 372 (Nev. App. 2015) (a district court's decision to award
8 attorney fees under Rule 68 is reviewed for an abuse of discretion). GSR's
9 attempt to render NRCP 68 meaningless and inapplicable to this case and any
10 case brought under a statute that may allow an award of attorney fees is
11 meritless. Unlike statutory provisions for attorney fees, NRCP 68 is this
12 Court's legitimate and appropriate effort to encourage settlement of lawsuits.
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15

16 GSR contends that NRS 600A.060 is the sole means by which attorney
17 fees may be awarded in trade secret cases, thereby precluding an award of
18 attorney fees under Rule 68. AOB, 48. The District Court rejected GSR's
19 argument because nothing in the language of NRS 600A.060 states that it is
20 the exclusive means by which attorney fees may be recovered in a trade secret
21 lawsuit. *See* NRS 600A.060; *see also* 29 AA 6829. Instead, an award of
22 attorney fees under NRS 600A.060 is purely discretionary upon a finding of
23 bad faith. *Id.*
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27 This Court has repeatedly rejected the argument that a discretionary
28 attorney fee statute preempts Rule 68. *Albios v. Horizon Cmty., Inc.*, 122

1 Nev. 409, 419-20, 132 P.3d 1022, 1029 (2006) (holding that NRS 40.655
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3 does not preclude an award of attorney fees under Rule 68 in a construction
4 defect action); *Beattie v. Thomas*, 99 Nev. 579, 587-88, 668 P.2d 268, 273-74
5 (1983) (holding that NRS 18.010 did not preclude an award of attorney fees
6 under Rule 68). Because attorney fees are awarded as a penalty under Rule
7 68, this Court reasons that the “policy of NRCP 68 . . . to save time and
8 money for the court system, the parties, and the taxpayer by rewarding the
9 party who makes a reasonable offer of judgment and punishing the party who
10 refuses to accept such an offer would be thwarted” if discretionary attorney
11 fee statutes preempted Rule 68. *Albios*, 122 Nev. at 418-19, 132 P.3d at
12 1028. Such a holding would render Rule 68 “nugatory” and “essentially
13 toothless” since “much of the incentive to serve an offer of judgment would
14 be removed.” *Id.* at 419, 132 P.3d at 1029. Thus, NRS 600A.060 does not
15 preempt Rule 68, and the District Court did not abuse its discretion in
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21 awarding attorney fees.

22 **B. ATTORNEY FEES WERE PROPERLY AWARDED**
23 **UNDER RULE 68.**

24 **1. Peppermill’s Offer Was Not Conditional.**

25 Peppermill’s offer of judgment was not invalid because it was a joint
26 offer of judgment. NRCP 68(c)(1) states that “[a] *joint* offer of judgment
27 may be made by multiple offerors.” (Emphasis added). Peppermill’s and
28

1 Tors' joint offer of judgment was not conditional. *See Stockton Kenworth,*
2
3 *Inc. v. Mentzer Detroit Diesel, Inc.*, 101 Nev. 400, 403-04, 705 P.2d 145, 148
4 (1985) (holding that an offer of judgment is "conditional" if it requires the
5 plaintiffs to take affirmative acts in addition to simply accepting the offer).
6
7 GSR only had to accept or deny the offer. *See* 28 AA 6485-86.

8 **2. The District Court Considered the *Beattie* Factors.**

9
10 Contrary to GSR's argument, "the district court's failure to make
11 explicit findings [on each *Beattie* factor] is not a per se abuse of discretion . . .
12 [i]f the record clearly reflects that the district court properly considered the
13 *Beattie* factors." *Wynn v. Smith*, 117 Nev. 6, 13, 16 P.3d 424, 428-29 (2001).
14

15 The District Court specifically stated that it considered the *Beattie*
16 factors to determine if the attorney fees were reasonable. 29 AA 6830.
17
18 Furthermore, the *Beattie* factors were briefed by the parties and GSR does not
19 provide any evidence that the District Court failed to consider these factors.
20
21 *See* 27 AA 6465 – 28 AA 6481; 28 AA 6706 – 29 AA 6728; *see also Seal v.*
22 *Camping World, Inc.*, 126 Nev. 754, 367 P.3d 818 (2010) (holding that the
23 district court did not abuse its discretion in failing to enumerate the *Beattie*
24 factors in its order awarding costs because "the *Beattie* factors were presented
25 in the relevant motions and" appellant "failed to demonstrate that they were
26 not considered").
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3 **3. Peppermill's Offer Was Reasonable.**

4 Finally, GSR's argument that Peppermill's \$100,000 offer of judgment
5 was unreasonable is belied by the record. As of the date of the offer of
6 judgment, GSR had not produced any evidence to support its contention that
7 it was entitled to *any* damages, let alone the \$24 million in damages it was
8 seeking. 27 AA 6479-80. GSR recovered \$0 in damages at trial. Indeed, by
9 that time, it had been sanctioned over \$27,000 for providing a false
10 computation of damages.
11

12 As of February 2015, GSR had not produced any experts to support its
13 prima facie case that pars are trade secrets. *Id.* By February 2015, all GSR
14 had to do was ask other casino owners if pars have independent economic
15 value. It would have immediately known that it had no case. Moreover,
16 GSR's own general manager agreed that pars have no independent economic
17 value. GSR's own executives testified that pars were not protectable secrets.
18 *Id.* At trial, GSR presented no evidence that its pars were protectable trade
19 secrets, that Peppermill used the pars obtained by Tors, or that GSR lost
20 revenue, profits or otherwise was entitled to damages as a result of Tors'
21 conduct. *Id.* Despite this total lack of evidence, GSR refused to settle, stated
22 that it was continuing to trial to punish Peppermill, and threatened to take
23 other affirmative acts to harm Peppermill (such as going to the NGCB and/or
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1 60 Minutes). *Id.* Peppermill's offer was more than reasonable, and the
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3 District Court did not abuse its discretion in awarding Peppermill its attorney
4 fees under Rule 68. The District Court should be affirmed.
5

6 CONCLUSION

7
8 The trial began and ended with emphasis on the elements of a trade
9 secret claim under NRS 600A.030. Indeed, GSR stipulated to the District
10 Court taking judicial notice of NRS 600A.030, and a copy of the statute was
11 admitted into evidence for the jury to read. GSR's executives testified that
12 pars are readily ascertainable. GSR's experts testified that pars are readily
13 ascertainable by proper, ethical, expeditious and inexpensive means.
14
15 Peppermill's executives also testified that pars are readily ascertainable by
16 proper means. Peppermill's expert Stacy Friedman showed the jury nine
17 different ways pars could be ascertained.
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20 These same witnesses testified that pars have no independent economic
21 value. The value issue was emphasized by the various casino owners' letters
22 and declaration confirming that, in the gaming community, pars have no
23 independent economic value. Clearly, if pars are readily ascertainable, no
24 right-minded casino executive or expert could credibly state otherwise. This
25 is confirmed by the testimony of GSR's general manager Tracy Mimno, who
26
27 conceded without hesitation that she would never purchase a par because it
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1 has no value. Once the jury heard GSR's own experts and executives, it had
2 no choice but to find for Peppermill. It appropriately did so having been
3 properly instructed on the statute GSR stipulated into evidence.
4

5 Although the jury never needed to reach the issue of use, the futility of
6 GSR's appeal is also shown by the overwhelming evidence that GSR's pars
7 were never used by the Peppermill. To get damages for a reasonable royalty
8 under NRS 600A.050, GSR had to prove that Peppermill used or disclosed
9 GSR's pars. GSR completely failed to present any evidence that Peppermill
10 used or disclosed the pars. Every GSR witness conceded that there was no
11 evidence of use, including GSR's NRCP 30(b)(6) witness on the topic of
12 Peppermill's use. GSR's expert Lombardo made a feeble attempt to argue "if
13 you know it, you use it." Pressed on this novel concept, Lombardo could not
14 explain how, when, where or who "used" the pars. Notably, the NGCB found
15 no use after a six month intensive investigation.
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21 GSR's efforts to establish a "reasonable royalty" were also futile.
22 GSR's damage was based on the NGCB's publication of "net pars." "Net
23 pars" are the actual par that exists after deducting free play, points, perks and
24 benefits awarded to the player. Neither Tors nor the Peppermill ever obtained
25 GSR's net pars. Net pars are not reflected on a machine's diagnostic screen.
26 Hence, GSR's damage model was not viable or relevant.
27
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1 Given the overwhelming evidence that its pars are readily ascertainable
2
3 and have no economic value, GSR had to change strategies during trial on the
4 definition of "trade secret." If GSR really believed that information which is
5 misappropriated is a *per se* trade secret, this argument would certainly have
6 appeared in a motion for summary judgment or in motions in limine. GSR
7 never objected to the presentment of evidence on the ascertainability or value
8 of its pars. The entire case was tried under the clear, express terms of NRS
9 600A.030(5).
10

11
12 GSR's arguments on appeal that address discovery disputes,
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14 amendment of the complaint, and motions in limine are irrelevant. Once the
15 statutory definition of trade secret is applied, GSR's appeal fails. Since
16 GSR's pars are readily ascertainable by proper means, and GSR conceded its
17 pars have no independent economic value, GSR's pars do not qualify as a
18 trade secret. No amount of discovery or evidence about other casino's having
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1 been keyed could have salvaged GSR's lawsuit against the Peppermill. The
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3 District Court should be affirmed in all respects.

4 Dated this 19th day of May, 2017.

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CERTIFICATE OF COMPLIANCE
PURSUANT TO RULE 28.2

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3 1. I hereby certify that this Respondent's Answering Brief
4
5 complies with the formatting requirements of NRAP 32(a)(4), the typeface
6 requirements of NRAP 32(a)(5), and the type style requirements of NRAP
7 32(a)(6) because:

8
9 This brief has been prepared in a proportionally spaced typeface using
10 Microsoft Word 10 in 14 font and Times New Roman type.

11
12 2. I further certify that this brief complies with the page- or type-
13 volume limitations of NRAP 32(a)(7) because, excluding the parts of the
14 brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a
15 typeface of 14 points or more, and contains exactly 13,797 words.

16
17 3. Finally, I hereby certify that I have read this appellate brief, and
18 to the best of my knowledge, information, and belief, it is not frivolous or
19 interposed for any improper purpose. I further certify that this brief complies
20 with all applicable Nevada Rules of Appellate Procedure, in particular NRAP
21 28(e)(1), which requires every assertion in the brief regarding matters in the
22 record to be supported by a reference to the page and volume number, if any,
23 of the transcript or appendix where the matter relied on is to be found. I
24 understand that I may be subject to sanctions in the event that the
25
26
27

28 ///

1 accompanying brief is not in conformity with the requirements of the Nevada
2
3 Rules of Appellate Procedure.

4 DATED this 19th day of May, 2017.

5
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1 **CERTIFICATE OF SERVICE**

2 I certify that I am an employee of Robison, Belaustegui, Sharp & Low, and
3 pursuant to NRAP 5(b)(2)(D) and N.E.F.C.R. 7, I caused the **RESPONDENT**
4 **PEPPERMILL CASINOS, INC.'S ANSWERING BRIEF** to be filed
5 electronically with the Clerk of the Nevada Supreme Court. Pursuant to
6 N.E.F.C.R. 9, notice of an electronically filed document by the Court "shall be
7 considered as valid and effective service of the document" on the below listed
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