

IN THE SUPREME COURT OF THE STATE OF NEVADA

DERRICK POOLE,

Appellant,

v

NEVADA AUTO DEALERSHIP
INVESTMENTS LLC a Nevada
Limited Liability Company d/b/a
SAHARA CHRYSLER, JEEP,
DODGE, and COREPOINTE
INSURANCE COMPANY,

Respondents,

Appeal from the Eighth Judicial District Court, Clark County.
The Honorable Nancy Alff, District Court Judge

Supreme Court Case No. 74804
District Court Case No. A-16-737120-C
Electronically Filed
Jun 13 2018 08:11 a.m.
Elizabeth A. Brown
Clerk of Supreme Court

APPELLANT'S OPENING BRIEF

Law Offices of George O. West III
Consumer Attorneys Against Auto Fraud
George O. West III Esq, State Bar No. 7951
10161 Park Run Drive, Suite 150
Las Vegas, NV 89145
Telephone : (702) 318-6570
Email: gowesq@cox.net

CRAIG B. FRIEDBERG [SBN 4606]
Law Offices of Craig B. Friedberg, Esq.
Craig B. Friedberg, Esq, State Bar. No. 4606
4760 S. Pecos Road, Suite 103
Las Vegas, NV 89121
Telephone: (702) 435-7968
Email: attcbf@cox.net

Attorneys for Appellant Derrick Poole

NRAP 26.1 DISCLOSURE

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

Appellant Derrick Poole is a natural person and is not subject to these disclosures.

Dated this 11th day of June, 2018

By /s/ George O. West III
George O. West III
Law Offices of George O. West III
Consumer Attorneys Against Auto Fraud
George O. West III Esq
10161 Park Run Drive, Suite 150

Craig B. Friedberg, Esq.
Law Offices of Craig B. Friedberg, Esq.
4760 S. Pecos Road, Suite 103
Las Vegas, NV 89121

**Attorneys for Appellant
DERRICK POOLE**

TABLE OF CONTENTS

NRAP 26.1 DISCLOSURE	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	vii
TABLE OF ABBREVIATIONS	x
JURISDICTIONAL STATEMENT	xi
ROUTING STATEMENT	xii
ISSUES PRESENTED FOR REVIEW	xii
STATEMENT OF THE CASE	1
STANDARD OF REVIEW	2
STATEMENT OF FACTS	2
SUMMARY OF ARGUMENT	8
A. SAHARA failed to disclose a material fact in a transaction in connection with the sale of goods. (NRS 598.0923(2))	8
B. SAHARA made a false representation in a transaction. (NRS 598.0915(15))	11
C. SAHARA represented that goods for sale were of a particular standard, quality or grade <u>when SAHARA knew or should have known</u> that they were of another standard, quality, grade ... and made a false representation as to the certification of goods for sale. (NRS 598.0915(2) and (7))	12

ARGUMENT

I.	A primer on statutory consumer fraud and deceptive trade practices in Nevada	14
A.	A claim for statutory consumer fraud under the provisions of the NRS 41.600 and the NDTPA should be <i>liberally construed</i> and is a separate and distinct claim for relief from that of traditional “common law” fraud	14
1.	Because NRS 41.600 and the NDTPA have a protective purpose and are remedial in nature, they should be <i>liberally construed</i> to effectuate the Legislature’s intent and the societal benefits afforded and the public policy furthered under the statute or Act	14
2.	NRS 41.600 and the NDTPA created a separate, distinct and independent statutory claim for “consumer fraud” that afforded much broader and comprehensive protections to consumers relating to the retail sale of goods to the community by merchants and retailers	16
II.	There are genuine issues of material fact as to whether SAHARA failed to disclose a material (important) fact in connection with the sale of goods under NRS 598.0923(2)	20
A.	NRS 598.0923(2) fundamentally and statutorily modified the common law with respect to a claim based upon misrepresentation <i>by omission</i> involving the sale of goods	20
B.	A material fact is a fact that a reasonable person would attach importance to with respect to the transaction at issue	23

C.	The facts and information regarding the nature and extent of the damage caused to the vehicle that was itemized, disclosed and monetized in the ACE would have been “material” (important) to any reasonable consumer within the community in making a decision to purchase a Dodge CPO vehicle, including POOLE	26
D.	Even under a traditional common law fraud analysis, SAHARA had a duty to disclose the information and facts reflected in the ACE because SAHARA had vastly superior and particularized knowledge over that of POOLE regarding the condition of the CPO vehicle at the time of sale	31
E.	The Court appears to have improperly established an reciprocal “quasi caveat emptor” obligation on the part of POOLE after he was informed about the pre-purchase collision by SAHARA	33
III.	There are genuine issues of material fact that SAHARA made false representations in a transaction and violated a federal statute relating to the sale of goods under NRS (NRS 598.0915(15) and 598.0923(3))	37
A.	There are genuine issues of material fact that SAHARA made affirmative misrepresentations to POOLE regarding the nature and extent of the pre-purchase collision during the sales process	37
B.	There are genuine issues of material fact that SAHARA violated 16 C.F.R. § 455.1(a)(1), a federal regulation relating to the sale of goods	39
IV.	There are genuine issues of material fact that SAHARA represented goods for sale that were of a particular standard, quality or grade that SAHARA <i>knew or should have known</i> were of another standard, quality or grade and made a false representation as to the <i>certification</i> of goods for sale.	40

V.	If there are genuine issues of material fact involving POOLE’s statutory claim for consumer fraud, then by necessity, there are triable issues with respect to all of POOLE’s equitable and declaratory claims for relief	45
VI.	POOLE had a statutory claim for relief directly against COREPOINT who issued the vehicle dealership licensing bond to SAHARA under NRS 482.345	46
A.	To bring the bond company in as a direct-party defendant under the provisions of NRS 482.345(7)(a), the vehicle dealership must be a party to the action.	46
B.	Bringing in the bond company as a direct party defendant pursuant to NRS 482.345(7) is one of three (3) statutorily authorized ways a consumer can seek compensation from the bond	49
C.	POOLE plead the requisite elements of a statutory claim against COREPOINT in his FAC and also demonstrated that triable issues existed involving those same elements in opposition to Defendants’ MSJ	50
D.	The legislative digest relating to the 2014 legislative amendments to NRS 482.345 <i>clearly reconfirmed</i> a claimant’s right under already existing law to bring in the bond company as a direct party defendant to seek compensation from the bond	53
VII	POOLE was damaged and/or suffered other monetary or other pecuniary loss as a result of SAHARA’s deceptive trade practices	53
	CONCLUSION	54
	CERTIFICATE IN COMPLIANCE WITH NRAP 28.2 AND 32	56
	CERTIFICATE OF SERVICE	57
	ADDENDUM “A” (NEVADA STATUTES)	

TABLE OF AUTHORITIES

Nevada Cases

<i>Betsinger v. D.R. Horton</i> , 126 Nev. 162, 166, 232 P.3d. 433 (2010)	18, 19
<i>Caughlin Ranch Homeowners Ass’n v. Caughlin Club</i> 109 Nev. 264, 849, P. 2d. 310 (1993)	2
<i>Collins v. Burns</i> , 103 Nev. 394, 397, 741 P.2d 819 (1987)	36
<i>Dow Chem. Co. v. Mahlum</i> , 114 Nev. 1468, 1487, 970 P.2d 98, 110 (1998)	22, 32
<i>Epperson v. Roloff</i> 102 Nev. 206, 719 P. 2d. 799 (1986)	21, 32
<i>Fishback v. Miller</i> , 15 Nev. 428 (1880)	36
<i>Harris Assocs. v. Clark Cty. Sch. Dist.</i> , 119 Nev. 638, 81 P.3d 532 (2003)	49
<i>Mackintosh v. Jack Matthews & Co.</i> , 109 Nev. 628, 855 P.2d 549 (1993)	31
<i>PERS v. Reno Newspapers Inc.</i> , 129 Nev. 833, 313 P. 3d 221 (2014)	2
<i>Powers v. United Services Auto. Ass’n</i> , 114 Nev. 690, 962 P.2d 596 (1998) (“ <i>Powers I</i> ”)	23, 25, 28
<i>Powers v United Services Ass’n</i> 115 Nev. 38, 979 P.2d 1286 (1999) (“ <i>Powers II</i> ”)	23, 24
<i>State Dep’t of Bus. & Indus. , Fin. Instit. Div. v.</i> <i>Dollar Loan Ctr., LLC</i> , 134 Nev. Adv. Op. 15, 412 P. 3d 30 (2018)	2
<i>Stanley v. Limberys</i> , 74 Nev. 109, 323 P .2d 925 (1958)	32
<i>State Welfare Div. v. Washoe Cty. Welfare Dep’t</i> , 88 Nev. 635, (1972)	15

Out of State Cases

<i>Besett v. Basnett</i> , 389 So. 2d 995, 998 (Fla. 1980).	37
<i>Brennan v. Kunzle</i> , 154 P.3d 1094 (2007)	25
<i>Briggs v American Nat. Property & Cas. Co.</i> , 209 P. 3d 1181 (2009)	24
<i>Bristol v. Braidwood</i> , 28 Mich. 191 (1873)	37
<i>Brown v. Bennett</i> , 136 S.W. 3d 552 (2004)	24
<i>Carcano v. JBSS, LLC</i> , 684 S.E. 2d 41 (2009)	24
<i>Casavant v. Norwegian Cruise Line, Ltd.</i> , 919 N.E. 2d 165 (2002)	24
<i>Colaizzi v. Beck</i> , 895 A. 2d 36 (2006)	24
<i>Com., by Creamer v. Monumental Properties, Inc.</i> , 329 A. 2d 812, (1974)	16
<i>Cox v. Sears Roebuck & Co.</i> , 647 A. 2d 454 (1994)	16
<i>Crowe v. Tull</i> , 126 P. 3d 196 (2006)	16
<i>Daniel N. Gordon, PC v. Rosenblum</i> , 370 P. 3d 850 (2016)	15
<i>Fricano v. Bank of Am. NA</i> , 875 N.W. 2d 143, 151 (2015	16
<i>Hawaii Cmty. Fed. Credit Union v. Keka</i> , 11 P. 3d 1 (2000)	15
<i>Inkel v. Pride Chevrolet-Pontiac, Inc.</i> , 945 A. 2d 855 (2008)	24
<i>Ly v. Nystrom</i> , 615 N.W. 2d 302 (2000)	15
<i>Panag v. Farmers Ins. Co. of Washington</i> , 204 P. 3d 885, (2009)	15

<i>Patterson v. Beall</i> , 19 P. 3d 839, 846 (2000)	15
<i>Robinson v. Toyota Motor Credit Corp.</i> , 775 N.E. 2d 951 (2002)	16
<i>State ex rel. Spaeth v. Eddy Furniture Co.</i> , 386 N.W. 2d 901 (1986)	16
<i>Smith v. KNC Optical, Inc.</i> , 2009 WL 2581866 (2009)	25
<i>Totz v. Cont'l Du Page Acura</i> , 236 Ill. App. 3d 891, 899, 602 N.E. 2d 1374, 1379 (1992)	24
<i>Weinstat v Dentsply Intern., Inc.</i> , 103 Cal. Rptr. 3d 614 (2010)	24
<i>Whitaker v. M.T. Auto., Inc.</i> , 855 N.E. 2d 825 (2006)	15
<i>White v. Wyeth</i> , 705 S.E. 2d 828 (2010)	16
<i>Yazd v. Woodside Homes Corp.</i> , 143 P. 3d 283 (2006)	25

Nevada Rules, Statutes and Regulations

NRS 30.040	45
NRS 41.600	passim
NRS 41.600(2)(e)	passim
NRS 41.600(3)(b)	45
NRS 104.2104(1)	20
NRS 482.345	48, 52
NRS 482.345(1)	50, 52
NRS 482.345(5)	46, 51
NRS 482.345(7)	passim
NRS 482.345(7)(a)	passim
NRS 482.345(10)	50, 52
NRS 41.600(2)(e)	passim

NRS 598.0915	20
NRS 598.0915(2)	12, 18, 40
NRS 598.0915(7)	12, 20, 40
NRS 598.0915(15)	passim
NRS 598.0917	20
NRS 598.092	20
NRS 598.0921	20
NRS 598.0923(2)	passim
NRS 598.0923(3)	passim
NRS 598.0925	20

Out of State Statutes and Rules

16 C.F.R. § 455.1(A)(1)	39
-------------------------	----

TABLE OF ABBREVIATIONS

ADDM	Addendum
Appx.	Appellant's Appendix
LH	Legislative history
MSJ	Defendants' Motion for Summary Judgment
NDTPA	Nevada Deceptive Trade Practices Act
RFJN	Request for Judicial Notice

JURISDICTIONAL STATEMENT

This is a civil appeal from the final order pursuant to NRAP 3(A)(b)(1). The Trial Court granted summary judgment pursuant to NRCP Rule 56 in favor of all remaining Defendants. The remaining Defendants, who are the only Respondents on this appeal, are NEVADA AUTO DEALERSHIP INVESTMENTS LLC (“SAHARA”) and COREPOINT INSURANCE COMPANY (“COREPOINT”) (hereinafter collectively referred to herein as “Defendants”). The entry of the order on Defendants’ motion for summary judgment (“MSJ”), filed on December 8, 2017, (Vol. 4, Appx. 849), disposed of all claims for relief alleged against both SAHARA and COREPOINT, leaving the Court with no other duties other than to enter final judgment in favor of all remaining Defendants. Final judgment was entered on March 28, 2018, after disposition of SAHARA’s motion for attorney’s fees, post-dismissal. *Vol. 7, Appx. 1406-1409.*¹

¹ Defendant WELLS FARGO DEALER SERVICES INC is not a party to this appeal as it was voluntarily dismissed from the action at the trial level via a stipulation and order.

ROUTING STATEMENT

Pursuant to NRAP 17(b)(2) this is a civil appeal involving a monetary judgment of less than \$250,000.00, exclusive of fees and costs and interest. Based on NRAP 17(b)(2), this matter presumptively within the purview of the Court of Appeals.

ISSUES PRESENTED FOR REVIEW

1. Did the passage of NRS 598.0923(2), which is part of the *Nevada Deceptive Trade Practices Act*, (“NDTPA”), statutorily modify and/or statutorily abrogate some of the common law requirements of a claim predicated upon misrepresentation by omission and/or non-disclosure ? ²

2. Were there genuine issues of material fact with respect to POOLE’s statutory claim for consumer fraud pursuant to NRS 41.600(2)(e), and the concomitant violations of the NDTPA codified within Chapter 598 of the NRS, with respect to SAHARA:

- A. ***Failing to disclose a material fact*** in connection with the sale of goods. [NRS 598.0923(2) and NRS 41.600(2)(e)]
- B. Making any ***other false representation*** in a transaction. [NRS 598.0915(15) and NRS 41.600(2)(e)]

² See Appellant’s Motion to Take Judicial Notice regarding Legislative History filed concurrently with this opening brief.

- C. Representing that goods for sale are of a particular standard, quality or grade ***if he knows or should know that they are of another standard, quality, grade,*** style or model. [NRS 598.0915(7) and NRS 41.600(2)(e)]
- D. Making a ***false representation*** as to the source, sponsorship, approval ***or certification*** of goods for sale. [NRS 598.0915(2) and NRS 41.600(e)]
- E. ***Violating a federal or state statute or regulation*** relating to the sale of goods. [NRS 598.0923(3) and NRS 41.600(2)(e)]

3. Did the Court err in deciding the issue of “materiality” under NRS 598.0923(2), as a matter of law, with respect to what would be considered a “material” (important) fact to a reasonable consumer within the community in making a decision to purchase a Dodge Certified Pre-Owned (“CPO”) vehicle ?

4. If there were genuine issues of material fact with respect to POOLE’s statutory consumer fraud claim under NRS 41.600(2)(e) based on violations of the NDTPA, concomitantly, were there also remaining genuine issues of material fact with respect to POOLE’s equitable claims for relief which were expressly and statutorily authorized pursuant to NRS 41.600(3)(b), in addition to POOLE’s claim for declaratory relief with respect to the validity of the installment contract involving the vehicle under NRS 30.040?

5. If there were genuine issues of material fact with respect to POOLE's statutory consumer fraud claim under NRS 41.600(2)(e) based on violations of the NDTPA, concomitantly, did Plaintiff also have a statutory claim against Defendant COREPOINT, (the bond company), **as direct party Defendant** pursuant to the provisions of NRS 482.345(5) to (7)?³

³ This issue was **directly raised** and fully briefed by all parties. Both SAHARA and COREPOINT contended that NRS 482.345(7) does **not** create a statutory claim for relief to allow a NRS 41.600 consumer fraud claimant to seek compensation from the bond via an action filed in court. [con't]

Not only is this a **pure issue of law** involving statutory interpretation, but the issue entirely ripe and germane for review. If not adjudicated and directly addressed in this appeal, this pure issue of law will surely be raised again should this matter be remanded for a jury trial. **Consequently, this Court should also dispose of this significant issue of law in the instant appeal.**

STATEMENT OF THE CASE

This action is based on Nevada's Consumer Fraud statute (NRS 41.600) involving the financed retail sale of a used 2013 Dodge "*Certified Pre Owned*" ("CPO) Ram 1500 Bighorn pick-up truck ("subject vehicle" or "CPO vehicle") by Defendant SAHARA.

This is an appeal from the final judgment granting Defendants SAHARA's and COREPOINT's MSJ. *Order on MSJ, Vol. 4, Appx. 845-847*. The entry of the order granting summary judgment dismissed all remaining Defendants, disposed of all claims for relief and left the Court with no other duties other than to enter final judgment in favor of Defendants. *Not. of Entry, Vol. 4, Appx. 849*. Judgment was entered on March 28, 2018 after the notice of entry was filed on Defendants' Motion for Attorney's fees and Plaintiff's Motion to Retax Costs. *Judgment, Vol. 7, Appx. 1406-1409*.

STANDARD OF REVIEW

The standard of review on orders granting summary judgment pursuant to Rule 56 is *de novo* to determine whether the evidence properly before the district court "demonstrate[s] that no 'genuine issue as to any material fact [remains] and that the moving party is entitled to a judgment as a matter of law.'" *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). If the standard of review is *de novo*, this Court's review is done

without deference to the lower court's findings. *Caughlin Ranch Homeowners Ass'n v. Caughlin Club*, 109 Nev. 264, 266, 849 P.2d 310, 311 (1993).

The standard of review regarding questions of statutory construction and interpretation is *de novo*. *PERS v. Reno Newspapers Inc.*, 129 Nev. 833, 836, 313 P.3d 221, 223 (2014). In addition, statutes or Acts with a protective and/or remedial purpose, which would include NRS 41.600, NDTPA and NRS 482.345, should be ***liberally construed*** in order to effectuate the protections and benefits intended to be obtained under their provisions. See *State Dep't of Bus. & Indus. , Fin. Institutions Div. v. Dollar Loan Ctr., LLC*, 134 Nev. Adv. Op. 15, 412 P.3d 30, 33 (2018).

STATEMENT OF FACTS

On March 26, 2014, the vehicle at issue was involved in a collision. *Sep. Stmt. # 6; Appx. 312; Def's Resp. to RFA # 9, Vol. 2, Appx. 385*. It was owned by Dale Hinton at that time. *Allstate Collision Estimate ("ACE"), Vol. 2, Appx. 361*. Mr. Hinton's auto insurer, Allstate, prepared the ACE which detailed the repairs made on the subject vehicle. *See ACE, Appx. 361-368*. Approximately six weeks after the collision, and after the subject vehicle was repaired, on May 5, 2014, Mr. Hinton sold the subject vehicle to SAHARA.

Sep. Stmt. # 1; Appx: 312; Def's Resp. to RFA # 1, Vol. 2, Appx. 383; ACE, Vol. 2, Appx. 361.

SAHARA's director of used car sales, Joshua Grant, personally handled the purchase transaction with Mr. Hinton on behalf of SAHARA. *Sep. Stmt. # 2 and 10; Vol. 2, Appx. 312 and 313; Depo. of Grant, Vol. 2, Appx. 416.* As the director of SAHARA's used car sales department, Mr. Grant was "the" person at SAHARA who established and instituted all of SAHARA's policies and practices in SAHARA's used car department, including making the decision of whether or not to resell any given vehicle to the community with a certified pre-owned ("CPO") designation, including the subject vehicle. *Sep. Stmt. # 11, 13 and 73, Vol. 2, Appx. 313-314 and 329; Depo. of Grant, Vol. 2, Appx. 408 and 421.*

During the purchase transaction of the subject vehicle by SAHARA, Mr. Hinton informed Mr. Grant of the March 26, 2014 collision (hereinafter referred to as the "pre-purchase collision"), and also gave Mr. Grant the ACE. *Sep. Stmt. # 3, Appx. 312; ACE, Appx. 361-368; Depo of Grant, Vol. 2, Appx. 416-419.* Mr. Grant **thoroughly reviewed** the ACE. *Sep. Stmt. # 4, Appx. 312; Depo. of Grant, Vol. 2, Appx. 420.*

The ACE breaks down what was actually repaired and/or replaced on the vehicle and describes and itemizes the nature and extent of the damage

to the vehicle as a result of the pre-purchase collision. *Sep. Stmt. # 7, Appx. 312; ACE, Vol. 2, Appx. 361-368; Depo of Grant, Vol. 2, Appx. 417.* More specifically, the ACE clearly reflects that the vehicle sustained **\$4,088.70** in property damage as a result of the pre-purchase collision. *Sep. Stmt. # 8, Appx. 313, ACE, Vol. 2, Appx. 361-364; Def's Resp. to RFA # 31, Vol. 2, Appx. 400.* The ACE also clearly reflects the following repairs done to the vehicle, which include, but are not limited to:

- A replaced front bumper.
- A replaced front bumper bracket.
- A replaced left front frame end bracket.
- A replaced radiator support.
- A replaced left outer and inner tie rod.
- A replaced aftermarket left stabilizer line.
- **A replaced left wheel.** ⁴
- A repainted left front fender ⁵

On May 5, 2014, the day Mr. Grant, on behalf of SAHARA, purchased the subject vehicle, he also obtained a Carfax on the vehicle. *Sep. Stmt. # 77, Vol. 2, Appx. 330; Carfax, Vol. 2, Vol. 2, Appx. 373-376; Depo. of Grant, Vol.*

⁴ The particular significance of the replaced wheel that was clearly identified on the ACE will be discussed *infra* with respect to Plaintiff's statutory claim that the subject vehicle was not of CPO standard, quality or grade and that SAHARA made a false statement regarding the Dodge CPO certification.

⁵ *Sep. Stmt. # 9, Appx. 313; ACE, Appx. 361-364; Def's Resp. to RFA # 17, Vol. 2, Appx. 397.* This is only a partial list, the full list of replaced and/or repaired parts and the nature and extent of the previous damage is reflected on the ACE at *Appx. 361-363.*

2, Appx. 420. The Carfax noted the pre-purchase collision identified in the ACE. *Sep. Stmt. # 77 and 78, Vol. 2, Appx. 330; Carfax, Vol. 2, Vol. 2, Appx. 375; Depo. of Grant, Vol. 2, Appx. 420; ACE, Vol. 2, Appx. 361.*

Three weeks later, on May 26, 2014, Plaintiff/Appellant DERRICK POOLE (“POOLE”) purchased the subject vehicle from SAHARA, which, by then, had been certified by SAHARA as a Dodge CPO vehicle. It was Joshua Grant, who made the decision to resell the vehicle to the community as a Dodge CPO vehicle. *Sep. Stmt. # 73, Vol. 2, Appx. 329; Depo. of Grant, Vol. 2, Appx. 421.*

Prior to signing the purchase documents, POOLE and SAHARA’s salesperson, Travis Spruell, took the vehicle on a test drive. During the test drive, Mr. Spruell told POOLE that the vehicle was in a previous accident. *Sep. Stmt. # 61, Vol. 2, Appx. 326; Decl. of POOLE ¶ 2, Vol 2, Appx. 282.* In response, POOLE ***specifically inquired*** about the accident and was told by Mr. Spruell that it was only a “minor” accident, that the vehicle had been through their 125 point comprehensive inspection given to CPO vehicles, and that if the vehicle had been in a significant accident, SAHARA would not sell the vehicle to him. *Sep. Stmt. # 61, Vol. 2, Appx. 326; Decl. of POOLE ¶ 2, Vol. 2, Vol. 2, Appx. 282.*⁶

⁶ SAHARA did ***not*** submit any evidence whatsoever, such as a

SAHARA's salesperson's representation that the pre-purchase collision was only "minor" in nature and not significant allayed POOLE's concerns about the pre-purchase collision. Later in the sales process, SAHARA disclosed the same pre-purchase collision to POOLE in writing via the Carfax, which POOLE reviewed and signed, given his previous inquiry about the nature of pre-purchase collision had been answered. *Sep. Stmt. # 59, Vol. 2, Appx. 325; Decl. of POOLE ¶¶ 3-4, Vol. 2, Appx. 262-263; Carfax, Vol. 2, Appx. 373 and 375.*

Notwithstanding SAHARA representing the pre-purchase collision as only being a "minor" in nature and nothing significant, SAHARA ***never disclosed*** any of the ***specific information*** in the ACE which reflected the *nature of, extent of, or cost of repair for the damage* to POOLE's CPO vehicle as a result of the pre-purchase collision – ***information SAHARA had in its actual possession at time of sale.***⁷ *SAHARA's Resp. to RFA # 7, 10, and 36-38, Vol. 2, Appx. 392-393; Sep. Stmt. # 59 and 104, Vol. 2, Appx. 325 and 385; Decl. of POOLE ¶ 4, Vol. 2, Appx. 283.*

declaration from Mr. Spruell, to dispute POOLE's version of events involving his specific inquiry about the nature of the accident after he was first informed of it orally by Mr. Spruell. *Defs' MSJ, Vol. 1, Appx. 048-225*

⁷ This was ***undisputed*** by SAHARA because it was admitted by SAHARA via POOLE's requests for admissions. *SAHARA's Resp. to RFA # 7, 10, and 36-38, Vol. 2, Appx. 392-393*

However, perhaps most compelling is the fact that SAHARA's own employees, the finance & insurance ("F&I") manager, Noah Grant, and the salesperson, Mr. Spruell, both of whom were **directly involved** in the sale of the CPO vehicle to POOLE, **would have disclosed** to POOLE the particular **information reflected in the ACE** had they been **personally aware** of the ACE's existence at the time of sale. *Sep. Stmt. # 42-46, 54-56, Vol. 2, Appx. 321-322 and 324-325; Depo of Grant, Vol. 2, Appx. 432-434; Depo of Spruell, Vol. 2, Appx. 447-449.*⁸ These SAHARA employees would have disclosed to POOLE the specific information reflected in the ACE at time of sale because **they believed** the information in the ACE **would have been important to disclose** to any consumer within the community who was deciding on whether to purchase a Dodge CPO vehicle from SAHARA. *Sep. Stmt. # 42-46, 54-56, Vol. 2, Appx. 321-322 and 324-325; Depo of Grant, Vol. 2, Appx. 433-434; Depo of Spruell, Vol. 2, Appx. 447-449.*

⁸ These same SAHARA employees were testifying as to their professional experience with and being personally involved in selling **hundreds of CPO vehicles** to other consumers within the community, and also received training involving the Dodge CPO program. *Sep. Stmt. # 36, 56, Vol. 2, Appx. 320 and 324; Depo. of Grant, Vol. 2, Appx. 431; Depo. of Spruell, Vol. 2, Appx. 447-448.*

That same information reflected in the ACE also ***would have been important to POOLE*** in making his decision on whether or not to purchase the CPO vehicle from SAHARA. *Sep. Stmt. #64-66 and 107, Appx. 327 and 336; Decl. of POOLE ¶¶ 1-6, Vol 2, Appx. 282-284.*

POOLE sustained monetary loss and/or damages and SAHARA was unjustly enriched as a result of SAHARA's deceptive trade practices. *Sep. Stmt. # 105, Vol. 2, Appx. 336; Decl. of Avillini ¶¶ 21-31, Vol. 2, Appx. 296-302.*

SUMMARY OF ARGUMENT

A. SAHARA failed to disclose a material fact in a transaction in connection with the sale of goods. (NRS 598.0923(2)).

NRS 598.0923(2) required SAHARA to disclose ***all*** material facts known to SAHARA relating to the purchase of his CPO vehicle, which would have statutorily included the specific information regarding the nature and extent of the damage caused to the vehicle by the pre-purchase collision – information that SAHARA had ***actual knowledge*** and of which was in their ***exclusive possession*** at the time of sale.

As a threshold matter, because NRS 41.600 and the NDTPA are consumer protection statutes, they are ***remedial in nature***, and their provisions are to ***liberally construed***. Furthermore, statutory consumer

fraud/deceptive trade practices are ***separate and distinct claims*** from those based on common law fraud. They are pure creatures of statute and are not merely “codifications” of common law fraud.

In fact, some of the NDTPA’s provisions, such as NRS 598.0923(2) which is at issue in this appeal, fundamentally changed existing common law by ***statutorily abrogating*** some of the common law elements that were required to be shown before a valid claim based upon misrepresentation ***by omission*** could lie. NRS 598.0923(2) changed the entire landscape involving a claim based upon misrepresentation by omission in connection with the sale of goods by a person (i.e. a “merchant”), who sells goods to the community ***in the course of their business or occupation***.

Because the provisions of the NDTPA are to be liberally construed, the Court erred by narrowly construing the scope of the affirmative statutory disclosure obligations under NRS 598.0923(2) with respect to SAHARA’s sale of a Dodge CPO vehicle that was involved in a pre-purchase collision. The Court found that the “only” material fact SAHARA was under an obligation to disclose under NRS 598.0923(2) relating to the pre-purchase collision, was the pre-purchase collision itself. The Court ruled that SAHARA had no statutory duty whatsoever under NRS 598.0923(2) to disclose any of the material information reflected in the ACE relating to the

nature and extent of that pre-purchase collision, ***even though SAHARA had this information in their actual knowledge and possession.***

Order on MSJ, Vol. 4, Vol. 4, Appx. 846: 21-22.

In essence, by making this ruling, the Court disregarded or overlooked the declaration of POOLE, as well as the deposition testimony of SAHARA's own employees offered in opposition to Defendants' MSJ. The Court ruled, as a matter of law, that the information reflected in the ACE relating to the nature and extent of the damage caused by the pre-purchase collision would ***not*** be encompassed within the disclosure requirements of NRS 598.0923(2). By making this ruling the Court also had to have found, by extension, that the particular information reflected in the ACE would ***not*** have been "material" to a reasonable consumer within the community in making their decision to buy a Dodge CPO vehicle. This is because if there were genuine issues of fact that the information in the ACE was "material" to a purchaser in a Dodge CPO sale transaction, then the Court was compelled to deny Defendants' MSJ.

A "material" fact is a fact that a reasonable person would attach importance to with respect to the transaction at issue. Generally, the materiality of a fact, meaning its importance in any given sales transaction, ***is a question of fact for the jury to determine.*** The Court's ruling, as

a matter of law, as to what would be considered a “material” fact under NRS 598.0923(2) was in error.

**B. SAHARA made a false representation in a transaction.
(NRS 598.0915(15))**

In granting Defendants’ MSJ, the Court found that there “***was no indication in the record*** that Plaintiff inquired about the parts and services used to repair the vehicle as provided in the ACE, and such information was then withheld.” *Order on MSJ, Vol. 4, Appx. 846: 24-26.* However, this finding is not only in *direct contravention* of undisputed fact number 61 in POOLE’s separate statement, and paragraph 2 of his declaration filed in opposition to Defendants’ MSJ, but the Court’s finding also *contradicts* SAHARA’s affirmative statutory duty to POOLE, as a buyer, to disclose ***all material facts*** known to SAHARA involving the pre-purchase collision. *NRS 598.0923(2); Sep. Stmt # 61, Vol. 2, Appx. 326; Decl. of POOLE ¶¶ 1-2, Vol 2, Appx. 282-283.* POOLE did in fact made an affirmative inquiry about the pre-purchase collision and was then ***affirmatively mislead*** by SAHARA about the nature and extent of the very accident he inquired about after initially being told about it on the test drive.

Furthermore, whether SAHARA’s representation to POOLE was “false” with respect to the pre-purchase accident as only being “minor” in

nature and not substantial, (***when compared to*** the information reflected in the ACE), is an issue for the jury to decide, and not for the Court to adjudicate on summary judgment. Most certainly had POOLE been given the ACE ***after*** it was represented to him by SAHARA that the pre-purchase collision was only “minor” in nature, he would ***not*** have considered that collision as being a minor accident.

Finally, there is ***no basis*** in the Court’s MSJ order or any finding that SAHARA did ***not*** make an affirmative false representation to POOLE about the nature and extent of the pre-purchase collision based on NRS 598.0915(15). *Order on MSJ, Vol. 4, Appx. 845-847.*

C. **SAHARA represented that goods for sale were of a particular standard quality or grade when SAHARA knew or should have known that they were of another standard, quality, grade ... and made a false representation as to the certification of goods for sale. (NRS 598.0915(2) and (7))**

SAHARA holds out their Dodge CPO vehicles to the community as being ***superior in value, safety and quality*** as compared to a comparable non-CPO used vehicle. POOLE’s vehicle was not of Dodge CPO standard, quality or grade. POOLE presented admissible evidence that the vehicle was ***not*** properly repaired according to the Fiat Chrysler Auto (“FCA”) factory repair specifications, and that SAHARA new or should have

known that, and that the vehicle never should have been listed or sold as a Dodge CPO.

In its is order the Court essentially established a *quasi-irrebuttable* “*presumption*” that the vehicle was properly CPO certified simply because the vehicle at issue underwent SAHARA’s CPO inspection, and had “passed” that inspection, *according to SAHARA*. This was evidenced by SAHARA’s CPO “passing” vehicle inspection checklist. *CPO checklist, Vol. 2, Appx. 370-371*. Because SAHARA provided evidence that the vehicle “passed” the CPO inspection, the Court ruled that POOLE was precluded from arguing that the vehicle at issue was not of CPO quality, standard or grade or that SAHARA made a false statement with respect to the vehicle being CPO certified. This was improper and in error because POOLE met his burden of persuasion in opposition to Defendants’ MSJ.

POOLE submitted a plethora of admissible evidence that meticulously challenged and got beyond the four corners of SAHARA’s “passing” CPO checklist. This evidence clearly demonstrated that genuine issues of material fact exist as to whether the vehicle at issue was of CPO standard, quality or grade; in addition to the fact that the vehicle should have never been represented as or sold as a certified Dodge CPO because it was never previously repaired properly in compliance with Dodge’s factory repair

specifications – information that SAHARA knew ***or should have known about.*** *Sep. Stmt. # 94-103, Vol 2, Appx. 333-335; Decl. of Avillini ¶¶ 14-20, Vol. 2, Appx. 292-296.*

ARGUMENT

- I. **A primer on statutory consumer fraud and deceptive trade practices in Nevada**
 - A. **A claim for statutory consumer fraud under the provisions of the NRS 41.600 and the NDTPA should be *liberally construed* and is a separate and distinct claim for relief from that of traditional “common law” fraud**
 1. **Because NRS 41.600 and the NDTPA have a protective purpose and are remedial in nature, they should be *liberally construed* to effectuate the Legislature’s intent and the societal benefits afforded and the public policy furthered under the statute or Act**

As a threshold matter, in Nevada, like in most jurisdictions, statutes or Acts with a remedial purpose are to be liberally construed to effectuate the Legislature’s public policy objectives underlying these statutes, and the benefits intended and protections afforded under these statutes.⁹

⁹ See *State Dep’t of Bus. & Indus. , Fin. Institutions Div. v. Dollar Loan Ctr., LLC*, 134 Nev. Adv. Op. 15, 412 P.3d 30, 33 (2018) [case involving high interest short term loan legislation that protected consumers from predatory lending practices holding consumer protection statutes, such as those found in Chapter 604A of the NRS, have a protective purpose and should be ***liberally construed*** in order to effectuate the benefits intended to be obtained].

Furthermore, as the Court in *State Welfare Div. v. Washoe Cty. Welfare Dep't.*, 88 Nev. 635, 637 (1972) held, when liberally construing a remedial statute:

The leading rule for the construction of [remedial] statutes is to ascertain the intention of the legislature in enacting the statute, and the intent, when ascertained, will prevail over the literal sense [citations omitted]. *The meaning of words used in a statute may be sought by examining the context and by considering the reason or spirit of the law or the causes which induced the legislature to enact it. **The entire subject matter and the policy of the law may also be involved to aid in its interpretation, and it should always be construed so as to avoid absurd results.*** [emphasis added]

The same liberal interpretation has been held to be universally applicable to comparable consumer protection statutes and/or Acts in other jurisdictions involving the same of similar consumer protection objectives which underlie NRS 41.600 and the NDTPA.¹⁰

See also *Int'l Game Tech., Inc. v. Second Judicial Dist. Court ex rel. Cty. of Washoe*, 124 Nev. 193, 201, 179 P.3d 556, 560 (2008) [**holding remedial statutes should be liberally construed to effectuate the intended benefit**]. See also cases cited therein at footnote 20.

¹⁰ See *Whitaker v. M.T. Auto., Inc.*, 855 N.E. 2d 825, 829 (Sprm. Ct. Ohio 2006) [holding that **Ohio's Consumer Sales Protection Act** is remedial in nature and must be liberally construed]; *Ly v. Nystrom*, 615 N.W.2d 302, 308 (Sprm. Ct. Minn. 2000) [**Minn. Consumer Fraud Act**; same]; *Hawaii Cmty. Fed. Credit Union v. Keka*, 11 P.3d 1, 17 (Sprm. Ct. Haw. 2000) [**Haw. Decp. Prac. Act**; same]; *Panag v. Farmers Ins. Co. of Washington*, 204 P.3d 885, 889 (Sprm. Ct. Wash. 2009) [**Wash. Consumer Protection Act**; same]; *Patterson v. Beall*, 19 P.3d 839, 846 (Sprm. Ct. Ok. 2000) [**Ok. Consumer Protection Act**; same]; *Daniel N.*

2. **NRS 41.600 and the NDTPA created a separate, distinct and independent statutory claim for “consumer fraud” that afforded much broader and comprehensive protections to consumers relating to the retail sale of goods to the community by merchants and retailers**

In 1973, the Nevada Legislature, via AB 300 (“AB 300”), created what is now commonly known today as the NDTPA. The Legislature found there was an immediate and pronounced need to provide more protection and remedies to consumers involving retail sales of goods between consumers and retailer merchants, ***because consumers were being defrauded in ways that made it too difficult for consumers to prove under a traditional common law fraud claim.*** See Request for Judicial Notice Re: Legislative History (“RFJN-LH”): Exh. 1, Assembly Bill (“AB”) 300, pp. 014-017, 019-021, and 087-089. As a result of AB 300, Chapter 598

Gordon, PC v. Rosenblum, 370 P.3d 850, 855 [Sprm. Ct. Or. 2016) [**Or. Decp. Trade Practices Act; same**]; *Cox v. Sears Roebuck & Co.*, 647 A.2d 454, 461 (Sprm. Ct. N.J 1994) [**NJ Consumer Protection Act; same**]; *Robinson v. Toyota Motor Credit Corp.*, 775 N.E.2d 951, 960 (Sprm. Ct. Ill. 2002); [**Ill. Consumer Fraud Act; same**] *White v. Wyeth*, 705 S.E.2d 828, 836 (W.V Sprm. Ct. 2010) [**W.Va. Consumer Protection Act; same**]; *Fricano v. Bank of Am. NA*, 875 N.W.2d 143, 151, (Wis. App. 2015) [**Wis. Decp. Trade Practices. Act; same**]; *State ex rel. Spaeth v. Eddy Furniture Co.*, 386 N.W.2d 901, 903 (N.D. Sprm. Ct. 1986) [**N.D. Consumer. Fraud Act; same**]; *Crowe v. Tull*, 126 P.3d 196, 203 (Sprm. Ct. Colo. 2006) [**Colo. Consumer Protection Act; same**]; *Com., by Creamer v. Monumental Properties, Inc.*, 329 A.2d 812, 817 (Sprm. Ct. 1974) [**Penn. Consumer Protection Act; same**].

(NDTPA), was ***amended and dramatically expanded*** by establishing a broad range of enumerated statutory conduct that would constitute a statutory deceptive trade practice. *Id.* However, while the NDTPA was extensively broadened, there was no private enforcement of its provisions. That all changed two years later in 1975.

In 1975, the Legislature, via AB 319 (“AB 319”), passed NRS 41.600 that ***created a new private claim for relief*** to “*establish consumer fraud as a separate cause of action apart from breach of contract or other causes of action in commercial dealings.*” *RFJN-LH: Exh. 2, AB 319, pp. 094-095.* Not only did the Legislature create a new statutory claim for relief for “consumer fraud,” but they also provided for a ***statutory private cause of action*** for violation of NDTPA’s provisions which were added to Chapter 598 two years earlier via AB 300, *supra*. By expressly incorporating the NDTPA, (Chapter 598), into 41.600’s provisions, NRS 41.600 gave much greater and expansive consumer protections in sales transactions between consumers and retail merchants relating to the sale of goods because the NDTPA embraces much broader concepts involving deception and unfair practices. *RFNJ-LH, Exh. 2, p. 114; NRS 41.600(2)(c), and RFJN-LH: Exh. 1, AB 300, p. 014-016, 015-018, and 087-089.*

Consequently, NRS 41.600 and the NDTPA are **not** just simply “codifications” of common law fraud. Rather they were drafted and passed to address broader concepts involving deception and unfair practices to root out unfair and deceptive practices from the consumer marketplace in connection with the retail sales of goods and services to the community. *Id.* Furthermore, unlike common law fraud, a claim for “statutory consumer fraud” or “deceptive trade practices” is a **pure creature of statute**. NRS 41.600 and NRS 598.0915 to 598.0925.

Statutory consumer fraud under NRS 41.600 and the NDTPA is a **separate and distinct** claim from common law fraud, even though many statutory deceptive trade practices may “sound in fraud,” the NDTPA was promulgated to provide consumers with a cause of action that was “easier to establish than common law fraud.” *See Betsinger v. D.R. Horton*, 126 Nev. 162, 165 * 166, 232 P.3d. 433, 435 * 436 (2010) [holding the lower preponderance of evidence standard applies to a statutory claim for “consumer fraud;” **rejecting** the clear and convincing standard that must be shown under a traditional common law fraud claim].

The Legislature’s intent in initially passing, in conjunction with its continuous and robust expansion of *both* the NDTPA and NRS 41.600 for the last 35 years, (1983 to 2015), is entirely indicative of the underlying

objectives the Legislature sought to put in place, which was create and maintain robust statutory scheme imbuing a broad and expansive range of purely statutory claims for “consumer fraud” to enable consumers to avail themselves of more capacious remedies. *See Betsinger v. D.R. Horton*, 126 Nev. 162, 165 * 166, 232 P.3d. 433, 435 * 436 (2010). *See ADDM. “A” 001-010; RFJN-LH: Exh. 1, AB 300*, (passing and expanding NDTPA), pp.014-017; 019-022 and 087-089; *Ex. 2, AB 319*, (passing NRS 41.600), p. 095 and 098 and 114; *Exh. 3, AB 379*, (passing NRS 598.0923(2)), pp. 118, 124-125 and 160; *Exh. 4, AB 431*, (passing NRS 598.0923(3)), pp. 171, 173, and 179.

Two of those broad and subsequent expansions to the NDTPA are directly at issue in this appeal – NRS 598.0923(2), which ***fundamentally modified the common law*** by statutorily abrogating some common law requirements involving a claim based upon misrepresentation by omission when the sales transaction is in connection with the sale of goods by a merchant; and NRS 598.0923(3), which expanded the definition of statutory consumer fraud to include violating a “*state or federal statute relating to the sale of goods.*” This was a claim that was not previously or even remotely actionable under any existing common law fraud theory.

The **hallmark** of both of these expansions to the NDTPA is that they primarily address much more deeper and broader concepts of deception and unfair practices in the consumer marketplace, in addition to maintaining a robust, broad and expansive application of the NDTPA involving consumer sales transactions involving the sale of goods **by merchants**.¹¹

II. There are genuine issues of material fact as to whether SAHARA failed to disclose a material (important) fact in connection with the sale of goods under NRS 598.0923(2)

A. NRS 598.0923(2) fundamentally and statutorily modified the common law with respect to a claim based upon misrepresentation by omission involving the sale of goods

¹¹ It is significant to point out that the NDTPA primarily focuses its applicability on those sales transactions involving a seller's "**business or occupation**." See NRS §§ 598.0915, 598.0917, 598.0921, 598.092 & 598.0923 and 598.0925; ADDM "A" 001 to 010. This is significant because, by this definition, the overwhelming percentage of the NDTPA's applicability is primarily focused on the **sale of goods to consumers within the community by "merchants,"** as defined under the UCC.

A "merchant" is defined as "... **a person who deals in goods of the kind** or otherwise by his or **her occupation** that holds himself or herself out as having knowledge or skill peculiar to the practices or goods involved in the transaction ..." NRS 104.2104(1)

Consequently, the NDTPA does **not** apply to sales of goods by private sellers who are **not** merchants, or who otherwise do not sell a good to a buyer outside of their "business of profession." This is significant because the Legislative history is very clear with respect to exactly what the Legislature sought to address in passing, and in continuously expanding NRS 41.600 and the NDTPA -- **which was the deleterious effect this type of deceptive conduct had on consumer marketplace**. They were passed to address and/or root out deception, fraud and unfair practices relating to everyday consumer sales transactions **involving the sale of a good by a merchant to a consumer buyer**.

NRS 598.0923(2) states in pertinent part:

A person engages in a “deceptive trade practice” when in the course of his or her business or occupation he or she knowingly:

Fails to disclose a material fact in connection with the sale of ... goods ... [emphasis added]

NRS 598.0923(2) drastically modified existing common law and changed the entire landscape with respect to a claim predicated upon misrepresentation by non-disclosure and/or omission ***in consumer sales transactions involving the sale of goods*** – sales transactions, the vast overwhelming majority of which do ***not*** involve any type of “fiduciary,” “confidential” or other “special” relationship.

This is significant because the legal landscape prior to the passage of NRS 598.0923(2) with respect to a *common law* claim of misrepresentation based upon non-disclosure or omission, was that in order to trigger the duty of full disclosure of all material facts from the seller, a buyer was ***required*** to demonstrate the existence of a fiduciary or other special relationship between the buyer and seller, or that the seller had superior or particularized knowledge not reasonably discoverable to the buyer.¹²

¹² See *Epperson v. Roloff*, 102 Nev. 206, 213, 719 P.2d 799, 803 (1986) [holding that generally an action for deceit under common law ***will not lie*** for non-disclosure; for an omission to constitute actionable fraud, a plaintiff must first demonstrate that the defendant ***had a duty to disclose the fact at issue***, because of a fiduciary or other special relationship, or because

NRS 598.0923(2) **statutorily abrogated** these common law requirements and/or elements *in a consumer transaction involving the sale of goods* when the buyer's claim is based upon misrepresentation by omission. Contrary to SAHARA's contention at the trial level, POOLE was not attempting to impose "overbroad" legal duties on SAHARA so as to require SAHARA to "disclose *each and every fact a car dealer might have* regarding any used vehicle inventory..." *Defs' MSJ; Vol. 1 Appx. 051; 25, 052: 1-2*. In fact, quite the opposite was true.

As clearly alleged in the *FAC ¶¶ 26-30, Vol. 1, Appx. 027-025*, as well as in POOLE's Separate Statement, *Vol, 2, Appx. 312-337*, POOLE was only seeking to enforce an already existing statutory duty under NRS 598.0923(2) that required full disclosure of ***all material facts know to SAHARA involving the pre-purchase collision the Plaintiff's CPO vehicle was involved in.*** NRS 598.0923(2) required SAHARA to disclose the specific information reflected in the ACE involving the nature and extent of

the seller had superior or particularized knowledge.]; *Dow Chem. Co. v. Mahlum*, 114 Nev. 1468, 1487, 970 P.2d 98, 110 (1998) [rev'd on other grnd's] [holding that generally, for an omission to constitute actionable common law fraud, at a minimum, some form of fiduciary or other special relationship between the parties must be present, or particularized or superior knowledge be in the possession of only the seller and not reasonably discoverable by the buyer, and absent such a relationship or particularized knowledge, ***no duty to disclose arises, and as a result, no liability for fraudulent concealment attaches to the non-disclosing party***].

the damage caused by that pre-purchase collision because that information would have been “material” to any reasonable consumer purchasing a Dodge CPO vehicle – additional and particularized material information which it is ***undisputed*** SAHARA ***had full knowledge of at time of sale.*** *Sep. Stmt. # 3-7 and 104, Vol 2, Appx. 312 and 336; Depo. of Grant, Vol 2, Appx. 416-417, 419- 420; ACE, Vol. 2, Appx. 361-368,*

B. A material fact is a fact that a reasonable person would attach importance to with respect to the transaction at issue

A fact is material if it concerns a subject reasonably relevant to the transaction at issue and if a reasonable person would attach importance to that fact. See *Powers v. United Services Auto. Ass’n*, 114 Nev. 690, 698, 962 P.2d 596, 601 (1998) (“*Powers I*”), modified on other grounds, 115 Nev. 38, 979 P.2d 1286 (1999) (“*Powers II*”). While *Powers* concerned a bad faith insurance case involving what would be material or important to a reasonable claims adjuster in investigating a claim which was denied based upon alleged insurance fraud committed by the insured, the same issue of law involves the instant case.

Furthermore, the “objective” materiality standard set forth in *Powers* is *equally applicable* to the instant case and is also entirely in line with numerous other jurisdictions with respect to what constitutes a “material”

fact in a sale transaction, whether it be in the form of an omission or an affirmative misrepresentation.¹³

¹³ See *Totz v. Cont'l Du Page Acura*, 236 Ill. App. 3d 891, 899, 602 N. E. 2d 1374, 1379 (1992) [**holding in the context of statutory consumer fraud the dealer's failure to disclose previously repaired damage and failure to disclose vehicle was in a previous severe wreck, which the dealer knew about, was a "material" fact in a used vehicle sale transaction**]; *Weinstat v. Dentsply Int'l, Inc.*, 180 Cal. App. 4th 1213, 1223, 103 Cal. Rptr. 3d 614, 622, fn. 8 (2010) [**holding the issue of materiality, in a Deceptive Trade Practices cause of action based on fraudulent or deceptive practices, is whether a reasonable person would attach importance to the representation or nondisclosure in deciding how to proceed in the particular transaction**]; *Inkel v. Pride Chevrolet-Pontiac, Inc.*, 183 Vt. 144, 151, 945 A.2d 855, 859 (2008) [**holding under Consumer Fraud Act involving a material omission, a fact is material if a reasonable person would regard that fact as important in making a decision to purchase**]; *Briggs v. Am. Nat. Prop. & Cas. Co.*, 209 P. 3d 1181, 1186 (Colo. App. 2009) [**holding undisclosed facts are "material," under the Colorado Consumer Protection Act for fraudulent concealment, or misrepresentation by omission if the consumer's decision might have been different had the truth been disclosed**]; *Casavant v. Norwegian Cruise Line, Ltd.*, 76 Mass. App. Ct. 73, 78, 919 N. E. 2d 165, 170 (2009) [**holding that with respect to nondisclosure under Massachusetts Deceptive Trade Practices Act, determining whether the non-disclosure was a material fact depends on whether the plaintiff likely would have acted differently but for the nondisclosure**]; *Colaizzi v. Beck*, 895 A. 2d 36, 39 (Pa. App. 2006) [rev'd on other grdns] [**holding a misrepresentation is material, for purposes of Pennsylvania Consumer Protection Act, if it is of such a character that if it had not been misrepresented, the transaction would not have been consummated**]. *Brown v. Bennett*, 136 S.W. 3d 552, 556 (Mo. Ct. App. 2004) [**holding facts to which a reasonable person might be expected to attach importance in making one's choice of action are material, for purposes of a fraud claim**]; *Carcano v. JBSS, LLC*, 200 N.C. App. 162, 176, 684 S.E. 2d 41, 53 (2009) [**holding a fact is a**

Obviously, what constitutes a “material” fact depends on the nature and type of the transaction at issue. However, determining whether a fact is “material” is based upon an **objective standard**, which in turn is based upon what would be material (important) to the reasonable consumer within the community.

Furthermore, as explained in *Powers II*, “**materiality is generally a question of fact**, and only where reasonable minds cannot differ may the issue be resolved as a matter of law.” *Id.*, 115 Nev. at 44, 979 P.2d at 1289. “[I]t is **only in the rarest of cases** [involving deception] that the

“material fact” if, had it been known to the party, and it would have influenced that party's decision in making the contract at all]; Brennan v. Kunzle, 37 Kan. App. 2d 365, 382, 154 P.3d 1094, 1106 (2007) [holding an undisclosed matter is “material,” as an element of fraud by silence, if it is one to which a reasonable man would attach importance in determining his choice of action in the transaction in question], Smith v. KNC Optical, Inc., 296 S.W. 3d 807, 812 (Tex. App. 2009) [reaffirming previous Texas Appellate opinions holding that a “material” fact for purposes of establishing material misrepresentation as an element of fraud claim, means a reasonable person would attach importance to, and would be induced to act on, the information in determining his choice of actions in the transaction in question], Yazd v. Woodside Homes Corp., 143 P. 3d 283, 289 (Ut. Sprm. Ct), [holding a “material” fact in a case involving fraudulent non-disclosure, is a fact that is important to the buyer which the information could be expected to influence the judgment of a person to go through with the transaction].

materiality issue can be taken from the jury." *Powers I*, 114 Nev. at 698, 962 P.2d at 601.

C. The facts and information regarding the nature and extent of the damage caused to the vehicle that was itemized, disclosed and monetized in the ACE would have been “material” (important) to any reasonable consumer within the community in making a decision to purchase a Dodge CPO vehicle, including POOLE

As set forth in POOLE’s separate statement in support of his opposition to Defendants’ MSJ, (*Appx. 311 et seq.*), Joshua Grant, SAHARA’s 30(b)(6) representative on CPO sales, who had previously sold ***thousands*** of CPO Dodge vehicles, and also who had percipient knowledge involving the vehicle at issue, testified:

- SAHARA holds out their Dodge CPO vehicles to the community as being ***superior in value, safety and quality*** as compared to a comparable non-CPO used vehicle because “***they must pass a strident certification process that guarantees only the finest late model vehicles get certified.***” *Sep. Stmt. # 21 , Vol. 2, Appx. 315; Depo of Grant, Appx. 426.*
- That to help ensure a buyer within the community can make an ***informed choice and educated decision***, it is important for SAHARA to be completely truthful, honest and accurate and make full disclosure to the car buyer who is thinking of purchasing a Dodge CPO vehicle. *Sep. Stmt. # 30, 31, Vol. 2, Appx. 319; Depo. of Grant, Vol 2, Appx. 425.*

- That it is important for SAHARA ***to make full disclosure*** to a used car buyer involving things that ***might affect a vehicle's value, safety, desirability or marketability***, because SAHARA “prefers to be upfront and honest as possible, legally ethically and morally.” *Sep. Stmt. # 32 and 33, Vol. 2, Appx. 319; Depo of Grant, Vol. 2, Appx. 413 and 425.*

The aforementioned 30(b)(6) testimony of Mr. Joshua Grant clearly established SAHARA’s own internal policy of “full disclosure” involving things that ***might affect a vehicle's value, safety, desirability or marketability***. More importantly, Mr. Joshua Grant clearly established, based upon his own experience in selling *thousands* of CPO Dodge vehicles, what a consumer’s ***objective expectations*** are when purchasing a Dodge CPO vehicle. *Sep. Stmt. # 18-20, Vol. 2, Appx. 315; Depo. of Grant, Vol, 2, Appx. 407, 410-411*

If a consumer, based on SAHARA’s own 30(b)(6) witness’s testimony, ***objectively believes and has the expectation*** that a Dodge CPO is of superior value, quality and safety than a comparable non-CPO Dodge vehicle, then there were genuine issues of material fact as to whether the specific information reflected in the ACE would have been important (material) to a consumer’s decision in purchasing a Dodge CPO. POOLE most certainly believed that a Dodge CPO vehicle was of superior value,

quality and safety as compared to a comparable non-CPO Dodge vehicle. *See also Decl. of Plntf. ¶¶ 1, 4, 5 and 6, Vol. 2, Appx. 282-284.*

It is a question of fact for a jury to determine if **\$4,088.70** in previous property damage and/or if all the repairs undertaken to the vehicle as reflected in the ACE would be “material” to a buyer’s decision in purchasing a Dodge CPO vehicle; and if they were material at the time POOLE purchased the subject vehicle, whether SAHARA was affirmatively obligated to disclose those known material facts to POOLE. *See Powers, supra, and case citations in footnote 13, supra.*

Moreover, POOLE was also crystal clear that the information reflected in the ACE, had it been disclosed to him, would have been **important** in his decision **not** to purchase the CPO vehicle; and had that information been disclosed to him, he never would have entered into the contract for the purchase of the vehicle, nor would he have done any business with SAHARA. *Sept. Stmt. # 59, 65 and 107, Appx. 326, 327 and 336, Decl. of POOLE ¶¶ 4-6, Vol. 2, Appx. 283-284.*

Finally, and perhaps the evidence that was most compelling with respect to the “materiality” of the information in the ACE as it related to the sale of a Dodge CPO, was the deposition testimony of SAHARA’s sales person, Travis Spruell, and its F&I manager, Noah Grant. Their deposition

testimony on this issue, in and of themselves, should have been more than sufficient to compel denial of Defendants' MSJ.

Both were directly involved with the POOLE in the sale and financing of POOLE's CPO vehicle. Based on their personal experiences in selling hundreds of Dodge CPO vehicles to the community, each testified that the information on the ACE involving the nature and extent of the damage to the CPO vehicle **would be important** to a consumer who is purchasing a Dodge CPO vehicle. And had they known about the ACE's existence, they **would have disclosed that information** to POOLE, given he was purchasing a Dodge CPO vehicle. Specifically, Mr. Grant testified:

- Because it is important to disclose to the consumer a vehicle's accident history, ***it would be equally important to disclose to the consumer the nature and extent of that accident, if the dealership knew the nature and extent of the previous accident.*** Sep. Stmt. # 42 and 46, Appx. 321-322; Depo of Grant, Vol. 2, Appx. 432 and 434.
- That if the actual nature and extent of an accident was known to the dealer, meaning the dealer knew what parts were replaced and repaired and the amount of previous accident damage, ***those facts would be important to disclose to a consumer who is buying a CPO Dodge.*** Sep. Stmt. # 43, Vol. 2, Appx. 321; Depo of Grant, Vol. 2, Appx. 433-434.
- That he **would have disclosed** that the CPO vehicle POOLE was purchasing had **\$4,088.70** in damage to it based upon the pre-purchase collision if he had knowledge of such a fact. Sep. Stmt. # 44, Appx. 321; Depo of Grant, Vol. 2, Appx. 433-434.

Mr. Spruell testified:

- Because it is important to be truthful honest and accurate with the consumer, ***it would be equally important to disclose to the consumer the nature and extent of that accident, if the dealership knew the nature and extent of the previous accident.*** *Sep. Stmt. # 53, Vol. 2, Appx. 324; Depo of Spruell, Vol. 2, Appx. 445*
- That he ***would have disclosed*** to POOLE that the vehicle had **\$4,088.70** in damage caused to it by the pre-purchase collision, if he had knowledge of such a fact. *Sep. Stmt. # 54-56, Vol. 2, Appx. 324-325; Depo of Spruell, Vol. 2, Appx. 447-449*

POOLE did not contend that SAHARA failed to disclose that the vehicle was in a pre-purchase accident. Rather, POOLE contended, pursuant to NRS 598.0923(2), that SAHARA's mere disclosure that the CPO vehicle was in a pre-purchase accident was ***not sufficient*** given SAHARA ***actually knew of*** additional and particularized adverse material facts involving the precise nature and extent of the damage caused by the pre-purchase collision—material facts that were in the ***exclusive possession*** of SAHARA at time of sale and of which were ***never disclosed*** to POOLE. *FAC ¶¶ 19-31, Vol. 1, Appx. 023-027; Sep. Stmt. # 59, 60, 62, and 63, Vol. 2, Appx. 325-327, Def's Resp. to RFA # 36-38, Vol. 2, Appx. 391-393, Decl. of POOLE ¶ 4, Vol. 2, Appx. 283.*

Based on the aforementioned, there were triable issues of material fact with respect to POOLE's statutory claim under NRS 598.0923(2) that the Court should not have determined against POOLE, as a matter of law.

D. Even under a traditional common law fraud analysis, SAHARA had a duty to disclose the information and facts reflected in the ACE because SAHARA had vastly superior and particularized knowledge over that of POOLE regarding the condition of the CPO vehicle at the time of sale

As a threshold matter, SAHARA conceded that it has ***vastly superior knowledge*** about the condition of a CPO vehicle as opposed to that of the consumer at the time of sale. *Sep. Stat # 29, Vol 2, Appx. 318; Depo of Grant, Vol. 2, Appx. 424.* Not only did SAHARA ***expressly concede*** in their moving papers that POOLE “is not a car guy and ***would unlikely*** have knowledge of the individual replaced or repaired parts [on the vehicle],” but POOLE further attested to this fact that he had no expertise to know or to discover the nature and extent of the damage caused by the pre-purchase collision, either via an inspection or the test drive undertaken by him, *Defs’ MSJ, Vol.1, 2, Appx. 065: 5-7; Sep. Stmt. #106, Vol. 2, Appx. 337; Decl. of POOLE ¶ 2, Vol. 2, Appx. 283.*

It has long been held in Nevada, even under a common law fraud by omission claim, that the seller has a duty to disclose material facts ***that are particularly within the knowledge of the seller***, and are not within the fair and reasonable reach of the other party.¹⁴

SAHARA had vastly superior knowledge about the condition of the vehicle given SAHARA had possession of the ACE, ***in conjunction with*** the fact that the vehicle underwent SAHARA's 125 point CPO inspection that was conducted by their trained and certified technician. *Sep. Stmt. # 29 and*

¹⁴ See *Dow Chem. Co. v. Mahlum*, 114 Nev. 1468, 1486, 970 P.2d 98, 110 (1998) [rev'd on other grnd's] [citing *Villialon v. Bower*, 70 Nev 456, 467, 273 P2d. 409, 415 (1954)] [***holding that party's superior knowledge can impose a duty to speak in certain transactions and nondisclosure will become the equivalent of fraudulent concealment when it becomes the duty of a person to speak in order that the party with whom he is dealing may be placed on an equal footing with him***]; *Epperson v. Roloff*, 102 Nev. 206, 211-12, 719 P.2d 799, 803 (1986) [holding that even an independent investigation will not preclude reliance where the falsity of the defendant's statements is not apparent from the inspection, **where the plaintiff is not competent to judge the facts without expert assistance, or where the defendant has superior knowledge about the matter in issue**, citing *Stanley v. Limberys*, 74 Nev. 109, 323 P.2d 925 (1958)]; *Mackintosh v. Jack Matthews & Co.*, 109 Nev. 628, 633, 855 P.2d 549, 552 (1993) [***holding where the seller knows of facts materially affecting the value or desirability of the property which are known or accessible only to [the seller] and also knows that such facts are not known to, or within the reach of the diligent attention and observation of the buyer, the seller is under a duty to disclose them to the buyer***].

91, Vol. 2, Appx. 318 and 333; Depo. of Grant, Vol. 2, Appx. 424; Def's Resp. to RFA # 20, Vol. 2, Appx. 388.

Given the nature of the ACE, POOLE had no access to, nor even the ability to access the ACE from any other source on the date of sale because it was a private insurance document. *ACE: Appx. 261-268.* Consequently, even under existing common law based on a claim of misrepresentation by omission, it was still incumbent on SAHARA to disclose the information reflected in the ACE to POOLE. *See cases at footnote 14, supra.*

Consequently, if SAHARA had the duty to disclose the information contained in the ACE under a traditional common law fraud analysis, SAHARA most certainly had the same duty to do so pursuant to the statutory disclosure obligations under NRS 598.0923(2) – material information that was within the particular and exclusive knowledge of SAHARA at the time of sale, which was never disclosed to POOLE. *Sep. Stmt. # 3-9 and 104, Appx. 312-313; Appx, Sep. Stmt. # 59, 60, 62, and 63, Vol. 2, Appx. 325-327; Def's Resp. to RFA # 36-38, Vol. 2, Appx. 391-393; Decl. of POOLE ¶ 4, Vol. 2, Appx. 283. and 336.*

E. The Court appears to have improperly established an reciprocal “quasi caveat emptor” obligation on the part of POOLE after he was informed about the pre-purchase collision by SAHARA

In the Court's order granting Defendants' MSJ, the Court found:

"... There is no indication in the record that Plaintiff inquired about the parts and services used to repair the vehicle as provided in the ACE, **and such information was then withheld...**"

MJS order, Vol. 4, Appx. 846: 24-26.

In making this finding the Court seems to have ruled that for a seller to have statutory liability under NRS 598.0923(2), the seller must have *affirmatively withheld* material facts from the buyer, **after** the buyer was informed of some material facts, but did not make a sufficient "follow up" inquiry with the seller. Notwithstanding that this finding "sounds in common law fraud," POOLE did in fact make an inquiry into the nature and extent of the pre-purchase collision after being initially informed of it, and was then **mislead** by SAHARA about the nature and extent of the pre-purchase collision upon his inquiry. *Sep. Stmt. # 59, Vol. 2, Appx. 325; Decl. of POOLE ¶¶ 3-4, Vol. 2, Appx. 262-263*

Notwithstanding, even if the facts showed that POOLE never made any inquiry with SAHARA about the pre-purchase collision, the Court misconstrued the **one way** affirmative disclosure obligations under NRS 598.0923(2). The "essence" of a statutory claim under NRS 598.0923(2) for misrepresentation by omission is that there were material facts **known to the seller** which were not reasonably known or reasonably discoverable to

the buyer at time of sale, ***which the seller failed to disclose to the buyer.***

The Court's ruling seems to require that for liability to attach under NRS 598.0923(2), the buyer is required to make an affirmative inquiry with the seller, and ***only if*** the seller then actively or affirmatively "withholds" known additional material facts can liability attach. There is ***no requirement*** of any affirmative suppression or withholding of material facts by the seller for there to be liability under NRS 598.0923(2). Rather, under NRS 598.0923(2) it became statutorily incumbent on the merchant seller to make full disclosure of all known material facts ***up front*** to the buyer, ***without the need*** for the buyer to make an affirmative inquiry, or show some "special" relationship between the parties, or demonstrate superior knowledge on the part of the seller about facts not reasonably known to the buyer. Not only does this reasoning run categorically contrary to the plain language of the statute, but it would also be an anathema to the stated objectives behind the statute, along with the underlying objectives behind NRS 41.600 and the NDTA. *See footnote 11, supra and RFJN-LH.*

By ruling the way it did, the Court essentially established some sort of reciprocal "quasi caveat emptor" obligation on the part of buyer under NRS 598.0923(2). In fact, given that NRS 598.0923(2) ***fundamentally***

modified the common law with respect to a seller's disclosure obligations based on claim of misrepresentation by omission, unless the defect was patently obvious to the reasonable buyer at time of sale, or the seller has in fact made full disclosure of all material facts to the buyer, caveat emptor **cannot** be a defense to a claim under NRS 598.0923(2).

It is well established that the doctrine of caveat emptor **only applies** when the defect is patent and obvious, and when the buyer and seller have equal opportunities of knowledge. **Furthermore, it does NOT apply when the other party has engaged in fraud.** *Collins v. Burns*, 103 Nev. 394, 397, 741 P.2d 819, 821 (1987). *Collins* held:

... It has long been the rule in this jurisdiction that ***the maxim of caveat emptor only applies when the defect is patent and obvious, and when the buyer and seller have equal opportunities of knowledge.*** *Fishback v. Miller*, 15 Nev. 428, 440 (1880). Otherwise, a contracting party has a right to rely on an express statement of existing fact, the truth of which is known to the party making the representation and unknown to the other party. *Id.* ***The recipient of the statement is under no obligation to investigate and verify the statement.*** *Id.* The Michigan Supreme Court long ago commented on the injustice of allowing a party to say,

“It is true that I lied to you, and for the purpose of defrauding you, but you were guilty of negligence, of want of ordinary care, in believing that I told you the truth; and because you trusted to my word, when you ought have suspected me of falsehood, I am entitled to the fruits of my falsehood and cunning, and you are without a remedy.”

Bristol v. Braidwood, 28 Mich. 191, 196 (1873) quoted in *Besett v. Basnett*, 389 So.2d 995, 998 (Fla. 1980). Such a result would be untenable. We agree with the Florida Supreme Court that **a person guilty of fraud should not be permitted to use the law as his shield**, “[W]hen the choice is between the two—fraud and negligence—negligence is less objectionable than fraud. Though one should not be inattentive to one's business affairs, the law should not permit an inattentive person to suffer loss at the hands of a misrepresenter.” *Besett v. Basnett*, *supra*, 389 So.2d at 998.

It was **undisputed** that POOLE did not know, nor was it within his reasonable ability to know what the nature and extent of the damage caused to the vehicle as a result of the pre-purchase collision, ***nor did POOLE know that SAHARA had this information in their possession.*** *SAHARA’s Resp. to RFA # 7, 10, and 36-38, Vol. 2, Appx. 392-393; Sep. Stmt. # 59 and 104, Vol. 2, Appx. 325 and 385; Decl. of POOLE ¶ 4, Vol. 2, Appx. 283.*

III. There are genuine issues of material fact that SAHARA made false representations in a transaction and violated a federal statute relating to the sale of goods under NRS (NRS 598.0915(15) and 598.0923(3))

A. There are genuine issues of material fact that SAHARA made affirmative misrepresentations to POOLE regarding the nature and extent of the pre-purchase collision during the sale to s process

Nowhere in the Court's order granting Defendants' MSJ does the Court make any finding, nor did the Court address, POOLE's statutory claim that SAHARA made a false representation in a transaction under NRS 598.0915(15). *MSJ order, Vol. 4, Appx. 845-848.* When POOLE ***specifically inquired*** during the test drive with SAHARA's sales person about the accident, Mr. Spruell told POOLE that it was just a "minor" accident, that it had gone through the 125 CPO safety inspection, and that if the pre-purchase accident had been significant, SAHARA would not be selling the vehicle to him. *Sep. Stmt. # 61, Appx. 326 Decl. of POOLE ¶ 2, Vol. 2, Appx. 282*

A four corners review of the information contained in the ACE does ***not*** comport with the description of the collision as represented by Mr. Spruell with respect to the pre-purchase collision being "minor" in nature and not significant. *See Decl. of POOLE ¶¶ 4-6, Appx. 283-284; Sep. Stmt. # 64-66 and 107, Vol. 2, Appx. 327 and 336; ACE; Vol. 2, Appx. 361-368.*

At a bare minimum, it is a question of fact for the jury to decide whether the affirmative representations made to POOLE regarding the nature and extent of the pre-purchase collision were "false" under NRS 598.0915(15). More specifically, it is up to the jury, not the Court, to determine if **\$4,088.70** in previous damage, along with all of the

components and parts that were replaced or repaired on the vehicle as disclosed in the ACE was merely a “minor” accident, especially when dealing with the purchase of a Dodge CPO vehicle.

B. There are genuine issues of material fact that SAHARA violated 16 C.F.R. § 455.1(a)(1), a federal regulation relating to the sale of goods

NRS 598.0923(3) states in pertinent part that it is a deceptive trade practice to: “violate a state or federal statute or regulation *relating to the sale ... of goods*” 16 C.F.R. § 455.1(A)(1) states:

It is a deceptive act or practice for any used vehicle dealer, when that dealer sells or offers for sale a used vehicle in or affecting commerce as *commerce* is defined in the Federal Trade Commission Act:

To misrepresent the mechanical condition of a used vehicle.

16 C.F.R. § 455.1(A)(1) is a federal regulation “relating to the sale of goods.” 16 C.F.R. § 455.1(A)(1) does not in and of itself provide for a private claim for relief. However, because it is a federal statute “relating to the sale of goods,” NRS 598.0923(3) “borrows” from 16 C.F.R. § 455.1(A)(1)’s provisions. Consequently, any violation of 16 C.F.R. § 455.1(A)(1) now becomes an actionable and independent **state** deceptive trade practice pursuant to NRS 598.0923(3), which, in turn, is statutory consumer fraud

under NRS 41.600(2)(e), *supra*. For the reasons previously set forth in this briefing regarding SAHARA making a false representation in a transaction, there are genuine issues of material fact with respect to POOLE's claim for violation of NRS 598.0923(3).

IV. There are genuine issues of material fact that SAHARA represented goods for sale that were of a particular standard, quality or grade that SAHARA *knew or should have known* were of another standard, quality or grade and made a false representation as to the *certification* of goods for sale.

NRS 598.0915(2) and (7) state:

A person engages in a “deceptive trade practice” when in the course of his or her business or occupation he or she knowingly:

(2) Represents that goods for sale are of a particular standard, quality or grade ***if he knows or should know*** that they are of another standard, quality, grade, style or model.

(7) Makes a ***false representation*** as to the source, sponsorship, approval ***or certification*** of goods for sale.

Merely preparing and presenting a “passing” CPO checklist and having POOLE sign it did not irrebuttably establish that the vehicle at issue was “properly certified” as a Dodge CPO. In dismissing POOLE's claim based on violation of NRS 598.0915(2) and (7), the Court appears to have improperly established a ***quasi-irrebuttable*** “presumption” that the vehicle was properly certified as a Dodge CPO because the vehicle had allegedly undergone and “passed” the 125 point CPO inspection undertaken by

SAHARA, as evidenced by the CPO checklist generated by SAHARA's mechanic. *Order on MSJ, Vol. 4, Appx. 847; 3-8; CPO checklist, Vol. 2, Appx. 370-371.* Because POOLE was provided with a "passing" CPO checklist, of which he relied upon, the Court ruled that this foreclosed POOLE from arguing that SAHARA misrepresented the CPO certification status of the vehicle. *Order on MSJ, Vol. 4, Appx. 847; 3-8.*

However, as meticulously set forth in POOLE's Separate Statement in opposition to Defendants' MSJ, (*fact # 92-104, Vol. 2, Appx. 333-336*), POOLE credibly challenged and got beyond the "the four corners" of SAHARA's "passing" CPO inspection check list. POOLE demonstrated the existence of genuine issues of material fact as to why the vehicle was **not** of CPO standard, quality or grade, and that SAHARA made a false representation as to the vehicle being Dodge CPO certified. *Sep. Stmt. # 100-103, Appx. 335; Decl. of Avillini ¶¶ 14-20, Vol. 2, Appx. 292-296.*

POOLE presented admissible evidence that the vehicle should never should have been certified as a Dodge CPO in the first place because it was not repaired according to the stringent FCA factory repair specifications involving the **prohibited use** of "reconditioned" wheels in the repair of

Dodge vehicles. *FCA Pos. Stmt.*, Vol. 2, Appx. 403; *Sep. Stmt. # 100-103*, Appx. 335; *Decl. of Avillini ¶¶ 14-16*, Vol. 2, Appx. 292-296.¹⁵

As previously demonstrated herein, it was ***undisputed*** that SAHARA had possession of the ACE and was fully aware of all of its contents on the day of sale. *Sep. Stmt. # 3-9, 72, 90, and 104*, Vol. 2, Appx. 312-313, 328, 332, and 336; *ACE*; Vol. 2, Appx. 361-368. Based on SAHARA's actual knowledge of the contents of the ACE at time of sale, POOLE demonstrated triable issues that ***SAHARA either actually knew, or should have known, the following:***

- (1) That as a result of the pre-purchase collision, (as set forth in the ACE), the vehicle's front left wheel was damaged and was repaired with either a "reconditioned" or "recycled" front left wheel. *Sep. Stmt. # 92-94*, Vol. 2, Appx. 333; *ACE*, Vol. 2, Appx. 362-363; *Decl. of Avillini ¶¶ 14-16*, Vol 2, Appx. 292-294.
- (2) That a "reconditioned" wheel under the FCA factory position statement is defined as a "previously damaged" wheel, meaning a wheel that has been bent, broken, cracked or some other physical damage which may have compromised the wheel structure. *FCA statement*, Vol. 2, Appx. 403; *Decl. of Avillini ¶¶ 14-16*, Vol 2, Appx. 292-294.

¹⁵ As a Dodge factory franchised and authorized repair facility, the FCA official position statement on the prohibited use of "reconditioned" wheels for the repair of Dodge vehicles would have or should have been known to SAHARA. *Sep. Stmt. # 99*, Vol. 2, Appx. 335 ; *Decl. of Avillini ¶ 15*, Vol. 2, Appx. 293

- (3) That the definition of a “recycled” wheel under the ACE is a “used” wheel. *ACE, Vol. 2, Appx. 365; ACE, Vol 2, Appx. 365. Decl. of Avillini ¶ 16, Vol 2, Appx. 294.*
- (4) That the **prohibited used** of “reconditioned” (previously damaged) wheels in the repair of Dodge vehicles is clearly set forth in the FCA position statement. *Sep. Stmt. # 99-100, Appx. 335, Decl. of Avillini ¶ 16, Vol 2, Appx. 294.*
- (5) The FCA position statement clearly indicates that the “replating or chrome plated wheels is not an acceptable repair procedure as this may alter the mechanical properties that affect fatigue.” *Sep. Stmt. # 96, Vol. 2, Appx. 334, FCA Stmt., Vol 2, Appx 403*
- (6) The ACE clearly indicates the front left wheel was sent out to be “rechromed,” but then also states the wheel was replaced with a “recycled” (used) wheel. *ACE, Vol. 2, Appx. 362-363, Decl. of Avillini, ¶ 14, Vol. 2, Appx. 292-293.*
- (7) According the FCA factory position statement, use of a “reconditioned” (previously damaged) or “recycled” (used) wheel in the repair of a Dodge vehicle **CAN RESULT IN A SUDDEN CATASTROPHIC WHEEL FAILURE WHICH COULD CAUSE LOSS OF CONTROL AND RESULT IN INJURY OR DEATH.** [emphasis added] *Sep. Stmt. # 95: Vol. 2, Appx. 334; FCA Stmt., Vol. 2, Appx. 403; Decl. of Avillini ¶ 14, Vol 2, Appx. 292-293.*
- (8) That use of a “reconditioned” (previously damaged) or “recycled” (used) wheel in the repair of a Dodge vehicle does **not comply** with the FAC factory specifications set forth in the official FCA factory position statement about the use of reconditioned” wheels on Dodge vehicles. *FCA Stmt., Vol. 2, Appx. 403; Decl. of Avillini ¶ 14-16, Vol 2, Appx. 292-294.*

POOLE’s expert, Mr. Avillini, stated the following in his declaration in opposition to Defendants’ MSJ:

- (1) Whether the left front wheel on the vehicle was repaired by being “rechromed” or replaced with a “used” (recycled) wheel, either method would **not** meet Dodge factory repair specifications under the FCA factory position statement. *Sep. Stmt. # 101, Vol. 2, Appx. 335, Decl. of Avillini ¶¶ 14-16, Vol. 2, Appx. 292-294.*
- (2) ***In addition to*** being out of compliance with the FAC factory position statement, POOLE’s vehicle was still **not** repaired in compliance of the FCA factory specifications. *Sep. Stmt. # 101-103, Vol. 2, Appx. 335, ACE, Vol. 2, Appx. 361-368; FCA Pos. Stmt., Vol. 2, Appx. 403; Decl. of Avillini ¶¶ 14-20, Vol. 2, Appx. 292-296.*
- (3) The photos of the pre-purchase collision repair of the vehicle ***that depict the damage to the left front wheel*** show a sizeable chip taken out of its rim. *Sep. Stmt. # 97, Vol. 2, Appx. 334; Photos, Appx. Vol. 2, Appx. 451-452; Decl. of Avillini. ¶ 16, Vol. 2, Appx. 293-294.*
- (4) The chip taken out of the edge of the front left wheel on the vehicle meets the definition of a damaged wheel under the FCA factory position statement, and the repair and/or reuse of that wheel on a Dodge vehicle would **not** be in compliance with FCA factory repair specifications. *FCA Stmt., Vol. 2, Appx. 403; Decl. of Avillini ¶ 16, Vol. 2, Appx. 292-293.*
- (5) Mr. Avillini has dealt with ***hundreds*** of the types of wheels with the same type of damage to them (a chip out of the rim). This type of damage that can easily cause a crack to propagate into the wheel causing sudden loss of control, and that is why FCA prohibits the use of reconditioned or recycled wheels in the repair of Dodge vehicles. *Sep. Stmt. # 97, Vol. 2, Appx. 334; Photos, Appx. Vol. 2, Appx. 451-452; Decl. of Avillini. ¶ 16, Vol. 2, Appx. 293-294.*

- (6) POOLE's vehicle was **not** repaired according FCA factory specifications in compliance with the FCA position statement involving the prohibited use of "reconditioned" wheels. *Sep. Stmt. # 101-103, Vol. 2, Appx. 335, ACE, Vol. 2, Appx. 361-368; FCA Pos. Stmt., Vol. 2, Appx. 403; Decl. of Avillini ¶¶ 14-16, Vol. 2, Appx. 292-294.*

Based on the aforementioned, POOLE met his countervailing burden of persuasion under Rule 56 in opposing Defendants' MSJ, and it should have been denied.

V. If there are genuine issues of material fact involving POOLE's statutory claim for consumer fraud, then by necessity, there are triable issues with respect to all of POOLE's equitable and declaratory claims for relief

As a threshold matter, pursuant to NRS 41.600(3)(b), a consumer fraud claimant is statutorily and expressly authorized to also seek any and all appropriate equitable claims or remedies for violation of any of the enumerated items set forth in NRS 41.600(2)(e). However, any consumer fraud-related equitable remedy or claim is entirely predicated upon a viable claim for statutory consumer fraud. *Order on MSJ, Appx. 847; 10-14.* Should this Court find there are triable issues involving POOLE's 41.600(2)(e) claim for statutory consumer fraud for violation of the NDTPA, then all of POOLE's equitable claims should also be reinstated.

Furthermore, NRS 30.040(1) states in pertinent part :

Any person interested under a ... ***written contract ... or whose rights, status or other legal relations ARE AFFECTED BY A ... CONTRACT...*** may have determined ***ANY QUESTION OF ... VALIDITY ARISING UNDER THE CONTRACT...*** and obtain a declaration of rights, status or other legal relations thereunder.

As alleged in the FAC, POOLE seeks declaratory judgment ***as to the validity*** of the installment contract he entered into with SAHARA as a result of SAHARA's consumer fraud, rendering the contract invalid or otherwise unenforceable because it was void ab initio. *FAC ¶¶ 44-46, Vol. 1, Appx. 30-31*. If there were triable issues of material fact concerning POOLE's statutory claim for consumer fraud, then there were also issues of fact regarding POOLE's claim for declaratory relief.

VI. POOLE had a statutory claim for relief directly against COREPOINT who issued the vehicle dealership licensing bond to SAHARA under NRS 482.345.

A. To bring the bond company in as a direct-party defendant under the provisions of NRS 482.345(7)(a), the vehicle dealership must be a party to the action.

In dismissing POOLE's statutory claim for consumer fraud against SAHARA, the legal effect of that dismissal also resulted in a concurrent dismissal of COREPOINT. *Order on MSJ, Appx. 845-847*. This is because NRS 482.345(5) and (7), *infra*, requires a claimant to have a viable claim ***against the dealership to be able to seek compensation from the bond***. With the underlying predicate claim of consumer fraud being

dismissed as against SAHARA, there was no remaining claim against COREPOINT to seek recovery under the bond. This is because COREPOINT's liability in this case was strictly vicarious and/or derivative in nature and entirely predicated on a viable claim against SAHARA.

However, the opposite is also true. If POOLE had a viable claim against SAHARA for statutory deceptive trade practices, then POOLE also had a direct statutory claim for relief against the bond company under NRS 482.345(7) to seek compensation from the bond.

Defendants contended in their MSJ that NRS 482.345(7)(a) did not allow POOLE to bring in COREPOINT as a direct party Defendant because POOLE had to first obtain a judgment against COREPOINT **before** he could sue COREPOINT directly to seek compensation from the bond. *Defs' MSJ, Vol. 1, Appx. 074: 11-18.* Defendants' interpretation of NRS 482.345(7)(a) misconstrues the clear and unambiguous language of the statute, would lead to absurd results and multiplicity of actions, and would also contradict the Legislative Digest dealing with the 2013 amendments to the statute (which expressly reconfirmed existing law as to claimant's right to bring in the bond company as a direct party defendant under NRS 482.345(7)). *Infra.*

NRS 482.345(7)(a) states in pertinent part: ***if a consumer has a claim for relief against a dealer*** ... representative or salesperson, ***the consumer may:***

- (a) ***bring and maintain an action in any court of competent jurisdiction...***

NRS 482.345(7), goes on to state “if the court ... enters judgment against the dealer... it is binding on the surety.” The actual entry of a judgment is ***not*** a prerequisite for standing to sue the bond company directly under NRS 482.345(7)(a), *infra*. Rather the entry of judgment is merely the triggering event that would allow POOLE to acquire compensation from the bond ***if*** he prevailed and judgment was entered against the dealership.

If the claimant does not prevail against the dealership, then the bond company is not vicariously liable to the claimant and has no liability. But the entry of judgment ***has nothing to do*** with the POOLE’s ability to name the bond company as a direct party defendant under NRS 482.345(7)(a), ***as long as the claimant has a qualifying claim of relief against the dealership***. See NRS 482.345, *infra*. NRS 482.345(7)(a) does not “require” a claimant to first obtain a judgment against the dealer, and then file a secondary “collection” action against the bond to seek compensation from the bond if a claimant prevails in the underlying action, but that is

precisely what Defendants argued in their *Defs' MSJ; Vol. 1, Appx. 074: 11-18*.

B. Bringing in the bond company as a direct party defendant pursuant to NRS 482.345(7) is one of three (3) statutorily authorized ways a consumer can seek compensation from the bond

The Supreme Court reviews issues of statutory construction *de novo*. *Harris Assocs. v. Clark Cty. Sch. Dist.*, 119 Nev. 638, 641-42, 81 P.3d 532, 534 (2003). When “the words of the statute have a definite and ordinary meaning, this Court will not look beyond the plain language of the statute, unless it is clear that this meaning was not intended”. *Id.*

NRS 482.345(7) unambiguously gives a NRS 41.600 consumer fraud claimant three methods to seek compensation from the bond: (1) file a legal action in court, (2) file a claim with the DMV and for good cause shown the DMV will determine the amount of compensation to be paid to the claimant by the bond, or (3) settle with the bond company in a notarized writing, and if the DMV finds there is no collusion and the settlement is made in good faith, the DMV will direct the bond to pay the agreed upon compensation to the claimant.

The language of NRS 482.345(7)(a), (b) and (c) is clear. It says “the claimant **may...**” avail themselves of any of the three statutorily authorized methods to seek compensation from the bond involving a claim alleged

against a vehicle dealer, or any of their representatives working in the course and scope of their employment with the dealership. It is entirely at the claimant's discretion as to which option he or she wished to proceed on. One of those statutorily authorized methods is to file an action in a court of competent jurisdiction. *NRS 482.345((7)(a). Infra.* POOLE opted for method number one by filing an action in Court naming the dealer (SAHARA) and the bond (COREPOINT). It is that simple of an analysis.

C. POOLE plead the requisite elements of a statutory claim against COREPOINT in his FAC and also demonstrated that triable issues existed involving those same elements in opposition to Defendants' MSJ

For COREPOINT to be brought in as a direct party Defendant, POOLE was required to demonstrate triable issues existed on summary judgment with respect to the requisite provisions of NRS 482.345(1), (5), (7) and (10).

NRS 482.345(1), (5), (7) and (10) state in pertinent part :

1. Before any dealer's license ... is furnished to a dealer ... the Department shall require that the applicant ... to procure and file with the Department a good and sufficient bond ... and conditioned that the applicant or any employee who acts on behalf of the applicant within the scope of his or her employment shall conduct business as a dealer, without breaching a consumer contract ***or engaging in a deceptive trade practice, fraud or fraudulent representation, and without violation of the provisions of this chapter.***

5. The undertaking on the bond is ***for the use and benefit of the consumer*** and includes any breach of a consumer contract, ***deceptive trade practice, fraud, fraudulent representation*** or violation of any of the provisions of this chapter by the representative... or the salesperson of any licensed dealer ... who acts for the dealer ... on his or her behalf and within the scope of the employment of the representative or salesperson.

7. ***If a consumer has a claim for relief against a dealer*** ... representative or salesperson, the consumer ***may***:

(a) ***bring and maintain an action in any court of competent jurisdiction.*** If the court enters:

(1) A judgment on the merits against the dealer... the judgment is binding on the surety.

(2) A judgment other than on the merits against the dealer ... without limitation, a default judgment, the judgment is binding on the surety only if the surety was given notice and an opportunity to defend at least 20 days before the date on which the judgment was entered against the dealer ... representative or salesperson.

(b) ***Apply to the Director, for good cause shown, for compensation from the bond.*** The Director may determine the amount of compensation and the consumer to whom it is to be paid. The surety shall then make the payment.

(c) ***Settle the matter with the dealer*** ... representative or salesperson. If such a settlement is made, the settlement must be reduced to writing, signed by both parties and acknowledged before any person authorized to take acknowledgments in this State, and submitted to the Director ***with a request for compensation from the bond.*** If the Director determines that the settlement was reached in good faith and there is no evidence of collusion or fraud between the parties in reaching the settlement, ***the surety shall make the payment to the***

consumer in the amount agreed upon in the settlement.

10. As used in this section, “consumer” means **any person who comes into possession of a vehicle as a final user for any purpose** other than offering it for sale.

Keeping this statutory framework in mind, to have a claim against COREPOINT under NRS 482.345, POOLE demonstrated triable issues existed with respect to the following:

- SAHARA was a vehicle dealer as defined in Chapter 482. NRS 482.345(7); *Sep. Stmt. # 2 and 11, Vol. 2, Appx. 313; Depo. of Grant, Vol. 2, Appx. 408.*
- POOLE had **claims for relief against SAHARA**. NRS 482.345(7).
- POOLE’s claims for relief against SAHARA **were related to or arising from** deceptive trade practices caused by a representative of the dealer within the scope of their employment with the dealer. *See NRS 482.345(1) and (5),*
- POOLE was a “consumer,” meaning any person **who comes into possession of a vehicle as a final user for any purpose** other than offering it for sale. *See NRS 482.345(10).*

Based on the aforementioned, POOLE met the requisite showing in opposition to Defendants’ MSJ to have a viable claim against COREPOINT under NRS 482.345(7)(a), assuming this Court finds that the Trial Court erred in dismissing POOLE’s claim for consumer fraud under NRS 41.600(2)(e) against SAHARA.

D. The legislative digest relating to the 2014 legislative amendments to NRS 482.345 *clearly reconfirmed* a claimant's right under already existing law to bring in the bond company as a direct party defendant to seek compensation from the bond

Finally, as submitted in opposition to Defendants' MS, the Legislative Digest regarding the 2014 amendments to NRS 482.345 makes it clear that a consumer who has a claim against a dealer may sue the bond company directly in the same action. *Vol. 3, Appx. 571-578*. As the digest clearly sets out, the 2014 amendments ***further reconfirmed existing law*** regarding a consumer's right to bring in a bond company under NRS 482.345 ***as a direct party defendant..***

VII. POOLE was damaged and/or suffered other monetary or other pecuniary loss as a result of SAHARA's deceptive trade practices

Because of the nature and extent of the damage caused to the vehicle as a result of the pre-purchase collision, the vehicle sustained substantial diminished value, causing the vehicle to be worth thousands less the day POOLE purchased the vehicle from SAHARA. *Sep. Stmt. # 105, Vol. 2, Appx. 336; Decl. of Avillini ¶¶ 21-31, Vol. 2, Appx. 296-302*. Furthermore, as part of his purchase transaction, POOLE accepted SAHARA giving him \$4,000.00 in positive trade equity towards the purchase of the CPO vehicle which was intrinsically worth thousands less. This was the equivalent of a

down payment, which SAHARA unjustly retained because POOLE never would have agreed to giving SAHARA the trade equity but for their deceptive trade practices. *Sep. Stmt. # 106, Vol. 2, Appx. 336; Decl. of POOLE ¶ 6, Vol. 2, Appx. 284.*

Had POOLE been informed of the contents of the ACE, he never would have entered into the contract for the CPO vehicle, nor would he have consented to giving his \$ 4,000.00 positive equity position in his trade-in to be used towards the purchase of a CPO vehicle that had suffered significant diminished value. As a result of SAHARA's deceptive trade practices, SAHARA was unjustly enriched \$4,000.00 as that was a retained unjust benefit by SAHARA, which was the agreed upon value of POOLE's trade. *Sep. Stmt. # 66 and 107, Vol. 2, Appx. 336; Decl. of POOLE ¶ 5, Vol. 2, Appx. 383-284; Installment Sale Contract, Vol 3, Appx. 507-509.*

CONCLUSION

Based on the aforementioned, the Court's order granting summary judgment in favor of SAHARA and COREPOINT should be vacated and remanded for trial on all of POOLE's claims for relief as alleged in his FAC.

Dated this 11th day of June, 2018

By /s/ George O. West III
George O. West III
Law Offices of George O. West III
Consumer Attorneys Against Auto Fraud
10161 Park Run Drive, Suite 150
Las Vegas, NV 89145

Law Offices of Craig B. Friedberg, Esq.
Craig B. Friedberg, Esq.
4760 S. Pecos Road, Suite 103
Las Vegas, NV 89121

Attorneys for Appellant
DERRICK POOLE

CERTIFICATE OF COMPLIANCE

1. We hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2011 in 14-point Georgia font.

2. We further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is:

[X] proportionally spaced, has a typeface of 14 points or more and contains 13,922 words.¹⁶

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

¹⁶ This number excludes Appellant's counsel's signature page which identifies counsel and their address on page 55.

PROOF OF SERVICE

STATE OF NEVADA)
)
COUNTY OF CLARK)

On June 11, 2018, I served the forgoing document(s) described as 1) **APPELLANT’S OPENING BRIEF** interested party(ies) in this action by either fax and/or email, or by placing a true and correct copy and/or original thereof addressed as follows:

JEFF BENDAVID, ESQ
Moran, Brandon, Bendavid, Moran
630 South Fourth Street
Las Vegas, NV 89101
j.bendavid@moranlawfirm.com

☐ **(BY FIRST CLASS MAIL)** I am readily familiar with the firm’s practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal service on that same day with first class postage thereon fully prepaid at Las Vegas, NV in the ordinary course of business.

☐ **(BY PERSONAL SERVICE)** I delivered such envelope by hand to the office, and/or to the attorney listed as the addressee below.

☐ **(BY FAX SERVICE)** Pursuant to consent under NRCP, Rule 5(b), I hereby certify that service of the aforementioned document(s) via facsimile, pursuant to EDCR Rule 7.26(a), as set forth herein.

☒ **(BY EMAIL SERVICE) (Wiznet/email)** Pursuant NRCP, Rule 5(b)(2)(D), and the EDCR on electronic service, I hereby certify that service of the aforementioned document(s) via email to pursuant to the relevant and pertinent provisions of EDCR and NRCP, as set forth herein.

Executed on this 11th day of June, 2018

/s/ George O. West III
GEORGE O. WEST III

ADDENDUM “A”

ADDENDUM “A”

NRS 41.560 Relief which may be granted. The court may grant temporary or permanent equitable relief, or may enter such order as may be necessary to enforce compliance with any statute, regulation or ordinance for the protection of the air, water and other natural resources from pollution, impairment or destruction.
(Added to NRS by [1971, 861](#))

NRS 41.570 Provisions supplementary to existing administrative or regulatory provisions. The provisions of [NRS 41.540](#) to [41.570](#), inclusive, shall be supplementary to existing administrative and regulatory procedures provided by law.
(Added to NRS by [1971, 861](#))

LIABILITY OF RECEIVER OF STOLEN PROPERTY

NRS 41.580 Action by owner of property; treble damages. If property has been taken from its owner by larceny, robbery, burglary, embezzlement, theft or any other offense that is a crime against property and another person buys, receives, possesses or withholds the property under circumstances that make such conduct a violation of subsection 1 of [NRS 205.275](#), the owner of the property may bring a civil action against the person who bought, received, possessed or withheld the property and may recover treble the amount of any damage the owner has suffered, together with the owner's costs in the action and a reasonable attorney's fee.
(Added to NRS by [1973, 1050](#); A [1997, 346](#))

LENDERS' LIABILITY

NRS 41.590 Lender not liable for defects in property acquired with borrowed money. A lender who makes a loan of money, the proceeds of which are used or may be used by the borrower to finance the design, manufacture, construction, repair, modification or improvement of real or personal property, shall not be held liable to the borrower or to third persons for any loss or damage occasioned by any defect in the real or personal property so designed, manufactured, constructed, repaired, modified or improved or for any loss or damage resulting from the failure of the borrower to use due care in the design, manufacture, construction, repair, modification or improvement of such real or personal property, unless the loss or damage is the result of some other action or activity of the lender than the loan transaction.
(Added to NRS by [1973, 1189](#))

FRAUD UPON PURCHASERS; MISREPRESENTATION

NRS 41.600 Actions by victims of fraud.

1. An action may be brought by any person who is a victim of consumer fraud.

2. As used in this section, "consumer fraud" means:

(a) An unlawful act as defined in [NRS 119.330](#);

(b) An unlawful act as defined in [NRS 205.2747](#);

(c) An act prohibited by [NRS 482.36655](#) to [482.36667](#), inclusive;

(d) An act prohibited by [NRS 482.351](#); or

(e) A deceptive trade practice as defined in [NRS 598.0915](#) to [598.0925](#), inclusive.

3. If the claimant is the prevailing party, the court shall award the claimant:

(a) Any damages that the claimant has sustained;

(b) Any equitable relief that the court deems appropriate; and

(c) The claimant's costs in the action and reasonable attorney's fees.

4. Any action brought pursuant to this section is not an action upon any contract underlying the original transaction.

(Added to NRS by [1975, 1177](#); A [1985, 2261](#); [1989, 649](#); [1997, 2216](#); [2001, 490](#); [2005, 1425](#); [2007, 743](#); [2011, 268](#); [2013, 1029](#))

NRS 41.610 Actions against seller or manufacturer of unapproved drug for misrepresentation of its therapeutic effect. The purchaser of a substance which has not been approved as a drug by the Food and Drug Administration but which has been licensed for manufacture in this state has a cause of action against the seller or manufacturer for any misrepresentation of its therapeutic effect made directly to the purchaser or by publication.

(Added to NRS by [1977, 1645](#); A [1983, 111](#))

LIABILITY REGARDING NEGOTIABLE INSTRUMENTS AND CREDIT AND DEBIT CARDS

NRS 41.620 Liability for issuance on nonexistent account or drawing on insufficient money; liability for use of invalid credit or debit card.

1. Except as otherwise provided in [NRS 604A.490](#), any person who:

(a) Makes, utters, draws or delivers a check or draft for the payment of money drawn upon any financial institution or other person, when that person has no account with the drawee of the instrument or has insufficient money, property or credit with the drawee to pay; or

(b) Uses a credit card or debit card to obtain money, goods, property, services or anything of value, when that person knows or should have known the credit card or debit card is no longer valid,

[Rev. 5/24/2016 4:12:12 PM--2015]

CHAPTER 598 - DECEPTIVE TRADE PRACTICES

GENERAL PROVISIONS

NRS 598.0903	Definitions.
NRS 598.0905	“Advertisement” defined.
NRS 598.0907	“Certification mark” defined.
NRS 598.091	“Collective mark” defined.
NRS 598.0913	“Commissioner” defined.
NRS 598.0915	“Deceptive trade practice” defined.
NRS 598.0916	“Deceptive trade practice” defined.
NRS 598.0917	“Deceptive trade practice” defined.
NRS 598.0918	“Deceptive trade practice” defined.
NRS 598.092	“Deceptive trade practice” defined.
NRS 598.0921	“Deceptive trade practice” defined.
NRS 598.0922	“Deceptive trade practice” defined.
NRS 598.0923	“Deceptive trade practice” defined.
NRS 598.0924	“Deceptive trade practice” defined.
NRS 598.0925	“Deceptive trade practice” defined.
NRS 598.0927	“Director” defined.
NRS 598.0933	“Elderly person” defined.
NRS 598.0934	“Goods” defined.
NRS 598.0935	“Mark” defined.
NRS 598.0936	“Person with a disability” defined.
NRS 598.0937	“Property” defined.
NRS 598.094	“Sale” defined.
NRS 598.0943	“Service mark” defined.
NRS 598.0945	“Trademark” defined.
NRS 598.0947	“Trade name” defined.
NRS 598.0953	Engaging in deceptive trade practice prima facie evidence of intent to injure competitor; other rights of action not limited.
NRS 598.0955	Applicability of NRS 598.0903 to 598.0999 , inclusive.
NRS 598.0957	Director may delegate powers and duties.
NRS 598.0959	Advisory committees: Creation and appointment; membership; compensation.
NRS 598.096	Powers of Director, Commissioner and Attorney General.
NRS 598.0963	Additional powers of Attorney General.
NRS 598.0964	Use and sharing of confidential information by Attorney General; cooperation between Attorney General and other agencies and officials.
NRS 598.0965	Commissioner or Director to provide investigative assistance to Attorney General; legal advice and guidance by Attorney General.
NRS 598.0966	Revolving account for Consumer Affairs Division: Creation; duties of Director or designee; deposits; use.
NRS 598.0967	Commissioner and Director: Subpoenas; hearings; regulations.
NRS 598.097	Commissioner, Director and Attorney General: Equitable relief.
NRS 598.0971	Orders for enforcement: Authority of Commissioner and Director or designee; judicial review and enforcement; administrative fine; civil penalty and equitable relief.
NRS 598.0973	Civil penalty for engaging in deceptive trade practice directed toward elderly person or person with disability.
NRS 598.0974	Civil penalty prohibited under certain circumstances.
NRS 598.0975	Deposit and use of money collected pursuant to NRS 598.0903 to 598.0999 , inclusive; exception for criminal fines and restitution.
NRS 598.0977	Civil action by elderly person or person with disability against person who engaged in deceptive trade practice; remedies.
NRS 598.0979	Restraining orders; injunctions; assurances of discontinuance.
NRS 598.098	Use and disclosure of information by Commissioner or Director; regulations.
NRS 598.0983	Actions by district attorney: Prerequisites.
NRS 598.0985	Actions by district attorney: Injunctive relief.
NRS 598.0987	Actions by district attorney: Preliminary notice required before filing; exception.
NRS 598.0989	Actions by district attorney: Venue; powers of court.
NRS 598.099	Injunctions without prior notice.

[NRS 598.0993](#)
[NRS 598.0995](#)
[NRS 598.0997](#)
[NRS 598.0999](#)

Relief for injured persons.
 Assurances of discontinuance.
 Service of notices.
 Civil and criminal penalties for violations.

PYRAMID PROMOTIONAL SCHEMES; ENDLESS CHAINS

[NRS 598.100](#)
[NRS 598.110](#)
[NRS 598.120](#)
[NRS 598.130](#)

Definitions.
 Pyramid promotional schemes or endless chains are deceptive trade practices.
 Contracts and agreements voidable by participant.
 Injunctive relief; receivership.

SOLICITATIONS FOR OR ON BEHALF OF CHARITABLE ORGANIZATIONS

[NRS 598.1305](#)

Prohibited acts; jurisdiction of Attorney General; violation constitutes deceptive trade practice.

SALES PROMOTIONS

[NRS 598.131](#)
[NRS 598.1315](#)
[NRS 598.132](#)
[NRS 598.1325](#)
[NRS 598.133](#)
[NRS 598.1335](#)
[NRS 598.134](#)
[NRS 598.135](#)
[NRS 598.135](#)
[NRS 598.136](#)
[NRS 598.137](#)
[NRS 598.138](#)
[NRS 598.139](#)

Definitions.
 "Advertisement" defined.
 "Advertiser" defined.
 "Advertising premium" defined.
 "Merchandise" defined.
 "Sale" defined.
 "Sales promotion" defined.
 Scope. [Effective through June 30, 2017.]
 Scope. [Effective July 1, 2017.]
 Representation that person has won prize or is winner of contest.
 Representation that person has chance to receive prize.
 Representation that person has been specially selected.
 Violation constitutes deceptive trade practice.

DOOR-TO-DOOR SALES

[NRS 598.140](#)
[NRS 598.150](#)
[NRS 598.160](#)
[NRS 598.170](#)
[NRS 598.180](#)
[NRS 598.200](#)
[NRS 598.210](#)
[NRS 598.220](#)
[NRS 598.230](#)
[NRS 598.240](#)
[NRS 598.250](#)
[NRS 598.260](#)
[NRS 598.280](#)
[NRS 598.2801](#)

Definitions.
 "Business day" defined.
 "Buyer" defined.
 "Consumer goods or services" defined.
 "Door-to-door sale" defined.
 "Place of business" defined.
 "Purchase price" defined.
 "Seller" defined.
 Right of buyer to rescind contract of sale; notice of rescission.
 Seller to furnish buyer copy of receipt or contract; required contents.
 Seller to furnish buyer form for notice of cancellation.
 Penalty for cancellation permitted; limitations.
 Unlawful acts.
 Violation constitutes deceptive trade practice.

SELLERS OF TRAVEL

GENERAL PROVISIONS

[NRS 598.305](#)

Definitions. [Effective July 1, 2017.]

[NRS 598.307](#)
[NRS 598.315](#)
[NRS 598.317](#)
[NRS 598.325](#)
[NRS 598.335](#)
[NRS 598.345](#)
[NRS 598.356](#)
[NRS 598.361](#)
[NRS 598.365](#)

“Account” defined. [Effective July 1, 2017.]
 “Commissioner” defined. [Effective July 1, 2017.]
 “Consumer” defined. [Effective July 1, 2017.]
 “Division” defined. [Effective July 1, 2017.]
 “Seller of travel” defined. [Effective July 1, 2017.]
 “Travel services” defined. [Effective July 1, 2017.]
 “Vacation certificate” defined. [Effective July 1, 2017.]
 Seller to maintain trust account; exception. [Effective July 1, 2017.]
 Seller to register, deposit security and pay fees before advertising services or conducting business in this State; certificate of registration; renewal of certificate. [Effective July 1, 2017.]
 Seller to include registration number in advertising; form. [Effective July 1, 2017.]
 Seller to display notice of recovery of financial damages from Recovery Fund; administrative fines and disciplinary action. [Effective July 1, 2017.]

RECOVERY FUND

[NRS 598.371](#)
[NRS 598.372](#)
[NRS 598.373](#)
[NRS 598.374](#)

Administration of Fund: Separate accounting; limitations on use. [Effective July 1, 2017.]
 Administration of Fund: Report to Legislature; employment of persons; interest on money; limitations on balance; regulations. [Effective July 1, 2017.]
 Recovery from Fund: Deadline for complaint; hearing; judgment of court; action by Division. [Effective July 1, 2017.]
 Recovery from Fund: Eligibility; limitations on payment; subrogation of claim. [Effective July 1, 2017.]

SECURITY DEPOSITED BY SELLER

[NRS 598.375](#)
[NRS 598.385](#)
[NRS 598.395](#)

Security required for registration: Form; term; amount; records; rejection for nonconformance; change in form; inadequate amount; exception. [Effective July 1, 2017.]
 Rights and remedies of injured consumers; resolution by Division of claims against security; regulations. [Effective July 1, 2017.]
 Release of security if seller ceases to operate or registration expires. [Effective July 1, 2017.]

SIGHTSEEING TOURS

[NRS 598.405](#)
[NRS 598.416](#)
[NRS 598.425](#)
[NRS 598.435](#)
[NRS 598.445](#)
[NRS 598.455](#)
[NRS 598.465](#)
[NRS 598.471](#)

Definitions. [Effective July 1, 2017.]
 “Advertise” and “advertisement” defined. [Effective July 1, 2017.]
 “Commissioner” defined. [Effective July 1, 2017.]
 “Division” defined. [Effective July 1, 2017.]
 “Sightseeing tour” defined. [Effective July 1, 2017.]
 “Tour broker” defined. [Effective July 1, 2017.]
 “Tour operator” defined. [Effective July 1, 2017.]
 Tour broker and tour operator to register, pay fee and, if applicable, deposit security before advertising services or conducting business in this State; certificate of registration; renewal of certificate. [Effective July 1, 2017.]
 Tour broker and tour operator required to disclose total price in advertisement and prohibited from charging higher amount; notice required on billing invoice; tour broker and tour operator required to honor valid coupon; violation constitutes deceptive trade practice. [Effective through June 30, 2017.]
 Tour broker and tour operator required to disclose total price in advertisement and prohibited from charging higher amount; notice required on billing invoice; tour broker and tour operator required to honor valid coupon; violation constitutes deceptive trade practice. [Effective July 1, 2017.]
 Applicability of provisions limited to tour brokers and tour operators operating in certain counties. [Effective July 1, 2017.]
 Security required to be deposited by tour broker and tour operator: Form; term; amount; records; rejection for nonconformance; change in form; inadequate amount. [Effective July 1, 2017.]
 Rights and remedies of injured consumers; resolution by Division of claims against security; regulations. [Effective July 1, 2017.]
 Release of security if tour broker or tour operator ceases to operate. [Effective July 1, 2017.]
 Regulations. [Effective July 1, 2017.]

GRANT WRITING SERVICES

[NRS 598.535](#)
[NRS 598.545](#)
[NRS 598.555](#)
[NRS 598.565](#)
[NRS 598.575](#)
[NRS 598.585](#)
[NRS 598.595](#)

Definitions.
 “Buyer” defined.
 “Grant” defined.
 “Grant writing service” defined.
 Applicability.
 Contracts for grant writing services: Requirements; content.
 Violation constitutes deceptive trade practice.

CREDIT SERVICE ORGANIZATIONS, ORGANIZATIONS FOR BUYING GOODS OR SERVICES AT DISCOUNT, DANCE STUDIOS AND HEALTH CLUBS**GENERAL PROVISIONS**

NRS 598.701	Definitions.
NRS 598.706	“Commissioner” defined.
NRS 598.711	“Division” defined.
NRS 598.716	“Registrant” defined.
NRS 598.721	Registration: Application; fee; deposit of security; certificate of registration; renewal of certificate.
NRS 598.726	Security required for registration: Form; term; records; rejection for nonconformance; change in form; inadequate amount.
NRS 598.731	Rights and remedies of injured consumers; resolution by Division of claims against security; regulations.
NRS 598.736	Release of security if registrant ceases to operate or registration expires.

CREDIT SERVICE ORGANIZATIONS

NRS 598.741	Definitions.
NRS 598.746	Prohibited acts: Receiving money before complete performance; receiving money for referral to provider of credit; misleading statements; other fraudulent or deceptive acts.
NRS 598.752	Organization to register and deposit security before advertising services or conducting business in this State; separate security not required from salesperson, agent or representative of organization; regulations.
NRS 598.757	Organization to provide buyer certain information in writing.
NRS 598.762	Requirements of contract for purchase of services; copy of contract must be retained by organization.
NRS 598.767	Organization to maintain registered agent for service of legal process.
NRS 598.772	Waiver of statutory rights prohibited; burden of proof upon person claiming exemption or exception from definition.
NRS 598.777	Buyer’s action for recovery of damages or injunctive relief; attorney’s fees; punitive damages.
NRS 598.782	Criminal penalty.
NRS 598.787	Provisions and remedies not exclusive; violation constitutes deceptive trade practice.

ORGANIZATIONS FOR BUYING GOODS OR SERVICES AT DISCOUNT

NRS 598.840	Definitions. [Effective through June 30, 2017.]
NRS 598.840	Definitions. [Effective July 1, 2017.]
NRS 598.845	Scope. [Effective July 1, 2017.]
NRS 598.851	Organization to register and post security before advertising services or conducting business in this State. [Effective July 1, 2017.]
NRS 598.852	Organization to register on prescribed form and pay fee; certificate of registration; renewal of certificate. [Effective July 1, 2017.]
NRS 598.853	Security required for registration: Form; term; records; rejection for nonconformance; change in form; inadequate amount. [Effective July 1, 2017.]
NRS 598.854	Rights and remedies of injured consumers; resolution by Division of claims against security; regulations. [Effective July 1, 2017.]
NRS 598.8541	Release of security if registrant ceases to operate or registration expires. [Effective July 1, 2017.]
NRS 598.855	Trust account required for payments on contracts. [Effective July 1, 2017.]
NRS 598.860	Trust account required for payments on goods and services. [Effective July 1, 2017.]
NRS 598.865	Administration of trust accounts; audits. [Effective July 1, 2017.]
NRS 598.870	Disclosure of information to buyer required before buyer signs contract or application for membership.
NRS 598.875	Requirements for contracts for membership. [Effective through June 30, 2017.]
NRS 598.875	Requirements for contracts for membership. [Effective July 1, 2017.]
NRS 598.880	Limits on contracts for membership.
NRS 598.885	Cancellation of contract by buyer; notice required.
NRS 598.890	Membership of buyer effective 7 days after contract signed.
NRS 598.895	Refund required, if requested, for goods not delivered within 6 weeks.
NRS 598.900	Untrue or misleading statements by organization prohibited; effect on contract.
NRS 598.905	Correction of violations.
NRS 598.910	Effect of transfer by organization of its obligation to provide goods or services; circumstances under which buyer may rescind contract.
NRS 598.915	Waiver of statutory rights is void. [Effective July 1, 2017.]
NRS 598.920	Actions against organization; restitution, treble damages, attorney’s fees and costs may be awarded.
NRS 598.930	Remedies not exclusive; violation constitutes deceptive trade practice. [Effective through June 30, 2017.]
NRS 598.930	Remedies not exclusive; violation constitutes deceptive trade practice. [Effective July 1, 2017.]

DANCE STUDIOS AND HEALTH CLUBS

NRS 598.940	Definitions.
NRS 598.9403	“Business day” defined.
NRS 598.9405	“Buyer” defined.

NRS 598.9407	“Commissioner” defined. [Effective July 1, 2017.]
NRS 598.941	“Dance studio” defined.
NRS 598.9413	“Division” defined. [Effective July 1, 2017.]
NRS 598.9415	“Health club” defined.
NRS 598.9417	“Pre-sale” defined.
NRS 598.9418	“Registrant” defined. [Effective July 1, 2017.]
NRS 598.942	Scope.
NRS 598.944	Registration of dance studio or health club required. [Effective July 1, 2017.]
NRS 598.946	Owner of dance studio or health club to register and deposit security before advertising services or conducting business in this State: Amount of security; adjustment of security; exception from requirement to deposit security. [Effective July 1, 2017.]
NRS 598.947	Dance studio or health club to register on prescribed form and pay fee; certificate of registration; renewal of certificate. [Effective July 1, 2017.]
NRS 598.9472	Security required for registration: Form; term; records; rejection for nonconformance; change in form; inadequate amount. [Effective July 1, 2017.]
NRS 598.9474	Rights and remedies of injured consumers; resolution by Division of claims against security; regulations. [Effective July 1, 2017.]
NRS 598.9476	Release of security if registrant ceases to operate or registration expires. [Effective July 1, 2017.]
NRS 598.948	Requirements for contract between buyer and dance studio or health club. [Effective through June 30, 2017.]
NRS 598.948	Requirements for contract between buyer and dance studio or health club. [Effective July 1, 2017.]
NRS 598.950	Cancellation of contract by buyer; notice required.
NRS 598.952	False or misleading representations by dance studio or health club prohibited; effect on contract.
NRS 598.954	Rights of buyer who becomes disabled during term of contract.
NRS 598.956	Rights of buyer upon closure of dance studio or health club; election of remedies.
NRS 598.958	Rights of buyer when dance studio or health club transfers its obligations or moves its place of business.
NRS 598.960	Correction of violations.
NRS 598.962	Waiver of provisions is void.
NRS 598.966	Remedies, duties and prohibitions not exclusive; violation constitutes deceptive trade practice. [Effective through June 30, 2017.]
NRS 598.966	Remedies, duties and prohibitions not exclusive; violation constitutes deceptive trade practice. [Effective July 1, 2017.]

PROVISION OF TELECOMMUNICATION SERVICES

NRS 598.968	Definitions.
NRS 598.9682	“Provider” defined.
NRS 598.9684	“Telecommunication service” defined.
NRS 598.969	Prohibited acts: Changing a customer’s carrier without timely authorization; failure to provide timely written notices and confirmations; engaging in other fraudulent or deceptive acts; proposing contract to waive or authorize violations of the protections of this section.
NRS 598.9691	Regulations governing disclosures made by provider to customer.
NRS 598.9692	Opportunity to freeze interexchange carrier.
NRS 598.9694	Remedies, duties and prohibitions not exclusive; violation constitutes deceptive trade practice.

GENERAL PROVISIONS

NRS 598.0903 Definitions. As used in [NRS 598.0903](#) to [598.0999](#), inclusive, unless the context otherwise requires, the words and terms defined in [NRS 598.0905](#) to [598.0947](#), inclusive, have the meanings ascribed to them in those sections.
(Added to NRS by [1973, 1482](#); A [1983, 881](#); [1985, 1480, 2256](#); [1989, 649](#); [1993, 1979](#); [1995, 2174](#); [1997, 158](#); [1999, 3334](#); [2001, 660](#); [2003, 587](#); [2005, 1227, 1249](#); [2007, 738](#); [2009, 1188](#); [2013, 1031](#))

NRS 598.0905 “Advertisement” defined. “Advertisement” means the attempt by publication, dissemination, solicitation or circulation to induce, directly or indirectly, any person to enter into any obligation to lease or to acquire any title or interest in any property.
(Added to NRS by [1973, 1482](#); A [1999, 3280](#))

NRS 598.0907 “Certification mark” defined. “Certification mark” means a mark used in connection with the goods or services of a person other than the certifier to indicate geographic origin, material, mode of manufacture, quality, accuracy or other characteristics of the goods or services or to indicate that the work or labor on the goods or services was performed by members of a union or other organization.
(Added to NRS by [1973, 1482](#))

NRS 598.091 “Collective mark” defined. “Collective mark” means a mark used by members of a cooperative, association or other collective group or organization to identify goods or services and distinguish them from those of others, or to indicate membership in the collective group or organization.

ADDENDUM "A" 006

(Added to NRS by [1973, 1483](#))

NRS 598.0913 “Commissioner” defined. “Commissioner” means the Commissioner of Consumer Affairs.

(Added to NRS by [1973, 1483](#); R temp. [2009, 2732](#); R temp. [2011, 2652](#); R temp. [2013, 1054](#); A [2015, 3652, 3653](#))

NRS 598.0915 “Deceptive trade practice” defined. A person engages in a “deceptive trade practice” if, in the course of his or her business or occupation, he or she:

1. Knowingly passes off goods or services for sale or lease as those of another person.
 2. Knowingly makes a false representation as to the source, sponsorship, approval or certification of goods or services for sale or lease.
 3. Knowingly makes a false representation as to affiliation, connection, association with or certification by another person.
 4. Uses deceptive representations or designations of geographic origin in connection with goods or services for sale or lease.
 5. Knowingly makes a false representation as to the characteristics, ingredients, uses, benefits, alterations or quantities of goods or services for sale or lease or a false representation as to the sponsorship, approval, status, affiliation or connection of a person therewith.
 6. Represents that goods for sale or lease are original or new if he or she knows or should know that they are deteriorated, altered, reconditioned, reclaimed, used or secondhand.
 7. Represents that goods or services for sale or lease are of a particular standard, quality or grade, or that such goods are of a particular style or model, if he or she knows or should know that they are of another standard, quality, grade, style or model.
 8. Disparages the goods, services or business of another person by false or misleading representation of fact.
 9. Advertises goods or services with intent not to sell or lease them as advertised.
 10. Advertises goods or services for sale or lease with intent not to supply reasonably expectable public demand, unless the advertisement discloses a limitation of quantity.
 11. Advertises goods or services as being available free of charge with intent to require payment of undisclosed costs as a condition of receiving the goods or services.
 12. Advertises under the guise of obtaining sales personnel when the purpose is to first sell or lease goods or services to the sales personnel applicant.
 13. Makes false or misleading statements of fact concerning the price of goods or services for sale or lease, or the reasons for, existence of or amounts of price reductions.
 14. Fraudulently alters any contract, written estimate of repair, written statement of charges or other document in connection with the sale or lease of goods or services.
 15. Knowingly makes any other false representation in a transaction.
 16. Knowingly falsifies an application for credit relating to a retail installment transaction, as defined in [NRS 97.115](#).
- (Added to NRS by [1973, 1483](#); A [1983, 881](#); [1985, 2256](#); [1995, 1094](#); [1997, 1375](#); [1999, 3280](#); [2001, 489, 2149](#))

NRS 598.0916 “Deceptive trade practice” defined. A person engages in a “deceptive trade practice” when, in the course of his or her business or occupation, he or she disseminates an unsolicited prerecorded message to solicit a person to purchase goods or services by telephone and he or she does not have a preexisting business relationship with the person being called unless a recorded or unrecorded natural voice:

1. Informs the person who answers the telephone call of the nature of the call; and
2. Provides to the person who answers the telephone call the name, address and telephone number of the business or organization, if any, represented by the caller.

(Added to NRS by [1999, 3332](#))

NRS 598.0917 “Deceptive trade practice” defined. A person engages in a “deceptive trade practice” when in the course of his or her business or occupation he or she employs “bait and switch” advertising, which consists of an offer to sell or lease goods or services which the seller or lessor in truth may not intend or desire to sell or lease, accompanied by one or more of the following practices:

1. Refusal to show the goods advertised.
2. Disparagement in any material respect of the advertised goods or services or the terms of sale or lease.
3. Requiring other sales or other undisclosed conditions to be met before selling or leasing the advertised goods or services.
4. Refusal to take orders for the sale or lease of goods or services advertised for delivery within a reasonable time.
5. Showing or demonstrating defective goods for sale or lease which are unusable or impractical for the purposes set forth in the advertisement.
6. Accepting a deposit for the goods or services for sale or lease and subsequently switching the purchase order or lease to higher priced goods or services.
7. Tendering a lease of goods advertised for sale or a sale of goods advertised for lease or tendering terms of sale or lease less favorable than the terms advertised.

(Added to NRS by [1985, 2255](#); A [1993, 1959](#); [1999, 3281](#))

NRS 598.0918 “Deceptive trade practice” defined. A person engages in a “deceptive trade practice” if, during a solicitation by telephone or sales presentation, he or she:

1. Uses threatening, intimidating, profane or obscene language;
2. Repeatedly or continuously conducts the solicitation or presentation in a manner that is considered by a reasonable person to be annoying, abusive or harassing;
3. Solicits a person by telephone at his or her residence between 8 p.m. and 9 a.m.;
4. Blocks or otherwise intentionally circumvents any service used to identify the caller when placing an unsolicited telephone call; or
5. Places an unsolicited telephone call that does not allow a service to identify the caller by the telephone number or name of the business, unless such identification is not technically feasible.

(Added to NRS by [2001, 659](#); A [2003, 2875](#))

NRS 598.092 “Deceptive trade practice” defined. A person engages in a “deceptive trade practice” when in the course of his or her business or occupation he or she:

ADDENDUM "A" 007

1. Knowingly fails to identify goods for sale or lease as being damaged by water.
2. Solicits by telephone or door to door as a lessor or seller, unless the lessor or seller identifies himself or herself, whom he or she represents and the purpose of his or her call within 30 seconds after beginning the conversation.
3. Knowingly states that services, replacement parts or repairs are needed when no such services, replacement parts or repairs are actually needed.
4. Fails to make delivery of goods or services for sale or lease within a reasonable time or to make a refund for the goods or services, if he or she allows refunds.
5. Advertises or offers an opportunity for investment and:
 - (a) Represents that the investment is guaranteed, secured or protected in a manner which he or she knows or has reason to know is false or misleading;
 - (b) Represents that the investment will earn a rate of return which he or she knows or has reason to know is false or misleading;
 - (c) Makes any untrue statement of a material fact or omits to state a material fact which is necessary to make another statement, considering the circumstances under which it is made, not misleading;
 - (d) Fails to maintain adequate records so that an investor may determine how his or her money is invested;
 - (e) Fails to provide information to an investor after a reasonable request for information concerning his or her investment;
 - (f) Fails to comply with any law or regulation for the marketing of securities or other investments; or
 - (g) Represents that he or she is licensed by an agency of the State to sell or offer for sale investments or services for investments if he or she is not so licensed.
6. Charges a fee for advice with respect to investment of money and fails to disclose:
 - (a) That he or she is selling or offering to lease goods or services and, if he or she is, their identity; or
 - (b) That he or she is licensed by an agency of any state or of the United States to sell or to offer for sale investments or services for investments or holds any other license related to the service he or she is providing.
7. Notifies any person, by any means, as a part of an advertising plan or scheme, that he or she has won a prize and that as a condition of receiving the prize he or she must purchase or lease goods or services.
8. Knowingly misrepresents the legal rights, obligations or remedies of a party to a transaction.
9. Fails, in a consumer transaction that is rescinded, cancelled or otherwise terminated in accordance with the terms of an agreement, advertisement, representation or provision of law, to promptly restore to a person entitled to it a deposit, down payment or other payment or, in the case of property traded in but not available, the agreed value of the property or fails to cancel within a specified time or an otherwise reasonable time an acquired security interest. This subsection does not apply to a person who is holding a deposit, down payment or other payment on behalf of another if all parties to the transaction have not agreed to the release of the deposit, down payment or other payment.
10. Fails to inform customers, if he or she does not allow refunds or exchanges, that he or she does not allow refunds or exchanges by:
 - (a) Printing a statement on the face of the lease or sales receipt;
 - (b) Printing a statement on the face of the price tag; or
 - (c) Posting in an open and conspicuous place a sign at least 8 by 10 inches in size with boldface letters,
 ➔ specifying that no refunds or exchanges are allowed.
11. Knowingly and willfully violates [NRS 597.7118](#) or [597.7125](#).
12. Knowingly takes advantage of another person's inability reasonably to protect his or her own rights or interests in a consumer transaction when such an inability is due to illiteracy, or to a mental or physical infirmity or another similar condition which manifests itself as an incapability to understand the language or terms of any agreement.

(Added to NRS by [1985, 2256](#); [A 1987, 87](#); [1993, 1959](#); [1999, 3281](#); [2005, 1426](#); [2009, 2443](#); [2011, 266](#))

NRS 598.0921 "Deceptive trade practice" defined.

1. A person engages in a "deceptive trade practice" if, in the course of his or her business or occupation:
 - (a) He or she issues a gift certificate that expires on a certain date, unless either of the following is printed plainly and conspicuously on the front or back of the gift certificate in at least 10-point font and in such a manner that the print is readily visible to the buyer of the gift certificate before the buyer purchases the gift certificate:
 - (1) The expiration date of the gift certificate; or
 - (2) A toll-free telephone number accompanied by a statement setting forth that the buyer or holder of the gift certificate may call the telephone number to obtain the balance of the gift certificate and the expiration date of the gift certificate;
 - (b) He or she imposes upon the buyer or holder of a gift certificate a service fee, unless each of the following is printed plainly and conspicuously on the front or back of the gift certificate in at least 10-point font and in such a manner that the print is readily visible to the buyer of the gift certificate before the buyer purchases the gift certificate:
 - (1) The amount of the service fee;
 - (2) The event or events that will cause the service fee to be imposed;
 - (3) The frequency with which the service fee will be imposed; and
 - (4) If the service fee will be imposed on the basis of inactivity, the duration of inactivity, which must not be less than 3 continuous years of nonuse, that will cause the service fee to be imposed; or
 - (c) Regardless of the notice provided, he or she imposes upon the buyer or holder of a gift certificate:
 - (1) A service fee or a combination of service fees that exceed a total of \$1 per month; or
 - (2) A service fee that commences or is imposed within the first 12 months after the issuance of the gift certificate.
2. The provisions of this section do not apply to:
 - (a) A gift certificate that is issued as part of an award, loyalty, promotional, rebate, incentive or reward program and for which issuance the issuer does not receive money or any other thing of value;
 - (b) A gift certificate that is sold at a reduced price to an employer or nonprofit or charitable organization, if the expiration date of the gift certificate is not more than 30 days after the date of sale; and

ADDENDUM "A" 008

(c) A gift certificate that is issued by an establishment licensed pursuant to the provisions of [chapter 463](#) of NRS.

3. As used in this section:

(a) "Gift certificate" means an instrument or a record evidencing a promise by the seller or issuer of the instrument or record to provide goods or services to the holder of the gift certificate for the value shown in, upon or ascribed to the instrument or record and for which the value shown in, upon or ascribed to the instrument or record is decreased in an amount equal to the value of goods or services provided by the issuer or seller to the holder. The term includes, without limitation, a gift card, certificate or similar instrument. The term does not include:

(1) An instrument or record for prepaid telecommunications or technology services, including, without limitation, a card for prepaid telephone services, a card for prepaid technical support services and an instrument for prepaid Internet service purchased or otherwise distributed to a consumer of such services, including, without limitation, as part of an award, loyalty, promotional or reward program; or

(2) An instrument or record, by whatever name called, that may be used to obtain goods or services from more than one person or business entity, if the expiration date is printed plainly and conspicuously on the front or back of the instrument or record.

(b) "Issue" means to sell or otherwise provide a gift certificate to any person and includes, without limitation, adding value to an existing gift certificate.

(c) "Record" means information which is inscribed on a tangible medium or which is stored in an electronic or other medium, including, without limitation, information stored on a microprocessor chip or magnetic strip, and is retrievable in perceivable form.

(d) "Service fee" means any charge or fee other than the charge or fee imposed for the issuance of the gift certificate, including, without limitation, a service fee imposed on the basis of inactivity or any other type of charge or fee imposed after the sale of the gift certificate.

(Added to NRS by [2005, 1226](#); [A 2007, 308](#))

NRS 598.0922 "Deceptive trade practice" defined.

1. Except as otherwise provided in subsection 2, a person engages in a "deceptive trade practice" if the person advertises or conducts a live musical performance or production in this State through the use of a false, deceptive or misleading affiliation, connection or association between a performing group and a recording group.

2. A person does not engage in a "deceptive trade practice" pursuant to subsection 1 if:

(a) The performing group is the authorized registrant and owner of a federal service mark comprising in whole or dominant part the mark or name of that group registered in the United States Patent and Trademark Office;

(b) At least one member of the performing group was a member of the recording group and has a legal right by virtue of use or operation under the group name without having abandoned the name or affiliation with the group;

(c) The live musical performance or production is identified in all advertising and promotion as a salute or tribute and the name of the performing group is not so closely related or similar to that used by the recording group that it would tend to confuse or mislead the public;

(d) The advertising does not relate to a live musical performance or production taking place in this State; or

(e) The performance or production is expressly authorized in writing by the recording group.

3. As used in this section:

(a) "Performing group" means a vocal or instrumental group seeking to use the name of another group that has previously released a commercial sound recording under that name.

(b) "Person" means the performing group or its promoter, manager or agent. The term does not include the performance venue or its owners, managers or operators unless the performance venue has a controlling or majority ownership interest in and produces the performing group.

(c) "Recording group" means a vocal or instrumental group at least one of whose members has previously released a commercial sound recording under that group's name and in which the member or members have a legal right by virtue of use or operation under the group name without having abandoned the name or affiliation with the group.

(d) "Sound recording" means a work that results from the fixation on a material object of a series of musical, spoken or other sounds regardless of the nature of the material object, such as a cassette tape, compact disc or phonograph album, in which the sounds are embodied.

(Added to NRS by [2007, 737](#))

NRS 598.0923 "Deceptive trade practice" defined. A person engages in a "deceptive trade practice" when in the course of his or her business or occupation he or she knowingly:

1. Conducts the business or occupation without all required state, county or city licenses.

2. Fails to disclose a material fact in connection with the sale or lease of goods or services.

3. Violates a state or federal statute or regulation relating to the sale or lease of goods or services.

4. Uses coercion, duress or intimidation in a transaction.

5. As the seller in a land sale installment contract, fails to:

(a) Disclose in writing to the buyer:

(1) Any encumbrance or other legal interest in the real property subject to such contract; or

(2) Any condition known to the seller that would affect the buyer's use of such property.

(b) Disclose the nature and extent of legal access to the real property subject to such agreement.

(c) Record the land sale installment contract pursuant to [NRS 111.315](#) within 30 calendar days after the date upon which the seller accepts the first payment from the buyer under such a contract.

(d) Pay the tax imposed on the land sale installment contract pursuant to [chapter 375](#) of NRS.

(e) Include terms in the land sale installment contract providing rights and protections to the buyer that are substantially the same as those under a foreclosure pursuant to [chapter 40](#) of NRS.

ADDENDUM "A" 009

As used in this subsection, “land sale installment contract” has the meaning ascribed to it in paragraph (d) of subsection 1 of [NRS 375.010](#).

(Added to NRS by [1985, 2256](#); A [1999, 3282](#); [2009, 1118](#))

NRS 598.0924 “Deceptive trade practice” defined.

1. A provider or vendor of floral or ornamental products or services engages in a “deceptive trade practice” if the provider or vendor misrepresents the geographic location of its business by listing:

(a) A local telephone number in any advertisement or listing unless the advertisement or listing identifies the actual physical address, including the city and state, of the provider or vendor’s business.

(b) An assumed or fictitious business name in any advertisement or listing if:

(1) The name of the business misrepresents the provider or vendor’s geographic location; and

(2) The advertisement or listing does not identify the actual physical address, including the city and state, of the provider or vendor’s business.

2. The provisions of this section do not apply to:

(a) A publisher of a telephone directory or any other publication or a provider of a directory assistance service that publishes or provides information about another business;

(b) An Internet website that aggregates and provides information about other businesses;

(c) An owner or publisher of a print advertising medium that provides information about other businesses;

(d) An Internet service provider; or

(e) An Internet service that displays or distributes advertisements for other businesses.

3. This section does not create or impose a duty or an obligation on a person other than a vendor or provider described in subsection 1.

4. As used in this section:

(a) “Floral or ornamental products or services” means floral arrangements, cut flowers, floral bouquets, potted plants, balloons, floral designs and related products and services.

(b) “Local telephone number” means a specific telephone number, including the area code and prefix, assigned for the purpose of completing local telephone calls between a calling party or station and any other party or station within a telephone exchange located in this State or its designated local calling areas. The term does not include long distance telephone numbers or toll-free telephone numbers listed in a local telephone directory.

(Added to NRS by [2013, 1030](#))

NRS 598.0925 “Deceptive trade practice” defined.

1. Except as otherwise provided in this section, a person engages in a “deceptive trade practice” when, in the course of his or her business or occupation, he or she:

(a) Makes an assertion of scientific, clinical or quantifiable fact in an advertisement which would cause a reasonable person to believe that the assertion is true, unless, at the time the assertion is made, the person making it has possession of factually objective scientific, clinical or quantifiable evidence which substantiates the assertion; or

(b) Fails upon request of the Commissioner or Attorney General to produce within 6 working days the substantiating evidence in his or her possession at the time the assertion of scientific, clinical or quantifiable fact was made.

2. This section does not apply to general assertions of opinion as to quality, value or condition made without the intent to mislead another person.

(Added to NRS by [1989, 649](#); A [1997, 3195](#); [2009, 2712](#); [2011, 2652](#); [2013, 1054](#); [2015, 3653](#))

NRS 598.0927 “Director” defined. “Director” means the Director of the Department of Business and Industry.

(Added to NRS by [1983, 881](#); A [1993, 1799](#); R temp. [2009, 2732](#); R temp. [2011, 2652](#); R temp. [2013, 1054](#); A [2015, 3652](#), [3653](#))

NRS 598.0933 “Elderly person” defined. “Elderly person” means a person who is 60 years of age or older.

(Added to NRS by [1993, 1978](#); A [2003, 2569](#))

NRS 598.0934 “Goods” defined. “Goods” includes, without limitation, a mobile or manufactured home which:

1. Is not affixed to land; or

2. Is affixed to land and sold, leased or offered for sale or lease separately from the land to which it is affixed.

(Added to NRS by [2003, 587](#))

NRS 598.0935 “Mark” defined. “Mark” means a word, name, symbol, device or any combination of the foregoing in any form or arrangement.

(Added to NRS by [1973, 1484](#))

NRS 598.0936 “Person with a disability” defined. “Person with a disability” means a person who:

1. Has a physical or mental impairment that substantially limits one or more of the major life activities of the person;

2. Has a record of such an impairment; or

3. Is regarded as having such an impairment.

(Added to NRS by [1993, 1978](#)) — (Substituted in revision for NRS 598.093)

NRS 598.0937 “Property” defined. “Property” means any real or personal property, or both real and personal property, intangible property or services.

(Added to NRS by [1973, 1484](#))