IN THE SUPREME COURT OF THE STATE OF NEVADA

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| AARON LEIGH-PINK; and TANA EMERSON,<br><br>Appellants,<br><br>vs.<br><br>RIO PROPERTIES, LLC<br><br>Respondent. | Supreme Court Case No. 82572<br><br>United States Court of Appeals for the Ninth Circuit: Case No. 19-17556<br><br>United States District Court for the District of Nevada Case No. 2:17-cv-02910-GMN-VCF |



ON THE CERTIFIED QUESTION FROM THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

# OPENING BRIEF OF APPELLANTS

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## NRAP 26.1 DISCLOSURE

The undersigned counsel of record certified 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 of recusal.

1. Appellants AARON LEIGH-PINK and TANA EMERSON are natural persons.

2. Counsel of record for Appellants, Robert A. Waller, Jr., has not appeared previously before this Court.

3. To Appellants' counsel's knowledge no publically traded company has any interest in this appeal.

Dated: July 9, 2021

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## I. STATEMENT OF JURISDICTION

This case presents a question regarding Nevada state law as certified pursuant to NRAP 5, from the United States Court of Appeals for the Ninth Circuit (the "Ninth Circuit") in *Aaron Leigh-Pink, Tana Emerson v. Rio Properties LLC*, No. 19-17556 (United States District Court of Nevada Case No. 2:17-cv-02910-GMN-VCF), and accepted by this Court.

## II. ROUTING STATEMENT

The Supreme Court of Nevada should retain jurisdiction over this appeal because the subject of this appeal is a certified question presented by the United States Court of Appeals for the Ninth Circuit and this court accepted the certified question.

## III. STATEMENT OF ISSUES PRESENTED

The Ninth Circuit certified the following question to the Supreme Court of Nevada:

> For purposes of a fraudulent concealment claim, and for purposes of a consumer fraud claim under NRS § 41.600, has a plaintiff suffered damages if the defendant's fraudulent actions cause the plaintiff to purchase a product or service that the plaintiff would not otherwise have purchased, even if the product or service was not worth less than what the plaintiff paid?

Appellants' Appendix ("App. Appx.") at 218.

To be sure, and, respectfully, contrary to the question certified by the Ninth Circuit, Appellants have *always maintained and alleged* throughout this action the value of the hotel room and facilities in which they stayed at the Rio Hotel *is worth nothing, or is worth less,* than what Appellants paid to stay at the Hotel. Appellants have consistently alleged that they and all putative class members "parted with their money by paying Defendant the room rate demanded by Defendant to stay at the hotel and/or the Resort Fee charged and collected by Defendant when *they either would not have stayed at the RIO at all and would have stayed at another hotel in Las Vegas*, or alternatively, paid Defendant amounts *greater than what a room and facilities in a hotel with legionnaires (sic) bacteria in the water system is fairly and reasonably worth to the average consumer*." App. Appx. 18 (Second Amended Complaint ¶48, italics added), see also, App. Appx. 57 (operative Third Amended Complaint ¶50).

Appellants have alleged consistently they paid more than what a room in a non-*Legionella* bacteria-infected hotel is worth to the average consumer whether that payment was in the form of an unspecified "Resort Fee"[1] or a regular room

[1] It is undisputed that every guest at the Rio is required to pay the demanded Resort Fee before being allowed to stay in a hotel room regardless of whether the room was "comp'd." Thus, Appellants and all putative class members paid money to stay in the hotel room regardless of how that money was categorized by the Rio.

charge and as a consequence Appellants have suffered a form of damages which fits within the plain meaning of "any damages" authorized by NRS 41.600.

## IV. INTRODUCTION

When a 2,500+ room hotel in Las Vegas, Nevada has an uncontrollable outbreak of *Legionella* bacteria in the hotel's water system which already caused two guests to be hospitalized and another guest to die[2] from Legionnaires disease symptoms does the hotel owe a duty to disclose the health hazard to its guests?

Has the hotel engaged in a deceptive trade practice in violation of the Nevada Deceptive Trade Practices Act ("NDTPA") [NRS 41.600, 598.0923(2)] when it knowingly concealed from its guests the fact the hotel's hot water system is uncontrollably contaminated[3] with *Legionella* bacteria which posed a serious health risk to guests?

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[2] There are reports that one guest died from Legionnaires disease after staying at the Hotel. See, https://www.bensonbingham.com/news_and_events/benson-bingham-to-file-suit-against-rio-hotel-for-deceased-victim-of-legionnaires-disease/ (last visited 7/7/2021)

[3] "Contaminated" is how the district court categorized the state of the Hotel's water system from the *Legionella* bacteria. See, App. Appx. 1, ln. 16-18 (Doc. 40).

Have guests of the hotel suffered "any damages" under N.R.S. 41.600 when they paid the hotel money to stay there, whether in the form of only a Resort Fee[4] or a full room rate, when the guests would not have stayed at the hotel in the first place, or they paid more for the hotel room than it is worth compared to a hotel that does not have an uncontrolled *Legionella* bacteria outbreak?

Stated another way, where a consumer alleges they paid for something they would never have purchased had they known the true facts, or they paid more for it than it was worth, has the consumer alleged sufficiently they suffered "any damages" as permitted by N.R.S. 41.600? Answer: Yes.

### A. Factual Background

The action stems from the Rio All-Suites Hotel's (the "RIO" or "Hotel") purposeful concealment from its guests of the fact there was an uncontrollable outbreak of *Legionella* bacteria that contaminated the hotel's water system. Two

[4] Resort Fees are charged and required to be paid by guests to cover such things as internet service, telephone use, and access to the fitness room for two guests regardless of whether their room is "comp'ed" by the hotel as was the Plaintiffs' rooms. See, App. Appx. 33, ln. 22-24 ("Plaintiffs paid a "resort fee" of $34.01 per night, which according to Defendant, pays for internet use, telephone use, and fitness room access for two guests.") Because the action was dismissed prior to the parties being able to conduct discovery this representation is not supported by any admissible evidence at this stage of the proceedings.

guests had been hospitalized for Legionnaires disease-related symptoms, and another reportedly died, after staying at the Hotel in early 2017. See, App. Appx. 47, TAC ¶1, ¶7.

The Southern Nevada Health District (SNHD) was notified after receiving reports of the hospitalization of two guests who had stayed at the Rio and the SNHD launched an investigation on May 1, 2017. App. Appx. 46, TAC ¶¶2-4. In its May 1, 2017, letter to the Hotel the SNHD informed the Hotel that *Legionella* bacteria can spread through hot showers in guest rooms and guests can contract Legionnaires disease from inhaling the infected mist. See, App. Appx. 68, Ex. 1 to TAC.

During its investigation, on May 3, 2017, the SNHD met with and explained to the Hotel's representatives the seriousness of the situation and the significant health risks posed to guests of the Hotel. *Id.* As part of its investigation the SNHD asked the Hotel for access to an occupied guest room to take water samples to test for the presence of *Legionella* bacteria. The Hotel refused to move the guest from their room so the SNHD could perform the testing in the room. See, App. Appx. 9-10, SAC ¶4.

Notwithstanding its actual knowledge of the presence of the uncontrolled *Legionella* bacteria contamination of the hotel's water system and the fact at least

two people had contracted Legionnaire's disease and been hospitalized, the Hotel continued to conceal the fact from guests of the Hotel, including Plaintiffs. See, App. Appx. 47, TAC ¶5.

Taking a page from Ford's handling of the Pinto crisis of the 1970s[5], the Hotel chose to roll the dice and gamble the health and safety of its guests against a significant loss of revenue and choose to conceal from its guests the fact the Hotel's water system was contaminated with *Legionella* bacteria. The Hotel had, literally, millions of reasons (in the form of lost revenue) to conceal from the thousands of guests staying at its property the fact the Hotel's water system was contaminated with *Legionella* bacteria and presented a serious health risk. The Hotel was, after all, host of the 2017 World Series of Poker Tournament (see, https://www.wsop.com/ history/wsop/), and the NCAA "March Madness" Men's Basketball tournament was also being played during the same time the Hotel was unable to contain the *Legionella* bacteria outbreak. See, App. Appx. 47, TAC ¶8.

The Hotel continued for another five months, through at least September 2017, to conceal from guests, including Plaintiffs, the fact *Legionella* bacteria had contaminated the Hotel's water system. See, App. Appx. 47, TAC ¶6.

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[5] Ford's handling of the Pinto crisis is recognized generally as a corporation placing profits over safety.

## V. DISCUSSION

### A. NRS 41.600 PERMITS RECOVERY OF "ANY DAMAGES" TO ACCOMPLISH THE LEGISLATIVE INTENT TO PROTECT PUBLIC WELFARE

NRS 41.600 (Actions by victims of fraud; Fraud upon Purchasers; Misrepresentation) is a component of the remedies available for violations of the Nevada Deceptive Trade Practices Act (NDTPA). Nevada Revised Statutes (NRS), Title 3 (Remedies; Special Actions and Proceedings), Chpt. 41 (Actions and Proceedings in Particular Cases Concerning Persons); NRS 41.600(2)(E) (A deceptive trade practice as defined in NRS 598.915 to 598.0925, inclusive.)

The NDTPA is a remedial statutory scheme designed to redress existing grievances and introduce regulations conducive to the public good. *Poole v. Nevada Auto Dealership investments, LLC*, 449 P.3d 479, 485, citing, *Sellinger v. Freeway Mobile Home Sales, Inc.*, 110 Ariz. 573 (1974). As such, the NDTPA is construed liberally to accomplish its intent to protect public welfare. *Poole, Id.,* citing, *Welfare Div. of State Dep't of Health, Welfare & Rehab. v. Washoe Cty. Welfare Dep't*, 88 Nev. 635, 637.

Likewise, the primary goal of interpreting statutes is to effectuate the Legislature's intent. *Cromer v. Wilson*, 126 Nev. 106, 109, 225 P.3d 788, 790 (2010). "We interpret clear and unambiguous statutes based on their plain meaning." *Id*.

NRS 41.600 plainly permits the recovery of "any damages." NRS 41.600 (3)(a). Under Nevada law "damages are awarded to make the aggrieved party whole... . *Hanneman v. Downer*, 110 Nev. 167, 172-173 (1994). "Sometimes, however, neither the out-of-pocket nor the benefit-of-the-bargain measure is particularly helpful or appropriate. *Davis v. Beling*, 128 Nev. 301, 317 (2012) [278 P.3d 501, 512], citing, *Strebel v. Brenlar Investments, Inc.,* 135 Cal.App.4th 740 (2006).

### B. WELL-SETTLED NEVADA LAW AUTHORIZES RECOVERY OF UNJUST ENRICHMENT DAMAGES CLAIMED BY APPELLANTS IN THIS ACTION

One component of damages claimed by Appellants based on the theory they paid for a hotel room they would not otherwise have stayed in, or paid more for the hotel room that it was worth, is the damages they incurred by Respondent's

unjust enrichment through its deceptive trade practice in violation of the NDTPA.[6]

Unjust enrichment is the modern counterpart of the doctrine of quasi-contract. *Unionamerica Mortg. and Equity Trust v. McDonald*, 97 Nev. 210, 212 (Nev. 1981). Unjust enrichment occurs whenever a person has and retains a benefit which in equity and good conscience belongs to another. *Id.* This Court has long held that "in a case with a ... unjust enrichment theory of recovery, *the proper measure of damages* is the 'reasonable value of [the] services.'" *Asphalt Products Corp. v. All Star Ready Mix, Inc.*, 111 Nev. 799, 802 (Nev. 1995) (internal citations omitted.)

NRS 41.600 authorizes the recovery of "any damages that the claimant has sustained." NRS 41.600(3)(a). Because unjust enrichment damages are a well-recognized form of recoverable damages according to well-settled Nevada law, they are recoverable pursuant to NRS 41.600.

For the foregoing reasons, this Court should answer in the affirmative the certified question that NRS 41.600 does include recovery of damages based on a theory the plaintiff paid for a product or service they would not have otherwise

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[6] Recall that the Ninth Circuit reversed the District Court's dismissal of Appellants' unjust enrichment claim for damages. App. Appx. at 220 ("In a separate memorandum filed concurrently with this opinion, we reverse the dismissal of the claim for unjust enrichment... .")

purchased, or paid more for that product or service that it was worth, based on a deceptive trade practice in violation of the NDTPA.

### C. NEVADA COURTS REGULARLY LOOK FIRST TO CALIFORNIA PRECEDENT TO DECIDE UNSETTLED QUESTIONS OF NEVADA LAW

Assuming this Court still finds Nevada law is lacking and finds it necessary to answer the certified question by looking to the law of other jurisdictions this Court should still find NRS 41.600 authorizes recovery of damages where the plaintiff claims they paid money for a product or service they would not have purchased at all but for the deceptive trade practice, or paid more for the product or service than it was worth because of the deceptive trade practice.

The Nevada Supreme Court often looks to California statutory and case law to decide unresolved questions of law, particularly those regarding issues of public interest. See, *Shapiro v. Welt*, 133 Nev. 35, 39 (2017) ("This court has not yet determined what constitutes 'an issue of public interest' in the anti-SLAPP context. However, California courts have addressed this question. Because this court has recognized that California's and Nevada's anti-SLAPP 'statutes are similar in purpose and language' we look to California law for guidance on this issue." Internal citations omitted); see also, *Patin v. Ton Vinh Lee*, 134 Nev. 722,

724 ("Because no Nevada precedent is instructive on this issue, we look to California precedent for guidance." citing, *Shapiro, Id.*); also, *Federal Ind. Co. v. American Hardware Mut. Ins. Co.*, 124 Nev. 319 at 327-28 (analyzing coverage language of an insurance contract by looking first to California appellate interpretation of similar language (*Acceptance Ins. Co. v. Syufy Enterprises*, 69 Cal.App.4th 321 (1999)), as well as other states including Wyoming (*Marathon Ashland Pipe Line LLC v. Maryland Cas. Co.*, 243 F.3d 1232 (10th Cir. 2001)) and Massachusetts law (*Merchants Ins. Co. of New Hampshire, Inc. v. U.S. Fidelity and Guar. Co.*, 143 F.3d 5 (1998)).

Since the Nevada Supreme Court has not heretofore addressed specifically the question of a consumer's ability to recover under the NDTPA and the "any damages" remedy afforded by NRS 41.600, money which the consumer paid for a product or service based on the merchant's fraudulent concealment of material facts about the product or service, and where the consumer alleges they would either have never purchased the good or service, or that they paid more for the good or service than what it was worth, the Court properly looks to other jurisdictions for guidance starting with California.

### 1. Other States Allow Recovery Of Damages For Consumer Fraud Where A Consumer Paid Money For A Good or Service They Would Not Otherwise Have Purchased, or Paid More Than They Would Have, Based On Fraudulent Conduct of the Merchant

Other states where the Nevada Supreme Court refers to answer unsettled questions guiding the interpretation and application of Nevada law include the following which recognize that a consumer may recover as damages money paid for a good or service the consumer would not otherwise have purchased, or paid more for it, based on the fraudulent conduct by the merchant.

#### a. California Law

As the Ninth Circuit points out in its certified question, California law allows for the recovery of money paid by "plaintiffs who can truthfully allege they were deceived by a product's label into spending money to purchase the product, and would not have purchased it otherwise," because those consumers "have lost money or property within the meaning of" California's Unfair Competition Law. App. Appx. 222, citing *Kwikset Corp. v. Superior Court*, 51 Cal.4th 310, 317 [246 P.3d 877, 881] (2011).

#### b. Arizona Law

Under Arizona law a consumer states a claim for damages in violation of the Arizona Consumer Fraud Act (CFA) [Ariz. Rev. Stat. §44-1522(A)] where the

consumer alleges they would never have purchased the product or service had they known the true facts and the merchant's fraudulent conduct. See, *Cheetham v. ADT Corporation*, 161 F.Supp.3d 815, 831 (D. Ariz. 2016).

**c. Wyoming Law**

The Supreme Court of Wyoming has ruled similarly that a consumer states a claim for damages for violation of the Wyoming Consumer Protection Act [WY ST §40-12-108] where the consumer paid money for a product they would not otherwise have purchased had the merchant not engaged in fraudulent conduct. In *Big-O Tires, Inc. v. Santini*, 838 P.2d. 1169 (Wyo. 1992), the Supreme Court of Wyoming held a consumer states a viable claim for damages in a case of fraudulent misrepresentation in a consumer sales transaction when the consumer establishes they were induced to make the purchase of a product to their detriment by their reasonable reliance on the seller's statements. See also, *Britton v. Bill Anselmi Pontiac-Buick-GMC, Inc.*, 786 P.2d 855, 860 (Wyo. 1990).

In *Big-O Tires*, the Supreme Court of Wyoming noted further that it agreed with the Minnesota Supreme Court in its decision in *B.F. Goodrich Co. v. Mesabi Tire Co., Inc.*, 430 N.W.2d 180 (Minn. 1988) that the "'benefit-of -the-bargain' rule and the 'out-of-pocket' rule may each serve salutary purposes depending on the totality of the circumstances in a given case. However, where application of

those rules *results in leaving a loss uncompensated, a trial court may properly allow recovery of the economic loss sustained." Id.*, 838 P.2d at 1174 (italics added). The *Big-O* court went on to explain that the jury could reasonably find the plaintiff's losses (*i.e.*, damages) to be the $25.95 cost of the tire she purchased based on the fraudulent conduct of the defendant. *Id.*

**d. Florida Law**

A claim for violation of the Florida Deceptive and Unfair Trade Practices Act (FDUTPA) [Fla. Stat. §501.204] recognizes a cause of action for damages where the plaintiff adequately alleged actual damages in the form that they did not get what they bargained and paid for. In *Collins v. DaimlerChrysler Corp.*, 894 So.2d 988 (Fla.Dist.Ct.App. 2004), the plaintiff alleged actual damages when she purchased a vehicle with defective seatbelts. Like Respondent asserts in the case at bar, in *Collins*, Chrysler argued the plaintiff did not suffer any out-of-pocket damages because the seatbelt never malfunctioned during a accident. The Florida appellate court, however, recognized that this was the wrong damages metric. The *Collins* court held that because the FDUTPA allows for damages based on diminution in market value, the court permitted the plaintiff top proceed on the theory that she did not get what she bargained for. *Collins, Id.,* at 990-91. The *Collins* court concluded, "This case turns on a relatively simple question, at least

as to damages - Is a car with defective seatbelt buckles worth less than a car with operational seatbelt buckles? Common sense indicates that it is[.]" *Id.* at 991.

Likewise, in *Carriuolo v. General Motors Co.*, 823 F.3d 977, 986-87 (2016), the United States Court of Appeals for the Eleventh Circuit applied the same damages reasoning from *Collins* to the plaintiff's claim that General Motors misrepresented the safety ratings on its 2014 Cadillac CTS vehicles. The *Carriuolo* court held "[t]he plaintiffs may show that a vehicle presented with three perfect safety ratings is more valuable than a vehicle presented with no safety ratings. General Motors received the same benefit of the bargain from the sale or lease to each class member—even if individual class members negotiated different prices—because a vehicle's market value can be measured objectively." *Id.*, at 986-87.

The same is true for Appellants' claims in this case - the market value of a room in a hotel whose water system is contaminated with deadly *Legonella* bacteria is worth less than one which is not and thus the market value of such a hotel room can be measured objectively giving rise to "actual damages" as permitted by section 41.600 of the NDTPA.

### e. Kansas Law

Under the Kansas Consumer Protection Act (KCPA) [K.S.A. 50-623*, et seq.*], a plaintiff alleges recoverable damages when they allege they would not have purchased the defendant's product had they known the true facts about the product which were concealed by the defendant. In *Gonzalez . Pepsico, Inc.*, 489 F.Supp.2d 1233 (D. Kan. 2007), the plaintiffs alleged they would not have purchased the defendants' beverages had the defendants disclosed the tendency of those products to contain benzene. *Id.*, at 1239. The *Gonzalez* plaintiffs did not allege that any of the beverage products which they purchased and consumed actually contained benzene or that they have suffered any personal injuries. *Id.* The *Pepsico* defendants, like Respondent does here, argued the court should dismiss the complaint because the plaintiffs have not suffered any injury in fact because they alleged no personal injury and they received what they paid for when they purchased their beverage products.. *Id.*, 489 F.Supp.2d at 1239. Analyzing the allegations under the state law of Kansas, the district court determined such allegations are sufficient to allege a violation of the KCPA. *Id.*, at 1248.

The Supreme Court of Kansas ruled similarly that a consumer need not establish direct monetary loss to be aggrieved under the KCPA and entitled to recovery. See, *Via Christi Regional Med. Ctr. v. Reed* , 298 Kan. 503, 519 (2013).

### f. Massachusetts Law

Massachusetts also allows a consumer to recover damages for violation of the Consumer Protection Act [MA ST. 93A] where the allegation is that the value of what was received in the transaction is worth less than what was paid based on the defendant's fraudulent conduct.

In *Iannacchino v. Ford Motor Co.*, 451 Mass. 623, 630–31, (Mass. 2008), the plaintiffs alleged that a door lock on the vehicles they purchased did not comply with federal safety standards, although they did not allege the locks had actually failed and caused injury. The plaintiffs alleged simply paying for a vehicle that could be dangerous means they paid more than what they received.

As the Supreme Judicial Court of Massachusetts explained, "[a]ccordingly, the purchase price paid by the plaintiffs for their vehicles would entitle them to receive vehicles that complied with those safety standards or that would be recalled if they did not comply. If Ford knowingly sold noncompliant (and therefore potentially unsafe) vehicles or if Ford, after learning of noncompliance, failed to initiate a recall and to pay for the condition to be remedied, the plaintiffs would have paid for more (*viz*., safety regulation-compliant vehicles) than they received. Such an overpayment would represent an economic loss—measurable by the cost to bring the vehicles into compliance—for which the plaintiffs could seek

redress under G.L. c. 93A, § 9." *Id.*, at 630-31.

**g. New York Law**

In its certified question, the Ninth Circuit notes "courts in other jurisdictions have rejected plaintiff's theory" relying on *Small v. Lorillard Tabacco Co.*, 720 N.E.2d 892 (Ct. App. N.Y. 1999). See, App. Appx. 223. In *Small*, however, the Court of Appeals of New York noted that, were the plaintiffs to have alleged a claim for "the higher price the consumer paid for the product as a result of the misrepresentation", they "might have a claim." *Id.*, 720 N.E.2d at 898, fn. 5. Thus, even under New York law, Appellants' theory in this case that they paid more to stay in Respondent's hotel room than the room was worth , whether by way of the Resort Fee or a room rate, may be a cognizable claim under New York law.

**h. South Carolina Law**

In *Austin v. Stokes-Craven Holding Corp.*, 387 S.C. 22, 691 S.E.2d 135 (So.Car. (2010), the Supreme Court of South Carolina held a plaintiff who alleges and introduces testimony at trial that the product they purchased [a truck that had been in an undisclosed prior crash] was not worth anything to him, and an expert's testimony that the vehicle has a "zero retail value", were sufficient to establish damages for violation of the UTPA. *Austin, Id.,* at 42-43. The *Austin* court

explained the plaintiff's testimony that he would not have purchased the product had he know that it had been "wrecked," and the expert's opinion that the product had a zero retail value on the date of sale, were sufficient to establish for the jury the fair market value of the product was zero and thus the plaintiff sustained damages in the amount of the price paid. *Id.* at 44-45.

**i. Texas Law**

The Texas Deceptive Trade Practices-Consumer Protection Act (DTPA) [Tex. Bus. & Com. § 17.41, *et seq.*] permits a consumer to maintain an action for "failing to disclose information concerning goods or services which was known at the time of the transaction if such failure to disclose such information was intended to induce the consumer into a transaction into which *the consumer would not have entered had the information been disclosed."* Tex. Bus. & Com. §17.50(a)(24) (italics added). Under the Texas DTPA the difference between the amount the consumer paid for a product and the value of that product was the proper measure of damages for a violation of the DTPA. *Mewhinney v. London Wineman, Ltd.* 339 S.W.3d 177 (App. 5 Dist. 2011).

**j. Wisconsin Law**

Wisconsin similarly allows a plaintiff to claim as damages that money which the plaintiff parted with to purchase a product the plaintiff would not

otherwise have paid for had they known the true condition or quality of the product. *K & S Tool & Die Corp. v. Perfection Mach. Sales, Inc.*, 732 N.W.2d 792, 802 (Wis. 2007).

**k. Vermont Law**

Vermont is another state which allows a plaintiff to recover on a claim for violation of the Vermont Consumer Fraud Act [9 V.S.A. §2453(a)] where the consumer purchases a product based on false information about that product where the consumer's purchasing decision may have been different had they known the true condition of the product even where the product performs its function without defect or injury. *Peabody v. P.J.'s Auto Village, Inc.*, 153 Vt. 55, 58-59 (Vt. 1989) ("All plaintiff must show, however, is that the deceptive omission is 'likely to influence a consumer's conduct' by 'distort [ing]' the buyer's 'ultimate exercise of choice.' The [trial] court found that 'a consumer cannot be expected to have th[e] confidence' that this clipped car is as good as a whole 1974 Saab, and that 'the lack of information may have materially affected the consumer's decision because of the chary nature of used car purchases.' "*Id.,* internal citations omitted..

## VI. CONCLUSION

Based on the plain language of NRS 41.600 authorizing the recovery of "any damages" and the fact well-settled Nevada law permits recovery of damages

based on a defendant's unjust enrichment, as well as the foregoing analysis supporting Appellants' theory of recovery that they would not have parted with their money to stay at the Rio Hotel at all, or they paid more for the hotel room than it was worth, this Court should answer the certified question posed by the Ninth Circuit in the affirmative - NRS 41.600 does authorize recovery of damages under Appellants' theory.

Respectfully submitted,

Dated: July 9, 2021

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## CERTIFICATE OF COMPLIANCE NRAP 28.2 AND 32

I hereby certify that this Brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this Brief has ben prepared in a proportionally spaced typeface using WordPerfect X9 in 14 font size and New Times Roman font face.

I further certify this Brief complies with the page requirements of NRAP 32(a)(7)(A)(i) in that it does not exceed 30 pages, excluding the Table of Contents and Table of Authorities and required certificates.

I hereby certify that I have read this Brief and to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I 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 number and volume number, if any, of the transcript of appendix where the matter relied upon is to be found.

I understand that I may be subject to sanctions in the event that this Brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated: July 9, 2021

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## CERTIFICATE OF SERVICE

This is to certify that on July 9, 2021, a true and correct copy of the foregoing **APPELLANTS' OPENING BRIEF** was submitted for filing via the Court's eFlex electronic filing system and that such is served on interested parties in this action by serving VIA EMAIL (Wiznet/Eflex) pursuant to the NRAP and that electronic notification will be sent to the following:

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