IN THE SUPREME COURT OF THE STATE OF NEVADA

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

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

APPELLANTS' APPENDIX (CORRECTED)

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Citations to the appendix include page numbering designated as "NVSC 0000X" to avoid confusion with documents which may have been previously numbered before the United States Court of Appeals for the Ninth Circuit or the United States District Court.

INDEX TO APPENDIX

[1] "Doc" refers to the District Court's Docket number.

ALPHABETICAL INDEX TO APPENDIX

Third Amended Complaint ("TAC") (Doc. 32)	4/19/2019	45-72

Dated: July 12, 2021

/s/ Robert A.Waller, Jr.
Robert A. Waller, Jr.
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AARON LEIGH-PINK and
TANA EMERSON

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

JAY AMES *et al.*, Plaintiffs, vs. CAESARS ENTERTAINMENT CORPORTATION, *et al.*, Defendants.	Case No.: 2:17-cv-02910-GMN-VCF **ORDER**

Pending before the Court is the Motion to Dismiss, (ECF No. 37), filed by Defendant Rio Properties, LLC ("Defendant"). Plaintiffs Aaron Leigh-Pink and Tana Emerson ("Plaintiffs") filed a Response, (ECF No. 38), and Defendant filed a Reply, (ECF No. 39). For the reasons discussed below, the Court **GRANTS** Defendant's Motion to Dismiss.

I. BACKGROUND

This case arises from Defendant's alleged failure to notify Plaintiffs, prior to Plaintiffs' stay at the Rio Hotel, that the hotel's water was contaminated with legionella bacteria, which can cause Legionnaires' Disease. Plaintiffs allege that Defendant knew about the contamination prior to Plaintiffs' stay because the Southern Nevada Health District previously notified Defendant of the contamination. (Third Am. Compl. ("TAC") ¶¶ 2–3 ECF No. 32). Plaintiffs further allege Defendant concealed the contamination to avoid financial losses. (*Id.* at ¶ 7). Accordingly, Plaintiffs assert the following claims: (1) violations of the Nevada Deceptive Trade Practices Act ("NDPTA"); (2) common law negligence; (3) fraudulent concealment; (4) unjust enrichment; and (5) declaratory relief. (*Id.* at ¶¶ 30–86).

Defendant's instant Motion requests that the Court dismiss Plaintiffs' Third Amended Complaint. (*See* Mot. to Dismiss ("MTD"), ECF No. 37). It argues that the Third Amended Complaint, like the Second Amended Complaint, fails to plead recoverable damages. (*Id.* 2:11–

22). In the Court's Order dismissing Plaintiffs' Second Amended Complaint, the Court gave Plaintiffs leave to amend in order to plead facts showing they are plausibly entitled to relief. (*See* Order 11:18-23, ECF No. 31).

The Second Amended Complaint and the Third Amended Complaint assert the same claims. (*See* Sec. Am. Compl. ("SAC") 1:15–20, ECF No. 22); (TAC 1:15–9). With respect to damages, the Second Amended Complaint alleges that Plaintiffs suffered harm by paying $34.01 per day in resort fees that they would not have paid had they known about the contamination. (SAC 9:1–4). The Court previously explained the resort fees are not recoverable because Plaintiffs received the intended benefits of the fees: access to internet, telephones, and a fitness center. (Order 6:3–9).

Plaintiffs again argue that the resort fees are recoverable damages despite receiving the benefits of the fees. (TAC 13:14–21). Defendant's Motion requests the Court dismiss the Third Amended Complaint with prejudice because Plaintiffs have again failed to plead recoverable damages. (MTD 8:6–23).

II. LEGAL STANDARD

Rule 12(b)(6) of the Federal Rules of Civil Procedure mandates that a court dismiss a cause of action that fails to state a claim upon which relief can be granted. *See North Star Int'l v. Ariz. Corp. Comm'n*, 720 F.2d 578, 581 (9th Cir. 1983). When evaluating a motion to dismiss under Rule 12(b)(6) for failure to state a claim, dismissal is appropriate if the complaint does not give the defendant fair notice of a legally cognizable claim and the grounds on which it rests. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

In considering whether the complaint sufficiently states a claim, the court will take all material allegations as true and construe them in the light most favorable to the plaintiff. *See NL Indus., Inc. v. Kaplan*, 792 F.2d 896, 898 (9th Cir. 1986). The court, however, is not required to accept as true allegations that are merely conclusory, unwarranted deductions of

fact, or unreasonable inferences. *See Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). A formulaic recitation of a cause of action with conclusory allegations is not sufficient; a plaintiff must plead facts showing that a violation is plausible, not just possible. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Twombly*, 550 U.S. at 555). In order to survive a motion to dismiss, a complaint must allege "sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Id.* "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.*

Rule 15(a)(2) of the Federal Rules of Civil Procedure permits courts to "freely give leave [to amend] when justice so requires." Fed. R. Civ. P. 15(a)(2). The Ninth Circuit "ha[s] held that in dismissing for failure to state a claim under Rule 12(b)(6), 'a district court should grant leave to amend even if no request to amend the pleading was made, unless it determines that the pleading could not possibly be cured by the allegation of other facts.'" *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000) (quoting *Doe v. United States*, 58 F.3d 494, 497 (9th Cir. 1995)).

III. DISCUSSION

In the previous Order, the Court granted Defendant's Motion to Dismiss because, among other reasons, Plaintiffs failed to plead recoverable damages for their claims. (Order 6:3–9, 7:4–7, 9:12–5). Plaintiffs again fail to plead recoverable damages.

A. Deceptive Trade Practices, Negligence, and Fraudulent Concealment

Plaintiffs have not alleged facts demonstrating that they have sustained recoverable damages. Damages are an essential element of NDTPA, common law negligence, and fraudulent concealment claims. *Picus v. Wal-Mart Stores, Inc.*, 256 F.R.D. 651, 657–58 (D. Nev. 2009) (explaining damages are an element of NDPTA claims); *Nevada Power Co. v. Monsanto Co.*, 891 F. Supp. 1406, 1415 (D. Nev. 1995) (explaining damages are an element of

fraudulent concealment claims); *Hammerstein v. Jean Dev. W.*, 907 P.2d 975, 977 (Nev. 1995) (explaining damages are an element of negligence claims). Generally, out-of-pocket expenses are recoverable damages when plaintiffs incur the expenses as a result of defendant's fraudulent conduct. *Randono v. Turk*, 466 P.2d 218, 222–23 (Nev. 1970). However, out-of-pocket expenses are not recoverable if the plaintiff received the "benefit of their bargain" with the defendant. *See Gotshalk v. Hellwig*, No. 2:13-cv-00448-JAD-NJK, 2017 WL 1240191. *6 (D. Nev. Mar. 3, 2017).

Plaintiffs do not claim that they have been physically harmed from exposure to legionella bacteria. Nor do Plaintiffs claim that they suffered damages by paying for their room reservation; the Rio "comp'd"[1] the costs. (*See* TAC ¶¶ 37, 41, 48, 58, 69, 72, 77, ECF No. 32). Rather, the damages Plaintiffs allege are the $34.01 they each paid in "resort fees." (*Id.* ¶¶ 48, 50, 60–61, 70, 72, 78–79).[2] Plaintiffs paid the resort fee in order to receive phone, internet, and fitness center access. (MTD 5:17–19, ECF No. 37). Plaintiffs do not allege the Rio denied them the benefit of the resort fees. Therefore, the Court dismisses the Third Amended Complaint with prejudice because Plaintiffs have repeatedly failed to cure their deficient pleading of damages, which indicates that Plaintiffs cannot cure the deficiency in the Complaint. (*See* Order 6:3–9, 9:22–10:4).

B. Unjust Enrichment

Plaintiffs allege that Defendant unjustly enriched itself by collecting the resort fees and concealing the presence of legionella bacteria in the water. (TAC ¶¶ 75–81). In order to

[1] "Comp'd" is a commonly used abbreviation in the hospitality industry for "complimentary," indicating that the goods or services were provided without charge.

[2] Plaintiffs repeatedly assert that they and members of the class "suffered harm and damages in that they parted with their money by paying Defendant the room rate and/or Resort Fee . . . or, alternatively, paid amounts greater than what a room and facilities in a hotel with legionnaires bacteria in the water system is fairly and reasonably worth to the average consumer." (TAC ¶¶ 50, 61, 78). Only the resort fee is in issue because the currently named Plaintiffs did not pay for their rooms. (*Id.* ¶ 37). Plaintiffs assert without supporting factual allegations that phone, internet, and fitness center access is worth less in a facility with contaminated water.

plausibly state a claim for unjust enrichment Plaintiffs must allege: "a benefit conferred on the defendant by the 'plaintiff [sic]; appreciation by the defendant of such benefit, and acceptance and retention by the defendant of such benefit under circumstances such that it would be inequitable for him to retain the benefit without payment of the value thereof." *See LasePartners Corp., Inc. v. Robert L. Brooks Trust*, 942 P.2d 182, 187 (Nev. 1997) (quoting *Unionamerica Mtg. v. McDonald*, 626 P.2d 1272, 1273 (Nev. 1981)). The only benefit Plaintiffs conferred upon Defendant was the resort fee, as The Rio had "comp'd" Plaintiffs' hotel rooms. (*See* TAC ¶ 77). As discussed above, Plaintiffs fail to allege that they did not receive the amenities covered by the resort fee. Therefore, the Court must dismiss the claim with prejudice because Plaintiffs cannot show that Defendant inequitably retained a benefit conferred by plaintiffs.

C. Declaratory Relief

As stated in the Court's previous Order, "Declaratory relief is not a separate cause of action or independent grounds for relief." (Order 11:5–6, ECF No. 31) (citing *in re Wal-Mart Wage & Hour Employ. Practices Litig.*, 490 F. Supp. 2d 1091, 1130 (D. Nev. 2007)). Plaintiffs' request for declaratory relief must be dismissed because they have no other surviving claims.

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IV. CONCLUSION

Plaintiffs' Third Amended Complaint retains the same deficiencies as the Second Amended Complaint.

Accordingly,

IT IS HEREBY ORDERED that Defendant's Motions to Dismiss, (ECF No. 37), is **GRANTED.**

IT IS FURTHER ORDERED that Plaintiffs' Third Amended Complaint, (ECF No. 32), is **DISMISSED with prejudice**.

The Clerk of Court shall close the case and enter judgment accordingly.

DATED this 26 day of November, 2019.

Gloria M. Navarro, District Judge
United States District Court

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

Jay Ames, et al.,

Plaintiff,

v.

Caesars Entertainment Corporation, et al.,

Defendants.

JUDGMENT IN A CIVIL CASE

Case Number: 2:17-cv-02910-GMN-VCF

___ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

___ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

X **Decision by Court.** This action came for consideration before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

that judgment is entered in favor of Defendant and against Plaintiffs.

11/26/2019
Date

DEBRA K. KEMPI
Clerk

/s/ M. Reyes
Deputy Clerk

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UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEVADA

AARON LEIGH-PINK, and TANA EMERSON, Individually and on behalf of all others similarly situated, Plaintiffs, vs. RIO PROPERTIES LLC, a Nevada Limited Liability Company; and DOES 1-50, inclusive, Defendants.	Case No.: 17-cv-02910-GMN-VCF ***SECOND AMENDED*** CLASS ACTION COMPLAINT: 1) Violation of NRS 205.377; 2) Violation of Nevada Deceptive Trade Practices Act [NRS 41.600, NRS 598.0923(2)]; 3) Violation of Nevada's Racketeer Influenced and Corrupt Organizations Act (RICO) [NRS 207.350]; 4) Common Law Negligence 5) Unjust Enrichment; 6) Declaratory Relief

Plaintiffs AARON LEIGH-PINK and TANA EMERSON, individually and on behalf of all others similarly situated, allege the following:

I.

NATURE OF THE CASE

1. This is a class action brought against Defendant RIO PROPERTIES LLC (hereinafter "Defendant") which owns, manages and/or operates and does business as the RIO ALL-SUITE HOTEL AND CASINO ("RIO") located in Las Vegas, Nevada, and for its concealment and/or failure to disclose to hotel guests the material and important fact the hotel's water system was infected with legionella bacteria which causes Legionnaires disease, a potentially deadly bacterial disease. Despite Defendant's knowledge for months that legionella bacteria had infected the hotel's water system Defendant continued to book reservations and rent rooms and charge Resort Fees to tens, if not hundreds, of thousands of guests all while never saying a word to any of them about the presence of the legionella bacteria in the hotel's water system and facilities.

2. On or about May 1, 2017, the Southern Nevada Health District ("SNHD") notified Defendant in writing of a report that two guests who stayed at the hotel in March and April 2017 contracted Legionnaires disease after staying at the RIO. Attached hereto as Exhibit "1" and incorporated by this reference is a copy of the May 1, 2017, letter sent by SNHD to Defendant.

3. On or about May 2, 2017, Erin Calvin of the SNHD Special Programs Unit sent an email to Defendant's representatives Brad Waldron (Vice President, Risk Management) and Jack Hines (Facilities Senior Manager at the Rio Hotel) following up on a meeting they had earlier that date wherein an environmental assessment of the RIO would be conducted by the SNHD for legionella bacteria in the hotel's water system. Attached hereto as Exhibit "2" and incorporated by this reference is a copy of Ms. Calvin's email.

4. On or about May 3, 2017, SNHD inspectors Calvin, Diaz and Ramirez-Luna met in person with Defendant's representatives Brad Waldron (Vice President, Risk Management) and Jack Hines (Facilities Senior Manager) and discussed the fact SNHD would be conducting a legionella investigation of the RIO hotel. During the meeting Ms. Calvin reviewed a Legionella power point presentation with Messrs. Hines and Waldron, to educate Defendant's representatives on the seriousness of the situation and the health risks to guests of the hotel. During the May 3, 2017, in-

person meeting Defendant's representatives chose not to remove at least one guest from their room in which the SNHD wanted to test for the presence of legionella bacteria.

5. Notwithstanding Defendant's actual knowledge of the presence of legionella bacteria in the hotel's water system and the fact at least two people had contracted Legionnaires disease, Defendant continued to conceal and/or fail to disclose this material fact from registered guests of the hotel.

6. Plaintiffs allege legionella bacteria continued to be present in the RIO's water system through at least September 28, 2017, based on testing performed by the SNHD, Defendant and/or their agents.

7. Defendant concealed from and/or failed to disclose to all guests, including Plaintiffs, the material fact of the report that guests have been exposed to legionella bacteria in its hotel and at least two guests had contracted Legionnaires disease while staying at the RIO in March and April 2017. Defendant concealed and/or failed to disclose this material information when it made and accepted room reservations to stay at the RIO, when sending emails to registered guests ahead of their arrival and providing guests with a link to check-in online and use the Express Check-In Kiosk, while and/or when guests checked into the hotel at the front desk, and/or while guests were staying in the hotel.

8. Plaintiffs allege that instead of disclosing to guests the fact the hotel's water system was infected with legionella bacteria Defendant chose to roll the dice hoping none of their guests would find out or learn of the presence of legionella bacteria in the hotel's water system and take their business to another hotel/casino in Las Vegas. Defendant were particularly motivated to conceal this information during the 2017 NCAA Men's Basketball Championships known as "March Madness" (which took place from March 14 – April 3, 2017) and while hosting the 2017 World Series of Poker ("WSOP") tournament (which began May 30, 2017 and ran through July 23, 2017). Rather than disclose to its guests the material fact the RIO's water system was infected with legionella bacteria Defendant chose to wager the potential health of its guests against its odds of realizing multiple-millions of dollars in revenue from gambling, room rates, Resort Fees, and food and beverage sales.

9. Defendant realizes a premium on the amount they are able to charge and collect from guests to stay in its rooms (the "room rate") during big events such as March Madness and the WSOP which draw many more people to its hotel than a regular, ordinary weekday or weekend in Las Vegas. Defendant charges an even greater premium room rate on weekends including Fridays and Saturdays.

In addition to room rates, Defendant also charges all guests who stay at the RIO a "Resort Fee" which was charged to and paid by Plaintiffs and all class members and collected by Defendant whether any guest's room rate is covered by Defendant or not (*i.e.*, a "comp'ed room").

10. It was not until on or about July 5, 2017, that Defendant sent a letter to registered guests who stayed at RIO during the time legionnaires bacteria was present in the hotel's water system a letter advising them of the presence of the legionella bacteria in the water system during their stay at the RIO. Attached hereto as Exhibit "3" is a true and correct copy of the July 5, 2017, sent by Defendant to RIO registered guests. Notwithstanding Defendant's knowledge months prior to sending the July 5, 2017, letter to *past guests* that the waters system had been infected with legionella bacteria during their stay, Defendant continued to conceal from and/or failed to disclose to all prospective, new, arriving and existing guests the fact legionella bacteria infected the hotel's water system and the serious, and potentially fatal, health risks it presented.

II.

THE PARTIES

11. Plaintiff AARON LEIGH-PINK (a.k.a., AARON PINK) was a registered guest who stayed at the RIO ALL-SUITE HOTEL AND CASINO from on or about May 12, 2017 to May 14, 2017, and again September 1, 2017, to September 4, 2017.

12. Plaintiff AARON LEIGH-PINK is a competent adult and resident of California.

13. Plaintiff TANA EMERSON was a registered guest who stayed at the RIO ALL-SUITE HOTEL AND CASINO from on or about June 7, 2017 to June 9, 2017.

14. Plaintiff TANA EMERSON is a competent adult and resident of California.

15. Defendant RIO PROPERTIES LLC is a Nevada limited liability company registered to do business in Nevada with the Nevada Secretary of State. Defendant owns, operates and/or manages and does business as the RIO ALL-SUITE HOTEL AND CASINO, located at 3700 W Flamingo Road, Las Vegas, Nevada 89103.

16. Plaintiffs are ignorant of the true names, capacities, and identities of defendants sued herein as DOES 1-50, inclusive and therefore sues these defendants by such fictitious names. Plaintiffs will amend this complaint to allege their true names, capacities and identities when ascertained.

17. Plaintiffs are informed, believe and thereon allege that each of the fictitiously named defendants is responsible in some manner for the occurrences herein alleged, and that plaintiffs' and/or the class' injuries as herein alleged were proximately caused by such acts.

18. Plaintiffs are informed and believe, and based thereon allege, that each DOE defendant acted in all respects pertinent to this action as the agent or ostensible agent of the other defendants and/or DOES, and carried out a joint scheme, business plan or policy in all respects pertinent hereto, and the acts of each DOE defendant are legally attributable to the other.

III.

CLASS ACTION ALLEGATIONS

19. Plaintiffs bring this suit as a class action pursuant to Federal Rules of Civil Procedure, Rule 23, on behalf of themselves and all other similarly situated persons. Without having the benefit of discovery, and based on information currently available to Plaintiffs, the proposed class and/or sub-classes are currently defined as follows:

> All persons who were registered guests of and stayed at the Rio All-Suite Hotel and Casino during the time legionella bacteria was present in the hotel's water system.

20. Excluded from the class/sub-classes are: (1) Defendant and any entity or division in which Defendant(s) has/have a controlling interest, and its legal representatives, officers, directors, assigns and successors; (2) Defendant's employees; (3) the judge or other judicial officers to whom this case is assigned.

21. Plaintiffs reserve the right to amend or modify the class description with greater specificity or further division into subclasses or limitation as to particular issues or claims based on facts and/or information that may be disclosed during discovery.

22. This action has been brought and may properly be maintained as a class action under the provisions of Rule 23 of the Federal Rules of Civil Procedure because there is a well-defined community of interest in the litigation and the proposed class is easily ascertainable.

A. Numerosity

23. The potential members of the class as defined are so numerous and are dispersed throughout the United States such that joinder of all class members is impracticable. While the precise number

of class members has not been determined at the time of filing this complaint, based on the fact there are believed to be 2,522 rooms at the RIO ALL-SUITE HOTEL AND CASINO and legionella bacteria was present in the hotel's water system from at least May 1, 2017, (the date of SNHD's letter to Defendant) through at least September 28, 2017 (the date when testing continued show the presence of legionella bacteria in the hotel's water system), there are alleged to be hundreds of thousands of persons who are members of the class.

24. Assuming, conservatively, the RIO was on average only *half full* during the class period and assuming there was only one (1) person staying in each room there are *at least* 189,150 class members (1,261 rooms x 150 days [5/1/17 – 9/28/17] = 189,150).

B. Common Questions of Fact and Law

25. Common questions of fact and law exist as to all members of the class and predominate over any questions affecting solely individual members of the class. Among the questions of fact and law that predominate over any individual issues are:

a. Whether Defendant concealed, omitted disclosing, and/or negligently failed to disclose to guests there was legionella bacteria in the hotel's water system in violation of Nevada Revised Statute 41.600;

b. Whether Defendant violated the provisions of NRS 41.600 and corresponding NRS 205.377(1) [multiple transactions involving fraud, fraud includes omission of a material fact];

c. Whether Defendant engaged in deceptive trade practices in by concealing and/or failing to disclose to guests the material fact of the presence of legionella bacteria in the hotel's water system in violation of Nevada Deceptive Trade Practices Act, NRS 598.0923(2) [failure to disclose material facts in connection with the sale or lease of goods or services];

d. Whether Defendant violated the provisions of Nevada's Racketeer Influenced and Corrupt Organizations (RICO) statute set forth in Nevada Revised Statute (NRS) 207.350, *et seq*;

e. Whether Defendant has been unjustly enriched;

f. A declaration of the rights and/or remedies available to Plaintiffs and the class.

C. Typicality

26. The claims of the named Plaintiffs are typical of the claims of the members of the class. Plaintiffs and all members of the class sustained damages arising out of or caused by Defendant's and/or DOES' common course of conduct in violation of laws and regulations that have the force and effect of laws and statutes as alleged.

D. Adequacy of Representation

27. Plaintiffs will fairly and adequately protect the interests of the members of the class and will advocate for and on behalf of the class. Counsel who represent Plaintiffs are competent and experienced in litigating class action and multi-party cases and will competently and adequately represent the interests of the class. There are no conflicts or adverse interests between Plaintiffs or counsel and the class members.

E. Superiority of Class Action

28. A class action is superior to all other means for the fair and efficient adjudication of this controversy. Individual joiner of all class members is not practicable, and questions of law and fact common to the class predominate over any questions affecting only individual members of the class. Each class member has been damaged and is entitled to recovery because of Defendant's common business practice of concealing and/or failing to disclose to all guests staying at the RIO the presence of legionella bacteria in the hotel's water system.

29. Class action treatment will allow those similarly situated persons to litigate their claims in the manner most efficient and economical for the parties and the judicial system. Plaintiffs are unaware of any difficulties that are likely to be encountered in the management of this action that would preclude its maintenance as a class action.

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IV.

FIRST CAUSE OF ACTION

Violation of Nevada Revised Statute 205.377

[Multiple Transactions Involving Fraud or Deceit in Course of Enterprise or Occupation; Penalty]

30. Plaintiffs incorporate all previous allegations as though set forth in full herein.

31. Plaintiffs bring this cause of action individually and on behalf of all similarly situated class members.

32. Plaintiff alleges Defendant's actions and conduct as herein alleged constitutes violations of Nevada Revised Statute 205.377 which provides: (1) A person shall not, in the course of an enterprise or occupation, knowingly and with the intent to defraud, engage in an act, practice or course of business or employ a device, scheme or artifice which operates or would operate as a fraud or deceit upon a person by means of a false representation or omission of a material fact that: (a) The person knows to be false or omitted; (b) The person intends another to rely on; and (c) Results in a loss to any person who relied on the false representation or omission, in at least two transactions that have the same or similar pattern, intents, results, accomplices, victims or methods of commission, or are otherwise interrelated by distinguishing characteristics and are not isolated incidents within 4 years and in which the aggregate loss or intended loss is more than $650.

33. Pursuant to NRS 207.80, the provisions of NRS 205.377 apply to Defendant because Defendant is a corporation or other business entity.

34. Plaintiffs allege Defendant concealed and/or omitted from disclosing to Plaintiffs and the class members the fact legionella bacteria was present in the RIO's water system during their stay at the hotel. Plaintiffs allege the presence of legionella bacteria in the hotel's water system was a material fact which they and all other class members would reasonably rely upon in making the decision whether to stay at the RIO at all, or alternatively, whether the quoted room rate and/or Resort Fee was a fair and reasonable rate to pay for a room and facilities in a hotel which has legionella bacteria in the water system which exposes people to serious, and potentially deadly, illness.

35. Plaintiffs allege they relied justifiably on Defendant's concealment/omission when they stayed at the RIO and parted with their money by paying Defendant the demanded amount for the Resort Fee of $34.01 per day. Plaintiffs' "room rate" had been "comp'ed" by Defendant. Plaintiffs and each of them have therefore suffered actual harm and/or injury.

36. Plaintiffs alleges that since Defendant concealed and/or omitted from disclosing to all other guests the material fact of the presence of legionella bacteria in the RIO's water system it is reasonable to infer that all guests who stayed at the RIO during the time legionella bacteria was in the water system and paid Defendant the demanded room rate for their guest rooms and/or the Resort Fee relied reasonably on Defendant's concealment/omission.

37. Plaintiffs allege Defendant engaged in multiple acts on a daily basis of concealment/omission in violation of NRS 205.377, between at least May 1, 2017 through at least September 28, 2017 when Defendant concealed/omitted from disclosing to guests reserving a room, while checking in and/or while staying at the RIO the material fact of the presence of legionella bacteria in the hotel's water system and the serious health risks, including death, it presented.

38. As a direct and proximate result of Defendant's actions as herein alleged Plaintiffs and the class members suffered harm and damages in that they parted with their money by paying Defendant the room rate and/or Resort Fee demanded by Defendant to stay at the hotel when they either would have not 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 bacteria in the water system is fairly and reasonably worth to the average consumer. Plaintiffs and the class members have therefore suffered damages in an amount according to proof at trial.

39. Pursuant to NRS 205.377, in additional to any other penalty that may be assessed the court shall order a person who violates subsection 1 to pay restitution. Plaintiffs and the class members are therefore entitled to restitution in an amount according to proof at trial.

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V.

SECOND CAUSE OF ACTION

Violation of Nevada Deceptive Trade Practices Act (NDTPA)

[NRS 41.600, NRS 598.0923(2)]

40. Plaintiffs incorporates all previous allegations as though set forth in full herein.

41. Plaintiffs bring this cause of action individually and on behalf of all similarly situated class members.

42. Plaintiffs bring this cause of action in accordance with NRS 41.600 [Actions by victims of fraud], and specifically NRS 41.600(2)(e), for violations of the Nevada Deceptive Trade Practices Act. Plaintiffs allege Defendant violated the provisions of NRS 598.0923(2) by concealing/omitting from disclosure and/or failing to disclose a material fact in connection with the sale or lease of goods or services.

43. Plaintiffs allege Defendant concealed/omitted from disclosure and/or failed to disclose the presence of legionella bacteria in the RIO's water system while Plaintiffs and all other members of the class stayed at the hotel.

44. Plaintiffs allege Defendant concealed and/or omitted from disclosing to Plaintiffs and the class members the fact legionella bacteria was present in the RIO's water system during their stay at the hotel. Plaintiffs allege the presence of legionella bacteria in the hotel's water system was a material fact which they and all other class members would reasonably rely upon in making the decision whether to stay at the RIO at all, or alternatively, whether the quoted room rate and payment of the charged Resort Fee was a fair and reasonable rate to pay for a room and facilities in a hotel which has legionella bacteria in the water system which exposes people to serious illness.

45. Plaintiffs allege they relied justifiably on Defendant's concealment/omission when they stayed at the RIO and parted with their money by paying Defendant the demanded amount for the Resort Fee of $34.01 per day. Plaintiffs' "room rate" had been "comp'ed" by Defendant.

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46. Plaintiffs allege that since Defendant concealed and/or omitted from disclosing to all other guests the material fact of the presence of legionella bacteria in the RIO's water system it is reasonable to infer that all guests who stayed at the RIO during the time legionella bacteria was in the water system and paid Defendant the demanded room rate for their guest rooms and/or the charged Resort Fee they all relied reasonably on Defendant's concealment/omission.

47. Plaintiffs allege Defendant engaged in multiple acts on a daily basis between at least May I, 2017 through at least September 28, 2017 when Defendant concealed/omitted from disclosure to guests reserving a room, while checking in and/or while staying at the RIO the presence of legionella bacteria in the hotel's water system of concealment/omission in violation of NRS 41.600 [Actions by victims of fraud], and specifically NRS 41.600(2)(e), for violations of the Nevada Deceptive Trade Practices Act and the provisions of NRS 598.0923(2).

48. As a direct and proximate result of Defendant's actions as herein alleged Plaintiffs and the class members suffered harm and damages in that they 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 have not 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 bacteria in the water system is fairly and reasonably worth to the average consumer. Plaintiffs and the class members have therefore suffered damages in an amount according to proof at trial.

49. Plaintiffs are also entitled to an award of (a) any damages Plaintiffs and the class members have sustained; (b) any equitable relief the court deems appropriate; and (c) Plaintiffs' and the class members' costs in the action and reasonable attorney's fees.

50. Plaintiffs have retained counsel to represent them and as such are entitled to an award of attorney fees and costs pursuant to statute in an amount according to proof.

51. Plaintiffs further allege the actions and conduct of Defendant as herein alleged were fraudulent, oppressive and malicious in that they were carried out with a knowing, willful, purposeful, and intentional disregard for the rights and/or safety of all Defendant's guests. Defendant chose to wager the potential health of its guests against its odds of realizing multiple-millions of dollars in

revenue from gambling, room reservations, and food and beverage sales. As such, Plaintiffs and the class members are entitled to an award of punitive or exemplary damages against Defendant in an amount according to proof so as to punish and/or make an example of Defendant for other business in the hospitality industry and to prevent future similar wrongdoing.

VI.

THIRD CAUSE OF ACTION

Violation of Nevada RICO Statute [NRS 207.350, *et seq.*]

52. Plaintiffs incorporate all previous allegations as though set forth in full herein.

53. Plaintiffs bring this cause of action for themselves individually and on behalf of all similarly situated class members.

54. Plaintiffs have standing to bring this cause of action pursuant to NRS 207.470, which provides a private right of action to "[a]ny person who is injured in his or her business or property by reason of any violation of NRS 207.400 has a cause of action against a person causing such injury for three times the actual damages sustained. An injured person may also recover attorney's fees in the trial and appellate courts and costs of investigation and litigation reasonably incurred.

55. Plaintiffs allege Defendant violated the Nevada Racketeer Influenced and Corrupt Organizations Act ("RICO") NRS 207.350, and more specifically NRS 207.360(9) [Taking property from another under circumstances not amounting to robbery].

56. Plaintiffs allege Defendant violated the Nevada Racketeer Influenced and Corrupt Organizations Act ("RICO") NRS 207.350, and more specifically NRS 207.360(33) [Any violation of NRS 205.377 (Multiple transactions involving fraud or deceit in course of enterprise or occupation; penalty).

57. Plaintiffs allege Defendant engaged in multiple predicate acts, practices, or a course of business on a daily basis between at least May 1, 2017 through at least September 28, 2017, or employed a device, scheme or artifice which operated or would operate as a fraud or deceit upon a person by means of a false representation or omission of a material fact that: (a) The person knows to be false or omitted; (b) The person intends another to rely on; and (c) Results in a loss to any person who relied on the false representation or omission, in at least two transactions that have the same or

similar pattern, intents, results, accomplices, victims or methods of commission, or are otherwise interrelated by distinguishing characteristics and are not isolated incidents within 4 years and in which the aggregate loss or intended loss is more than $650.

58. Plaintiffs allege Defendant violated the provisions of Nevada's RICO statute by concealing and omitting and/or failing to disclose to them and all guests who registered to stay at, stayed at, and/or were staying at the RIO while the hotel's water system was infected with the potentially deadly legionella bacteria.

59. Plaintiffs allege Defendant engaged in two or more predicate acts on a daily basis between at least May 1, 2017 through at least September 28, 2017, of omission of a material fact as herein alleged in the four years preceding the filing of this action when Defendant concealed/omitted from disclosure to guests registering and/or staying at the RIO the presence of legionella bacteria in the hotel's water system.

60. Plaintiffs allege Defendant's actions resulted in an aggregate monetary benefit and/or a loss or intended loss to Plaintiffs and the class of more than $650.00.

61. Plaintiffs did not participate in the commission of Defendant's predicate acts as herein alleged.

62. As a direct and proximate result of Defendant's actions and conduct as herein alleged, Plaintiffs and the class members have been harmed, suffered damages and are entitled to recovery as provided by NRS 207.470, all in an amount according to proof at trial.

63. As a direct and proximate result of Defendant's actions as herein alleged Plaintiffs and the class members suffered harm and damages in that they parted with their money by paying Defendant the room rate and/or Resort Fee demanded by Defendant to stay at the hotel when they either would have not 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 bacteria in the water system is fairly and reasonably worth to the average consumer. Plaintiff and the class members have therefore suffered damages in an amount according to proof at trial.

64. Plaintiffs have retained counsel to represent them in this action and are therefore entitled to an award of attorney fees and costs according to proof.

65. Plaintiffs further allege the actions and conduct of Defendant as herein alleged were fraudulent, oppressive and malicious in that they were carried out with a knowing, willful, purposeful, and intentional disregard for the rights and/or safety of Defendant's guests. Defendant chose to wager the potential health of its guests against its odds of realizing multiple-millions of dollars in revenue from gambling, room reservations, and food and beverage sales. As such, Plaintiff and the class members are entitled to an award of punitive or exemplary damages against Defendant in an amount according to proof so as to punish and/or make an example of Defendant for other business in the hospitality industry and to prevent future similar wrongdoing.

VII.

FOURTH CAUSE OF ACTION

Common Law Negligence

66. Plaintiffs incorporate all previous allegations as though set forth in full herein.

67. Plaintiffs bring this cause of action individually and on behalf of all similarly situated class members.

68. At all times Defendant is and was in the business of operating a hotel and providing lodging for guests and were/was at all times open to the public. As such Defendant owed a duty to provide safe, clean, and disease-free accommodations, including a disease-free water system, to all guests of its hotel and not to expose it guests to diseases such as legionella bacteria whether negligently or recklessly. As the operator of a hotel and providing lodging for guests and being a facility that is open to the general public Defendant further owed a duty to disclose the presence of diseases such as legionella bacteria which were present in the hotel's water system to guests who reserved rooms at Defendant's hotel, or when those guests checked into Defendant's hotel and/or while those guests were staying at Defendant's hotel.

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69. Defendant breached its duty to Plaintiffs and all members of the class when it negligently and/or recklessly failed to maintain its water system in a safe, clean, and disease-free condition. Defendant further breached its duty to Plaintiffs and all members of the class when it negligently concealed and/or failed to inform, disclose or otherwise notify Plaintiffs and the class members of the existence of legionella bacteria in its hotel's water system while they were staying at Defendant's hotel.

70. As a direct and proximate result of Defendant's actions as herein alleged Plaintiffs and the class members suffered harm and damages in that they parted with their money by paying Defendant the room rate and/or Resort Fee demanded by Defendant to stay at the hotel when they either would have not 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 bacteria in the water system is fairly and reasonably worth to the average consumer. Plaintiff and the class members have therefore suffered damages in an amount according to proof at trial.

71. Plaintiffs further alleges the actions and conduct of Defendant as herein alleged were fraudulent, oppressive and malicious in that they were carried out with a reckless, knowing, willful, purposeful, and conscious disregard for the rights and/or safety of Defendant's guests. Defendant chose to wager the potential health of its guests against its odds of realizing multiple-millions of dollars in revenue from gambling, room reservations, and food and beverage sales. As such, Plaintiffs and the class members are entitled to an award of punitive or exemplary damages against Defendant in an amount according to proof so as to punish and/or make an example of Defendant for other business in the hospitality industry and to prevent future similar wrongdoing.

VII.

FIFTH CAUSE OF ACTION

Fraudulent Concealment

72. Plaintiffs incorporate all previous allegations as though set forth in full herein.

73. Plaintiffs bring this cause of action individually and on behalf of all similarly situated class members.

74. At all times Defendant are and were in the business of operating a hotel and providing lodging for guests and were/was at all times open to the public. As such Defendant owed a duty to provide safe, clean, and disease-free accommodations, including a disease-free water system, to all guests of its hotel and not to expose it guests to diseases such as legionella bacteria whether negligently or recklessly. As the operator of a hotel and providing lodging for guests and being a facility that is open to the general public Defendant further owed a duty to disclose the presence of diseases such as legionella bacteria which were present in the hotel's water system to guests who reserved rooms at Defendant's hotel, or when those guests checked into Defendant's hotel and/or while those guests were staying at Defendant's hotel.

75. Plaintiffs allege Defendant had actual knowledge as of at least May 1, 2017 of the presence of legionella bacteria in the hotel's system and that at least two guests who stayed at the RIO in March and April 2017 had contracted Legionnaires disease. Plaintiffs further allege Defendant and each of them had actual knowledge that in June 2017, other guests staying at the RIO had contracted Legionnaires disease.

76. Plaintiffs allege Defendant fraudulently concealed and/or omitted from disclosing to Plaintiffs and the class members the fact legionella bacteria was present in the RIO's water system during their stay at the hotel. Plaintiffs allege the presence of legionella bacteria in the hotel's water system was a material fact which they and all other class members would reasonably rely upon in making the decision whether to stay at the RIO at all, or alternatively, whether the quoted room rate and payment of the charged Resort Fee was a fair and reasonable rate to pay for a room and facilities in a hotel which has legionella bacteria in the water system which exposes people to serious illness.

77. Plaintiffs allege they relied justifiably on Defendant's concealment/omission when they stayed at the RIO and parted with their money by paying Defendant the demanded amount for the Resort Fee of $34.01 per day. Plaintiffs' "room rate" had been "comp'ed" by Defendant.

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78. Plaintiffs allege that since Defendant concealed and/or omitted from disclosing to all other guests the material fact of the presence of legionella bacteria in the RIO's water system it is reasonable to infer that all guests who stayed at the RIO during the time legionella bacteria was in the water system and paid Defendant the demanded room rate for their guest rooms and/or the charged Resort Fee all relied reasonably on Defendant's concealment/omission.

79. As a direct and proximate result of Defendant's actions as herein alleged Plaintiffs and the class members suffered harm and damages in that they 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 have not 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 bacteria in the water system is fairly and reasonably worth to the average consumer. Plaintiffs and the class members have therefore suffered damages in an amount according to proof at trial.

80. Plaintiffs further allege the actions and conduct of Defendant as herein alleged were fraudulent, oppressive and malicious in that they were carried out with a reckless, knowing, willful, purposeful, and conscious disregard for the rights and/or safety of Defendant's guests. Defendant chose to wager the potential health of its guests against its odds of realizing multiple-millions of dollars in revenue from gambling, room reservations, and food and beverage sales. As such, Plaintiffs and the class members are entitled to an award of punitive or exemplary damages against Defendant in an amount according to proof so as to punish and/or make an example of Defendant for other business in the hospitality industry and to prevent future similar wrongdoing.

VIII.

FIFTH CAUSE OF ACTION

Unjust Enrichment

81. Plaintiffs incorporate all previous allegations as though set forth in full herein.

82. Plaintiffs bring this cause of action individually and on behalf of all similarly situated class members.

83. Plaintiffs allege Defendant was unjustly enriched and received an unjustified monetary and financial windfall by its concealment/omission from disclosure and/or failure to disclose to guests the presence of legionella bacteria in the RIO's water system during their stay.

84. Here, Plaintiffs and the class members conferred a financial benefit on Defendant by paying money for a room and/or the Resort Fee at the RIO. Defendant appreciated such benefit and there was acceptance and retention by Defendant of such benefit under circumstances such that it would be inequitable for them to retain the benefit without payment of the value thereof.

85. As a direct and proximate result of Defendant's actions as herein alleged Plaintiffs and the class members suffered harm and damages in that they parted with their money by paying Defendant the room rate and/or Resort Fee of $34.01/day demanded by Defendant to stay at the hotel when they either would have not 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 bacteria in the water system is fairly and reasonably worth to the average consumer. Plaintiffs and the class members have suffered damages in an amount according to proof at trial.

IX.

SIXTH CAUSE OF ACTION

Declaratory Relief

86. Plaintiffs incorporate all previous allegations as though set forth in full herein.

87. Plaintiffs bring this cause of action for themselves individually and on behalf of all similarly situated class members.

88. An actual controversy has arisen between Plaintiffs and the class members on the one hand and Defendant on the other with regard to the rights, responsibilities and obligations of each party relating to the presence of legionella bacteria in the RIO ALL-SUITE HOTEL AND CASINO water system when Plaintiffs and the class 1) made reservations to stay at Defendant's hotel, 2) when they checked into their room at Defendant's hotel, and 3) while they were staying at Defendant's hotel.

89. Plaintiffs individually and on behalf of the class members desires a judicial declaration of their and Defendant's rights, statutory obligations and/or legal duties.

PRAYER FOR RELIEF

WHEREFORE Plaintiffs seek judgment as follows:

1. That this action be maintained as a class action;

2. For restitution in an amount according to proof at trial;

3. For compensatory damages in an amount according to proof at trial;

4. For an award of punitive or exemplary damages against Defendant in an amount according to proof so as to punish and/or make an example of Defendant for other business in the hospitality industry and to prevent future similar wrongdoing.

5. For special damages according to proof at trial;

6. For attorney fees pursuant to statute in an amount according to proof at trial;

7. For costs of suit and other litigation expenses in an amount according to proof at trial;

8. For prejudgment interest; and

9. Any and such other relief the Court deems fair, just, and equitable.

DATED: February 23, 2018

By: Robert A. Waller, Jr.
Robert A. Waller, Jr., *(pro hac vice)*
Attorneys for Plaintiffs and the class

DEMAND FOR JURY TRIAL

Plaintiffs and each of them hereby demands trial by jury on all causes of action for which a jury trial is available.

DATED February 23, 2018

By: Robert A. Waller, Jr.
Robert A. Waller, Jr., *(pro hac vice)*
Attorneys for Plaintiffs and the class

EXHIBIT "1"

SNHD
Southern Nevada Health District

May 1, 2017

Rio Suites Hotel
3700 W Flamingo RD
Las Vegas NV 89103-4043

Re: Notification of a case of Legionellosis associated with Rio Suites Hotel, 3700 W Flamingo RD, Las Vegas NV 89103-4043, PR0005134

Dear Mr. Hines:

The Southern Nevada Health District (SNHD) has received notification that a patient diagnosed with legionellosis stayed at your facility during their incubation period sometime in March. *Legionella pneumophila* is the bacterial organism that causes legionellosis. *Legionella* are ubiquitous in the environment and can enter a facility through the water supply. They can grow within the biofilm of the water supply system in areas where the water temperature is between 77 and 108 degrees Fahrenheit. These areas can include cooling towers, spas, whirlpools, fountains, showers and misters, all of which have previously been linked to Legionnaires' disease outbreaks. A susceptible person must inhale the mist or water vapor that contains the *Legionella* bacteria.

The SNHD will take a number of water samples from areas in and around your facility where the patient visited. These samples will be tested at a laboratory that is Environmental *Legionello* Isolation Techniques Evaluation (ELITE)–program certified by the Centers for Disease Control and Prevention (CDC). As part of the investigation, with your consent and cooperation, SNHD staff will also conduct an environmental assessment and determine if there are other areas in the facility or on the facility grounds that may pose a legionellosis risk to visitors and employees. The SNHD will provide further remediation recommendations and instructions based on the results of the environmental sample testing. You facility will be billed for the cost of the sampling at $98.25 per sample for this investigation.

Thank you for your time and continued cooperation in ensuring that the residents and visitors to Southern Nevada are protected to the greatest possible extent from exposure to *Legionella*.

Sincerely,
Southern Nevada Health District

Rob Cole, REHS
Environmental Health Senior

Erin Cavin, REHS
Environmental Health Specialist II

cc: Vivek Raman, SNHD, EH—Public Accommodations

EXHIBIT "2"

From: Erin Cavin
To: "Brad Waldron"; "jhines1@caesars.com"
Bcc: Robert Cole
Subject: Legionella Investigation
Date: Tuesday, May 02, 2017 10:56:00 AM

Hello Mr. Waldron and Mr. Hines,

Attached you will find the copy of the environmental assessment form that we were going through today at our meeting. Please fill it out the rest of the way as accurately as possible. Then scan and email it back to me with all the requested documents that we mentioned as well as a copy of the introduction letter we gave you this morning. I look forward to seeing you tomorrow.

Should you have any questions, please feel free to contact me.

702-465-5448
Southern Nevada Health District
Special Programs
333 N. Rancho, Suite 450, Las Vegas

EXHIBIT "3"

July 5, 2017

Dear Valued Guest,

We were notified by the Southern Nevada Health District of two instances of individuals who stayed at the Rio All-Suite Hotel and Casino (the Rio), one in March and one in April, that contracted Legionnaires' disease. Fortunately, both individuals have recovered. However, recent testing indicated the presence of the Legionella bacteria in water systems at the Rio, and we worked with the Southern Nevada Health District to address the concern and take aggressive remediation action to ensure the safety of the water. Our records show that you also recently stayed with us at the Rio so we wanted to provide you with this letter and important information.

Legionnaire's disease is contracted by inhaling, not drinking, droplets of water or mist containing the Legionella bacteria and is a type of pneumonia. The Legionella bacteria can reside in the hot water systems of buildings. Until the system was fully treated, taking a shower or a bath with the jets running may have put you at risk by breathing water in the air. Taking a normal bath, handwashing, or drinking water would generally not pose an elevated risk.

Symptoms usually begin two to 10 days after exposure to the bacteria. Guests developing symptoms within 14 days of their stay at the Rio should seek medical attention. The Southern Nevada Health District has advised that if you stayed at the Rio more than two weeks ago, and you are currently well and do not show pneumonia-like symptoms, then there is no need to be concerned at this point in time. If it has been less than 14 days since your stay, you should not hesitate to seek medical attention if you are showing pneumonia-like symptoms, and your health care provider will evaluate you appropriately.

Additionally, if you have any questions or would like more information about Legionnaire's disease, please contact the Southern Nevada Health District or visit their website at http://southernnevadahealthdistrict.org/health-topics/legionellosis.php.

If you would like to contact SNHD by phone, please call (702) 759-0999 from Monday – Friday 9 AM t 4:30 PM Pacific Time.

We are very sorry for any inconvenience or concern this situation may cause.

Respectfully,

Hotel Management

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

JAY AMES, Plaintiff, vs. CAESARS ENTERTAINMENT CORPORATION, *et al.*, Defendants.	Case No.: 2:17-cv-02910-GMN-VCF **ORDER**

Pending before the Court is the Motion to Dismiss, (ECF No. 25), filed by Defendant Rio Properties, LLC ("Defendant"). Plaintiff Aaron Leigh-Pink and Tana Emerson (collectively, "Plaintiffs") filed a Response, (ECF No. 26), and Defendant filed a Reply, (ECF No. 27). For the reasons discussed below, Defendant's Motion to Dismiss is **GRANTED**.

I. BACKGROUND

This case arises from alleged violations of the Nevada Deceptive Trade Practices Act ("NDTPA") and other state-based claims. (*See* Am. Second Compl. ("SAC") ¶¶ 30–89, ECF No. 22). Plaintiffs' allegations are as follow. Defendant owns and operates the Rio All-Suite Hotel and Casino ("Rio"), located in Las Vegas, Nevada. (*Id.* ¶ 1). Plaintiff Leigh-Pink was a guest at the Rio, in May and September 2017. (*Id.* ¶ 11). Plaintiff Emerson was a guest at the Rio in June 2017. (*Id.* ¶ 13). Plaintiffs did not pay "room rates" for their respective hotel rooms; their stays were "comp'ed" (*i.e.*, complimentary). (*See id.* ¶¶ 9, 35). However, 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 hotel guests. (*Id.*); (Mot. to Dismiss ("MTD") 2:14–16, ECF No. 22).

Plaintiffs further allege that from May 1, 2017, to "at least" September 28, 2017, Defendant knew that the Rio's water system was infected with legionella bacteria, which causes legionnaires disease, a potentially deadly bacterial disease. (*See, e.g.*, *id.* ¶ 37, 47). More specifically, Plaintiffs allege that on May 1, 2017, the Southern Nevada Health District ("SNHD") notified Defendant of a report that two guests who stayed at the Rio in March and April 2017 developed legionnaires disease after staying at the Rio. (*Id.* ¶ 2). Over the next few days, SNHD representatives corresponded and met with Defendant's representatives, and "discussed the fact that SNHD would be conducting a legionella investigation of the [Rio] hotel." (*Id.* ¶¶ 3, 4). Further, Defendant's representatives were shown a PowerPoint presentation "to educate" them "on the seriousness of the situation and the health risks to guests of the hotel." (*Id.* ¶ 4).

Plaintiffs do not allege that they contracted or developed legionnaires disease as a result of their stay at the Rio. Instead, Plaintiffs allege that "they relied justifiably on Defendant's concealment/omission when they stayed at the [Rio]" and that they "suffered harm and damages" in that they "parted ways with their money by paying . . . the Resort Fee of $34.01 per day," when Plaintiffs "either would have not stayed at the [Rio] at all . . . , or alternatively, paid Defendant amounts greater than what a room and facilities in a hotel with legionella bacteria in the water system is fairly and reasonably worth to the average consumer." (*See, e.g.*, *id.* ¶¶ 35, 38, 45, 48).

On October 11, 2017, Plaintiffs filed a class action against Defendant in Clark County District Court. (Compl., ECF No. 1-1). In December 2017, Plaintiffs filed their First Amended Complaint. Defendants removed to federal court pursuant to the Class Action Fairness Act. (Pet. Removal, ECF No. 1). On March 1, 2018, Plaintiffs filed a Second Amended Complaint setting forth the following claims against Defendant: (1) violation of Nevada Revised Statute ("NRS") § 205.377; (2) violation of NDTPA; (3) violation of Nevada's Racketeer Influenced

and Corrupt Organizations Act ("RICO"); (4) negligence; (5) fraudulent concealment; (6) unjust enrichment; and (7) declaratory relief. (SAC ¶¶ 30–89). Defendant now moves to dismiss Plaintiffs' Second Amended Complaint.

II. LEGAL STANDARD

Rule 12(b)(6) of the Federal Rules of Civil Procedure mandates that a court dismiss a cause of action that fails to state a claim upon which relief can be granted. *See North Star Int'l v. Ariz. Corp. Comm'n*, 720 F.2d 578, 581 (9th Cir. 1983). When considering a motion to dismiss under Rule 12(b)(6) for failure to state a claim, dismissal is appropriate only when the complaint does not give the defendant fair notice of a legally cognizable claim and the grounds on which it rests. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). In considering whether the complaint is sufficient to state a claim, the Court will take all material allegations as true and construe them in the light most favorable to the plaintiff. *See NL Indus., Inc. v. Kaplan*, 792 F.2d 896, 898 (9th Cir. 1986).

The Court, however, is not required to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences. *See Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). A formulaic recitation of a cause of action with conclusory allegations is not sufficient; a plaintiff must plead facts showing that a violation is *plausible*, not just possible. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Twombly*, 550 U.S. at 555) (emphasis added). In order to survive a motion to dismiss, a complaint must allege "sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Id.* "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.*

"Generally, a district court may not consider any material beyond the pleadings in ruling on a Rule 12(b)(6) motion . . . . However, material which is properly submitted as part of the

complaint may be considered on a motion to dismiss." *Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d 1542, 1555 n.19 (9th Cir. 1990) (citations omitted). Similarly, "documents whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the pleading, may be considered in ruling on a Rule 12(b)(6) motion to dismiss" without converting the motion to dismiss into a motion for summary judgment. *Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir. 1994). Under Federal Rule of Evidence 201, a court may take judicial notice of "matters of public record." *Mack v. S. Bay Beer Distrib.*, 798 F.2d 1279, 1282 (9th Cir. 1986). Otherwise, if the district court considers materials outside of the pleadings, the motion to dismiss is converted into a motion for summary judgment. *See* Fed. R. Civ. P. 12(d); *Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 925 (9th Cir. 2001).

If the court grants a motion to dismiss, it must then decide whether to grant leave to amend. Pursuant to Rule 15(a), the court should "freely" give leave to amend "when justice so requires," and in the absence of a reason such as "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of the amendment, etc." *Foman v. Davis*, 371 U.S. 178, 182 (1962). Generally, leave to amend is only denied when it is clear that the deficiencies of the complaint cannot be cured by amendment. *See DeSoto v. Yellow Freight Sys., Inc.*, 957 F.2d 655, 658 (9th Cir. 1992).

III. DISCUSSION

In the instant Motion, Defendant contends Plaintiffs' Second Amended Complaint should be dismissed because it is "populated by conclusory allegations rather than the specific factual averments needed to support the claims asserted." (MTD 3:8–10, ECF No. 25). Defendant sets forth several arguments supporting its contention, including that Plaintiffs did not suffer damages, that they failed to plead their fraud-based claims with particularity as

mandated by the Federal Rules of Civil Procedure, and that Plaintiffs fail to allege a predicate violation for their Nevada RICO claim, among others. (*See generally* Compl.). Plaintiffs respond that their Second Amended Complaint "sufficiently alleges the who, what, where and when about Defendant's fraudulent conduct of concealing material facts from guests, their knowledge of the presence of legionella bacteria in the [Rio's] water system, and properly alleges facts supporting each of the causes of action[.]" (Resp. 3:20–23, ECF No. 26).

The Court now addresses the sufficiency of Plaintiffs' claims, starting with those that require an element of damages.

A. Nevada Deceptive Trade Practices Act

Courts in this district have held that to establish a violation of the NDTPA, the plaintiff must demonstrate that (1) an act of consumer fraud by the defendant (2) caused (3) damages to the plaintiff. *Picus v. Wal–Mart Stores, Inc.*, 256 F.R.D. 651, 657–58 (D. Nev. 2009). Specifically, NRS § 41.600 provides: "An action may be brought by any person who is a victim of consumer fraud. As used in this section, 'consumer fraud' means: . . . A deceptive trade practice as defined in NRS 598.0915 to NRS 598.0925 . . . ." Here, Plaintiffs' NDTPA claim rests on NRS § 598.0923(3), which states that "[a] person engages in a 'deceptive trade practice' when in the course of his or her business or occupation he or she knowingly . . . . [f]ails to disclose a material fact in connection with the sale or lease of goods or services."

Plaintiffs contend Defendant violated the NDTPA because Defendant had knowledge of the presence of legionella bacteria in its water system, which was a material fact that it withheld from guests. (SAC ¶ 44). Moreover, Plaintiffs state that Defendant's omission caused them damages in "that they parted with their money" to stay at the Rio when they could have stayed somewhere else, "or alternatively, paid Defendant amounts greater than what a room and

facilities in a hotel with legionella bacteria in the water system" is worth to the average customer. (*Id.* ¶ 48).

The Court finds that Plaintiffs failed to present sufficient factual matter to state a claim to relief that is plausible on its face. To begin with, Plaintiffs' damages, if any, were economic in nature, as they have not alleged personal injury or property damage. Moreover, Plaintiffs concede that their stay at the Rio was complimentary, except for the resort fee of $34.01. (*Id.* ¶ 9, 35). The resort fee paid for internet use, telephone use, and fitness room access. (MTD 2:14–16). Plaintiffs do not allege that during their stay they did not receive those amenities, sufficient access to those amenities, or that the amenities were otherwise unsatisfactory.

But even if Plaintiffs had alleged that they were injured because they were unable to use the amenities that they paid for, Plaintiffs' NDTPA claim would still fail, as Defendants have not sufficiently alleged a causal link between the purported bacteria in the Rio's water system, and any issue they may have had in trying to access or enjoy said amenities. Because Plaintiffs do not plead sufficient factual content to allow the Court to draw "the reasonable inference that the defendant is liable for the misconduct alleged," Plaintiffs' claim is not facially plausible and will be dismissed with leave to amend. *Iqbal*, 556 U.S. at 678.

B. Fraudulent Concealment

To establish a prima facie case of fraudulent concealment under Nevada Law, a plaintiff must offer proof that satisfies five essential elements:

> (1) The defendant must have concealed or suppressed a material fact;
> (2) The defendant must have been under a duty to disclose the fact to the plaintiff;
> (3) The defendant must have intentionally concealed or suppressed the fact with the intent to defraud the plaintiff, that is, he must have concealed or suppressed the fact for the purpose of inducing the plaintiff to act differently than he would if he knew the fact;
> (4) The plaintiff must have been unaware of the fact and would not have acted as he did if he had known of the concealed or suppressed fact;
> (5) And, finally, as a result of the concealment or suppression of the fact, the plaintiff must have sustained damages.

Nevada Power Co. v. Monsanto Co., 891 F. Supp. 1406, 1415 (D. Nev. 1995) (citing Nevada Jury Instruction 9.03). Fraudulent concealment must be pled with Rule 9(b) particularity. *See* Fed. R. Civ. P. 9(b).

For the reasons stated above, Plaintiffs have not presented facts establishing damages. Given that damages are a necessary element of fraudulent concealment, Plaintiffs have not sufficiently pled this claim. However, the Court notes that Plaintiffs have not set forth facts satisfying the second element—that is, that Defendant had a "duty to disclose."

In Nevada, the duty to disclose arises from the relationship between the parties. *Dow Chem. Co. v. Mahlum*, 970 P.2d 98, 110 (Nev. 1998), *overruled on other grounds by GES, Inc. v. Corbitt*, 21 P.3d 11 (Nev. 2001). A duty to disclose arises where there is a fiduciary relationship or where there is a "special relationship," such that the complaining party imparts special confidence in the defendant and the defendant reasonably knows of that confidence. *Id.* The Nevada Supreme Court has recognized such a "special relationship" between real estate agents/buyers, insurers/insureds, trustees/beneficiaries, and attorneys/clients, such that "[n]ondisclosure . . . become[s] the equivalent of fraudulent concealment." *Nevada Power Co.*, 891 F. Supp. at 1416 n.3 (citing cases); *Giles v. General Motors Corp.*, 494 F.3d at 865, 881 (9th Cir. 2007) (citing *Mackintosh v. Jack Matthews & Co.*, 855 P.2d 549 (Nev. 1993)).

Here, Plaintiffs allege that they were guests at Defendant's hotel. Plaintiffs have not provided factual allegations indicating that they had either a fiduciary or special relationship. In their Response, Plaintiffs attempt to cure this deficiency stating that "Defendant was under a duty to disclose [that there was legionella present in the water system] to Plaintiffs based on the relationship and the class members' health." (Resp. at 19, ECF No. 26). However, Plaintiffs fail to cite any recognized special relationship based on "health." Accordingly, Defendant's motion to dismiss is granted as to fraudulent concealment.

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A. Nevada RICO

For a plaintiff to recover under Nevada's civil RICO statute, three conditions must be met: "(1) the plaintiff's injury must flow from the defendant's violation of a predicate Nevada RICO act; (2) the injury must be proximately caused by the defendant's violation of the predicate act; and (3) the plaintiff must not have participated in the commission of the predicate act." *Allum v. Valley Bank of Nevada*, 849 P.2d 297, 299 (Nev. 1993).

As discussed above, Plaintiffs have failed to demonstrate both injury and causation. On those grounds alone, Plaintiffs' Nevada RICO claim fails and must be dismissed. However, the Court also notes that Plaintiffs have not alleged any predicate RICO act outlined in NRS § 207.400. While Plaintiffs acknowledge this in their Response, they nevertheless discount it as a "technical deficiency." (Resp. at 14). However, it is not just a technicality, as the predicate acts set forth in NRS § 207.400 are what give rise to civil RICO claims. *Allum*, 849 P.2d at 299 (Nev. 1993) ("It is well-settled that to have standing as a RICO plaintiff, one's injury must flow from the violation of a predicate RICO act."). The Court dismisses this claim without prejudice.

B. Negligence

"To recover under a negligence theory, [a plaintiff] must prove four elements: (1) that [the defendant] owed him a duty of care; (2) that [the defendant] breached this duty of care; (3) that the breach was the legal cause of [the plaintiff's] injury; and (4) that the complainant suffered damages." *Hammerstein v. Jean Dev. W.*, 907 P.2d 975, 977 (Nev. 1995).

Here, Defendant argues that because Plaintiffs allege no personal injury, their negligence claim must be dismissed pursuant to Nevada's economic loss doctrine. (MTD at 14). Under this doctrine a plaintiff cannot bring a tort claim for "purely economic losses" absent a claim for personal injury or property damage. *Terracon Consultants Western, Inc. v. Mandalay Resort Grp.*, 206 P.3d 81, 86 (Nev. 2009). Exceptions to the economic loss doctrine exist "in

[a] certain categor[y] of cases when strong countervailing considerations weigh in favor of imposing liability," such as cases "where there is significant risk that 'the law would not exert significant financial pressures to avoid such negligence.'" *Halcrow, Inc. v. Eighth Jud. Dist. Ct.*, 302 P.3d 1148, 1153 (Nev. 2013) (quoting *Terracon*, 206 P.3d at 86, 88). Additionally, the economic loss doctrine does not bar recovery in tort where the defendant had a duty imposed by law rather than by contract and where the defendant's intentional breach of that duty caused purely monetary harm to the plaintiff." *Giles v. Gen. Motors Acceptance Corp.*, 494 F.3d 865, 879 (9th Cir. 2007) (collecting Nevada Supreme Court cases).

Here, Plaintiffs argue, *inter alia*, that Defendant's alleged concealment of the legionella contamination in Defendant's water system posed a significant risk that the law would not exert significant financial pressures to avoid, and thus its negligence claim against Defendant is not barred by the economic loss doctrine. (Resp. at 17). Nevertheless, even accepting this as true, Plaintiffs have not sufficiently pled causation and damages, two essential elements of a negligence claim. The Court accordingly dismisses Plaintiffs' claim for negligence, but without prejudice.

C. Unjust Enrichment

In Nevada, the elements of an unjust enrichment claim are: "(1) a benefit conferred on the defendant by the plaintiff; (2) appreciation of the benefit by the defendant; and (3) acceptance and retention of the benefit by the defendant (4) in circumstances where it would be inequitable to retain the benefit without payment." *See Leasepartners Corp., Inc. v. Robert L. Brooks Trust*, 942 P.2d 182, 187 (Nev. 1997) (citation omitted).

In their Complaint, Plaintiffs allege that they conferred a financial benefit on Defendant by paying money for a resort fee, that "Defendant appreciated such benefit," and that Defendant accepted the benefit, under circumstances "such that it would be inequitable for them [sic] to retain benefit without payment of the value thereof." (SAC ¶ 22). However, "[a]

formulaic recitation of a cause of action with conclusory allegations is not sufficient; a plaintiff must plead facts showing that a violation is *plausible*, not just possible." *Iqbal*, 556 U.S. 662 at 678. Because Plaintiffs have not presented facts plausibly showing that Defendant was unjustly enriched, Plaintiffs claim is dismissed. However, the claim is dismissed without prejudice.

D. Violation of NRS § 205.377

Plaintiffs allege that Defendant violated NRS § 205.377 when it did not disclose the presence of legionella bacteria in Defendant's water system to hotel guests. (SAC ¶ 34–39). Specifically, NRS § 205.377 provides that

> a person shall not, in the course of an enterprise or occupation, knowingly and with the intent to defraud, engage in an act, practice or course of business . . . which operates . . . as a fraud or deceit upon a person by means of [an] . . . omission of a material fact that:
> (a) The person knows to be false or omitted;
> (b) The person intends another to rely on; and
> (c) Results in a loss to any person who relied on the false representation or omission, in at least two transactions that have the same or similar pattern, intents, results, accomplices, victims or methods of commission, or are otherwise interrelated by distinguishing characteristics and are not isolated incidents within 4 years and in which the aggregate loss or intended loss is more than $650.

NRS § 205.377(1). The statute provides that said conduct is a felony that is punishable by a prison term of 1 to 20 years and a fine of not more than $10,000.00.

This statute and the entirety of Section 205 governs *crimes* against property. Criminal statutes cannot form the basis of a civil suit without express civil enforcement provision, and NRS § 205.377 does not contain such an express provision. *See Burgess v. City and County of San Francisco*, 49 F. App'x 122 (9th Cir. 2002). Indeed, the Nevada Supreme Court has held that "the absence of an express provision providing for a private cause of action to enforce a statutory right strongly suggests that the Legislature did not intend to create a privately enforceable judicial remedy." *Baldonado v. Wynn Las Vegas, LLC*, 194 P.3d 96, 101 (Nev. 2008); *see also Collins v. Palczewski*, 841 F. Supp. 333, 340 (D. Nev. 1993) (criminal statutes

are not generally enforceable by a civil action) (citations omitted). Accordingly, Plaintiffs' NRS § 205.377 claim for relief fails as a matter of law and is dismissed without leave to amend.

E. Declaratory Judgment

Declaratory relief is not a separate cause of action or independent grounds for relief. *See in re Wal–Mart Wage & Hour Employ. Practices Litig.*, 490 F. Supp. 2d 1091, 1130 (D. Nev. 2007). Plaintiffs have failed to state any claim for which declaratory relief could be granted or pled facts showing that they are entitled to such relief. Accordingly, this claim is dismissed without prejudice.

F. Leave to Amend

Rule 15(a)(2) of the Federal Rules of Civil Procedure permits courts to "freely give leave [to amend] when justice so requires." Fed. R. Civ. P. 15(a)(2). The Ninth Circuit "ha[s] held that in dismissing for failure to state a claim under Rule 12(b)(6), 'a district court should grant leave to amend even if no request to amend the pleading was made, unless it determines that the pleading could not possibly be cured by the allegation of other facts.'" *Lopez v. Smith,* 203 F.3d 1122, 1127 (9th Cir. 2000) (quoting *Doe v. United States,* 58 F.3d 494, 497 (9th Cir. 1995)).

The Court finds that Plaintiffs may be able to plead additional facts to support the above causes of action, with the exception of Plaintiffs' claim under NRS § 205.377. Accordingly, the Court will grant Plaintiffs leave to file an amended complaint. Plaintiffs shall file their amended complaint within twenty-one days of the entry of this Order if they can allege sufficient facts that plausibly establish their claims against Defendant.

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IV. CONCLUSION

IT IS HEREBY ORDERED that Defendant's Motion to Dismiss, (ECF No. 25), is **GRANTED**. Plaintiffs' claim under NRS § 205.377 is dismissed with prejudice. All other claims are dismissed without prejudice.

DATED this 1 day of April, 2019.

Gloria M. Navarro, Chief Judge
United States District Court

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UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEVADA

JAY AMES, AARON LEIGH-PINK, and TANA EMERSON, Individually and on behalf of all others similarly situated,

Plaintiffs,

vs.

RIO PROPERTIES LLC, a Nevada Limited Liability Company; and DOES 1-50, inclusive,

Defendants.

Case No.: 17-cv-02910-GMN-VCF

THIRD AMENDED
CLASS ACTION COMPLAINT:

1) Violation of Nevada Deceptive Trade Practices Act [NRS 41.600, NRS 205.377, NRS 598.0923(2)];
2) Common Law Negligence
3) Fraudulent Concealment;
4) Unjust Enrichment;
5) Declaratory Relief

Plaintiffs AARON LEIGH-PINK and TANA EMERSON, individually and on behalf of all others similarly situated, allege the following:

I.

NATURE OF THE CASE

1. This is a class action brought against Defendant RIO PROPERTIES LLC (hereinafter "Defendant") which owns, manages and/or operates and does business as the RIO ALL-SUITE HOTEL AND CASINO ("RIO") located in Las Vegas, Nevada, and for its concealment and/or failure to disclose to hotel guests the material and important fact the hotel's water system was infected with legionella bacteria which causes Legionnaires disease, a potentially deadly bacterial disease. Despite Defendant's knowledge for months that legionella bacteria had infected the hotel's water system and at least two guests had become ill from their exposure to the legionella bacterial at the RIO, Defendant continued to book reservations and rent rooms and charge Resort Fees to tens, if not hundreds, of thousands of guests all while never saying a word to any of them about the presence of the legionella bacteria in the hotel's water system and facilities or the risk to guests' health presented by the infected water system.

2. On or about May 1, 2017, the Southern Nevada Health District ("SNHD") notified Defendant in writing of a report that two guests who stayed at the hotel in March and April 2017 contracted Legionnaires disease after staying at the RIO. Attached hereto as Exhibit "1" and incorporated by this reference is a copy of the May 1, 2017, letter sent by SNHD to Defendant.

3. On or about May 2, 2017, Erin Calvin of the SNHD Special Programs Unit sent an email to Defendant's representatives Brad Waldron (Vice President, Risk Management) and Jack Hines (Facilities Senior Manager at the Rio Hotel) following up on a meeting they had earlier that date wherein an environmental assessment of the RIO would be conducted by the SNHD for legionella bacteria in the hotel's water system. Attached hereto as Exhibit "2" and incorporated by this reference is a copy of Ms. Calvin's email.

4. On or about May 3, 2017, SNHD inspectors Calvin, Diaz and Ramirez-Luna met in person with Defendant's representatives Brad Waldron (Vice President, Risk Management) and Jack Hines (Facilities Senior Manager) and discussed the fact SNHD would be conducting a legionella investigation of the RIO hotel. During the meeting Ms. Calvin reviewed a Legionella power point presentation with Messrs. Hines and Waldron, to educate Defendant's representatives on the

seriousness of the situation and the health risks to guests of the hotel. During the May 3, 2017, in-person meeting Defendant's representatives chose not to remove at least one guest from their room in which the SNHD wanted to test for the presence of legionella bacteria.

5. Notwithstanding Defendant's actual knowledge of the presence of legionella bacteria in the hotel's water system and the fact at least two people had contracted Legionnaires disease, Defendant continued to conceal and/or fail to disclose this material fact from registered guests of the hotel.

6. Plaintiffs allege legionella bacteria continued to be present in the RIO's water system through at least September 28, 2017, based on testing performed by the SNHD, Defendant and/or their agents.

7. Defendant concealed from and/or failed to disclose to all guests, including Plaintiffs, the material fact of the report that guests have been exposed to legionella bacteria in its hotel and at least two guests had contracted Legionnaires disease while staying at the RIO in March and April 2017 and had become ill as a result. Defendant concealed and/or failed to disclose this material information when it made and accepted room reservations to stay at the RIO, when sending emails to registered guests ahead of their arrival and providing guests with a link to check-in online and use the Express Check-In Kiosk, while and/or when guests checked into the hotel at the front desk, and/or while guests were staying in the hotel.

8. Plaintiffs allege that instead of disclosing to guests the fact the hotel's water system was infected with legionella bacteria Defendant chose to roll the dice hoping none of their guests would find out or learn of the presence of legionella bacteria in the hotel's water system and take their business to another hotel/casino in Las Vegas. Defendant were particularly motivated to conceal this information during the 2017 NCAA Men's Basketball Championships known as "March Madness" (which took place from March 14 – April 3, 2017) and while hosting the 2017 World Series of Poker ("WSOP") tournament (which began May 30, 2017 and ran through July 23, 2017). Rather than disclose to its guests the material fact the RIO's water system was infected with legionella bacteria Defendant chose to wager the potential health of its guests against its odds of realizing multiple-millions of dollars in revenue from gambling, room rates, Resort Fees, and food and beverage sales.

9. Defendant realizes a premium on the amount they are able to charge and collect from guests to stay in its rooms (the "room rate") during big events such as March Madness and the WSOP which

draw many more people to its hotel than a regular, ordinary weekday or weekend in Las Vegas. Defendant charges an even greater premium room rate on weekends including Fridays and Saturdays. In addition to room rates, Defendant also charges all guests who stay at the RIO a "Resort Fee" which was charged to and paid by Plaintiffs and all class members and collected by Defendant whether any guest's room rate is covered by Defendant or not (*i.e.*, a "comp'd room").

10. It was not until on or about July 5, 2017, that Defendant sent a letter to registered guests who stayed, up to that date, at RIO up to that date during the time legionnaires bacteria was present in the hotel's water system a letter advising them of the presence of the legionella bacteria in the water system during their stay at the RIO. Attached hereto as Exhibit "3" is a true and correct copy of the July 5, 2017, sent by Defendant to RIO registered guests. Notwithstanding Defendant's knowledge months prior to sending the July 5, 2017, its letter to *past guests* that the waters system had been infected with legionella bacteria during their stay, Defendant continued to conceal from and/or failed to disclose to all prospective, new, arriving and existing guests the fact legionella bacteria infected the hotel's water system and the serious, and potentially fatal, health risks it presented.

II.

THE PARTIES

11. Plaintiff AARON LEIGH-PINK (a.k.a., AARON PINK) was a registered guest who stayed at the RIO ALL-SUITE HOTEL AND CASINO from on or about May 12, 2017 to May 14, 2017, and again September 1, 2017, to September 4, 2017.

12. Plaintiff AARON LEIGH-PINK is a competent adult and resident of California.

13. Plaintiff TANA EMERSON was a registered guest who stayed at the RIO ALL-SUITE HOTEL AND CASINO from on or about June 7, 2017 to June 9, 2017.

14. Plaintiff TANA EMERSON is a competent adult and resident of California.

15. Defendant RIO PROPERTIES LLC is a Nevada limited liability company registered to do business in Nevada with the Nevada Secretary of State. Defendant owns, operates and/or manages and does business as the RIO ALL-SUITE HOTEL AND CASINO, located at 3700 W Flamingo Road, Las Vegas, Nevada 89103.

16. Plaintiffs are ignorant of the true names, capacities, and identities of defendants sued herein as DOES 1-50, inclusive and therefore sues these defendants by such fictitious names. Plaintiffs will amend this complaint to allege their true names, capacities and identities when ascertained.

17. Plaintiffs are informed, believe and thereon allege that each of the fictitiously named defendants is responsible in some manner for the occurrences herein alleged, and that plaintiffs' and/or the class' injuries as herein alleged were proximately caused by such acts.

18. Plaintiffs are informed and believe, and based thereon allege, that each DOE defendant acted in all respects pertinent to this action as the agent or ostensible agent of the other defendants and/or DOES, and carried out a joint scheme, business plan or policy in all respects pertinent hereto, and the acts of each DOE defendant are legally attributable to the other.

III.

CLASS ACTION ALLEGATIONS

19. Plaintiffs bring this suit as a class action pursuant to Federal Rules of Civil Procedure, Rule 23, on behalf of themselves and all other similarly situated persons. Without having the benefit of discovery, and based on information currently available to Plaintiffs, the proposed class and/or sub-classes are currently defined as follows:

> All persons who were registered guests of and stayed at the Rio All-Suite Hotel and Casino during the time legionella bacteria was present in the hotel's water system.

20. Excluded from the class/sub-classes are: (1) Defendant and any entity or division in which Defendant(s) has/have a controlling interest, and its legal representatives, officers, directors, assigns and successors; (2) Defendant's employees; (3) the judge or other judicial officers to whom this case is assigned.

21. Plaintiffs reserve the right to amend or modify the class description with greater specificity or further division into subclasses or limitation as to particular issues or claims based on facts and/or information that may be disclosed during discovery.

22. This action has been brought and may properly be maintained as a class action under the provisions of Rule 23 of the Federal Rules of Civil Procedure because there is a well-defined community of interest in the litigation and the proposed class is easily ascertainable.

A. Numerosity

23. The potential members of the class as defined are so numerous and are dispersed throughout the United States such that joinder of all class members is impracticable. While the precise number of class members has not been determined at the time of filing this complaint, based on the fact there are believed to be 2,522 rooms at the RIO ALL-SUITE HOTEL AND CASINO and legionella bacteria was present in the hotel's water system from at least May 1, 2017, (the date of SNHD's letter to Defendant) through at least September 28, 2017 (the date when testing continued show the presence of legionella bacteria in the hotel's water system), there are alleged to be hundreds of thousands of persons who are members of the class.

24. Assuming, conservatively, the RIO was on average only *half full* during the class period and assuming there was only one (1) person staying in each room there are *at least* 189,150 class members (1,261 rooms x 150 days [5/1/17 – 9/28/17] = 189,150).

B. Common Questions of Fact and Law

25. Common questions of fact and law exist as to all members of the class and predominate over any questions affecting solely individual members of the class. Among the questions of fact and law that predominate over any individual issues are:

a. Whether Defendant concealed, omitted disclosing, and/or negligently failed to disclose to guests there was legionella bacteria in the hotel's water system in violation of Nevada Revised Statute 41.600;

b. Whether Defendant violated the provisions of NRS 41.600 and corresponding NRS 205.377(1) [multiple transactions involving fraud, fraud includes omission of a material fact];

c. Whether Defendant engaged in deceptive trade practices in by concealing and/or failing to disclose to guests the material fact of the presence of legionella bacteria in the hotel's water system in violation of Nevada Deceptive Trade Practices Act, NRS 598.0923(2) [failure to disclose material facts in connection with the sale or lease of goods or services];

d. Whether Defendant violated the provisions of Nevada's Racketeer Influenced and Corrupt Organizations (RICO) statute set forth in Nevada Revised Statute (NRS) 207.350, *et seq*;

e. Whether Defendant has been unjustly enriched;

f. A declaration of the rights and/or remedies available to Plaintiffs and the class.

C. Typicality

26. The claims of the named Plaintiffs are typical of the claims of the members of the class. Plaintiffs and all members of the class sustained damages arising out of or caused by Defendant's and/or DOES' common course of conduct in violation of laws and regulations that have the force and effect of laws and statutes as alleged.

D. Adequacy of Representation

27. Plaintiffs will fairly and adequately protect the interests of the members of the class and will advocate for and on behalf of the class. Counsel who represent Plaintiffs are competent and experienced in litigating class action and multi-party cases and will competently and adequately represent the interests of the class. There are no conflicts or adverse interests between Plaintiffs or counsel and the class members.

E. Superiority of Class Action

28. A class action is superior to all other means for the fair and efficient adjudication of this controversy. Individual joiner of all class members is not practicable, and questions of law and fact common to the class predominate over any questions affecting only individual members of the class. Each class member has been damaged and is entitled to recovery because of Defendant's common business practice of concealing and/or failing to disclose to all guests staying at the RIO the presence of legionella bacteria in the hotel's water system.

29. Class action treatment will allow those similarly situated persons to litigate their claims in the manner most efficient and economical for the parties and the judicial system. Plaintiffs are unaware of any difficulties that are likely to be encountered in the management of this action that would preclude its maintenance as a class action.

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IV.

FIRST CAUSE OF ACTION

Violation of Nevada Deceptive Trade Practices Act (NDTPA)

[NRS 41.600, NRS 205.377, NRS 598.0923(2)]

30. Plaintiffs incorporates all previous allegations as though set forth in full herein.

31. Plaintiffs bring this cause of action individually and on behalf of all similarly situated class members.

32. Plaintiffs bring this cause of action in accordance with NRS 41.600 [Actions by victims of fraud], and specifically NRS 41.600(2)(e), for violations of the Nevada Deceptive Trade Practices Act (NDTPA).

A. Count One - Violation of NRS 598.0923(2) As An Unlawful Business Practice

33. Plaintiffs allege Defendant violated the provisions of NRS 598.0923(2) by concealing/omitting from disclosure and/or failing to disclose a material fact in connection with the sale or lease of goods or services.

34. Plaintiffs allege Defendant concealed/omitted from disclosure and/or failed to disclose the presence of legionella bacteria in the RIO's water system while Plaintiffs and all other members of the class stayed at the hotel.

35. Plaintiffs allege a special relationship existed between them, individually and as a class, and Defendant which imposed on Defendant a duty to warn or otherwise disclose to Plaintiffs and all guests the fact the RIO's water system was infected with potentially deadly legionella bacteria. The special relationship between Defendant and Plaintiffs is based, *inter alia,* on the fact Defendant is an innkeeper/operator of a public accommodation and thus owes a duty to inform and/or warn its guests and invitees, such as Plaintiffs, of hazards or conditions existing on the premises which are known to the property owner/manager and which expose Plaintiffs to foreseeable harm, injury or damage, including illness and death. As an innkeeper/operator of public accommodations Defendant undertook to render services to another (*i.e.*, Plaintiffs and the class) including but not necessarily limited to offering sleeping accommodations, lavatories/sinks for guests to wash their faces and/or brush their teeth, and facilities for bathing including hot water baths and showers (through which Defendant had

actual knowledge guests were exposed to the legionnaires bacteria), and thus Defendant accepted the special relationship with its gusts/invitees, including Plaintiffs. Based on Defendant's status as an innkeeper/operator of public accommodations Plaintiffs and each of them vested in Defendant a special confidence that Defendant would provide accommodations which were safe, sanitary, and not infected with bacteria known to Defendant to cause serious health problems and even death. Based on the nature of the innkeeper/guest-invitee relationship Plaintiffs further vested special confidence in Defendant that Plaintiffs and each of them would be informed by Defendant of any conditions of the hotel or the accommodations being provided to Plaintiffs, including the water system supplying hot water to lavatories/sinks and showers inside the rooms being occupied by Plaintiffs, which presented a risk of harm or injury, including illness or death, by a water system infected with legionella bacteria. Plaintiffs and each of them vested a special confidence in Defendant because Defendant had exclusive knowledge of the true condition of the RIO's water system and Plaintiffs would have no way of knowing whether the water system was infected with legionella bacteria unless Defendant informed/disclosed to them that material information about the condition of the hotel.

36. The special relationship of between Defendant and Plaintiffs is further evidenced by the fact Plaintiffs and all other guests/invitees of Defendant were dependent entirely on Defendant to provide clean, safe, and hazard-free accommodations, including a water system supplying the rooms in which they slept and where they would be using hot water to shower, wash their hands and face, and brushing their teeth. Plaintiffs and each of them had no way of knowing the true condition of the RIO's water system and that it was infected with legionella bacteria at the time of their stay and thus Plaintiffs' ability to provide for their own protection was limited by their submission to the control of Defendant.

37. Plaintiffs further allege a special relationship between them and Defendant existed based on the fact Plaintiffs were and had each been members of Defendant's Total Rewards[1] program for more than 10 years, respectively, and thus have a long-term relationship and long-term course of dealing with Defendant both through its Total Rewards program as well as through prior stays at the RIO hotel. Plaintiffs allege Defendant, through the Total Rewards program, incentivizes and rewards the loyalty

[1] The Total Rewards program was recently renamed Caesars Rewards but promises the "same great program" and that "all your current benefits remain the same." See, https://www.caesars.com/total-rewards/benefits-overview (last visited 4/17/2019).

of its members, such as Plaintiffs, who stay and play at Caesars' properties including the RIO. Defendant incentivizes, promises and rewards members who earn points by staying and playing at Caesars' properties, including the RIO, with benefits including discounted or free rooms (like the "comp'd" rooms provided to Plaintiffs LEIGH-PINK and EMERSON) based on their loyalty and regular patronage of Defendant's properties including the RIO. Plaintiffs allege thereon that through the more than decade-long course of loyalty and dealings between them and Defendant a special relationship and level of trust existed between them such that Defendant had a duty to disclose to/inform Plaintiffs at the time they booked their rooms, checked into the hotel, and/or during their stay that the water system at the RIO was infected with legionella bacteria and the risks legionella bacteria presented to one's health, including serious illness or death. Defendants knew Plaintiffs and all other class members would be exposed to the hotel's infected water system by virtue of the fact Plaintiffs were staying in guest rooms in the hotel where Plaintiffs would be foreseeably using water from the infected water system supplied to the guest rooms' lavatories/sinks, baths and showers where Plaintiffs would be bathing, showering, brushing their teeth and/or washing their hands, irrespective of whether Plaintiffs' room were "comp'd" and equally irrespective of whether Plaintiffs or any other guests/invitees made use of the internet, phones, or fitness room for which they paid a Resort Fee.

38. Plaintiffs allege a reasonable person would find that these facts and conditions created a special relationship between Plaintiffs and Defendant such that a duty on the part of Defendant to disclose existed.

39. Plaintiffs allege a reasonable person would impart special confidence and trust in an innkeeper/hotel such as the RIO to provide accommodations (*e.g.*, a lavatory/sink in which to wash one's hands and brush one's teeth, and a bath/shower in which to bathe) to its guests/invitees that are free of bacteria in the water system and which will not expose them to foreseeable harm, including serious illness or death. Plaintiffs allege a reasonable person would likewise impart special confidence and trust in an innkeeper/hotel to disclose to its guests/invitees the existence of such known hazardous conditions during their stay. Plaintiffs further allege an innkeeper/ hotel such as the RIO reasonably should have known of the confidence and trust imparted to it by its guests/invitees, and Defendant reasonably should have known, or did know, that Plaintiffs and reasonable people would have no way

of knowing, absent Defendant disclosing the material facts, that the water system was infected with legionella bacteria which exposed them to foreseeable harm, including serious illness and death.

40. Plaintiffs allege Defendant concealed and/or omitted from disclosing to Plaintiffs and the class members the fact legionella bacteria was present in the RIO's water system during their stay at the hotel. Plaintiffs allege the presence of legionella bacteria in the hotel's water system was a material fact which they and all other class members would reasonably rely upon in making the decision whether to stay at the RIO at all, or alternatively, whether the quoted room rate and payment of the charged Resort Fee was a fair and reasonable rate to pay for a room and facilities (*e.g.*, a lavatory/sink in which to wash one's hands and brush one's teeth, and a bath/shower in which to bathe) in a hotel which has legionella bacteria in the water system which exposes people to serious illness or even death.

41. Plaintiffs allege they relied justifiably on Defendant's concealment/omission when they stayed at the RIO and parted with their money by paying Defendant the demanded amount for the Resort Fee of $34.01 per day. Plaintiffs' "room rate" had been "comp'ed" by Defendant.

42. Plaintiffs allege that since Defendant concealed and/or omitted from disclosing to all other guests the material fact of the presence of legionella bacteria in the RIO's water system it is reasonable to infer that all guests who stayed at the RIO during the time legionella bacteria was in the water system and paid Defendant the demanded room rate for their guest rooms and/or the charged Resort Fee they all relied reasonably on Defendant's concealment/omission.

B. Count Two - Violation of NRS 205.377 As An Unlawful Business Practice

43. Plaintiffs incorporate Paragraphs 35-39 as though set forth herein. Plaintiffs thereon allege a special relationship existed between Plaintiffs and Defendant which imposed on Defendant a duty to disclose and/or not conceal or omit from disclosure the material fact the RIO's water system which supplied water to guest rooms and facilities (*e.g.*, a lavatory/sink in which to wash one's hands and brush one's teeth, and a bath/shower in which to bathe) was infected with legionella bacteria and that it posed a risk to the health of gusts/invitees including serious illness or death.

44. Plaintiffs further bring this cause of action in accordance with NRS 205.377(5) which provides "[a] violation of this section constitutes a deceptive trade practice for the purposes of NRS 598.0903 to 598.0999, inclusive."

45. Plaintiffs allege Defendant violated NRS 205.377, which states "[a] person shall not, in the course of an enterprise or occupation, knowingly and with the intent to defraud, engage in an act, practice or course of business or employ a device, scheme or artifice which operates or would operate as a fraud or deceit upon a person by means of a false representation or omission of a material fact that: (a) The person knows to be false or omitted; (b) The person intends another to rely on; and (c) Results in a loss to any person who relied on the false representation or omission, in at least two transactions that have the same or similar pattern, intents, results, accomplices, victims or methods of commission, or are otherwise interrelated by distinguishing characteristics and are not isolated incidents within 4 years and in which the aggregate loss or intended loss is more than $650."

46. Plaintiffs allege Defendant engaged in multiple acts on a daily basis between at least May 1, 2017 through at least September 28, 2017 when Defendant concealed/omitted from disclosure to Plaintiffs and all guests reserving a room, while checking in and/or while staying at the RIO that the water system which supplied water to guest rooms and facilities (*e.g.*, a lavatory/sink in which to wash one's hands and brush one's teeth, and a bath/shower in which to bathe) was infected with legionella bacteria in violation of NRS 41.600 [Actions by victims of fraud], and specifically NRS 41.600(2)(e), for violations of the Nevada Deceptive Trade Practices Act and the provisions of NRS 598.0923(2).

47. Plaintiffs allege Defendant concealed and/or omitted from disclosing to Plaintiffs and the class members the fact legionella bacteria was present in the RIO's water system which supplied water to guest rooms and facilities (*e.g.*, a lavatory/sink in which to wash one's hands and brush one's teeth, and a bath/shower in which to bathe) during their stay at the hotel. Plaintiffs allege the presence of legionella bacteria in the hotel's water system was a material fact which they and all other class members would reasonably rely upon in making the decision whether to stay at the RIO at all, or alternatively, whether the quoted room rate and/or Resort Fee was a fair and reasonable rate to pay for a room and facilities in a hotel which has legionella bacteria in the water system which exposes people to serious, and potentially deadly, illness.

48. Plaintiffs allege they relied justifiably on Defendant's concealment/omission when they stayed at the RIO and parted with their money by paying Defendant the demanded amount for the Resort Fee of $34.01 per day. Even though Plaintiffs' "room rate" had been "comp'd" by Defendant, Plaintiffs would be foreseeably using water from the infected water system supplied to the guest rooms' lavatories/sinks, baths and showers where Plaintiffs would be bathing, showering, brushing their teeth and/or washing their hands, irrespective of whether Plaintiffs' room were "comp'd" and equally irrespective of whether Plaintiffs or any other guests/invitees made use of the internet, phones, or fitness room for which they paid a Resort Fee. Plaintiffs and each of them have therefore suffered actual harm and/or injury.

49. Plaintiffs alleges that since Defendant concealed and/or omitted from disclosing to all other guests the material fact of the presence of legionella bacteria in the RIO's water system it is reasonable to infer that all guests who stayed at the RIO during the time legionella bacteria was in the water system and paid Defendant the demanded room rate for their guest rooms and/or the Resort Fee relied reasonably on Defendant's concealment/omission.

50. As a direct and proximate result of Defendant's actions as herein alleged Plaintiffs and the class members suffered harm and damages in that they 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 have not 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 bacteria in the water system is fairly and reasonably worth to the average consumer. Plaintiffs and the class members have therefore suffered damages in an amount according to proof at trial.

51. Plaintiffs are also entitled to an award of (a) any damages Plaintiffs and the class members have sustained; (b) any equitable relief the court deems appropriate; and (c) Plaintiffs' and the class members' costs in the action and reasonable attorney's fees.

52. Plaintiffs have retained counsel to represent them and as such are entitled to an award of attorney fees and costs pursuant to statute in an amount according to proof.

53. Plaintiffs further allege the actions and conduct of Defendant as herein alleged were fraudulent, oppressive and malicious in that they were carried out with a knowing, willful, purposeful, and intentional disregard for the rights and/or safety of all Defendant's guests. Defendant chose to wager the potential health of its guests against its odds of realizing multiple-millions of dollars in revenue from gambling, room reservations, and food and beverage sales. As such, Plaintiffs and the class members are entitled to an award of punitive or exemplary damages against Defendant in an amount according to proof so as to punish and/or make an example of Defendant for other business in the hospitality industry and to prevent future similar wrongdoing.

V.

SECOND CAUSE OF ACTION

Common Law Negligence

54. Plaintiffs incorporate all previous allegations as though set forth in full herein.

55. Plaintiffs bring this cause of action individually and on behalf of all similarly situated class members.

56. Plaintiffs also incorporate specifically Paragraphs 35-39 as though set forth herein. Plaintiffs thereon allege a special relationship existed between Plaintiffs and Defendant which imposed on Defendant a duty to disclose and/or not conceal or omit from disclosure the material fact the RIO's water system was infected with legionella bacteria.

57. At all times Defendant is and was in the business of operating a hotel and providing lodging for guests and were/was at all times open to the public. As such Defendant owed a duty to provide safe, clean, and disease-free accommodations, including a disease-free water system, to all guests of its hotel and not to expose it guests to diseases such as legionella bacteria whether negligently or recklessly. As the operator of a hotel and providing lodging for guests and being a facility that is open to the general public Defendant further owed a duty to disclose and/or not conceal from guests/invitees who reserved rooms at Defendant's hotel, or when those guests/invitees checked into Defendant's hotel and/or while those guests/invitees were staying at Defendant's hotel the presence of diseases such as legionella bacteria which were present in the hotel's water system which supplied water to

guest rooms and facilities (*e.g.*, a lavatory/sink in which to wash one's hands and brush one's teeth, and a bath/shower in which to bathe).

58. Defendants knew Plaintiffs and all other class members would be exposed to the hotel's infected water system by virtue of the fact Plaintiffs were staying in guest rooms in the hotel where Plaintiffs would be foreseeably using water from the infected water system supplied to the guest rooms' lavatories/sinks, baths and showers where Plaintiffs would be bathing, showering, brushing their teeth and/or washing their hands, irrespective of whether Plaintiffs' room were "comp'd" and equally irrespective of whether Plaintiffs or any other guests/invitees made use of the internet, phones, or fitness room for which they paid a Resort Fee.

59. Defendant breached its duty to Plaintiffs and all members of the class when it negligently and/or recklessly failed to maintain its water system in a safe, clean, and disease-free condition. Defendant further breached its duty to Plaintiffs and all members of the class when it negligently concealed and/or failed to inform, disclose or otherwise notify Plaintiffs and the class members of the existence of legionella bacteria in its hotel's water system which supplied water to guest rooms and facilities (*e.g.*, a lavatory/sink in which to wash one's hands and brush one's teeth, and a bath/shower in which to bathe) while they were staying at Defendant's hotel.

60. Defendant's negligence as herein alleged caused Plaintiffs to agree to stay at the RIO and thus caused Plaintiffs to part with their money by paying Defendant the demanded amount for the Resort Fee of $34.01 per day.

61. As a direct and proximate result of Defendant's actions as herein alleged Plaintiffs and the class members suffered harm and damages in that they parted with their money by paying Defendant the room rate and/or Resort Fee demanded by Defendant to stay at the hotel when they either would have not 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 bacteria in the water system is fairly and reasonably worth to the average consumer. Plaintiff and the class members have therefore suffered damages in an amount according to proof at trial.

62. Plaintiffs further alleges the actions and conduct of Defendant as herein alleged were fraudulent, oppressive and malicious in that they were carried out with a reckless, knowing, willful,

purposeful, and conscious disregard for the rights and/or safety of Defendant's guests. Defendant chose to wager the potential health of its guests against its odds of realizing multiple-millions of dollars in revenue from gambling, room reservations, and food and beverage sales. As such, Plaintiffs and the class members are entitled to an award of punitive or exemplary damages against Defendant in an amount according to proof so as to punish and/or make an example of Defendant for other business in the hospitality industry and to prevent future similar wrongdoing.

VI.

THIRD CAUSE OF ACTION

Fraudulent Concealment

63. Plaintiffs incorporate all previous allegations as though set forth in full herein.

64. Plaintiffs also incorporate specifically Paragraphs 35-39 as though set forth herein. Plaintiffs thereon allege a special relationship existed between Plaintiffs and Defendant which imposed on Defendant a duty to disclose and/or not conceal or omit from disclosure the material fact the RIO's water system which supplied water to guest rooms and facilities (*e.g.*, a lavatory/sink in which to wash one's hands and brush one's teeth, and a bath/shower in which to bathe) was infected with legionella bacteria.

65. Plaintiffs bring this cause of action individually and on behalf of all similarly situated class members.

66. At all times Defendant are and were in the business of operating a hotel and providing lodging for guests/invitees and were/was at all times open to the public. As such Defendant owed a duty to provide safe, clean, and disease-free accommodations, including a disease-free water system, to all guests of its hotel and not to expose it guests to diseases such as legionella bacteria whether negligently or recklessly. As the operator of a hotel and providing lodging for guests/invitees and being a facility that is open to the general public Defendant further owed a duty to disclose the presence of diseases such as legionella bacteria which were present in the hotel's water system which supplied water to guest rooms and facilities (*e.g.*, a lavatory/sink in which to wash one's hands and brush one's teeth, and a bath/shower in which to bathe) to guests who reserved rooms at Defendant's hotel, or when

those guests checked into Defendant's hotel and/or while those guests were staying at Defendant's hotel.

67. Plaintiffs allege Defendant had actual knowledge as of at least May 1, 2017 of the presence of legionella bacteria in the hotel's system and that at least two guests who stayed at the RIO in March and April 2017 had contracted Legionnaires disease and suffered serious illness. Plaintiffs further allege Defendant and each of them had actual knowledge that in June 2017, other guests staying at the RIO had contracted Legionnaires disease and suffered serious illness.

68. Plaintiffs allege Defendant fraudulently concealed and/or omitted from disclosing to Plaintiffs and the class members the fact legionella bacteria was present in the RIO's water system which supplied water to guest rooms and facilities (*e.g.*, a lavatory/sink in which to wash one's hands and brush one's teeth, and a bath/shower in which to bathe) during their stay at the hotel. Plaintiffs allege the presence of legionella bacteria in the hotel's water system was a material fact which they and all other class members would reasonably rely upon in making the decision whether to stay at the RIO at all, or alternatively, whether the quoted room rate and payment of the charged Resort Fee was a fair and reasonable rate to pay for a room and facilities in a hotel which has legionella bacteria in the water system which exposes people to serious illness.

69. Defendants knew Plaintiffs and all other class members would be exposed to the hotel's infected water system by virtue of the fact Plaintiffs were staying in guest rooms in the hotel where Plaintiffs would be foreseeably using water from the infected water system supplied to the guest rooms' lavatories/sinks, baths and showers where Plaintiffs would be bathing, showering, brushing their teeth and/or washing their hands, irrespective of whether Plaintiffs' room were "comp'd" and equally irrespective of whether Plaintiffs or any other guests/invitees made use of the internet, phones, or fitness room for which they paid a Resort Fee.

70. Defendant's fraudulent conduct as herein alleged caused Plaintiffs to agree to stay at the RIO and thus caused Plaintiffs to part with their money by paying Defendant the demanded amount for the Resort Fee of $34.01 per day. As a direct and proximate result of Defendant's actions as herein alleged Plaintiffs and the class members suffered harm and damages in that they parted with their money by paying Defendant the room rate and/or Resort Fee demanded by Defendant to stay at the hotel when

they either would have not 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 bacteria in the water system is fairly and reasonably worth to the average consumer. Plaintiff and the class members have therefore suffered damages in an amount according to proof at trial.

71. Plainly put, Plaintiffs allege Defendant's fraudulent conduct caused Plaintiffs to pay Defendant money they (Plaintiffs) would not otherwise have paid to Defendant thus causing Plaintiffs and the class members to suffer damages.

72. Plaintiffs allege they relied justifiably on Defendant's concealment/omission when they stayed at the RIO and parted with their money by paying Defendant the demanded amount for the Resort Fee of $34.01 per day. Plaintiffs' "room rate" had been "comp'd" by Defendant.

73. Plaintiffs allege that since Defendant concealed and/or omitted from disclosing to all other guests the material fact of the presence of legionella bacteria in the RIO's water system it is reasonable to infer that all guests who stayed at the RIO during the time legionella bacteria was in the water system and paid Defendant the demanded room rate for their guest rooms and/or the charged Resort Fee all relied reasonably on Defendant's concealment/omission.

74. Plaintiffs further allege the actions and conduct of Defendant as herein alleged were fraudulent, oppressive and malicious in that they were carried out with a reckless, knowing, willful, purposeful, and conscious disregard for the rights and/or safety of Defendant's guests. Defendant chose to wager the potential health of its guests against its odds of realizing multiple-millions of dollars in revenue from gambling, room reservations, and food and beverage sales. As such, Plaintiffs and the class members are entitled to an award of punitive or exemplary damages against Defendant in an amount according to proof so as to punish and/or make an example of Defendant for other business in the hospitality industry and to prevent future similar wrongdoing.

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VII.

FOURTH CAUSE OF ACTION

Unjust Enrichment

75. Plaintiffs incorporate all previous allegations as though set forth in full herein.

76. Plaintiffs bring this cause of action individually and on behalf of all similarly situated class members.

77. Plaintiffs allege Defendant's fraudulent and/or negligent conduct as herein alleged caused Plaintiffs to agree to stay at the RIO and thus caused Plaintiffs and the class members to part with their money by paying Defendant the demanded amount for the Resort Fee of $34.01 per day (Plaintiffs' rooms were "comp'd"), or the demanded room rate. Defendants knew Plaintiffs and all other class members would be exposed to the hotel's infected water system which supplied water to guest rooms and facilities (*e.g.*, a lavatory/sink in which to wash one's hands and brush one's teeth, and a bath/shower in which to bathe) by virtue of the fact Plaintiffs were staying in guest rooms in the hotel where Plaintiffs would be foreseeably using water from the infected water system supplied to the guest rooms' lavatories/sinks, baths and showers where Plaintiffs would be bathing, showering, brushing their teeth and/or washing their hands, irrespective of whether Plaintiffs' room were "comp'd" and equally irrespective of whether Plaintiffs or any other guests/invitees made use of the internet, phones, or fitness room for which they paid a Resort Fee.

78. Defendant was thus unjustly enriched and received an unjustified monetary and financial windfall by its negligent conduct and/or concealment/omission from disclosure and/or failure to disclose the presence of legionella bacteria in the RIO's water system during Plaintiffs' and the class members' stay when they either would have not 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 bacteria in the water system is fairly and reasonably worth to the average consumer.

79. Here, Plaintiffs and the class members conferred a financial benefit on Defendant by paying money for a room and/or the Resort Fee at the RIO under circumstances where had Defendant not been negligent, or not engaged in the fraudulent concealment and/or deceptive trade practices as herein

alleged, Plaintiffs would not have paid Defendants anything because they would have stayed at another hotel, or paid less.

80. Defendant appreciated such benefit and there was acceptance and retention by Defendant of such benefit under circumstances such that it would be inequitable for them to retain the benefit without payment of the value thereof based on Defendant's negligence, fraudulent and/or deceptive trade practice towards Plaintiffs and the class as herein alleged.

81. As a direct and proximate result of Defendant's actions as herein alleged Defendants have been unjustly enriched in an amount according to proof at trial.

VIII.

FIFTH CAUSE OF ACTION

Declaratory Relief

82. Plaintiffs incorporate all previous allegations as though set forth in full herein. Plaintiffs also incorporate specifically Paragraphs 35-39 as though set forth herein. Plaintiffs thereon allege a special relationship existed between Plaintiffs and Defendant which imposed on Defendant a duty to disclose and/or not conceal or omit from disclosure the material fact the RIO's water system was infected with legionella bacteria.

83. Plaintiffs bring this claim for declaratory relief for themselves individually and on behalf of all similarly situated class members.

84. An actual controversy has arisen between Plaintiffs and the class members on the one hand and Defendant on the other with regard to whether a special relationship existed between Plaintiffs and Defendant as herein alleged and whether Defendant owed a duty to Plaintiffs to disclose to Plaintiffs and the class the fact the RIO's water system was infected with legionella bacteria during their stay, whether Defendant was negligent in concealing from and/or failing to disclose to Plaintiffs and the class the fact the RIO's water system was infected with legionella bacteria during their stay, whether Defendant fraudulently concealed from and/or intentionally failed to disclose to Plaintiffs and the class the fact the RIO's water system was infected with legionella bacteria during their stay.

85. Plaintiffs further allege an actual controversy had arisen between the parties with regard to the legal rights Plaintiffs and the class has under Nevada and/or federal law to the rights,

responsibilities and obligations of each party relating to the presence of legionella bacteria in the RIO ALL-SUITE HOTEL AND CASINO water system when Plaintiffs and the class 1) made reservations to stay at Defendant's hotel, 2) when they checked into their room at Defendant's hotel, and 3) while they were staying at Defendant's hotel.

86. Plaintiffs individually and on behalf of the class members desires a judicial declaration of their and Defendant's rights, statutory obligations and/or legal duties.

PRAYER FOR RELIEF

WHEREFORE Plaintiffs seek judgment as follows:

1. That this action be maintained as a class action;
2. For restitution in an amount according to proof at trial;
3. For compensatory damages in an amount according to proof at trial;
4. For an award of punitive or exemplary damages against Defendant in an amount according to proof so as to punish and/or make an example of Defendant for other business in the hospitality industry and to prevent future similar wrongdoing.
5. For special damages according to proof at trial;
6. For attorney fees pursuant to statute in an amount according to proof at trial;
7. For costs of suit and other litigation expenses in an amount according to proof at trial;
8. For prejudgment interest; and
9. Any and such other relief the Court deems fair, just, and equitable.

DATED: April 19, 2019

By:

Robert A. Waller, Jr.

Robert A. Waller, Jr., *(pro hac vice)*
Attorneys for Plaintiffs and the class

DEMAND FOR JURY TRIAL

Plaintiffs and each of them hereby demands trial by jury on all causes of action for which a jury trial is available.

DATED April 19, 2019

By:

Robert A. Waller, Jr.

Robert A. Waller, Jr., *(pro hac vice)*
Attorneys for Plaintiffs and the class

EXHIBIT "1"

Southern Nevada Health District

May 1, 2017

Rio Suites Hotel
3700 W Flamingo RD
Las Vegas NV 89103-4043

Re: Notification of a case of Legionellosis associated with Rio Suites Hotel, 3700 W Flamingo RD, Las Vegas NV 89103-4043, PR0005134

Dear Mr. Hines:

The Southern Nevada Health District (SNHD) has received notification that a patient diagnosed with legionellosis stayed at your facility during their incubation period sometime in March. *Legionella pneumophila* is the bacterial organism that causes legionellosis. *Legionella* are ubiquitous in the environment and can enter a facility through the water supply. They can grow within the biofilm of the water supply system in areas where the water temperature is between 77 and 108 degrees Fahrenheit. These areas can include cooling towers, spas, whirlpools, fountains, showers and misters, all of which have previously been linked to Legionnaires' disease outbreaks. A susceptible person must inhale the mist or water vapor that contains the *Legionella* bacteria.

The SNHD will take a number of water samples from areas in and around your facility where the patient visited. These samples will be tested at a laboratory that is Environmental *Legionella* Isolation Techniques Evaluation (ELITE)–program certified by the Centers for Disease Control and Prevention (CDC). As part of the investigation, with your consent and cooperation, SNHD staff will also conduct an environmental assessment and determine if there are other areas in the facility or on the facility grounds that may pose a legionellosis risk to visitors and employees. The SNHD will provide further remediation recommendations and instructions based on the results of the environmental sample testing. You facility will be billed for the cost of the sampling at $98.25 per sample for this investigation.

Thank you for your time and continued cooperation in ensuring that the residents and visitors to Southern Nevada are protected to the greatest possible extent from exposure to *Legionella*.

Sincerely,
Southern Nevada Health District

Rob Cole, REHS
Environmental Health Senior

Erin Cavin, REHS
Environmental Health Specialist II

cc: Vivek Raman, SNHD, EH—Public Accommodations

EXHIBIT "2"

From: Erin Cavin
To: "Brad Waldron"; "jhines1@caesars.com"
Bcc: Robert Cole
Subject: Legionella Investigation
Date: Tuesday, May 02, 2017 10:56:00 AM

Hello Mr. Waldron and Mr. Hines,

Attached you will find the copy of the environmental assessment form that we were going through today at our meeting. Please fill it out the rest of the way as accurately as possible. Then scan and email it back to me with all the requested documents that we mentioned as well as a copy of the introduction letter we gave you this morning. I look forward to seeing you tomorrow.

Should you have any questions, please feel free to contact me.

702-465-5448
Southern Nevada Health District
Special Programs
333 N. Rancho, Suite 450, Las Vegas

EXHIBIT "3"

July 5, 2017

Dear Valued Guest,

We were notified by the Southern Nevada Health District of two instances of individuals who stayed at the Rio All-Suite Hotel and Casino ("the Rio"), one in March and one in April, that contracted Legionnaires' disease. Fortunately, both individuals have recovered. However, recent testing indicated the presence of the *Legionella* bacteria in water systems at the Rio, and we worked with the Southern Nevada Heath District to address the concern and take aggressive remediation action to ensure the safety of the water. Our records show that you also recently stayed with us at the Rio so we wanted to provide you with this letter and important information.

Legionnaire's disease is contracted by inhaling, not drinking, droplets of water or mist containing the *Legionella* bacteria and is a type of pneumonia. The *Legionella* bacteria can reside in the hot water systems of buildings. Until the system was fully treated, taking a shower or a bath with the jets running may have put you at risk by breathing water in the air. Taking a normal bath, handwashing, or drinking water would generally not pose an elevated risk.

Symptoms usually begin two to 10 days after exposure to the bacteria. Guests developing symptoms within 14 days of their stay at the Rio should seek medical attention. The Southern Nevada Health District has advised that if you stayed at the Rio more than two weeks ago, and you are currently well and do not show pneumonia like symptoms, then there is no need to be concerned at this point in time. If it has been less than 14 days since your stay, you should not hesitate to seek medical attention if you are showing pneumonia-like symptoms, and your health care provider will evaluate you appropriately.

Additionally, if you have any questions or would like more information about Legionnaire's disease, please contact the Southern Nevada Heath District or visit their website at http://southernnevadahealthdistrict.org/health-topics/legionellosis.php.

If you would like to contact SNHD by phone, please call (702) 759-0999 from Monday – Friday 9 AM t 4:30 PM Pacific Time.

We are very sorry for any inconvenience or concern this situation may cause.

Respectfully,

Hotel Management

Janice M. Michaels (State Bar No. 6062)
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Attorneys for Defendant, Rio Properties LLC

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEVADA

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AARON LEIGH-PINK, and TANA EMERSON, Individually and on behalf of all other similarly situated, Plaintiffs, v. RIO PROPERTIES LLC, a Nevada Limited Liability Company; and DOES 1-50, inclusive, Defendant.	Case No. 17-CV-02910-GMN-VCF **DEFENDANT RIO PROPERTIES, LLC'S MOTION TO DISMISS PLAINTIFFS' THIRD AMENDED CLASS ACTION COMPLAINT**

Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, Defendant Rio Properties, LLC submits the following motion to dismiss Plaintiffs' Third Amended Class Action Complaint ("TAC") (ECF No. 32). For the reasons explained below, the TAC fails to state a claim upon which relief can be granted. Because Plaintiffs have now had multiple attempts to amend their complaint to state a claim, including once with the Court's guidance as to their complaint's shortcomings, it is requested that the dismissal be with prejudice.

I. INTRODUCTION

Plaintiffs' claims involve the alleged presence of *Legionella* bacteria in certain water systems at the Rio All-Suite Hotel and Casino in Las Vegas, Nevada (the "Hotel"). Plaintiffs seek to represent a class of individuals who stayed at the Hotel while *Legionella* bacteria was allegedly

present. Plaintiffs claim that they and the putative class would not have stayed at the Hotel had they known of the alleged presence of the bacteria. Alternatively, Plaintiffs allege that they and the putative class paid a higher "room rate" and/or "Resort Fee" than what their stays at the Hotel were worth. Significantly, Plaintiffs do not allege that they suffered any mental, physical, or emotional harm from the alleged presence of *Legionella* bacteria, and their class definition is not limited as such. To the contrary, Plaintiffs' stays at the Hotel were uneventful. Moreover, by Plaintiffs' own admissions, they did not even pay for their rooms—they paid only the "Resort Fee," which was for their use of internet, telephone, and the fitness center for two guests. Nevertheless, they brought this lawsuit only after they completed their stays and enjoyed all of the benefits of the Hotel and the amenities that accompany the Resort Fee.

This is not the first time this Court is tasked with analyzing the sufficiency of Plaintiffs' allegations. Indeed, in an Order dated April 1, 2019, this Court dismissed Plaintiffs' entire Second Amended Complaint ("SAC"). Specifically, this Court dismissed Plaintiffs' Nevada Deceptive Trade Practices Act ("NDTPA"), Nevada RICO, negligence, fraudulent concealment, and declaratory relief claims without prejudice and NRS § 205.377 claim with prejudice. In dismissing the SAC, this Court held that Plaintiffs failed to sufficiently allege that they were damaged and, even if they had, they did not plead a nexus between their alleged damages and the alleged presence of *Legionella* in certain water systems at the Hotel. More specifically, the Court held that Plaintiffs had not sufficiently pleaded a causal link between the alleged presence of *Legionella* bacteria and any issue Plaintiffs may have had in trying to access or enjoy the amenities associated with the Resort Fee. The Court concluded that this failure was fatal to all of Plaintiffs' causes of action requiring proof of damages.

In response, Plaintiffs filed their TAC, which repeats, with remarkably little substantive alteration, Plaintiffs' claims for violations of the NDTPA, negligence, fraudulent concealment, unjust enrichment, and declaratory relief.[1] Notably, Plaintiffs' TAC is largely unchanged from the

[1] As noted, Plaintiffs' claim for a violation of NRS § 205.377 was dismissed with prejudice. Separately, Plaintiffs chose not to replead their claim for a violation of the Nevada RICO Act.

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recently-dismissed SAC and fails to address, much less correct, the deficiencies that resulted in the SAC's dismissal. Specifically, despite this Court's guidance, Plaintiffs still fail to adequately allege damages and, in particular, how they were deprived, if at all, of the amenities associated with the Resort Fee. Indeed, virtually all Plaintiffs have done is litter throughout each cause of action within the TAC the general allegation that:

> [E]ven though [their] 'room rate' had been 'comp'd' by Defendant, Plaintiffs would be foreseeably using water from the infected water system supplied to the guest rooms, lavoratories/sinks, baths and showers where Plaintiffs would be bathing, showering, brushing their teeth and/or washing their hands, irrespective of whether Plaintiffs' rooms were "comp'd" and equally irrespective of whether Plaintiffs or any other guests made use of the internet, phones, or fitness room for which they paid a Resort Fee.

(TAC, at ¶ 37, 48, 58, 69, 77).

However, the addition of such language does nothing to rectify this Court's holding that Plaintiffs failed to sufficiently plead damages, and defies the Court's holding that, in order to state a claim, they must plead a causal link between the allege presence of *Legionella* and any claim to damages. In essence, in dismissing the SAC, this Court held that Plaintiffs did not sufficiently allege damages because they were not deprived of their use of the amenities for which they allegedly paid through the Resort Fee. In response to that ruling, Plaintiffs' TAC essentially makes the same, rejected allegations of damages and contends that they suffered these damages "irrespective" of whether they actually utilized the amenities associated with the Resort Fee. Plaintiffs' "amendments," therefore, are not really amendments at all, and constitute no more than a disguised second attempt to ask the Court to accept their original flawed theories.

Allowing Plaintiffs to proceed with their claims based upon the facts alleged would fly in the face of this Court's Order dismissing the SAC, violate well-established Nevada law and the clear intent of the Nevada legislature, and, ultimately, open the floodgates to limitless liability of Nevada businesses based upon any alleged defect(s) in their products or services, even when those

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alleged defects do not result in harm. For instance, under Plaintiffs' theories of recovery, satisfied hotel guests who later learned that the hotel had a malfunctioning fire sprinkler system would be entitled to compensation simply by alleging that they would not have stayed at the hotel had they known the sprinkler system was not working, even if no fire occurred and nobody was harmed. Similarly, according to Plaintiffs' theory, patrons of a night club whose security guard fell asleep during his shift would be entitled to some level of compensation despite the fact that no breach of security occurred. These types of claims—that result in no actual damages or injuries—are not what Nevada's consumer protection statutes and tort system are intended to address.

In addition to Plaintiffs' continued deficiencies with respect to alleging damages, Plaintiffs' TAC should also be dismissed for failing to adequately plead each of their claims under *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544 (2007), *Ashcroft v Iqbal,* 556 U.S. 662 (2009), and the Federal Rules of Civil Procedure. Indeed, as discussed below, each of Plaintiffs' claims rests upon conclusory allegations rather than the specific factual averments needed to support the claims asserted. Accordingly, Defendant respectfully requests that this Court dismiss Plaintiffs' TAC in its entirety. And, because Plaintiffs have had multiple opportunities to correct the deficiencies in their pleadings—all to no avail—it is requested that the dismissal be with prejudice.

II. FACTUAL BACKGROUND

Plaintiffs filed their TAC after this Court dismissed the SAC in its entirety. The dismissal of the SAC was based largely on Plaintiffs' failure to plead causation and damages. Although this Court granted Plaintiffs partial leave to amend to correct their pleading deficiencies,[2] Plaintiffs' TAC largely mirrors the SAC and reiterates the same speculative, conclusory allegations that this Court previously found insufficient to state a claim. Significantly, the TAC suffers from the same fatal flaws as the SAC, namely their failure to adequately plead causation and damages.

[2] The Court granted Plaintiffs leave to amend their causes of action for a violation of the NDTPA, fraudulent concealment, negligence, unjust enrichment, and declaratory relief. Plaintiffs were not granted relief to amend their claim for a violation of NRS § 205.377. Plaintiffs opted not to amend their RICO claim.

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Plaintiffs' TAC centers around three purported stays at the Hotel by two individuals, ranging from May 12, 2017 to September 4, 2017. (TAC, at ¶¶ 11, 13). Plaintiffs contend that the "hotel's water system was infected with *Legionella* bacteria which causes legionnaires disease," but such information was never disclosed to them. (*Id.* at ¶ 1). Reliant on those allegations, Plaintiffs seek to represent a putative class of guests at the Hotel defined as: "All persons who were registered guests of Rio All-Suite Hotel and Casino during the time legionella bacteria was present in the hotel's water system." (*Id.* at ¶ 19). Noticeably absent from Plaintiffs' TAC are any allegations of what constitutes a "registered guest" or the specific time-period when Plaintiffs contend *Legionella* bacteria became present in the Hotel's "water system." Also noticeably absent are any allegations of an impairment of Plaintiffs' use of the Hotel or its amenities or physical harm or emotional injury to Plaintiffs—either during their Hotel stays or after. Nevertheless, Plaintiffs allege five causes of action against Defendant: (1) violation of the NDTPA; (2) negligence; (3) fraudulent concealment; (4) unjust enrichment; and (5) declaratory relief. (*See generally id.*).

Each of Plaintiffs' causes of action must be dismissed due to Plaintiffs' failure to sufficiently plead causation and damages. Plaintiffs admittedly did not pay for their rooms because they were "comp'd" by the Hotel. (*Id.* at ¶ 37, 41, 48, 58, 72, 78). Plaintiffs paid only the "Resort Fee," which encompassed internet access, telephone use, and the use of the Hotel's fitness center for two guests. Despite being given yet another bite of the proverbial apple, Plaintiffs have again wholly failed to allege how the purported presence of *Legionella* bacteria in certain of the Hotel's water systems affected their use of these amenities or how they were deprived of the benefit of the bargain as to these amenities (*i.e.*, they failed to plead damages). Instead, Plaintiffs allege, without explanation, that they were injured "irrespective" of whether they paid for their rooms and "equally irrespective" of whether the alleged presence of *Legionella* impacted their enjoyment of the items that comprise the Resort Fee. (*Id.* at ¶¶ 37, 41, 48, 58, 72, 78).

III. ARGUMENT

Federal Rule of Civil Procedure 12(b)(6) provides for dismissal for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). "To survive a motion to dismiss, the

complaint must allege 'enough facts to state a claim to relief that is plausible on its face.'" *Taylor v. Yee*, 780 F.3d 928, 935 (9th Cir. 2015). "While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555 (internal citations omitted and alteration in original). Although this Court is to accept Plaintiffs' allegations as true, the Court is not "required to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *In re Gilead Sciences Securities Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008).

In essence, a plaintiff must plead "enough facts to state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. The "plausibility" requirement "asks for more than a sheer possibility that a defendant has acted unlawfully." *Turner v. City and County of San Francisco*, 788 F.3d 1206, 1210 (9th Cir. 2015). To that end, a complaint must be dismissed if it cannot cross "the line from conceivable to plausible." *Iqbal*, 556 U.S. at 680.

As set forth more fully below, the allegations in Plaintiffs' TAC fail to rise above the level of "labels, conclusions, and formulae" proscribed by *Twombly*. Indeed, the TAC fails to sufficiently address the predominant deficiencies noted in this Court's Order dismissing the SAC. Had Plaintiffs been able to advance sufficient allegations to state a claim, they surely would have done so when filing the TAC. They have not. The claims alleged in the TAC, therefore, should be dismissed with prejudice.

A. Plaintiffs Have Failed to Sufficiently Allege Damages For Any Cause of Action

Plaintiffs' TAC must be dismissed for their failure to cure the insufficiently-pleaded allegations of causation and damages that led to the dismissal of their SAC. Despite the clear directives of this Court in its Order dismissing Plaintiffs' SAC, Plaintiffs once again fail to establish that they have suffered any injury as a result of the alleged presence of *Legionella* bacteria.

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Unquestionably, the element of "damages" is required to sustain each of Plaintiffs' claims. *See, e.g., Picus v. Wal-Mart Stores, Inc.*, 256 F.R.D. 651, 657-58 (D. Nev. 2009) (holding that to establish a violation of the NDTPA, the plaintiff must demonstrate that (1) an act of consumer fraud (2) caused (3) damages to the plaintiff); *Turner v. Mandaly Sports Entm't, LLC*, 180 P.3d 1172, 1175 (Nev. 2008) (stating that damages are a required element of a negligence claim); *Nevada Power Co. v. Monsanto Co.*, 891 F.Supp. 1406, 1415 (D. Nev. 1995) (the elements of a claim for fraudulent concealment include that "plaintiff sustained causation and damages as a result of the concealment or suppression of a fact"); *Robinson v. Coury*, 976 P.2d 518, 521 (Nev. 1999) (stating that to maintain a claim for unjust enrichment, plaintiff must allege that defendant "accepted and retained the benefit under circumstances where it would be inequitable for defendant to retain the benefit without the payment of value for the same") (citations omitted).

In dismissing Plaintiffs' SAC, this Court specifically rejected Plaintiffs' theory of causation and damages, holding that Plaintiffs failed to sufficiently plead that they suffered damages under any of their purported claims:

- NDTPA: "Plaintiffs do not allege that during their stay they did not receive those amenities, sufficient access to those amenities, or that the amenities were otherwise unsatisfactory" and "[E]ven if Plaintiffs had alleged that they were injured because they were unable to use the amenities that they paid for, Plaintiffs' NDTPA claim would still fail, as [they] have not alleged a causal link between the purported bacteria in the Rio's water system, and any issue they may have had in trying to access or enjoy said amenities";
- Fraudulent Concealment: "Plaintiffs have not presented facts establishing damages. Given that damages are a necessary element of fraudulent concealment, Plaintiffs have not sufficiently pled this claim";
- Nevada RICO: "As discussed above, plaintiffs have failed to demonstrate both injury and causation";
- Negligence: "Nevertheless, even accepting [Plaintiffs' arguments that their claims are not barred by the economic loss doctrine] as true, Plaintiffs have not

sufficiently pled causation and damages, two essential elements of a negligence claim"; and

- Unjust Enrichment: "Because Plaintiffs have not presented facts plausibly showing that Defendant was unjustly enriched, Plaintiffs claim is dismissed."

(ECF No. 31, at 5-10).

Plaintiffs' TAC makes no attempt to address–much less rectify–the insufficiencies outlined by this Court. In fact, Plaintiffs double down on the same failed theories, alleging "even though [their] 'room rate' had been 'comp'd' by Defendant, Plaintiffs would be foreseeably using water from the infected water system supplied to the guest rooms, lavoratories/sinks, baths and showers where Plaintiffs would be bathing, showering, brushing their teeth and/or washing their hands, irrespective of whether Plaintiffs' rooms were 'comp'd' and equally irrespective of whether Plaintiffs or any other guests made use of the internet, phones, or fitness room for which they paid a Resort Fee." (TAC, at ¶ 37, 48, 58, 69, 77). Based on the Court's prior Order, this new allegation is simply not enough. Plaintiffs have essentially conceded that they have no alleged damages, and the TAC merely states their previous theory in a different way. Notably, there are no new allegations connecting the alleged presence of *Legionella* bacteria to any alleged inability to utilize the items that comprise the Resort Fee.

Plaintiffs' SAC was dismissed, in part, due to their inability to satisfy the elements of causation and damages for each of their purported claims. The fact that Plaintiffs fail to adequately allege damages after another opportunity was provided to them with clear indications as to their claims' shortcomings confirms that they are unable to state claims upon which relief can be granted. As a result–on this issue alone–Plaintiffs' TAC should be dismissed in its entirety with prejudice.

B. In Addition to Failing to Plead Damages, Plaintiffs' NDTPA Claim Should Be Dismissed Because Plaintiffs Have Not Adequately Alleged A Wrongful Act or Defendant's Purported Knowledge

As discussed above, Plaintiffs' claim that Defendant violated the NDTPA should be dismissed alone on the fact that they are unable to sufficiently allege that they have sustained

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damages as a result of the alleged presence of *Legionella* bacteria. Plaintiffs' NDTPA claim also fails for two additional reasons: first, Plaintiffs allege a violation of the NDTPA based upon a criminal statute under which Plaintiffs have no standing, and there has been no determination that the criminal statute has been violated; and second, Plaintiffs are unable to sufficiently plead that Defendant had the requisite purported knowledge to state a claim under the NDTPA.

i. Plaintiffs Do Not Have Standing to Assert a Violation of NRS § 205.377

In a naked attempt to salvage a rejected cause of action, Plaintiffs replead a violation of NRS § 205.377–a criminal statute that was previously dismissed by this Court with prejudice–as a basis for a claim under the NDTPA. Plaintiffs have no standing to pursue an alleged violation of NRS § 205.377. The Nevada legislature unambiguously intended, and this Court has rightly held, that § 205.377 does not confer a private right of action upon Plaintiffs. (ECF No. 31, at 10) ("The statute and entirety of Section 205 governs *crimes* against property. Criminal statues cannot form the basis of a civil suit without express civil enforcement provision, and N.R.S. § 205.377 does not contain such an express provision.") (emphasis in original).

In opposition to this motion, Plaintiffs will undoubtedly argue, as they do within their TAC, that § 205.377(5) allows them to pursue this claim. It does not. NRS § 205.377(5) states, "[a] violation of this section constitutes a deceptive trade practice for the purposes of NRS 598.0903 to 598.0999, inclusive." *See* NRS § 205.377(5). Plaintiffs' TAC alleges a violation of § 205.377 despite the fact that no finding of a violation has occurred, much less has any criminal proceeding been so much as threatened against Defendant. What's more, it is self-evident that no criminal finding can be made by this Court in the context of a civil trial. *See Collins v. Palczewski*, 841 F. Supp. 333, 340 (D. Nev. 1993) (criminal statutes are not generally enforceable by a civil action); *Bass Angler Sportsman Soc. v. Scholze Tannery, Inc.*, 329 F. Supp. 339, 345 (E.D.Tenn.1971) (only proper prosecuting authorities may enforce violations of criminal statutes, not private parties); *Solis-Diaz v. Las Vegas Metro. Police Dep't*, No. 212CV00619JADGWF, 2017 WL 374908, at *4 (D. Nev. Jan. 25, 2017) (refusing to consider the acquittal of defendant in a parallel criminal action as evidence in civil court on account of the differing burdens of proof in criminal and civil actions). Plaintiffs have no ability or standing to "prove" a violation of a

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criminal statute in this civil trial, and their NDTPA claim predicated on NRS § 205.377 should be dismissed.

ii. Plaintiffs' NDTPA Claim Must Be Dismissed Because Plaintiffs Have Not Adequately Alleged Defendant's Purported Knowledge

Plaintiffs' NDTPA claim is in the nature of a fraud claim. To proceed with their claim, Plaintiffs must adequately allege that Defendant *knew* that there was *Legionella* bacteria in certain parts of the Hotel's water system at any time Plaintiffs allegedly stayed at the Hotel. This requirement is explicit in NRS §598.0923(2), which states "[a] person engages in a 'deceptive trade practice' when in the course of his or her business or occupation he or she ***knowingly*** . . . 2. Fails to disclose a material fact in connection with the sale or lease of goods or services." NRS §598.0923(2) (emphasis and alteration added). Without factual allegations to support Plaintiffs' theory regarding Defendant's knowledge, Plaintiffs' claim falls short of crossing "the line between possibility and plausibility of 'entitlement to relief.'" *Iqbal*, 556 U.S. at 678.

Defendant acknowledges that Rule 9(b) permits "knowledge" to be "alleged generally." Fed. R. Civ. P. 9(b). However, this does not mean that conclusory allegations of "knowledge" will suffice. Indeed, although "[i]t is true that 'knowledge' . . . may be pled generally . . ., the pleading must include sufficient allegations to allow the court to 'reasonably infer that a party acted with the requisite state of mind.' The allegations must plausibly support the inference that the individual made a 'deliberate decision to withhold a known material reference.'" *ESCO Corp. v. Cashman Equip. Co.*, 158 F. Supp. 3d 1051, 1061-62 (D. Nev. 2016) (internal citations omitted and alteration added). This is because even fraud claims subject to Rule 9(b) must still satisfy the plausibility standard, in addition to the particularity standard. *Cafasso, U.S. ex rel. v. General Dynamics C4 Systems, Inc.*, 637 F.3d 1047, 1055 (9th Cir. 2011). As noted in *Iqbal*, Rule 9(b) "does not give [a plaintiff] license to evade the less rigid—though still operative—strictures of Rule 8." 556 U.S. at 686-87 (alteration added). To that end, a complaint is properly dismissed when it contains only conclusory allegations regarding the defendant's knowledge. *See, e.g., Wilson v. Hewlett-Packard Co.*, 668 F.3d 1136, 1148 (9th Cir. 2012) (concluding the district court did not err in finding that the plaintiff's second amended complaint contained insufficient

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allegations of knowledge and affirming dismissal); *U.S. ex rel. Thompson v. Honeywell Intern., Inc.*, 649 Fed. App'x. 617, 618 (9th Cir. May 12, 2016) (affirming dismissal with prejudice because "the operative complaint does not specifically allege facts leading to the plausible inference" of defendant's knowledge or that it "acted with reckless disregard of the truth"); *Tomek v. Apple Inc.*, 636 Fed. App'x. 712, 713-14 (9th Cir. Jan. 27, 2016) (relying on *Iqbal* and concluding that plaintiff did not allege "specific facts that 'allow[] the court to draw the reasonable inference' that" the defendant knew its advertisements were misleading and affirming dismissal of California consumer protection claims) (alteration in original).

Plaintiffs' TAC fails to plausibly allege that Defendant had specific "knowledge" of the alleged presence of *Legionella* bacteria at any time that Plaintiffs allegedly stayed at the Hotel. Indeed, Plaintiffs' TAC is plagued with conclusory allegations and unsupported presumptions regarding Defendant's "knowledge" without sufficient factual allegations to support their NDTPA claim. (*See, e.g.*, TAC, at ¶ 1) ("Despite Defendants' [sic] knowledge for months . . . ."). For example, Plaintiffs claim that they stayed at the Hotel at various dates in May 2017, June 2017, and September 2017; yet the TAC contains no allegations that during each of those stays Defendant had knowledge of the alleged presence of *Legionella* bacteria in certain parts of the water system. This omission, alone, warrants dismissal of Plaintiffs' claim.

It is anticipated that Plaintiffs will highlight that they alleged that Defendant was notified by the Southern Nevada Health District in May 2017 that there were *allegations* of two guests contracting Legionnaires' disease at some unknown time after staying at the Hotel. (TAC, at ¶ 2). These mere allegations of illness, however, are insufficient to support their claim that Defendant knew *Legionella* bacteria was present in certain parts of the Hotel's water system at any time Plaintiffs allegedly stayed at the Hotel. *Legionella* bacteria are ubiquitous. *See Flaherty v. Legum & Norman Realty, Inc.*, No. 1:05-1492, 2007 WL 4694346, at *18 (E.D. Va. Jan. 4, 2007) ("it was established that *Legionella* is ubiquitous and are present in all water sources"). As such, it can be found at grocery stores, amusement parks, schools, shopping malls, and virtually any other establishment. Therefore, the mere fact that two guests of the Hotel may have been diagnosed with Legionnaires' disease at some point in time after their stays is insufficient to impute on

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Defendant the specific knowledge that their illnesses were caused by their stays at the Hotel, that *Legionella* bacteria was in certain water systems in the Hotel and, particularly, the specific knowledge that such bacteria were present at any time Plaintiffs were staying at the Hotel. Without such allegations of knowledge, the Court should dismiss Plaintiffs' NDTPA claim because Plaintiffs have not alleged sufficient factual allegations to allow the Court to infer that it is *plausible* that Defendant had knowledge, not merely that it *possibly* had knowledge.

C. Plaintiffs' Fraudulent Concealment Claim Fails as a Matter of Law Because Plaintiffs Have Not Adequately Alleged the Requisite Elements of Their Cause of Action.

Plaintiffs' fraudulent concealment claim fails as a matter of law because Plaintiffs have not adequately alleged the requisite elements of their cause of action. A cause of action for fraudulent concealment requires the following five elements to be alleged:

> 1) the defendant concealed or suppressed a material fact; (2) the defendant was under a duty to disclose the fact to the plaintiff; (3) the defendant intentionally concealed or suppressed the fact with the intent to defraud the plaintiff; that is, the defendant concealed or suppressed the fact for the purpose of inducing the plaintiff to act differently than she would have if she had known the fact; (4) the plaintiff was unaware of the fact and would have acted differently if she had known of the concealed or suppressed fact; (5) and, as a result of the concealment or suppression of the fact, the plaintiff sustained damages.

Roeder v. Atlantic Richfield Co., No. 3:11-cv-00105, 2011 WL 4048515 at *9 (D. Nev. Sep. 8, 2011). In addition to Plaintiffs' failure to adequately allege damages, as is discussed throughout this motion to dismiss, Plaintiffs' fraudulent concealment claim should be dismissed for two reasons: (1) Plaintiffs have not alleged a "special relationship" between them and Defendant sufficient to give rise to a duty to disclose; and (2) Plaintiffs did not allege Defendant's knowledge of the alleged presence of *Legionella*. Each of these deficiencies, independently and in connection

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with the lack of cognizable damages, warrants the dismissal of Plaintiffs' TAC.

i. Plaintiffs Have Not Alleged a Special Relationship

This Court previously granted Defendant's motion to dismiss Plaintiffs' fraudulent concealment claim on the basis that Plaintiffs did not allege any "special relationship" between them and Defendant sufficient to give rise to a duty to disclose under Nevada law. (ECF No. 31, at 7). Plaintiffs' TAC presents two theories—both of which lack support in law and in reason—to establish the necessary special relationship: (1) an innkeeper-guest relationship; and (2) a relationship premised upon Plaintiffs' membership in the "Total Rewards" rewards program. (TAC, at ¶¶ 35-37). Neither of Plaintiffs' theories amount to a special relationship.

In order to prove the existence of a special relationship, a party must show that (1) "the conditions would cause a reasonable person to impart special confidence" and (2) the trusted party reasonably should have known of that confidence. *Giles v. Gen. Motors Acceptance Corp.*, 494 F.3d 865, 881 (9th Cir. 2007). As noted by the Court, special relationships typically arise in situations that mimic a fiduciary relationship, such as those among real estate broker/buyer, insurer/insured, trustee/beneficiary, and attorney/client. *See Nevada Power Co. v. Monsanto Co.*, 891 F.Supp. 1406, 1416 n.3 (D. Nev. 1995). Conversely, straightforward business transactions, without more, do not amount to a special relationship. *Peri & Sons Farms, Inc. v. Jain Irrigation, Inc.*, 933 F. Supp. 2d 1279, 1292 (D. Nev. 2013) ("simply manufacturing or selling an alleged defective product is not enough to support the required relationship"); *DiMartini v. Purcell Tire & Rubber*, No. 319CV00279ECRVPC, 2009 WL 10697342, at *5 (D. Nev. Dec. 14, 2009) (quoting *Shoen v. Amerco, Inc.*, 896 P.2d 469, 475 (Nev. 1995)) (finding that special relationships among employers-employees are limited to "situations '[w]here the employer-employee relationship becomes analogous to or approximates the kind of special reliance, trust and dependency that is present in insurance cases'").

Notably, this Court has already implicitly rejected that a special relationship can be created merely as a result of an innkeeper-guest relationship. Indeed, the Court's Order noted that "Plaintiffs allege that they were guests at Defendant's hotel"; yet the Court still dismissed Plaintiffs' fraudulent concealment claim. (ECF No. 31, at 7). Moreover, an innkeeper-guest

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relationship is no more than an ordinary business relationship which Nevada courts have confirmed do not rise to the level of special relationships.

Plaintiffs' argument that a special relationship exists based upon their alleged membership in the "Total Rewards" rewards program similarly fails. Apart from the fact that this, too, is no more than an ordinary business relationship, Plaintiffs' theory produces absurd results and would open the floodgates to confer special relationship status–normally reserved for exceptional circumstances of trust and confidence–upon any consumer with the foresight to fill out a simple form. For instance, accepting Plaintiffs' theory as true, Delta Airlines would owe different standards of care in Nevada to its SkyMiles members than it would to unaffiliated passengers. Similarly, Avis Rent-a-Car would owe separate duties of disclosure to its AVIS FIRST members than it would to the general public. Simply put, Plaintiffs do not allege more than that they participated in a straightforward, arms-length transaction with Defendant–one in which thousands of similar patrons engage daily. There is no legal basis to transform participation in a voluntary "rewards" program into a "special relationship"; to do so would presumably permit individuals to change the applicable standard of care based solely on whether he or she chooses to participate in such program. On these facts, Nevada law is clear that no special relationship exists.

ii. Plaintiffs Have Not Sufficiently Alleged That Defendant Had Knowledge of the Alleged Presence of *Legionella*

Plaintiffs' claim for fraudulent concealment fails for failure to sufficiently plead knowledge. To sustain a claim for fraudulent concealment, Plaintiffs must plead some facts alleging that Defendant had knowledge of a "material fact" that was allegedly concealed. *Montes v. Bank of America NA*, No. 2:13-CV-660-RCJ-VCF, 2013 WL 5882778, at *6 (D. Nev. Oct. 20, 2013) (dismissing plaintiff's claim for fraudulent concealment for failure to plead claim with Rule 9(b) particularity where plaintiff states that Defendants "intentionally and fraudulently concealed" various policy provisions and amounts). Assuming that the purported presence of *Legionella* was the "material fact," Plaintiffs must allege facts to support that Defendant had knowledge that *Legionella* was present in the Hotel's water system servicing the areas they were in at the time they stayed at the Hotel. For the reasons discussed above, Plaintiffs have not adequately alleged

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such knowledge. This claim, therefore, fails as a matter of law.

D. Plaintiffs' Common Law Negligence Claim Should be Dismissed Because it is Barred by the Economic Loss Doctrine and Because Plaintiffs Have Failed to Adequately Plead Damages and Causation

"To recover under a negligence theory, [a plaintiff] must prove four elements: (1) that [the defendant] owed him a duty of care; (2) that [the defendant] breach this duty of care; (3) that the breach was the legal cause of [the plaintiff's] injury; and (4) that the complainant suffered damages." *Hammerstein v. Jean Dev. W.*, 907 P.2d 975, 977 (Nev. 1995). This Court previously dismissed Plaintiffs' negligence claim in the SAC due to their failure to plead damages and causation. In this regard, Plaintiffs' TAC suffers from the same fatal flaws and must also be dismissed because they allege they did not pay for their rooms, they have not alleged any impairment of the amenities for which they did allegedly pay, and, even if there was such an impairment, they certainly could not attribute the impairment to the alleged presence of *Legionella* bacteria in certain water systems of the Hotel.

Additionally, because Plaintiffs allege no personal injury, their negligence claim must be dismissed pursuant to Nevada's economic loss doctrine. Nevada law on the economic loss doctrine is well-settled: "[t]his doctrine states that generally, a plaintiff cannot bring a tort claim for 'purely economic losses' absent a claim for personal injury or property damage." *Morrison v. Quest Diagnostics Inc.*, 139 F. Supp. 3d 1182, 1182 (D. Nev. 2015) (citing *Terracon Consultants Western, Inc. v. Mandalay Resort Grp.*, 206 P.3d 81, 86 (Nev. 2009)) (alteration added). "Purely economic loss is generally defined as the loss of the benefit of the user's bargain . . . without any claim of personal injury or damage to other property." *Id.* (quoting *Calloway v. City of Reno*, 993 P.2d 1259, 1263 (Nev. 2000), *overruled on other grounds by Olson v. Richard*, 89 P.3d 31, 31-33 (Nev. 2004)).

Here, Plaintiffs assert only economic loss. Indeed, their sole allegation of damages is that they claim that they would not have stayed at the Hotel had they known of the alleged presence of the *Legionella* bacteria. (TAC, at ¶¶ 40, 50, 61, 70, 78). Alternatively, Plaintiffs allege that they and the putative class paid a higher "room rate" and/or "Resort Fee" than what their stays at the

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Hotel were worth. (*Id.*). Because Plaintiffs have failed to allege damages outside the purported economic loss of the benefit of the bargain (which they fail to articulate in a sufficient manner), Plaintiffs' negligence claim fails as a matter of law.

E. Plaintiffs' Unjust Enrichment Claim Fails as a Matter of Law Because Plaintiffs Received What They Bargained For and Plaintiffs Have Not Adequately Alleged that Defendant Was Unjustly Enriched

Plaintiffs' alleged unjust enrichment claim fails as a matter of law because Plaintiffs received what they bargained for and Defendant was not unjustly enriched. "[U]njust enrichment occurs whenever a person has and retains a benefit which in equity and good conscience belongs to another." *Las Vegas Development Group, LLC v. Yfantis*, 173 F. Supp. 3d 1046, 1059 (D. Nev. 2016) (quoting *Mainor v. Nault*, 101 P. 3d 308, 317 (Nev. 2004)) (alteration in original). Under Nevada law, the elements of unjust enrichment are "(1) a benefit conferred on the defendant by the plaintiff; (2) appreciation by the defendant of such benefit; and (3) an acceptance and retention by the defendant of such . . . benefit under circumstances that it would be inequitable for him to retain the benefit without payment of the value thereof." *Takiguchi v. MRI Intern., Inc.*, 47 F. Supp. 3d 1100, 1119 (D. Nev. 2014) (alteration added).

This Court dismissed Plaintiffs' unjust enrichment claim in the SAC because Plaintiffs had not plausibly alleged that Defendant was unjustly enriched. (ECF No. 31, at 10). Plaintiffs' TAC alleges no new facts to rectify this glaring deficiency. Plaintiffs fully utilized their hotel rooms, for which they admit they did not pay, as well as all other Hotel amenities, without incurring any physical or emotional harm. They do not allege that their use of the accommodations and services included in the "Resort Fee" was in any way inhibited by the alleged presence of *Legionella*.

Plaintiffs' contention that they would be exposed to the Hotel's water system "irrespective of whether Plaintiffs' rooms were comp'd and equally irrespective of whether Plaintiffs . . . . or any other guests/invitees made use of the internet, phones, or fitness rooms for which they paid a Resort Fee" (*Id.* at ¶¶ 37, 41, 48, 58, 72, 78) is of no moment to this analysis. Simply stated, these facts do not give rise to an unjust enrichment claim, and courts throughout the country have dismissed unjust enrichment claims under analogous sets of facts. *Cf. In re Baycol Products*

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Litigation, 596 F.3d 884, 892 (8th Cir. 2010) (affirming dismissal of unjust enrichment claim on summary judgment because plaintiff took medicine, did not suffer from any harm, and thereby received "the benefit of his bargain"); *In re Zappos, Inc.*, No. 3:12-cv-00325, 2013 WL 4830497 at *5 (D. Nev. Sep. 9, 2013) ("Although Plaintiffs allege having bestowed the benefit of their purchase of goods, it appears undisputed that Defendant provided plaintiffs a benefit in return (providing the goods) such that there is no unrecompensed benefit conferred."); *Mazur v. Milo's Kitchen, LLC*, No. 12-1011, 2013 WL 3245203, at * 10 (W.D. Pa. June 25, 2013) (dismissing unjust enrichment claim where the plaintiff was "dissatisfied with the [product], [but] she nevertheless purchased, received and used the product") (alteration added); *Tatum v. Takeda Pharmaceuticals North America, Inc.*, No. 12-1114, 2012 WL 5182895, at *5 (E.D. Pa. Oct. 19, 2012) (dismissing unjust enrichment claim in matter involving pharmaceutical which plaintiff alleged had risks of which defendants were aware and did not disclose because "there is no allegation that defendants refused to provide a service or goods after [the plaintiff] provided defendants with a benefit") (alteration added); *Prohias v. Pfizer, Inc.*, 490 F. Supp. 2d 1228, 1236 (S.D. Fla. 2007) (finding plaintiffs failed to state claim for unjust enrichment because both plaintiffs "purchased a cholesterol reducing drug, and both men obtained cholesterol reduction as a result. Therefore, in a general sense, they obtained the benefit of their bargain"). As succinctly stated in the United States District Court for the Western District of Missouri:

> As a general proposition, determining whether a defendant's retention of the benefit (i.e., the purchase price for the goods) is "unjust" requires considering what a particular plaintiff received in exchange for bestowing that benefit. As discussed in prior Orders, if a person completely used a product without encountering ill-effects or other difficulties and can only declare after the fact that s/he would not have purchased the goods had the truth been known, such a person may not have "unjustly" enriched the seller.

In re Bisphenol-A (BPA) Polycarbonate Plastic Products Liability Litigation, 276 F.R.D. 336, 344 (W.D. Mo. 2011).

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As noted, Plaintiffs cannot allege that Defendant was "unjustly enriched" given the circumstances surrounding this matter. Plaintiffs paid only the Resort Fee at the Hotel and, in return, Defendant provided rooms, accommodations, and services that Plaintiffs enjoyed during incident-and injury-free stays at the Hotel. Plaintiffs do not dispute that, on each occasion, they received the room and the Hotel experience which amounts to more than they paid for—not less. Accordingly, their alleged unjust enrichment claim fails as a matter of law.

F. Plaintiffs Do Not Have a Separate Claim for Declaratory Relief

Plaintiffs do not have a separate claim for "declaratory relief." In its Order dismissing Plaintiffs' SAC, this Court made clear that "[d]eclaratory relief is not a separate cause of action or independent grounds for relief" and that "Plaintiffs have failed to state any claim for which declaratory relief could be granted or pled facts showing that they are entitled to such relief." (ECF No. 31, at 10). Despite the Court's clear and unequivocal pronouncement that a request for declaratory relief is not a standalone claim, the TAC continues to seek such relief as a separate cause of action. For this reason alone, Plaintiffs' "cause of action" for declaratory relief should be dismissed. Moreover, Plaintiffs have not added any sufficient factual allegations consistent with the Court's Order on Defendant's original motion to dismiss to justify such a claim for declaratory relief. This claim, therefore, should be dismissed with prejudice.

G. Plaintiffs Are Not Entitled to Any Further Leave to Amend

Any further request by Plaintiffs for leave to amend should be denied. Plaintiffs were granted leave to amend their SAC with express instructions for re-pleading, embedded within the Court's Order on Defendant's motion to dismiss. Again, they have come up short. In this circumstance, no further leave should be granted. "[W]here the plaintiff has previously been granted leave to amend and has subsequently failed to add the requisite particularity to [his] claims, the district court's discretion to deny leave to amend is particularly broad." *Loos v. Immersion, Corp.*, 762 F.3d 880, 891 (9th Cir. 2014) (quoting *Zucco Partners, LLC v. Digimarc Corp.*, 552 F.3d 981, 1007 (9th Cir. 2009)). Plaintiffs have had multiple attempts, including with the Court's guidance, to state a claim, and they have been unable to do so. Accordingly, Plaintiffs' TAC should be dismissed with prejudice.

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IV. CONCLUSION

For the foregoing reasons, Defendant RIO PROPERTIES, LLC respectfully requests that this Court dismiss Plaintiffs' Third Amended Class Action Complaint in its entirety, with prejudice.

DATED: May 17, 2019

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of May, 2019, a true and correct copy of **DEFENDANT RIO PROPERTIES, LLC'S MOTION TO DISMISS PLAINTIFFS' THIRD AMENDED CLASS ACTION COMPLAINT** was served via the United States District Court CM/ECF system on all parties or persons requiring notice.

By _____
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UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEVADA

AARON LEIGH-PINK and TANA EMERSON, Individually and on behalf of all others similarly situated, Plaintiff(s), v. RIO PROPERTIES LLC, A Nevada Limited Liability Company; and DOES 2-50, inclusive, Defendants.	CASE NO. 17-cv-02910-GMN-VCF PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS THIRD AMENDED CLASS ACTION COMPLAINT ***ORAL ARGUMENT REQUESTED***

Plaintiffs AARON LEIGH-PINK and TANA EMERSON ("Plaintiffs") submit the following response in opposition to Defendant RIO PROPERTIES LLC's ("Defendant") motion to dismiss (ECF No. 37) Plaintiffs' Third Amended Complaint (TAC) (ECF No. 32).

In its order granting Defendant's motion to dismiss Plaintiffs' Second Amended Complaint (ECF No. 31), the Court granted Plaintiffs leave to amend to cure pleading deficiencies regarding Plaintiffs' claim of damages with regard to their Nevada Deceptive Trade Practices Act (NDTPA) (see, ECF No. 31 at p. 6).

The Court also granted Plaintiffs leave to amend to plead facts sufficient to show a legal duty to disclose by Defendant, including by alleging facts evidencing a special relationship between the parties. *Id.* at p. 7. The Court, likewise, dismissed Plaintiff's negligence claim without prejudice noting "the economic loss doctrine does not bar recovery in tort where the defendant had a duty imposed by law rather than by contract and where the defendants's intentional breach of that duty caused purely economic harm to the plaintiff." *Id.* at p. 9. The Court also dismissed without prejudice Plaintiff's unjust enrichment claim noting that Plaintiffs have not alleged facts plausible showing that Defendant was unjustly enriched. Plaintiffs were granted leave to amend. *Id.* at p. 11.

I. NATURE OF THE CASE AND PLAINTIFFS' CLAIMS

This case stems from Defendant's fraudulent concealment from its invitees/guests the fact the Rio All-Suite Hotel's water system was infected with *Legionella* bacteria which Defendant had actual knowledge presented a risk to the health of hotel guests. ECF No. 32 at ¶¶1-10. Plaintiffs claims for damages are simple - they paid out-of-pocket money to Defendant *which they would not have paid* had Defendant informed them of the fact the Hotel's water system was infected with *Legionella* bacteria which posed a health risk to invitee/guests staying at the Hotel. *Id.* at ¶41, ¶60, ¶71, ¶79. Defendant, in fact, had actual knowledge that two of its invetees/guests had already been hospitalized with *Legionella* disease symptoms following their stay at the Rio All-Suite's Hotel. *Id.* at ¶2.

There is *no dispute and Defendant does not challenge* Plaintiffs' allegations the Hotel's water system was in fact infected with *Legionella* bacteria during Plaintiffs' stay and that Defendant was unsuccessful in eradicating the bacteria from its water system until at least September 2017. *Id.* at ¶6. There is, likewise, no dispute and Defendant does not challenge Plaintiffs' allegation Defendant notified *only past guests* who had stayed previously at the Hotel and that Defendant did nothing to inform or notify future or incoming invitees/guests, such as Plaintiffs, that *Legionella* bacteria was still present in the Hotel's

water system. *Id.* at ¶10.[1]

At their core, Plaintiffs' claims are grounded on the fact Plaintiffs (and any reasonable person with knowledge of the true facts) would *not have stayed* at the Rio All-Suite Hotel had they been informed of these material facts about the condition of the Hotel and the health risks presented by *Legionella* bacteria in the Hotel's water system. Plainly put, Plaintiffs suffered actual damages in that they paid money to Defendant they would not have otherwise paid because Plaintiffs were duped; Plaintiffs were defrauded of their money, plain and simple. Plaintiffs allege properly that they were defrauded of their money irrespective of whether they were able to access the internet, use the telephone or the fitness center because, in the absence of Defendant's fraudulent concealment, Plaintiffs would not have paid Defendant *anything* since Plaintiffs would not have stayed at the Rio All-Suites Hotel n the first place. ECF No. 32 at ¶37, ¶58, ¶69, ¶77.

Plaintiffs have alternatively plead damages in the form of the difference between what they paid to stay at the Rio All-Suites Hotel – even if only the Resort Fee which Plaintiffs were *required to pay* to stay in the Hotel – whose water system is infected with *Legionella* bacteria and a hotel whose water system is not. *Id.* at ¶40, ¶61, ¶68, ¶78. Cutting to the chase, Plaintiffs allege a hotel whose water system is infected with *Legionella* bacteria and exposes them to serious health risk is worth *nothing* to Plaintiffs or the reasonable consumer. *Id.* at ¶40, ¶50, ¶61, ¶79. Thus, paying *anything*, including a required Resort Fee, to stay at a hotel whose water system is infected with *Legionella* bacteria caused Plaintiffs and the class actual damages.

As such, Defendant's motion should be denied in its entirety.

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[1] The fact Defendant notified *past guests* of the presence of *Legionella* bacteria in the Hotel's water system in itself evidences Defendant recognized its special relationship with its guests and its duty to notify them of the health hazard presented.

II. DISCUSSION

A. Plaintiffs' Damages Claims Based On Defendant's Fraudulent Conduct

1. Nevada Deceptive Trade Practices Act (NDTPA)

The Nevada Deceptive Trade Practices Act (NDTPA) allows for the recovery of "*[a]ny damages* that the claimant has sustained." See, N.R.S. 41.600(3)(a) (italics added). The term *"any damages"* includes out-of-pocket losses in the form of money which a plaintiff would not have otherwise paid to the defendant but for the Defendant's alleged fraudulent conduct. *Gotshalk v. Hellwig* (D. Nev., Mar. 30, 2017, No. 213CV00448JADNJK) 2017 WL 1240191, at *6 ("Out-of-pocket losses are a measure of damages often used in fraud cases." citing, *Davis v. Beling*, 128 Nev. 301, 316 [278 P.3d 501, 512] (Nev. 2012).)

Here, Plaintiffs allege they suffered damages in the form of the money they paid Defendant which Plaintiffs would not have otherwise paid had they known about the presence of *Legionella* bacteria in the hotel's water system and that other invitees/guests had become sick, including one who died.

The NDTPA also allows for the recovery of any appropriate equitable relief and costs and fees. N.R.S. §41.600(3). "By allowing for recovery of 'any' damages sustained, the statute allows for the possibility of any absence of economic injury." *Bauman v. Saxe*, 2019 WL 591439 (D. Nev., Feb. 13, 2019) at *4 (holding consumers' allegations of damages in the form of privacy violations and a disruption in the quiet use and enjoyment of their cellular telephones sufficient to state a plausible claim as to damages.)

Moreover, the NDTPA allows for the recovery of equitable remedies, including an award of restitution. N.R.S. 41.600. In the TAC, Plaintiff prays for restitution of Defendant's ill-gotten gain. ECF No. 32 at ¶51, TAC Prayer ¶2.

Here, Plaintiffs claim they suffered out of pocket losses which qualify as "any damages" for purposes of the NDTPA and have prayed for equitable relief including restitution. As such, Plaintiffs have adequately plead a claim for Defendant's violation of the NDTPA and Defendant's motion to dismiss should be denied.

2. Damages From Defendants' Fraudulent Conduct

Under Nevada law a defrauded party can recover what he has lost "out of pocket," that is the difference between what he gave and the value of what he received. *Randono v. Turk*, 86 Nev. 123, 130 (Nev. 1970).

In this case, Plaintiffs allege they paid "out of pocket" for a room in a hotel – again, even if Plaintiffs paid only the required Resort Fee they still paid money to stay at the Hotel[2] – which Plaintiffs allege was not worth anything, or was worth substantially less, because the hotel's water system supplying guest rooms was infected with *Legionella* bacteria. Plaintiffs thus claim their out of pocket damages as a result of Defendant's fraudulent conduct is the difference between what they actually paid Defendant to stay at the Rio All-Suites Hotel and the cost to stay at a hotel whose water system presents a serious, even deadly, health risk. Plaintiffs allege neither they, nor any reasonable consumer, would pay *anything* to stay at such a hotel and thus they suffered actual out of pocket damages.

B. The Existence of a Special Relationship Between Defendant and Plaintiffs

1. Well-Settled Nevada Law Imposes A Legal Duty on Landowners to Warn Invitees/Guests of Known But Hidden Hazards

Nevada law is well-settled that a landowner or possessor owes a duty to warn of a hidden, latent or concealed peril of which an invitee is unaware of or who is without knowledge of the peril. *Twardowski v. Westward Ho Motels*, 86 Nev. 784 [476 P.2d 946] (1970) ("A landowner or possessor 'must exercise ordinary care and prudence to render the premises reasonably safe for the visit' of a person invited on his premises for business purposes. *Hotels El Rancho v. Pray*, 64 Nev. 591, at 606 [187 P.2d 568] (1947). In dealing with a hidden or latent defect as compared to an obvious danger, this court said in *Worth v. Reed*, 79 Nev. 351 [384 P.2d 1017] (1963), 'If a peril is hidden, latent or concealed, ordinary care

[2] There is no dispute and Defendant does not challenge Plaintiffs' allegation that they were *required* to pay the Resort Fee to stay at the hotel even if the room itself was "comp'ed."

requires an owner, with actual or constructive knowledge of the peril, to warn the invited guest who is without such knowledge. . . . On the other hand, if the danger is 'obvious,' ordinary care does not require a warning from the owner because 'obviousness' serves the same purpose.' 79 Nev. at 354.)" *Twardowski*, 86 Nev. at 787.

Importantly, Defendant does not challenge Plaintiffs' allegations that it is a landowner or possessor. See, TAC ¶1, ¶35. Defendant also does not challenge Plaintiffs' allegations that *Legionella* bacteria had infected the hotel's water system (see, TAC ¶¶1-6), or that it posed a serious risk to Plaintiffs' and all other guests' health, including death. See, TAC ¶¶4, 5. Defendants also do not challenge Plaintiffs' allegation that the health risk was a hidden, latent or concealed condition which was unknown to Plaintiffs. See, TAC ¶7. Because that information was known only to Defendant they owed Plaintiffs a duty to warn. *Twardowski, ibid.* Defendant, moreover, does not challenge Plaintiffs' allegation they were invitees and/or guests of the hotel. (See, TAC ¶11, ¶13. Thus, Defendants do not dispute the essential facts which, under Nevada law, impose a duty to disclose.

Based on long-controlling Nevada law, Defendant owed a legal duty to disclose to Plaintiffs and all other invitees/guests the fact the Hotel's water system was infected with *Legionella* bacteria which presented a known risk to the health of guests given the Southern Nevada Heath District had notified Defendant of two people who had already been hospitalized with Legionnaires disease symptoms after staying at the Rio All-Suites Hotel. This condition was latent and hidden and known only to Defendant. Thus, Defendant had the well-established duty of disclosure.

2. Plaintiffs Have Alleged Facts Which Establish A "Special Relationship"

In addition to the legal duty of disclosure imposed on a premises owner or possessor to warn of hidden perils under Nevada law, Plaintiffs have alleged facts sufficient to shed light on the existence of a special relationship between them and Defendant which also imposed a duty of disclosure. Factual assertions shedding light on

the nature of the special relationship between Plaintiffs and Defendant include "any previous communications, duration of the relationship, or any prior course of dealing." See, *Silver State Broadcasting LLC v. Crown Castle MU LLC*, 2018 WL 6606064 at *3 (18-cv-00734-GMN-VCF, D. Nev., Dec. 17, 2018).

In the TAC, Plaintiffs provide factual assertions about the parties' previous communications, the duration of the parties' relationship, and the parties' prior course of dealing, including Plaintiffs' decade-long membership in Defendant's Total Rewards program. See, TAC ¶¶35-37, ¶56, ¶64. As such, Plaintiffs have alleged facts sufficient to establish the existence of a special relationship between them and Defendant.

C. Under Nevada Law The Economic Loss Doctrine Does Not Bar Plaintiffs' Recovery of Purely Economic Losses

"To the extent [Plaintiffs'] claim is grounded in intentional conduct, the economic loss doctrine does not bar recovery." *Silver State Broadcasting, LLC v. Crown Castle MU, LLC*, 2018 WL 6606064 at *7 (18-cv-00734-GMN-VCF, D. Nev., Dec. 17, 2018).

It is well-settled under Nevada law the economic loss doctrine does not bar the recovery of purely economic losses when the defendant intentionally breaches a duty that is imposed independently of the obligations arising from contract. *Davis v. Beling* (2012) 128 Nev. 301, 320 [278 P.3d 501, 514] (*citing, Bernard v. Rockhill Dev. Co.*, 103 Nev. 132, 135, 734 P.2d 1238, 1240 (1987); see, *Giles v. General Motors Acceptance Corp.*, 494 F.3d 865, 879 (9th Cir.2007) (meticulously analyzing Nevada's economic loss doctrine jurisprudence and explaining that in Nevada, as in most jurisdictions, the doctrine does not bar claims "where the defendant had a duty imposed by law rather than by contract and where the defendant's intentional breach of that duty caused purely monetary harm to the plaintiff"). After all, it is often the case that claims stemming from a defendant's intentional wrongdoing, " 'such as fraud and conversion[,] exist to remedy purely economic losses.'" *Id.* at 875 (quoting, *Grynberg v. Questar Pipeline Co.*, 70 P.3d 1, 11 (Utah 2003)).

Here, Plaintiffs allege Defendant intentionally breached its duty to disclose to Plaintiffs and all other invitee/guests that the Hotel's water system was infected with *Legionella* bacteria. See, ECF No. 32 at ¶56 (also incorporating by reference ¶35-39), ¶57. As explained, *supra*, Defendant had a special relationship with Plaintiffs as the owners/operators of a hotel and public accommodation which imposed on Defendant a duty to disclose to Plaintiffs as invitees/guests of the property the fact the hotel's water system was infected with *Legionella* bacteria which posed a hazard to the health of all guests who stayed at the hotel including Plaintiffs.

III. Defendant Has Been Unjustly Enriched By Its Fraudulent Conduct

Plaintiffs have alleged they paid money to Defendant they would not have paid but for Defendant's fraudulent conduct in concealing the fact the Hotel's water system was infected with *Legionella* bacteria. ECF No. 32 at ¶77. Plaintiffs further allege Defendant was unjustly enriched by the monetary benefit conferred on them by Plaintiffs. *Id.* at ¶78-¶79.

"Unjust enrichment is the unjust retention of a benefit to the loss of another, or the retention of money or property of another against the fundamental principles of justice or equity and good conscience." *Nevada Industrial Dev. v. Benedetti*, 103 Nev. 360, 363 n. 2, 741 P.2d 802, 804 n. 2 (1987). [The Nevada Supreme Court] has observed that the essential elements of unjust enrichment 'are a benefit conferred on the defendant by the plaintiff, appreciation by the defendant of such benefit, and acceptance and retention by the defendant of such benefit.' *Unionamerica Mtg. v. McDonald*, 97 Nev. 210, 212, 626 P.2d 1272, 1273 (1981)." *Topaz Mut. Co., Inc. v. Marsh* (1992) 108 Nev. 845, 856 [839 P.2d 606, 613].

In *Topaz*, the Nevada Supreme Court found viable a claim for unjust enrichment where a lender brought suit to recover money she loaned to a private water company but did not receive what she expected under the terms of the promissory note. Instead of making interest payments to the plaintiff the defendant fraudulently used the money to delay foreclosure on its own property. *Topaz*, 108 Nev. 845, 856.

Here, because of Defendant's fraudulent concealment Plaintiffs paid Defendant money they would not otherwise have given them. As Plaintiffs have alleged, had they known the true facts that the Hotel's water system was infected with *Legionella* bacteria and presented a risk to their health, Plaintiffs would not have stayed at the Rio All-Suites Hotel nor paid money to Defendant. Thus, Defendant acquired and retained the monetary benefits conferred by Plaintiffs under pretenses which are against the fundamental principals of equity and good conscious. Plaintiffs have thus stated a proper cause of action for unjust enrichment.

IV. CONCLUSION

Based on the foregoing, Plaintiffs have plead recoverable damages from Defendant's fraudulent conduct in the form of "any damages" under the NDTPA and any "out of pocket" damages suffered as a result of Defendants' fraudulent concealment.

Likewise, well-established Nevada law imposes a duty on property owners or possessors such as Defendant to disclose hidden or latent risks to the health or welfare of invitees/guests where Defendant has knowledge of the peril, such as the fact *Legionella* bacteria has infected the Hotel's water system and sent two people who had previously stayed at the hotel to the hospital with Legionnaires disease symptoms.

Lastly, because Defendant intentionally breached its duty imposed by law the economic loss doctrine does not bar Plaintiffs' claims for purely economic loss.

For each of the foregoing reasons, the Court should deny Defendant's motion to dismiss (ECF No. 37) in its entirety and order Defendant to answer the Third Amended Complaint.

Respectfully submitted,

Dated: May 31, 2019

/s/ Robert A. Waller, Jr.
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UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEVADA

AARON LEIGH-PINK, and TANA EMERSON, Individually and on behalf of all other similarly situated,

Plaintiffs,

v.

RIO PROPERTIES LLC, a Nevada Limited Liability Company; and DOES 1-50, inclusive,

Defendants.

Case No. 17-CV-02910-GMN-VCF

REPLY IN SUPPORT OF DEFENDANT RIO PROPERTIES, LLC'S MOTION TO DISMISS PLAINTIFFS' THIRD AMENDED CLASS ACTION COMPLAINT

Trial Date: None Set

Defendant submits the following in further support of its Motion to Dismiss Plaintiffs' Third Amended Class Action Complaint ("TAC") (the "Motion"). As explained below, Plaintiffs' Opposition to the Motion confirms that Plaintiffs are unable to state a claim against Defendant, and their TAC should be dismissed with prejudice.

Most glaring from Plaintiffs' Opposition is that when faced with this Court's April 1, 2019 Order dismissing their Second Amended Complaint ("SAC") and Defendant's Motion, they remain unable to allege a viable legal theory of damages and sufficient facts that any of the purported damages they have alleged–which this Court already found were insufficient—were caused by the alleged presence of *Legionella* in certain water systems at the Hotel. Indeed, Plaintiffs double down on their same rejected theory that they would not have stayed at the Hotel

had they known of the alleged presence of *Legionella*. In essence, by relying on the same flawed theory, Plaintiffs are using their TAC and Opposition as an improper means to seek reconsideration of this Court's April 1, 2019 Order. Plaintiffs' theory remains legally and factually incorrect and procedurally improper.

Notwithstanding the lack of an adequate theory of damages, Plaintiffs' claims remain deficient under *Twombly* and *Iqbal* and are subject to dismissal under Nevada law and even the most liberal of pleading standards. Most glaringly, Plaintiffs entirely ignore several bases for Defendant's Motion. This is a tacit admission that Plaintiffs are unable to fully oppose Defendant's Motion, and it should be granted for those reasons alone.

Ultimately, Plaintiffs' Opposition is no more than a guise to attempt to misdirect the Court's attention to issues other than whether their *fourth pleading attempt* states a claim as a matter of law. While Plaintiffs' Opposition is riddled with misstatements that "Defendant does not challenge" certain of their factual allegations—which, of course, it does—such an argument is a mere red herring. Defendant need not "challenge" or "dispute' Plaintiffs' factual allegations in a motion to dismiss. It is Plaintiffs' burden to allege facts sufficient to state a claim and, under the law of the case of this Court's prior Order, they have continued to fail to do so.

By repeatedly failing to state a claim—and blatantly ignoring this Court's Order regarding the insufficiencies in Plaintiffs' SAC—Plaintiffs have wasted enough resources of this Court and Defendant. Dismissal, therefore, should be with prejudice and without any further leave to amend.

A. Plaintiffs' Opposition Confirms That They Are Unable to Sufficiently Allege Damages

Plaintiffs' Opposition is little more than a regurgitation of Plaintiffs' previously-rejected theories of "damages" and a thinly-veiled request that the Court revisit its prior Order dismissing Plaintiffs' SAC for failure to plead damages. To be clear, in Plaintiffs' SAC, they alleged that they were damaged "in that they parted with their money by paying Defendant the room rate and/or Resort Fee demanded by Defendant to stay at the hotel 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 with legionnaires bacteria in the water

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system is fairly and reasonably worth to the average consumer." (SAC, ECF No. 22, at ¶ 48 (NDTPA claim); ¶ 70 (negligence claim); ¶ 79 (fraudulent concealment claim); ¶ 85 (unjust enrichment claim)). Critically, in its prior Order dismissing the SAC, this Court specifically found that these allegations were insufficient to state a claim upon which relief can be granted. In other words, Plaintiffs were required to allege more in their TAC. They did not.

Indeed, in their TAC, Plaintiffs primarily rely on the identical theory already rejected by this Court, *to wit*, that "they paid out-of-pocket money to Defendant which they would not have paid had Defendant informed them of the fact the Hotel's water system was infected with *Legionella* bacteria which posed a health risk to invitee / guests staying at the Hotel." (Opp. at 2) (italics removed); *see also id.* at 3 ("Plainly put, Plaintiffs suffered actual damages in that they paid money to Defendant they would not have otherwise paid because plaintiffs were duped."). Again, the Court has already rejected this theory:

> The Court finds that Plaintiffs failed to present sufficient factual matter to state a claim to relief that is plausible on its face. To begin with, Plaintiffs' damages, if any, were economic in nature, as they have not alleged personal injury or property damage. Moreover, Plaintiffs concede that their stay at the Rio was complimentary, except for the resort fee of $34.01. The resort fee paid for internet use, telephone use, and fitness room access. Plaintiffs do not allege that during their stay they did not receive those amenities, sufficient access to those amenities, or that the amenities were otherwise unsatisfactory.

(MTD Order, ECF No. 31, at 6 (citations omitted)). Accordingly, Plaintiffs' Opposition is no more than a request for the Court to accept their already-rejected theories. Plaintiffs' TAC is just as deficient as their SAC, and it should similarly be dismissed, in full, for failing to plead damages sufficiently.

Notwithstanding the foregoing—and although entirely unclear from Plaintiffs' Opposition—it appears that Plaintiffs may be asserting a new theory of damages with respect to their NDTPA claim. Plaintiffs cite to *Bauman v. Saxe*, No. 2:14-CV-01125, 2019 WL 591439 (D. Nev. Feb. 13, 2019) for the proposition that the NDTPA "allows for the possibility of an[] absence of economy injury." (Opp. at 4). *Bauman* is readily distinguishable and is of no relevance to this

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matter from a legal or factual perspective. *Bauman* involved an alleged violation of the Telephone Consumer Protection Act regarding the collection and storage of cellular telephone numbers and the sending of unsolicited text messages advertising various Las Vegas events. *Bauman*, 2019 WL 591439 at *1. In dicta, after finding the plaintiffs did not state a claim under the NDTPA, the court explained that damages could be "in the form of privacy violations and a disruption in the quiet use and enjoyment of their cellular telephones." *Id.* at *4.

Here, Plaintiffs are seeking only economic damages in the form of a refund of the Hotel's room rate and/or Resort Fee. Plaintiffs have not alleged any "privacy violations" or a "disruption in the quiet use and enjoyment" of the Hotel. In fact, despite their four attempts to state a claim, not once have they alleged that their stays at the Hotel were anything other than what they expected. *Bauman* does not salvage Plaintiffs' NDTPA claim, and this claim, along with all other claims in the TAC, should be dismissed with prejudice.

B. Nevada Premises Liability Law Does Not Create a "Special Relationship" Between Plaintiffs and Defendant

Plaintiffs appear to contend that their alleged status as invitees at the Hotel creates a "special relationship" and gives rise to a duty to disclose. Plaintiffs' reliance on Nevada premises liability law, however, is of no moment and should be summarily disregarded. Plaintiffs do not disclose to the Court that the Nevada Supreme Court has adopted the Restatement (Third) of Torts § 51 with respect to Nevada premises liability law. *Foster v. Costco Wholesale Corp.*, 128 Nev. 773, 775 (Nev. 2012). Importantly, § 51 of the Restatement applies to "Liability for Physical and Emotional Harm." Plaintiffs' claims do not relate to any "physical or emotional harm," nor do they allege such harm in the TAC or Opposition. Therefore, Plaintiffs' citation to premises liability law is inapplicable to the facts of this case.

Additionally, this Court should not adopt a theory that the status of an entrant on property—even a Hotel—gives rise to a "special relationship." Such a theory undermines the meaning of "special relationship" and would permit nearly every single person to allege a "special relationship" with any place of business in which he or she enters in the State of Nevada. This would open the floodgates of potential liability far beyond what was contemplated in creating the

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"special relationship" inquiry.

C. Being a Member of a Rewards Program Does Not Constitute a "Special Relationship"

Plaintiffs' Opposition further contends that a "special relationship" was created by virtue of Plaintiffs being a part of Defendant's rewards program. Of course, Plaintiffs provide no authority for this incredulous theory that the mere act of completing a written form for a rewards program automatically triggers a relationship whereby a guest "impart[s] special confidence" in the operator of the rewards program and that the operator of the rewards program "reasonably should have known of that confidence." *Giles v. Gen. Motors Acceptance Corp.*, 494 F.3d 865, 881 (9th Cir. 2007).

The sole case cited by Plaintiffs, *Silver v. State Broadcasting LLC v. Crown Castle MU, LLC*, No. 2:18-CV-00734, 2018 WL 6606064 (D. Nev. Dec. 17, 2018), is of no help to them. In *Silver*, this Court rejected an argument that a special relationship existed because there were no "factual assertions shedding light on their relationship such as any previous communications, duration of the relationship, or any prior course of dealing." *Id.* at *3. "Without more, the Court cannot plausibly infer that Christen imposed confidence in Plaintiff such that Plaintiff justifiably placed more credence in his representations than that of any other person with whom Plaintiff exchanged communications." *Id.* Importantly, "an association characterized by 'routine, arms-length dealings' will not suffice to establish a special relationship." *Id.*

Here, the only factual allegation contained in Plaintiffs' TAC regarding this misplaced legal theory is that they were members of Defendant's Total Rewards program for more than ten years. But Plaintiffs are not different than the hundreds of thousands, if not millions, of similar individuals who are also Total Rewards members and who became members through the mere completion of a form. Mere participation in Defendant's Total Rewards program is an insufficient basis to establish a "special relationship" and constitutes, at most, no more than an arms-length transaction between Plaintiffs and Defendant.

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D. This Court Has Already Concluded That the Mere Fact That Plaintiffs Were Guests at the Hotel is Insufficient to Establish a "Special Relationship"

Plaintiffs appear to suggest that a "special relationship" can be established merely because Defendant allegedly operated the Hotel. (Opp. at 8) ("As explained, *supra*, Defendant had a special relationship with Plaintiffs as the owners/operators of a hotel and public accommodation . . . ."). Notwithstanding the fact that Plaintiffs cite to no authority for this conclusory statement, this Court has already rejected such a theory. Indeed, this Court concluded that mere allegations of an innkeeper-guest relationship do not amount to a special relationship. (MTD Order at 7) (stating "[a] duty to disclose arises where there is a fiduciary relationship or where there is a "special relationship" and "[h]ere, Plaintiffs allege that they were guests at Defendant's hotel. Plaintiffs have not provided factual allegations indicating that they had either a fiduciary or special relationship"). In other words, the Court acknowledged Plaintiffs' allegations that they were guests at the Hotel and still found that there were no "factual allegations" giving rise to a special relationship. This argument, therefore, should be rejected.

E. Plaintiffs Have Not Overcome the Economic Loss Doctrine

Plaintiffs' sole opposition to the economic loss doctrine is that the doctrine is inapplicable when there is an "intentional" breach of a duty "imposed independently of the obligations arising from contract." (Opp. at 7). The sole "duty" to which Plaintiffs refer is that of a "duty to disclose" to invitees and Defendant's "duty to disclose" as a result of a "special relationship" with Plaintiffs. (*Id.* at 8). As discussed above, however, the Nevada premises liability law upon which Plaintiffs rely in attempting to advance their theory of a special relationship is inapplicable to this matter, and the facts alleged are insufficient to give rise to a "special relationship." For those reasons, Plaintiffs have failed to state a claim of any "duty to disclose" owed to them by Defendant that could allow them to circumvent the economic loss doctrine. The economic loss doctrine unequivocally bars Plaintiffs' negligence claim.

F. Plaintiffs Enjoyed the Benefit of Their Bargain

Plaintiffs undoubtedly received what they paid for: the amenities associated with the "Resort Fee." To be sure, if they had not, they would have alleged as such in their TAC. A claim

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for unjust enrichment requires that "a person has and retains a benefit which in equity and good conscience belongs to another." *Las Vegas Development Group, LLC v. Yfantis*, 173 F. Supp. 3d 1046, 1059 (D. Nev. 2016) (quoting *Mainor v. Nault*, 120 Nev. 750, 101 P.3d 308, 317 (Nev. 2004) (en banc)). Plaintiffs have not sufficiently alleged inequity under the circumstances. Indeed, Plaintiffs do not allege that they were ever refused the amenities included in the "Resort Fee" or that they suffered some illness or even inconvenience during their stay at the Hotel. Plaintiffs do not—and cannot—allege that Defendant withheld any benefit from Plaintiffs, and the fact that they were allegedly "at risk" of being exposed to *Legionella* has no impact on their unjust enrichment claim. This is particularly so where, as here, Plaintiffs acknowledge that they paid only the "Resort Fee" and were provided unrestricted access to all amenities associated with such fee. *Cf. Tatum v. Takeda Pharm. N. Am., Inc.*, No. 12-1114, 2012 WL 5182895, at *5 (E.D. Pa. Oct. 19, 2012) (dismissing unjust enrichment claim in a matter involving a pharmaceutical which plaintiff alleged had risks of which defendants were aware and did not disclose because "there is no allegation that defendants refused to provide a service or goods after [the plaintiff] provided defendants with a benefit") (alteration added).

Plaintiffs' Opposition cites *Topaz Mut. Co., Inc. v. Marsh*, 108 Nev. 845, 856 (Nev. 1992), which is inapposite to the instant facts. In *Topaz*, plaintiff, a lender, was cheated out of the entire amount of her $121,000 loan plus interest when the borrower failed to secure approval for the loan, fraudulently conveyed the loan amount, and failed to make the required interest payments to plaintiff. (*Id.*) Indeed, the plaintiff in *Topaz* unquestionably did not receive the benefit of the bargain. Here, just like in their SAC, Plaintiffs do not dispute that they enjoyed incident-and injury-free stays at the Hotel. Even more, Plaintiffs concede that their rooms were comp'd by the Hotel and do not allege that they were deprived of any of the amenities associated with the "Resort Fee." (TAC at ¶ 77). As such, there was no benefit that was inequitably transferred from Plaintiffs, who did not pay for their rooms, to Defendant, that provided all amenities for which Plaintiffs paid and, in fact, more. Plaintiffs' TAC does nothing to change this analysis. Therefore, Plaintiffs' unjust enrichment claim fails as a matter of law.

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G. Defendant's Unopposed Bases For Dismissal Should Be Granted

In addition to the above, Defendant's Motion should be granted on any issues that were unopposed by Plaintiff. A court may grant a movant's argument as unopposed when the argument is unaddressed in opposition. *See Donell v. Fidelity Nat'l Title Agency of Nevada*, No. 2:07–CV–00001–KJD, 2012 WL 1669421, at *7 (D. Nev. May 11, 2012) (noting that opposition brief's failure to address summary judgment motion's arguments regarding particular claim was sufficient ground for granting summary judgment against plaintiff on that issue) (citing to LR 7-2(d) ("The failure of an opposing party to file points and authorities in response to any motion . . . constitutes a consent to the granting of the motion.")).

The following bases for dismissal were not opposed by Plaintiff and, therefore, Defendant's Motion should be granted:

- Plaintiffs failed to plead knowledge to state a claim under the NDTPA and for fraudulent concealment;
- Plaintiffs have no standing to base their NDTPA claim upon a purported violation of NRS § 305.277; and
- Plaintiffs have not pleaded sufficient facts for an independent claim for declaratory relief.

Accordingly, because these meritorious and well-supported arguments were unopposed, the Motion should be granted on these bases as to Plaintiffs' First Cause of Action (Count One and Two), Third Cause of Action, and Fifth Cause of Action.

H. The Dismissal of Plaintiffs' TAC Should Be With Prejudice and Without Leave to Amend

As noted in Defendant's Motion, "where the plaintiff has previously been granted leave to amend and has subsequently failed to add the requisite particularity to [his] claims, the district court's discretion to deny leave to amend is particularly broad." *Loos v. Immersion, Corp.*, 762 F.3d 880, 891 (9th Cir. 2014) (quoting *Zucco Partners, LLC v. Digimarc Corp.*, 552 F.3d 981, 1007 (9th Cir. 2009)). Plaintiffs have not requested, nor should this Court grant, any further leave to amend. Plaintiffs have had multiple attempts to state a claim, and they are unable to do so.

Dismissal, therefore, should be with prejudice.

DATED: June 7, 2019

WOOD, SMITH, HENNING & BERMAN LLP

By: _____

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CERTIFICATE OF SERVICE

I hereby certify that on this 7 day of June, 2019, a true and correct copy of **REPLY IN SUPPORT OF DEFENDANT RIO PROPERTIES, LLC'S MOTION TO DISMISS PLAINTIFFS' THIRD AMENDED CLASS ACTION COMPLAINT** was served via the United States District Court CM/ECF system on all parties or persons requiring notice.

By _____
Monica L. Jacobs, an Employee of
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Attorneys for Plaintiffs Individually and on behalf of all others similarly situated

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEVADA

JAY AMES, Individually and on behalf of all others similarly situated, Plaintiff(s), v. CAESARS ENTERTAINMENT CORPORATION d.b.a. RIO ALL-SUITES HOTEL AND CASINO; RIO PROPERTIES, LLC., Defendants.	CASE NO. 2:17-cv-02910-GMN-VCF NOTICE OF APPEAL TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT Judge: Hon. Gloria M. Navarro

Plaintiffs AARON PINK and TANA EMERSON hereby appeal to the United States Court of Appeals for the Ninth Circuit from the judgment and all parts thereto entered in favor of Defendants CAESARS ENTERTAINMENT CORPORATION, d.b.a. RIO ALL-SUITES HOTEL AND CASINO; RIO PROPERTIES LLC, and each of them, and against Plaintiffs which was entered in this action on November 26, 2019 (Doc. #41).

By,

Dated: December 20, 2019

/s/ Robert A. Waller, Jr.
ROBERT A. WALLER, JR.
Attorneys for Plaintiffs

CLOSED,APPEAL

United States District Court
District of Nevada (Las Vegas)
CIVIL DOCKET FOR CASE #: 2:17-cv-02910-GMN-VCF

Ames v. Caesars Entertainment Corporation et al
Assigned to: Chief Judge Gloria M. Navarro
Referred to: Magistrate Judge Cam Ferenbach
Case in other court: Ninth Circuit, 19-17556
Clark County District Court, A-17-762930-C
Cause: 28:1441 Petition for Removal- Fraud

Date Filed: 11/20/2017
Date Terminated: 11/26/2019
Jury Demand: Both
Nature of Suit: 370 Fraud
Jurisdiction: Diversity

Plaintiff

Jay Ames
TERMINATED: 02/26/2018

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Plaintiff

Tana Emerson

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V.

Defendant

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TERMINATED: 02/26/2018
doing business as
Rio All-Suite Hotel and Casino
TERMINATED: 02/26/2018

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Justin Smerber

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TERMINATED: 03/16/2018

Lewis W. Brandon , Jr.
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TERMINATED: 03/16/2018

Richard Fama
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Date Filed	#	Docket Text
11/20/2017	1	PETITION FOR REMOVAL from Clark County District Court, Case Number A-17-762930-C, (Filing fee $ 400 receipt number 0978-4864834) by Caesars Entertainment Corporation. (Attachments: # 1 Exhibit, # 2 Exhibit, # 3 Civil Cover Sheet)(Brandon, Lewis) NOTICE of Certificate of Interested Parties requirement: Under Local Rule 7.1-1, a party must immediately file its disclosure statement with its first appearance, pleading, petition, motion, response, or other request addressed to the court. (Entered: 11/20/2017)
11/20/2017		Case assigned to Chief Judge Gloria M. Navarro and Magistrate Judge Cam Ferenbach. (MR) (Entered: 11/21/2017)
11/21/2017	2	**FIRST NOTICE: of Non-Compliance with and Local Rule IA 11-1 and LR IC 2-1(a):** The Court has no record of **Adam C. Rapaport,** being admitted to the U.S. District Courts bar and the attorney is not registered with CM/ECF. **Attorney Action Required** 1. Attorney advised to comply with the admission requirements of this Court. Admission forms are available on the Court's website at www.nvd.uscourts.gov. 2. **Upon complying with LR IA 11-1,** you are required to register for the Courts Case Management and Electronic Case Filing (CM/ECF) program 3. Please visit the Courts website, then select **ATTORNEY REGISTRATION** located in the middle of the web page to register for CM/ECF. **(no image attached)** (DKJ) Modified on 12/6/2017 to correct spelling of Attorney's last name (DKJ). (Entered: 11/21/2017)
11/21/2017	3	NOTICE TO COUNSEL PURSUANT TO LOCAL RULE IA 11-2. Counsel Robert A. Waller, Jr. to comply with completion and electronic filing of the Verified Petition and Designation of Local Counsel. For your convenience, click on the following link to obtain the form from the Court's website - www.nvd.uscourts.gov/Forms.aspx. Upon approval of the Verified Petition, counsel is required to register for the Court's Case Management and Electronic Case Filing (CM/ECF) system and the electronic service of pleadings. Please visit the Court's website **www.nvd.uscourts.gov** to register Attorney(s). Verified Petition due by 1/5/2018. **(no image attached)** (MR) (Entered: 11/21/2017)
11/21/2017	4	MINUTE ORDER IN CHAMBERS of the Honorable Chief Judge Gloria M. Navarro on 11/21/2017. Statement regarding removed action is due by 12/6/2017. Joint Status Report regarding removed action is due by 12/21/2017. (Copies have been distributed pursuant to the NEF - MR) (Entered: 11/21/2017)

11/22/2017	5	CERTIFICATE of Interested Parties by Caesars Entertainment Corporation. There are no known interested parties other than those participating in the case (Attachments: # 1 Civil Cover Sheet) (Brandon, Lewis) (Entered: 11/22/2017)
11/22/2017	6	CIVIL COVER SHEET to 1 Petition for Removal, filed by Defendant Caesars Entertainment Corporation. (Brandon, Lewis) Modified on 11/27/2017 to correct docket entry relationship (TR). (Entered: 11/22/2017)
11/28/2017	7	ERRATA to 1 Petition for Removal,, by Defendant Caesars Entertainment Corporation. (Attachments: # 1 Exhibit) (Brandon, Lewis) (Entered: 11/28/2017)
11/30/2017	8	STIPULATION *and Order to Extend Time to File Answer or Other Responsive Pleading to Plaintiff's First Amended Complaint* by Defendant Caesars Entertainment Corporation. (Brandon, Lewis) (Entered: 11/30/2017)
12/04/2017	9	ORDER Granting 8 Stipulation to Extend Time to File Answer or Other Responsive Pleading to Plaintiff's First Amended Complaint. Signed by Magistrate Judge Cam Ferenbach on 12/4/2017. (Copies have been distributed pursuant to the NEF - MR) (Entered: 12/04/2017)
12/06/2017	10	STATEMENT REGARDING REMOVAL by Defendant Caesars Entertainment Corporation, **Rio Properties LLC**. (Brandon, Lewis) Modified on 12/6/2017 to add filing party (DKJ). (Entered: 12/06/2017)
12/06/2017	11	STATEMENT REGARDING REMOVAL by Defendant Caesars Entertainment Corporation, **Rio Properties LLC**. (Brandon, Lewis) (Attachments: # 1 Exhibit, # 2 Exhibit)(Brandon, Lewis) Modified on 12/6/2017 to add filing party (DKJ).. (Entered: 12/06/2017)
12/15/2017	12	MOTION/VERIFIED PETITION for Permission to Practice Pro Hac Vice by Robert A. Waller, Jr. and DESIGNATION of Local Counsel Adam C. Rapaport (Filing fee $ 250 receipt number 0978-4896205) by Plaintiff Jay Ames. (Rapaport, Adam) (Entered: 12/15/2017)
12/21/2017	13	Joint STATUS REPORT by Defendant Caesars Entertainment Corporation. (Brandon, Lewis) (Entered: 12/21/2017)
12/21/2017	14	ORDER Granting 12 Verified Petition for Permission to Practice Pro Hac Vice for Attorney Robert A. Waller, Jr. for Jay Ames and approving Designation of Local Counsel Adam C. Rapaport. Signed by Chief Judge Gloria M. Navarro on 12/21/2017. Any Attorney not yet registered with the Court's CM/ECF System shall submit a Registration Form on the Court's website www.nvd.uscourts.gov (Copies have been distributed pursuant to the NEF - MR) (Entered: 12/21/2017)
12/27/2017	15	MOTION/VERIFIED PETITION for Permission to Practice Pro Hac Vice by Richard Fama and DESIGNATION of Local Counsel Lewis Brandon, Jr. (Filing fee $ 250 receipt number 0978-4907520) by Defendant Caesars Entertainment Corporation. (Attachments: # 1 Exhibit) (Brandon, Lewis) (Entered: 12/27/2017)
12/28/2017	16	MOTION to Dismiss by Defendant Caesars Entertainment Corporation. Responses due by 1/11/2018. (Attachments: # 1 Exhibit, # 2 Exhibit, # 3 Exhibit) (Brandon, Lewis) (Entered: 12/28/2017)
12/29/2017	17	ORDER Granting 15 Verified Petition for Permission to Practice Pro Hac Vice for Attorney Richard Fama for Caesars Entertainment Corporation and Rio Properties LLC and approving Designation of Local Counsel Lewis Brandon, Jr. Signed by Chief Judge Gloria M. Navarro on 12/29/2017. (Copies have been distributed pursuant to the NEF - MR) (Entered: 12/29/2017)
01/11/2018	18	RESPONSE to 16 Motion to Dismiss by Plaintiff Jay Ames. Replies due by 1/18/2018. (Waller, Robert) (Entered: 01/11/2018)
01/18/2018	19	REPLY to Response to 16 Motion to Dismiss by Defendant Rio Properties LLC. (Attachments: # 1 Exhibit) (Brandon, Lewis) (Entered: 01/18/2018)

02/26/2018	20	STIPULATION for Filing of Second Amended Complaint, Substitution of Named Plaintiffs and Dismissal; filed by Plaintiff Jay Ames. (Attachments: # 1 Exhibit Exhibit A to Stipulation, # 2 Certificate of Service) (Waller, Robert) (Entered: 02/26/2018)
02/26/2018	21	ORDER Granting 20 Stipulation re Filing of Second Amended Complaint, Substitution of Named Plaintiffs and Dismissal Without Prejudice of Defendant Caesars Entertainment Corp. Signed by Magistrate Judge Cam Ferenbach on 2/26/2018. (Copies have been distributed pursuant to the NEF - MR) (Entered: 02/27/2018)
03/01/2018	22	Second AMENDED COMPLAINT with Jury Demand against All Defendants by Tana Emerson, Aaron Leigh-Pink. Adds and removes parties. Proof of service due by 5/30/2018. (Attachments: # 1 Certificate of Service)(Waller, Robert) (Entered: 03/01/2018)
03/16/2018	23	MOTION to Substitute Attorney Janice M. Michaels in for Attorney Lewis W. Brandon, Jr by Defendant Rio Properties LLC. (Michaels, Janice) (Entered: 03/16/2018)
03/16/2018	24	ORDER Granting 23 Motion to Substitute Attorney. Signed by Magistrate Judge Cam Ferenbach on 3/16/2018. (Copies have been distributed pursuant to the NEF - MR) (Entered: 03/16/2018)
03/29/2018	25	MOTION to Dismiss by Defendant Rio Properties LLC. Responses due by 4/12/2018. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C) (Michaels, Janice) (Entered: 03/29/2018)
04/12/2018	26	RESPONSE to 25 Motion to Dismiss by Plaintiffs Tana Emerson, Aaron Leigh-Pink. Replies due by 4/19/2018. (Attachments: # 1 Certificate of Service) (Waller, Robert) (Entered: 04/12/2018)
04/19/2018	27	REPLY to Response to **25 Motion to Dismiss** ~~26 Response~~ by Defendant Rio Properties LLC. (Attachments: # 1 Exhibit A) (Michaels, Janice) Modified on 4/19/2018 to correct docket entry relationship pursuant to LR IC 2-2(d) (TR). (Entered: 04/19/2018)
05/07/2018	28	**Amended** CERTIFICATE of Interested Parties by Rio Properties LLC that identifies all parties that have an interest in the outcome of this case. Corporate Parent Caesars Resort Collection, LLC for Rio Properties LLC added. **Other Affiliates Caesars Entertainment Resort Properties Holdco, LLC., Caesars Entertainment Corporation, Caesars Growth Properties Parent, LLC., Harrah's BC, Inc., HIE Holdings, Inc., HIE Holdings Topco, Inc., CEOC, LLC added** (Michaels, Janice) Modified on 5/7/2018 to add other affiliates (DKJ). (Entered: 05/07/2018)
06/14/2018	29	ORDER. IT IS HEREBY ORDERED that 16 Defendants' Motion to Dismiss is DENIED as moot. Signed by Chief Judge Gloria M. Navarro on 6/14/2018. (Copies have been distributed pursuant to the NEF - MR) (Entered: 06/14/2018)
08/23/2018	30	NOTICE of Change of Address by Janice M Michaels. *for Rio Properties LLC* (Michaels, Janice) (Entered: 08/23/2018)
04/01/2019	31	ORDER Granting 25 Motion to Dismiss. See Order for details/deadlines. Signed by Chief Judge Gloria M. Navarro on 4/1/2019. (Copies have been distributed pursuant to the NEF - MR) (Entered: 04/01/2019)
04/19/2019	32	Third AMENDED COMPLAINT with Jury Demand against All Defendants by Tana Emerson, Aaron Leigh-Pink. No changes to parties. Proof of service due by 7/18/2019. (Attachments: # 1 Certificate of Service)(Waller, Robert) (Entered: 04/19/2019)
04/23/2019	33	MOTION to remove attorney Christina M. Mamer, Esq. from the Electronic Service List in this case by Defendant Rio Properties LLC. (Michaels, Janice) (Entered: 04/23/2019)
04/24/2019	34	ORDER Granting 33 Motion to Remove Attorney Christina M. Mamer from Electronic Service List. Signed by Magistrate Judge Cam Ferenbach on 4/24/2019. (Copies have been distributed pursuant to the NEF - JQC) (Entered: 04/24/2019)
04/26/2019	35	STIPULATION FOR EXTENSION OF TIME (First Request) *TO ANSWER, MOVE, OR OTHERWISE RESPOND TO PLAINTIFFS THIRD AMENDED COMPLAINT* re 32 Amended Complaint by Defendant Rio Properties LLC. (Michaels, Janice) (Entered: 04/26/2019)

04/29/2019	36	ORDER granting 35 Stipulation; Rio Properties LLC answer due 5/17/2019. Signed by Magistrate Judge Cam Ferenbach on 4/29/2019. (Copies have been distributed pursuant to the NEF - JM) (Entered: 04/29/2019)
05/17/2019	37	MOTION to Dismiss 32 Amended Complaint by Defendant Rio Properties LLC. Responses due by 5/31/2019. (Michaels, Janice) (Entered: 05/17/2019)
05/31/2019	38	RESPONSE to 37 Motion to Dismiss by Plaintiffs Tana Emerson, Aaron Leigh-Pink. Replies due by 6/7/2019. (Attachments: # 1 Certificate of Service) (Waller, Robert) (Entered: 05/31/2019)
06/07/2019	39	REPLY to Response to 37 Motion to Dismiss by Defendant Rio Properties LLC. (Michaels, Janice) (Entered: 06/07/2019)
11/26/2019	40	ORDER Granting 37 Motion to Dismiss. The Clerk of Court shall close the case and enter judgment accordingly. Signed by Judge Gloria M. Navarro on 11/26/2019. (Copies have been distributed pursuant to the NEF - MR) (Entered: 11/26/2019)
11/26/2019	41	CLERK'S JUDGMENT in favor of Defendant and against Plaintiffs. Signed by Clerk of Court Debra K. Kempi on 11/26/2019. (Copies have been distributed pursuant to the NEF - MR) (Entered: 11/26/2019)
12/20/2019	42	NOTICE OF APPEAL as to 41 Judgment by Plaintiffs Tana Emerson, Aaron Leigh-Pink. Filing fee $ 505, receipt number 0978-5820082. E-mail notice (NEF) sent to the US Court of Appeals, Ninth Circuit. (Attachments: # 1 Certificate of Service) (Waller, Robert) (Entered: 12/20/2019)
12/23/2019	43	USCA ORDER for Time Schedule as to 42 Notice of Appeal, filed by Tana Emerson, Aaron Leigh-Pink. **USCA Case Number 19-17556**. (MR) (Entered: 12/23/2019)

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DOCKET NO. 19-17556

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

AARON LEIGH-PINK, ET AL.

Plaintiff-Appellant,

v.

CAESARS ENTERTAINMENT CORPORATION, DBA Rio All-Suite Hotel and Casino and RIO PROPERTIES, LLC

Defendant-Respondent.

APPEAL FROM A DECISION OF THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA
CASE NO. 2:17-cv-02910-GMN-VCF
THE HONORABLE GLORIA M. NAVARRO

OPENING BRIEF OF APPELLANT

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I. STATEMENT OF JURISDICTION

A. The Basis for the District Court's Jurisdiction

This action was filed originally in Nevada state court. The action was removed to the United States District Court for the District of Nevada on the basis of diversity of citizenship [28 U.S.C. 1332] and the Class action Fairness Act ("CAFA") [28 U.S.C. 1332(d)].

B. The Basis for This Court's Jurisdiction

On November 26, 2019, judgment was entered following the district court's granting of dismissal pursuant to Rule 12b. (Vol. 1 EOR at p. 1)[1]. On December 20, 2019, Plaintiffs timely filed this appeal. (3 EOR 112). This Court has jurisdiction pursuant to 28 U.S.C. 1291.

II. STATEMENT OF ISSUES PRESENTED

When a 2,500+ room hotel in Las Vegas, Nevada[2] has an uncontrollable outbreak of *Legionella* bacteria in the hotel's water system which already caused

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[1] "EOR" refers to the Excerpts of Record with the volume number preceding the abbreviation.

[2] Because original jurisdiction in this case is based on diversity of citizenship (28 U.S.C. 1332) and the Class Action Fairness Act (28 U.S.C. 1332(d)(2)) the district court was required to apply the substantive law of Nevada. See, *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938); accord, *Gasparini v. Center for Humanities, Inc.*, 518 U.S. 415, 427, 116, S.Ct. 2211, 135 L.Ed.2d 659 (1996).

two guests to be hospitalized and another guest to die[3] 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[4] with *Legionella* bacteria which posed a serious health risk to guests?

Have guests of the hotel suffered recoverable damages when they paid the hotel money to stay there, whether in the form of only a Resort Fee[5] or a room rate, when the guests would not have stayed at the hotel in the first place had they been

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[3] There are also 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

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

[5] 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, 2 EOR 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.")

informed of the *Legionella* bacteria outbreak and the health risks posed? Stated another way, have Plaintiffs suffered recoverable damages in the form of the money they paid Defendant which Plaintiffs would not have paid had they known the true condition of the hotel and the health risks they were exposed to - whether they had an uneventful stay or not?

The district court ruled Plaintiffs did not suffer "*any damages*"[6] because they received the "benefit of the bargain" for which they paid the Resort Fee in the form of internet access, telephone use and access to the fitness room. See, 1 EOR 4, ln. 12-14 ("Plaintiffs paid the resort fee in order to receive phone, internet and fitness center access. Plaintiffs do not allege the Rio denied them the benefit of the resort fee." (Internal docket references omitted). The district court overlooked, or ignored, the fact Plaintiffs paid money to Defendant not knowing the true condition of the hotel and the health risk posed by the *Legionella* bacteria contamination of the Hotel's water system. Did the district court thus err in dismissing the action for failure of the Plaintiffs to allege recoverable damages? Answer: yes.

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[6] See, Nevada Revised Statutes ("NRS") 41.600(3)(a) reads in full, "If the claimant is the prevailing party, the court shall award the claimant: (a) Any damages that the claimant has sustained."

Similarly, has the hotel been unjustly enriched when it demanded, and was paid, money by guests – even if only the Resort Fee – when the Hotel purposely concealed the known health hazard and guests would have stayed at another hotel had they been told of the health hazard? Because guests would not have paid money to the Hotel *at all* had they known of the true condition of the hotel and the health risks presented to them by staying there, has the Hotel has been unjustly enriched by its concealment of the *Legionella* bacteria outbreak. Answer: yes.

Because Plaintiffs have alleged recoverable damages the district court erred in dismissing the action and the dismissal should be reversed.

III. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

A. Nature of the Case

This case comes to the Court of Appeal following the district court's dismissal of the action pursuant to Fed. R. Civ. P. Rule 12. The court must accept as true the allegations of the operative complaint[7] and view them in the light most favorable to the plaintiff. *NL Industries, Inc. v. Kaplan*, 792 F.2d 896, 898 (9th Cir.1986).

[7] The Third Amended Complaint ("TAC") is the operative complaint.

The action stems from the Rio All-Suites Hotel's (the "Hotel") purposeful concealment from its guests of the fact there was an uncontrollable outbreak of *Legionella* bacteria that infected the hotel's water system. Two guests had been hospitalized for Legionnaires disease-related symptoms, and another reportedly died, after staying at the Hotel in early 2017. See, 2 EOR 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. 2 EOR 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, 2 EOR 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, 2 EOR 9-10, TAC ¶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, 2 EOR 47, TAC ¶5.

Taking a page from Ford's handling of the Pinto crisis of the 1970s[8], 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, 2 EOR , 47, TAC ¶8.

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

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, 2 EOR 47, TAC ¶6.

B. The Plaintiffs

Plaintiff AARON LEIGH-PINK ("Plaintiff PINK") was a registered guest at the Hotel from May 12 - 14, 2017 (shortly after the SNHD had launched its investigation) and again in September 2017. 2 EOR 48, TAC ¶11. On both occasions the Hotel concealed from Plaintiff PINK the *Legionella* bacteria contamination of the Hotel's water system and the significant health risk it presented. See, 2 EOR 52, TAC ¶34.

Plaintiff TANA EMERSON ("Plaintiff EMERSON") was a registered guest and stayed at the Hotel in June 2017. (2 EOR 48, TAC ¶13.) Plaintiff EMERSON also was never told by the Hotel that the Hotel's water system was contaminated with *Legionella* bacteria and the serious health risk it posed to guests when EMERSON stayed at the Hotel.

Both Plaintiffs allege they paid a mandatory Resort Fee of $34.01 even though their rooms were complimentary ("comp'ed") based each of their long-standing participation in the Hotel's Rewards program. 2 EOR 55, TAC ¶41. Plaintiffs allege they paid the demanded Resort Fee and stayed at the Hotel in

reliance on the special relationship the Hotel had with its guests as an innkeeper and operator of public accommodations "to inform and/or warn its guests and invitees, such as Plaintiffs, of hazards or conditions existing on the premises which are known to the property owner/manager and which expose Plaintiffs to foreseeable harm, injury or damage, including illness and death." See, *Lee v. GNLV Corp., D/B/A/ Golden Nugget Hotel and Casino*, 117 Nev. 291, 295 (2001); see also, 2 EOR 52-53, TAC ¶35. Plaintiffs further allege that, based on Defendant's status as an innkeeper/operator, the Hotel would disclose any health or safety risks to Plaintiffs. *Id.*

Plaintiffs allege they relied also on the Hotel to provide them "accommodations which were safe, sanitary, and not infected with bacteria known to Defendant to cause serious health problems and even death." 2 EOR 53, TAC ¶35, p. 9, ln. 3-5. Plaintiffs also allege "[they] and all other guests/invitees of Defendant (the Hotel) were dependent entirely on Defendant to provide clean, safe, and hazard-free accommodations, including a water system supplying the rooms in which they slept and where they would be using hot water to shower, wash their hands and face, and brushing their teeth." 2 EOR 53, TAC ¶36.

Plaintiffs allege neither they nor any other reasonable hotel guest would have paid any money to the Hotel, or stayed at the Hotel, had they known the

hotel's water system was contaminated with *Legionella* bacteria which posed a significant health and safety risk. See, 2 EOR 57, TAC ¶50. Plaintiffs thereon claim they paid money to the Hotel which Plaintiffs would never have paid had they known the true facts about the condition of the hotel. See, *e.g.*, 2 EOR 57, TAC ¶50. Plaintiffs seek to recover as damages, or as restitution, for themselves and the putative class the money they paid the Hotel whether in the form of a Resort Fee, or a room rate.

C. Procedural History

This action was filed originally in Nevada state court by Plaintiff JAY AMES. While the action was pending in Nevada state court on November 18, 2017, Plaintiff Ames filed a First Amended Complaint ("FAC"). The action was removed to federal court on November 20, 2017. (3 EOR 115, Dkt. Entry 1.) Defendant RIO filed a motion to dismiss the FAC on December 28, 2017. See, 3 EOR 116 (Dkt, Entry 16). By stipulation Plaintiffs PINK and EMERSON were substituted for Plaintiff AMES and a Second Amended Complaint ("SAC") was filed. See, 3 EOR 117 (Dkt, Entry 20). On March 1, 2018, Plaintiffs filed a Second Amended Complaint ("SAC"). 2 EOR 8, SAC (Doc. 22). Defendants moved to dismiss and the district court granted Defendant's motion with leave to amend. 2 EOR 33, Order (Doc. 31).

On April 9, 2019, Plaintiffs filed the operative Third Amended Complaint ("TAC"). 2 EOR 45, TAC (Doc. 32). In the TAC, Plaintiffs seek to represent a class of "All persons who were registered guests of and stayed at the Rio All-Suite Hotel and Casino during the time legionella bacteria was present in the hotel's water system." See, 2 EOR 49, TAC ¶19. Defendant moved to dismiss the TAC (2 EOR 73, Doc. 37), Plaintiffs opposed the motion (2 EOR 93, Doc. 38) and Defendant filed a reply (2 EOR 102, Doc. 39).

On November 26, 2019, the district court granted Defendant's motion and dismissed the action with prejudice. 1 EOR 1, Doc. 40. The same day the district court entered judgment in favor of Defendant and against Plaintiffs. 1 EOR 7, Doc. 41. Plaintiffs timely appeal. 3 EOR 112 (Doc. 42)

IV. STANDARD OF REVIEW

This action comes on appeal following the district court's grant of a motion to dismiss pursuant to Rule 12(b). The district court determined Plaintiffs have failed to state a claim for recoverable damages. 1 EOR 3, Order at ln. 17-19 (Doc. 40). An order granting or denying a Fed. R. Civ. P. Rule 12(b)(6) motion to dismiss for failure to state a claim is reviewed *de novo*. *Lloyd v. CVB Fin'l Corp.*, 811 F3d 1200, 1205 (9th Cir. 2016).

V. DISCUSSION

The district court dismissed Plaintiffs' complaint because, according to the district court, Plaintiffs failed to allege recoverable damages. See, 1 EOR 3, Order at ln. 17-19 (Doc. 40).

Because damages - particularly the payment of money - can manifest itself in many forms and the nature of the damages does not always fit squarely into the strict confines of either the "out-of-pocket" rule or the "benefit of the bargain" rule, the district court erred in finding Plaintiffs did not allege they suffered recoverable damages. The district court determined Plaintiffs had not suffered recoverable damages because they received the "benefit of the bargain" in that they did not allege any interference with their access to the internet, telephone, or a fitness center. 1 EOR 2, Order at ln. 8-10 (Doc. 40) ("The Court previously explained the resort fees are not recoverable because Plaintiffs received the intended benefit of the fees: access to internet, telephones, and a fitness center.")

A. Recoverable Damages

Under Nevada law "damages are awarded to make the aggrieved party whole... ." *Hanneman v. Downer* (1994) 110 Nev. 167, 172–173 [871 P.2d 279, 283]. "Sometimes, however, neither the out-of-pocket nor benefit-of-the-bargain measure is particularly helpful or appropriate." *Davis v. Beling* (2012) 128 Nev.

301, 317 [278 P.3d 501, 512], citing, *Strebel v. Brenlar Investments, Inc.*, 135 Cal.App.4th 740, 37 Cal.Rptr.3d 699, 705 (2006).

"As the California Court of Appeal has observed, these measures are often mistakenly portrayed 'as being the sole antagonists on the battlefield of damages when at times neither is truly applicable'." *Davis,* 128 Nev. At 317, citing, *Overgaard v. Johnson*, 68 Cal.App.3d 821, 137 Cal.Rptr. 412, 413 (1977).

It is, moreover, the Law of the Land that "... damages in tort cases are designed to provide '*compensation* for the injury caused to plaintiff by defendant's breach of duty.' " *Memphis Community School Dist. v. Stachura* (1986) 477 U.S. 299, 306 [106 S.Ct. 2537, 2542, 91 L.Ed.2d 249]; citing, 2 F. Harper, F. James, & O. Gray, *Law of Torts* § 25.1, p. 490 (2d ed. 1986) (emphasis in original). The Supreme Court of the United States has explained also that, in our system of justice, "[c]ompensatory damages 'are intended to redress the concrete loss that the plaintiff has suffered by reason of the defendant's wrongful conduct.' " *State Farm Mut. Auto. Ins. Co. v. Campbell* (2003) 538 U.S. 408, 416 [123 S.Ct. 1513, 1519, 155 L.Ed.2d 585]; citing, *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 121 S.Ct. 1678, 149 L.Ed.2d 674 (2001), *Restatement (Second) of Torts* § 903, pp. 453–454 (1979).

Here, the district court dismissed Plaintiffs' action because, according to the district court, Plaintiffs failed to allege "recoverable damages." See, 1 EOR 3, Order at ln. 17-19. The district court determined that since Plaintiffs' paid only the Hotel's Resort Fee (because Plaintiffs' rooms were "comp'ed"), and Plaintiffs did not allege any interference with the Hotel's internet access, telephone use and access to the fitness room for which the Resort Fee was charged, Plaintiffs have not alleged recoverable damages. See, 1 EOR 4, Order at ln. 12-14. Stated another way, according to the district court Plaintiffs got what they paid for irrespective of whether Plaintiffs would ever have paid *any money* to the Hotel had they known of the uncontrolled *Legionela* bacteria contamination of the Hotel's water system and the health risks it presented to all guests who stayed at the hotel.

The district court applied too narrow a definition of damages and what it would take to "make Plaintiffs whole" (see, *Hanneman, supra.*), "compensat[e] for the injury caused to plaintiff by defendant's breach of duty" (see, *Memphis Community School Dist., supra*), or "redress the concrete loss that the plaintiff has suffered by reason of the defendant's wrongful conduct." See, *State Farm Mut. Auto. Ins. Co., supra.*

Plaintiff's claims for damages flow from the fact they would never have given their money to the Hotel - even in the form of a Resort Fee - had they known

the true facts about the condition of the hotel and the health and safety hazards presented by the *Legionella* bacteria contamination of the hotel's water system. 3 EOR 41, TAC ¶41.

Moreover, Plaintiffs alleged they justifiably expected to receive "accommodations which were safe, sanitary, and not infected with bacteria known by Defendant to cause serious health problems and even death." 2 EOR 53, TAC ¶35. Based on this allegation Plaintiffs did not receive what they expected when they paid the Resort Fee to stay at the Hotel.[9] What Plaintiffs in fact received for the payment of their money was a guest room in a Hotel whose water system was contaminated with *Legionella* bacteria - something Plaintiffs did not know about, did not bargain for, did not agree to, and would never have accepted had they been told the truth about the conditions of the hotel. 2 EOR 57, TAC ¶50.

Since guests were exposed to the *Legionella* bacteria by, among other things, taking a hot shower in their guest room (see, 2 EOB 28, Ex. 1 to TAC), and payment of the Resort Fee was required before guests would be allowed to stay at the hotel, it follows that Plaintiffs' payment of the Resort Fee constituted payment

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[9] There is no legitimate contention Defendant would have permitted Plaintiffs to stay at the Hotel had Plaintiffs refused to pay the Resort Fee. Thus, the district court's focus on Plaintiffs having paid only the Resort Fee is misplaced because Plaintiffs had to pay Defendant money to stay at the Hotel.

to stay at the hotel - regardless of whether their rooms were "comp'ed" or not. Paying for something based fraudulent concealment of material facts which one would not otherwise have purchased constitutes actionable fraud with resulting damage.

The Supreme Court of Nevada explained in *Collins v. Burns* (1987) 103 Nev. 394, 397–398 [741 P.2d 819, 821], the injustice of allowing party who defrauded another into paying money for something to reap the benefits of their fraud saying,

> "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."

Collins, Id., citing, *Bristol v. Braidwood*, 28 Mich. 191, 196 (1873), quoted in *Besett v. Basnett*, 389 So.2d 995, 998 (Fla.1980). The Supreme Court of Nevada also agreed with the Florida Supreme Court that "a person guilty of fraud should not be permitted to use the law as his shield." *Collins*, 103 Nev. at 398.

Collins involved the sale of a liquor store. The sellers misstated the profitability of the store and the purchasers paid money to purchase the store. *Collins*, 103 Nev. at 397-97. After purchasing the liquor store its sales remained about the same then plummeted due to economic conditions. The purchasers

closed the business a couple years after purchasing it, defaulted on the promissory note, and the sellers sued. *Collins*, *Id.* The purchasers asserted as a defense fraud by the sellers for their misrepresentation of the financial viability of the business and counterclaimed for fraud and damages. *Collins, supra.,* 103 Nev. at 396.

The district court dismissed the purchasers counterclaim finding they were not justified in relying on the sellers statements and did not allege recoverable damages because any losses the purchasers experienced resulted solely from general economic downtown. *Collins,* 103 Nev. at 398.

The Supreme Court of Nevada disagreed, holding that, "[i]n reliance on the misrepresentations, appellants [purchasers], who thought they were purchasing a viable business, gained ownership of a losing enterprise with no proven potential for any profit at all. Regardless of subsequent events, appellants [purchasers] were damaged in the transaction. *Collins*, *Id.*

While the *Collins* court was confronted in the first instance with having to decide whether the party claiming to have been defrauded was negligent in relying on the conduct of the party perpetrating the fraud, the legal principal articulated by the Nevada Supreme Court against allowing a party to benefit from their fraudulent conduct apply to the situation at bar; "[t]hough 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." Collins, *ibid*, 103 Nev. At 398, citing *Besett, Id.*

Based thereon, Plaintiffs have alleged recoverable damages in the form of the money they paid to the Hotel which they would not otherwise have paid.

B. Plaintiffs' Claim for Violation of Nevada Deceptive Trade Practices Act (NDTPA) and Fraudulent Concealment

Plaintiffs' first cause of action alleges a violation of the Nevada Deceptive Trade Practices Act ("NDTPA") set forth in Nevada Revised Statutes ("NRS") NRS 41.600, *et seq.,* NRS 205.377, and NRS 598.0923.

NRS 41.600 provides that "An action may be brought by any person who is a victim of consumer fraud." NRS 41.600 (1). "Consumer fraud" means "a deceptive trade practice as defined in NRS 598.0915 to 598.0925, inclusive." NRS 41.600(2)(e). The statute also provides that "if the claimant is the prevailing party, the court *shall* award the claimant *any damages* that the claimant has sustained." NRS. 41.600(3)(a) (italics added).

The Merriam-Webster dictionary defines the term "any" to mean:

> 2. one, some, or all indiscriminately of whatever quantity:
> a : one or more —used to indicate an undetermined number or amount // "Do you have *any* money?"
> b : all —used to indicate a maximum or whole
> // "He needs *any* help he can get."

> c : a or some without reference to quantity or extent
> "I'd be grateful for *any* favor at all."

See, https://www.merriam-webster.com/dictionary/any

Based on the plan language of the statute "any" means "any." There is no ambiguity in the plain language of the statute or Legislature's having authorized recovery of *any damages* sustained by the prevailing party in a claim for deceptive trade practices in violation of the NDTPA. Therefore, based on the plain and unambiguous language of the NDTPA, Plaintiffs are entitled to recover *any damages* they sustained - including money hey paid to the Hotel in reliance on the Hotel's fraudulent concealment of material facts which Plaintiffs would not otherwise have paid had they known the true condition of the Hotel and the health risks posed by staying there.

The Ninth Circuit has recognized that "Nevada statutes are interpreted according to their plain meaning 'unless it clearly appears that the Legislature did not intend such a meaning.' *S. Nev. Home-builders Ass'n v. Clark Cnty.*, 121 Nev. 446, 117 P.3d 171, 173 (2005) (internal quotations omitted); citing, *City of Reno v. Bldg. & Constr. Trades Council of N. Nev.*, ——Nev. ——, 251 P.3d 718, 722 (2011). We must not interpret a statute to 'render words or phrases superfluous or make a provision nugatory.' " *Del Webb Communities, Inc. v. Partington* (9th Cir. 2011) 652 F.3d 1145, 1151.

The Nevada Supreme Court has taken a similar approach to interpreting statutes that contain plain language such as the term "any." "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." *Harris Assocs. v. Clark Cty. Sch. Dist.*, 119 Nev. 638, 641-42, 81 P.3d 532, 534 (2003). Because the language of the NDTPA statute is plain and unambiguous there is also no need to look to legislative history to determine what the Legislature may have intended by the wording of a statute.

The Nevada Supreme Court has also held that where the wording of a statute is unambiguous, [the court] need not resort to legislative history. *McKay v. Bd. of Supervisors of Carson City*, 102 Nev. 644, 648, 730 P.2d 438, 441 (1986) ("[w]here a statute is clear on its face, a court may not go beyond the language of the statute in determining the legislature's intent.")

IT is therefore clear that "any damages" means "any damages." The term "any damages" in the NDTPA [NRS 41.600], has been interpreted to allow for even the possibility of an absence of economic injury. "By allowing for recovery of 'any' damages sustained, the statute allows for the possibility of an absence of economic injury." *Bauman v. Saxe* (D. Nev., Feb. 13, 2019, No. 2:14-CV-01125 (RFB) (PAL) 2019 WL 591439, at *4. Thus, the term "any damage" need not fit

squarely into pre-defined categories of damage such as the "out of pocket" or "benefit of the bargain" rules as those were strictly applied by the district court and may include the possibility of other types of losses suffered by a plaintiff.

Notwithstanding the fact Plaintiffs paid only the Resort Fee because their rooms were "comp'ed," there is no dispute Plaintiffs paid money to the Hotel to have a guest room to stay in. Regardless of how the money Plaintiffs paid was categorized by the Hotel, the fact remains Plaintiffs were required to pay to stay and in the process were exposed by the Hotel's fraudulent concealment to the health and safety risk posed by the *Legionella* bacteria contamination by using the hot water in their guest room to take a hot shower or wash their hands. See, 1 EOR , Ex. 1 to TAC.[10] Plaintiffs would not have assumed the health risk (see, 2 EOR ¶40, ¶50, TAC (Doc. 32)) had they been told by the Hotel they could contract Legionnaires disease even if the internet, telephone and fitness center were working properly. Therefore, Plaintiffs allegations they sustained a loss of money paid to the Hotel constitutes "any damages" as permitted by NRS 41.600.

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[10] SNHD warned the Hotel that, "*Legionella* are ubiquitous in the environment and can enter a facility through the water supply. They can grown within the biofilm of the water supply system in areas were the water temperature is between 77 and 108 degrees Fahrenheit. These areas can include cooling towers, spas, whirlpools, fountains, ***showers*** and misters, all of which have previously been linked to Legionnaires' disease outbreaks." (Bold, italics added.)

C. Plaintiffs' Negligence Claims

The district court dismissed Plaintiffs' negligence claims on the same ground as their NDTPA, fraudulent concealment and unjust enrichment claims - that Plaintiffs failed to allege they sustained recoverable damages. 1 EOR 4-3, Order (Doc. 40), citing, *Hammerstein v. Jean Dev. W.*, 907 P.2d 975, 977 [111 Nev. 1471] (explaining damages are an element of negligence claims).

For the same reasons discussed above, Plaintiffs have alleged recoverable damages for the negligence of the Hotel in breaching its duty as an innkeeper/ operator of public accommodations by failing to inform and/or warn its guests and invitees, such as Plaintiffs, of hazards or conditions existing on the premises which are known to the property owner/manager and which expose Plaintiffs to foreseeable harm, injury or damage. *Lee, supra;* see also, 2 EOR 52, TAC ¶35 (Doc. 32).

" 'Broadly speaking, a tort is a civil wrong, other than breach of contract, for which the court will provide a remedy in the form of an action for damages.' Prosser and Keeton on the Law of Torts p. 2, West Publishing Co., (5th ed. 1984)." *Szekeres by Szekeres v. Robinson* (1986) 102 Nev. 93, 95 [715 P.2d 1076, 1077].

Tort liability is part of a body of law which is directed toward the compensation of individuals for wrongs suffered within the scope of their legally recognized interests and where the law considers that compensation to be properly (and morally) required. "Tort obligations are in general obligations imposed by law on policy considerations to avoid some kind of loss to others." Prosser and Keeton, above, at 656. *Szekeres by Szekeres v. Robinson* (1986) 102 Nev. 93, 97 [715 P.2d 1076, 1078–1079].

Since the district court dismissed Plaintiffs' negligence claims for a failure to plead recoverable damages, the dismissal should properly be reversed for the same reasons this Court should reverse the dismissal of Plaintiffs' NDTPA claims and unjust enrichment claims, *infra.*

D. Unjust Enrichment

Plaintiffs claim the Hotel was unjustly enriched by concealing from guests the true condition of the Hotel's *Legionella* contaminated water system and the health risk posed thereby and in the same breath demanding, receiving and retaining money paid by its guests to stay at the hotel - regardless of whether the money was paid as a Resort Fee or a room rate. 3 EOR 63, TAC ¶¶77-78.

"Unjust enrichment occurs whenever a person has and retains a benefit which in equity and good conscience belongs to another." *Nevada Industrial Dev.*

v. Benedetti, 103 Nev. 360, 363 n. 2, [741 P.2d 802, 804 n. 2] (1987).

Here, Plaintiffs claim they were defrauded into paying money to the Hotel and were thus under a misapprehension of the true facts leading to their parting with their money.

The law in Nevada is clear that "[m]oney paid through misapprehension of facts belongs, in equity and good conscience, to the person who paid it. *Nevada Indus. Development, Inc. v. Benedetti* (1987) 103 Nev. 360, 363, fn. 2 [741 P.2d 802, 804], citing, 66 Am.Jur.2d Restitution & Implied Contracts §119 (1973). The ground on which the rule rests is that money paid through misapprehension of facts belongs, in equity and good conscience, to the person who paid it. *Id.,* §116 (1973).

It is similarly well-recognized that "[a] conclusion that one party has obtained benefits from another by fraud is also one of the most recognizable sources of unjust enrichment. Rescission of the transaction may also reverse the unjust enrichment, but rescission is not always available; even if available, rescission by itself may not suffice to avoid the unjust enrichment of the fraudulent party at the expense of the claimant." Restatement (Third) of Restitution and Unjust Enrichment § 13 (2011).

Plaintiffs paid the Hotel money – even if only a Resort Fee because their rooms were "comp'ed" – based on the Hotel's fraudulent concealment of the true condition of the hotel and the health risks posed to guests by the *Legionella* bacteria contamination of the hotel's water system. Plaintiffs thereon paid the money under a misapprehension of facts in that they believed they were paying for, and thus expected to receive, "accommodations which were safe, sanitary, and not infected with bacteria known by Defendant to cause serious health problems and even death." 2 EOR 53, TAC ¶35.

Plaintiffs thus provided a financial benefit to the Hotel they would not otherwise have paid had Plaintiffs known the true facts about the condition of the Hotel. Plaintiffs therefore did not receive what they justifiably expected[11] when

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[11] In *Nevada Transfer and Warehouse Co. v. Peterson*, 60 Nev. 87, 89 P.2d 8, 99 P.2d 633 (1939), the general rule was said to be that "an owner or occupant of lands or buildings who knows, or in the exercise of reasonable care should know, of their dangerous and unsafe condition and who invites others to enter upon the property owes to such invitees a duty to warn them of the danger, where the peril is hidden, latent, or concealed or the invitees are without knowledge thereof." In dealing with a hidden or latent defect as compared to an obvious danger, this court said in *Worth v. Reed*, 79 Nev. 351, 384 P.2d 1017 (1963), 'If a peril is hidden, latent or concealed, ordinary care requires an owner, with actual or constructive knowledge of the peril, to warn the invited guest who is without such knowledge. *Twardowski v. Westward Ho Motels, Inc.* (1970) 86 Nev. 784, 787 [476 P.2d 946, 947]

they paid the demanded Resort Fee in order to stay at the Hotel. What Plaintiffs in fact received for the payment of their money was a room in a Hotel whose water system was contaminated with *Legionella* bacteria - something Plaintiffs neither bargained for, agreed to, nor would have accepted had they been told the truth about the conditions of the hotel. 2 EOR 57, TAC ¶50. The Hotel was thus unjustly enriched by demanding and receiving money from Plaintiffs.

Plaintiffs' claims of unjust enrichment by the Hotel are straightforward - they paid the Hotel $34.01 per night which they would not otherwise have paid had the Hotel disclosed the fact the Hotel's water system was contaminated with *Legionella* bacteria which presented a serious health risk to guests. By paying the Hotel $34.01 per night as demanded by the Hotel in order for Plaintiffs to stay there Plaintiffs conferred a financial benefit on the Hotel. The Hotel appreciated the financial benefit and the Hotel's acceptance and retention of the financial benefit under circumstances where it was secured by fraudulent conduct would be inequitable.

E. Declaratory Relief

The district court dismissed Plaintiffs' request for declaratory relief because "they have no other surviving claims." 1 EOR 5, Order at p. 5 (Doc. 40). As the district court's rulings on Plaintiffs' other claims should be properly reversed

because Plaintiffs' have alleged recoverable damages so too should this Court reverse the dismissal of Plaintiffs' claim for declaratory relief.

VI. CONCLUSION

In this case the Defendant-Hotel perpetrated a fraud on Plaintiffs by concealing from them the fact the Hotel's water system was contaminated with *Legionella* bacteria which posed a significant risk to guests' health and safety. In so doing the Hotel engaged in a deceptive trade practice in violation of the Nevada Deceptive Trade Practices Act (NDTPA), perpetrated a fraud on Plaintiffs, were negligent and unjustly enriched.

Based on the foregoing Plaintiffs have alleged recoverable damages in the form of the money they paid to the Hotel which they would not otherwise have paid thereby sustaining cognizable losses and having conferred a financial benefit on the Hotel the Hotel would not otherwise have realized.

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Because Plaintiffs have properly alleged recoverable damages for each of the causes of action alleged in the Third Amended Complaint, the district court's dismissal of the action was erroneous and should be reversed in its entirety.

Respectfully submitted,

LAW OFFICE OF ROBERT A. WALLER, JR.

Date: February 18, 2020

/s/ Robert A. Waller, Jr.
Attorney for Plaintiffs-Appellants
AARON LEIGH-PINK and
TANA EMERSON

STATEMENT OF RELATED CASES

Plaintiff-Appellants Aaron Leigh-Pink and Tana Emerson are aware of no cases related to this appeal.

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)(B)(i)

This brief complies with Rule 32(a)(7)(B)(i) as it contains no more than 14,000 words in 14-point font. According to WordPerfect X9, the word processing program used to create this brief, the brief contains a total of 6,905 words.

CERTIFICATE OF SERVICE

I hereby certify that on this date, I electronically filed the foregoing Appellant's Opening Brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system to the following:

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I declare under penalty of perjury the foregoing is true and correct.

Executed on February 18, 2020 Signature: /s/ Robert A. Waller, Jr.

No. 19-17556

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AARON LEIGH-PINK and TANA EMERSON

Plaintiffs and Appellants,

v.

RIO PROPERTIES, LLC

Defendant and Appellee

On Appeal from the
United States District Court for the District of Nevada
Case No. 2:17-cv-02910
The Honorable Gloria M. Navarro, Judge Presiding

APPELLEE'S BRIEF BY RIO PROPERTIES, LLC

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Defendant-Appellee Rio Properties, LLC hereby states, by and through its counsel, that Rio Properties, LLC is a limited liability company that has a single member, Caesars Resort Collection, LLC, which is a limited liability company that has a single member, Caesars Growth Partners, LLC, which is a limited liability company that has a single member, Caesars Entertainment Corporation. Caesars Entertainment Corporation is incorporated in Delaware and has a principal place of business in Nevada. Caesars Entertainment Corporation is presently unaware of any publicly-traded corporation that owns 10% or more of its stock.

Dated: June 19, 2020

Respectfully Submitted,

COZEN O'CONNOR

By: */s/ Richard Fama*
Richard Fama
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Attorneys for Defendant-Appellee Rio Properties, LLC

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JURISDICTIONAL STATEMENT

Defendant-Appellee Rio Properties, LLC does not object to the statement of jurisdiction of Plaintiffs-Appellants.

Defendant-Appellee Rio Properties, LLC ("Defendant" or "Rio") respectfully submits the following Brief in response to the Opening Brief of Appellants Aaron Leigh-Pink and Tana Emerson (collectively, "Plaintiffs").

INTRODUCTION

This Court should affirm the District Court's dismissal of Plaintiffs' Third Amended Complaint ("TAC") which asserted a wide array of claims against Rio as a result of the purported presence of *Legionella* bacteria in certain water systems at the Rio All-Suite Hotel & Casino (the "Hotel") in Las Vegas. Plaintiffs claim that they were not advised of the alleged presence of *Legionella* bacteria when they stayed at the Hotel and that, had they known, they would not have stayed at the Hotel or, alternatively, would have paid less for their stay. Critically, Plaintiffs do not allege that they even paid for their rooms at the Hotel. Instead, they allege that their rooms were "comped" and that they paid only the "Resort Fee" which, according to their TAC, is for internet, gym, and telephone access, amenities which they do not allege they were deprived of notwithstanding the purported presence of *Legionella* bacteria.

The District Court twice dismissed Plaintiffs' claims. On each occasion, the District Court concluded, *inter alia*, that Plaintiffs did not adequately plead damages under Nevada law. Plaintiffs did not challenge the analyses employed by the District Court—particularly "benefit of the bargain" damages and "out of pocket losses"

inquiries—in finding that Plaintiffs did not adequately plead damages. In fact, to the contrary, Plaintiffs advocated for the very analyses performed by the District Court. Now, after facing an adverse result and the dismissal of their TAC, Plaintiffs are challenging the District Court's opinion by arguing that it engaged in an incorrect analysis. Plaintiffs' challenges are improper and should be summarily rejected.

Even if Plaintiffs are entitled to challenge the analyses performed by the District Court, its dismissal of Plaintiffs' claims for failure to adequately plead damages was proper and should be affirmed. Nevada law is clear that fraud-based claims (namely, Plaintiffs' NDTPA and fraudulent concealment claims) are analyzed under the "benefit of the bargain" and "out of pocket loss" analyses, both of which measure, in essence, what Plaintiffs received versus what they paid for. Here, Plaintiffs paid the "Resort Fee" at the Rio for internet, gym, and telephone access and had full use of those amenities during their safe, uneventful, and "comped" stay at the Hotel. Under these allegations, Plaintiffs have failed to adequately allege they suffered cognizable damages.

Plaintiffs' negligence and unjust enrichment claims are similarly deficient. For their negligence claim, as the District Court concluded, Plaintiffs have failed to allege cognizable damages stemming from the purported presence of *Legionella* bacteria in certain parts of the water system at the Hotel. In terms of their unjust enrichment claim, Plaintiffs paid the "Resort Fee" to the Rio and received full,

unencumbered access to the "Resort Fee" amenities in exchange. Under Nevada law and these circumstances, Plaintiffs have not adequately alleged damages to maintain an unjust enrichment claim.

Allowing Plaintiffs to proceed with their claims based upon the facts alleged would open the floodgates to crippling, limitless liability of Nevada businesses and other businesses operating within this Circuit. For instance, satisfied guests at a hotel who later learned that the hotel had a malfunctioning fire sprinkler system would be entitled to a full refund of their stay simply by alleging that they would not have stayed there had they known the sprinkler system was not working, even if no fire occurred and they were not harmed. A monthly rental storage facility would be subject to lawsuits for a refund of monthly storage rates if it was revealed that an employee neglected to lock the facility every night, regardless of whether any property was stolen from the facility. Similarly, according to Plaintiffs' theory, patrons of a night club whose security guard's attention was distracted during his shift would be entitled to some level of compensation despite the fact that no breach of security occurred. It is respectfully submitted that Nevada law does not impose, must less intend, such limitless liability, and the District Court's dismissal of Plaintiffs' TAC should be affirmed.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

Plaintiffs fill their statement of the issues presented for review with arguments that pose a number of rhetorical questions to the Court but do not adequately frame the issues in light of the District Court's dismissal of the claims below. To that end, Rio offers the following statements of issues presented to this Court for review:

1. Did Plaintiffs waive their right to appeal the District Court's dismissal of their claims for failure to adequately plead damages when they did not challenge the "benefit of the bargain" and "out of pocket loss" damages inquiries and, in fact, advocated that such inquiries be conducted by the District Court?

2. Did the District Court apply the correct "benefit of the bargain" and "out of pocket loss" analyses to Plaintiffs' allegations of damages for their fraud-based claims?

3. Did the District Court properly dismiss Plaintiffs' negligence claim because Plaintiffs failed to adequately plead damages and causation as a result of the purported presence of *Legionella* bacteria in certain parts of the Hotel's water system?

4. Did the District Court properly dismiss Plaintiffs' unjust enrichment claim when Plaintiffs failed to adequately plead damages under Nevada law because they received access to the amenities associated with the "Resort Fee"—the only amount they allegedly paid to Rio?

5. Whether this Court should affirm the dismissal of Plaintiffs' TAC on any ground in the record, including: (a) Plaintiffs failed to adequately plead "knowledge" for their NDTPA and fraudulent concealment claims; and, (b) Plaintiffs cannot use a criminal statute to support a claim under the NDTPA.

6. Did the District Court properly dismiss Plaintiffs' claim for "declaratory relief" when there is no such independent cause of action under Nevada law?

STATEMENT OF THE CASE

Plaintiff Jay Ames filed a putative class action lawsuit against Defendant[1] in the District Court of Clark County, Nevada on October 11, 2017 alleging violations of the Nevada Trade Practices Act ("NDTPA") and Nevada's RICO statute and claims of negligence, unjust enrichment and declaratory relief.

On November 8, 2017, Plaintiff Ames filed his First Amended Class Action Complaint ("FAC") and this matter was removed to the United States District Court for the District of Nevada on November 20, 2017. Following the motion to dismiss the FAC and before a decision was rendered by the Court, Plaintiffs requested that

[1] Caesars Entertainment Corporation d/b/a Rio All-Suites Hotel and Casino ("CEC") was initially named as a Defendant in the Complaint and First Amended Complaint. The parties, however, stipulated to dismiss CEC from the instant matter. Also, while not named in the original Complaint, Defendant Rio Properties, LLC was added as a defendant in the First Amended Complaint. Rio is filing a separate motion to correct the caption in this instant appeal.

Defendant stipulate to the filing of a Second Amended Complaint ("SAC") and substitution of named-Plaintiff from Jay Ames to the current Plaintiffs. The parties so stipulated, and Plaintiffs filed their SAC on March 1, 2018 alleging, in addition to the aforementioned claims, fraudulent concealment.

Plaintiffs sought to represent a class of individuals who were registered guests at the Hotel while *Legionella* bacteria was purportedly present in certain water systems at the Hotel. (EOR[2] 12). Plaintiffs alleged that they would not have stayed at the Hotel had they known of the alleged presence of the bacteria. (EOR 16, 18, 20, 22, 24). Alternatively, Plaintiffs alleged that they and the putative class paid Rio more than what a room and facilities in the Hotel were worth. *Id.*

Notably, Plaintiffs did not allege that they suffered physical or emotional harm as a result of their stays at the Hotel. (EOR 8–26). In fact, they did not allege that their respective stays were compromised in any way. Further, Plaintiffs did not pay for their hotel rooms–their rooms were comped by Rio–and both paid only a "Resort Fee" of $34.01for internet use, telephone use, and fitness room access (EOR 16, 17, 23, 25). The Plaintiffs never claimed that they were unable to access or enjoy the internet, telephone and/or fitness room during their stays. (EOR 8–26).

[2] "EOR" refers to citations to the Excerpts of Record filed by Plaintiffs on February 18, 2020.

Although not directly the subject of the instant appeal, by Order dated April 1, 2019, the District Court dismissed Plaintiffs' SAC holding that Plaintiffs failed to adequately plead damages for each of their respective claims. (EOR 33–44). The District Court specifically noted that "Plaintiffs' damages, if any, were economic in nature . . ." and neither alleged they "did not receive those amenities [for which they paid a "Resort Fee"], or sufficient access to those amenities, or that the amenities were otherwise unsatisfactory." (EOR 38). With respect to Plaintiffs' claims for fraudulent concealment and negligence, the District Court additionally concluded that Plaintiffs had not set forth facts sufficient to establish that, by virtue of their relationship with Plaintiffs, Rio had a "duty to disclose." (EOR 39, 41). All claims were dismissed; however, the District Court granted Plaintiffs leave to amend to address their insufficiencies with respect to some of their claims. (EOR 43). Plaintiffs' claims under RICO and for a violation of NRS § 205.377 (a criminal statute) were dismissed with prejudice. (EOR 40, 43).

Plaintiffs' TAC, filed on April 19, 2019, remained largely the same as their SAC. Defendant moved to dismiss Plaintiffs' TAC on May 17, 2019 on the grounds that, *inter alia*, Plaintiffs again failed to sufficiently plead causation and damages (EOR 74–76, 77–80) and on the additional grounds that Plaintiffs' claims were inadequately pleaded as they rested upon conclusory allegations rather than specific factual averments. (EOR 77–78, 80–89). Included in Rio's motion to dismiss was

the argument that Plaintiffs did not plead damages under the "benefit of the bargain" and "out of pocket loss" analyses. (EOR 88–90). Notably, at no point prior to this appeal did Plaintiffs argue that their alleged damages should not be analyzed under these inquiries or that they should be analyzed under some other theory. Indeed, Plaintiffs raised the unsuitability of the "benefit of the bargain" and "out of pocket loss" analyses to their claims for the first time in this appeal.

Moreover, the following bases for dismissal were not opposed by Plaintiff: (1) Plaintiffs failed to plead "knowledge" to state a claim under the NDTPA and for fraudulent concealment; (2) Plaintiffs lacked standing to base their NDTPA claim upon a purported violation of NRS § 205.377; and (3) Plaintiffs had not sufficiently pleaded facts for an independent claim of declaratory relief. (EOR 93–101, 109).

In dismissing the TAC, the District Court concluded that Plaintiffs failed to cure their deficient pleading of damages. (EOR 4). Specifically, the District Court held, *inter alia*, that Plaintiffs failed to allege facts demonstrating that they sustained recoverable damages (EOR 4) or that Rio denied Plaintiffs the benefits associated with the "Resort Fee," namely internet use, telephone use, and fitness room access. (EOR 4). Given the multitude of opportunities Plaintiffs had to cure their reoccurring pleading deficiencies and their continued failure to do so, the District Court dismissed the TAC with prejudice.

SUMMARY OF THE ARGUMENT

This Court should affirm the dismissal of Plaintiffs' TAC because they have failed to adequately allege an essential element—damages—of their NDTPA, negligence, unjust enrichment, and fraudulent concealment claims.

A primary, threshold question before the Court is whether Plaintiffs have waived the right to challenge the damages analyses performed by the District Court in dismissing their TAC. As discussed below, the District Court concluded that Plaintiffs did not adequately allege "out of pocket" losses because they received the "benefit of the bargain" of what they paid in the form a "Resort Fee." Plaintiffs' instant appeal centers around whether the District Court's application of the "out of pocket" and "benefit of the bargain" analyses to the allegations of the TAC was proper. Plaintiffs' challenge, however, is improper because they did not challenge these analyses when opposing Rio's motion to dismiss the TAC. In fact, Plaintiffs advocated for the exact analyses conducted by the District Court. Plaintiffs cannot now complain about the District Court doing exactly what they requested.

Assuming, *arguendo*, that Plaintiffs' challenge is properly before this Court, the District Court's conclusions are supported by Nevada law. First, Nevada law is clear that Plaintiffs' fraud-based claims—NDTPA and fraudulent concealment—should be analyzed under the "benefit of the bargain" and "out of pocket loss" analyses. Plaintiffs have not identified any case involving similar allegations which

requires any different analysis. Second, as noted by the District Court, Plaintiffs' negligence claim was insufficiently pled because they did not plead damages or causation—two essential elements. Even accepting Plaintiffs' allegations as true that Rio's alleged negligence resulted in the purported presence of *Legionella* bacteria in the water system, Plaintiffs did not allege damages as a result of the presence of same. Indeed, Plaintiffs suffered no cognizable damages as a result of the purported presence of *Legionella* bacteria as their use of the amenities associated with the "Resort Fee" were not affected. Third, with respect to Plaintiffs' unjust enrichment claim, Plaintiffs have not alleged adequate damages because Nevada law requires allegations that a plaintiff provided a defendant with a benefit and received nothing in return. Here, Plaintiffs did receive amenities in exchange for their payment of the "Resort Fee" and, therefore, they have not adequately alleged damages.

Apart from the failure to adequately allege damages, Plaintiffs' TAC should be dismissed for additional grounds in the record. Plaintiffs' NDTPA and fraudulent concealment claims should be dismissed because of their failure to allege Rio's "knowledge"—an essential element of both claims. Plaintiffs' claims of knowledge are conclusory in nature and are not supported by factual allegations. Moreover, Plaintiffs' NDTPA claim is based, in part, on an alleged violation of a Nevada criminal statute. The District Court, however, noted that there is no private right of

action for an alleged violation of a criminal statute. Because there has been no finding that any crime has been committed, and the District Court cannot make a finding of a criminal violation in the context of a civil trial, any claim resting upon a criminal statute should be dismissed.

Finally, Plaintiffs request that this Court revive their claim for "declaratory relief." As the District Court concluded, however, there is no such cause of action for "declaratory relief," and it was properly dismissed.

It is respectfully requested that the District Court's dismissal of the TAC be affirmed.

STANDARD OF REVIEW

This Court reviews *de novo* the District Court's order granting Rio's motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). *Ebner v. Fresh, Inc.*, 838 F.3d 958, 962 (9th Cir. 2016). Moreover, this Court "may 'affirm the District Court's dismissal on any ground supported by the record.'" *Id.* (citing *ASARCO, LLC v. Union Pac. R.R.*, 765 F.3d 999, 1004 (9th Cir. 2014); *see also Astre v. McQuaid*, No. 18-1723, 2020 U.S. App. LEXIS 9297 at *2 (9th Cir. 2020).

ARGUMENT

I. PLAINTIFFS WAIVED THEIR RIGHT TO CHALLENGE THE ANALYSES CONDUCTED BY THE DISTRICT COURT

In dismissing Plaintiffs' TAC, the District Court explained that "out-of-pocket expenses are not recoverable if the plaintiff received the 'benefit of their bargain' with the defendant." (EOR 4). In this appeal, Plaintiffs challenge the District Court's use of the "out of pocket" analysis in assessing Plaintiffs' allegations. (*See, e.g.*, Plaintiffs' Brief at 11 (arguing "the nature of the damages does not always fit squarely into the strict confines of either the 'out-of-pocket' rule or the 'benefit of the bargain' rule" and suggesting that District Court erred in finding Plaintiffs did not adequately allege damages)); *id.* at 13 (arguing District Court "applied too narrow a definition of damages and what it would take to 'make Plaintiffs whole'"). Plaintiffs' challenge is improper.

Specifically, Plaintiffs should not be permitted to challenge the District Court's analysis because they wholly failed to object to an "out of pocket" or "benefit of the bargain" loss analysis when opposing Rio's motion to dismiss the TAC. "Generally, [a court of appeals] do[es] not 'entertain arguments on appeal that were not presented or developed before the district court.'" *Tibble v. Edison Int'l*, 843 F.3d 1187, 1194 (9th Cir. 2016) (citing *Visendi v. Bank of Am., N.A.,* 733 F.3d 863, 869 (9th Cir. 2013); *see also Sazerac Company, Inc. v. Fetzer Vineyards, Inc.*, 786 Fed. Appx. 662, 664 (9th Cir. 2019) (noting issue on appeal was forfeited

because it was never argued in district court "despite having had the opportunity to do so"). It is indisputable that Rio sought to dismiss Plaintiffs' TAC because Plaintiffs received what they paid for and, therefore, did not adequately allege "benefit of the bargain" or "out of pocket" damages. (*See, e.g.*, EOR at 75 ("In essence, in dismissing the SAC, this Court held that Plaintiffs did not sufficiently allege damages because they were not deprived of their use of the amenities for which they alleged paid through the Resort Fee" and arguing that Plaintiffs TAC advanced the same "flawed theories")); (EOR at 77 ("Despite being given yet another bite of the proverbial apple, Plaintiffs have again wholly failed to allege how the purported presence of *Legionella* bacteria in certain of the Hotel's water systems affected their use of these amenities or how they were deprived of the benefit of the bargain as to these amenities (*i.e.*, they failed to plead damages.")))); (EOR 79 (discussing District Court's dismissal of SAC on basis that "Plaintiffs do not allege that during their stay they did not receive those amenities, sufficient access to those amenities, or that the amenities were otherwise satisfactory")).

Despite knowing Rio's basis for the motion to dismiss, at no time did Plaintiffs argue that their alleged claim to damages should be examined under any inquiry *other than* the inquiry argued by Rio, *to wit*, the "out of pocket loss" or "benefit of the bargain" damages analyses. In fact, to the contrary, Plaintiffs opposed the motion to dismiss the TAC and ***advocated*** for the District Court to conduct an "out

of pocket" damages analysis. (*See, e.g.*, EOR 96 (arguing "any damages" under NDTPA includes "out-of-pocket losses")); *id.* (citing *Gotshalk, infra*, for proposition that "[o]ut-of-pocket losses are a measure of damages often used in fraud cases"); *id.* ("Here, Plaintiffs claim they suffered out of pocket losses . . . ."). Most telling is Plaintiffs' admission in the District Court that "[u]nder Nevada law a defrauded party can recover what he has lost 'out of pocket,' that is the difference between what he gave and the value of what he received" and argued that they suffered such "out of pocket" losses. (EOR 97).

Simply, the District Court did exactly what Plaintiffs asked. It examined Plaintiffs' claim to damages under the "out of pocket" loss analysis and concluded that Plaintiffs did not adequately allege damages. Because of this, Plaintiffs have forfeited any challenge to the Court's use of such an analysis, and their appeal should be summarily dismissed.

II. THE DISTRICT COURT PROPERLY DISMISSED PLAINTIFFS' TAC BY FINDING THAT PLAINTIFFS DID NOT ADEQUATELY PLEAD THE NECESSARY ELEMENTS UNDER NEVADA LAW

Plaintiffs' appeal challenges the District Court's dismissal of four of their causes of action, specifically their claims for a purported violation of the NDTPA and for fraudulent concealment, negligence, and unjust enrichment. As discussed below, the District Court properly dismissed these causes of action because Plaintiffs failed to adequately plead the necessary elements of their claims under Nevada law.

A. The District Court correctly applied Nevada's "benefit of the bargain" and "out of pocket loss" damages analyses to Plaintiffs' fraud-based claims.

Plaintiffs do not—and cannot—dispute that their fraud-based claims (a purported violation of the NDTPA and for fraudulent concealment) require sufficient allegations of damages. *See, e.g.*, *Picus v. Wal-Mart Stores, Inc.*, 256 F.R.D. 651, 657-58 (D. Nev. 2009) (holding that to establish a violation of the NDTPA, the plaintiff must demonstrate, among other things, "damage to the plaintiff"); *Nevada Power Co. v. Monsanto Co.*, 891 F. Supp. 1406, 1415 (D. Nev. 1995) (elements of claim for fraudulent concealment include that "as a result of the concealment or suppression of the fact, the plaintiff must have sustained damages"). As concluded by the District Court in two opinions, Plaintiffs failed to adequately allege damages for both of these fraud-based causes of action.

Plaintiffs did not dispute in the District Court and do not dispute here that they received exactly what they paid for, *to wit*, that they paid the "Resort Fee" at the Hotel and received access to all of the benefits attendant with the payment of the "Resort Fee" during their uneventful stay at the Hotel. Plaintiffs further do not dispute that under the "benefit of the bargain" and "out of pocket loss" damages analyses applied by the District Court, they failed to adequately state a claim upon which relief can be granted. Instead, as noted above, Plaintiffs' primary focus in this appeal is that the District Court should not have applied these two measures of

damages and, instead, should have applied some other type of amorphous "damages" analysis that Plaintiffs wholly fail to define or identify.

Plaintiffs' argument for the application of some different form of damages analysis lacks support under Nevada law. In Nevada, damages for claims based in fraud are reviewed under the "benefit of the bargain" and "out of pocket loss" analyses. *Randono v. Turk*, 86 Nev. 123, 130, 466 P.2d 218, 222-23 (1970). Indeed, more than fifty years ago, the Nevada Supreme Court explained two measures of damages for matters involving alleged fraud:

> The measure of damages for fraudulent misrepresentation can be determined in one of two ways. The first allows the defrauded party to recover the 'benefit-of-his-bargain,' that is, the value of what he would have received if the representations were true, less what he had received. The second allows the defrauded party to recover only what he has lost 'out-of-pocket,' that is, the difference between what he gave and what he actually received.

Id.; see also Collins v. Burns, 103 Nev. 394, 741 P.2d 819 (1987) (noting two "measures of damages" in fraud cases, first being "benefit of the bargain" damages and second being "out of pocket" damages); *Gotshalk v. Hellwig*, No. 2:13-cv-00448, 2017 LEXIS 49236 at *16 (D. Nev. Mar. 30, 2017) (noting in "fraud-based claims," a party may seek rescission, "[o]ut-of-pocket losses" and "benefit-of-the bargain" damages).[3]

[3] Rescission is not an appropriate measure of damages in this matter because Plaintiffs have not alleged the existence of a contract. *See, e.g.*, *Bergstrom v. Estate*

Based upon the foregoing well-settled Nevada case law, the District Court was correct in concluding that Plaintiffs did not adequately plead damages. To be sure, Plaintiffs readily acknowledge that their NDTPA and fraudulent concealment claims are grounded in fraud. (*See, e.g.*, EOR 94 ("This case stems from Defendant's fraudulent concealment . . . .")); (EOR 95 ("Plaintiffs were defrauded of their money, plain and simple.")); (Plaintiffs' Brief at 14 ("Paying for something based on fraudulent concealment of material facts which one would not otherwise have purchased constitutes actionable fraud with resulting damage.")); *id.* at 18 (alleging "fraudulent concealment"); *id.* at 20 (arguing that putative class members were "exposed by the Hotel's fraudulent concealment"); *id.* at 22 ("Here, Plaintiffs claim they were defrauded into paying money to the Hotel . . . ."); *id.* at 25 (noting Rio "perpetrated a fraud on Plaintiffs"). To that end, Nevada law confirms that the District Court properly analyzed Plaintiffs' claims under the "benefit of the bargain" and "out of pocket loss" inquiries. Because Plaintiffs (improperly) only challenge whether these doctrines should have been applied—and not whether they actually

of DeVoe, 109 Nev. 575, 577, 854 P.2d 860, 861 (1993) ("Rescission is an equitable remedy which totally abrogates a contract and which seeks to place the parties in the position they occupied prior to executing the contract."). Moreover, in any event, Plaintiffs did not plead rescission as a remedy in their TAC. *See Gotshalk*, 2017 LEXIS 49236 at *17 (acknowledging that the plaintiffs did not seek to rescind contract).

alleged damages under these doctrines—their appeal should be rejected, and the dismissal of their fraud-based claims should be affirmed.

Plaintiffs rely on *Davis v. Beling*, 128 Nev. 301, 278 P.3d 501 (2012) to support their argument that the District Court improperly performed "benefit of the bargain" and "out of pocket loss" inquiries. Specifically, Plaintiffs cite to *Davis* to suggest that "out of pocket" and "benefit of the bargain" damages are not always "particularly helpful or appropriate." (*See* Plaintiffs' Brief at 11). However, *Davis* does not support disturbing the District Court's dismissal as Plaintiffs take *Davis*'s holding out of context. Explaining a California Court of Appeal case—*Strebel v. Brenlar Investments, Inc.*, 135 Cal. App. 4th 740, 37 Cal. Rptr. 699 (2006)—the court in *Davis* stated that "out of pocket" or "benefit of the bargain" damages would not be an appropriate measure of damages in a case such as where a "homeowner . . . was fraudulently induced by his real estate agent into selling his home" because such damages should look to "the appreciation that [the homeowner] would have accrued had he not sold his home, rather than his more limited out-of-pocket damages" and that a "diminution" of property value (at issue in *Davis*) could be an appropriate measure of damages. *Davis*, 128 Nev. at 317-18, 278 P.3d at 513. While the *Davis* court acknowledged that "out of pocket" and "benefit of the bargain" damages are the appropriate measure of damages in most cases alleging fraud, it came to the foregoing conclusion recognizing that there exist a limited number of

cases where those measures of damages do not adequately redress certain compensatory damages incurred by the plaintiff.

Here, Plaintiffs' claims do not call for the application of anything other than a "benefit of the bargain" or "out of pocket" analysis. Certainly, there is no appreciation or diminution in the amount Plaintiffs purportedly paid to Rio for their "Resort Fee," and this matter does not relate to the purchase or sale of real estate. Plaintiffs have not alleged otherwise. *Davis*, therefore, is not instructive on whether the District Court applied the correct analysis of alleged damages.

Critically, in opposing two motions to dismiss and in their opening brief to this Court, Plaintiffs have not identified a single state or federal case which supports their contention that they have adequately alleged damages. Plaintiffs' brief most heavily relies on the Nevada Supreme Court's decision in *Collins v. Burns* to support their conclusion that they "have alleged recoverable damages in the form of the money they paid to the Hotel which they would not otherwise have paid." *See* Plaintiffs' Brief at 16. *Collins*, however, does not stand for the sweeping proposition Plaintiffs advance and, in fact, confirms the District Court's analysis that Plaintiffs have not adequately alleged damages.

Collins involved a dispute relating to the sale and purchase of a liquor store. 103 Nev. 394, 396, 741 P.2d 819, 820 (1987). The purchasers sought an income-producing business. *Id.* After reviewing certain records, the purchasers believed

that the liquor store would provide "acceptable income." *Id.* Unbeknownst to the purchasers, however, the sellers had reported business losses the year prior and for part of the current year and the documents reviewed by the purchasers contained inflated sales. *Id.* Nevertheless, relying on the inflated business records, the purchasers bought the liquor store and executed a promissory note which was assigned to the sellers. *Id.* at 396-97, 741 P.2d at 821. The liquor store never made a profit, and the purchasers ultimately closed it after spending a significant amount of their own money to keep it open. *Id.* at 397, 741 P.2d at 821. The sellers brought an action against the purchasers for defaulting on the promissory note, and the purchasers counterclaimed for damages as a result of fraud. *Id.*

In discussing damages, the Nevada Supreme Court explained that the purchasers were damaged because they "thought they were purchasing a viable business" but, instead, "gained ownership of a losing enterprise with no proven potential for any profit at all." *Id.* at 398, 741 P.2d at 822. After discussing the "two ways" damages could be measured—benefit of the bargain and out of pocket losses, and clearly applying them to the facts of that case—the Nevada Supreme Court concluded that the purchasers were "entitled to recover the difference between the amount they paid to the [sellers] and the actual value of the business at the time of the sale." *Id.* at 399, 741 P.2d at 822.

In this case, consistent with the Nevada Supreme Court's reasoning in *Collins*, the District Court properly applied the "benefit of the bargain" and "out of pocket" analyses and properly concluded that Plaintiffs did not adequately allege damages. In *Collins*, the purchasers received something less than what they paid for—*i.e.*, a business that was failing rather than thriving—and their alleged damages were the difference of the value of what they paid and the value of what they received. Here, Plaintiffs alleged that they paid the "Resort Fee" to the Rio, do not dispute that they received all of the benefits associated with the "Resort Fee," and enjoyed a safe and uneventful stay at the Hotel. Under these circumstances, Plaintiffs have not adequately alleged they suffered any damages for their fraud-based claims because they received the full benefit of the bargain.

Finally, contrary to Plaintiffs' argument, *Bauman v. Saxe*, No. 2:14-cv-01125, 2019 U.S. Dist. LEXIS 23351 (D. Nev. Feb. 13, 2019) does not support Plaintiffs' claim that they adequately alleged damages. There, the District of Nevada simply explained that "any" damages under the NDTPA includes damages in addition to economic injury, specifically "privacy violations and a disruption in the quiet use and enjoyment of . . . cellular phones." *Id.* at *11. Plaintiffs here are seeking solely economic damages and are specifically not seeking damages for "privacy violations" or "a disruption in the quiet use and enjoyment of" their room at the Hotel. To the

contrary, they had full, uninterrupted access to the amenities associated with the "Resort Fee" for which they paid.

Simply, the District Court properly examined Plaintiffs' TAC to determine whether they adequately alleged damages under the "benefit of the bargain" and "out of pocket loss" inquiries. Curiously, Plaintiffs advocated for these measures of damages in the District Court and objected to them only after their application to the facts of this case resulted in the dismissal of their claims. Now, before this Court, Plaintiffs advocate for a different damages analysis without identifying what that analysis should be or entail, and why their claim for damages should not be viewed within traditional "benefit of the bargain" and "out of pocket" rubric. Because the District Court properly analyzed Plaintiffs' allegations of damages, its dismissal of Plaintiffs' claims with prejudice should be affirmed.

B. The District Court correctly concluded that Plaintiffs failed to plead damages and causation for their negligence claim.

Like Plaintiffs' fraud-based claims, Plaintiffs' negligence claim similarly requires allegations of damages. *Turner v. Mandaly Sports Entm't, LLC*, 124 Nev. 213, 217, 180 P.3d 1172, 1175 (Nev. 2008) (stating that damages are required element of negligence action). A claim for negligence also requires causation. *Id.*

Here, Plaintiffs' TAC alleges as follows:

> At all times Defendant is and was in the business of operating a hotel and providing lodging for guests and were/was at all times open to the public. As such

> Defendant owed a duty to provide safe, clean, and disease-free accommodations, including a disease-free water system, to all guests of its hotel and not to expose its guests to diseases such as legionella bacteria whether negligently or recklessly. As the operator of a hotel and providing lodging for guests and being a facility that is open to the general public Defendant further owed a duty to disclose and/or not conceal from guests/invitees who reserved rooms at Defendant's hotel, or when those guests/invitees checked into Defendant's hotel and/or while those guests/invitees were staying at Defendant's hotel the presence of diseases such as legionella bacteria which were present in the hotel's water system which supplied water to guest rooms and facilities (*e.g.*, a lavatory/sink in which to wash one's hands and brush one's teeth, and a bath/shower in which to bathe).

(EOR 58, ¶ 57). Plaintiffs further alleged that Rio "negligently and/or recklessly failed to maintain its water system in a safe, clean, and disease-free condition" and "further breached its duty to Plaintiffs and all members of the class when it negligently concealed and/or failed to inform, disclose or otherwise notify Plaintiffs and the class members of the existence of legionella bacteria in its hotel's water system." (EOR 59, ¶ 59).

Even accepting Plaintiffs' allegations as true, they still have failed to state a claim for damages, let alone damages causally related to the above-referenced claims, because they complain about a condition that had no effect upon what they received. By way of analogy, if an amusement park had a duty to ensure the safety of its guests and notify its guests of any hazards, it would not be held liable to its guests for the price of admission in the event that there was a trip and fall hazard

present in the park when a plaintiff did not trip over that hazard, suffered no ill-effects from that hazard, fully used the amusement park as intended, and simply learned at some point after he or she left the park that such a hazard existed. Similarly, Plaintiffs here paid the "Resort Fee" to Rio; however, they indisputably enjoyed the Hotel and all of its amenities without suffering any of the alleged ill-effects as a result of *Legionella* purportedly being in certain parts of the Hotel's water system. There are no allegations that Plaintiffs were prevented from enjoying such amenities or were in some way physically harmed. Under these circumstances, as the District Court concluded, Plaintiffs have not alleged they suffered any cognizable damages as a result of the purported presence of *Legionella* bacteria in certain parts of the Hotel's water system. And, because Plaintiffs have not adequately alleged damages, it follows that they have not adequately alleged causation. Accordingly, the District Court properly dismissed Plaintiffs' negligence claim.

C. The District Court applied the correct analysis to Plaintiffs' unjust enrichment claim under Nevada law.

The District Court applied the correct analysis when dismissing Plaintiffs' unjust enrichment claim for failure to adequately plead damages. In seeking to revive their unjust enrichment claim, Plaintiffs wholly fail to address critical elements necessary to state a claim. Plaintiffs appear to suggest that a claim for unjust enrichment is sufficiently pled when they allege that "a person has and retains

a benefit which in equity and good conscience belongs to another." *See* Plaintiffs' Brief at 22. Nevada law, however, requires more. To allege a claim for unjust enrichment, Nevada law requires there be "(1) a benefit conferred on the defendant by the plaintiff; (2) appreciation by the defendant of such benefit; and (3) an acceptance and retention by the defendant of such . . . benefit under circumstances such that it would be **inequitable for him to retain the benefit without payment of the value thereof**." *Takiguchi v. MRI Intern., Inc.*, 47 F. Supp. 3d 1100, 1119 (D. Nev. 2014) (emphasis added) (citing *Unionamerica Mortg. & Equity Trust v. McDonald*, 97 Nev. 210, 626 P.2d 1272, 1273 (1981)). Said differently, a plaintiff must have given something to a defendant without receiving anything in return:

> The claim known as "unjust enrichment" in most states . . . means more than that the defendant has profited unscrupulously while the plaintiff has been harmed. The claim only lies against a defendant who has willingly received the plaintiff's labor or goods without giving anything of equal value in return under circumstances where it would be inequitable not to require payment or "restitution" therefor.

In re Zappos.com, Inc., No. 3:12-cv-00325, 2013 U.S. Dist. LEXIS 128155 at *20 (D. Nev. Sep. 3, 2013). An unjust enrichment claim should not lie, therefore, when a plaintiff receives what he or she paid for. *Cf. In re Baycol Products Litigation*, 596 F.3d 884, 892 (8th Cir. 2010) (affirming dismissal of unjust enrichment claim on summary judgment because plaintiff took medicine, did not suffer from any harm, and thereby received "the benefit of his bargain"); *In re Zappos, Inc.*, 2013 U.S. Dist.

LEXIS 128155 at *21 ("Although Plaintiffs allege having bestowed the benefit of their purchase of goods, it appears undisputed that Defendant provided plaintiffs a benefit in return (providing the goods) such that there is no unrecompensed benefit conferred."); *Mazur v. Milo's Kitchen, LLC*, No. 12-1011, 2013 U.S. Dist. LEXIS 89126 at *29 (W.D. Pa. June 25, 2013) (dismissing unjust enrichment claim where the plaintiff was "dissatisfied with the [product], [but] she nevertheless purchased, received and used the product") (alteration added); *Tatum v. Takeda Pharmaceuticals North America, Inc.*, No. 12-1114, 2012 U.S. Dist. LEXIS 151031 at *13 (E.D. Pa. Oct. 19, 2012) (dismissing unjust enrichment claim in matter involving pharmaceutical which plaintiff alleged had risks of which defendants were aware and did not disclose because "there is no allegation that defendants refused to provide a service or goods after [the plaintiff] provided defendants with a benefit") (alteration added); *Prohias v. Pfizer, Inc.*, 490 F. Supp. 2d 1228, 1236 (S.D. Fla. 2007) (finding plaintiffs failed to state a claim for unjust enrichment because both plaintiffs "purchased a cholesterol reducing drug, and both men obtained cholesterol reduction as a result. Therefore, in a general sense, they obtained the benefit of their bargain"). As succinctly stated by the United States District Court for the Western District of Missouri:

> As a general proposition, determining whether a defendant's retention of the benefit (i.e., the purchase price for the goods) is "unjust" requires considering what a particular plaintiff received in exchange for bestowing that

> benefit. As discussed in prior Orders, if a person completely used a product without encountering ill-effects or other difficulties and can only declare after the fact that s/he would not have purchased the goods had the truth been known, such a person may not have "unjustly" enriched the seller.

In re Bisphenol-A (BPA) Polycarbonate Plastic Products Liability Litigation, 276 F.R.D. 336, 344 (W.D. Mo. 2011).

As noted above and in the District Court's prior orders, Plaintiffs paid the "Resort Fee" to Rio for internet, telephone, and gym access and, in return, Rio provided the services included in the "Resort Fee" during their incident-and injury-free stays at the Hotel. Plaintiffs do not dispute this and, therefore, cannot dispute that on each occasion they stayed at the Hotel, they received exactly what they paid for. Under analogous circumstances, courts throughout the country have found that such allegations do not constitute unjust enrichment. The District Court, therefore, properly dismissed Plaintiffs' unjust enrichment claim.

III. THIS COURT SHOULD AFFIRM THE DISTRICT COURT'S DISMISSAL OF PLAINTIFFS' TAC BASED UPON OTHER ARGUMENTS CONTAINED IN THE RECORD

While the District Court provided Plaintiffs with the opportunity to amend their SAC and address the multitude of deficiencies warranting dismissal, Plaintiffs TAC remained largely the same. As such, the District Court's dismissal should be affirmed based upon those additional grounds identified in its order dismissing the SAC, and argued by Defendant in its motion to dismiss the TAC.

A. Plaintiffs' NDTPA and fraudulent concealment claims were properly dismissed because Plaintiffs have not adequately alleged Rio's purported knowledge.

In order to sustain a claim under NRS § 598.0923(2), Plaintiffs must show that Defendant "knowingly" failed "to disclose a material fact in connection with the sale or lease of goods or services." Knowledge is similarly a requirement for Plaintiffs' fraudulent concealment claim. *See Montes v. Bank of America NA*, No. 2:13-CV-660-RCJ-VCF, 2013 U.S. Dist. LEXIS 156402 at *21 (D. Nev. Oct. 20, 2013). While "knowledge" may be "alleged generally," a complaint is properly dismissed where it contains only conclusory allegations regarding the defendant's knowledge. *See, e.g., Wilson v. Hewlett-Packard Co.*, 668 F.3d 1136, 1148 (9th Cir. 2012) (concluding the district court did not err in finding that the plaintiff's second amended complaint contained insufficient allegations of knowledge and affirming dismissal); *U.S. ex rel. Thompson v. Honeywell Intern, Inc.*, 649 Fed. App'x. 617, 618 (9th Cir. 2016) (affirming dismissal with prejudice because "the operative complaint does not specifically allege facts leading to the plausible inference" of defendant's knowledge or that it "acted with reckless disregard of the truth"); *Tomek v. Apple, Inc.*, 636 Fed. App'x. 712, 713-14 (9th Cir. 2016) (relying on *Iqbal* and concluding that plaintiff did not allege "specific facts that allow[] the court to draw the reasonable inference' that" the defendant knew its advertisements were misleading and affirming dismissal of California consumer protection claims)

(alteration in original); *Montes*, 2013 U.S. Dist. LEXIS at *23 (dismissing plaintiff's claim for fraudulent concealment for failure to plead a claim with Rule 9(b) particularity where plaintiff states that defendants "intentionally and fraudulently concealed" various policy provisions and amounts).

Other than mere conclusory allegations and unsupported presumptions, Plaintiffs' TAC fails to plausibly allege that Defendant had specific "knowledge" of the purported presence of *Legionella* bacteria at any time that Plaintiffs allegedly stayed at the Hotel. Plaintiffs continued reliance on Rio's receipt of a notification from the Southern Nevada Health District in May 2017 of two Hotel guests allegedly contracting Legionnaires' disease at some unknown time after staying at the Hotel is misguided. (*See* Plaintiffs' Brief at 5). Given the ubiquitous nature of *Legionella*, the mere fact that two individuals purportedly contracted Legionnaires' disease after staying at the Hotel while also being exposed to all of the other hotels, casinos, restaurants, night clubs, and shows that Las Vegas offers, is insufficient to impute on Rio the specific knowledge that their illnesses were caused by stays at the Hotel, that *Legionella* bacteria was in certain water systems in the Hotel, and, particularly, the specific knowledge that such bacteria were present at any time Plaintiffs were staying at the Hotel. Further, and perhaps most importantly, Plaintiffs did not oppose this basis for dismissal in their opposition to Rio's motion to dismiss the TAC. It is well-settled that when "a plaintiff files an opposition to a dispositive motion and

addresses only certain arguments raised by the defendant, a court may treat those arguments that the plaintiff failed to address as conceded." *Cunningham v. Tenn. Cancer Specialists, PLLC*, 957 F. Supp. 2d 899, 921 (E.D. Tenn. 2013); *see Samper v. Providence St. Vincent Med. Ctr.*, 2010 U.S. Dist. LEXIS 86238 at *44 (D. Or. Aug. 23, 2010), *aff'd*, 675 F.3d 1233 (9th Cir. 2012); *see also Walsh v. Nev. Dep't of Human Res.*, 471 F.3d 1033, 1037 (9th Cir. 2006).

Based upon Plaintiffs' failure to adequately plead Rio's purported knowledge, as well as their failure to oppose this basis for dismissal, Rio respectfully submits that the District Court's decision should be affirmed and Plaintiffs' claimed violation of the NDTPA and claim for fraudulent concealment should be dismissed.

B. Plaintiffs' reliance on an alleged violation of NRS § 205.377, a criminal statute, was insufficient to support Plaintiffs' NDTPA claim.

As emphasized by the District Court in its decision dismissing the SAC, NRS § 205.377 "governs *crimes* against property." (EOR 42). "[C]riminal statutes cannot form the basis of a civil suit without express civil enforcement provision," which NRS § 205.377 does not contain. *Id.* (citing *Burgess v. City and County of San Francisco*, 49 F. App'x 122 (9th Cir. 2002)). As a result, in its decision dismissing the SAC, the District Court dismissed Plaintiffs' claim under NRS § 205.377 without leave to amend. Undeterred, Plaintiffs once again repleaded an alleged violation of NRS § 205.377 in their TAC, although this time, rather than

asserting a separate cause of action, Plaintiffs attempted to use NRS § 205.377 to support their NDTPA claim. Whether pleaded as a separate cause of action or disguised under the cloak of their NDTPA claim, Plaintiffs' claim that Rio violated NRS § 205.377 was appropriately disregarded by the District Court and their NDTPA cause of action was properly dismissed insofar as it was premised on that criminal statute.

While NRS § 205.377(5) provides that a violation of NRS § 205.377 constitutes a deceptive trade practice "for purposes of NRS 598.0903 to 598.0999, inclusive," there has not been a criminal proceeding nor have there been any threats of criminal proceedings against Rio. Moreover, criminal findings cannot be made by a court in the context of a civil trial. *See Collins v. Palczewski*, 841 F. Supp. 333, 340 (D. Nev. 1993) (criminal statutes are generally not enforceable by a civil action); *Bass Angler Sportmans Soc. v. Scholze Tannery, Inc.*, 329 F. Supp. 339, 345 (E.D. Tenn. 1971) (only proper prosecuting authorities may enforce violations of criminal statutes, not private parties); *Solis-Diaz v. Las Vegas Metro. Police Dep't*, No. 2:12-CV-00619, 2017 U.S. Dist. LEXIS 11023, at *9 (D. Nev. Jan. 25, 2017) (refusing to consider the acquittal of defendant in a parallel criminal action as evidence in civil court on account of the differing burdens of proof in criminal and civil actions). As a result, the District Court is not empowered to adjudicate Plaintiffs' claim that Rio violated NRS § 205.377(5) in this civil context and Plaintiffs have no private right

of action under that statute. Stated differently, Plaintiffs lack standing to bring a claim premised upon a violation of NRS § 205.377(5). Accordingly, the District Court properly dismissed Plaintiffs' NDTPA claim insofar as it was dependent upon a violation of that criminal statute. Also, in opposing Rio's motion to dismiss the TAC, Plaintiffs did not dispute that they lack standing to assert a violation of NRS § 205.377. Accordingly, Plaintiffs' silence on this issue can be treated as a concession that they do not have standing to assert an NDTPA claim based upon a purported violation of NRS § 205.377(5). *Cunningham*, 957 F. Supp. 2d at 921; *Samper*, 2010 U.S. Dist. LEXIS 86238 *44 ; *see also Walsh*, 471 F.3d at 1037. As a result, Rio respectfully submits that the District Court's decision be affirmed and Plaintiffs' NDTPA claim based upon a violation of NRS § 205.377 be dismissed.

IV. PLAINTIFFS CONTINUE TO ATTEMPT TO ADVANCE A CLAIM FOR "DECLARATORY RELIEF" DESPITE THEIR BEING NO SUCH CAUSE OF ACTION

Finally, Plaintiffs request that the Court revive their claim for declaratory relief. *See* Brief at 25. As noted by the District Court, there is no independent claim in Nevada for "declaratory relief." (EOR at 43 (citing *In re Wal-Mart Wage & Hour Employ. Practices Litig.*, 490 F. Supp. 2d 1091, 1130 (D. Nev. 2007))). Plaintiffs advance no new argument for trying to revive this claim, and the District Court's dismissal of it should be affirmed.

CONCLUSION

For the reasons articulated above, Plaintiffs waived any challenge to the District Court's use of the "benefit of the bargain" or "out of pocket losses" inquiries with respect to their claims to damages. Even if they have not waived any such challenge, Nevada law supports the District Court's analysis as to the adequacy of Plaintiffs' allegations of damages with respect to all of Plaintiffs' causes of action. Moreover, as more fully set forth above, the dismissal of Plaintiffs' claims is supported by additional grounds in the record. Accordingly, Rio respectfully requests that this Court affirm the District Court's dismissal of Plaintiffs' TAC.

Dated: June 19, 2020

Respectfully Submitted,

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STATEMENT OF RELATED CASES
PURSUANT TO CIRCUIT RULE 28-2.6

Defendant-Appellee Rio Properties, LLC is not aware of any related case pending in this Court.

Dated: June 19, 2020

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the length limits permitted by Ninth Circuit Rule 32-1. The brief is 7,961 words, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

Dated: June 19, 2020

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CERTIFICATE OF SERVICE

I hereby certify that on this date, I electronically filed the foregoing Appellee's Brief with the Clerk of the Court of the United States Court of Appeals for the Ninth Circuit using the Appellate Electronic Filing system which caused a copy to be served on the following counsel:

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Dated: June 19, 2020

DOCKET NO. 19-17556

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

AARON LEIGH-PINK, ET AL.

Plaintiff-Appellant,

v.

CAESARS ENTERTAINMENT CORPORATION, DBA Rio All-Suite Hotel and Casino and RIO PROPERTIES, LLC

Defendant-Respondent.

APPEAL FROM A DECISION OF THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA
CASE NO. 2:17-cv-02910-GMN-VCF
THE HONORABLE GLORIA M. NAVARRO

REPLY BRIEF OF APPELLANT

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I. INTRODUCTION

There is no legitimate or genuine dispute the Rio All-Suites Hotel and Casino (hereinafter "the Rio") was experiencing an uncontrollable outbreak of *Legionella* bacteria in the hotel's water system from May 2017 through (see, Excerpts of Record ("EOR") at 28) through at least September 28, 2017 (EOR 47, Third Amended Complaint ¶6). There is also no legitimate or genuine dispute at least two guests who stayed at the Rio were hospitalized with Legionnaires disease symptoms. EOR 28. Most importantly, there is no legitimate or genuine dispute the Rio concealed and *never* informed any of its guests of the uncontrollable outbreak and the health and safety hazards the *Legionella* bacteria posed to them while staying in guest rooms at the hotel.

The question for the District Court was whether Plaintiffs and putative class members who were never informed of the outbreak and stayed at the Rio have suffered recoverable damages and/or whether the Rio was unjustly enriched by its fraudulent concealment of such a material facts.

The District Court dismissed Plaintiffs case on the basis that "Plaintiffs paid the resort fee in order to receive phone, internet and fitness center access." EOR 4, ln. 12-13. The District Court further explained its analysis of Plaintiffs' theory

of damage was based on the fact "Plaintiffs assert without supporting factual allegations that phone, internet, and fitness center access is worth less in a facility with contaminated water." See, EOR 4, fn. 2.

The District Court, however, misapplied in too limited a manner, Plaintiffs allegations that they were required to pay the demanded Resort Fee as a prerequisite to being allowed to stay at the hotel and thus Plaintiffs were damaged by parting with their money. See, EOR 55, ln. 11-3 ("Plaintiffs...parted with their money by paying Defendant the demanded amount for the Resort Fee of $34.01 per day.") There is little question that had Plaintiffs refused to pay the Resort Fee (even if, for example, they had no intention of using the telephone, internet or fitness center) Respondent would never have allowed them to stay in a guest room at the hotel. The age-old adage "no ticket, no laundry" is equally applicable to this case - "no Resort Fee, no room." Thus, Plaintiffs were required to part with their money in order to stay at the hotel, period.

Plaintiffs adequately alleged they were required by Respondent to pay the Resort Fee as a prerequisite to being allowed to stay in a guest room at the Rio and would not have paid that money to Respondent had they been told by Respondent they could be exposed to deadly *Legionella* bacteria *while using the lavatory/sink or shower in their guest room*. See, EOR 55, ¶41.

Respondent, and the District Court, took a surgeon's scalpel to the concept of what makes up Plaintiffs' out-of-pocket damages when parsing "fees" charged to, and paid by, a guest *in order for the guest to be allowed to stay in a hotel room* between the Resort Fee and a room rate by excising money paid as a Resort Fee from that of a "room rate" as if a guest has the right or ability to refuse to pay the Resort Fee while also having their room comp'd. It is at best doubtful Respondent would allow a guest the benefit of having their cake and eating it too by getting a free room *and* not having to pay the demanded Resort Fee. Either way Plaintiffs and the putative class paid money to stay at the hotel and were thus damaged.

A. No Floodgates of "Crippling" Limitless Liability Will Ensue By Allowing Plaintiffs to Proceed With This Action

In a not-so-veiled attempt to instill panic in the minds of this Court's judges who will decide this case, Respondent asserts, without a single shred of supporting evidence or authority, that allowing Plaintiffs to proceed with this action would "open the floodgates to crippling limitless liability of Nevada businesses and businesses in this Circuit." Respondent's Brief at pg. 3.

Not only does this argument lack any basis in reality, but the opposite holds true; not holding Respondent to account for its fraudulent conduct will serve to reward and, inevitably, encourage Respondent and other businesses to fraudulently

conceal from their customers material information about the goods and services they are paying for to avoid those customers taking their business elsewhere.

If Respondent wants truly to prevent future liability to Nevada businesses and businesses in this Circuit all they and every business needs to do is refrain from concealing from their invitees and customers material facts about which they are mandated by law to disclose and warn. *Twardowski v. Westward Ho Motels*, 86 Nev. 784 [476 P.2d 946] (1970). Respondent and all other businesses should be honest with and put the health and safety of their customers ahead of making a profit in any way possible.

II. DISCUSSION

A. Plaintiffs-Appellees Did Not Waive Their Damages Argument Before the District Court

Respondent asserts Plaintiffs waived their damages argument on appeal by not raising the issue before the District Court. Respondent's Brief at pg. 12. Not much could be farther from the truth.

In opposition to Respondent's motion to dismiss the Third Amended Complaint, Plaintiffs argued, and cited applicable supporting authorities, that the Nevada Deceptive Trade Practices Act (NDTPA) allows for the recovery of *[a]ny damages* that the claimant has sustained. See, EOR 96 (citing the statutory

language of N.R.S. 41.600(3)(a) and *Gotshalk v. Hellwig* (D. Nev., Mar. 30, 2017, No. 213CV00448JADNJK 2017 WL 1240191, at *6 ("Out-of-pocket losses are a measure of damages often used in fraud cases." citing, *Davis v. Beling*, 128 Nev. 301, 316 [278 P.3d 501, 512 (Nev. 2012).

Plaintiffs also argued before the district court that their claim of damages - in the form of the money they paid the Rio which they would not otherwise have paid - qualify as "out of pocket" damages, or alternatively benefit of the bargain damages, because they paid to stay in a room in a hotel they would never otherwise have stayed in had they known the true facts. See, EOR 97. Respondent may not like the reality that a guest room in a hotel whose water system is uncontrollably infected with deadly *Legionella* bacteria is worth nothing, or substantially less, to guests who are properly informed of the situation. But those are Plaintiffs' claims and those claims properly fall within the scope of the NDTPA's authorization for recovery of "any damages" including under the out-of-pocket rule.

Plaintiffs, moreover, argued before the District Court the statutory language of the NDTPA permitting the recovery of "any damages" includes restitution of the money they paid out of pocket under an unjust enrichment theory. See, EOR 96.

Lastly, on the outside chance there was some semblance of waiver, this court may consider issues not presented to the district court which are raised for the first time on appeal. *In re Mercury Interactive Corp. Securities Litigation*, 618 F.3d 988, 992 (9th Cir. 2010) ("Such waiver is a discretionary, not jurisdictional, determination.") Notwithstanding, the issue of Plaintiffs damages was " 'raised sufficiently for the trial court to rule on it.' " *Id.*, internal citation omitted.

B. The District Court Erred In Dismissing Plaintiffs' Claims for Purported Failure to Allege Recoverable Damages

1. Plaintiffs' NDTPA and Fraud-Based Claims

The District Court dismissed Plaintiffs' fraud-based Nevada Deceptive Trade Practices Act (NDTPA) and unjust enrichment claims on the ground Plaintiffs "fail to allege that they did not receive the amenities covered by the resort fee." EOR 5, ln. 8-9. The District Court further determined "Plaintiffs cannot show that Defendant inequitably retained a benefit conferred by plaintiffs." *Id.*, ln. 10-11.

The District Court erred, however, in failing to recognize, or appreciate, that Plaintiffs' damages claims flow from the allegation that a guest room in a hotel whose water system is uncontrollably infected with deadly *Legionella* bacteria *is worth nothing to the reasonable consumer, or worth substantially less* than what

was paid for it. See, EOR 97, ln. 9-14.[1]; see also, EOR 55, ¶40 (TAC). This is a form of damages recognized by the out-of-pocket rule, including for alleged violations of the NDTPA and fraud-based conduct. See, *Davis v. Beling*, 128 Nev. 301, 316 [278 P.3d 501, 512] (Nev. 2012).

In *Goodrich & Pennington Mortg. Fund, Inc. v. JR Woolard, Inc.*, 120 Nev. 777 (Nev. 2004) the Nevada Supreme Court explained out-of-pocket damages "include (1) the difference between the value of what the plaintiff received in the induced transaction and the value given for it, and (2) the pecuniary loss sustained in consequence of the Plaintiff's reliance on the false representation." *Id.* 120 Nev. at 782, citing at fn. 9 Restatement (Second) of Torts §552B (1977). This is precisely what Plaintiffs have alleged and how they framed their claim of damages.

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[1] The passage reads: "Plaintiffs thus claim their out of pocket damages as a result of Defendant's fraudulent conduct is the difference between what they actually paid Defendant to stay at the Rio All-Suites Hotel and the cost to stay at a hotel whose waters system presents a serious, even deadly, health risk. Plaintiffs allege neither they, not any reasonable consumer, would pay *anything* to stay at such a hotel and thus they suffered actual out of pocket damages."

2. Plaintiffs' Unjust Enrichment Claim

The district court dismissed Plaintiffs claim for unjust enrichment on the same ground - failure to allege recoverable damages. The district court and Respondent again miss the point because the issue is not whether Respondent [Defendants] inequitably "retained a benefit" but rather that Respondent *obtained* inequitably a financial benefit they would not otherwise have received from Plaintiffs.

Plaintiffs allege they would not have paid Respondent *any money*, even the "Resort Fee," had they been informed by the Rio of the uncontrollable presence of *Legionella* bacteria in the hotel's water system which infected guest rooms where Plaintiffs would stay. See, EOR 53, ¶35, ln. 10-14.[2] It is axiomatic one cannot "retain" a benefit without first *obtaining* the benefit unjustly by enriching itself through fraudulent conduct violative of fundamental principals of justice, equity and good conscious. The claim is, after all, captioned "unjust *enrichment.*"

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[2] The passage states "Defendants knew Plaintiffs and all other class members would be exposed to the hotel's infected water system by virtue of the fact Plaintiffs were staying in guest rooms in the hotel where Plaintiffs would be foreseeably using water from the infected water system supplied to the guest rooms' lavatories/sinks, baths and showers where Plaintiffs would be bathing, showering, brushing their teeth and/or washing their hands, irrespective of whether Plaintiffs' room were 'comp'd'... ."

The Nevada Supreme Court has long held "[m]oney paid through misapprehension of facts belongs, in equity and good conscience, to the person who paid it. *Nevada Indus. Development, Inc. v. Benedetti*, 103 Nev. 360, 363 [741 P.2d 802, 804] (Nev. 1987), citing, 66 Am.Jur.2d Restitution & Implied Contracts § 119 (1973). Here, that is the plaintiffs as the party who paid the money.

Likewise, the fact Plaintiffs may have received some *de minimis* benefit from the money they gave the Rio in the form of internet access and telephone service does not absolve Respondent of liability for having been unjustly enriched by its fraudulent conduct. In *Topaz Mut. Co., Inc. v. Marsh*, 108 Nev. 845, 856 [839 P.2d 606, 613] (Nev. 1992), Nevada Supreme Court confirmed a plaintiff is entitled to unjust enrichment damages even when the plaintiff received some amount of benefit from the money claimed to have been paid to the defendant unjustly and as a result of fraudulent conduct.

In *Topaz,* the plaintiff, Marsh, loaned money to the defendants for purposes of financing improvements of a water system and to retire debts. *Id.* at 848. The Marsh loan was secured by a promissory note and called for periodic payments. Marsh received two payments on the note. *Id.* at 849. Unbeknownst to Marsh, however, the borrowers used the money for other things and none of the money

was used to purchase improvements to the water system. *Id.* When Marsh discovered the defendants' fraudulent conduct Marsh sued for, *inter alia*, fraud and unjust enrichment.

Following a jury trial the trial court awarded Marsh $10,000 in unjust enrichment damages even though Marsh realized a partial benefit from her loan in the form of the two payments she received. On appeal the Supreme Court of Nevada reversed the trial court's unjust enrichment award and directed a new trial *on the amount of the unjust enrichment damages*. *Id.* at 856-57. In so doing, the Nevada Supreme Court affirmed the long standing principal that a party is unjustly enriched when they receive, not only retain, a benefit of money from another against the fundamental principles of justice or equity and good conscience. *Topaz, ibid*, citing, *Nevada Industrial Dev., supra.*

Here, there is little question the Rio obtained money from Plaintiffs under fraudulent circumstances which it would otherwise not have received because, as alleged and as guided by common sense, neither Plaintiffs nor any reasonable consumer would ever knowingly pay *any money* to stay in a hotel whose water system was uncontrollably infected with deadly *Legionella* bacteria. Respondent was thus unjustly enriched and Plaintiffs have properly pleaded recoverable damages.

For these reasons, the District Court's dismissal of Plaintiffs' NDTPA and unjust enrichment claims on the ground Plaintiffs did not allege recoverable damages should be reversed.

C. Plaintiffs Alleged Respondent Had Actual Knowledge of *Legionella* Bacteria in the Rio's Water System

In the Third Amended Complaint (TAC) Plaintiffs pled Respondent undeniably had actual knowledge of the presence of *Legionella* bacteria in the Rio's water system as early as May 1, 2017, when the Southern Nevada Health District (SNHD) wrote its letter to the Rio informing it that "a patient with legionellosis stayed at your facility during their incubation period sometime in March." See, EOR 68; see also, EOR 46, ¶2. This notification was followed up the next day, May 2, 2017, by an email from Erin Calvin sent directly to the Rio's Vice President, Risk Management (Brad Waldron) and Facilities Senior Manager (Jack Hines), confirming an on-site inspection of the Rio's water system the following day, May 3. See, EOR 70; see also, EOR 46, ¶3. These communications from SNHD set the stage for the Rio's and SNHD's testing of the hotel's water system for the presence of *Legionella* bacteria.

Plaintiffs further detailed the extent of the Rio's actual knowledge when SNHD inspectors met at the Rio with Messrs. Waldron and Hines on May 3 during

which Rio's representatives refused to remove at least one guest from their room in which the SNHD wanted to test for the presence of *Legionella* bacteria. See, EOR 46, ¶4. Plaintiff went on to allege *Legionella* bacteria continued to be present in the Rio's water system through "at least September 28, 2017," with Respondent's actual knowledge *based on testing performed by the SNHD, the Rio itself, and/or the Rio's agents*. EOR 47, ¶6 (italics added.)

Tying together the timeline of Respondent's actual knowledge of the presence of *Legionella* bacteria in the hotel's water system and Plaintiffs' respective stays at the hotel, the Third Amended Complaint alleges Plaintiff Leigh-Pink stayed at the Rio from May 12, 2017 to May 14, 2017 (within days of the SNHD's May 1 letter, May 2 email, and May 3 meeting at the hotel), and again September 1, 2017 to September 4, 2017 (before September 28 when the Rio's water system was still infected). EOR 48, ¶11. Plaintiff Emerson alleges she stayed at the Rio from on or about June 7 to June 9, 2017. EOR 48, ¶13.

More telling of Respondent's actual knowledge of *Legionella* bacteria in the hotel's water system comes directly from Respondent itself. In its July 5, 2017, letter to their "Valued Guest," the Respondent *admits* "recent testing indicated the

presence of *Legionella* bacteria in water systems at the Rio, ..." [3] See, EOR 72, Ex. 3 to Third Amended Complaint.

Based thereon, Plaintiffs more than adequately plead Respondent's actual knowledge of the highly infectious bacteria in the Rio's water system to support its claims of fraudulent concealment and violation of the NDTPA.

III. CONCLUSION

Because Plaintiffs' claim for damages fall within the scope of recovery under the out-of-pocket rule, as well as the NDTPA's authorization that a plaintiff may recover "any damages" the District Court erred in dismissing Plaintiffs' NDTPA, common law negligence, fraudulent concealment and unjust enrichment claims. As such, this court should reverse the District Court on all grounds.

Respectfully submitted,

LAW OFFICE OF ROBERT A. WALLER, JR.

Date: July 3, 2020

/s/ Robert A. Waller, Jr.
Attorney for Plaintiffs-Appellants

[3] Given the Rio sent its July 5 letter to guests confirming its actual knowledge of *Legionella* bacteria in the hotel's water system it strains credibility for Respondent to aver in its Response Brief that "Plaintiffs continued reliance on Rio's receipt of a notification from the [SNHD] in May 2017 of two Hotel guests allegedly contracting Legionnaires' disease at some unknown time after staying at the Hotel is misguided" while patently ignoring the fact its own letter was attached to the Third Amended Complaint as Exhibit 3.

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)(B)(i)

This brief complies with Rule 32-1(b) as it contains no more than 7,000 words in 14-point font. According to WordPerfect X9, the word processing program used to create this brief, the brief contains a total of 3,416 words.

STATEMENT OF RELATED CASES

Plaintiff-Appellants Aaron Leigh-Pink and Tana Emerson are aware of no cases related to this appeal.

CERTIFICATE OF SERVICE

I hereby certify that on this date, I electronically filed the foregoing Appellant's Opening Brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system to the following:

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I declare under penalty of perjury the foregoing is true and correct.

Executed on July 3, 2020 Signature: /s/ Robert A. Waller, Jr.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AARON LEIGH-PINK; TANA EMERSON, *Plaintiffs-Appellants*, v. RIO PROPERTIES, LLC, *Defendant-Appellee.*	No. 19-17556 D.C. No. 2:17-cv-02910-GMN-VCF ORDER CERTIFYING QUESTION TO THE SUPREME COURT OF NEVADA

Appeal from the United States District Court
for the District of Nevada
Gloria M. Navarro, District Judge, Presiding

Argued and Submitted December 10, 2020
Pasadena, California

Filed March 3, 2021

Before: Ronald M. Gould and Ryan D. Nelson, Circuit Judges, and Brian M. Cogan,* District Judge.

Order

* The Honorable Brian M. Cogan, United States District Judge for the Eastern District of New York, sitting by designation.

SUMMARY[**]

Certification to Nevada Supreme Court

The panel certified to the Nevada Supreme Court the following question:

> 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 caused 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?

ORDER

Under Rule 5 of the Nevada Rules of Appellate Procedure, we respectfully certify to the Supreme Court of Nevada the questions of law set forth in Section III of this order. These questions will be determinative of claims pending before this court, and it appears to us that there is no controlling precedent in the decisions of the Supreme Court or Court of Appeals of Nevada. Nev. R. App. P. 5(a).

[**] This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

I.

This suit arose after plaintiffs Aaron Leigh-Pink and Tana Emerson stayed at the Rio All-Suite Hotel and Casino (the "Rio") in Las Vegas. The rooms were complimentary, so the only charge that plaintiffs incurred was a $34.01 per day "resort fee" that covered access to the internet, telephones, and use of the fitness room. At first, the stays seemed uneventful. But unbeknownst to plaintiffs, the Rio's water system had been contaminated with *legionella*, the bacteria that cause Legionnaires' disease.

Plaintiffs allege that the Rio knew of that contamination based on the following allegations. Before plaintiffs visited the hotel, the Rio had received a letter from the Southern Nevada Health District ("SNHD") stating that two guests had contracted Legionnaires' disease. SNHD investigators met with both the Rio's Vice President and its Facilities Senior Manager. The investigators stated that they planned to conduct an "environmental assessment," and at a follow-up meeting, they gave a PowerPoint presentation on the dangers of the bacteria. Yet that same day, plaintiffs allege, the Rio refused to remove "at least one guest" from a room that the SNHD wanted to test for *legionella*.

A few months later, the Rio sent a letter notifying previous guests of the contamination. It reported that two guests had contracted Legionnaires' disease and that "recent testing indicated the presence of the *Legionella* bacteria in water systems at the Rio." The hotel claimed to have taken "aggressive remediation action to ensure the safety of the water," but it admitted that "[u]ntil the system was fully treated, taking a shower or bath with the jets running may have put [guests] at risk by breathing water in the air." The Rio did not share that same information with any incoming guests.

A guest soon commenced this putative class action in Clark County District Court. After removal, Leigh-Pink and Emerson became the named plaintiffs. They had not contracted Legionnaires' disease, but based on the Rio's alleged failure to disclose the *legionella*, they sought to recover the resort fee. Their operative complaint asserted claims for (1) fraudulent concealment, (2) negligence, (3) unjust enrichment, (4) "declaratory relief," and (5) two consumer fraud claims under Nevada Revised Statutes ("NRS") § 41.600. These two consumer fraud claims derive from NRS § 205.377(1), which prohibits "fraud or deceit upon a person by means of a false representation or omission of a material fact," and NRS § 598.0923(2), which prohibits failures "to disclose a material fact in connection with the sale or lease of goods or services." The district court dismissed for failure to state a claim, and this appeal followed.

In a separate memorandum filed concurrently with this opinion, we reverse the dismissal of the claim for unjust enrichment and affirm the dismissal of the claims for negligence, declaratory relief, and violations of NRS § 205.377(1). We also reject all but one of the Rio's arguments regarding the claims for fraudulent concealment and violations of NRS § 598.0923(2). The memorandum leaves one remaining issue that is addressed here: whether plaintiffs have suffered damages for purposes of their claims for fraudulent concealment and violations of NRS § 598.0923(2).

II.

The district court concluded that plaintiffs did not suffer any damages. The court noted that plaintiffs did not allege personal injury or property damage, which meant that the damages, if any, "were economic in nature." The resort fee

could not fall within that category, the court continued, since plaintiffs received access to the amenities that the fee covered. Thus, plaintiffs received the "benefit of the bargain" and suffered no damages.

The Rio echoes that analysis on this appeal. It contends that the only appropriate measures of damages are (1) "the out-of-pocket measure, which, in the misrepresentation context, is comprised of 'the difference between what the defrauded party gave and what he actually received'"; and (2) "[t]he benefit-of-the-bargain measure, which consists of 'the value of what the defrauded party would have received had the representations been true, less what he actually received.'" *Davis v. Beling*, 278 P.3d 501, 512 (Nev. 2012) (alterations adopted) (quoting *Collins v. Burns,* 741 P.2d 819, 822 (Nev. 1987) (per curiam)). Under either measure, the Rio argues, plaintiffs cannot recover because they never alleged that access to the internet, telephones, and fitness room was worth less than the $34.01 they paid. In short, plaintiffs did not suffer damages because they "received exactly what they paid for."

Plaintiffs respond with a simple but untested theory. They point to their allegation that they would not have stayed at the Rio – and would not have paid the resort fee – had the Rio disclosed the *legionella* contamination. Thus, say plaintiffs, they "have alleged recoverable damages in the form of the money they paid to the Hotel which they would not otherwise have paid."

We do not understand Nevada courts to have addressed this issue of damages – *i.e.*, whether a plaintiff suffers damages when, due to the defendant's misrepresentation, the plaintiff purchases a product or service that the plaintiff would not otherwise have purchased, even though the

product or service was not worth less than what the plaintiff paid.

In other cases, this court has observed that "[w]here Nevada law is lacking, its courts have looked to the law of other jurisdictions, particularly California, for guidance." *Eichacker v. Paul Revere Life Ins. Co.*, 354 F.3d 1142, 1145 (9th Cir. 2004) (quoting *Mort v. United States,* 86 F.3d 890, 893 (9th Cir. 1996)). This court, too, has looked to California "to inform [its] analysis" of Nevada law. *Id.* Here, the most instructive California case is *Kwikset Corp. v. Superior Court*, 246 P.3d 877 (Cal. 2011). It concerned a defendant that labeled its products as "Made in U.S.A." even though they "contained foreign-made parts or involved foreign manufacture." *Id.* at 881. The plaintiffs did not allege that the products were overpriced or defective; they instead relied on their "patriotic desire to buy fully American-made products." *Id.* at 883. The court held that "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, have 'lost money or property' within the meaning of" California's Unfair Competition Law. *Id.* at 881.

The federal district court in Nevada has followed this lead. In *Cruz v. Kate Spade & Co., LLC*, No. 2:19-cv-952, 2020 WL 5848095, at *1 (D. Nev. Sept. 30, 2020), the court addressed allegations that the defendant had "indicat[ed] the items [it sold] were significantly discounted from the prices listed on the tags" when, in fact, the items were "never actually sold at the reference price marked on the tags." The plaintiff did not allege that the items were worth less than what she paid. *Id.* at *5. Yet she insisted "that she did not get the deal she thought she was getting," and she alleged that she would not have purchased the items "had she known

their true market value." *Id.* at *1. The district court concluded that the plaintiff had adequately pleaded damages for purposes of a consumer fraud claim under NRS § 41.600. *See id.* at *5; *see also Hinojos v. Kohl's Corp.*, 718 F.3d 1098, 1104–05 (9th Cir. 2013) (holding that similar allegations were sufficient to establish that a plaintiff "lost money or property" under California's Unfair Competition Law).

These authorities do not reflect a consensus, for courts in other jurisdictions have rejected plaintiffs' theory. *See Small v. Lorillard Tobacco Co.*, 720 N.E.2d 892, 898 (N.Y. 1999) (rejecting the idea that, without more, "consumers who buy a product that they would not have purchased, absent a manufacturer's deceptive commercial practices" have suffered an injury under the state's consumer fraud statute); *see also Benson v. Fannie May Confections Brands, Inc.*, 944 F.3d 639, 648 (7th Cir. 2019) (reaching the same conclusion under Illinois law); *In re Avandia Mktg. Sales Pracs. & Prod. Liab. Litig.*, 639 F. App'x 866, 869 (3d Cir. 2016) (reaching the same conclusion under Missouri law).

We thus face a question that involves matters of state law and policy that have not been addressed by the Supreme Court or Court of Appeals of Nevada, and that have divided courts in other jurisdictions. Because we believe that these questions are best resolved by the highest court in Nevada, we conclude that certification is appropriate.

III.

The question of law we certify is:

> 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 caused 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?

We do not intend this framing to restrict the Supreme Court's discretion. Should it accept certification, it may reformulate the question and consider any other issues it deems relevant. *See, e.g.*, *United States v. Figueroa-Beltran*, 892 F.3d 997, 1004 (9th Cir. 2018).

IV.

We respectfully request that the Supreme Court of Nevada accept and decide the question certified herein. The clerk of this court shall forward a copy of this order, under official seal, to the Supreme Court of Nevada, along with copies of all briefs and excerpts of the record that have been filed in this court. We recognize that, should the Supreme Court of Nevada accept certification, "[t]he written opinion of the Supreme Court stating the law governing the questions certified . . . shall be res judicata as to the parties." Nev. R. App. P. 5(h).

Further proceedings in our court are stayed pending resolution of the Supreme Court's decision whether to accept the certified question and, if so, the receipt of the answer to the certified question. The clerk is directed to administratively close this docket, pending further order. The panel will resume control and jurisdiction on the certified question upon receiving an answer to the certified question or upon the decision to decline to answer the question.

The parties shall notify the clerk of this court within 14 days of any decision by the Supreme Court of Nevada to accept or decline certification. If the Supreme Court accepts certification, the parties shall file a joint status report every six months after the date of acceptance, or more frequently if the circumstances warrant. As required by Rules 5(c)(4) and 5(c)(5) of the Nevada Rules of Appellate Procedure, we have provided in the appendix the names and addresses of counsel and have designated which party will serve as the appellant and the respondent should the Supreme Court of Nevada accept certification.

IT IS SO **ORDERED**.

/s/ Brian M. Cogan

Brian M. Cogan, District Judge

APPENDIX

For Appellants Aaron Leigh-Pink and Tana Emerson:

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F. Brenden Coller, Cozen O'Connor P.C., 1650 Market Street, Suite 2800, Philadelphia, PA 19103.

General Docket
United States Court of Appeals for the Ninth Circuit

Court of Appeals Docket #: 19-17556 **Docketed:** 12/23/2019
Nature of Suit: 3370 Other Fraud **Termed:** 03/03/2021
Aaron Leigh-Pink, et al v. Rio Properties, LLC
Appeal From: U.S. District Court for Nevada, Las Vegas
Fee Status: Paid

Case Type Information:
1) civil
2) private
3) null

Originating Court Information:
District: 0978-2 : 2:17-cv-02910-GMN-VCF
Trial Judge: Gloria M. Navarro, District Judge
Date Filed: 11/20/2017

Date Order/Judgment:	Date Order/Judgment EOD:	Date NOA Filed:	Date Rec'd COA:
11/26/2019	11/26/2019	12/20/2019	12/20/2019

Prior Cases:
None

Current Cases:
None

AARON LEIGH-PINK Plaintiff - Appellant,	Robert A. Waller, Jr., Attorney Direct: 760-753-3118 Email: robert@robertwallerlaw.com [COR LD NTC Retained] Law Offices of Robert A. Waller, Jr P.O. Box 999 Cardiff-By-The-Sea, CA 92007
TANA EMERSON Plaintiff - Appellant,	Robert A. Waller, Jr., Attorney Direct: 760-753-3118 [COR LD NTC Retained] (see above)
v.	
CAESARS ENTERTAINMENT CORPORATION, DBA Rio All-Suite Hotel and Casino **Terminated:** 07/29/2020 Defendant - Appellee,	
RIO PROPERTIES, LLC Defendant - Appellee,	F Brenden Coller, Attorney Direct: 215-665-5518 Email: bcoller@cozen.com [COR NTC Retained] COZEN & O'CONNOR One Liberty Place 1650 Market Street Suite 2800 Philadelphia, PA 19103 Richard Fama Direct: 212-908-1229 Email: rfama@cozen.com [COR NTC Retained] Cozen O'Connor 3 WTC 175 Greenwich Street 55th Floor New York, NY 10007

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AARON LEIGH-PINK; TANA EMERSON,

Plaintiffs - Appellants,

v.

RIO PROPERTIES, LLC,

Defendant - Appellee.

12/23/2019	☐ 1 30 pg, 1.62 MB	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. SEND MQ: Yes. The schedule is set as follows: Appellants Tana Emerson and Aaron Leigh-Pink Mediation Questionnaire due on 12/30/2019. Appellants Tana Emerson and Aaron Leigh-Pink opening brief due 02/18/2020. Appellees Caesars Entertainment Corporation and Rio Properties, LLC answering brief due 03/19/2020. Appellant's optional reply brief is due 21 days after service of the answering brief. [11542595] (HC) [Entered: 12/23/2019 03:15 PM]
12/23/2019	☐ 2 3 pg, 357.13 KB	Filed (ECF) Appellants Tana Emerson and Aaron Leigh-Pink Mediation Questionnaire. Date of service: 12/23/2019. [11542796] [19-17556] (Waller, Robert) [Entered: 12/23/2019 04:17 PM]
12/23/2019	☐ 3	The Mediation Questionnaire for this case was filed on 12/23/2019. To submit pertinent **confidential** information directly to the Circuit Mediators, please use the following **link**. Confidential submissions may include any information relevant to mediation of the case and settlement potential, including, but not limited to, settlement history, ongoing or potential settlement discussions, non-litigated party related issues, other pending actions, and timing considerations that may impact mediation efforts.[11543011]. [19-17556] (AD) [Entered: 12/23/2019 06:44 PM]
01/10/2020	☐ 4 5 pg, 169.48 KB	MEDIATION CONFERENCE SCHEDULED - DIAL-IN Assessment Conference, 01/27/2020, 11:00 a.m. PACIFIC Time. The briefing schedule previously set by the court remains in effect. See order for instructions and details. [11557977] (CL) [Entered: 01/10/2020 01:21 PM]
01/27/2020	☐ 5 1 pg, 89.52 KB	MEDIATION ORDER FILED: This case is RELEASED from the Mediation Program. Counsel are requested to contact the Circuit Mediator should circumstances develop that warrant further settlement discussions. [11575756] (CL) [Entered: 01/27/2020 04:50 PM]
02/04/2020	☐ 6	Filed (ECF) notice of appearance of F Brenden Coller (Cozen O'Connor, 1650 Market Street, One Liberty Place, Suite 2800, Philadelphia, PA 19103) for Appellees Caesars Entertainment Corporation and Rio Properties, LLC. Date of service: 02/04/2020. (Party was previously proceeding with counsel.) [11584710] [19-17556] (Coller, F Brenden) [Entered: 02/04/2020 11:41 AM]
02/04/2020	☐ 7	Added Attorney(s) F Brenden Coller for party(s) Appellee Rio Properties, LLC Appellee Caesars Entertainment Corporation. [11584738] (RL) [Entered: 02/04/2020 11:46 AM]
02/18/2020	☐ 8 35 pg, 195.05 KB	Submitted (ECF) Opening Brief for review. Submitted by Appellants Tana Emerson and Aaron Leigh-Pink. Date of service: 02/18/2020. [11600233] [19-17556]--[COURT UPDATE: Attached corrected brief. 02/19/2020 by SML] (Waller, Robert) [Entered: 02/18/2020 02:14 PM]
02/18/2020	☐ 9 127 pg, 6.28 MB	Submitted (ECF) excerpts of record. Submitted by Appellants Tana Emerson and Aaron Leigh-Pink. Date of service: 02/18/2020. [11600249] [19-17556] (Waller, Robert) [Entered: 02/18/2020 02:19 PM]
02/19/2020	☐ 10 1 pg, 91.82 KB	Filed clerk order: The opening brief [8] and excerpts of record [9] submitted by Tana Emerson and Aaron Leigh-Pink are filed. No paper copies are required at this time. [11602158] (SML) [Entered: 02/19/2020 02:55 PM]
03/02/2020	☐ 11	Filed (ECF) Streamlined request for extension of time to file Answering Brief by Appellees Caesars Entertainment Corporation and Rio Properties, LLC. New requested due date is 04/17/2020. [11615121] [19-17556] (Coller, F Brenden) [Entered: 03/02/2020 02:44 PM]
03/02/2020	☐ 12	**Streamlined request [11] by Appellees Caesars Entertainment Corporation and Rio Properties, LLC to extend time to file the brief is approved. Streamlined requests allow for a 30 day extension of time to file the brief. Amended briefing schedule: Appellees Caesars Entertainment Corporation and Rio Properties, LLC answering brief due 04/20/2020. The optional reply brief is due 21 days from the date of service of the answering brief.** [11615167] (JN) [Entered: 03/02/2020 02:56 PM]
03/23/2020	☐ 13 2 pg, 114.44 KB	Filed (ECF) Appellee Caesars Entertainment Corporation Correspondence: Due to logistical issues related to the COVID-19 virus, Defendant-Appellants Caesars Entertainment Corporation and Rio Properties, LLC require a 60-day extension of time to file their Answering Brief, currently due on April 20, 2020.. Date of service: 03/23/2020 [11637784] [19-17556] (Coller, F Brenden) [Entered: 03/23/2020 06:03 AM]
03/26/2020	☐	Updated deadlines. Automatic 60 day extension Re: Notice Covid 19 (Docket Entry No. [13]) Appellees Caesars Entertainment Corporation and Rio Properties, LLC answering brief due 06/22/2020. The optional reply brief is due 21 days after service of the answering brief. [11642690] (EU) [Entered: 03/26/2020 12:16 PM]
06/19/2020	☐ 14 39 pg, 2.25 MB	Filed (ECF) Appellee Rio Properties, LLC Motion for miscellaneous relief [Motion to Correct the Caption]. Date of service: 06/19/2020. [11727132] [19-17556] (Coller, F Brenden) [Entered: 06/19/2020 08:39 AM]
06/19/2020	☐ 15 44 pg, 729.91 KB	Submitted (ECF) Answering Brief for review. Submitted by Appellee Rio Properties, LLC. Date of service: 06/19/2020. [11727429] [19-17556] (Fama, Richard) [Entered: 06/19/2020 10:47 AM]
06/19/2020	☐ 16 1 pg, 91.12 KB	Filed clerk order: The answering brief [15] submitted by Rio Properties, LLC is filed. No paper copies are required at this time. [11727715] (SML) [Entered: 06/19/2020 01:10 PM]

07/03/2020	☐ 17 19 pg, 152.18 KB	Submitted (ECF) Reply Brief for review. Submitted by Appellants Tana Emerson and Aaron Leigh-Pink. Date of service: 07/03/2020. [11741663] [19-17556] (Waller, Robert) [Entered: 07/03/2020 01:32 PM]
07/06/2020	☐ 18 2 pg, 95.23 KB	Filed clerk order: The reply brief [17] submitted by Tana Emerson and Aaron Leigh-Pink is filed. Within 7 days of the filing of this order, filer is ordered to file 6 copies of the brief in paper format, accompanied by certification (attached to the end of each copy of the brief) that the brief is identical to the version submitted electronically. Cover color: gray. The paper copies shall be submitted to the principal office of the Clerk. [11742549] (SML) [Entered: 07/06/2020 11:39 AM]
07/06/2020	☐ 19 2 pg, 137.67 KB	Filed clerk order: The Court previously filed the opening brief [8] and excerpts of record [9] submitted by Appellants Tana Emerson and Aaron Leigh-Pink and the answering brief [15] submitted by Appellee Rio Properties, LLC. *Within 7 days of this order, the filer of each brief is ordered to file 6 copies of that brief in paper format, accompanied by certification (attached to the end of each copy of the brief) that the brief is identical to the version submitted electronically. The Form 18 certificate is available on the Court's website at http://www.ca9.uscourts.gov/forms/form18.pdf.* The covers of the opening brief must be blue. The covers of the answering brief must be red. *Within 7 days of this order, the filer of each set of excerpts of record is ordered to file 3 copies of that set of excerpts in paper format securely bound on the left side, with white covers.* The paper copies shall be submitted to the principal office of the Clerk. The address for regular U.S. mail is P.O. Box 193939, San Francisco, CA 94119-3939. The address for overnight mail is 95 Seventh Street, San Francisco, CA 94103-1526. [11742562] (SML) [Entered: 07/06/2020 11:44 AM]
07/08/2020	☐ 20 3 pg, 85.64 KB	Filed (ECF) Appellants Tana Emerson and Aaron Leigh-Pink Unopposed Motion to extend time to comply with the order dated 07/06/2020. Date of service: 07/08/2020. [11745339] [19-17556] (Waller, Robert) [Entered: 07/08/2020 05:51 AM]
07/09/2020	☐ 21	Received 6 paper copies of Answering Brief [15] filed by Rio Properties, LLC. [11748773] (SD) [Entered: 07/10/2020 12:09 PM]
07/14/2020	☐ 22	Received 3 paper copies of excerpts of record [9] in 3 volume(s) filed by Appellants Tana Emerson and Aaron Leigh-Pink. [11752640] (KWG) [Entered: 07/14/2020 02:04 PM]
07/14/2020	☐ 23	Received 6 paper copies of Reply Brief [17] filed by Tana Emerson and Aaron Leigh-Pink. [11753676] (LA) [Entered: 07/15/2020 11:20 AM]
07/14/2020	☐ 25	Received 6 paper copies of Opening Brief [8] filed by Tana Emerson and Aaron Leigh-Pink. [11758447] (DB) [Entered: 07/20/2020 11:06 AM]
07/17/2020	☐ 24 1 pg, 99.83 KB	Filed clerk order (Deputy Clerk: SSR): Appellant's unopposed motion (Docket Entry No. [20]) for an extension of time to file the paper copies is granted. The paper copies for the excerpts of record and reply brief have been received. The paper copies for the opening brief are due July 20, 2020. [11757734] (OC) [Entered: 07/17/2020 05:11 PM]
07/20/2020	☐ 26	Received 6 additional paper copies of Opening Brief [8] filed by Tana Emerson and Aaron Leigh-Pink. [11763282] (SD) [Entered: 07/23/2020 10:27 AM]
07/29/2020	☐ 27 1 pg, 98.03 KB	Filed clerk order (Deputy Clerk: SZ): Appellee Rio Properties, LLC's unopposed motion to amend the caption (Docket Entry No. [14]) is granted. The Clerk shall amend the docket to reflect that Rio Properties, LLC is the only appellee in this appeal. Briefing is complete. [11770348] (OC) [Entered: 07/29/2020 10:19 AM]
08/03/2020	☐ 28	This case is being considered for an upcoming oral argument calendar in Pasadena Please review the Pasadena sitting dates for November 2020 and the 2 subsequent sitting months in that location at http://www.ca9.uscourts.gov/court_sessions. If you have an unavoidable conflict on any of the dates, please file Form 32 **within 3 business days of this notice** using the CM/ECF filing type **Response to Case Being Considered for Oral Argument**. Please follow the form's instructions carefully. When setting your argument date, the court will try to work around unavoidable conflicts; the court is not able to accommodate mere scheduling preferences. You will receive notice that your case has been assigned to a calendar approximately 10 weeks before the scheduled oral argument date. If the parties wish to discuss settlement before an argument date is set, they should jointly request referral to the mediation unit by filing a letter **within 3 business days of this notice**, using CM/ECF (**Type of Document**: Correspondence to Court; **Subject**: request for mediation).[11775947]. [19-17556] (AW) [Entered: 08/03/2020 07:51 PM]

08/04/2020	☐ 29 1 pg, 99.87 KB	Filed (ECF) Attorney Robert A Waller, Jr. for Appellants Tana Emerson and Aaron Leigh-Pink response to notice for case being considered for oral argument. Date of service: 08/04/2020. [11776137] [19-17556] (Waller, Robert) [Entered: 08/04/2020 08:39 AM]
08/19/2020	☐ 30	This case is being considered for an upcoming oral argument calendar in Pasadena Please review the Pasadena sitting dates for December 2020 and the 2 subsequent sitting months in that location at http://www.ca9.uscourts.gov/court_sessions. If you have an unavoidable conflict on any of the dates, please file Form 32 **within 3 business days of this notice** using the CM/ECF filing type **Response to Case Being Considered for Oral Argument**. Please follow the form's instructions carefully. When setting your argument date, the court will try to work around unavoidable conflicts; the court is not able to accommodate mere scheduling preferences. You will receive notice that your case has been assigned to a calendar approximately 10 weeks before the scheduled oral argument date. If the parties wish to discuss settlement before an argument date is set, they should jointly request referral to the mediation unit by filing a letter **within 3 business days of this notice**, using CM/ECF (**Type of Document**: Correspondence to Court; **Subject**: request for mediation).[11795697]. [19-17556] (AW) [Entered: 08/19/2020 06:43 PM]
09/27/2020	☐ 31	Notice of Oral Argument on Thursday, December 10, 2020 - 09:30 A.M. - Courtroom 3 - Scheduled Location: Pasadena CA. The hearing time is the local time zone at the scheduled hearing location, even if the argument is fully remote. View the Oral Argument Calendar for your case **here**. NOTE: Although your case is currently scheduled for oral argument, the panel may decide to submit the case on the briefs instead. *See* Fed. R. App. P. 34. Absent further order of the court, if the court does determine that oral argument is required in this case, any argument may be held **remotely** with all of the judges and attorneys appearing by video or telephone. Travel to a courthouse will not be required. If the panel determines that it will hold oral argument, the Clerk's Office will be in contact with you directly at least two weeks before the set argument date to make any necessary arrangements for remote appearance. Be sure to review the GUIDELINES for important information about your hearing, including when to be available (30 minutes before the hearing time) and when and how to submit additional citations (filing electronically as far in advance of the hearing as possible). If you are the specific attorney or self-represented party who will be arguing, use the **ACKNOWLEDGMENT OF HEARING NOTICE** filing type in CM/ECF no later than 21 days before Thursday, December 10, 2020. No form or other attachment is required. If you will not be arguing, do not file an acknowledgment of hearing notice.[11838087]. [19-17556] (AW) [Entered: 09/27/2020 06:13 AM]
09/28/2020	☐ 32	Filed (ECF) Acknowledgment of hearing notice by Attorney Robert A Waller, Jr. for Appellants Tana Emerson and Aaron Leigh-Pink. Hearing in Pasadena on 12/10/2020 at 09:30 A.M. (Courtroom: Courtroom 3). Filer sharing argument time: No. Special accommodations: NO. Filer admission status: I certify that I am admitted to practice before this Court. Date of service: 09/28/2020. [11839858] [19-17556] (Waller, Robert) [Entered: 09/28/2020 04:27 PM]
11/10/2020	☐ 33	Filed (ECF) Acknowledgment of hearing notice by Attorney Mr. Richard Fama for Appellee Rio Properties, LLC. Hearing in Pasadena on 12/10/2020 at 09:30 A.M. (Courtroom: Courtroom 3). Filer sharing argument time: No. Special accommodations: NO. Filer admission status: I certify that I am admitted to practice before this Court. Date of service: 11/10/2020. [11888394] [19-17556] (Fama, Richard) [Entered: 11/10/2020 12:48 PM]
12/10/2020	☐ 34	ARGUED AND SUBMITTED TO RONALD M. GOULD, RYAN D. NELSON and BRIAN M. COGAN. [11922416] (DLM) [Entered: 12/10/2020 12:02 PM]
12/11/2020	☐ 35 1 pg, 18.14 MB	Filed Audio recording of oral argument. **Note:** Video recordings of public argument calendars are available on the Court's website, at http://www.ca9.uscourts.gov/media/ [11924700] (DLM) [Entered: 12/11/2020 02:43 PM]
03/03/2021	☐ 36 10 pg, 155.32 KB	Order filed for PUBLICATION (RONALD M. GOULD, RYAN D. NELSON and BRIAN M. COGAN) We respectfully request that the Supreme Court of Nevada accept and decide the question certified herein. The clerk of this court shall forward a copy of this order, under official seal, to the Supreme Court of Nevada, along with copies of all briefs and excerpts of the record that have been filed in this court. (SEE ORDER FOR FULL TEXT). Further proceedings in our court are stayed pending resolution of the Supreme Court's decision whether to accept the certified question and, if so, the receipt of the answer to the certified question. The clerk is directed to administratively close this docket, pending further order. The panel will

		resume control and jurisdiction on the certified question upon receiving an answer to the certified question or upon the decision to decline to answer the question. The parties shall notify the clerk of this court within 14 days of any decision by the Supreme Court of Nevada to accept or decline certification. If the Supreme Court accepts certification, the parties shall file a joint status report every six months after the date of acceptance, or more frequently if the circumstances warrant. As required by Rules 5(c)(4) and 5(c)(5) of the Nevada Rules of Appellate Procedure, we have provided in the appendix the names and addresses of counsel and have designated which party will serve as the appellant and the respondent should the Supreme Court of Nevada accept certification. IT IS SO ORDERED. [12022381] (AKM) [Entered: 03/03/2021 08:21 AM]
03/03/2021	☐ 37 7 pg, 181.26 KB	FILED MEMORANDUM (RONALD M. GOULD, RYAN D. NELSON and BRIAN M. COGAN) We have certified this question to the Supreme Court of Nevada for the reasons set forth in the order filed concurrently with this memorandum. The panel shall retain jurisdiction over this case pending resolution of that question, and we stay further proceedings in this appeal. For the claims addressed above, however, the judgment of the district court is AFFIRMED IN PART AND REVERSED IN PART. [12022383] (AKM) [Entered: 03/03/2021 08:24 AM]
03/03/2021	☐ 38 1 pg, 153.91 KB	Transmitted to the Nevada State Supreme Court: an original certification order; a copy of the certified docket report; 3 briefs; 3 volumes of excerpts of record. State Supreme Court Case Number: 82572. Tracking Information: e-filed. [12022549]--[Edited 03/03/2021 by AKM] (AKM) [Entered: 03/03/2021 09:35 AM]
03/08/2021	☐ 39 1 pg, 12.8 KB	Filed Supreme COurt of the State of Nevada Office of the Clerk letter dated 03/03/2021 re: Receipt for documents. Paper filing deficiency: None. (PANEL) [12028206] (RL) [Entered: 03/08/2021 03:56 PM]
03/09/2021	☐ 40 26 pg, 1.09 MB	Filed (ECF) Appellee Rio Properties, LLC Motion to extend time to file petition for rehearing until 03/12/2021. Date of service: 03/09/2021. [12030234] [19-17556] (Coller, F Brenden) [Entered: 03/09/2021 09:34 PM]
03/11/2021	☐ 41 1 pg, 98.75 KB	Filed order (RONALD M. GOULD, RYAN D. NELSON and BRIAN M. COGAN) Appellee's motion (Dkt. No. [40]) for clarification of the court's memorandum or, in the alternative, for an extension of time to file a motion for reconsideration and request a rehearing en banc is GRANTED IN PART. The deadline for filing a petition for panel rehearing or a petition for rehearing en banc is stayed until the resolution of the remaining issues on this appeal. [12032600] (WL) [Entered: 03/11/2021 02:10 PM]
04/09/2021	☐ 42 3 pg, 294.1 KB	Received a copy of Supreme Court of the State of Nevada order re: Order accepting certified question, directing briefing, and directing submission of filing fee. (PANEL) [12069989] (RL) [Entered: 04/09/2021 04:46 PM]
04/29/2021	☐ 43 1 pg, 10.42 KB	Received a copy of Supreme Court of the State of Nevada Office of the Clerk document dated 04/26/2021 re: Receipt of documents. You are hereby notified that the Clerk of the Supreme Court has received and/or filed the following: 04/26/2021 Filing Fee Paid. $125.00 from Cozen O'Connor. (Respondent) (PANEL) [12097405] (RL) [Entered: 04/29/2021 04:27 PM]

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CERTIFICATE OF SERVICE

This is to certify that on July 12, 2021, a true and correct copy of the foregoing **APPELLANTS' APPENDIX (CORRECTED)** 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:

Richard Fama Email: rfama@cozen.com COZEN O'CONNOR 45 Broadway Atrium, Suite 1600 New York, New York 10006 Telephone: 212-908-1229 Counsel for Respondent	F. Brenden Coller Email: bcoller@cozen.com COZEN O'CONNOR 1650 Market Street, Suite 2800 Philadelphia, Pennsylvania 19103 Telephone: 215-665-5518 Counsel for Respondent
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Dated: July 12, 2021

/s/ Robert A.Waller, Jr.
Robert A. Waller, Jr.
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Counsel for Appellants
AARON LEIGH-PINK and
TANA EMERSON