IN THE SUPREME COURT OF THE STATE OF NEVADA

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

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

RESPONDENT'S ANSWERING BRIEF

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NRAP 26.1 DISCLOSURE

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

1. Respondent Rio Properties, LLC is owned by Caesars Nevada Newco, LLC, which is owned by Caesars Palace, LLC, which is owned by Caesars Resort Collection, LLC, which is owned by Caesars Growth Partners, LLC, which is owned by Caesars Holding, Inc., which is owned by Caesars Entertainment, Inc., a publicly traded entity. Blackrock, Inc. may hold 10 percent or more of Caesars Entertainment, Inc.'s stock.

2. Attorneys who have appeared for Respondent Rio Properties, LLC in the proceedings in the United States District Court for the District of Nevada, the United States Court of Appeals for the Ninth Circuit, and this Court are the following:

a. Richard Fama, F Brenden Coller, and Karl O. Riley of Cozen O'Connor.

b. Robert L. Eisenberg of Lemons, Grundy & Eisenberg.

c. Janice M. Michaels of Wood, Smith, Henning & Berman, LLP.

d. Lewis W. Brandon, Jr. of Brandon Smerber Law Firm.

DATED: October 1, 2021

/s/ Karl O. Riley

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STATEMENT OF THE ISSUE PRESENTED

This matter is before the Court on a certified question ("Certified Question") from the United States Court of Appeals for the Ninth Circuit ("Ninth Circuit"). The Certified Question states:

> 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?

Appx. 218. In certifying the question, the Ninth Circuit stated "[w]e 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." Appx. 221-22.

STATEMENT OF THE CASE

Appellants originally filed this putative class action in the Eighth Judicial District Court, Clark County, Nevada, and Respondent subsequently removed the case to the United States District Court for the District of Nevada ("District Court"). The District Court twice dismissed Appellants' claims on the basis that they failed to state a claim upon which relief can be granted. Pertinent to the

Certified Question, the District Court concluded that Appellants did not adequately allege damages as a result of the alleged presence of *Legionella* bacteria in certain parts of the water system at the Rio All-Suites Hotel and Casino (the "Hotel") because Appellants paid a "resort fee" for the use of certain amenities at the Hotel, and Appellants did not allege that they did not have complete, unrestricted access to those amenities.

Appellants appealed to the Ninth Circuit on or about December 20, 2019, which was argued on December 10, 2020. On March 3, 2021, the Ninth Circuit issued the Certified Question as to damages related to two of Appellants' causes of action for evaluation by this Court under Nevada law.

STATEMENT OF FACTS RELEVANT TO THE CERTIFIED QUESTION

Answering the Certified Question in the affirmative would have a catastrophic effect on those who do business in the State of Nevada because it would result in limitless liability in so-called "no injury" class actions. Indeed, an affirmative answer would validate a claim for damages, attorneys' fees, and costs when consumers purchased and utilized goods and services (and realized all related benefits), only to later claim they would not have purchased the goods or services but for some misrepresentation or failure to inform the consumers about something regarding the consumed goods or services. As discussed more fully below, such a holding would permit plaintiffs in Nevada to secure windfalls, thereby opening the

floodgates to a panoply of futile lawsuits that all Nevada businesses would have to defend.

Appellants' claims arise from their alleged stays at the Hotel in 2017. Appx. 45-72. Appellant Aaron Leigh-Pink stayed at the Hotel twice—from May 12, 2017 to May 14, 2017 and again from September 1, 2017 to September 4, 2017. Appx. at 48, ¶ 11. Appellant Tana Emerson stayed at the Hotel once from June 7, 2017 to June 9, 2017. Appx. 48, ¶ 13. As Appellants allege and the Ninth Circuit noted, Appellants did not pay for their rooms and paid only the "resort fee," which is for access to certain Hotel amenities. Appx. 219 ("The rooms were complimentary, so the only charge that [Appellants] incurred was a $34.01 per day 'resort fee' that covered access to the internet, telephones, and use of the fitness room."); Appx. 55, ¶ 41 (alleging Appellants paid the "Resort Fee of $34.01 per day" and that their "'room rate' had been 'comp'ed' by [Respondent]"). After their stays, Appellants allegedly learned that there was purportedly *Legionella* bacteria in certain areas of the Hotel's water system, but they do not allege that they ever contracted Legionnaire's disease or that the *Legionella* affected their stays. Appx. 48, ¶ 10.

Appellants subsequently sued on behalf of themselves and a putative class of persons who were registered guests at the Hotel while *Legionella* bacteria purportedly existed in certain Hotel water systems. Appx. 49, ¶ 19. Appellants do not allege—and do not seek any damages for—personal or emotional injury or

interference with their alleged stays or use of amenities at the Hotel. Appx. 45-72. Rather, Appellants pursue an "untested theory" that "they would not have stayed at the [Hotel] . . . had the [Hotel] disclosed the *legionella* contamination." Appx. 221. As stated above, neither Appellant alleges that the amenities for which they paid as part of the "resort fee" were inhibited or affected in any way due to the purported presence of *Legionella*. Appx. 45-72. As noted by the Ninth Circuit, the District Court found that Appellants "received access to the amenities that the [resort] fee covered." *See* Appx. 221. Based on this and the lack of any personal injury, the District Court dismissed all of Appellants' claims because they "received the 'benefit of the bargain' and suffered no damages." Appx. 220-21.

SUMMARY OF THE ARGUMENT

When guests stay at a hotel and receive access to certain amenities for which they pay—or consumers purchase a good or service and use the intended benefits of the good or service—they have not suffered "damages" under Nevada law, particularly where, as the Ninth Circuit has found here, the value of those amenities (or other good or service) was equal to or greater than the amount paid. To conclude the opposite—that there are cognizable "damages"—would impose a crushing burden on Nevada courts and businesses from "no injury" class action lawsuits. Indeed, answering the Certified Question in the affirmative would encourage class action lawsuits and allow for plaintiffs to obtain windfalls by

recovering the amounts they paid with no setoff for the benefits they received and enjoyed. For example:

- Guests stay at a hotel without incident and then six months later learn that there were three slip-and-fall accidents in an allegedly hazardous area of the hotel lobby prior to their stay. An affirmative answer to the Certified Question would allow for an award of damages in the full amount the guests paid to stay at the hotel on the basis that had the hotel informed them of the accidents, they would not have stayed there.
- Guests stay at a resort without incident and then six months later learn that there was a robbery in the parking structure years before they stayed there. An affirmative answer to the Certified Question would allow for an award of damages in the full amount they paid to stay at the resort on the basis that had the hotel advised the guests of the robbery, they would not have stayed there.
- Customers hire a plumber who successfully repairs leaking pipes in their homes. Six months later the customers learn that the plumbing company received prior complaints about the quality of the plumber's work, despite the plumbing company's representation to the customers that the plumber's work is always

performed to the satisfaction of its customers. An affirmative answer to the Certified Question would allow for an award of damages in the full amount paid by the customers on the basis that they would not have hired the plumber had the plumbing company disclosed the history of complaints about the plumber's work.

- Patrons of a nightclub have pleasant discussions and interactions with the club's security staff and otherwise have a safe and enjoyable evening at the club. However, months later the patrons learn that members of the security staff have criminal records of robbery and assault and battery. An affirmative answer to the Certified Question would allow for an award of damages in the total amount the patrons paid to the nightclub on the basis that they would not have frequented the club had they known of the staff members' criminal history.

There is no support under Nevada law that these hypothetical plaintiffs have compensable "damages" for which they can bring a cause of action.[1] Yet, Appellants and Amici advocate for those similarly situated to be compensated and,

[1] Respondent anticipates that Appellants may attempt to distinguish these hypotheticals by arguing that some of them do not contain claims of fraud. However, the Court can interject allegations of fraud into any of the hypotheticals and the result will still be the same. Appellants' anticipated focus on the fraudulent conduct highlights their conflation of the act with the injury.

in doing so, eviscerate decades of this Court's precedent and expose Nevada courts and businesses to unlimited lawsuits for such after-the-fact "they should have told me" claims for circumstances in which business patrons suffered no damages.

At the outset, this Court should reject Appellants' Opening Brief because they improperly attempt to change the Certified Question. The Ninth Circuit's question, in no uncertain terms, was posed as whether a consumer was damaged if the consumer received a good or service with the same or greater value as to what he or she paid. Unhappy with the Ninth Circuit's characterization of their claims, Appellants use their Opening Brief to redirect the Certified Question to obtain an answer to a question that was never asked, *to wit*, whether they were "damaged" if they paid more for the "resort fee" than it was worth. But this is not the question posed by the Ninth Circuit and an answer to it would have no bearing on the Certified Question.

It is axiomatic that "damages"—as that term is used in NRS 41.600 and common law fraudulent concealment—are meant to be compensatory. In other words, "damages" are meant to compensate for one's loss. This interpretation is supported by the express language of NRS 41.600 and this Court's recitation of the elements of a fraudulent concealment claim. Contrary to Appellants and Amici's arguments, "damages," for purposes of those claims, are not intended to punish or penalize an alleged wrongdoer.

Because damages are intended to compensate for one's loss, the issue before the Court is how to measure that loss in a fraud-based claim under the factual scenario contemplated by the Certified Question. This Court has reaffirmed for more than fifty years that the appropriate measures of damages for fraud-based claims are the benefit of the bargain and out of pocket loss theories. In all of the hallmark cases decided by this Court regarding damages in fraud-based claims, this Court assessed damages by calculating the amounts paid by a plaintiff and then reducing that amount by the value of what was received in exchange for the payment. In none of the cases cited by Appellants or Amici has this Court ever awarded a windfall to a plaintiff by refunding the amount paid for a good or service while, at the same time, permitting the plaintiff to keep the benefits of the good or service for which he or she paid. Yet, this radical departure from precedent is exactly what Appellants and Amici advocate for here.

Appellants attempt to suggest that other jurisdictions' case law supports answering the Certified Question in the affirmative, yet all of the cases they cite are distinguishable. In fact, in most of the cases cited by Appellants, the courts set forth the same standard as used by Nevada courts (by comparing the amounts paid and the value received) and concluded that the consumers in those cases allegedly received something of lesser value than what they paid. Even under those other states' analyses, therefore, the damages awardable to consumers similarly situated

to Appellants (*e.g.* consumers who received something of greater or equivalent value to what they paid) are zero. In short, the cases cited by Appellants do not stand for the principle that consumers may receive a full refund for goods or services they purchased on the allegation that they would not have purchased it but for the defendant's alleged fraudulent conduct when the consumers received all of the intended benefits of the goods or services and enjoyed those benefits without incident.

Respectfully, Nevada should follow the reasoning of courts throughout the country in similar situations. In those cases, like here, consumers alleged after they received the benefit of their bargain (*e.g.*, the full use and enjoyment of goods or services) that they would not have purchased the subject goods or services had they known of some alleged concealed or suppressed fact or had some alleged misrepresentation not been made. Those courts, however, reasoned that when a consumer receives the full benefit of the bargain (such as, if a consumer purchases a medication for an intended effect on his or her body and receives that intended effect without any physical injury arising from certain undisclosed risks associated with the medication), no damages exist under those states' consumer protection statutes. The same is true for the hypothetical consumer identified in the Certified Question.

Apparently recognizing that compensatory damages are not available under their NRS 41.600 or fraudulent concealment claims, both of which are legal claims, Appellants set forth a convoluted argument that their "unjust enrichment" damages may satisfy the "damages" elements of their legal claims. This theory is equally unavailing. An equitable claim for unjust enrichment is inherently incompatible—and cannot exist—with a legal claim for fraud because a claim for unjust enrichment requires that there be no adequate remedy at law. Because these two claims cannot co-exist, alleged damages for one claim may not constitute damages for the other. And, even if it were permissible, Nevada law measures damages under an unjust enrichment theory by looking to the value of services. To that end, when the value of what was received is the same as or greater than the value of what was paid, there can be no unjust enrichment damages that would be sufficient to satisfy the "damages" element of a fraud claim.

Finally, Appellants and Amici argue that Nevada consumers would have no redress if the goods or services they received do not comply with their expectations, using as an example a consumer who receives a scarf instead of a bargained-for bicycle. But Appellants' scarf-bicycle example represents a wildly different factual scenario than that which exists here and gives rise to the Certified Question. In this example, the scarf is of no value to the hypothetical consumer because it does provide the consumer with any of the intended uses of a bicycle,

namely to serve as a means of recreation, exercise, or transportation. Here, Appellants do not allege that the amenities they received did not satisfy their intended uses; they admittedly received gym access, internet, and local telephone calls during their respective stays at the Hotel. Rather, all they allege is that they would not have paid the Hotel's resort fee had they known of the risks associated with alleged *Legionella* in the Hotel's water system, even though the amenities associated with the resort fee were unaffected by *Legionella*. In so doing, Appellants are alleging deception as both the act and injury.

Further, Appellants' argument that consumers will be without redress if this Court answers the Certified Question in the affirmative misses the mark. Under existing Nevada law, consumers will have no redress only where, like here, they have suffered no damages. This Court need not disturb well-settled jurisprudence to fashion a remedy for a claim that is simply without merit and results in no damages.

As Appellants and Amici would have it, consumers would receive a windfall in consumer fraud actions where they purchase a good or service, fully enjoy the benefits of that good or service, and then bring an action to receive a full refund of the purchase price while still realizing the benefits of the good or service. Such a holding stretches compensatory damages beyond that which is acceptable and alters the meaning and purpose of compensatory damages under Nevada law.

Respectfully, this Court should refrain from answering the Certified Question in the affirmative when such a conclusion would have the potential effect of opening the floodgates to "no injury" litigation in Nevada which could be ruinous for entities doing business in the state.

ARGUMENT

I. Appellants And Amici Attempt To Rewrite The Certified Question To Ignore That The Ninth Circuit Found That Appellants Received The Full Value Of That For Which They Paid

The primary arguments raised in Appellants' Opening Brief should be ignored because they fail to answer the actual question certified by the Ninth Circuit and accepted by this Court. As much as Appellants argue to the contrary, the Certified Question is ***not***, and has never been, whether a consumer who receives something of lesser value than the amount he or she paid is "damaged" under Nevada law. Rather, the scope of the accepted Certified Question is limited to situations where the product or service received "was **not** worth less than what the plaintiff paid." Appx. 218 (emphasis added). Nor is the Certified Question whether consumers are "damaged" under Nevada law if they purportedly receive an entirely different good or service than expected.

To be sure, Appellants bargained for the amenities associated with the resort fee and their enjoyment and use of the amenities associated with the resort fee were not in any way impacted by the alleged presence of *Legionella* bacteria. In

other words, this is not a situation where Appellants bargained for a bicycle and received a scarf as at least one Amici suggests. Rather, the Ninth Circuit asked this Court to answer whether consumers have been "damaged" under Nevada law even where they received the intended benefit of a good or service and that intended benefit is of the same or greater value than what they paid. *Id.*

Appellants did not brief this question because Nevada law simply does not support their position and claim to damages. Fearing that an answer to the ***actual*** Certified Question in the negative would dispense with their NRS 41.600 and fraudulent concealment claims, Appellants pose an entirely different question to this Court. In doing so, they assert different facts than those presented by the Ninth Circuit by claiming that what they received was worth *less* than what they paid—a factual issue rejected by the Ninth Circuit. *See, e.g.*, Opening Brief of Appellants ("Op. Br.") at 2 ("To be sure, and, respectfully, contrary to the question certified by the Ninth Circuit, Appellants have *always maintained and alleged* throughout this action the value of the hotel room and facilities in which they stayed at the Rio Hotel *is worth nothing, or is worth less*, than what Appellants paid to stay at the Hotel.") (italics in original). *See also id.* ("Appellants have alleged consistently they paid more than what a room in a non-*Legionella* bacteria-infected hotel is worth to the average consumer whether that payment was in the form of an unspecified "Resort Fee" or a regular room charge . . . .").

Appellants' attempt to change the factual basis of the Certified Question is improper under Nevada law. Indeed, this Court has previously confirmed on multiple occasions that it is bound by the facts contained in the Certification Order, and this Court refrains from making any additional findings of fact. *See In re Fontainebleau Las Vegas Holdings*, 127 Nev. 941, 956, 267 P.3d 786, 795 (2011) ("We are persuaded by the majority approach and hold that this court is bound by the facts as stated in the certification order and its attachment and that this court cannot make findings of fact in responding to a certified question."); *Figueroa-Beltran v. United States*, 136 Nev. 386, 388, 467 P.3d 615, 619 (2020) ("As the answering court, our role is limited to answering the questions of law posed to [us;] the certifying court retains the duty to determine the facts and to apply the law provided by the answering court to those facts. Thus, [w]e accept the facts as stated in the certification order and its attachments.") (internal citation and quotation marks omitted; alterations in original); *Nalder on behalf of Nalder v. United Automobile Insurance Company*, 2019 WL 5260073 at *2 (Nev. Sep. 20, 2019; No. 70504; unpublished disposition) (declining to consider certain "arguments because they exceed the scope of the certified question, require application of law to facts that are disputed, or involve alleged facts not included in the original or supplemental certified question orders").

Despite this clear authority, Appellants repeatedly attempt to change the Ninth Circuit's Certified Question by arguing that the value of what they received was less than what they paid, and ask the Court to assume these different facts when answering the Certified Question. *See, e.g.*, Op. Br. at 2 ("Appellants have alleged consistently they paid more than what a room in a non-*Legionella* bacteria-infected hotel is worth to the average consumer . . . ."); *id.* at 4 (appearing to change question to "[h]ave guests of the hotel suffered 'any damages' under N.R.S. 41.600 when they paid the hotel money to stay there . . . when the guests would not have stayed at the hotel in the first place, or they paid more for the hotel room than it is worth compared to a hotel that does not have an uncontrolled *Legionella* bacteria outbreak?"); *id.* at 9-10 (arguing that "NRS 41.600 does include recovery of damages based on a theory the plaintiff paid for a product or service they would not have otherwise purchased, or paid more for that product or service tha[n] it is worth").

Answering the questions posed by Appellants would require this Court to ignore its own precedent and assume facts other than those which are contained in the Certification Order. Respectfully, the Court should not determine any facts and should accept what is contained in the Certification Order. To that end, the sole question—which is unanswered by Appellants' Opening Brief—is whether consumers have sustained "damages" under Nevada law if they pay money for a

good or service, receive the benefits of the good or service which is equal to or greater than the value he or she paid, and enjoy the benefits of the good or service, only to later claim that they would not have purchased it. The answer to that inquiry, based upon Nevada law and the law of the majority of the country, is "no."

II. This Court Should Answer The Certified Question In The Negative Because Consumers Who Receive And Fully Enjoy The Intended Benefits Of The Goods Or Services They Purchase Are Not "Damaged"

Consumers who pay for goods or services, and receive and fully enjoy the intended benefits of those goods or services, are not damaged under Nevada law. Attempting to stoke fear, Amici pose wild hypotheticals that are not rooted in the same factual background posed by the Ninth Circuit. For instance, one Amici argues that answering the Certified Question in the negative would result in consumers having "no claim for damages if the defendant represented that the product was a non-refundable hotel room in Las Vegas when the room was actually in Reno, or represented that the room was a family suite that slept five people when it was actually a standard room for two—as long as the defendant generally charged the same amount for the rooms." *See* Brief of Amici Curiae of Public Citizen, et al. ("Public Citizen Amicus Br.") at 11. It continues to argue that answering the Certified Question in the negative would result in a plaintiff having no claim for damages if she "was led to believe she was buying a $200 bicycle" and "instead she is given a $200 scarf." *Id.*

The Court need not answer whether consumers are damaged after receiving a bicycle instead of a scarf or otherwise receive goods or services that do not provide them with the intended uses for which they bargained. Nor does this Court need to answer whether consumers have been damaged when they received something of a different value, as that question was not asked by the Ninth Circuit. Instead, it is respectfully requested that this Court exercise restraint and answer the limited, narrow question posed by the Certified Question: is a consumer damaged under Nevada law when he or she receives a good or service of equal or greater value to what he or she paid? The answer to that limited, narrow question is what "may be determinative of the cause." *See* NRAP 5(a).

Long-standing Nevada law supports answering the Certified Question in the negative. As noted in the underlying proceedings, Appellants' fraud-based claims require "damages." Damages in this context are compensatory—not punitive—and are intended to provide a plaintiff with compensation for a loss if, and only if, a loss is incurred. They are not—as Appellants and Amici encourage—intended to provide a windfall to a plaintiff or to punish an alleged wrongdoer. Given the purpose behind compensatory damages, the damages analysis conducted by this Court in fraud-based claims has repeatedly been an assessment of the value paid versus the value received.

A. "Damages" For Purposes Of NRS 41.600 And Fraudulent Concealment Are Compensatory And Not Punitive

In general, "damages" in Nevada fall within two categories—compensatory and penal (punitive). *See, e.g.*, *Webb v. Shull*, 128 Nev. 85, 90-92, 270 P.3d 1266, 1269-71 (2012) (determining whether treble damages under statute were meant to "penalize or compensate"). As discussed in the following sections, "damages," as that phrase is used in NRS 41.600 and applied to common law fraudulent concealment claims, are intended to compensate a claimant and not to punish an alleged wrongdoer.

1. Based Upon The Express Language Of NRS 41.600, "Damages" Are Intended To Compensate For A Loss, Not To Punish A Defendant

The plain language of NRS 41.600 and the meaning and purpose of "damages" under Nevada law support that they are intended only to compensate claimants for their loss as a result of alleged wrongdoing. At least one Amici advocates for this Court to interpret "damages" as a penalty. *See, e.g.*, Amicus Brief of the Legal Aid Center of Southern Nevada, Inc. ("Legal Aid Amicus Br.") at 3 (arguing Nevada Deceptive Trade Practices Act ("NDTPA") "is expansive and remedial in nature . . . with the express intent . . . to allow consumers to penalize deception") (emphasis added); *id.* at 7 (describing provision for an award of "any damages" sustained as a "penalt[y]"); *id.* at 10 ("The NDTPA seeks not only to make a prevailing claimant monetarily whole, but also penalizes the deception and

prevent the profitability of fraud."). This position is unsupported by the express language of NRS 41.600 and the meaning of damages under Nevada law.

First, the plain language of NRS 41.600 makes clear that the statute's intent is to compensate consumers for actual losses sustained. NRS 41.600 provides for an award of "[a]ny damages that the claimant has sustained." *See* NRS 41.600(3)(a). When determining legislative intent, the Court should apply the common and ordinary meaning of the statute's words and phrases. *See McGrath v. State Dep't of Pub. Safety*, 123 Nev. 120, 123, 159 P.3d 239, 241 (2007) ("In interpreting the plain language of a statute, we presume that the Legislature intended to use words in their usual and natural meaning."); *McKay v. Bd. of Supervisors of Carson City*, 102 Nev. 644, 648, 730 P.2d 438, 441 (1986) ("Where a statute is clear on its face, a court may not go beyond the language of the statute in determining the legislature's intent."). Here, the plain and ordinary meaning of NRS 41.600 is that it is intended to compensate losses because a claimant cannot "sustain" damages that are meant to punish an alleged wrongdoer. *See Bader v. Cerri*, 96 Nev. 352, 359, 609 P.2d 314, 318 (1980) ("punitive damages are not to compensate an injured person for the loss sustained, but to punish a defendant") *overruled on other grounds in Evans v. Dean Witter Reynolds, Inc.*, 116 Nev. 598, 5 P.3d 1043 (2000).

Appellants and Amici concede that "damages" are intended to compensate for one's loss. *See, e.g.*, Op. Br. at 8 (arguing that "damages are awarded to make the aggrieved party whole"); Public Citizen Amicus Br. at 7 (arguing "[d]amages 'compensat[e] injured parties for their 'loss or injury.'") (quoting *Damages*, Black's Law Dictionary (11th ed. 2019)); Legal Aid Amicus Br. at 20 ("When awarding damages, the goal is the same: to put the defrauded plaintiff back in the position he was in before he was defrauded."). At its very core, Nevada recognizes that the purpose of damages is to make a claimant whole, *see, e.g., Detwiler v. Eighth Judicial Dist. Court in and for County of Clark*, 137 Nev. ___, 486 P.3d 710, 719 (2021) ("Like tort damages, compensatory contempt sanctions serve to make the innocent party whole."), and this Court has held that a plaintiff "may not unfairly profit from a defendant's wrongdoing." *See Davis v. Beling*, 128 Nev. 301, 319 n.7, 278 P.3d 501, 513 n.7 (2012). It is clear, then, that "damages" for purposes of NRS 41.600 do not have a punitive purpose and are limited to providing claimants with compensation for an actual loss to the extent a loss has been incurred.

The Legislature's intent is further evidenced by the lack of any reference to punitive damages in the text of NRS 41.600 despite the fact that the Legislature referenced punitive damages in other statutes. *See Williams v. State Dep't of Corrs.*, 133 Nev. 594, 598, 402 P.3d 1260, 1264 (2017) ("We must presume that

the variation in language indicates a variation in meaning."); *see also Loughrin v. United States*, 573 U.S. 351, 358 (2014) ("[W]hen [the Legislature] includes particular language in one section of a statute but omits it in another[,] . . . this Court presumes that [the Legislature] intended a difference in meaning.") (internal quotation marks and alteration omitted); *Richardson Constr., Inc. v. Clark Cnty. Sch. Dist*., 123 Nev. 61, 65, 156 P.3d 21, 23 (2007) ("[W]hen a statute provides an express remedy, courts should be cautious about reading additional remedies into the statute."). Indeed, the Legislature is clearly aware of how to provide for punitive damages and, if it intended to do so in connection with NRS 41.600, it would have expressly provided for such. *Compare* NRS 598.0977 (providing for "punitive damages, if appropriate" if an "elderly person or a person with a disability suffers damage or injury as a result of a deceptive trade practice") *with* NRS 41.600 (no reference to punitive damages).

Nor is the plain language of NRS 41.600 altered by describing the NDTPA as a "remedial" statute. Appellants and Amici attempt to improperly expand the damages available under NRS 41.600 by emphasizing that the NDTPA is a "remedial" statute and, therefore, should be given broader application than that intended by the Legislature. *See, e.g.*, Op. Br. at 7 ("The NDTPA is a remedial statutory scheme designed to redress existing grievances and introduce regulations conducive to the public good."); Public Citizen Amicus Br. at 16 ("And because

the consumer fraud statute is part of a remedial statutory scheme, it must be afforded liberal construction to accomplish its beneficial intent.") (internal quotation marks omitted); Legal Aid Amicus Br. at 3 ("First, [the NDTPA] is expansive and remedial in nature; it was drafted, passed into law, and subsequently amended by the Nevada Legislature with the express intent to force businesses that engage in unscrupulous acts to disgorge their ill-gotten profits and to allow consumers to penalize deception and prevent the profitability of fraud.").

Simply calling a statute "remedial," however, does not nullify the need to have suffered a compensable loss to have "damages." Indeed, as this Court acknowledged in *Webb*, even "remedial" damages can serve to *compensate* a plaintiff rather than *punish* a defendant. *See Webb*, 128 Nev. at 90, 270 P.3d at 1269 (discussing that treble damages could be "remedial" meaning they were intended to provide compensation). Contrary to Appellants and Amici's arguments, merely because the NDTPA may be "remedial" does not mean that "damages" under NRS 41.600 should be interpreted beyond its express wording and intent which is to compensate consumers for their loss without any regard to a "punitive" component.

2. "Damages" For Purposes Of Common Law Fraudulent Concealment Are Similarly Intended To Compensate For A Loss, Not Punish An Alleged Wrongdoer

Appellants and Amici ask this Court to accept that when consumers make a purchase as a result of a concealed or suppressed fact (and would not have done so if the facts had not been concealed or suppressed), the transaction *ipso facto* gives rise to "damages" under Nevada law. Like NRS 41.600, "damages" for purposes of a fraudulent concealment claim are intended to compensate claimants for their loss. Indeed, the elements of a fraudulent concealment claim are as follows:

> (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.**

Dow Chem. Co. v. Mahlum, 114 Nev. 1468, 1485, 970 P.2d 98, 110 (1998) (emphasis added), *overruled in part on other grounds by GES, Inc. v. Corbitt*, 117 Nev. 265, 21 P.3d 11 (2001). As with claims brought under NRS 41.600, the words and phrases "as a result of" and "sustained" impose a causation requirement, and claimants cannot be caused to "sustain" any damages other than their actual loss. Moreover, damages cannot be read to permit the recovery of damages intended only to penalize an alleged wrongdoer because punitive damages are not available unless there is an actual loss. *See, e.g., City of Reno v. Silver State Flying*

Serv., Inc., 84 Nev. 170, 180, 438 P.2d 257, 264 (1968) ("Punitive damages cannot be awarded by a jury unless it first finds compensatory damages."); *Betsinger v. D.R. Horton, Inc.*, 126 Nev. 162, 167, 232 P.3d 433, 436 (2010).

Based on this Court's recitation of the elements of a fraudulent concealment claim, therefore, a purchase of a good or service alone is insufficient to state a claim without some showing of damages. *See Dow Chem. Co.*, 114 Nev. at 1485, 970 P.2d at 110 (separating the fourth element (*i.e.*, a consumer would not have purchased a good or service had the concealed or suppressed facts been known) from the damages element). Because damages are an entirely separate element from the actual act, Nevada consumers must show a loss to obtain compensatory damages for a fraudulent concealment claim.

B. Answering The Certified Question In The Affirmative Is Inconsistent With Long-Standing Nevada Precedent And Would Place Nevada In The Minority

Under Nevada law, damages for fraud-based claims are analyzed by comparing the amounts paid and the value received in return. This well-settled Nevada law is consistent with case law from other jurisdictions. It is respectfully submitted that this Court should affirm its precedent and agree with case law from other jurisdictions with analogous factual scenarios which confirm that there are no damages in the scenario posed by the Certified Question.

1. It Is Settled Nevada Law That "Damages" In Fraud-Based Claims Are Analyzed By Comparing The Amounts Paid And The Value Received In Return

As discussed above, damages are intended to compensate claimants for their loss. When a claim sounds in fraud, the law in Nevada for more than fifty years has analyzed such damages by comparing the amounts paid by claimants to the value received in return. In *Randono v. Turk*, 86 Nev. 123, 466 P.2d 218 (1970), this Court explained

> 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 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. at 130, 466 P.2d at 222-23 (citing MCCORMICK ON DAMAGES § 121 (1935); Annot., 13 A.L.R.3d 875, 881-82 (1967)). *Randono* involved alleged fraud in an investment transaction. *Id.* at 129-130, 466 P.2d at 222. This Court held that the damages awarded to the plaintiff should be the amount of the investment minus amounts received as returns on the investment. *Id.* at 126-27, 130, 133, 466 P.2d at 220, 222, 224. Thus, this Court concluded that amounts received in return should be deducted from any "damages."

More than thirty years ago in *Collins v. Burns*, 103 Nev. 394, 741 P.2d 819 (1987), this Court reaffirmed the measure of damages for fraud-based claims.

"First, a defrauded party may be able to recover the 'benefit of the bargain,' that is the value of what he would have received had the representations been true, less what he actually received." *Id.* at 398, 741 P.2d at 822. "The second measure of damages allows the defrauded party to recover what he has lost 'out of pocket,' that is the difference between what he gave and what he actually received." *Id.* at 398-99, 741 P.2d at 822. In *Burns*, a storeowner presented inflated sales to a prospective buyer which induced the buyer to purchase the business. *Id.* at 396, 741 P.2d at 820-21. This Court explained that "[i]n reliance on the [storeowner's] misrepresentations, [the purchasers], who thought they were purchasing a viable business, gained ownership of a losing enterprise with no proven potential for any profit at all." *Id.* at 398, 741 P.2d at 822. In discussing damages, this Court did not conclude that the buyers were entitled to a refund of the entire amount paid for the business; rather, it concluded that the buyers were "entitled to recover the difference between the amount they paid to the respondents and the actual value of the business at the time of the sale." *Id.* at 399, 741 P.2d at 822.

Appellants and Amici assert that this Court's most recent decision in *Davis v. Beling* supports their position for a more expansive interpretation of damages beyond the well-established benefit of the bargain or out of pocket loss theories. *See* Op. Br. at 8; Legal Aid Amicus Br. at 4. In fact, the opposite is true. In *Davis*, homeowners advised their real estate agent that they would purchase a new home

(referred to as the Ping Property) only if they were able to sell their old home (referred to as the Augusta Property). *Davis*, 128 Nev. at 307, 278 P.3d at 506. The real estate agent allegedly provided assurances to the homeowners that buyers would be able to purchase the Augusta Property, resulting in the homeowners purchasing the Ping Property. *Id.* at 308, 278 P.3d at 507. Ultimately, however, the buyers could not purchase the Augusta Property, and the homeowners asserted, among other claims, a claim for fraudulent concealment against the real estate agent. *Id.*

The homeowners were awarded damages including $199,558.66 for fraudulent concealment which was comprised of moving expenses and a diminution of the value of the Ping Property. *Id.* at 308 n.2, 278 P.3d at 507 n.2. Thus, while Appellants and Amici rely on *Davis* to argue that courts should look beyond traditional benefit of the bargain or out of pocket loss theories to compensate for losses that are not calculable under either of those theories, that argument falls flat when applied to the Certified Question and the facts of the underlying matter. *Davis* involved a diminution of value in real property whereas this matter involves no losses or damages at the time of, or at any time after, the transaction.

Here, Appellants and Amici advocate that this Court ignore fifty years of Nevada precedent and create a new theory of damages—for which there is

absolutely no support—that consumers are entitled to receive a full refund of the amount paid for a good or service (even after fully reaping all of the intended benefits of the good or service), simply because they allege after-the-fact that they would not have purchased it. The reason why Appellants seek this change in well-settled law on damages is simple—under existing Nevada law, consumers who purchase goods or services and receive and fully enjoy the intended benefits of the goods or services which are of the same or greater value as that which they paid, do not suffer damages. *See* Legal Aid Amicus Br. at 20 (arguing "there could be certain factual scenarios, such as this appeal-at-bar, where a fraud victim is damaged by a defendant's fraudulent conduct but is unable to plead or show actual damages under either measure when examining the monetary loss incurred compared to the value of services received").

Appellants and Amici essentially ask this Court to ignore the compensatory nature of damages and create a rule permitting consumers who allege fraud to enjoy the fruits of their purchases and also receive a full refund of those purchases. Accepting this position, however, leads to unjust results. For instance, such a rule would have resulted in the buyers in *Burns* being awarded a refund of the entire amount they paid for the business while also keeping the business, and the homeowners in *Davis* being awarded the full amount they paid for the Ping Property while at the same time keeping the Ping Property. This is neither the law

in Nevada nor anywhere else in the country, and this Court respectfully should answer the Certified Question in the negative.

2. Law From Other Jurisdictions, Including Those Referenced By Appellants And Amici, Support Answering The Certified Question In The Negative

If this Court answers the Certified Question in the affirmative, it would result in Nevada standing alone in the country in finding that consumers are entitled to a full refund of the amount paid for a good or service, even after receiving the full value of the good or service, based simply on an allegation that they would not have purchased the good or service if not for an alleged misrepresentation or omission.

Appellants cite authority from ten jurisdictions in a section which they entitle "Other States Allow Recovery Of Damages For Consumer Fraud Where A Consumer Paid Money For A Good or Service They Would Not Otherwise Have Purchased, or Paid More Than They Would Have, Based On Fraudulent Conduct of the Merchant." *See* Op. Br. at 12-20. The cases cited by Appellants, however, do not address the Certified Question.

a. Arizona

Appellants cite *Cheetham v. ADT Corp.*, 161 F. Supp. 3d 815 (D. Ariz. 2016) for the proposition that "[u]nder Arizona law[,] a consumer states a claim for damages in violation of [the state's consumer fraud act] where the consumer

alleges they would never have purchased the product or service had they known the true facts and the merchant's fraudulent conduct." *See* Op. Br. at 12-13. *Cheetham* involved a security system, which was hackable by third-parties, and the plaintiff suffered multiple "security breaches." *Cheetham*, 161 F. Supp. 3d at 820-22. Certainly, a consumer who is forced to continue to pay for a security system which does not, in fact, provide security is not receiving the intended benefit of the bargain.[2] This factual scenario, therefore, does not fall within the scope of the Certified Question.

b. Wyoming

Appellants cite the matter *Big-O Tires, Inc. v. Santini*, 838 P.2d 1169 (Wyo. 1992), but *Big-O Tires, Inc.* presents a far different factual circumstance than that presented in the Certified Question. There, the plaintiff purchased a tire which was represented as "new" but, in fact, it was a retread or remanufactured tire. *Id.* at 1171. Five months after purchasing the tire, the tread separated causing the plaintiff to lose control of her car and become seriously injured in an accident. *Id.* The actual issue before the Supreme Court of Wyoming was whether an award of damages for a deceit claim was duplicative of an award of damages for other

[2] The District of Arizona recognized the plaintiff alleged damages because she was being forced to fulfil her contract with the defendant to avoid a cancellation penalty. 161 F. Supp. 3d at 831.

claims. *Id.* at 1174. That is not an issue here. Nevertheless, a failed tire that resulted in an accident and severe injuries certainly is not of the same value as the plaintiff paid and is not the factual scenario raised in the Certified Question.[3]

c. Florida

The Florida cases cited by Appellants relate to different theories that are simply not implicated in the Certified Question. In *Collins v. DaimlerChrysler Corp.*, 894 So.2d 988 (Fla. Dist. Ct. App. 2004), the plaintiff alleged she owned a vehicle with a "dangerous and unfit" restraint system. *Id.* at 989. The court explained that the matter there involved "a relatively simple question, at least as to damages—Is a car with defective seatbelt buckles worth less than a car with operational seatbelt buckles?" and that the damages sought were in the form of a "diminution in value" of a vehicle. *Id.* at 990-91. *DaimlerChrysler Corp.*, therefore, addressed the polar opposite factual scenario than that presented by the Certified Question because here, the Ninth Circuit's Certified Question assumes that the amount paid by Appellants was the same as or less than the value received. Also, because the amenities associated with the resort fee are consumable goods, there can be no claim for diminished value.

[3] Without any context, Appellants also cite *Britton v. Bill Anselmi Pontiac-Buick-GMC, Inc.*, 786 P.2d 855, 860 (Wyo. 1990). The section of the opinion referenced by Appellants, however, does not address how to assess damages and, therefore, is not helpful to the Certified Question.

Appellants' reliance on *Carriuolo v. General Motors Co.*, 823 F.3d 977 (11th Cir. 2016) is similarly flawed because the alleged damages there also presupposed there was a difference in the value paid versus the value received. *See id.* at 986 ("[D]amages should reflect the difference between the market value of a 2014 Cadillac CTS with perfect safety ratings for three standardized categories and the market value of a 2014 Cadillac CTS with no safety ratings"). As with *DaimlerChrysler Corp.*, the alleged damages in *Carriuolo* assumed the value paid was more than the value received whereas the Certified Question provides that the value received was the same or greater than the value paid by the consumer.

d. <u>Kansas</u>

Appellants' reliance on the District of Kansas' decision in *Gonzalez v. Pepsico, Inc.*, 489 F. Supp. 2d 1233 (D. Kan. 2007) omits a key contention regarding damages. While Appellants state that the allegation was that the plaintiffs in that case "would not have purchased the defendants' beverages had the defendants disclosed the tendency of those products to contain benzene," *see* Op. Br. at 16, the claim to damages was that the product the plaintiffs purchased was worth less than what they received. *See Gonzalez*, 489 F. Supp. 2d at 1240 ("Here, the complaint alleges that plaintiffs suffered economic damages resulting from the difference between the purchase price of the beverage products as warranted and their actual value considering the potential presence of benzene in those

products."). Here, there is no difference in the value in the scenario posed in the Certified Question. In fact, if anything, the Certified Question contemplates the scenario that Appellants could have received something of greater value than they paid. Therefore, *Gonzalez* is not instructive.[4]

e. Massachusetts

Appellants' reliance on *Iannacchino v. Ford Motor Co.*, 451 Mass. 623, 888 N.E.2d 879 (2008) is based upon cherry-picked statements from the court's opinion without a full analysis. There, the plaintiffs brought a claim that certain Ford vehicles had handle systems that were defective, unsafe, and not in compliance with safety standards. *Id.* at 624, 888 N.E.2d at 882. *Iannacchino* simply stands for the proposition that if the vehicle was not in compliance with safety standards, then "the plaintiffs would have paid more . . . than they received" and that the "overpayment would represent an economic loss." *Id.* at 631, 888 N.E.2d at 886. *Iannacchio* is not persuasive here as that matter involved an asset the plaintiffs had in their possession which was purportedly not worth what they paid. Here, on the other hand, the underlying dispute involves a "consumable"

[4] Appellants also cite to *Via Christi Reg'l Med. Ctr., Inc. v. Reed*, 298 Kan. 503, 314 P.3d 852 (2013) for the proposition that a consumer "need not establish direct monetary loss to be aggrieved under the [Kansas Consumer Protection Act] and entitled to recovery." *See* Op. Br. at 16. What needs to be demonstrated to be "aggrieved" as that term is used in another state's statute is of no assistance here.

service (temporary use of certain amenities) which the Ninth Circuit concluded was of the same or greater value than what Appellants paid.

The *Iannacchino* court contrasted the case before it and a prior decision, *Hershenow v. Enterprise Rent-A-Car Co. of Boston*, 445 Mass. 790, 840 N.E.2d 526 (2006), in which the plaintiffs brought a claim that a "collision damage waiver" in a car rental agreement violated Massachusetts law. *Iannacchino*, 451 Mass. at 629, 888 N.E.2d at 885. Distinguishing the facts of the matter from *Hershenow*, the court explained:

> The plaintiffs here purchased and own vehicles that they allege are noncompliant with applicable safety regulations. In contrast, the *Hershenow* plaintiffs purchased agreements committing a car rental company, Enterprise, to waive claims against them for damage to their rental cars occurring only during the rental period. The *Hershenow* plaintiffs would have been harmed only had two sequential events occurred: car damage during the rental period, followed by Enterprise's attempt to enforce against them a contract containing terms disallowed under Massachusetts law. Although the *Hershenow* plaintiffs had purchased a product that offered less protection than statutorily required, the unlawful contract terms "did not and could not" cause any harm to the plaintiffs *after* they had returned their vehicles undamaged at the end of their rental periods.

Id. at 630, 888 N.E.2d at 886. Massachusetts law does not support Appellants' argument.

f. <u>New York</u>

While Appellants acknowledge that the Ninth Circuit concluded that New York does not support their theory of damages, they nevertheless attempt to distinguish the New York case cited by the Ninth Circuit by referring to a footnote in which the New York court noted that there "might" be a claim if a consumer paid a "higher price . . . as a result of the misrepresentation." *See* Op. Br. at 18 (quoting *Small v. Lorillard Tobacco Co., Inc.*, 94 N.Y.2d 43, 56, 720 N.E.2d 892, 898 n.5 (N.Y. 1999)). While *Small* is discussed in its entirety below, it is clear that this dicta language contained in a footnote is inapplicable to the Certified Question before the Court because the Certified Question does not involve a "higher price" paid as the Ninth Circuit concluded that the price paid was equal to or less than the value of what was received.

g. <u>South Carolina</u>

Appellants' reliance on South Carolina law suffers from the same fatal flaws. The dispute in *Austin v. Stokes-Craven Holding Corp.*, 387 S.C. 22, 691 S.E.2d 135 (2010) involved the plaintiff's purchase of a truck not knowing it had previously been "wrecked." *Id.* at 32-33, 691 S.E.2d at 140. The court explained that in South Carolina, the "measure of damages for the sale of a defective vehicle is the difference in fair market value between the car, having been wrecked, and the value of the car had it not been wrecked at time of sale." *Id.* at 43, 691 S.E.2d at 146. The court simply concluded that there was sufficient evidence that the

truck had zero market value and, therefore, the plaintiff's damages were the amount paid. *Id.* at 44-45, 691 S.E.2d at 146-47. In other words, the court concluded that the plaintiff was stuck with an "asset" that had no value.

In contrast, Appellants are not holding a depreciating or valueless asset like the plaintiff in *Austin*. Rather, they paid for the amenities associated with the resort fee and used and enjoyed those benefits without incident. If anything, South Carolina law confirms that Appellants suffered no damages because any damages assessment should reduce the amount paid by the value received which, in the Certified Question, results in zero damages.

h. Texas

Appellants' reliance on Texas law and *Mewhinney v. London Wineman, Ltd.*, 339 S.W.3d 177 (Tex. App. 2011) is perplexing because it again supports Respondent's position. According to Appellants, under the Texas deceptive trade practices statute, "the difference between the amount the consumer paid for a product and the value of that product was the proper measure of damages for a violation of the [statute]." *See* Op. Br. at 19. Applying Texas' measure of damages to the scenario presented in the Certified Question, the amount of damages is zero.

i. Wisconsin

Appellants rely on *K & S Tool & Die Corp. v. Perfection Mach. Sales, Inc.*, 301 Wis.2d 109, 732 N.W.2d 792 (2007) to support their proposition that Wisconsin permits an award of damages for "money which the plaintiff parted with to purchase a product the plaintiff would not otherwise have paid for had they known the true condition or quality of the product." *See* Op. Br. at 19-20. There, however, the plaintiff was told it was purchasing a 1,000-ton metal press when, in actuality, it was an "800-ton press, which had been converted from a 1000-ton press." *K & S Tool & Die Corp.*, 301 Wis.2d at 119, 732 N.W.2d at 797. The portion of the Wisconsin Supreme Court's opinion referenced by Appellants simply related to whether the plaintiff had demonstrated causation between the alleged misrepresentation (*i.e.*, that it was purchasing a 1,000-ton press) and its claimed damages (*i.e.*, that it had received a press with less tonnage). *K&S Tool & Die Corp.* is substantively different than the underlying proceedings. The plaintiff there needed a 1,000-ton press for its business. *Id.* at 116, 732 N.W.2d at 796. Because of the alleged misrepresentation, the plaintiff had an 800-ton press which did not work for its purposes. *Id.* at 118, 732 N.W.2d at 797. An 800-ton press would have zero value to the plaintiff in those circumstances. Here, however, the Certified Question states that the value received is equal to or greater than the value paid. Thus, Wisconsin law is not helpful to Appellants' position.

j. <u>Vermont</u>

Finally, the Vermont case cited by Appellants also does not help their position. In *Peabody v. P.J.'s Auto Village, Inc.*, 153 Vt. 55, 569 A.2d 460 (1989), the plaintiff purchased a "clipped" Saab (meaning the front of a 1974 Saab was welded to the back of a 1972 Saab) when it was represented as being a 1974 Saab. *Id.* at 56, 569 A.2d at 461. Under Vermont law, the plaintiff did not need to show damages to state a claim. *See id.* at 58, 569 A.2d at 463 ("It is apparent that the trial court considered actual damage as an element of consumer fraud. All plaintiff must show, however, is that the deceptive omission is 'likely to influence a consumer's conduct' by 'distort[ing]' the buyer's 'ultimate exercise of choice.'"). Because a claim under Vermont law does not need to show damages, it is not instructive as to the Certified Question which is an analysis specifically on the issue of damages.

While Appellants suggest that other jurisdictions' case law is helpful to them, the opposite is true. All of the case law is readily distinguishable, and the vast majority of the law is consistent with Nevada law insofar as damages should be analyzed by assessing the value paid for a good or service and the value received in return. Not a single case cited by Appellants supports the draconian measure of damages where a consumer is not only entitled to a full refund of the amount paid for the good or service, but is also entitled to retain its benefits.

Respectfully, Nevada should not be the first jurisdiction to adopt such a measure of damages.

3. This Court Should Follow The Reasoning Of Cases More Analogous To The Certified Question And Negatively Answer The Same

Respondent respectfully submits that this Court should adopt the reasoning of courts throughout the country in which a consumer pays for a good or service, receives the full value of the good or service and, therefore, suffers no damage as a result of alleged wrongdoing.

a. New York

As the Ninth Circuit noted in its Certified Order, New York rejects Appellants' theory. In *Small*—the case referenced by the Ninth Circuit—the plaintiffs claimed that the defendants "deceived them about the addictive properties of cigarettes and fraudulently induced them to purchase and continue to smoke cigarettes." 94 N.Y.2d at 50, 720 N.E.2d at 894. In other words, the plaintiffs alleged that the "defendants used deceptive commercial practices to sell their cigarettes to New Yorkers and that they would not have bought these cigarettes had they known that nicotine is an addictive drug." *Id.* at 51, 720 N.E.2d at 895. The plaintiffs sought "only the reimbursement of the purchase cost of cigarettes that they claim they would not have bought, but for defendants' fraudulent and deceptive practices." *Id.* The Court of Appeals of New York

"disagree[d]" with the plaintiffs' argument that "consumers who buy a product that they would not have purchased, absent a manufacturer's deceptive commercial practices, have suffered an injury under" New York's consumer protection statute. *Id.* at 56, 720 N.E.2d at 898. The court further explained:

> Plaintiffs' definition of injury is legally flawed. Their theory contains no manifestation of either pecuniary or "actual" harm; plaintiffs do not allege that the cost of cigarettes was affected by the alleged misrepresentation, nor do they seek recovery for injury to their health as a result of their ensuing addiction. Indeed, they chose expressly to confine the relief sought solely to monetary recoupment of the purchase price of the cigarettes. Plaintiffs' cause of action under this statute, as redefined by the trial court and as embraced by them, thus sets forth deception as both act and injury.

Id. (internal citations omitted). Ultimately, the court held that the plaintiffs "fail[ed] to demonstrate that they were 'actually harmed' or suffered pecuniary injury by reason of any alleged deception within the meaning of the statute." *Id.*

b. <u>Massachusetts</u>

In *Rule v. Fort Dodge Animal Health, Inc.*, 607 F.3d 250 (1st Cir. 2010), the plaintiff purchased the defendant manufacturer's heartworm medication. *Id.* at 251. According to the plaintiff, the defendant manufacturer did not disclose safety issues which ultimately resulted in an FDA recall. *Id.* The plaintiff's dog did not suffer any harm and did not develop heartworm. *Id.* The plaintiff alleged damages calculated as "the difference between the price they actually paid for [the

heartworm medication] and what it would have been worth had safety risks been adequately disclosed." *Id.* at 251-52. In assessing damages under Massachusetts' consumer protection law, the First Circuit explained that the plaintiff's

> law suit was brought *after* her purchases and use of the drug and she now knows that she got both the protection and convenience she sought [from the drug] *and* that the [safety] risk did not manifest itself in injury to her or her dog. Nor is she still *holding* a product that is worth less than she paid; she used the product and *in fact* suffered no economic injury at all.

Id. at 253 (italics in original).

c. <u>Missouri</u>

The Third Circuit's decision in *In re Avandia Marketing Sales Practices and Prods. Liab. Litig.*, 639 Fed. App'x 866 (3d Cir. 2016) is also persuasive. There, the plaintiff was a former user of a prescription diabetes medication that was prescribed to lower blood sugar. *Id.* at 867. The plaintiff claimed that the manufacturer misrepresented or failed to disclose the risks of the medication and that the medication was worth less than as represented. *Id.* Affirming the dismissal of the plaintiff's claims, the Third Circuit explained that the plaintiff "received the drug she was prescribed, the drug did the job it was meant to do (*i.e.*, controlled her blood sugar levels), and it caused no apparent physical injuries." *Id.* at 869.

The Western District of Missouri's opinion in *In re Bisphenol-A (BPA) Polycarbonate Plastic Prods. Liab. Litig.*, 687 F. Supp. 2d 897 (W.D. Mo. 2009) is similarly persuasive. That matter arose out of the defendants' alleged use of BPA in certain baby products. *Id.* at 901. The court discussed whether the plaintiffs had alleged any damages. *Id.* at 910. In discussing damages, the court separated the plaintiffs into two categories. *Id.* at 911-13. The "second category" included "those who disposed of or used the products before learning about BPA." *Id.* at 912. The court explained that consumers in this group "received all the benefits they desired and were unaffected by Defendants' alleged concealment. While they may contend they would not have purchased the goods had they known about BPA, these Plaintiffs received 100% use (and benefit) from the products and have no quantifiable damages." *Id.*

The court further discussed that a contrary position would lead to "absurd results." *Id.* Using a hypothetical where "a food seller knew its product contained a poison that has a 50% chance of killing the person after eating it," the court explained

> suppose that the buyer ate the food, was unaffected, and then was told that the food contained poison. Clearly, the buyer would not have purchased and eaten the food poison had he known about the poison—but even ignorant of the true facts he safely consumed the food. The food fulfilled its originally anticipated function by providing the nutrition and satisfaction value the buyer expected, so the buyer obtained the full anticipated

> benefit of the bargain. While he may not have paid the asking price, offset against this is the fact that he received the benefits he paid for—leaving him with no damages. In the present case, consumers purchased products for use by infants and toddlers. They would not have purchased those products had they known the true facts, but they obtained full use of those products before learning the truth: the formula was consumed or the children grew to an age where they did not use bottles and sippy cups, so they were discarded. These consumers thus obtained full value from their purchase and have not suffered any damage.

Id. at 912-13.

d. Delaware

The Delaware Supreme Court's decision in *Brzoska v. Olson*, 668 A.2d 1355 (Del. 1995) is persuasive. There, a dentist was advised that he was HIV-positive but nevertheless continued his practice. *Id.* at 1357. The plaintiffs brought various causes of action, including one for fraudulent misrepresentation on the basis of "various representations and statements made by [the dentist] to certain patients who, upon inquiry as to his condition, were provided with allegedly deceptive answers concerning his health." *Id.* at 1359. The plaintiffs sought damages in the form of, among other things, "reimbursement for monies paid to [the dentist] for dental treatment." *Id.* The Delaware Supreme Court explained that "[i]n general, a recovery for fraudulent misrepresentation is limited to economic damages, *i.e.*, those damages which are the direct and proximate result of the false representation

consisting of the loss of bargain or actual out of pocket losses." *Id.* at 1367.[5] Regarding damages, the Delaware Supreme Court explained "[w]ith respect to the plaintiffs' claim for reimbursement of the cost of their dental care, the fees paid to [the dentist] were for services rendered and plaintiffs, apparently, received exactly what they bargained for in the way of dental services." *Id.* at 1367.

e. Minnesota

Minnesota courts have similarly rejected Appellants' theory. In *Carey v. Select Comfort Corp.*, No. 27CV 04-015451, 2006 WL 871619 (Minn. Dist. Ct. Jan. 30, 2006), the plaintiff purchased a bed which allegedly had a defect which "cause[d] mold to grow." *Id.* at *1. No mold grew on the plaintiff's bed. *Id.* In discussing damages, the court explained:

> plaintiff bases his claim on the allegation that he would not have purchased the bed if he had known of its mold propensity and the actions necessary to prevent it. In the alternative, he alleges he would not have paid as much as he did if he had known of the mold propensity. These are his damage claims. They are legally insufficient.

Id. at *2 (internal citations omitted).

The above decisions reflect a consensus among courts throughout the country. If a consumer purchases a good or service and obtains and uses all of the

[5] Any argument from Appellants that Nevada law does not limit damages to "economic damages" is a red herring. All Appellants are claiming here are economic damages.

expected benefits of that good or service, he or she cannot claim "damage" based solely on an allegation that he or she would not have purchased the good or service had additional facts been known. Nevada should join these states in their sound, common sense approach and answer the Certified Question in the negative.

4. The California Law Cited By Appellants And Amici Does Not Support Answering The Certified Question In The Affirmative

Both Appellants and Amici argue that this Court should follow California law in answering the Certified Question, but California law does not support the flawed theory they ask this Court to accept. Appellants and one Amici rely heavily on *Kwikset Corp. v. Super. Ct.*, 51 Cal. 4th 310, 246 P.3d 877 (2011). *Kwikset*, however, did not address a legal claim to "damages" but, rather, whether a plaintiff had "standing" under California law. *Id.* at 316-17, 246 P.3d at 881. An inquiry of standing under a different state statute has no applicability to "damages" under Nevada law.

In fact, *Kwikset* expressly distinguished itself from cases that addressed damages in fraud claims, including *Gagne v. Bertran*, 43 Cal.2d 481, 490-91, 275 P.2d 15 (1954). More than sixty years ago in *Gagne*, the California Supreme Court explained

> [i]n reliance on defendant's information plaintiffs purchased the property. If the property was worth less than they paid for it, defendant is liable for the difference. On the other hand, if the lots were worth

> what plaintiffs paid for them, plaintiffs were not damaged by their purchase, for even though they would not have bought the lots had they known the truth, they nevertheless received property as valuable as that with which they parted.

Id. at 490-91, 275 P.2d 15.

Gagne—which supports answering the Certified Question in the negative—was distinguished by the court in *Kwikset* but its reasoning remains valid today:

> [i]n its benefit of the bargain argument, Kwikset relies as well on two real property fraud cases, each of which recites the rule that damages for fraud in the sale of property are measured principally by the difference in the actual value of what was parted with and what was received (the "out-of-pocket-loss" rule). In the context of a common law deceit action, the rule's only purpose is to provide the measure of damages; it limits neither standing nor the availability of equitable remedies. Nothing in the text or history of Proposition 64 suggests the electorate intended to borrow this rule, developed in the context of a remedy (damages) unavailable under the UCL and false advertising laws, and deploy it for a wholly unrelated purpose, as a restriction on standing.

Kwikset, 51 Cal. 4th at 335-35, 246 P.3d at 898-84 (internal citations omitted).

In the context of the Certified Question, therefore, *Kwikset* has zero applicability whereas *Gagne* is persuasive authority in support of answering the Certified Question in the negative.[6]

[6] One Amici also discusses the Ninth Circuit's decision in *Nunez v. Saks Inc.*, 771 Fed. App'x 401 (9th Cir. 2019) which stated that a plaintiff had "Article III standing and statutory standing to pursue his individual claims for damages" under California law by alleging "economic injury" in that "he purchased a pair of Saks

III. Appellants' Claim To Equitable "Unjust Enrichment Damages" Does Not Satisfy The "Damages" Requirement For Their Legal Claims

Appellants' alternative argument that "unjust enrichment damages" can constitute damages for purposes of their claims is perplexing, convoluted, and lacks legal support. Although unclear, Respondent understands Appellants' argument to mean that the "damages" they are seeking with respect to their unjust enrichment claim satisfies "damages" under NRS 41.600 and for fraudulent concealment. Appellants' theory fails for at least two reasons.

First, an equitable claim of unjust enrichment and legal claims under NRS 41.600 and for fraudulent concealment are inherently incompatible. Indeed, a claim for equitable relief under an unjust enrichment theory is only available when there exists no adequate remedy at law. *See Benson v. State Eng'r*, 131 Nev. 772, 782, 358 P.3d 221, 228 (2015) (noting "[d]istrict courts should not entertain a petition for equitable relief based upon a party's unproven supposition that the remedy at law is inadequate"). In other words, Appellants' alleged unjust enrichment claim cannot co-exist with their alleged legal remedies under

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Fifth Avenue branded shoes and that he would not have purchased the shoes but for his reliance on the allegedly fictitious inflated 'Market Price' on the shoes' price tag." *Id.* at 402. While it is unclear whether the issue of "damages" was adequately raised, *Nunez* is nevertheless distinguishable because the plaintiff was left with a good that he did not want. As discussed in Section IV, *infra*, this factual scenario in *Nunez* is vastly different than situations where, as here, consumers purchase and use a fully consumable good or service without incident.

fraudulent concealment and NRS 41.600. Because of that, Appellants' argument that a purported equitable remedy can serve as a proxy for a remedy at law is unavailing.

Second, the Ninth Circuit's Certified Order and Appellants' own briefing render Appellants' theory without merit. Appellants argue that "[t]his Court has long held that in a case with a[n] . . . unjust enrichment theory of recovery, *the proper measure of damages* is the 'reasonable value of [the] services.'" *See* Op. Br. at 9 (quoting *Asphalt Prods. Corp. v. All Star Ready Mix, Inc.*, 111 Nev. 799, 802 (1995) (first two alterations added; third alteration, ellipses, and italics in original). As discussed above, the Ninth Circuit has already concluded that the value of what Appellants received is of the same or greater value as what they paid. Appx. 218. Thus, even if permissible to use an unjust enrichment remedy to satisfy damages for fraudulent concealment and NRS 41.600, the result will be the same—Appellants do not have a claim to damages because they did not receive something of lesser value than what they paid.

IV. Consumers Would Not Be Without Remedies If They Suffered Actual Damages As A Result Of Alleged Wrongdoing

As noted above, the Amici present doomsday scenarios and absurd hypotheticals, suggesting that consumers would be left without a remedy if this Court answers the Certified Question in the negative.

Amici suggest, for example, that a consumer would have no means of redress if he or she purchased a $200 bicycle but instead received a $200 scarf. *See* Public Citizen Amicus Br. at 11. Of course, Amici's hypothetical example does not present a novel situation, and its conclusion that consumers would have no recourse ignores the law of every state in the country. To be sure, consumers have received goods that have not conformed to their expectations for years, and over those years they have always had means of redress. What matters is that dissatisfied consumers who received a good or service that does not provide any of the intended benefits associated with the good or service for which they bargained (*e.g.* received a scarf rather than a bicycle) have a means of recourse and all parties to the transaction are treated fairly. Upsetting well-settled jurisprudence in order to fashion a new means of redress that would result in a windfall to consumers is not the appropriate solution to a hypothetical problem that simply does not exist—consumers are not now, nor have they ever been without a remedy.

It is respectfully submitted that Amici's hypothetical regarding the scarf and bicycle is a red herring because it is a vastly different factual scenario than that which gives rise to the Certified Question. In that scenario, consumers are arguably left with an entirely different product they never wanted and that is of no value to them. Here, on the other hand, Appellants paid for amenities, appreciated the full benefits of those amenities without issue, and later decided they wanted to

undo a transaction that had already been completed due to an alleged risk that had no effect on them or their use of the amenities associated with the resort fee. As the First Circuit explained in *Rule* when distinguishing a matter where the plaintiffs claimed they paid more for a vehicle than they would have had they known of noncompliance with safety standards,

> This certainly follows where the owners still possess their cars, whose value was now reduced because of the risk that the doors might malfunction. The owner of a product with a newly revealed defect is like the ProHeart 6 buyer who has not used the drug yet; he certainly does own a product whose newly revealed defect reduces its value below what was expected, possibly even to zero in the case of ProHeart 6, and so economic injury would exist and be recoverable in many jurisdictions. But Rule, as already explained, used up her purchases, neither holds nor sold anything of reduced value, faced no continuing risk and suffered no harm.

Rule, 607 F.3d at 255. *See also Shaulis v. Nordstrom, Inc.*, 120 F. Supp. 3d 40, 52 (D. Mass. 2015) ("There was therefore no form of redress available to the courts that would be equitable to all parties; any payment of money to the plaintiffs, or any effort to undo the transaction, would leave the plaintiffs in a better position than when they started. The transactions had become final without any harm having materialized. Once the dog medicine had been administered (without ill effect) and the automobile had been returned (without a collision), the risk of injury had disappeared, and the plaintiffs had received the full benefit of the purchase. Put simply, the plaintiffs were not entitled to both the money *and* the full

value of the product or service for which the money was exchanged.") (emphasis in original).

This Court respectfully should also take into account the potential ramifications of answering the Certified Question in the affirmative. As noted, Appellants claim in the underlying matter that they would not have stayed at the Hotel had they known of the alleged presence of *Legionella* bacteria in certain of the water systems. Yet, they do not allege that they suffered any harm associated with the presence of *Legionella* bacteria, such as physical illness or interference with the Hotel's amenities. By arguing that they suffered damages under these circumstances, they are conflating alleged deception with injury. *See Small*, 94 N.Y.2d at 56, 720 N.E.2d at 898 (rejecting argument that "sets forth deception as both act and injury"). As explained above, permitting Appellants and other similar consumers to recover under those circumstances would result in limitless liability on the part of businesses in Nevada. For instance, adopting Appellants' theory, a monthly rental storage facility would be subject to lawsuits for a refund of monthly storage rates if it was revealed—long after the consumer stopped using the storage facility—that an employee neglected to lock the facility every night, regardless of whether any property was stolen from the facility. Of course, consumers who are actually damaged by the alleged conduct (*i.e.*, guests who become physically ill or who were unable to use the Hotel's amenities as a result of *Legionella* or storage

facility users who had property stolen) would have a cause of action to compensate them for their actual losses. But permitting consumers to pursue a refund of amounts paid in the absence of a manifestation of the risks associated with the alleged wrongdoing would stretch the notions of damages far beyond tolerable limits.

Finally, it is unnecessary for the Court to answer the Certified Question in the affirmative solely to deter alleged wrongdoing in the future. The Nevada Legislature has already provided for a sufficient deterrent for alleged wrongdoing that would not require the Court to permit consumers to bring an action where they have suffered no damages. *See, e.g.*, NRS 598.0999 (permitting Attorney General to pursue actions).

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CONCLUSION

For the foregoing reasons, Respondent respectfully requests that this Court answer the Certified Question in the negative.

Dated: October 1, 2021

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CERTIFICATE OF COMPLIANCE (BASED UPON NRAP FORM 9)

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5), and the type style requirements of NRAP 32(a)(6), because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point font size and Times New Roman type style.

2. I further certify that this brief complies with the type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and contains 12,798 words.

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

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

DATED: October 1, 2021

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PROOF OF SERVICE

This is to certify that on October 1, 2021, a true and correct copy of the foregoing **RESPONDENT'S ANSWERING BRIEF** was submitted for filing via the Court's eFlex electronic filing system and that such is served on interested parties in this action by serving VIA EMAIL (Wiznet/Eflex) pursuant to the NRAP and that electronic notification will be sent to the following:

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