**Case No. _____**

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IN THE SUPREME COURT OF NEVADA

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R.J. REYNOLDS TOBACCO COMPANY, a foreign corporation, individually, and as successor-by-merger to LORILLARD TOBACCO COMPANY and as successor-in-interest to the United States tobacco business of BROWN & WILLIAMSON TOBACCO CORPORATION, which is the successor-by-merger to THE AMERICAN TOBACCO COMPANY,

Petitioner,

vs.

THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK, AND THE HONORABLE NADIA KRALL, DISTRICT COURT JUDGE,

Respondents,

- and -

SANDRA CAMACHO, individually; ANTHONY CAMACHO, individually; PHILIP MORRIS USA, INC., a foreign corporation; LIGGETT GROUP, LLC, a foreign corporation; and ASM NATIONWIDE CORPORATION d/b/a SILVERADO SMOKES & CIGARS, a domestic corporation,

Real Parties in Interest.

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District Court Case No. A-19-807650-C, Department IV

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# PETITION FOR WRIT OF MANDAMUS OR PROHIBITION

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**November 4, 2021**

## NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.l(a) and must be disclosed. These representations are made in order that the Justices of this Court may evaluate possible disqualification or recusal.

1. R.J. Reynolds Tobacco Company is an indirect, wholly owned subsidiary of British American Tobacco, p.l.c. (stock symbol: BTI).

2. R.J. Reynolds Tobacco Company is represented by Bailey❖Kennedy and King & Spalding.

Dated this 4th day of November 2021.

BAILEY❖KENNEDY

By: /s/ Dennis L. Kennedy
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## ROUTING STATEMENT

Petitioner R.J. Reynolds Tobacco Company ("Reynolds") requests that this Court retain jurisdiction pursuant to NRAP 17(a)(12), as this case presents matters of statewide importance and matters which are already fully briefed before the Court in *Camacho v. Eighth Judicial District Court*, Case No. 82654.

## ISSUE PRESENTED

Did Judge Krall manifestly abuse her discretion in granting Plaintiffs' motion for reconsideration over thirteen months after Judge Earley rendered her original decision dismissing Reynolds from this action where the same case and the same legal question are fully briefed and pending before this Court and where Plaintiffs' motion did not present any intervening development that would warrant a different outcome, let alone show that Judge Earley's original ruling was clear error?

## INTRODUCTION

This same case and the same underlying legal question are currently pending in this Court on Plaintiffs' fully briefed application for a writ challenging Judge Kerry Earley's August 2020 order dismissing Reynolds from this tobacco product liability action. (Case No. 82654). Judge Earley ruled that Plaintiffs could not pursue a Nevada Deceptive Trade Practices ("NDTPA") claim against Reynolds because Mrs. Camacho (the allegedly injured smoker in this case) never used or purchased a product manufactured by Reynolds. But on November 3, 2021, a newly elected successor judge (the Honorable Nadia Krall) granted Plaintiffs' belated motion for reconsideration.

Judge Krall's grant of reconsideration was a patent abuse of her discretion as a successor judge. Considerations of finality and judicial economy limit reconsideration of a prior ruling to rare situations. It is appropriate *only* if (1) intervening developments require a different outcome, or (2) the prior ruling was clear error. Neither circumstance was present here. Plaintiffs' motion did not identify any new evidence or change in the law since Judge Earley's ruling. Nor did Plaintiffs' motion show Judge Earley's ruling to be clear error.

In fact, Judge Earley's original order was correct. After full briefing and a lengthy hearing, Judge Earley concluded that Plaintiffs could not show that Mrs. Camacho was directly harmed by Reynolds's alleged fraud because she never

actually purchased or used a Reynolds cigarette. The Legislature limited standing for private lawsuits under the NDTPA to "victims" of consumer fraud—*i.e.*, those who have been directly harmed by the defendants' fraud. *See Del Webb Communities, Inc. v. Partington*, 652 F.3d 1145, 1153 (9th Cir. 2011) (noting that standing turns on whether a plaintiff can show he was "directly harmed" by a defendant). As this Court persuasively recognized in *Fairway Chevrolet Co. v. Kelley*, 134 Nev. 935, 429 P.3d 663, 2018 WL 5906906 (No. 72444, Nov. 9, 2018) (unpublished disposition), such direct harm is simply not present where the plaintiff never purchased or used the manufacturer's product. Judge Earley's original order was thus correct and not in error—let alone *clear* error.

In granting reconsideration, Judge Krall did not point to any case law or statutory provision that Judge Earley overlooked or misapprehended. Judge Krall's reconsideration order never addresses the threshold standing question; nor does it explain how Plaintiffs were directly harmed by *Reynolds's* alleged fraud where it is undisputed that Mrs. Camacho never bought a Reynolds product. Judge Krall simply substituted her own view for Judge Earley's—more than a year after Judge Earley reached her ruling and after the underlying question had long been pending in this Court. The only difference between Plaintiffs' position in their opposition to the motion to dismiss and their motion to reconsider is the judge reviewing the request. This arbitrary grant of reconsideration warrants extraordinary relief.

The need for this Court's intervention is even more compelling considering that the same legal question is currently pending before the Court in Plaintiffs' own fully briefed application for a writ challenging Judge Earley's original order. Instead of timely seeking reconsideration in the district court, Plaintiffs urged this Court to promptly review the threshold standing question. Reynolds agreed that this Court should resolve this recurring legal issue to provide guidance for this and other tobacco cases. Nothing about *that* has changed. The legal question remains exactly as important as it was before, and the considerations of judicial economy still militate in favor of resolving it now. It makes no sense to wait any longer when this critical question is already fully briefed and ripe for this Court's resolution in Plaintiffs' own application for a writ.

## STATEMENT OF THE FACTS

***Plaintiffs' complaints***. Plaintiffs filed this case against Liggett Group LLC ("Liggett"), Philip Morris USA ("PM USA"), and Reynolds seeking damages for Mrs. Camacho's laryngeal cancer. 1 Petitioners' Appendix ("PA") 1–106. Plaintiffs assert that Mrs. Camacho's cancer was caused by smoking L&M, Marlboro, and Basic brand cigarettes, which she allegedly smoked continuously from approximately 1964 until 2017 and to which she allegedly was addicted. 1 PA 57. At the time Mrs. Camacho allegedly smoked them, L&M cigarettes were designed, manufactured, and sold by Liggett. 1 PA 57. Marlboro and Basic cigarettes were

designed, manufactured, and sold by PM USA. 1 PA 57. Mrs. Camacho never alleged that she purchased or smoked any cigarettes designed, manufactured, or sold by Reynolds or any of its corporate predecessors in interest. *See id*. Plaintiffs nonetheless asserted two claims against Reynolds for: (1) violation of the NDTPA and (2) civil conspiracy to violate the NDTPA. 1 PA 95–102.

***Reynolds's motion to dismiss***. Reynolds moved to dismiss on three related grounds. 1 PA 107. First, Plaintiffs' claims, although labeled as NDTPA and civil conspiracy claims, were actually product liability claims that cannot survive without an allegation of product use. 1 PA 111. Second, Plaintiffs could not show that Mrs. Camacho was a "victim" who was directly harmed by Reynolds's alleged NDTPA violations as required by NRS 41.600(1) because she never purchased Reynolds's cigarettes. 1 PA 113. Third, Plaintiffs' derivative civil conspiracy claim against Reynolds failed because their predicate claim under the NDTPA failed. 1 PA 114.

In response, Plaintiffs argued that (1) product use is not a requirement for an NDTPA claim, (2) defendants, including Reynolds, engaged in deceptive trade practices through mass-marketing campaigns, and (3) Plaintiffs' civil conspiracy claim survives with their underlying NDTPA claim. 1 PA 117-0176.

***Judge Earley's original order on August 27, 2020***. After a lengthy hearing, Judge Kerry Earley dismissed both claims against Reynolds. With respect to the NDTPA claim, Judge Earley concluded that:

> Plaintiff Sandra Camacho did not purchase or use any R.J. Reynolds product. Plaintiffs therefore could not plead facts sufficient to show that R.J. Reynolds caused damage to the (sic.) Sandra Camacho. Further, Plaintiffs did not plead sufficient facts alleging that Sandra Camacho had any legal relationship with R.J. Reynolds, which is also necessary to support an NDTPA claim.

2 PA 393. As a result, Judge Earley concluded that "Civil Conspiracy is a derivative claim in Nevada with the Plaintiff[s] alleging the Violation of Deceptive Trade Practices Act as the underlying unlawful objective." 2 PA 394. Because the district court dismissed Plaintiffs' NDTPA claim, it found that their conspiracy claim against Reynolds failed as well. *Id.* Judge Earley signed that order on August 27, 2020.

***Plaintiffs' application for a writ filed on March 24, 2021***. Under EDCR 2.24, any motion for reconsideration from Judge Earley's ruling was due by September 10, 2020. But Plaintiffs did not file a motion for Judge Earley to reconsider the order dismissing Reynolds from the action. Instead, they waited nearly seven months and then filed a writ petition to this Court on March 24, 2021. 2 PA 410–48. At this Court's direction, Reynolds filed a response, and Plaintiffs filed a reply. 4 PA 846–74, 5 PA 963–81. The matter has been fully briefed before this Court since July 12, 2021.

***Plaintiffs' motion for reconsideration filed on May 25, 2021***. Nine months after Judge Earley's order——and soon after she retired from office——Plaintiffs filed a motion to reconsider with Judge Nadia Krall, the new judge assigned to this case after Judge Earley's retirement. 4 PA 649–845. Over thirteen months after

Judge Earley dismissed Reynolds from the case, Judge Krall granted Plaintiffs' motion to reconsider. 6 PA 1174–80.

***Judge Krall's grant of reconsideration on November 3, 2021***. At a hearing on September 23, 2021, Judge Krall provided little substantive reasoning for her decision, saying only that "under the Nevada Deceptive Trade Practices Act, this is more about detrimental reliance and the conspiracy and that without the concerted effort of all of the tobacco companies, they would not have succeeded in keeping this alleged harmful information from the public, including the fact that they testified in Congress." 6 PA 1153:19-25, 1154:1-2. When Reynolds emphasized that Plaintiffs had not met the rigorous requirements to warrant reconsideration and that the legal issue is currently pending before this Court, Plaintiffs argued that the court should nonetheless grant their motion and force Reynolds back into the action to participate in discovery "so that we don't delay it." 6 PA 1160:22. The court agreed and orally granted Plaintiffs' motion to reconsider. 6 PA 1169:8–9.

Almost six weeks later, Judge Krall signed an order that was drafted by Plaintiffs' counsel. In that order, Judge Krall asserts that Judge Earley's original order was clear error because Plaintiffs' NDTPA claim "is based upon the plain language of the [sic] several statutory provisions," 6 PA 1175:24–25, without identifying a single statutory provision. Judge Krall's order then accuses Judge Earley of having impermissibly added elements to Plaintiffs' claim before relying on

the "remedial" nature of the NDTPA to justify granting reconsideration. *Id*. But Judge Krall's order never addresses the threshold question of whether or how Plaintiffs could have standing to assert a private NDTPA claim against Reynolds as "victims" of Reynolds's alleged fraud without ever purchasing a product designed, manufactured, or sold by Reynolds. *See id*. This application for a writ followed.

## ARGUMENT

## A WRIT OF MANDAMUS IS WARRANTED.

A writ of mandamus is available (1) to "control an arbitrary or capricious exercise of discretion," *Int'l Game Tech., Inc. v. Second Jud. Dist. Ct.* ("*McAndrews*"), 124 Nev. 193, 197, 179 P.3d 556, 558 (2008) (en banc), or (2) to review "an important issue of law [that] needs clarification" when "considerations of sound judicial economy and administration militate in favor" of doing so, *id.* at 197–98. Both circumstances are present here: Judge Krall's grant of reconsideration was arbitrary because Plaintiffs' motion fell woefully short of the high burden required for reconsideration. Worse still, Judge Krall granted reconsideration while review of Judge Earley's original order was pending in this Court on Plaintiffs' fully briefed petition for a writ, which seeks much needed appellate guidance on the underlying legal question that has divided the district courts. This Court should not delay appellate resolution of this important issue simply because a trial judge

improperly granted reconsideration of an order by a predecessor judge thirteen months after it was rendered.

### A. Judge Krall Manifestly Abused Her Discretion by Arbitrarily Granting Reconsideration of Judge Earley's Original Order.

Motions to reconsider are appropriate "[o]nly in very rare instances in which new issues of fact or law are raised supporting a ruling contrary to the ruling already reached." *Moore v. City of Las Vegas*, 92 Nev. 402, 405, 551 P.2d 244, 246 (1976). Put differently, "[a] district court may reconsider a previously decided issue [only] if [1] substantially different evidence is introduced or [2] the decision is clearly erroneous." *Peddie v. Spot Devices, Inc*., 134 Nev. 994, 427 P.3d 125, 2018 WL 4781617, at *8 (No. 72721, Oct. 2, 2018) (unpublished disposition) (citation omitted). Neither ground existed here. Plaintiffs' motion did not point to any intervening development that could not have been raised in the original proceeding. Nor did Plaintiffs' motion show Judge Earley's order to be clearly erroneous. Granting reconsideration was thus arbitrary and a gross abuse of Judge Krall's discretion.

#### 1. Plaintiffs' motion did not introduce any new circumstance that was not available during the original proceeding.

Plaintiffs' motion to reconsider merely raises arguments fully available to Plaintiffs when they opposed Reynolds's motion to dismiss in 2020. There, Plaintiffs argued that (1) the plain language of the NDTPA supports their claim, 3 PA 459; (2)

a non-user of a product can be considered a "victim" under NRS 41.600(1), 3 PA 462; (3) civil conspiracy "extends liability beyond the active wrongdoing," 3 PA 467; and (4) if the court reinstates the NDTPA claim, it should reinstate the conspiracy claim as well. 3 PA 468. None of these arguments is based on any new legal or factual development; nor did Plaintiffs or Judge Krall claim that there had been any intervening development. *See Wallis v. J.R. Simplot Co.*, 26 F.3d 885, 892 n.6 (9th Cir. 1994) (for purposes of a motion to reconsider, "[e]vidence is not newly discovered if it was in the party's possession at the time of summary judgment or could have been discovered with reasonable diligence").

**2. Plaintiffs' motion did not show Judge Earley's original order was clearly erroneous.**

Unable to point to any intervening development, Plaintiffs' only remaining path to rehearing was to attempt to show that Judge Earley's order dismissing Reynolds was clearly erroneous. But Plaintiffs did not come close to meeting this exacting standard. Judge Earley carefully considered the parties' arguments after full briefing and a lengthy hearing, concluding that Plaintiffs "could not plead facts sufficient to show that R.J. Reynolds caused damage" to Mrs. Camacho because she never "purchase[d] or use[d] any R.J. Reynolds product." 2 PA 401–02. In other words, Plaintiffs could not show that Mrs. Camacho was a "victim" of Reynolds's alleged fraud as that term is used in the NDTPA and thus lacked standing to bring a private lawsuit against Reynolds under that Act. And given that Plaintiffs'

conspiracy claim alleged that same NDTPA claim against Reynolds as its "underlying unlawful objective," 2 PA 402, Judge Earley concluded that this derivative claim necessarily failed as well.

Far from clear error, Judge Earley's ruling was correct. No Nevada appellate court has ever allowed a non-use NDTPA claim to go forward against a product manufacturer; in fact, this Court rejected a similar claim in *Fairway*. Without a showing of direct harm from Reynolds's actions, Plaintiffs did not have standing for a private NDTPA claim or a derivative conspiracy claim premised on that same NDTPA claim against Reynolds. Notably, Judge Krall's reconsideration order never even addresses this threshold question of standing.

**a**. While the NDTPA provides wide reach for *government* action against deceptive trade practices, the Legislature expressly limited *private* actions for NDTPA violations to "victim[s]" of consumer fraud. NRS 41.600(1). Although this Court has yet to define this term in a published opinion, federal courts consistently have held that a plaintiff must show she was "directly harmed" by deceptive trade practices to have standing as a "victim" under NRS 41.600(1). *Del Webb*, 652 F.3d at 1153 (quotation marks omitted).

Here, Plaintiffs did not, and could not, allege that Mrs. Camacho was a "victim" of consumer fraud by Reynolds. They could not plead "direct harm" from Reynolds's actions because Mrs. Camacho never once used or purchased a Reynolds

product. Whatever deceptive statements Reynolds supposedly made did *not* convince Mrs. Camacho to purchase a Reynolds product, much less directly cause the harm Plaintiffs sue for—her laryngeal cancer. To the contrary, Plaintiffs claim that Mrs. Camacho's laryngeal cancer "was caused by smoking L&M brand cigarettes, Marlboro brand cigarettes, and Basic brand cigarettes." 1 PA 57. As these products were *not* manufactured or sold by Reynolds, Judge Earley correctly found that Plaintiffs could not plead facts sufficient to show that an alleged act of consumer fraud by Reynolds "directly harmed" Mrs. Camacho as required for her to qualify as a "victim" of Reynolds's alleged deceptive practices under NRS 41.600(1).

This Court's decision in *Fairway* is instructive on this point. In *Fairway*, the plaintiff saw a television commercial in which a car dealership falsely guaranteed financing. Br. of Respondent at 1–3, *Fairway*, 134 Nev. 935 (No. 80160), 2017 WL 5069301, at *1. Although he never purchased a car from the dealership, the plaintiff nonetheless brought a civil action under the NDTPA. *Id.* This Court reversed the denial of the defendants' summary judgment motion, holding that the plaintiff did not qualify as a "victim" of the dealership's actions under NRS 41.600. *Fairway*, 2018 WL 5906906, at *1. As the Court explained, "the definition of 'victim' connotes some sort of harm being inflicted on the 'victim.'" *Id.* (quoting Black's Law Dictionary (10th ed. 2014) (defining "victim" as "[a] person harmed by a crime, tort, or other wrong"); Merriam-Webster's Collegiate Dictionary 1394 (11th ed.

2007) (defining "victim" as "one that is injured, destroyed, or sacrificed under any of various conditions" and "one that is tricked or duped")). Put another way, "any sensible definition" of the term requires a showing that the claimant "suffer[ed] harm at the hands of [the defendant]." *Id*. And given that the plaintiff never purchased a car from the dealership, this Court concluded that he did not "suffer any harm at the hands" of the dealership and thus was "not a 'victim' authorized to bring a consumer fraud action under NRS 41.600." *Id*.

So too here. At best, Plaintiffs allege that Reynolds made fraudulent statements, but—like the plaintiff in *Fairway*—those statements never led Mrs. Camacho to buy, let alone use, a Reynolds product. If anything, Plaintiffs' theory is even more attenuated than the one this Court rejected in *Fairway* because they do not even allege that Mrs. Camacho saw a Reynolds advertisement, instead lumping Reynolds in with the other defendants and alleging that "Defendants" made various deceptive statements. 1 PA 99–101. But more fundamentally, even if Mrs. Camacho saw a Reynolds advertisement, she could not be a "victim" of Reynolds's alleged fraud because it did not persuade her to buy Reynolds's products and thus could not have "directly harmed" her by causing the laryngeal cancer that she blames on other manufacturers' cigarettes. *Del Webb*, 652 F.3d at 1153.

To conclude otherwise would allow virtually any private citizen to sue a product manufacturer for money damages over any perceived "deceptive trade

practice" regardless of whether the person purchased the product or the product injured her in any way. Plaintiffs point to nothing to support such an anomalous and atextual reading of the term "victim" in NRS 41.600. *See generally* A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 364–66 (2012) ("Why interpret a statute's language broadly or narrowly (as opposed to just reasonably or fairly)?"). In fact, Plaintiffs' proposed reading would undo the Legislature's carefully crafted balance between public and private enforcement of consumer fraud. The NDTPA itself grants only the government enforcement authority—including criminal prosecutions (NRS 598.0963)—and civil penalties up to $5,000 for each violation (NRS 598.0999). Two years after enacting the NDTPA, the Legislature created a limited private right of action for individuals who were "victim[s]" of consumer fraud with respect to a subset of deceptive trade practices listed in NRS 598.091 through 598.092. NRS 41.600(2)(e). As this Court recognized in *Fairway* (and as federal courts have held applying Nevada law), the Legislature's use of the term "victim" expresses its clear intent to strictly limit private lawsuits only to persons who suffer "harm at the hands" of the defendant. *Fairway*, 2018 WL 5906906, at *1.

Plaintiffs' position also contradicts well-established law in products liability cases like this one. In Nevada, it is axiomatic that "[a]mong manufacturers of products, liability rests only with the manufacturer of the product that actually

caused the alleged injury because that manufacturer profited from sales of the product and controlled its safety." *Moretti v. Wyeth, Inc*., No. 2:08-CV-00396-JCMGWF, 2009 WL 749532, at *4 (D. Nev. Mar. 20, 2009); *Baymiller v. Ranbaxy Pharms*., Inc., 894 F. Supp. 2d 1302, 1309–11 (D. Nev. 2012) (similar); *see also Dow Chem. Co. v. Mahlum*, 114 Nev. 1468, 1485–87, 970 P.2d 98, 110–11 (1998), *abrogated on other grounds by GES, Inc. v. Corbitt*, 117 Nev. 265, 21 P.3d 11 (2001) (reversing judgment against defendant on fraudulent misrepresentation claim "because it was not directly involved in the transaction from which [the] lawsuit arose, or any other transaction with the Mahlums"). Plaintiffs cannot circumvent this bedrock principle by using the NDTPA to seek damages from Reynolds for personal injuries caused by another manufacturer's product.

Nor does it matter that Plaintiffs have asserted claims against Reynolds under the NDTPA. This Court has consistently held that a claim must be analyzed "according to its substance, rather than its label." *Otak Nev., LLC v. Eighth Jud. Dist. Ct.*, 129 Nev. 799, 809, 312 P.3d 491, 489 (2013) (en banc); *accord Nev. Power Co. v. Eighth Jud. Dist. Ct.*, 120 Nev. 948, 960, 102 P.3d 578, 586 (2004) (en banc) (per curiam). Here, the substance of Plaintiffs' claims against Reynolds is rooted in product liability: they seek to recover personal injury damages for Mrs. Camacho's cancer allegedly caused by using products manufactured by PM USA and Liggett. That reality does not change just because Plaintiffs assert that Mrs. Camacho used

PM USA's and Liggett's products because of fraud. In both *Moretti* and *Baymiller*, the plaintiffs styled their claims as sounding in fraud, and both courts dismissed those fraud claims under Nevada law for lack of product use. *See Moretti*, 2009 WL 749532, at *4 (plaintiff's claims for misrepresentation and fraud failed because they were merely "an effort to recover for injuries caused by a product without meeting the requirements the law imposes in products liability actions"); *Baymiller*, 894 F. Supp. 2d at 1305 (dismissing plaintiffs' fraud claims because plaintiffs neither purchased nor used defendant's product).

In short, private lawsuits against manufacturers that did not design, manufacture, or sell the product that allegedly harmed the claimant would undermine the Legislature's carefully crafted scheme and flout well-settled principles of product liability law. Plaintiffs asserting such claims cannot fall within "any sensible definition" of "victim." *Fairway*, 2018 WL 5906906, at *1. Judge Earley was right—and certainly not clearly erroneous—to reject Plaintiffs' effort to circumvent the Legislature's limitation of private NDTPA suits to "victim[s]" of the defendant's deceptive practices. *Id*.

**b.** Plaintiffs' arguments to the contrary lack merit. Plaintiffs' rehearing motion first argued that they can file a private lawsuit against Reynolds because the NDTPA covers attempted sales, not just actual sales. 3 PA 459–62. This argument fails for numerous reasons. For one, Plaintiffs never raised it before Judge Earley

even though it was available during the original proceeding. It therefore cannot constitute a basis for rehearing. *See Wallis*, 26 F.3d at 892 n.6.

But in any event, this "attempted sale" argument misses the mark because it does not answer the threshold question of *standing* under NRS 41.600(1): the plaintiff must be "victim." Plaintiffs have offered no explanation of how a person can qualify as a "victim[] of deceptive trade practices" if the defendant "offered or attempted to sell a product" to her, but *failed*. Pet. at 19. As explained above, the Legislature created a private right of action only for actual "victims"—not "attempted victims." This Court's decision in *Fairway* is again instructive. The plaintiff in that case had *seen* the defendant's fraudulent advertisement—in other words, there was an "attempted sale" under Plaintiffs' approach. *See Fairway*, 2018 WL 5906906, at *1. In fact, the *Fairway* plaintiff made the same "attempted sale" argument that Plaintiffs make here. Br. of Respondent at 30, *Fairway*, 134 Nev. 935 (No. 80160), 2017 WL 5069301, at *38–41. But that argument failed because it overlooked the distinction between the broad, regulatory proscriptions of the NDTPA and the limited scope of the private right of action that the Legislature created in NRS 41.600(1). Plaintiffs' "attempted sale" argument just confirms their inability to show direct harm from Reynolds's alleged deceptive statements when Mrs. Camacho never used or purchased a Reynolds product and they allege that her injury was caused by other manufacturers' products.

Plaintiffs' motion next argued that individuals other than purchasers may be considered "victims" under NRS 41.600. 3 PA 462–67. This argument also fails. As a threshold matter, this Court has never held that non-consumers qualify as victims. Every case that Plaintiffs cite is a federal case interpreting Nevada law without guidance from this Court.

But permitting "victims" other than consumers to sue would not change the requirement that any private plaintiff still must qualify as a "victim" to sue. In other words, even assuming that the Legislature intended to allow private suits by individuals or companies "victim[ized]" by deceptive trade practices in ways other than being induced to buy or use the defendant's deceptively advertised goods or services, the plaintiff still must show that she was "victim" in that she was "directly harmed," *Guerra v. Dematic Corp*, No. 3:18-CV-0376-LRH-CLB, 2020 WL 8831583, at *3 (D. Nev. Sept. 9, 2020), "at the hands" of the defendant. *Fairway*, 2018 WL 5906906, at *1. Plaintiffs cannot show "direct harm" from anything Reynolds did when Mrs. Camacho never touched a Reynolds product; according to the allegations of the complaint, Mrs. Camacho's laryngeal cancer allegedly occurred "at the hands" of the manufacturers of the cigarettes she smoked.

Finally, Plaintiffs' motion baldly claimed that "[c]ausation is clearly alleged" in her claim against Reynolds. 3 PA 467. But the relevant part of the complaint just lumps Reynolds in with the defendants whose products allegedly injured Mrs.

Camacho and never identifies how Reynolds's cigarettes caused her harm. It fails to identify a single allegedly deceptive statement made by Reynolds, let alone explain how Reynolds's alleged NDTPA violation supposedly impacted Mrs. Camacho. No part of the NDTPA allegations in the complaint even contends that she saw any materials produced by Reynolds. 1 PA 99–101. Such threadbare allegations of causation are "too attenuated" and "remote" to demonstrate the direct harm at the hands of Reynolds that NRS 41.600 requires. *Prescott v. Slide Fire Sols., LP*, 410 F. Supp. 3d 1123, 1145–46 (D. Nev. 2019); *Fields v. Twitter, Inc.,* 881 F.3d 739, 745 (9th Cir. 2018); *see also, e.g.*, *Katz v. Pershing, LLC*, 672 F.3d 64, 76 (1st Cir. 2012) (dismissing the plaintiff's claims that misleading advertisements by a third party caused plaintiff injury because they likely affected her decision to pay another party's artificially inflated fees).

Nothing in Judge Earley's conclusion was clear error. Quite the opposite, she correctly concluded that the NDTPA does not confer standing for a plaintiff seeking damages for injury from a product to bring a private lawsuit against a defendant that did not design, manufacture, or sell the product—a threshold issue that Judge Krall's reconsideration order never even addresses.

**c.** Judge Earley was also correct to dismiss Plaintiffs' conspiracy claim against Reynolds. Plaintiffs made clear that this claim is entirely dependent on their NDTPA claim against Reynolds. *See* 3 PA 402. As Judge Earley explained, civil

conspiracy "is a derivative claim in Nevada with the Plaintiff[s] alleging the Violation of Deceptive Trade Practices Act as the underlying unlawful objective." 3 PA 465. And because Plaintiffs' predicate NDTPA claim against Reynolds fails, so too does their derivative conspiracy claim. *See Jordan v. State ex rel. Dep't of Motor Vehicles & Pub. Safety*, 121 Nev. 44, 74–75, 110 P.3d 30, 51 (2005) (en banc) (per curiam) (underlying cause of action for fraud is a necessary predicate to a cause of action for conspiracy to defraud), *overruled on other grounds*, *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 181 P.3d 670 (2008); *Sommers v. Cuddy*, No. 2:08-cv-78-RCJ-RJJ, 2012 WL 359339, at *5 (D. Nev. Feb. 2, 2012) (applying Nevada law and recognizing that a cause of action for civil conspiracy to defraud requires a viable underlying cause of action for fraud); *Goodwin v. Exec. Tr. Servs., LLC*, 680 F. Supp. 2d 1244, 1253–54 (D. Nev. 2010) (same).

* * *

Plaintiffs' motion to reconsider did not present any new evidence or authority, let alone show Judge Earley's decision to be clearly erroneous. *Peddie*, 134 Nev. 994. "Under such circumstances, the motion was superfluous and, in [this Court's] view, it was an abuse of discretion for the district court to entertain it." *Moore*, 92 Nev. at 405, 551 P.2d at 246. This alone warrants a writ of mandamus.

### B. The Underlying Question Presents an Important Issue of Law in Need of Appellate Clarification.

A second, independent basis for writ relief is the practical reality presented here. Plaintiffs' own petition for a writ from March of this year asked this Court to resolve the question of whether the NDTPA permits a non-user to bring a private lawsuit against a product manufacturer—a question that is recurring in tobacco cases in Nevada and has divided the district courts. And in its response to Plaintiffs' petition, Reynolds agreed that this Court should answer this threshold question now, instead of leaving the lower courts in a state of flux and forcing the parties to potentially spend resources needlessly. *See, e.g.*, *Tully v. Philip Morris USA Inc.*, No. A807657 (July 8, 2020) (finding that use was unnecessary to prevail on an NDTPA claim); *Clark v. Philip Morris USA Inc.*, No. A802987 (April 20, 2021) (concluding that "any person" is permitted to bring an action pursuant to the NDTPA and that Plaintiff had sufficiently pleaded NDTPA violations, fraud claims, and derivative civil conspiracy claims); *Rowan v. Philip Morris USA Inc.*, No. A811091 (Sept. 8, 2021)) (dismissing the plaintiff's NDTPA and civil conspiracy claims against non-use defendant). *See* 6 PA 1191-1228.

Nothing about that has changed. The question presented is still "an important issue of law [that] needs clarification," *International Game Tech.*, 124 Nev. 197–98, and "considerations of sound judicial economy and administration [still] militate in favor" of resolving it now. *Id*. The issue is fully briefed and pending before this

Court on Plaintiffs' petition for a writ; it frequently recurs in tobacco cases; and the parties and lower courts would benefit from this Court's guidance. In this case, for example, non-use defendant Reynolds would incur significant expense in defending this lawsuit and going through a multi-week trial—all based on a dubious legal theory that no Nevada appellate court has ever approved. Forcing Reynolds and other non-use defendants to bear the burden of an entire trial makes no sense when the threshold legal question is already teed up for resolution by this Court.

Plaintiffs, for their part, can hardly argue otherwise. They petitioned for a writ in March 2020 urging this Court to act now because the question was a matter of statewide importance. 2 PA 418–19. Having so argued, Plaintiffs cannot now credibly claim that the question is not important or that its resolution can wait.

Before Judge Krall, Plaintiffs suggested that granting reconsideration was prudent because it would require Reynolds to participate in this case and thus avoid the potential for separate proceedings against Reynolds at a later point. 6 PA 1160–61. But that makes no sense. For one thing, it presumes that Plaintiffs would win the threshold legal question in this Court. For another, any timing concerns are entirely of Plaintiffs' own making. Judge Earley issued her order in August 2020—but Plaintiffs did not move for reconsideration *until nine months later*, long past the 14-day window prescribed by EDCR Rule 2.24. *See* EDCR 2.24 (party seeking reconsideration "*must* file a motion for such relief within 14 days after service of

written notice of the order or judgment" (emphasis added)); *Dimick v. Eighth Jud. Dist. Court of State ex rel. County of Clark*, 129 Nev. 1110, 2013 WL 588891 (Case No. 62395, filed Feb. 13, 2013) (unpublished disposition) (motion for reconsideration filed outside the window prescribed by Rule. 2.24 was untimely).

This was a strategic choice by Plaintiffs. Instead of timely seeking reconsideration from Judge Earley, they decided to petition for a writ from this Court. But when Judge Krall was assigned to the case, Plaintiffs decided to try their luck with a much-belated motion for reconsideration—even though the same issue was fully briefed and pending in this Court. After waiting nine months to wait for the appointment of their preferred judge, Plaintiffs cannot possibly now raise concerns about timing or the possibility of additional proceedings.

In all events, both sides agree that the question presented is important and needs resolution by this Court. And given that it is already fully briefed and pending in this Court, considerations of judicial economy counsel in favor of resolving it now.

## CONCLUSION

For the reasons set forth herein, the Court should grant Reynolds's petition, vacate Judge Krall's order granting reconsideration and instruct Judge Krall to dismiss Reynolds from the action.

Respectfully submitted,

BAILEY❖KENNEDY

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## VERIFICATION

I, Dennis L. Kennedy, am a partner of the law firm of Bailey❖Kennedy, counsel of record for R.J. Reynolds Tobacco Company, and the attorney primarily responsible for handling this matter for and on behalf of R.J. Reynolds Tobacco Company. I make this Verification pursuant to NRS 34.170, NRS 34.330, NRS 53.045, and NRAP 21(a)(5).

I hereby declare under penalty of perjury under the laws of the State of Nevada that the facts relevant to this Petition are within my knowledge as an attorney for R.J. Reynolds Tobacco Company and are based on the proceedings, documents, and papers filed in the underlying action, *Sandra Camacho, individually, and Anthony Camacho, individually, v. Philip Morris USA, Inc., et al.*, No. A-19-807650-C, pending in Department IV of the Eighth Judicial District Court, Clark County, Nevada.

I know the contents of this Petition, and the facts stated therein are true of my own knowledge except as to those matters stated on information and belief. As to any matters identified as being stated on information and belief, I believe them to be true.

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True and correct copies of the orders and papers served and filed by the parties in the underlying action that may be essential to an understanding of the matters set forth in this Petition are contained in the Appendix to this Petition.

EXECUTED on this 4th day of November, 2021.

/s/ Dennis L. Kennedy
DENNIS L. KENNEDY

## CERTIFICATE OF COMPLIANCE

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:

[X] This brief has been prepared in a proportionally spaced typeface using Microsoft Word 365 ProPlus in 14-sized font Times New Roman.

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

[X] Proportionately spaced, has a typeface of 14 points or more and contains 5,424 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 this 4th day of November 2021.

BAILEY❖KENNEDY

By: /s/ Dennis L. Kennedy
Dennis L. Kennedy

*Counsel for Petitioner*
*R.J. Reynolds Tobacco Company*

## CERTIFICATE OF SERVICE

I certify that I am an employee of BAILEY❖KENNEDY and that on the 4th day of November, 2021, service of the PETITION FOR WRIT OF MANDAMUS OR PROHIBITION and APPENDIX OF EXHIBITS TO PETITION FOR WRIT OF MANDAMUS OR PROHIBITION, Volumes 1 through 6, was made by electronic service through the Nevada Supreme Court's electronic filing system, hand delivery, and/or depositing a true and correct copy in the U.S. Mail, first class postage prepaid, and addressed to the following at their last known address:

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