Case No. _____

IN THE SUPREME COURT OF NEVADA

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.

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

APPENDIX OF EXHIBITS TO PETITION FOR WRIT OF MANDAMUS OR PROHIBITION

VOLUME 5 OF 6

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APPENDIX OF EXHIBITS TO PETITION FOR WRIT OF MANDAMUS OR PROHIBITION

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EXHIBIT 17

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DISTRICT COURT

CLARK COUNTY, NEVADA

SANDRA CAMACHO, individually, and ANTHONY CAMACHO, individually,

Plaintiffs,

vs.

PHILIP MORRIS USA, INC., a foreign corporation; 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; LIGGETT GROUP, LLC., a foreign limited liability company; and ASM NATIONWIDE CORPORATION d/b/a SILVERADO SMOKES & CIGARS, a domestic corporation; and LV SINGHS INC. d/b/a SMOKES & VAPORS, a domestic corporation; DOES 1-X; and ROE BUSINESS ENTITIES XI-XX, inclusive,

Defendants.

Case No. A-19-807650-C
Dept. No. IV

DEFENDANT R.J. REYNOLDS TOBACCO COMPANY'S OPPOSITION TO PLAINTIFFS' MOTION TO RECONSIDER ORDER GRANTING MOTION TO DISMISS PLAINTIFFS' AMENDED COMPLAINT UNDER NRCP 12(B)(5)

Hearing Date: July 13, 2021
Hearing Time: 9:00 AM

I. INTRODUCTION

Plaintiffs' motion is not only untimely, but fails to identify any compelling reason why this Court should revisit its ruling to dismiss Plaintiffs' product liability claims against R.J. Reynolds Tobacco Company ("Reynolds"), which Plaintiffs concede never designed, manufactured or sold any of the cigarettes smoked by Plaintiff Sandra Camacho. As a threshold matter, Plaintiffs improperly seek reconsideration of an Order entered by Judge Earley approximately 9 months ago—well beyond the 14-day timeline for parties to do so under EDCR 2.24—and have not sought leave of Court to do so. And even if this motion was timely submitted to the Court, Plaintiffs do not argue that any newly discovered facts or intervening changes in controlling law should compel a different result here. Rather, Plaintiffs' motion merely seeks to relitigate the same arguments this Court has already rejected, and which are currently pending before the Supreme Court of Nevada in connection with Plaintiffs' writ of mandamus, raising the very same arguments in nearly verbatim fashion. This Court should not entertain Plaintiffs' untimely and ill-fated attempt for a third bite at the apple here, especially where Plaintiffs cannot demonstrate any clear error in the Court's prior ruling.

Plaintiffs filed this product liability case alleging that Mrs. Camacho contracted laryngeal cancer after decades of smoking cigarette products manufactured by Philip Morris USA Inc. ("PM USA") and Liggett Group ("Liggett"). Although Mrs. Camacho never purchased or used a product manufactured by Reynolds, Plaintiffs nonetheless named Reynolds as a defendant under the theory that Reynolds had violated the NDTPA through its advertisements and other statements about its products. But as the Supreme Court of Nevada recognized in *Fairway Chevrolet Co. v. Kelley*, 134 Nev. 935, 429 P.3d 663, 2018 WL 5906906 (2018) (unpublished), the Legislature limited standing for private actions to "victim[s] of consumer fraud" who were directly harmed by the defendant's NDTPA violation. Just like the plaintiff in *Fairway*, Mrs. Camacho cannot show the required direct harm from Reynolds's alleged NDTPA violations because Reynolds's allegedly deceptive statements never caused her to purchase or use a Reynolds product. Seeing allegedly deceptive statements—without acting on them by buying or using Reynolds's products—does not make Mrs. Camacho a "victim" of Reynolds's alleged consumer fraud with standing to sue Reynolds for personal injuries

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she alleges were caused by smoking cigarettes manufactured by PM USA and Liggett. She cannot show a direct injury from anything Reynolds did.

In using the straightforward term "victim" to limit consumer-fraud suits to people who suffered direct harm from a deceptive practice, the Legislature did not authorize everyone who happens to see a deceptive statement from a manufacturer about its product to sue regardless of whether the person ever purchased the product. Under Plaintiffs' reading, an individual could sue Ford for allegedly deceptive advertising and could seek damages for injuries caused by a defective Chevrolet even though she never bought a Ford vehicle. That is far beyond "any sensible definition" of "victim." *Fairway*, 2018 WL 5906906, at *1.

It is bedrock law that product liability requires product use. No matter how Plaintiffs label their claim, the only injury alleged is that Mrs. Camacho contracted laryngeal cancer from smoking cigarettes manufactured by PM USA and Liggett. Nothing in the Legislature's use of the word "victim" evinces an intent to allow NDTPA claims against manufacturers such as Reynolds that did not design or sell the product that caused the alleged harm. That would turn well-settled product liability law upside down and open a floodgate of private lawsuits by mere bystanders. Judge Earley did not err by defining the term "victim" consistent with its plain meaning, with longstanding product liability law, and with the Supreme Court of Nevada's decision in *Fairway*. This Court should accordingly deny Plaintiffs' motion for reconsideration.

II. RELEVANT BACKGROUND

Plaintiffs filed this case against Liggett, PM USA, and Reynolds to seek damages for Mrs. Camacho's laryngeal cancer. 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. Compl. ¶ 17. At the time Mrs. Camacho allegedly smoked them, L&M cigarettes were designed, manufactured, and sold by Liggett. *Id.* ¶ 18. Marlboro and Basic cigarettes were designed, manufactured, and sold by Philip Morris. *Id.* ¶ 19. Mrs. Camacho never alleged that she purchased or smoked any cigarettes manufactured by Reynolds. *See id*.

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Plaintiffs nonetheless asserted two claims against Reynolds for (1) violation of the NDTPA and (2) civil conspiracy. *Id.* ¶¶ 192-221. Reynolds moved to dismiss and raised three related arguments. First, Reynolds pointed out that Plaintiffs' claims, although labeled as NDTPA and civil conspiracy claims, were actually product liability claims that cannot survive without an allegation of product use. *See* Reynolds's Motion to Dismiss Plaintiffs' Amended Complaint under NRCP 12(b)(5) (Mar. 23, 2020), at 5-7. Second, Plaintiffs' claim for violation of the NDTPA failed because they 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 because she never purchased Reynolds's cigarettes. *Id.* at 7-8. Third, Plaintiffs' derivative civil conspiracy claim against Reynolds failed because its predicate claim under the NDTPA failed. *Id.* at 8.

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. Plaintiffs' Opposition to Reynolds's Motion to Dismiss Plaintiffs' Amended Complaint under NRCP 12(b)(5) (Apr. 6, 2020), at 6-10. Plaintiffs never argued that their NDTPA claim should proceed because Reynolds attempted a sale of its cigarettes to Mrs. Camacho.

After hearing lengthy oral argument, Judge Earley dismissed both claims against Reynolds. With respect to the NDTPA claim, the Court held 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 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.

Order Granting Defendant R.J. Reynolds Tobacco Company's Motion to Dismiss Plaintiffs' Amended Complaint under NRCP 12(b)5), at 2 (Aug. 27, 2020). The Court then held that "Civil Conspiracy is a derivative claim in Nevada with the Plaintiff alleging the Violation of Deceptive Trade Practices Act as the underlying unlawful objective." *Id.* at 3. Because the Court dismissed Plaintiffs' NDTPA claim, their conspiracy claim against Reynolds was dismissed as well. *Id.*

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Plaintiffs initiated their writ to the Supreme Court of Nevada on March 23, 2021[1] and then filed this motion for reconsideration two months later on May 25, 2021.

III. ARGUMENT

A. LEGAL STANDARD

Nevada Rules of Practice for the Eighth Judicial District Court clearly state that "[n]o motions once heard and disposed of may be renewed in the same cause, nor may the same matters therein embraced be reheard, unless by leave of the court[.]" EDCR 2.24. Moreover, "[a] party seeking reconsideration of a ruling of the court . . . must file a motion for such relief within 14 days after service of written notice of the order or judgment[.]" *Id.*

"Only in very rare instances in which new issues of fact or law are raised supporting a ruling contrary to the ruling already reached should a motion for rehearing be granted." *Moore v. City of Las Vegas*, 92 Nev. 402, 405, 551 P.2d 244, 246 (1976). Reconsideration is "'an extraordinary remedy, to be used sparingly in the interests of finality and conservation of judicial resources.'" *Kona Enterprises, Inc. v. Estate of Bishop*, 229 F.3d 877, 890 (9th Cir. 2000) (citing Moore's Federal Practice § 59.30[4] (3d ed. 2000)).[2] "'[A] motion for reconsideration should not be granted, absent highly unusual circumstances, unless the district court is presented with newly discovered evidence, committed clear error, or if there is an intervening change in the controlling law.'" *Id.* (citation omitted); *see also Masonry and Tile Contractors Ass'n of Southern Nev. v. Jolly, Urga & Wirth, Ltd.*, 113 Nev. 737, 741, 941 P.2d 486, 489 (1997) ("A district court may reconsider a previously decided issue if substantially different evidence is subsequently introduced or the decision is clearly erroneous.").

"Points or contentions not raised in the original hearing cannot be maintained or considered on rehearing." *Achrem v. Expressway Plaza Ltd. P'ship*, 112 Nev. 737, 742, 917 P.2d 447, 450 (1996); *accord Kona Enterprises*, 229 F.3d at 890 ("A Rule 59(e) motion may *not* be used to raise

[1] The Supreme Court of Nevada requested further briefing in connection with Plaintiffs' writ on April 15, 2021, and Reynolds's Answer was submitted on June 14, 2021.

[2] Federal cases interpreting rules of civil procedure are persuasive authority in Nevada courts. *Exec. Mgmt. Ltd. v. Ticor Title Ins. Co.*, 118 Nev. 46, 53, 38 P.3d 872, 876 (2002) (citing *Las Vegas Novelty v. Fernandez,* 106 Nev. 113, 119, 787 P.2d 772, 776 (1990)).

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arguments or present evidence for the first time when they could reasonably have been raised earlier in the litigation." (emphasis original)).

> [T]he purpose of a motion for reconsideration is to allow the parties to present new evidence and/or arguments that ***could not have*** been presented during the earlier adjudicated motion. Reconsideration is not a device to relitigate old matters ***or to raise arguments or evidence that could and should have been brought during the earlier proceeding***.

Kamaka v. Goodsill Anderson Quinn & Stifel, 176 P.3d 91, 103 (Haw. 2008) (emphasis added) (citation omitted).

B. PLAINTIFFS' MOTION IS UNTIMELY AND PROCEDURALLY IMPROPER.

Plaintiffs' motion is over 8 months too late. The Order challenged by Plaintiffs was issued by Judge Earley on August 27, 2020, and their time to file a motion for reconsideration expired on September 11, 2020. *See* Notice of Entry of Order (Aug. 28, 2020); EDCR 2.24. Worse, Plaintiffs have not sought leave of Court to file the instant motion beyond the 14-day period prescribed by the Rules. As such, Plaintiffs' motion is not properly before the Court and should be rejected accordingly.

C. THE COURT DID NOT ERR BY DISMISSING PLAINTIFFS' NDTPA CLAIM AGAINST REYNOLDS.

Even if Plaintiffs' motion were properly before the Court, Plaintiffs have not presented any "newly discovered evidence" or "intervening change in the controlling law" such that the Court should grant Plaintiff the "extraordinary remedy" of reversing Judge Earley's decision to dismiss Plaintiffs' claims against Reynolds. *See Kona*, 229 F.3d at 890. Nor have Plaintiffs presented any compelling reason why this Court should reconsider the prior ruling while the Supreme Court of Nevada is currently considering Plaintiffs' writ on this very issue.

In any event, it cannot be said that the Court committed "clear error" by concluding that Mrs. Camacho is unable to bring a NDTPA claim against a product manufacturer whose products she never used or purchased. No Nevada appellate court has ever allowed such a claim to go forward; in fact, the Supreme Court of Nevada rejected a similar claim in *Fairway*. The Legislature limited private civil actions under the NDTPA to "victim[s]" of consumer fraud, NRS 41.600(1), which in

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the product liability context includes only those who were directly harmed by the product. Having never used or purchased a Reynolds product, Mrs. Camacho did not and cannot plead facts to establish she was a victim of Reynolds' alleged fraud or that she had a legal relationship with Reynolds on which she can now premise civil liability.

1. Mrs. Camacho Does Not Have Standing to Sue as a "Victim" of Consumer Fraud Under NRS 41.600.

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 the Supreme Court of Nevada has yet to define the term "victim" in a published decision, federal courts have consistently 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). *See, e.g.*, *Del. Webb Communities, Inc. v. Partington*, 652 F.3d 1145, 1153 (9th Cir. 2011) (quoting *S. Serv. Corp. v. Excel Bldg. Servs., Inc.*, 617 F. Supp. 2d 1097, 1100 (D. Nev. 2007)). More specifically, a plaintiff must plead and ultimately prove "that (1) an act of consumer fraud by the defendant (2) caused (3) damage to the plaintiff." *Picus v. Wal-Mart Stores, Inc.*, 256 F.R.D. 651, 658 (D. Nev. 2009); *Sattari v. Wash. Mut.*, 475 F. App'x 648, 648 (9th Cir. 2011) (same).

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 statements Reynolds supposedly made did *not* convince Mrs. Camacho to actually purchase a Reynolds product, much less directly cause the harm that 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." Compl. ¶ 17. As these products were *not* manufactured or sold by Reynolds, Judge Earley correctly found that Plaintiffs' claim for personal injury damages against Reynolds was far too attenuated to satisfy the "direct harm" requirement for her to qualify as a "victim" of Reynolds's alleged deceptive practices under NRS 41.600(1).

The Supreme Court of Nevada's recent decision in *Fairway* is instructive on this point. In *Fairway*, the plaintiff saw a television commercial in which a car dealership falsely guaranteed

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financing. *Fairway Chevrolet*, Br. of Respondent at 1-3, 134 Nev. 935, (No. 80160), 2020 WL 4196115. Although he never actually purchased a car from the dealership, the plaintiff nonetheless brought a civil action under the NDTPA. *Id.* The Court reversed the denial of the defendants' summary judgment motion, holding that the plaintiff did not qualify as a "victim" under NRS 41.600. *Fairway*, 2018 WL 5906906, at *1.

The Court further explained that "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, the 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 a Reynolds product and she thus did not suffer "direct harm" from those statements. If anything, Plaintiffs' theory is even more attenuated than the one rejected in *Fairway* because Plaintiffs 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. Compl. ¶ 212. But more fundamentally, even if Mrs. Camacho saw a Reynolds advertisement, she would not be a "victim" of Reynolds's alleged fraud because it did not persuade her to buy Reynolds's products, and thus Reynolds could not have "direct[ly]" caused the laryngeal cancer that she blames on other manufacturers' cigarettes.

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. In

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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 passed NRS 41.600 to create a limited private right of action for a subset of individuals: those 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 the Supreme Court recognized in *Fairway* (and as federal courts have held when applying Nevada law), the Legislature's use of the term "victim" expresses a clear intent to limit private lawsuits to only those who suffer "harm at the hands" of the defendant, 2018 WL 5906906, at *1.

Plaintiffs' position also contradicts well-established law in product 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*, 2009 WL 749532, at *4 (citing *Allison v. Merck & Co.*, 110 Nev. 762, 767–68, 878 P.2d 948, 952 (1994)); *Baymiller*, 894 F. Supp. 2d at 1309-11 (similar). Plaintiffs cannot circumvent this bedrock principle using the NDTPA to seek damages from Reynolds for personal injuries that were allegedly caused by other manufacturers' products. The Nevada Supreme 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).

Although labeled under the NDTPA, Plaintiffs' allegations are nevertheless rooted in product liability—the only injury asserted is that Mrs. Camacho contracted laryngeal cancer as a result of using products manufactured by PM USA and Liggett. That reality does not change just because Plaintiffs are asserting fraud with respect to the product. 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

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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 sum, 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 statutory scheme and flout well-settled principles of product liability law. That cannot fall within "any sensible definition" of "victim," and Judge Earley correctly rejected Plaintiffs' novel effort to circumvent the Legislature's limitation of private NDTPA suits to "victim[s]" of the defendant's deceptive practices. *Fairway*, 2018 WL 5906906, at *1.

2. Plaintiffs' Arguments to the Contrary Lack Merit.

Plaintiffs now claim—for the first time—that the "NDTPA's plain language permits victims of deceptive trade practices to commence action as long as the defendant offered or attempted to sell a product." Pls.' Mot., at 16. Because "sales" as defined in the NDTPA includes attempted sales, Plaintiffs say they can bring a private lawsuit against Reynolds even though Mrs. Camacho never used Reynolds's products. *Id.* at 11-16. To be sure, Plaintiffs' failure to assert this argument at the original hearing on this motion dooms their attempt to raise it here. *Achrem*, 112 Nev. at 742 ("Points or contentions not raised in the original hearing cannot be maintained or considered on rehearing."); *accord Kona*, 229 F.3d at 890 ("A Rule 59(e) motion may not be used to raise arguments or present evidence for the first time when they could reasonably have been raised earlier in the litigation.").

In any event, this "attempted sale" argument misses the mark because it provides no answer to the threshold question of standing under NRS 41.600(1). Indeed, Plaintiffs' argument simply begs the question, as they offer 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*. *Id.* at 16.

Plaintiffs' argument that the NDTPA covers attempted sales ignores that they are suing under NRS 41.600 because, as private citizens, they have no cause of action under the NDTPA directly. As explained above, the Legislature created a private right of action only for actual victims—not "attempted victims." The Supreme Court's decision in *Fairway* is again instructive. The plaintiff in

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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 Chevrolet*, 134 Nev. 935 (No. 80160), 2020 WL 4196115. But that argument failed because it overlooks 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 statement when Mrs. Camacho never used or purchased a Reynolds product, and they allege that her injury was caused by other manufacturers' products.

Plaintiffs also claim that individuals other than purchasers may be considered "victims" under NRS 41.600, and they leap from that claim to the conclusion that they qualify because "[c]ausation is clearly alleged" in their complaint. Pls.' Mot., at 19 (citing Compl. ¶¶ 212-13). This argument also fails.

As a threshold matter, the Supreme Court of Nevada has never held that non-consumers qualify as victims. Every case that Plaintiffs cite is a federal case interpreting Nevada law without guidance from Nevada courts. But even assuming that NRS 41.600 could permit victims other than consumers to sue, that does not change the fact that any private plaintiff still must qualify as a "victim." In other words, even assuming that the Legislature intended to allow private suits by individuals or companies victimized by deceptive trade practices in ways other than being induced to buy or use the defendant's deceptively advertised goods or services, the plaintiff must still show 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; if anything, Mrs. Camacho's laryngeal cancer occurred "at the hands" of the manufacturers of the cigarettes she smoked.

Plaintiffs' claim that "[c]ausation is clearly alleged" against Reynolds is empty rhetoric. Pls.' Mot., at 19. The relevant part of the Complaint (¶¶ 212-13) mostly addresses conduct that occurred *before* the NDTPA was even enacted in 1973 and just lumps Reynolds in with the defendants whose

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products allegedly injured Mrs. Camacho. It fails to identify a single allegedly deceptive statement made by Reynolds, let alone explain how Reynolds's alleged NDTPA violation even impacted Mrs. Camacho. No part of the NDTPA allegations in the complaint even contends that she saw any materials produced by Reynolds. Such claims 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).

The cases upon which plaintiffs rely only underscore why their claims fail. Take *Del Webb Communities, Inc. v. Partington*, 652 F.3d 1145, 1153 (9th Cir. 2011). There, a contractor used deceptive and fraudulent means to solicit subdivision homeowners, offering to inspect their homes and then seeking payment by encouraging the homeowners to bring false claims against Del Webb, the developer. *Id.* at 1149. The court permitted Del Webb to sue the contractor because Del Webb clearly set forth what the contractor did and how his actions caused Del Webb concrete, economic, and direct harm. *Id.* at 1153. Plaintiffs offer nothing of the sort here. Their claims lie against the manufacturers of the products that allegedly injured Mrs. Camacho, not against Reynolds.

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D. THE COURT PROPERLY FOUND THAT PLAINTIFFS' DERIVATIVE CONSPIRACY CLAIM FALLS WITH THEIR PREDICATE NDTPA CLAIM.

Plaintiffs have made clear that their civil conspiracy claim against Reynolds is entirely dependent on their NDTPA claim against Reynolds. Pls.' Mot., at 21 ("Judge Earley correctly recognized that the NDTPA claim suffices as a predicate for the civil conspiracy claim"); June 11, 2020 Hr'g Tr., at 51:11-12, 15-17, attached as Exhibit 1 ("Now, what we do agree with is that there has to be an underlying tort [for civil conspiracy] . . . so, what we did is we had a Nevada Deceptive Trade Practices Act as the underlying fraud claim.").

Consistent with that position, Judge Earley explained that civil conspiracy "is a derivative claim in Nevada with the Plaintiff alleging the Violation of Deceptive Trade Practices Act as the underlying unlawful objective." Aug. 27, 2020 Order, at 3. 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) (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); *see also 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).

IV. CONCLUSION

For the reasons set forth herein, the Court should deny Plaintiffs' motion for reconsideration.

DATED this 22nd day of June, 2021.

Respectfully submitted,

BAILEY❖KENNEDY

By: */s/ Joseph A. Liebman*
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CERTIFICATE OF SERVICE

I certify that I am an employee of BAILEY❖KENNEDY and that on the 22nd day of June, 2021, service of the foregoing **DEFENDANT R.J. REYNOLDS TOBACCO COMPANY'S OPPOSITION TO PLAINTIFFS' MOTION TO RECONSIDER ORDER GRANTING MOTION TO DISMISS PLAINTIFFS' AMENDED COMPLAINT UNDER NRCP 12(B)(5)** was made by mandatory electronic service through the Eighth Judicial District Court's electronic filing system and/or by 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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Exhibit 1

Exhibit 1

TRAN

DISTRICT COURT

CLARK COUNTY, NEVADA

* * * * *

SANDRA CAMACHO, ANTHONY CAMACHO, Plaintiffs, vs. PHILIP MORRIS USA, INC., ET AL., Defendants.	CASE NO. A-19-807650-C DEPT. NO. IV **Transcript of Proceedings**

BEFORE THE HONORABLE KERRY EARLEY, DISTRICT COURT JUDGE

DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' AMENDED COMPLAINT

THURSDAY, JUNE 11, 2020

APPEARANCES: (ALL VIA VIDEO CONFERENCE)

For the Plaintiff: MICAH S. ECHOLS, ESQ.
SEAN K. CLAGGETT, ESQ.
KIMBERLY WALD, ESQ.

For the Defendants: J. CHRISTOPHER JORGENSEN, ESQ.
KELLY A. LUTHER, ESQ.
DENNIS L. KENNEDY, ESQ.
D. LEE ROBERTS, JR., ESQ.
JENNIFER B. KENYON, ESQ.

RECORDED BY: REBECA GOMEZ, DISTRICT COURT
TRANSCRIBED BY: KRISTEN LUNKWITZ

Proceedings recorded by audio-visual recording; transcript produced by transcription service.

THURSDAY, JUNE 11, 2020 AT 9:46 A.M.

THE CLERK: A807650-C.

THE COURT: Okay. And we have two Motions to Dismiss, one by defendant, R.J. Reynolds Tobacco Company, and that's Mr. Kennedy. Correct?

MR. KENNEDY: Yes, Your Honor. Dennis Kennedy here.

THE COURT: Okay. It's like roll call in grade school. Right? No, I don't mean it.

Okay. Is there anybody else on behalf of R.J. Reynolds? Anybody out of state? Okay. Just Mr. Kennedy.

And, then, for defendant Philip Morris, Liggett Group, and ASM Nationwide, is that all Mr. Roberts? Is that all you Mr. Roberts or is there somebody else for that Philip Morris's Motion?

MR. ROBERTS: Good morning, Judge. Lee Roberts for Philip Morris USA and ASM Nationwide, the retailer.

THE COURT: Okay.

MR. ROBERTS: I am not appearing for the Liggett Group, although we did file a Joint Response.

THE COURT: Okay.

MR. JORGENSEN: Good morning, Your Honor. This is Chris --

THE COURT: Hi.

MR. JORGENSEN: This is Chris Jorgensen. I am here representing Liggett Group and I have with me Kelly Luther, who is out of state.

THE COURT: Okay. So you're for the Liggett Group?

MR. JORGENSEN: Yes.

THE COURT: Okay. I'm sorry. It's just so hard to hear. Okay. And you have counsel from out of state?

MS. LUTHER: Good morning, Your Honor.

THE COURT: And who is here for --

MS. LUTHER: That's me.

THE COURT: -- Mr. Claggett? I thought I saw --

MS. LUTHER: Kelly Luther --

THE COURT: -- Mr. Claggett -- okay. I'm sorry. Oh, you're the one for --

MS. LUTHER: Kelly --

THE COURT: -- Liggett?

MS. LUTHER: That's correct, Your Honor.

THE COURT: And your name is -- all I can see is Kelly. The icons are on top of it. What's your last name?

MS. LUTHER: The last -- Luther, L- --

THE COURT: Okay.

MS. LUTHER: -- U-T-H-E-R.

THE COURT: Okay. Thank you. Okay. Thank you so much. And plaintiffs?

MS. KENYON: Good morning, Your Honor. This is -- also, this sis -- sorry to interrupt. This is Jennifer Kenyon on behalf of Philip Morris and I am out of state.

THE COURT: Okay. Okay. On behalf of Philip Morris. Okay. All right. And who else is here?

MR. ECHOLS: Good morning, Your Honor. This is Micah Echols for plaintiffs.

THE COURT: Hi, Mr. Echols. Nice to see you. We're not in trial. Hi. Good morning.

MR. ECHOLS: Yeah. Good morning, Your Honor.

THE COURT: All right. And somebody else here? I thought I saw Claggett. Did he leave?

MR. CLAGGETT: Yes. Good morning, Your Honor. Sean Claggett as well.

THE COURT: Okay. I thought maybe you got bored, Mr. Claggett. Okay.

MR. CLAGGETT: No. I had it on mute and I was talking to you but I was realizing I was on mute.

THE COURT: Okay. And is there -- I thought I saw another face?

MS. WALD: Yes. Kimberly Wald. I'm also here for plaintiff and I'm out of state.

THE COURT: Okay. What's now?

THE CLERK: I'm going to need her bar number for now.

THE COURT: Okay. She's from out of state.

THE CLERK: Oh. Okay.

THE COURT: So she doesn't -- you associated in, right, Kimberly?

MS. WALD: Yes. I believe I am pro haced in.

THE COURT: Okay.

THE CLERK: Mr. Echols.

THE COURT: Mr. Echols is -- do you want his bar number?

THE CLERK: Yes, please.

THE COURT: Micah, Mr. Echols, the Clerk needs your bar number.

MR. ECHOLS: It's 8437, Your Honor.

THE COURT: 8437. I know you've been in this courtroom, so I -- okay. All right.

Mr. Kennedy, do you -- I kind of started with defendant, R.J. Reynolds's Motion to Dismiss. Do you want to start?

MR. KENNEDY: Well, Your Honor, if I could suggest that Philip Morris go first?

THE COURT: Sure.

MR. KENNEDY: Theirs is the larger of the Motions to Dismiss --

THE COURT: Right. And theirs is under 12(b)(5).

MR. KENNEDY: -- as to most claims.

THE COURT: I agree because you picked out portions, they did the whole thing.

MR. KENNEDY: That's right. And I think Mr. Roberts would agree with me on that one.

THE COURT: okay. Mr. Roberts, do you agree the Court looked --

MR. ROBERTS: I --

THE COURT: -- at it right? You want the whole 12(b)(5), everything?

MR. ROBERTS: I do, Your Honor, and --

THE COURT: Okay.

MR. ROBERTS: -- I will be addressing -- the defendants have agreed that I should go first since ours is the most comprehensive and then since --

THE COURT: I have --

MR. ROBERTS: -- Liggett -- as Liggett joined with us in our Motion, they will probably go --

THE COURT: Okay. So, you have a Joinder. Okay.

MR. ROBERTS: They would probably go next, and then Mr. Kennedy with his more limited basis.

THE COURT: Okay. Okay. That's fine. Okay. So, Mr. Roberts, you're going first -- I'm sorry? Are we okay?

THE CLERK: Yes.

THE COURT: Okay. I'm sorry. This is not easy. Okay. Mr. Roberts, you're up on your Motion to Dismiss for

Defendant Philip Morris USA, Inc., and ASM -- or Liggett and ASM with the Joinder. Okay. I'm ready.

MR. ROBERTS: Thank you, Your Honor.

THE COURT: As best I can be.

MR. ROBERTS: Good to be back in your courtroom, Your Honor.

THE COURT: Yeah. It's nice to see everybody. This is just -- technology is great, but it is just not as efficient. Can you tell the way I -- I don't know. I'm an old litigator. I like people in front of me and explain things better, but okay. Mr. Roberts. Deal with what we've got.

MR. ROBERTS: Okay, Your Honor.

Your Honor, I know that we've addressed many of the issues in our briefing and our briefings are long. These --

THE COURT: Yeah.

MR. ROBERTS: -- are complex legal issues and what I would like to do to start out with is try to provide a framework through which our Motion to Dismiss might make more sense and through the lens of which it can be viewed by the Court.

THE COURT: Okay.

MR. ROBERTS: And that framework begins, I believe, with the fact that, first and foremost, this is a

product liability lawsuit.

THE COURT: I --

MR. ROBERTS: The plaintiff claims that she was injured by smoking our products.

So, if you want to view it, at least the product liability aspect of it, which is overwhelming majority of it, you have to go back to the policy reasons of why we have strict product liability in Nevada. And this goes all the way back to *Shony* [phonetic], but if you look at the *Allison v. Merck* case, just for the basic principles of product liability from 1994, what the Supreme Court said is that the principles supporting our product liability cases arises out of Section 402A of the Restatement, Comment C. And that is that public policy demands that the burden of accidental injuries caused by products intended for consumption [indiscernible] those who market them and be treated as a cost of production against which liability insurance could be obtained and that the consumer of such products is entitled to maximum protection at the hands of someone and proper persons to afford it to those who market the product.

THE COURT: It was basically a public policy type argument: Who should bear the risk or the loss? Yeah.

MR. ROBERTS: It was.

THE COURT: Yeah.

MR. ROBERTS: No negligence involved.

THE COURT: No.

MR. ROBERTS: As a matter of public policy, if you manufacture, market, sell a product and you're the one making the profits from the sale of that product and the product damages someone, that should come out of the profits and be treated as a cost of production. And, so, in that *Allison v. Merck* case, the Court then went on to say that if the Merck product did, in fact, cause Thomas's overwhelming misfortune, it must bear the burden of the accidental injuries caused by the product.

So, this is the framework for strict product liability. And, because of this framework, additional law, which I'm going to talk about, requires that in order to recover on strict product liability against a manufacturer, you have to prove that your damages were caused by that manufacturer's product. You have to prove which product caused the injury. If the Merck product caused the injury, it had to pay. If a Philip Morris product caused the injury, then we are potentially liable under strict liability.

But in order to state an adequate claim, a plaintiff has to plead, and then subsequently prove, that a product we manufactured and profited from the sale of caused the injuries alleged. And, fundamentally, this is

our problem with the Complaint as it is drafted currently, Your Honor.

THE COURT: Okay.

MR. ROBERTS: To put some meat on the bones in the context of additional causes of action, you know, we understand that they don't just allege direct product liability. There's a whole shotgun full of alleged state law claims, most based on fraud, and misrepresentation, failure to disclose, superior knowledge, but, once again, the common thread between the strict liability claim and all of the other claims is that plaintiffs must plead and subsequently prove --

THE COURT: The damages.

MR. ROBERTS: -- causation.

THE COURT: Yeah.

MR. ROBERTS: What -- not just damage -- there's something in between damages. Even if a product is defective, they have to prove that the defect in the product --

THE COURT: Caused.

MR. ROBERTS: -- caused their damages.

THE COURT: Yeah. I get it's a three-part: duty, breach, and causation. And then damages. Okay.

MR. ROBERTS: Right.

THE COURT: I figured that's where you all -- the

gist of the argument. Okay.

MR. ROBERTS: So, now I'd like to emphasize one of the cases that we cited in our brief, *Rivera v. Philip Morris*, the Supreme Court --

THE COURT: What's the case? I'm sorry.

MR. ROBERTS: -- of Nevada case --

THE COURT: Mr. Roberts, just give me the name again, because I read so much. I'm trying to keep my notes -- it's --

MR. ROBERTS: *Rivera*, R-I-V-E-R-A.

THE COURT: Okay.

MR. ROBERTS: *V. Philip Morris*.

THE COURT: Morris. Okay.

MR. ROBERTS: And that's 125 Nevada 185.

THE COURT: Okay.

MR. ROBERTS: A case from 2009.

THE COURT: Okay.

MR. ROBERTS: And, again, dealing with causation, what this case says is that in Nevada, when bringing a strict product liability failure to warn case, plaintiff carries the burden of proving, in part, that the inadequate warning caused his injuries. So, again, you have to have causation.

Going to Headnote 7, 8, 9, and 10 from this case, the Court gets more specific. In a strict product

liability case, the plaintiff carries both the burden of production and the burden of persuasion. To successfully prove a failure to warn case, a plaintiff must produce evidence demonstrating the same elements as any other case, that the product had a defect rendering it unreasonably dangerous, defect existed when it left the manufacturer, and [indiscernible] that the defect caused the plaintiff's injury.

Going to the failure to warn, in particular, Rivera, the plaintiff in that case, urged our Supreme Court to adopt a heeding presumption. A heeding presumption removes the plaintiff's responsibility to carry the initial burden of production as to the element of causation. And it shifts the burden to the manufacturer who must then rebut the presumption by proving the plaintiff would not have heeded a different warning.

Our Supreme Court rejected that argument and stated that in Nevada a plaintiff must always prove the element of causation and that adopting a heeding warning would inappropriately shift the burden. Therefore, in a product liability case like this, when you allege a failure to warn as one of the reasons the product is defective, a plaintiff has to prove that they would have heeded a different warning; that a failure to have a warning is what caused them to keep smoking.

This case is then built upon in a Ninth Circuit case, once again, *Rivera v. Philip Morris*. This is at 395 F.3d 1142. And in that case, the Ninth Circuit affirmed a dismissal of the case against Philip Morris, Headnote 17, because the record contained no admissible evidence identifying what statements attributable to Philip Morris the decedent actually saw, heard, or read and relied upon to support her decision to start and continue smoking. The plaintiff in that case admitted during discovery that he was unable to point to the specific statement in any advertisement or public communication which influenced Mrs. Rivera's decision to start, continue, or failed to quit smoking.

This is the fundamental problem with the Complaint, Your Honor. If the Court has read the Complaint, it's extremely long, but it's --

THE COURT: I've read it.

MR. ROBERTS: -- [indiscernible]. It just about matches all the other Complaints that have been filed, regardless of whose brand of cigarettes the decedent has claimed to have smoked and that has allegedly caused their injury. It is a diatribe about every alleged bad act the cigarette companies have committed since 1954, for the last 66 years. But under this well-established Nevada precedent, was affirmed by the Ninth Circuit, none of those

statements can state a cause of action against any one of these manufacturers without proof that there was a particular false representation, ad, or public statement which this smoker relied upon for their decision to start smoking or not to stop smoking.

And, Your Honor, ultimately, if that is part of the element of the cause of action, if that is what they ultimately must prove, then they certainly have to plead that in the Complaint. They have to plead which statement was it, by which manufacturer when, which this plaintiff -- which this smoker allegedly relied upon to start or continue smoking. And that they have simply failed to do.

One thing that they claim in their Opposition brief, Your Honor, is that there is so many statements and they're so pervasive that certainly if these things are targeted to the public they can just talk about how persuasive -- pervasive the message is and they don't have to point to a particular statement that she relied upon. And, going further, that if not for that statement she would have stopped, because they bear the burden of production on heeding.

Well, the Ninth Circuit rejected this argument specifically. What the Ninth Circuit held was -- Rivera argues that the pervasiveness of Philip Morris's advertisements creates an issue of material fact as to

whether his late wife saw those advertisements and relied upon them. The mere pervasiveness of the advertisements is insufficient to counter the plaintiff's testimony and the plaintiff's testimony was testimony that Rivera could not identify any misrepresentation by Philip Morris that his late wife saw or relied upon in deciding to smoke in general Marlboro cigarettes, in particular. And because reliance is an essential element of a misrepresentation claim, summary judgment was appropriate.

While we are not at the summary judgment stage, if this is a --

[Outside noise]

THE CLERK: Somebody has to mute themselves.

THE COURT: Somebody needs to mute themselves. Mr. Roberts, not you.

MR. ROBERTS: Yes. Mr. Peterson, I believe you -- you're not muted.

[Colloquy from attorneys on video conference not on mute]

UNIDENTIFIED SPEAKER: Lee, I think that was your queue to stop talking.

MR. ROBERTS: I guess I've bored Mr. Peterson, Your Honor.

THE COURT: I'm sorry. You've got to find humor in some of this. Okay. And I was really getting into this reliance element, Mr. Roberts.

MR. ROBERTS: Thank you, Your Honor. And our point on this Motion to Dismiss, --

THE COURT: Yes.

MR. ROBERTS: -- we acknowledge we're not at a summary judgment stage.

THE COURT: Yeah. Obviously. Yes.

MR. ROBERTS: But still the key elements, which the courts have found plaintiffs must establish, have to at least be plead. And we have to be put on adequate notice of what their claim is, of what they allegedly relied upon. And this is especially true for their fraud-related claims where 9(b) requires them to plead the who, what, when, and where with absolute specificity.

So, we're not asking for a dismissal with prejudice, Your Honor. Plaintiffs may very well be able to plead an adequate Complaint against Philip Morris or another manufacturer, but the current Complaint does not put us on notice and does not even allege key elements of their cause of action under Nevada law.

THE COURT: Okay.

MR. ROBERTS: To highlight the detriment and the lack of notice, I would point out to the Court that there's a very bare allegation as to the smoking habits and conduct of the smoker at issue in this case.

THE COURT: Okay.

MR. ROBERTS: And that is that she smoked basic Marlboro and L & M cigarettes from what? 1964 to when she was diagnosed and the -- look at the -- let me get that citation for the Court.

If the Court would look at paragraphs 19, 20, 21, we see that they're alleging that -- excuse me. Starting at 18. That L & M cigarettes were designed and manufactured, and sold by defendant Liggett; that Marlboro and Basic were designed, manufactured, and sold by defendant Philip Morris; and that Ms. Camacho purchased L & M, Marlboro, and Basic cigarettes from Silverados insufficient quantities to be a substantial contributing cause of her cancer.

The -- and this isn't going to where the plaintiff bought her cigarettes. I'm not addressing that in this argument right now, Your Honor. But I'm just addressing how general the allegations are because it matters what brand she smoked and when. So, if under the *Rivera* cases that I've cited they have to prove that there was a specific representation by a specific manufacturer that they relied upon, if they have to prove what product caused their damages, and they have to prove reliance on something to smoke someone's product, then we need to know more about the time frames in which this plaintiff allegedly smoked products manufactured by Philip Morris. There's a bare

allegation of the general time frame that the plaintiff smoked and there's an allegation that Basic was one of the cigarettes that she smoked.

The problem is, Your Honor, and I'm not asking the Court to rely upon my statement as supporting this proof, but the problem is, for example, Basic cigarettes were not manufactured, marketed, and sold by Philip Morris until 19 -- late 1970s. So, obviously, an advertisement for Basic cigarettes, marketed as a discount brand, could not have caused plaintiff to smoke between 1964 and 1969. There could be no causation.

THE COURT: But isn't that --

MR. ROBERTS: Here's the only --

THE COURT: -- more something a question of fact? I mean, you're kind of getting in -- okay. That's fine. Do you see where I'm going, Mr. -- I'm concerned that now we're adding questions of fact from Philip Morris. Right?

MR. ROBERTS: I --

THE COURT: Okay. It's okay.

MR. ROBERTS: Well, what -- and what I'm --

THE COURT: I under --

MR. ROBERTS: As to the fraud claims, Your Honor, --

THE COURT: Yes.

MR. ROBERTS: -- they do have to plead facts with

specificity --

THE COURT: Right.

MR. ROBERTS: -- and they failed to do that.

As to the product case, they at least have to plead product use.

THE COURT: Yeah. I --

MR. ROBERTS: And they've got a specific allegation that -- you know, they know that the failure to warn plaintiff is different pre-1969, once federal requirements required specific warnings.

THE COURT: Right.

MR. ROBERTS: And, so, they used a pre-1969 failure to warn claim between 1964, when this plaintiff started smoking, and 1969. Don't they at least have to plead that they smoked a brand of cigarettes manufactured by Philip Morris from 1964 to 1969 in order to adequately plead that claim? If the only brand they smoked was L & M, manufactured by Liggett, they would have no pre-1969 claim against Philip Morris. And we're entitled to know what the allegation is. And even if they don't plead specific facts on the product defect, they at least have to plead that she saw specific advertisements and that she would have never started to smoke or she would have stopped smoking had a different warning been given. They plead that nowhere in the Complaint and, therefore, they don't state an adequate

cause of action.

THE COURT: Okay.

MR. ROBERTS: They -- there are claims in the Complaint that we marketed to minors, to youth, but they allege that this plaintiff had reached the age of majority, 18 years old, when she started smoking. So how could that possibly allege a causal relationship establishing the cause of action under Nevada law? They claim that we improperly marketed light and ultra-light cigarettes as less dangerous when they weren't, but there's no allegation that this plaintiff ever smoked a light or a ultra-light cigarette.

So, just as Judge Crockett did, Your Honor, and when it comes to allegations such as that, they've either got to plead that she smoked an ultra-light cigarette because of her reliance on those advertisements and she would had not smoked had it not been for the advertisements or they have to drop it because they're simply not entitled to plead every single bad act that has no relationship to the damages in this case. And the manufacturer should not have to defend and be subjected to discovery about every single bad act where that bad act is not alleged to have any causal relationship.

They allege -- the 1954 statement, so if she was 18 in 1964, she was eight years old and getting out the

paper and reading the frank statement from the manufacturers in 1954 and relied upon that 10 years later to decide to start smoking? Your Honor, it's just not credible, which is why these claims have to be plead with specificity to give us some sort of adequate notice what it is specifically. What specific statements are they which they claim were fraudulent and which they relied upon to their detriment? For the product case, that they would have heeded an instruction or warning that was different than the ones we actually --

THE COURT: Right.

MR. ROBERTS: -- gave --

THE COURT: Okay.

MR. ROBERTS: Yeah. And, so, Your Honor, we're asking for this to be dismissed with leave to amend --

THE COURT: Yeah.

MR. ROBERTS: -- and that the plaintiffs be required to see if they can plead this with specificity and make any extraneous allegations, which they know they have no proof and ability to prove were actually a cause and a factor and a damage to their client, that those be dropped from the Complaint so that we can tailor this lawsuit to what is actually in dispute.

THE COURT: Okay.

MR. ROBERTS: The -- Your Honor, if I could just

close with the exception of that, I believe is the gross negligence claim. And we would ask that the gross negligence claim be dismissed with prejudice because it is completely redundant of the negligence claim.

And we've addressed this in the brief, but if the Court will look at every case on gross negligence where the Nevada Supreme Court has addressed and analyzed whether a defendant acted with gross negligence, it's only been in the limited circumstance where gross negligence is a specific element of a claim or defense. You know, for example -- for a police officer, may have limited immunity unless they can plead gross negligence. Well, the problem here is gross negligence is not a specific element to any claim or defense at issue in this litigation.

And, in addition, the Supreme Court -- the Nevada Supreme Court has held that gross negligence is not enough to establish punitive damages. So, if it's not an element of their cause of action, if it does not entitle plaintiffs to different or additional damages, if it's not enough, even if proven, to establish entitlement to punitive damages, or to allow them to go to a jury, then it's completely unnecessary and duplicative and it will simply encourage prejudicial arguments likely to enflame and confuse the jury where they're arguing both negligence and gross negligence, even though to the jury it makes no

difference as to liability or damages.

So, we are asking that the gross negligence claim be dismissed.

THE COURT: Okay.

MR. ROBERTS: The final thing, Your Honor, to -- you know, we've alleged preemption and even though they're entitled to try to plead an adequate state law claim that avoids the preemption arguments that we've made, the plaintiffs have made a key admission. In their Opposition at page 9, where they state:

> Plaintiffs do not attempt to hold Philip Morris and Liggett liable simply because they sold cigarettes or because their cigarettes are dangerous products.

Therefore, regardless of the Court's decision on any of the other arguments we're making here today and in our papers, we believe that the Court should dismiss any claims made expressly or impliedly in the Complaint that we are liable to them simply because we sell cigarettes or because cigarettes are dangerous products because the allegations in the Complaint, frankly, Your Honor, many of the allegations could be read just that way, that they are seeking to hold Philip Morris and Liggett liable simply for selling cigarettes that this plaintiff allegedly smoked over a number of years.

And, with that, Your Honor, I will turn it over to

Liggett to see if they have anything to add to their Joinder to --

THE COURT: You know, and your argument, Mr. Roberts, when I went through all this, I'm trying to decide: Is it a Motion to dismiss and let them amend? Is it more a Motion to Strike certain paragraphs? And your last argument -- I, honestly, Mr. -- you can see, I kind of went back and forth trying to figure out which way to go or what is it -- I always look at: What do you want the Court to do? And I tried to actually do a sheet to figure out what allegations you want stricken or which you think is -- your last argument, does that make sense why I felt that way also?

I've got -- what -- we're kind of balancing a Motion to Strike certain -- and I appreciate that you're trying to clean up the Complaint so you know how to do this litigation, know where to go. I understand that completely. But those are just my comments. So, what you just said kind of fits in the way I was kind of thinking when I went through this because it's -- to say it's an extensive Complaint, I understand. Okay. Those were my thoughts from your last discussion. Okay.

MR. ROBERTS: Thank you.

THE COURT: Does that make sense --

MR. ROBERTS: And I appreciate your patience --

THE COURT: -- the way I --

MR. ROBERTS: -- in letting me --

THE COURT: No.

MR. ROBERTS: -- go on for a while.

THE COURT: No. Believe me, I get it. I get it just going through it. Okay.

Now, counsel for -- do you want to do it -- do you want to finish up with Liggett and Philip Morris before because we now have plaintiff. Do you want -- how do you want to do the opposition? I -- do you want to -- let's do Philip Morris and Liggett together since they're in one Motion and then let the plaintiff respond? I don't know. You -- I see your face, so I don't know if you spoke or why you're up. I'm not sure how this -- I'm trying to get this Blue Jeans. Is it okay if we go ahead and listen to the counsel for Liggett to see what she wants to add to what Mr. Roberts said? Is that okay with plaintiffs?

MR. ECHOLS: That's fine with plaintiffs, Your Honor.

THE COURT: Okay. I just wanted to make sure since you're not here -- so I can't see everybody's face to see how they want the flow to go. Okay. So, now we're going to do counsel for Liggett. Correct?

MS. LUTHER: Your Honor, this is Kelly Luther on behalf --

THE COURT: Okay.

MS. LUTHER: -- of Liggett.

THE COURT: Okay.

MS. LUTHER: And I'm going to make this very easy. We have nothing to add to Mr. Roberts's argument.

THE COURT: Okay. Can I say God bless you? That's probably not right. Okay. Okay.

MR. KENNEDY: Your Honor, next, this is Dennis Kennedy on behalf of --

THE COURT: Yes.

MR. KENNEDY: -- Reynolds.

THE COURT: R.J. Reynolds.

MR. KENNEDY: I think it makes sense, I think, for me to argue our Motion, because it follows-up and incorporates Philip Morris's Motion, and then hear the Opposition. I'd ask the plaintiffs if that makes sense to them?

MR. ECHOLS: That's fine with us, Your Honor.

THE COURT: It makes sense to me, Mr. Kennedy, because there was so much overlap because many of the things Mr. Roberts said I have down in my notes that came from your briefing, Mr. Kennedy, because I started out with yours. So, honestly, the Court -- at least how I viewed it, I'm -- I think that is an appropriate way to do it.

MR. KENNEDY: Yeah. I do, too.

THE COURT: Okay.

MR. KENNEDY: And, for the record, Dennis --

THE COURT: And it will go with my notes or how I tried to -- when I went through this on my own.

MR. KENNEDY: Okay.

THE COURT: Okay. Okay.

MR. KENNEDY: For the record, Dennis Kennedy for defendant, R.J. Reynolds Tobacco Company. This is Reynolds's Motion to Dismiss and we are asking that the Complaint against Reynolds be dismissed with prejudice.

THE COURT: Right.

MR. KENNEDY: Because there is no prospect that any amendment is going to save this based upon the contents of the Complaint.

First off, we incorporate, as the Court noted, and adopt the arguments that have been made by Philip Morris and by Liggett. And I'll focus on the sixth and seventh claims, because those are the claims contained in the Amended Complaint that are made --

THE COURT: Right. I got that.

MR. KENNEDY: -- against R.J. Reynolds.

THE COURT: I've got 6, civil conspiracy, and, 7, violation of deceptive trade practices. Right?

MR. KENNEDY: Yes, Your Honor. That is correct.

THE COURT: Okay.

MR. KENNEDY: The most important thing to note from the Amended Complaint you can find in Paragraph 17, 18, and 19. That is where the plaintiff says: I smoked L & M, which is a Liggett product, Marlboro, which is a Philip Morris product, and Basic, which is also a Philip Morris product. Most importantly, out of that, the Court can see the plaintiff never purchased, never used any product manufactured or sold by R.J. Reynolds. That is a flat-out, undeniable admission made by the plaintiff. This makes Reynolds's argument in this regard separate and distinct from the argument that the Court heard from Philip Morris.

The Court said: Well, aren't there some fact issues here? But that may or may not be correct. With --

THE COURT: Okay.

MR. KENNEDY: -- Philip Morris, there are no fact issues here with respect to R.J. Reynolds. The plaintiff says: I never bought it. I never used it. I never smoked it if it was made by R.J. Reynolds.

Let's get to the claims then following that deadly admission that the plaintiff makes against R.J. Reynolds. The plaintiff says in the Deceptive Trade Practices --

THE COURT: Count 7.

MR. KENNEDY: -- Act claim: Well, the Deceptive Trade Practices Act pertains to the sale of goods. Someone

is damaged in a transaction arising out of the sale of goods or services, but there's no services in this case. Sale of goods. And Chapter 598A has all kinds of instances where someone who buys goods or contracts to buy goods who is deceived has a cause of action. The problem is this plaintiff admits that she never bought or used anything manufactured or sold by R.J. Reynolds. That is fatal to the Deceptive Trade Practices Act claim. You can't sue somebody for deceiving you with respect to the purchase of a good if you never bought the good and that's what we've got here. And this is what the plaintiff admits in the Complaint. The Deceptive Trade Practices Act is dead on arrival at this point because you have -- you can't possibly have causation because you have no purchase of the good at all, which the plaintiff admits.

Secondly, the conspiracy claim, --

THE COURT: Okay.

MR. KENNEDY: -- well, we start out knowing that the plaintiff never bought or used an R.J. Reynolds product. But the plaintiff says: Well, you've conspired to harm me. And the first undeniable point is: Well, how did we conspire to harm you? You never bought or used our product. So, I mean, you know, you -- there is no underlying wrongful act.

And all they have, the plaintiff, is a series of

general allegations saying: Well, you concealed the truth about smoking and about your product. And we've said: Well, look, you never bought our product. So what is it that we might have said that you relied on in purchasing our product? And the answer has to be: Nothing because you never purchased our product.

The first part of the conspiracy allegations, and Mr. Roberts covered these, which are absolutely implausible. The Amended Complaint actually says, with respect to events occurring in 1953, that -- and this is in Paragraph 155 of the Amended Complaint, the plaintiff says: I heard, read, and relied upon these things. Well, in 1953, the plaintiff appears to have been 7 years old. And the plaintiff says: When I was 7 years old, I heard these things and you know what? Seven or eight years later, based on what I heard when I -- in 1953 -- no, 11 years later, I decided to start smoking. Well, that's somewhat implausible, but that's what the Complaint says.

However, -- and then to go on to the argument that Mr. Roberts made. That -- those allegations are completely implausible as against R.J. Reynolds. But, to take the next step, you say, okay, let's give the plaintiff the benefit of the doubt as to plausibility and say: Okay. Maybe what you did here when you were seven caused you to start smoking when you were 14. What is it that R.J.

Reynolds said that you relied on not to buy a Reynolds product, which you admit you never did, but what did R.J. Reynolds say or do that caused you to start using a different product? And the answer is: Well, the Amended Complaint has nothing about that and the fact is it can't because R.J. Reynolds never said anything about a Philip Morris or a Liggett product.

And, so, what you have is you have a series of general, undifferentiated statements that the plaintiff says: Well, look at all these things that are out there. I'm going to sue R.J. Reynolds but I never used an R.J. Reynolds product. Okay. Where's the hook between those two things? Well, there is none. There can't be. And I'm not dumping on Philp Morris. I'm just saying you never used our product. How did we trick you or deceive you into using our product, which you admit you never used?

So, -- and the Rivera case is a good case. We cite at page 5 of our Reply another case, the *Poulos* case from the Ninth Circuit, which is also a good case. It's not a tobacco case. It's a gaming case.

THE COURT: It's a gaming case. Right?

MR. KENNEDY: Yeah.

THE COURT: Yes.

MR. KENNEDY: And I know it well because I defended the casinos in that case and the allegation in

that case was a fraud case saying: You know what? You've deceived us into gambling. In essence, you didn't tell us we might lose. And, you know, the Ninth Circuit -- the trial court and the Ninth Circuit said: Well, come on now, you've got to point to something specific that was said that --

[Pause in proceedings]

THE COURT: What happened? Hold on. He is holding on. He froze. What happened?

THE CLERK: It might have been something with his -- on his side.

THE COURT: We lost Mr. Kennedy.

MS. LUTHER: We did.

THE COURT: Okay. You -- you all are still here but we lost Mr. Kennedy. Okay. Maybe something on his end? Yes. My court staff -- he's not here to defend himself, so it's him. Isn't that how it works? I don't know. Can we try to call him or --

MR. ECHOLS: I think we can wait for a minute, Your Honor.

THE COURT: Okay.

MR. ECHOLS: He's probably aware that he's been cut off and maybe he's trying to log back in.

THE COURT: Okay. He's probably log -- okay. My law clerk says that's probably what's happened. Okay.

I'm more than --

[Pause in proceedings]

[Colloquy in another case]

[Recess taken at 10:30 a.m.]

[Hearing resumed at 10:33 a.m.]

MR. KENNEDY: Your Honor, it's Mr. Kennedy back. Our connection was vanished. So, with the Court's permission --

THE COURT: It's fine. You all of a sudden stopped.

MR. KENNEDY: -- I'll continue.

THE COURT: Mr. Kennedy, I tried to get Mr. Roberts to dye his hair and change his tie but he wouldn't do it. So we're good.

MR. KENNEDY: No. Anyway, --

THE COURT: I left off with the Ninth Circuit case that you talked about you have to plead something specific. It's on page 5 of your Reply were my last notes. Does that help?

MR. KENNEDY: That's right. That's the *Poulos* case.

THE COURT: Okay. Yeah, do -- spell the first word again, the gambling case.

MR. KENNEDY: Yeah. It's *Poulos*, P-O-L-O-U -- P-O-U-L-O-S *versus Caesars*.

THE COURT: Okay. I knew it was Caesars. I didn't recognize --

MR. KENNEDY: And that case --

THE COURT: Sometimes I do the defendant. Okay. Thank you. I thought that was that case. Okay. So, --

MR. KENNEDY: Yeah.

THE COURT: -- welcome back.

MR. KENNEDY: And that's 379 F.3d 654. It's a 2004 case.

THE COURT: Okay. Yeah.

MR. KENNEDY: And that essentially says: Look, you can't just stack up a whole bunch of general ads and promotions and things and say: Well, you know, the people saying those things actually knew other things that they weren't telling us. The Ninth Circuit said: Look, you've got to connect the dots here. And I think that's the language of the Circuit.

THE COURT: It is. I put that down.

MR. KENNEDY: Yeah. You've got to show what you saw, what you heard, and what you relied on. And, in this case, under -- the conspiracy claim, it's impossible because the plaintiff says: Yeah, R.J. Reynolds, gosh, look at the things you said, of course, I never used your product, but I'm going to sue you because you said these things. Well, you don't have an underlying claim. The

only underlying claim they put in was the deceptive trade practices claim, but that fails as a matter of law because it requires product use and purchase of product, which they never did.

So, bottom line, once you admit in a products case, like we have here, that you never bought the product, you never used it, well, you don't have a products liability claim. Mr. Roberts argued that at length and we incorporate that. That's why these two claims, the Deceptive Trade Practices Act claim and the conspiracy claim, against R.J. Reynolds fail as a matter of law based on that admission that I -- that the plaintiff never bought, never used the product. And you can't make out a products claims against somebody if you never bought and never used the product.

The conspiracy claim fails for the same reason and that reason is that there's no underlying claim, there's no underlying object of the conspiracy if you sue R.J. Reynolds and say: Look what you said, look what you did. And R.J. Reynolds says: Yes, and what was the result? Oh, well, I never bought your product. I never used your product. Okay. That claim is dead.

That's why we are asking not only that these claims against RJ Reynolds be dismissed, but they should be dismissed with prejudice because based on the plaintiffs'

own admission, there is nothing that the plaintiff can do to re-plead and re-allege these claims because the plaintiff admits: I never bought the product, I never used the product.

THE COURT: Okay.

MR. KENNEDY: And that's R.J. Reynolds's position simply stated.

THE COURT: All right.

MR. KENNEDY: If the Court has no questions, I'm done.

THE COURT: No. I have my little outline here and I -- I got it. I understood what you said --

MR. KENNEDY: Okay.

THE COURT: -- because I actually -- that's why -- I outlined everything to try to make sure I could follow the argument. Okay.

MR. KENNEDY: Okay.

THE COURT: I have no questions --

MR. KENNEDY: Sorry I stepped out for a minute. I have no explanation --

THE COURT: That's okay.

MR. KENNEDY: -- for what happened.

THE COURT: Once again, it's just what happens with -- as you and I know, with technology. But we've got to deal with what we can. Okay.

MR. KENNEDY: Yes, Your Honor.

THE COURT: Okay. So now anybody else that's here for a defendant wants to be heard before I switch to the plaintiff?

Okay. Hearing nothing, I'm gonna then go to -- Micah -- Mr. Echols, are you going to do it? I'm not sure. Who is going to do it for the plaintiff?

MR. ECHOLS: I am going to argue, Your Honor.

THE COURT: Okay. Welcome. Good to see you. Okay.

MR. ECHOLS: Thank you, Your Honor. Nice to see you, too. Micah Echols for the plaintiffs.

THE COURT: Okay.

MR. ECHOLS: So, it was interesting what Mr. Roberts talked about. He gave a little bit of background, a little bit of history, and I appreciate that. And, during his discussion, during Mr. Kennedy's discussion as well, there was a lot spoken of beyond the pleadings. Now, of course, there was a lot spoken of what was in the pleadings, but there was a lot spoken of beyond the pleadings. And what I mean by that is Mr. Roberts said: Your Honor, first the plaintiffs have to plead and then they have to prove. And so his entire argument talked about not only pleading, because we're at the pleading stage here, --

THE COURT: Yeah.

MR. ECHOLS: -- but also what we have to prove down the road. But all we have to do in a 12(b)(5) Motion to Dismiss standard, Your Honor, is show that we have a legally cognizable claim and the facts have to be accepted as true. And the defendants, in order for their Motions to be granted, they have to prove beyond a doubt that there is no legal cognizable claim.

So, that's the first thing I want to point out, Your Honor, is there are some factual issues that they raise with respect to causation and some different things and we're at the pleading standard here. So, what I wanted to do, Your Honor, is I wanted to go through the -- the same order we have the arguments on opposition and then I'll try to clean up any of the additional issues that were raised by both counsel today.

THE COURT: Okay.

MR. ECHOLS: So, the first thing I want to talk about is the preemption argument. So, there's the Federal Cigarette Labeling and Advertising Act, which we call the Labeling Act, and what we point out in our Opposition is that the Labeling Act does not preempt the failure to warn claims, which are embedded within some of the other causes of action, prior to July 1, 1969. And we all agree on that opinion, based upon some of the comments here today.

We haven't plead any failure to warn after July 1, 1969. So, the Labeling Act really doesn't apply here, Your Honor, and it doesn't preempt. And I can give you the -- the Court the paragraphs. It's Paragraph 92 of the Amended Complaint, Subsections A through E, and then Paragraph 115, Subsections letter N, as in Nancy, through R, as in Ronald.

THE COURT: N through R. Okay.

MR. ECHOLS: The -- in the -- there's some discussion about, hey, we have field preemption, we have conflict preemption, and so really the Supreme Court -- the U. S. Supreme Court came out and said there's no preemption of state law fraud claims and these are the couple of cases that we cited in our -- among the several in our Opposition, the *Altieri Group versus Good*, which is a U.S. Supreme Court at 555 U.S. 70 and that's a 2008 case. And, then, *Cipollone versus Liggett Group* is another U.S. Supreme Court case, which is 505 U.S. and then 504. And that's a 1992 case. And, so, there's no conflict preemption, there's no field preemption on our state law fraud claims.

If you move along to our -- the -- our negligence and strict liability causes of action, there's a little bit of argument from the defense here, Your Honor, of arguing that our claims are something that they're really not. It's not the way they were plead. And as the plaintiff, we

are entitled to artfully plead our Complaint.

The main case that the defense relies upon is this *FDA versus Brown & Williamson Tobacco Corp*. They discuss it in their brief. We discuss it in our brief. All the *FDA* case really says is that cigarettes are a legal product and can be manufactured. We're not saying they can't manufacture this. But what we do say is that what they've put out is in -- is an unreasonably dangerous and defective product. And, so, that's where the strict liability cause of action comes from. And, so, *FDA* really is an inapposite case. It doesn't bring up anything.

There was some discussion about what Judge Crockett has done in this case --

THE COURT: Yeah. I apologize. I don't know what Judge Crockett did. I didn't even know he had a case. I just take my cases, so I --

MR. ECHOLS: Okay.

THE COURT: -- wasn't -- I don't know what Judge Crockett did, but did he decide something?

MR. ECHOLS: And I understand that, Your Honor, and -- I understand that, Your Honor, and I know that's your position that whatever somebody else is doing it doesn't matter to Your Honor because you're going to look at things with fresh eyes. I mean, there's no deference to any other judge. The one point --

THE COURT: I think you and I have had that history, didn't we, in the -- we went through that. Didn't we? I mean, not that I don't want to hear what other judges, I just -- maybe it's just -- I just look at everything with fresh eyes. I don't know if he ruled -- I didn't even know he had the case, but did he have something, this kind of case recently? Obviously.

MR. ECHOLS: He did, Your Honor, and there's some Orders attached to our Opposition that outline what he did.

THE COURT: Okay. I didn't even --

MR. ECHOLS: But all Judge Crockett did --

THE COURT: -- look. I apologize. I didn't --

MR. ECHOLS: And there was a hearing transcript, but all Judge Crockett did is he said: Hey, in the fraud claims, which I'm going to require there to be particularity under Rule 9(b), he selected a certain few paragraphs only and said give me some more clarification on those paragraphs.

THE COURT: Oh, I read that.

MR. ECHOLS: But what we have --

THE COURT: I read that. I thought you meant a bigger thing. I read that part. That's just under NRCP 9, that he wanted -- okay. I did read that. I thought he had made broader decisions than that. Okay. No, I was aware of that. I'll be -- and that's kind of -- you know, what

is more particularity to one judge, as you and I know, that's kind of subjective in some respects. But okay. Oh, no. I was aware of that. I got the inference that maybe he made broader decisions. Okay. Well -- all right. I'm on the same page then. I gotcha.

MR. ECHOLS: All right. Thank you, Your Honor. Because there was some suggestions that he had done something more, but he didn't. He didn't dismiss any claims. He didn't do anything else.

THE COURT: Okay. That's why I wanted it clarified. Because I didn't say that they did it, I just didn't know. I knew about the particularity, which, you know, that's pretty subjective to a judge. Okay. Perfect. We're back on the same page. Thank you.

MR. ECHOLS: So, there's this next argument in the briefs, the common knowledge argument, and the *Rivera* case that was cited, the Ninth Circuit case, 395 F.3d 1142, talks about the common knowledge argument. Basically, the common knowledge argument is: Hey, everybody knows that smoking is bad, so, you know, if you want to engage in that, you knew that, you know what you're doing, so too bad. Common knowledge argument in the *Rivera* case, the Court says -- and to characterize it as a consumer expectation test.

Now, here is where the rub comes in. Our

allegations in the Complaint, which have to be accepted as true, are that the defendants concealed information that created a public health crisis and that they actively misrepresented the dangers of smoking. There was the frank statement, there were various others that I'll get to in my discussion here. But all throughout the historical allegations in the Complaint, how are we -- how is -- I'll take that back.

How is the public supposed to know? How is a consumer of a cigarette supposed to know the danger if it's concealed? And that's the point of -- and what this Ninth Circuit ruled at the summary judgment stage, Your Honor, and we're not there yet, in *Rivera*, the 2005 Ninth Circuit case, is that it was a factual issue. And, so, certainly, that's not an issue that's ripe at the pleading stage.

One other point we made besides the frank statement in our Opposition to Motion to Dismiss was Howard Coleman on CBS News saying that bad elements from the cigarettes would be removed. And, of course, they never were.

Let me address the gross negligence argument that Mr. Roberts made. He said: Hey, you know, what's the difference really between negligence and gross negligence? And here's the reason why we included it. It's to put the defendants on notice, which is notice pleading, it's not a

particularity claim. It's just negligence. That we believe that it's something more than negligence and it might even exceed gross negligence because, as defense acknowledged, once we exceed gross negligence under *Countrywide Home Loans versus Thitchener*, they went to punitive damages. We haven't done all of the discovery yet, Your Honor. We don't know all the statements. We don't know all of the concealed documents. We don't have all of their background studies yet in this case and we are allowed to plead in the alternative.

Now, if we get through discovery and say: Hey, you know, you discovered everything you wanted and we gave you a mountain of documents and we don't think you found anything that was either gross negligence or exceeded gross negligence, then they can file a Motion for Summary Judgment on that and say take out gross negligence and kick up punitive damages. But, at this point, it's just the pleading stage, Your Honor, and we are allowed to plead in the alternative.

THE COURT: You --

MR. ECHOLS: The particularity --

THE COURT: I'm sorry. On the gross negligence, I've always wondered because I get motions to dismiss all the time on gross negligence as a separate cause of action and I looked at it and every time I've read it I've looked

because the claim is either statutory where the -- you know, the -- it requires gross negligence as opposed to just the reasonable person standard or there's something specific that has required it. So, I -- and I've -- maybe you can -- I can never find caselaw that said gross negligence is a separate cause of action as opposed to negligence. It's a way you can prove a negligence standard, which is beyond what you need. But have you found any caselaw that says -- not that it's a part of a statute or something -- you know, a separate cause of action. Anything that just, in the general pattern situation, you can have a claim for negligence and a separate claim for gross negligence?

I'll be honest. I've never had a good answer on that. Do you know of any caselaw or anything that says -- because that's basically what Mr. Roberts argued to me and I've -- I have not struggled, but I have addressed this situation. Do you know of any -- or that the Supreme Court or anyone says that you can plead them separately?

And I understand the standard you have to do on punitives. You -- we all know that. But as a separate cause of action to get to punitives.

MR. ECHOLS: I haven't seen any specific caselaw --

THE COURT: Okay.

MR. ECHOLS: -- on that, Your Honor.

THE COURT: Okay. I'm just making it too intellectual, I guess. Okay.

MR. ECHOLS: Yeah. And --

THE COURT: I just wondered because it confuses me. Okay.

MR. ECHOLS: And I guess maybe the debate that is something similar to the punitive damages --

THE COURT: Yeah.

MR. ECHOLS: -- issue. Punitive damages is a remedy, but sometimes we allege punitive damages as a claim just so we can put people on notice: Hey, this is a punitive damages case. We think that there's enough evidence out there that punitive damages and we're just telling you right out of the gate or as soon as we -- sometimes when we hold back and say: Okay, we found some evidence of punitive damages in discovery, we'll come back and we do a Motion to Amend our Complaint to add a claim for punitive damages, the defense will say: Well, it's not a claim. It's just a remedy, so you don't need to plead it. And that's kind of -- maybe it falls in that same category.

THE COURT: You know what? It does. At least in my brain, it falls in that exact -- and I don't know an answer to it, but it falls in that category because I have

those same things. It's a remedy. It's damages. But also people want to know because the -- okay. I think you did a great analogy and I can see why I struggle with it. Okay. Thanks.

MR. ECHOLS: The --

THE COURT: Okay.

MR. ECHOLS: -- particularity for fraud under NRCP 9(b), there's a couple of arguments that go along with that and -- on the plaintiffs' side. So, the first one is *Rocker versus KPMG*.

THE COURT: Right.

MR. ECHOLS: This is a Nevada Supreme Court. It's 122 Nevada 1185. It's a 2006 --

THE COURT: Yeah.

MR. ECHOLS: -- case. And it's what we always call the *Rocker* discovery.

THE COURT: Yes.

MR. ECHOLS: Basically --

THE COURT: I'm aware of that case.

MR. ECHOLS: Basically, at a motion to dismiss stage, if we're alleging fraud but we don't have all of the information in our possession, we're allowed to allege fraud a little bit more generally until we have the discovery. And I think that's important in reading the actual language of Rule 9(b) because there's two sentence

in Rule 9(b) and I like the second sentence particularly because -- to combat or to respond to some of what the defense has said.

So, it says: In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake.

And then the second sentence says: Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally.

And, so, there's been some discussion here today of: Hey, we need to have all of this information that we don't have, which is true for fraud in general under 9(b). Not true for any of the other claims. But, then, if you notice the carve-out in 9(b), it just says a person. It doesn't say which person. It doesn't say the defendant, the plaintiff, the person making the allegation, the person receiving the allegation.

And, so, I think everything that we've alleged in our Complaint in terms of fraud is sufficient, Your Honor, and I'll point the Court to some paragraphs that I've written down that were also noted in the Opposition. The Amended Complaint is Paragraph 92 and then it's letters A through R, as in Ronald. 150 -- Paragraph 151, A through F, as in Frank; and then page -- or, excuse me. Paragraph 155, A through K that discussed the fraud claims.

And, then, the causation for fraud -- now, typically causation is going to be --

THE COURT: Can I stop you real --

MR. ECHOLS: -- a factual issue.

THE COURT: I'm sorry. But under the fraud, you don't think I should be focusing on the plaintiffs -- the fraudulent -- the alleged fraud by the defendant that induced the plaintiff? Don't they have to know what specifically the plaintiff relied on for the fraud? Or do you think --

MR. ECHOLS: Yes, Your Honor. That's for --

THE COURT: Or just generally -- no. Right?

MR. ECHOLS: That's for fraudulent inducement, Your Honor.

THE COURT: Right.

MR. ECHOLS: And, so, true, there is some particularity, but it's also tempered when it's in the second sentence of 9(b).

THE COURT: Okay.

MR. ECHOLS: So, here's our position on fraud --

THE COURT: Okay. I'm just --

MR. ECHOLS: -- in general.

THE COURT: -- trying to follow it a little bit better. Okay.

MR. ECHOLS: And, so, here's our position

generally on fraud and I'll throw in the causation elements of fraud --

THE COURT: Yeah.

MR. ECHOLS: -- too.

THE COURT: Yeah. I didn't mean to stop you. Okay.

MR. ECHOLS: We believe that the allegations in the Amended Complaint are sufficient.

THE COURT: No, I know.

MR. ECHOLS: But if the Court wants more particularity in those paragraphs that I outlined, we're happy to provide it.

THE COURT: Okay.

MR. ECHOLS: It's not a question of anything and we're happy to do it if that's what the Court orders.

THE COURT: Okay. I appreciate that. Thank you. I --

MR. ECHOLS: On the causation --

THE COURT: Causation. Okay.

MR. ECHOLS: -- for --

THE COURT: Yeah. That's different.

MR. ECHOLS: On the causation for fraud, in the Amended Complaint, Paragraph 156, and this is Subparts A through G and then 157, also A through G. And, so, I'll just leave the fraud at that, Your Honor.

So, there was an interesting argument made by defense -- by both defense counsel that we need particularity for civil conspiracy. That's just not true. There's no caselaw that says that. All I can do is plead the elements of civil conspiracy. Nobody said that we haven't. In our Opposition, pointed out to the jury instruction --

THE COURT: Yeah.

MR. ECHOLS: -- 6.9 and the *Picus versus Wal-Mart* [phonetic] case.

Now, what we do agree with is that there has to be an underlying tort.

THE COURT: Right.

MR. ECHOLS: A fraud tort to have -- or, excuse me, a fraud claim. And, so, what we did is we had a Nevada Deceptive Trade Practices Act as the underlying fraud claim. And, so, the argument made -- and I'll skip over a little bit to the R.J. Reynolds argument here. The argument is made by R.J. Reynolds that there has to be product use in order to have a Deceptive Trade Practices claim. And that's simply not true, Your Honor, and I'll point you to a couple of statutes.

NRS -- and these are cited in our Opposition, too, but NRS 41.600 talks about victims of consumer fraud, which we allege plaintiffs here are. And if you go specifically

to the Deceptive Trade Practices Act, NRS 598.0915 defines deceptive trade practice and then sub 5 of that statute says:

> Knowingly a deceptive trade practice in the course of the business or occupation is knowingly makes a false representation as to the characteristics, ingredients, uses, benefits, alterations, or quantities of goods or services for sale or lease by false representation as to the sponsorship, approval, status, affiliation, or connection of a person therewith.

All of these -- and there's 16 different types of deceptive trade practices listed in that particular code section. It doesn't say anything about I have to actually buy the product. It's a -- and that's exactly what we've alleged here, Your Honor. It's the advertising. It's the massive public fraud that's existed here and not only to the public, but also to the plaintiffs individually.

And, on the deceptive trade practices, there's a great line and I didn't see it cited in the Opposition, so I wanted to give the Court this citation, too.

THE COURT: Okay.

MR. ECHOLS: It might be in there and I might have missed it. It's *Betsinger*. And let me spell that. It's B-E-T-S-I-N-G-E-R *versus DR Horton, Inc*. And it's a Nevada case that's 232 P.3d 433. And the quote I have is at page

436. It's a 2010 Nevada Supreme Court case. And I'll just read this direct quote here, Your Honor. It says:

> The purpose of the consumer protection statute was to provide consumers with a cause of action that was easier to establish than common law fraud and, therefore, statutory fraud must only be proven by a preponderance of the evidence.
>
> And then it goes on and says: Statutory defenses that sound in fraud are separate and distinct from common law fraud.

And I think those two sentences out of the *Betsinger* case are very important in deciding this Motion to Dismiss because we don't have a particularity requirement for the statutory fraud case in the -- or the statutory fraud claim. The statutory fraud claim can act as the wheel, so to speak, the wheel in -- or the hub and spoke kind of analogy from law school for a conspiracy. So, we've alleged civil conspiracy. Where the underlying statutory fraud claim -- and the Nevada Supreme Court says: Hey, because it's statutory, you back off of some of those real [indiscernible] of the common law fraud claim.

THE COURT: Can -- then, based on your argument to me then, besides suing R.J. Reynolds, you could have sued any manufacturer of cigarettes within the time frame you want, even if there's no proof that your client used them,

you know, if -- is that what you're saying? Basically, not just R.J. Reynolds, but I don't know -- I'll be honest, how many cigarette manufacturers there were, but, based on that argument, you could have sued whatever companies were manufacturing cigarettes during the time frame that your client was smoking, even if there's no allegations that she smoked any of their products. Correct?

MR. ECHOLS: Correct, Your Honor. As long as the cigarette manufacturer participated in the civil conspiracy and that --

THE COURT: Well, but --

MR. ECHOLS: And that kind of goes back to our historical allegations in the Complaint.

So, there are two cases that are cited in our Opposition -- well, they're cited in the Motion, too, in the RJ Reynolds. And I'll switch over to the R.J. Reynolds just to clean up some of the arguments there.

So, there's the *Baymiller* case, which is a Federal Disctrct Court of Nevada case from 2012 and that's 894 F.Supp 1302.

THE COURT: Okay.

MR. ECHOLS: And then there's the *Moretti*, M-O-R-E-T-T-I, *versus Wyeth*, also a Federal District Court of Nevada. And I only have the Westlaw cite for that. I apologize, Your Honor. It's a 2009, Westlaw 49532.

THE COURT: Do it again. 2009 Westlaw?

MR. ECHOLS: And then 49532.

THE COURT: 495 -- okay. Thank you.

MR. ECHOLS: And, so, both of these cases are really inapposite to civil conspiracy and deceptive trade practices claims. *Baymiller* doesn't mention either one of these claims and *Moretti* interprets Minnesota deceptive trade practice law. And, so, to the extent that the defense relies upon those, you know, in their Motion, and they do here today, they're simply inapposite.

THE COURT: Okay.

MR. ECHOLS: And I think that's all I have. I don't recall any questions left out, but I'm happy to answer them if I've missed anything.

THE COURT: Let me look at my notes, if you don't mind, real quick since I --

MR. ECHOLS: Sure thing, Your Honor.

[Pause in proceedings]

THE COURT: Okay. I'm -- I got your notes. Thank you. Okay.

MR. ECHOLS: All right. Thank you, Your Honor.

THE COURT: You're welcome. Who -- there's more argument, if you want, from either -- from either of the people who filed the Motions, R.J. Reynolds or Liggett, Philip Morris. Does anyone want to add to the argument the

Court has heard?

MR. ROBERTS: Thank you, Your Honor. This is Lee Roberts for Philip Morris and ASM Nationwide.

THE COURT: Okay.

MR. ROBERTS: And I'd like to respond briefly to --

THE COURT: Yes. Okay.

MR. ROBERTS: -- these -- to the arguments raised by plaintiffs.

First of all, Your Honor, with regard to the gross negligence claim, --

THE COURT: Right.

MR. ROBERTS: What we're saying is it's not a separate cause of action.

THE COURT: Yeah. The -- you --

MR. ROBERTS: And what they claim [indiscernible] --

THE COURT: -- heard me ask about that, Mr. Roberts.

MR. ROBERTS: Yes.

THE COURT: I struggle with that.

MR. ROBERTS: So, I -- under this case, it simply is not a separate cause of action because it is not a necessary element of any claim or defense in the case.

THE COURT: Right. Okay.

MR. ROBERTS: All they have to prove is negligence. And, as far as they're putting us on notice that they think they have more than gross negligence, which would rise to conscious disregard under *Countrywide*, that's -- if gross negligence alone is not enough, why plead it? Just plead conscious disregard because that's what you have to prove.

THE COURT: Okay.

MR. ROBERTS: The Court was cited to several paragraphs of the Amended Complaint with regard to the time frames, and I believe you were cited Paragraph 92 and 115. But with regard to the pre-'69, pre-July 1st, 1969 failure to warn claim, I'd ask the Court to review Paragraph 93 of their Complaint.

THE COURT: Okay.

MR. ROBERTS: Which says that additionally, prior to July 1, 1969, defendants failed to warn or adequately warn foreseeable users of the following, including but not limited to, and then they go on to list some things. Well, here's the problem with the product case. You know, we've cited the basic policy reason for product liability cases. We have talked about the fact that you have to allege product use and that you have to prove the statements that are relied upon, that -- you know, that additional warnings would have been heeded and, ultimately, we're not arguing

that they can't prove something. We're arguing that if it's an element of the cause of action that they have to prove, then initially it has to be plead.

THE COURT: Yeah. They have --

MR. ROBERTS: Even if it's only --

THE COURT: -- plead it, all the --

MR. ROBERTS: -- basically in --

THE COURT: -- elements. I understand that. Yeah.

MR. ROBERTS: Yes.

So, let's talk about this pre-1969. You can't have a shotgun warning which fails -- I mean, shotgun pleading which fails to advise each individual defendant of what the allegations are against them. You can't lump together defendants that are not similarly situated. If she only used L & M cigarettes, for example, from 1964 to 1969, then we contend that they don't state a failure to warn claim or a product liability claim against Philip Morris who only manufactured the Marlboro and Basic brand cigarettes. And we know she could not have smoked Basic brand cigarettes prior to 1969 because they didn't exist. So, we're asking for more specificity. Which defendant failed to warn prior to 1969? Which defendants' product did you use prior to 1969? And all of this is intertwined under Nevada law with the product liability case.

Going back to *Allison v. Merck*, Your Honor, the -- you know, the Court said something here that was interesting, which is basically for product -- a product can be unreasonably dangerous if it fails to come with adequate warnings.

So, the warnings that existed with cigarettes differed over various periods of time. And, so, in order to adequately state a product liability case, we contend that they need to at least allege the time frames they smoked our cigarettes. This is at Headnotes 9 and 10 of the *Allison* case where it talks about an unavoidably unsafe vaccine may be defective if marketed without an adequate warning. Accordingly, under the [indiscernible] rational, even under the broadly exculpatory interpretation of Comment K, liability cannot be avoided by a manufacturer in the marketing of a vaccine unless the vaccine is accompanied by proper direction and warnings.

So, we believe that we're entitled to more specificity and whether or not they're alleging the pre-1969 failure to warn case against Philip Morris because, right now, the Complaint lumps the defendants together improperly and we don't know what is being alleged against us.

I -- with regard to the fraud claims, Your Honor, under Rule 9(b), we are asking that every one of the fraud-

related claims be dismissed with leave to amend with more specificity. And the *Rocker* case actually supports our Motion. The *Rocker* case, at Headnotes 5, 6, and 7, holds that, under Rule 9(b), a plaintiff must plead the circumstances constituting fraud with particularity. Pleading with particularity is required in order to afford adequate notice to the opposing parties so that they can defend against the charge and not just deny that they've done anything wrong. And here's the key. To plead with particularity, plaintiff must include in their Complaint averments to the time, the place, the identity of the parties involved, and the nature of the fraud.

And you can't just say here are all the bad statements and bad conduct and failure to warn and affirmative misrepresentations made over 66 years. You have to allege which one of those they claim defrauded them and the elements of fraud include reliance, and reliance under the caselaw means you would have heeded the different instruction, that you relied upon a particular fraudulent statement to either start smoking or to continue smoking. And that is completely absent from the current Complaint.

Plaintiffs contend that under *Rocker* that if there's information that they're lacking, they can relax the standard and find it in discovery. That is not what *Rocker* held. At page 1193 of *Rocker*, 122 Nevada 1193, the

heading on that section, first complete paragraph, is: Relaxed standards for particularized pleading when information is in the defendants' possession.

THE COURT: Correct.

MR. ROBERTS: And that's the key. If they had a plausible claim that they needed discovery in order to plead with more specificity, maybe *Rocker* would give them a break. However, as obvious by the Complaint, and -- they know every statement which these manufacturers have made and other people in the industry have made since 1954. What is missing from their Complaint is which one of those statements this plaintiff allegedly relied upon to start or continue smoking and that she would have stopped smoking if not for that statement. That information is only in the plaintiffs' possession. Only the plaintiffs know which of these 66 years of statements this plaintiff allegedly relied upon in choosing to continue smoking and, in fact, smoked. And chose to rely upon, as Mr. Kennedy said, to smoke our product, not to smoke somebody else's product. If I'm Philip Morris, we're talking about L & M cigarettes from 1964 to 1969. They cannot state a cause of action against us. So, we are asking for dismissal, Your Honor, with leave to amend.

Briefly addressing the consumer -- the conspiracy case, while generally they are correct that you don't have

to plead conspiracy with particularity, it's always conspiracy to do something, conspiracy to commit some tort, to commit some wrongful act. And, in this case, they acknowledge that it's conspiracy to defraud. And, therefore, they do have to plead that fraud with particularity. And they cannot escape that requirement by relying on the Consumer Protection Act as the type of fraud and the fact that you only need a preponderance of the evidence and not clear and convincing.

The *Betsinger* case, which they cited to the Court, is not a Motion to Dismiss case. And if the Court will read it, it doesn't say anything at all about a relaxed requirement to plead specificity for that type of fraud under Rule 9(b). It simply deals with the burden of proof and I'll leave that to Mr. Kennedy to explain further because he was one of the lawyers in that *Betsinger* case and he's intimately aware with it. But I am -- I'm not aware of anything in that case that says you don't have to plead consumer protection fraud with particularity in order to survive a Motion to Dismiss.

And, unless the Court has any questions for me, I'll turn it over to Liggett and then Mr. Kennedy.

THE COURT: Okay. That's fine. Thank you.

MR. ROBERTS: Thank you, Your Honor.

THE COURT: You're welcome.

MS. LUTHER: Your Honor, Kelly Luther again. Once again, I have nothing to add to Mr. Roberts's argument.

THE COURT: Okay. Thank you. Mr. Kennedy.

MR. KENNEDY: Your Honor, for R.J. Reynolds, Dennis Kennedy again. Okay.

I just -- I have one point, but it's got three subparts to it and it's quick.

THE COURT: Okay.

MR. KENNEDY: First off, the plaintiffs and the defendants agree there must be an underlying claim if you have a conspiracy claim. You had to conspire to do something.

THE COURT: To do something.

MR. KENNEDY: And, in this case, Mr. Echols said it's to violate the Deceptive --

THE COURT: Deceptive --

MR. KENNEDY: -- Trade Practices Act.

Mr. Roberts is right. I was the lawyer for the Betsingers in the *Betsinger* case. Contrary to what the Court was told, the *Betsinger* case does not stand for the proposition that you can sue for a violation of the Deceptive Trade Practices Act without the purchase and sale of a product. The *Betsinger* case involves a plaintiff who had a contract to purchase a house and when they went to close the purchase, the developer said: Sorry, we've sold

it to somebody else. And that was the crux of the case. That case does not say, nor does it come anywhere close to saying, you can violate the Deceptive Trade Practices Act without there having been a purchase --

THE COURT: Or sale.

MR. KENNEDY: -- or sale of a product.

Lastly, the Court hit it on the head when the Court asked: Wait a minute. Can you just sue anybody under the Deceptive Trade Practices Act whether you bought their product or not? And the plaintiffs said: Yes. In our view, you sure can.

Well, that's a rather unique view because no case anywhere says that and, of course, that can't be the case. It has to involve purchase or sale of a product or a service. And, as to R.J. Reynolds here, we have the plaintiff admitting: Never bought it; never used it if it's an R.J. Reynolds product. That's why we ask for a dismissal with prejudice. That's all I have.

THE COURT: Okay. All right. Thank you, all, very much. I really appreciate the good lawyership -- do you want to respond? I guess you can, Micah, but I've read it. I really, really appreciate the professionalism and the good legal -- I'm going to go back -- I read everything. In cases like this, I still take copious notes to make sure I didn't miss anything and to fill things in.

So, I'm going to -- I promise you I'm going to work on it this afternoon because I prefer to get the minute orders out, obviously, while it's fresh in my head. So I'm going to do it that way. Hopefully after lunch hour -- yeah. It's the lunch hour.

Okay. Thank you, all. It was a pleasure having you all. I'm -- thank you for participating, even though it's kind of difficult this way.

MR. ROBERTS: Thank you, Your Honor.

THE COURT: Okay.

MR. KENNEDY: Very good. Thanks, Your Honor.

THE COURT: Thank you. It's fun seeing all of you and I still have one case left. Right?

MR. ROBERTS: Appreciate your time.

PROCEEDING CONCLUDED AT 11:16 A.M.

* * * * *

CERTIFICATION

I certify that the foregoing is a correct transcript from the audio-visual recording of the proceedings in the above-entitled matter.

AFFIRMATION

I affirm that this transcript does not contain the social security or tax identification number of any person or entity.

KRISTEN LUNKWITZ
INDEPENDENT TRANSCRIBER

EXHIBIT 18

EXHIBIT 18

IN THE SUPREME COURT OF THE STATE OF NEVADA

SANDRA CAMACHO, individually; and ANTHONY CAMACHO, individually,

Petitioners,

vs.

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

Respondents,

and

PHILIP MORRIS USA, INC., a foreign corporation; 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; LIGGETT GROUP, LLC., a foreign corporation; and ASM NATIONWIDE CORPORATION d/b/a SILVERADO SMOKES & CIGARES, a domestic corporation, and LV SINGHS INC. d/b/a SMOKES & VAPORS, a domestic corporation,

Real Parties in Interest.

Case No. 82654

REPLY IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS OR PROHIBITION

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I. INTRODUCTION

Plaintiffs, Ms. and Mr. Camacho, request relief in this original proceeding to reinstate their claims against R.J. Reynolds for violation of the NDTPA and civil conspiracy.

For the first time in this litigation, R.J. Reynolds claims that Plaintiffs lack standing. Ans. at 7–16. However, this argument was waived. *See Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) ("A point not urged in the trial court, unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered on appeal.").

Additionally, R.J. Reynolds' answer fails to recognize that a victim can be directly harmed by a wrongdoer without having bought the wrongdoer's product. NRS 41.600 contemplates that scenario in its plain language, caselaw has interpreted it as such, and this case exemplifies it. R.J. Reynolds produced and spread false information that caused Sandra Camacho to believe cigarettes are safer than they are. This fraudulent representation caused her to begin and continue smoking until her larynx became cancerous. She was directly harmed by R.J. Reynolds' prominent participation in the tobacco industry's conspiracy to convince the public that cigarettes do not cause cancer. As such, Mrs. Camacho is a victim with statutory standing to sue R.J. Reynolds—not for its products, but for its deception regarding cigarettes' health risks.

The crux of R.J. Reynolds' argument is that direct harm can only arise from the purchase or use of the wrongdoer's product. Ans. at 8. Since civil conspiracy is a derivative claim, the upshot is that when several corporations conspire to defraud the public as a united front with false information about a ***common*** product, consumers can never hold the conspirators accountable under the NDTPA, only the manufacturer. This twisted position flouts the very purpose of the NDTPA and NRS 41.600 by eviscerating the function of these remedial statutes.

R.J. Reynolds' reasoning (1) sets up a strawman argument by mischaracterizing this Court's decision in *Fairway Chevrolet Co. v. Kelley*, 134 Nev. 935, 429 P.3d 663, 2018 WL 5906906 (2018) (unpublished); (2) disregards this Court's admonition in *Betsinger v. D.R. Horton, Inc.*, 126 Nev. 162, 232 P.3d 433 (2010) by conflating a common law fraud claim with a statutory claim under the NDTPA; and (3) betrays the legislative intent to create a private cause of consumer action that does not rely on privity.

II. LEGAL ARGUMENT

A. R.J. REYNOLDS' RELIANCE ON *FAIRWAY* IS A STRAW MAN ARGUMENT.

Fairway's plaintiff did not suffer any harm from the defendant's conduct and admitted so. Fairway Opening Brief ("FOB") at 10–12. He was a consumer protection vigilante, who sued the defendant for a 30-second TV commercial that he believed was unlawful. *Id.* at 1–2. In contrast, Mrs. Camacho was influenced and

misled by decades of misinformation created and disseminated by R.J. Reynolds and its conspirators. 1 PA 57, ¶ 23–58, ¶ 24. As a direct result of these false marketing and public relations efforts, Mrs. Camacho believed cigarettes to be safer than they were and became addicted to smoking, which caused her laryngeal cancer. 1 PA 99–101. To argue that these two plaintiffs are analogous is a flagrant misstatement.

This Court's unpublished opinion in *Fairway* simply holds that when a plaintiff does not allege harm at the hand of the defendant, NRS 41.600 provides no standing. *Id.* at *1. This Court did not require the plaintiff to have bought or used the defendant's product. *Id.* Nor did this Court impose any definition of "victim" that is narrower than the ordinary usage. *Id.*

Importantly, the successful appellant in *Fairway* relied heavily on three federal cases that addressed the same issue of standing at bar in this proceeding: *Picus v. Wal-Mart Stores, Inc.*, 256 F.R.D. 651 (D. Nev. 2009); *S. Serv. Corp. v. Excel Bldg. Servs., Inc.*, 617 F. Supp. 2d 1097 (D. Nev. 2007); and *Del Webb Communities, Inc. v. Partington*, 652 F.3d 1145 (9th Cir. 2011). FOB at 15. All three cases interpreted NRS 41.600 to merely require the defendant to have caused harm to the plaintiff, but none of these cases support R.J. Reynolds' argument that the harm must arise from the purchase or use of a defendant's product. Quite the opposite, *S. Serv. Corp* and *Del Webb Communities* staunchly guarded a broad and ordinary definition of "victim" against any narrow judicial construction. *S. Serv.*

Corp, 617 F. Supp. 2d at 1100; *Del Webb Communities*, 652 F.3d at 1152–1153. Having contemplated these cases, *Fairway* did not reject or modify the federal courts' reading of NRS 41.600. Instead, this Court ruled consistently with the federal courts by citing BLACK'S LAW DICTIONARY and MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY for the broad and ordinary definition of "victim": "The undisputed facts of this case demonstrate that respondent was not a 'victim' of consumer fraud under any ***sensible*** definition of that term, as the definition of "victim" connotes ***some sort*** of harm being inflicted on the "victim." *See, e.g.*, BLACK'S LAW DICTIONARY, 1798 (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***"). *Fairway*, 2018 WL 5906906, at *1 (emphases added).

If these are the meter-stick definitions of "victim," then this Court could not have intended to deprive a victim of her standing to sue when she was tricked into using a harmful product, simply because the trickster did not make the product. R.J. Reynolds' misconduct at issue here is not a false claim in its advertising about its own product, but a decades-long false narrative it perpetuated with its conspirators about a common product from which they all profited.

Plaintiffs' Amended Complaint detailed how R.J. Reynolds was involved in the conspiracy to deceive American consumers, like Mrs. Camacho, from the very beginning. 1 PA 57–70 (The Frank Statement was signed in 1954 by R.J. Reynolds' president). Plaintiffs not only pointed to R.J. Reynolds' misconduct through the Tobacco Industry Research Committee and the Tobacco Institute, 1 PA 62, ¶ 42; 67, ¶ 70, but also provided specific false statements from R.J. Reynolds, such as its CEO's 1982 claim that "there is absolutely no proof that cigarettes are addictive." 1 PA 89, ¶ 155(g). Plaintiffs even included a photograph containing R.J. Reynolds' CEO, James W. Johnston (third from the right), from a 1994 Congressional hearing, where he denied that cigarettes are addictive or disease-causing. 1 PA 68, ¶ 74. The totality of such false representations over decades is what led Mrs. Camacho to use, and become addicted to, cigarettes, which caused her laryngeal cancer. This causal link was clearly alleged by the Plaintiff's Amended Complaint. 1 PA 52–106.

Juxtaposed against the *Fairway* plaintiff's mere indignation, Mrs. Camacho's harm in this case is actual, substantial, and directly caused by R.J. Reynolds' deception. She is, in every "sensible" definition of the word, a "victim." Therefore, Plaintiffs have standing to sue R.J. Reynolds under NRS 41.600.

B. R.J. REYNOLDS MISTAKENLY CONFLATES A STATUTORY CONSUMER FRAUD CLAIM WITH A COMMON LAW FRAUD CLAIM.

The claim at issue in this case is not a common law fraud or misrepresentation claim. 1 PA 98. It is a statutory consumer fraud claim brought under the NDTPA and NRS 41.600. R.J. Reynolds' failure to recognize the difference is fatal to its argument.

Both *Moretti v. Wyeth, Inc.*, 2009 U.S. Dist. LEXIS 29550, 2009 WL 749532 (D. Nev. Mar. 20, 2009) and *Baymiller v. Ranbaxy Pharmaceuticals, Inc.*, 894 F. Supp.2d 1302 (D. Nev. 2012) are product liability cases where the plaintiff sought relief via the common law claims of fraud and misrepresentation. These common law claims require the plaintiff to prove that the defendant owed him a duty of care. *Moretti*, 2009 WL 749532, at *3. This duty, "at a minimum, required some form of relationship between the parties." *Baymiller*, 894 F. Supp.2d at 1309. In a negligent misrepresentation claim, this duty must arise from a business transaction. *Id.* In no uncertain language, the federal district court's decision in these cases turned on whether the plaintiff and defendant are connected by privity: "In *Kite,* this Court found that negligent misrepresentation was only available if a plaintiff suffered pecuniary losses in the context of a business transaction. *Id*. As such, this Court's previous reasoning is in line with *Moretti* and *Foster.* Thus, this Court finds that Glaxo does not have a duty to warn or otherwise disseminate information about the

risks associated with their generic competitors' drugs because Mary Baymiller did not purchase or ingest a Glaxo product. As such, Mary Baymiller did not have a relationship with Glaxo and Glaxo did not owe Mary Baymiller any duty to warn. Accordingly, the Court grants Glaxo's motion for summary judgment on claim 6 for fraud and negligent misrepresentation." *Baymiller*, 894 F. Supp. 2d at 1311.

A statutory consumer fraud claim under the NDTPA is vastly different. First, the NDTPA was enacted to "provide consumers with a cause of action that was easier to establish than common law fraud." *Betsinger v. D.R. Horton, Inc.*, 126 Nev. 162, 232 P.3d 433, 435 (2010). More importantly, NRS 41.600 was enacted precisely because the Legislature wished to give consumer victims the right to sue without having to establish privity. *See* Assembly History, A.B. 319, 58th Session (1975) ("A.B. 319 (chapter 629) establishes consumer fraud as a separate cause of action apart from breach of contract or other causes of action in commercial dealings."). This legislative intent is reflected in the plain language of the statute: "4. Any action brought pursuant to this section is not an action upon any contract underlying the original transaction." NRS 41.600(4) (1975). That provision remained unchanged through ten legislative amendments. *See* NRS 41.600(4) (2021).

Thus, the "bedrock principle" R.J. Reynolds relies on in its Answer has no bearing on this statutory consumer fraud claim. Ans. at 11. To the contrary, this

Court must "look to the language of the statute itself to determine a party's [standing]." *Fergason v. Las Vegas Metro. Police Dep't*, 131 Nev. 939, 952, 364 P.3d 592, 600 (2015). Since NRS 41.600 does not limit standing to purchasers or users of a defendant's product, this Court must afford the statute "liberal construction to accomplish its beneficial intent." *Poole v. Nevada Auto Dealership Investments, LLC*, 135 Nev. 280, 449 P.3d 479, 485 (Ct. App. 2019) (citing *Welfare Div. of State Dept. of Health, Welfare & Rehab. v. Washoe County Welfare Dept.*, 88 Nev. 635, 637, 503 P.2d 457, 458 (1972)). Aside from the fact that R.J. Reynolds did not argue against Plaintiffs' standing in the District Court (*Old Aztec Mine*, 97 Nev. 49 at 52, 623 P.2d 981 at 983), this Court must not impose a greater constitutional requirement for standing beyond the language of the statute. *See Fergason*, 131 Nev. 939 at 952, 364 P.3d 592 at 600. Thus, the Court should reject R.J. Reynolds' attempts to extinguish Plaintiff's NDTPA claim on several levels.

C. R.J. REYNOLDS' INTERPRETATION BETRAYS THE PURPOSE OF THE NDTPA AND NRS 41.600.

By asking this Court to impose the requirements of common law fraud onto a NDTPA claim, R.J. Reynolds seeks to nullify the NDTPA's remedial purpose. The Court of Appeals in *Poole* faced a similar request and rejected it with persuasive reasoning. The respondent in *Poole* asked the court to construe the word "knowingly" in the NDTPA as to require specific intent to defraud, which is the common law standard. *Id.* at 483. The Court of Appeals, however, chose to define

"knowingly" as to require only general intent because to do otherwise would "render NDTPA and common law fraud claims redundant" and "disserve the NDTPA's remedial purpose, and discourage claims by forcing parties to clear a significantly higher bar." *Id.* at 485. Analyzing other jurisdictions' treatment of the same issue, the Court of Appeals recognized that several states favored the respondent's reading. *Id.* at 484–485. But, the Court of Appeals held steadfast: "We conclude, however, that our interpretation better serves the NDTPA's remedial purpose. Because the NDTPA is a remedial statutory scheme, *Sellinger v. Freeway Mobile Home Sales, Inc.,* 110 Ariz. 573, 521 P.2d 1119, 1122 (1974) (recognizing that remedial statutes are those that "are designed to redress existing grievances and introduce regulations conducive to the public good"), we "afford[ ] [it] liberal construction to accomplish its beneficial intent." *Id.* at 485.

R.J. Reynolds' proposed reading would deny standing to the very victim that the NDTPA was enacted to protect. If a defendant corporation harmed a consumer through fraud, it is liable under the NDTPA, regardless of its liability under common law. Mrs. Camacho's cancer was caused by smoking, which was caused by the misinformation campaign that spanned most of her life. The depth of the deception was possible because R.J. Reynolds, like the other tobacco companies, conspired to present a united front. That causal link between R.J. Reynolds and Mrs. Camacho's injury exists without her having used R.J. Reynolds' product.

This lawsuit is unique in the scale, complexity, and length of deception perpetrated by R.J. Reynolds and its conspirators. As Judge Gladys Kessler wrote in her 1,683-page opinion finding R.J. Reynolds and other cigarette maker in violation of civil racketeering laws:

> It is about an industry, and in particular these Defendants, that survives, and profits, from selling a highly addictive product which causes diseases that lead to a staggering number of deaths per year, an immeasurable amount of human suffering and economic loss, and a profound burden on our national health care system. Defendants have known many of these facts for at least 50 years or more. Despite that knowledge, they have consistently, repeatedly, and with enormous skill and sophistication, denied these facts to the public, to the Government, and to the public health community.

United States v. Philip Morris USA, Inc., 449 F. Supp. 2d 1, 28, 2006 U.S. Dist. LEXIS 61412, 18–19 (D.D.C. Aug. 17, 2006). Common law fraud claims may be unequipped to address this type of fraudulent sophistication. But, the NDTPA closed that loophole, and that is the remedial purpose this Court should protect and enforce. Therefore, the Court should interpret Plaintiffs' NDTPA claim consistent with *Poole* and the various aligned cases that confirm the remedial purpose of these statutes.

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III. CONCLUSION

For the above reasons, this Court should reinstate Plaintiffs' NDTPA claim. Since R.J. Reynolds concedes that Plaintiffs' civil conspiracy claim should be reinstated if the NDTPA claim is viable, Ans. at 16–17, this Court should also reinstate the civil conspiracy claim.

DATED this 12th day of July 2021.

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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 this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Times New Roman font.

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

proportionally spaced, has a typeface of 14 points or more and contains 2,453 words and a motion to exceed has been filed with the Court; or

does not exceed ____ pages.

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

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I hereby certify that the foregoing **REPLY IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS OR PROHIBITION** were filed electronically with the Supreme Court of Nevada on the 12th day of July 2021. Electronic service of the foregoing document shall be made in accordance with the Master Service List as follows:

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I further certify that the foregoing documents were mailed via e-mail to the following:

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