IN THE SUPREME COURT OF THE STATE 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 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,

No. 83724

ANSWER TO R.J. REYNOLDS' PETITION FOR WRIT OF MANDAMUS OR PROHIBITION

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NRAP 26.1 DISCLOSURE

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

1. Sandra Camacho and Anthony Camacho are individuals.

2. Claggett & Sykes Law Firm and Kelley Uustal represent Sandra Camacho and Anthony Camacho in the District Court and in this Court.

DATED this 16th day of December 2021.

CLAGGETT & SYKES LAW FIRM

/s/ Micah S. Echols

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ROUTING STATEMENT

Real Parties in Interest, Sandra Camacho ("Ms. Camacho") and Anthony Camacho ("Mr. Camacho") (collectively "Plaintiffs"), do not object to this Court retaining jurisdiction pursuant to NRAP 17(a)(12), as this appeal presents matters of statewide importance.

ISSUE PRESENTED

Did Judge Krall correctly exercise her discretion to grant Plaintiffs' motion to reconsider Judge Earley's dismissal of R.J. Reynolds Tobacco Company ("RJR") from this action?

INTRODUCTION

The prior ruling from Judge Earley that Judge Krall reconsidered was clearly erroneous. The prior ruling not only disregarded the plain language of the Nevada Deceptive Trade Practices Act ("NDTPA"), but also betrayed the Act's legislative intent by making this remedial statute redundant of common law fraud. Further, Judge Earley's prior ruling was proscribed by every pertinent published opinion in both Nevada and federal court.

RJR's interpretation of the NDTPA finds no support in either case law or legislative history. RJR's heavy reliance on cases discussing common law fraud, such as *Moretti v. Wyeth, Inc.*, 2009 U.S. Dist. LEXIS 29550 (D. Nev. Mar. 20, 2009) and *Baymiller v. Ranbaxy Pharm., Inc.*, 894 F.Supp.2d 1302 (D. Nev. 2012), and an unpublished single-page order from this Court, *Fairway Chevrolet Co. v. Kelley*, Order of Reversal and Remand, Dkt. 72444, 2018 Nev. Unpub. LEXIS 1011 (Nov. 9, 2018) (unpublished), only highlights the fatal flaws in RJR's reasoning—1) the NDTPA is meant to cast a broader net than common law fraud; and 2) Ms. Camacho suffered at RJR's hands because of its deception, not its product.

A writ is an extraordinary relief reserved for extraordinary circumstances. *Archon Corp. v. Eighth Jud. Dist. Ct.*, 133 Nev. 816, 821, 407 P.3d 702, 707 (2017). RJR has not shown such a circumstance. Judge Krall's ruling was true of the NDTPA's language and intent, amply supported by case law, and saved Plaintiffs

from suffering immediate and irreparable harm. This Court should uphold her ruling and deny RJR's petition.

STATEMENT OF FACTS

Ms. Camacho fell victim to the lies told by RJR and the tobacco industry. She began to smoke in approximately 1964, became addicted, and continued to smoke until 2017. 1 Petitioner's Appendix ("PA") 57. In 2018, Ms. Camacho was diagnosed with laryngeal cancer, which was caused by smoking. *Id.*

While Ms. Camacho never smoked RJR's products, she relied on RJR's rampant misrepresentations through decades of advertisements, public relations campaigns, false Congressional testimony, and dissemination of disingenuous scientific conclusions, which caused her injury. *Id.* at 84–86. This is the basis of her claims against RJR under the NDTPA and for Civil Conspiracy. *Id.* at 95–102.

Plaintiffs alleged numerous deceptive trade practices by RJR and its co-conspirators and even presented direct quotations of their lies. *Id*. But the case is best summed up by Judge Gladys Kessler in her 1,683-page opinion finding RJR and other cigarette makers guilty 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 (D.D.C. 2006).

On June 17, 2020, upon RJR's motion, Judge Earley dismissed Plaintiffs' claims against RJR, holding that the NDTPA claim fails because Ms. Camacho "did not purchase or use any R.J. Reynolds product." 2 PA 0401. Subsequently, Plaintiffs filed a petition for a writ in this Court on March 24, 2021, 2 PA 410–448, and then a motion for reconsideration in the District Court containing the same arguments and legal analysis on May 25, 2021. 3 PA 449–471.

While Plaintiffs' writ petition was pending, Judge Earley's successor, Judge Krall, reconsidered Judge Earley's ruling on November 3, 2021. 6 PA 1184–1190. RJR filed its own petition for a writ two days later. But when Plaintiffs moved to voluntarily withdraw their petition for a writ, RJR vehemently opposed. 1 Real Parties in Interest Appendix ("RA") 137–199. Ultimately, this Court granted Plaintiffs' withdrawal and now only the RJR petition remains. 1 RA 200–202.

ARGUMENT

Petitioner RJR "bears the burden of demonstrating that extraordinary writ relief is warranted." *Archon Corp. v. Eighth Jud. Dist. Ct.*, 133 Nev. 816, 821, 407 P.3d 702, 707 (2017). This Court is afforded "broad discretion" to determine whether a writ should issue, and "infrequently decides to exercise its discretion to consider issues presented in the context of a petition for extraordinary

relief." *D.R. Horton, Inc. v. Eighth Jud. Dist. Ct. ex rel. Cty. of Clark*, 123 Nev. 468, 475, 168 P.3d 731, 737 (2007).

Two bases exist for granting such extraordinary relief. First, a writ is available "to control a manifest abuse or an arbitrary or capricious exercise of discretion" or "to arrest the performance of an act outside the trial court's discretion." *Id*. However, clear error alone does not justify a writ. The petitioner must also show that, "unless immediately corrected [the error] will wreak irreparable harm." *Archon Corp.*, 133 Nev. at 820, 407 P.3d at 706 (citation omitted). This Court has "previously pointed out, on several occasions, that the right to appeal is generally an adequate legal remedy that precludes writ relief… and we have determined that even if an appeal is not immediately available because the challenged order is interlocutory in nature, the fact that the order may ultimately be challenged on appeal from the final judgment generally precludes writ relief." *Pan v. Eighth Judicial Dist. Court ex rel. Cnty. of Clark*, 120 Nev. 222, 224–225, 88 P.3d 840, 841 (2004); *see also D.R. Horton*, 123 Nev. at 474–475, 168 P.3d at 736 ("The right to immediately appeal or even to appeal in the future, after a final judgment is ultimately entered, will generally constitute an adequate and speedy legal remedy precluding writ relief."); and *Archon Corp.*, 133 Nev. at 820, 407 P.3d at 706 ("[T]his court applies the statute-based rule that the right of eventual appeal from the final judgment 'is generally an adequate legal remedy that precludes writ relief.'").

Second, a writ is warranted "when 'an important issue of law needs clarification and considerations of sound judicial economy and administration militate in favor of granting the petition.'" *Id*. Such "advisory mandamus…allows this court 'to provide occasional appellate guidance on matters that often elude ordinary appeal, without establishing rules of appealability that will bring a flood of less important appeals in their wake.'" *Id.* The likelihood to elude ordinary appeal is critical for the petitioner to show, because otherwise "advisory mandamus…risks being misused in ways that subvert the final judgment rule." As this Court instructed, "Advisory mandamus…should issue only to address the rare question that is 'likely of significant repetition prior to effective review.…'" *Id.* at 822–823, 407 P.3d at 708.

I. JUDGE KRALL EXERCISED PROPER JURISDICTION AND DISCRETION IN RECONSIDERING JUDGE EARLEY'S PRIOR RULING WHICH WAS CLEARLY ERRONEOUS.

a. Plaintiffs' Motion to Reconsider was Timely.

RJR improperly relies upon Eighth Judicial District Court Rules ("EDCR") 2.24 for the timing to file Plaintiffs' motion for reconsideration. 4 RA 790–802. As a local rule, EDCR 2.24 is inferior to the Nevada Rules of Civil Procedure, as stated in NRCP 83(a). *See AA Primo Builders, LLC v. Washington*, 126 Nev. 578, 583, 245 P.3d 1190, 1193 (2010) ("NRCP 83 prohibits local rules that are inconsistent with the NRCP. . . ."). Thus, the proper timing for reconsideration is any time prior to the

entry of the final judgment, as allowed by NRCP 54(b). Accordingly, Plaintiffs were not bound by the 14-day limit in EDCR, and Judge Krall had the power to grant reconsideration, even though the District Court's prior ruling was decided by another Judge.

NRCP 63 addresses the role of a successor judge when the prior judge is unable to proceed. This Court has addressed Rule 63 in *Smith's Food King v. Hornwood*, 108 Nev. 666, 668, 836 P.2d 1241, 1242 (1992), where the Court held that "a judge who replaces the original trial judge after the original judge has filed findings of fact and conclusions of law has the discretion to grant a new trial." In situations prior to the entry of a final judgment, this Court has confirmed the ability of parties to request reconsideration, even when a case is transferred from one District Judge to another. *See Gibbs v. Giles*, 96 Nev. 243, 245, 607 P.2d 118, 199 (1980) ("Unless and until an order is appealed, the district court retains jurisdiction to reconsider the matter."); *see also In re Manhattan W. Mechanic's Lien Litig.*, 131 Nev. 702, 707 n.3, 359 P.3d 125, 128 n.3 (2015) ("[The petitioner] argues that the district court erred in reconsidering the motion. [The petitioner's] argument is without merit because NRCP 54(b) permits the district court to revise a judgment that adjudicates the rights of less than all the parties until it enters judgment adjudicating the rights of all the parties."). Therefore, this Court should reject RJR's timing argument regarding Plaintiffs' motion for reconsideration.

b. Judge Earley's Ruling Clearly Erred by Contradicting the Plain Language of the NDTPA.

RJR concedes that Judge Krall exercised proper jurisdiction and discretion if Judge Earley's ruling was clearly erroneous. Pet. at 16; s*ee also Masonry & Tile Contractors Ass'n of S. Nev. v. Jolley, Urga & Wirth, Ass'n*, 113 Nev. 737, 741, 941 P.2d 486, 489 (1997). That was exactly the case here.

Issues of statutory interpretation are questions of law that this Court reviews de novo in the context of a writ petition. *See State v. Second Jud. Dist. Ct. (Ayden A.)*, 132 Nev. 352, 355, 373 P.3d 63, 65 (2016).

The primary goal of interpreting statutes is to effectuate the Legislature's intent. *See Cromer v. Wilson*, 126 Nev. 106, 109, 225 P.3d 788, 790 (2010). Courts must interpret clear and unambiguous statutes based on their plain meaning. *Id*. Indeed, "if a statute is unambiguous, this [C]ourt does not look beyond its plain language in interpreting it." *Westpark Owners' Ass'n v. Eighth Jud. Dist. Ct.*, 123 Nev. 349, 357, 167 P.3d 421, 427 (2007); *Picus v. Wal-Mart Stores, Inc.*, 256 F.R.D. 651, 657 (D. Nev. 2009). Judge Earley's prior order violated this fundamental rule.

The NDTPA is codified as NRS Chapter 598 (Deceptive Trade Practices), which defines "deceptive trade practice" as follows:

> A person engages in a "deceptive trade practice" if, in the course of his or her business or occupation, he or she:

…
2. Knowingly makes a false representation as to the source, sponsorship, approval or certification of goods or services for ***sale*** or lease.
3. Knowingly makes a false representation as to affiliation, connection, association with or certification by another person.
…
5. Knowingly makes a false representation as to the characteristics, ingredients, uses, benefits, alterations or quantities of goods or services for ***sale*** or lease or a false representation as to the sponsorship, approval, status, affiliation or connection of a person therewith.
…
7. Represents that goods or services for ***sale*** or lease are of a particular standard, quality or grade, or that such goods are of a particular style or model, if he or she knows or should know that they are of another standard, quality, grade, style or model.
…
15. Knowingly makes any other false representation in a ***transaction***.
…

NRS 598.0915 (emphases added).

While "transaction" is not defined by the statute, it necessarily encompasses "sales" since the Legislature used the word in a catch-all category to penalize "any other false representation." *Id*.; *see also* "transaction," BLACK'S LAW DICTIONARY, 1802 (11th ed. 2019) ("1. The act or an instance of conducting business or other dealings; esp., the formation, performance, or discharge of a contract. 2. Something performed or carried out; a business agreement or exchange. 3. Any activity involving two or more persons. 4. *Civil law.* An agreement that is intended by the parties to prevent or end a dispute and in which they make reciprocal concessions.").

More importantly, "sale" is defined by the NDTPA to "include[] any sale, ***offer for sale*** or ***attempt to sell*** any property for any consideration." NRS 598.094

(emphases added). Nowhere in the NDTPA did the Legislature ever insert a product-use requirement that a plaintiff must assert in her pleadings to have standing. To the contrary, the definition of "sale" includes offers and attempts which need not be completed. *Id.* In short, the plain language of the statute prohibits and penalizes not only deceptive trade practices resulting in an eventual purchase or use by a plaintiff, but also those committed in an offer or attempt to transact with a plaintiff. The legislative intent on this particular issue has always been unambiguous because the definition of "sale" has stood unchanged since the enactment of the NDTPA in 1973. *Id.*

Judge Earley erred in reading a product-use/purchase requirement into the NDTPA because that reading conflates claims under the statute with claims under the common law. RJR makes the same mistake in its petition when it relies on *Moretti v. Wyeth, Inc.*, 2009 U.S. Dist. LEXIS 29550 (D. Nev. Mar. 20, 2009) and *Baymiller v. Ranbaxy Pharm., Inc.*, 894 F. Supp. 2d 1302 (D. Nev. Sept. 6, 2012). 4 RA 782–784. These are product liability cases where the plaintiff sought relief via the common law claims of fraud and misrepresentation, which 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 two 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.

Id. at 1311.

However, 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, 166, 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 spelled out 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 (1975). That provision remained unchanged through ten legislative amendments. *See* NRS 41.600

(2021). Thus, the "bedrock principle" RJR relies on in its petition has no bearing on Plaintiffs' NDTPA claim under NRS 41.600. Pet. at 15.

In *Betsinger*, this Court rejected a request to read a similarly unmentioned requirement into the NDTPA. The defendant there argued that NDTPA claims must be proven by clear and convincing evidence since common law fraud claims require such a standard of proof. This Court declined and held that "[s]tatutory offenses that sound in fraud are separate and distinct from common law fraud." *Id.* at 166, 232 P.3d at 435. Notably, this Court agreed with an Arizona court's analysis: "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.…" *Id.* Therefore, this Court refused to add an additional burden onto the plaintiff alleging an NDTPA claim absent any legislative directive. *Id.*

Likewise, the Court of Appeals in *Poole v. Nevada Auto Dealership Investments, LLC*, 135 Nev. 280, 449 P.3d 479 (Ct. App. 2019) faced an analogous 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 283, 449 P.3d at 484. 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 287, 449 P.3d at 485. Analyzing other jurisdictions' treatment of the same issue, the court recognized that several states favored the respondent's reading. *Id.* at 286–287, 449 P.3d at 484. But the court 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.

The same logic and principles apply to this case. Where there is no legislative directive to require product-purchase or product-use, the Court must abide by the plain language of the NDTPA, treat it distinctly from common law fraud, and not insert the Court's own requirements. *See S. Nev. Homebuilders Ass'n v. Clark Cty.*, 121 Nev. 446, 451, 117 P.3d 171, 174 (2005) ("[I]t is not the business of this court to fill in alleged legislative omissions based on conjecture as to what the legislature would or should have done."). To do otherwise would deny standing to the very victim that the NDTPA was enacted to protect.

c. NRS 41.600 Grants Plaintiffs Standing.

While this Court can and, therefore, must resolve this issue on the plain language of NRS 598.0915, RJR and Judge Earley's prior order erroneously relied

on a separate argument of standing. NRS 41.600(1) grants a private right of action to victims of consumer fraud, which includes deceptive trade practices as defined in NRS 598.0915, the NDTPA provision at issue. Neither the plain language nor case law commenting on NRS 41.600 has ever required a plaintiff to allege product-purchase or product-use to gain standing for an NDTPA claim. Quite the opposite, case law proscribes such a narrow construction and confirms that a non-user/purchaser can be a "victim" under NRS 41.600.

i. The Plain Language of NRS 41.600 Incorporates the NDTPA and Thus Grants Standing to Plaintiffs.

The statutory language is as follows:

> 1. An action may be brought by any person who is a victim of consumer fraud.
> 2. As used in this section, "consumer fraud" means:
> (a) An unlawful act as defined in NRS 119.330;
> (b) An unlawful act as defined in NRS 205.2747;
> (c) An act prohibited by NRS 482.36655 to 482.36667, inclusive;
> (d) An act prohibited by NRS 482.351; or
> (e) ***A deceptive trade practice as defined in NRS 598.0915 to 598.0925, inclusive***.
> 3. If the claimant is the prevailing party, the court shall award the claimant:
> (a) Any damages that the claimant has sustained;
> (b) Any equitable relief that the court deems appropriate; and
> (c) The claimant's costs in the action and reasonable attorney's fees.
> 4. Any action brought pursuant to this section is not an action upon any contract underlying the original transaction.

NRS 41.600 (emphasis added).

By referring to NRS 598.0915 in subsection 2(e), NRS 41.600 relies on the legislative scheme established by the NDTPA. *See Del Webb Communities, Inc. v.*

Partington, 652 F.3d 1145, 1152 (9th Cir. 2011) ("NRS 41.600(2) defines the kinds of actions that constitute 'consumer fraud' not by referring to a certain type of victim, but by cross-referencing other NRS sections defining deceptive trade practices and other offenses.").

This Court must "look to the language of the statute itself to determine a party's [standing]." *Fergason v. LVMPD*, 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*, 135 Nev. at 287, 449 P.3d at 485 (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)).

By cross-referencing NRS 598.0915, which was discussed in the previous section, the legislative intent of NRS 41.600 is clear: one can be a victim of deceptive trade practices even if the deception occurred during an offer or an attempt that did not end in a purchase or use of the product.

ii. Case Law Confirms That a Non-User of RJR's Product Can Be a Victim under NRS 41.600.

To effectuate the NDTPA's intent, courts have proscribed a narrow definition of "victim" under NRS 41.600, especially if the limitation would exclude plaintiffs who are directly harmed by deceptive trade practices.

Here, Judge Earley dismissed Plaintiffs' NDTPA claim in her prior order because:

> It is undisputed 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.

3 PA 464. However, the existing body of case law clearly shows that these requirements of product use/purchase and legal relationship between Ms. Camacho and RJR should not have been read into the NDTPA and NRS 41.600.

In both *Sears v. Russell Rd. Food & Beverage, LLC*, 460 F.Supp.3d 1065, 1070 (D. Nev. 2020) and *S. Serv. Corp. v. Excel Bldg. Servs., Inc.*, 617 F.Supp.2d 1097, 1100 (D. Nev. 2007), the Nevada Federal District Court rejected the defendants' argument that the NDTPA only provides consumers a right of action. Citing to the Ninth Circuit opinion in *Del Webb Communities*, the district court held that "the role of an individual in a transaction is irrelevant so long they are a 'victim of consumer fraud…[T]o be a victim under this statute, the plaintiff need only have been 'directly harmed' by the defendant." *Sears*, 460 F.Supp.3d at 1070. Therefore, the NDTPA does not require the plaintiff to be in any legal relationship with the defendant, as Judge Earley previously ruled in this case.

More importantly, courts do not restrict the phrase "directly harmed" to mean

only harm occurring between a seller and a purchaser. Instead, individuals without any legal relationship with the wrongdoer may bring an action under the NDTPA if they suffered from deceptive trade practices. In *S. Serv. Corp*, 617 F.Supp.2d at 1100, the court granted standing to the defendant's business competitor, who lost several contracts to the defendant because the defendant's deceptive practices allowed it to reduce costs and underbid the competitor. In *Bates v. Dollar Loan Ctr., LLC*, 2014 U.S. Dist. LEXIS 96699, at *3 (D. Nev. July 15, 2014), the court granted standing to a plaintiff who suffered invasion of privacy, due to the defendant's deceptive practices, even though the plaintiff was not the borrower from Dollar Loan Center but merely the borrower's credit reference. Indeed, the Ninth Circuit construes the NDTPA to provide standing even beyond consumers and competitors. *See Del Webb Communities*, 652 F.3d at 1153 ("There is no basis in the text of NRS 41.600 or in *Southern Service* to limit standing to a group broader than consumers but no broader than business competitors.").

Judge Earley's ruling flew in the face of these decisions. If the NDTPA does not restrict standing to only consumers, how can it restrict standing to a subset of consumers (either purchasers or users)? *See* "consumer" BLACK'S LAW DICTIONARY, 395 (11th ed. 2019) ("1. Someone who buys goods or services for personal, family, or household use, with no intention of resale; a natural person who uses products for personal rather than business purposes. 2. Under some consumer-

protection statutes, any individual.").

The Nevada Federal District Court's analysis in *Prescott v. Slide Fire Sols., LP*, 410 F.Supp.3d 1123, 1145–1146 (D. Nev. 2019) is particularly illuminating because it highlights the difference between the too-attenuated commercial injuries the plaintiff suffered there and the direct harm Ms. Camacho suffered in this case. *Prescott* arose from the mass shooting that occurred during the Route 91 Harvest Music Festival in 2017. Dismissing the NDTPA claim, the court wrote:

> [C]ourts have found standing under NRS 41.600 beyond just "business competitors" of a defendant or "consumers" of a defendant's goods or services….
>
> Here, Plaintiffs allege that Slide Fire… caused them commercial injury by: (1) creating the "false and misleading impression that the bump stock device could be used by members of the public for a lawful, safe purpose"; and (2) "displaying the 'ATF approved' legend on its homepage ... [thereby] knowingly creat[ing] the false and misleading impression that the ATF letter was an official approval of the legality of the bump stock." … These allegations do not, however, reveal a direct harm of commercial injury by Slide Fire's actions. According to the Amended Complaint, it was not the false statement about the lawfulness of a bump stock device or ATF's approval that "deprived Plaintiffs of their commercial business"; it was the "emotional trauma they experienced as a result of defendants' sale of the bump stock device *and* its subsequent use by the shooter." …Thus, while NRS 598.0915(5) is not limited to only consumers or competitors of a defendant, Plaintiffs' alleged commercial injuries here are too attenuated to establish standing for this claim.

Id. at 1145.

Whereas the plaintiffs in *Prescott* failed to claim that the defendant's false statement deprived them of their commercial business, Plaintiffs here enumerated a

long list of deceptive practices by RJR and the other Defendants that concealed the dangers of smoking, the addiction-inducing properties of cigarettes, which addicted Ms. Camacho, and led to her laryngeal cancer. 1 PA 98–102, 83–94 (by incorporation). Plaintiffs also clearly alleged causation:

> "e. Plaintiff acted in reliance upon Defendants' promises;
> f. Plaintiff was justified in relying upon Defendants' promises;
> g. As a direct and proximate and/or legal cause of Defendants' false promises, SANDRA CAMACHO became addicted to cigarettes and developed laryngeal cancer." *Id.* at ¶ 157;

> "f. Plaintiff was unaware of the dangerous and addictive nature of cigarettes, and would not have begun or continued to smoke had [s]he known the aforementioned concealed and/or suppressed information Defendants possessed;
> g. Plaintiff was unaware of the danger of Defendants' cigarettes, the addictive nature of Defendants' cigarettes, and that low tar, low nicotine, "light," and/or filtered cigarettes were just as dangerous as unfiltered and "regular" cigarettes;
> h. Plaintiff justifiably relied upon Defendants to disseminate the superior knowledge and information it possessed regarding the dangers of cigarettes;
> i. The concealment and/or suppressed of material facts regarding the hazards of cigarettes caused Plaintiff to become addicted to cigarettes, and also caused her to develop laryngeal cancer." *Id.* at ¶ 182.

RJR's deceptive practices directly harmed Ms. Camacho, independent of its products. In light of *Del Webb Communities, S. Serve Corp., Bates, Sears,* and *Prescott,* Judge Earley clearly erred by reading restrictions into the NDTPA and NRS 41.600 where there is no legislative directive to do so, and broad construction is proper. *See S. Nev. Homebuilders Ass'n*, 121 Nev. at 451, 117 P.3d at 174 ("[I]t is not the business of this court to fill in alleged legislative omissions based on

conjecture as to what the legislature would or should have done."). Thus, Judge Krall properly granted reconsideration.

d. RJR's Reliance on *Fairway* is a Strawman Argument.

Fairway's plaintiff did not suffer any harm from the defendant's conduct and admitted so. *See Fairway* Opening Brief, 1 RA 19–24, 28–34. He was a consumer protection vigilante, who sued the defendant for a 30-second TV commercial that he believed was unlawful. 1 RA 20–21. In contrast, Ms. Camacho was influenced and misled by decades of misinformation created and disseminated by RJR and its conspirators. 1 PA 57–60. As a direct result of these false marketing and public relations efforts, Ms. Camacho believed cigarettes to be safer than they were and became addicted to smoking, which caused her laryngeal cancer. 1 PA 83–94, 99–101. To argue that these two plaintiffs are analogous is a flagrant misstatement.

This Court's unpublished order in *Fairway* simply holds that when a plaintiff does not allege harm at the hand of the defendant, NRS 41.600 provides no standing. *Fairway*, 2018 Nev. Unpub. LEXIS 1011, 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 common American usage. *Id.*

In fact, *Fairway* undermines RJR's argument. The successful appellant in *Fairway* relied heavily on the very cases cited in the above section: *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). 1 RA 33. Having contemplated these cases, this Court 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 natural 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.*, *Victim*, 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*"**)

Id. at 935 (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. RJR's 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 detailed how RJR was involved in the conspiracy to deceive American consumers like Ms. Camacho from the very beginning, with RJR's

president signing the Frank Statement in 1954. 1 PA 62. Plaintiffs not only pointed to RJR's misconduct through the Tobacco Industry Research Committee and the Tobacco Institute, 1 PA 62–64, but also provided specific false statements from RJR, such as its CEO's 1982 claim that "there is absolutely no proof that cigarettes are addictive." 1 PA 86. Plaintiffs even included a photograph containing RJR's 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. The totality of such false representations over decades is what led Ms. Camacho to use, and become addicted to, cigarettes, which caused her laryngeal cancer.

Juxtaposed against the *Fairway* plaintiff's mere indignation, Ms. Camacho's harm in this case is actual, substantial, and directly caused by RJR's deception. She is, in every *sensible* definition of the word, a "victim" under NRS. 41.600.

II. RJR'S RIGHT OF APPEAL AFTER A FINAL JUDGMENT PRECLUDES WRIT RELIEF DUE TO THE LACK OF IRREPARABLE HARM.

"A writ of mandamus is not a substitute for an appeal…Nor should the interlocutory petition for mandamus be a routine litigation practice; mandamus is an extraordinary remedy, reserved for extraordinary causes." *Archon Corp.*, 133 Nev. at 819, 407 P.3d at 706 (citations omitted). Here, RJR is not only wrong on the substantive legal issues; it also cannot show that Judge Krall's decision "will wreak

irreparable harm" because RJR will have the opportunity to brief this issue on appeal should the jury return a verdict against it. *Id*.

RJR is in a drastically different position than Plaintiffs when Plaintiffs were the petitioners in the prior writ petition, Case No. 82654. While Judge Earley's erroneous ruling created a situation where Plaintiffs would have had to retry their case, re-present their witnesses for deposition, and re-litigate various pretrial motions, Judge Krall's ruling—even if incorrect—could easily be remedied by reversing any verdict against RJR. This is a significant difference in practice because Ms. Camacho, the key Plaintiff, cannot speak due to a total laryngectomy, is hard of hearing, and has eyesight limitations. Here is RJR's own description of the deposition process:

> But, unfortunately, this is not a "normal" case. There are serious and real communication challenges posed by this case of which the parties are intimately aware. Mrs. Camacho is unable to speak following a total laryngectomy in 2018. On top of that, Mrs. Camacho is hard of hearing and has eyesight limitations (i.e., difficulty seeing and reading exhibits and medical records). Knowing the challenges this posed, the parties worked together to develop a process by which Mrs. Camacho could point to one of eight pre-written answers on a page and a separate, neutral court reporter would then read the response into the record. In the event that no pre-written answer was adequate, Mrs. Camacho was able to write her answer on an erasable white board, which would also be read into the record by the neutral reporter. This process is slow and tedious, but was (and is) the best solution the parties could collectively devise to conduct Mrs. Camacho's deposition.

1 RA 211.[1] Therefore, while Plaintiffs would have suffered irreparable harm under Judge Earley's ruling, RJR cannot claim the same.

III. CONTEXT FOR THIS COURT TO DETERMINE WHETHER TO ISSUE AN ADVISORY MANDAMUS

Plaintiffs agree that this is a matter of statewide importance. This Court is uniquely positioned to gauge the likelihood of recurrence that would evade ordinary appeal, which determines the necessity of entertain this writ petition. Here, Plaintiffs simply provide the status of litigation around this issue in several District Courts.

In addition to this case, there are six tobacco lawsuits currently in progress, five of which contain this issue.[2] Below is their status:

CASE	**TRIAL COURT RULING ON THIS ISSUE**	**RULING DATE**	**TRIAL DATE**
Tully v. Philip Morris USA, Inc., et al., Case No.: A-19-807657-C	Motion to Dismiss Denied	July 8, 2020	May 23, 2022
Speed v. Philip Morris USA, Inc., et al., Case No.: A-20-819040-C	Motion to Dismiss Denied	March 23, 2021	April 17, 2023
Estate of Cleveland Clark v. Philip Morris	Motion to Dismiss Denied	April 20, 2021	September 6, 2022

[1] On November 29, 2021 RJR and other Defendants filed a Motion for Additional Time for Plaintiff Sandra Camacho's Deposition, wherein they sought extra time due to the incredible difficulty Ms. Camacho faces during her testimony.

[2] This issue does not apply to *Timothy Geist v. Philip Morris USA, Inc., et al.,* Case No.: A-19-807653-C.

USA Inc., et al., Case No.: A-19-802987-C			
Rowan v. Philip Morris USA, Inc. et al., Case No.: A-20-811091-C	Dismissed NDTPA & Conspiracy claims; pending reconsideration	September 8, 2021 Reconsideration on January 18, 2022	November 21, 2022
Kelly v. Philip Morris USA, Inc. et al., Case No.: A-20-820112-C	Dismissed NDTPA claim, but let Civil Conspiracy remain	December 30, 2020	February 7, 2023

Trial court orders on motions to dismiss and trial schedules. 1 PA 1194–1203; 1 RA 116–119; 1 RA 107–112; 1 RA 120–126; 6 PA 1207–1215; 1 RA 131–136; 1 RA 127–130; 6 PA 1220–1224; 1 RA 101–106; 1 RA 113–115.

This case is scheduled for trial on August 1, 2022. 1 RA 97–100. Plaintiffs are not aware of any other litigation on this issue in other District Courts.

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CONCLUSION

Judge Krall had proper jurisdiction to reconsider Judge Earley's ruling and did not abuse her discretion when she granted reconsideration, which reinstated Plaintiffs' claims against RJR, because both statutory language and case law prohibited Judge Earley's prior dismissal order. This prior dismissal order improperly inserted a product-use requirement into the plain language of the NDTPA. Therefore, this Court should deny RJR's petition.

DATED this 16th day of December 2021.

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CERTIFICATE OF COMPLIANCE

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

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 6,174 words; or

☐ does not exceed _____ pages.

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 a reference to the page and volume number, if any, of the transcript or appendix where the court will find the matter relied on to support every assertion in the brief.

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

DATED this 16th day of December 2021.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing **ANSWER TO R.J. REYNOLDS' PETITION FOR WRIT OF MANDAMUS OR PROHIBITION** and **APPENDIX OF REAL PARTIES IN INTEREST, Vol. 1** with Supreme Court of Nevada on the 16th day of December 2021. I shall make electronic service of the foregoing document in accordance with the Master Service List as follows:

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