Case No. 83724

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

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS OR PROHIBITION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

ARGUMENT

A WRIT OF MANDAMUS IS WARRANTED.

As Reynolds pointed out in its petition, there are two independent bases for a writ of mandamus in this case: (A) Judge Krall's grant of reconsideration was an arbitrary exercise of her discretion as a successor judge and (B) this writ presents "an important issue of law [that] needs clarification" and "considerations of sound judicial economy and administration militate in favor" of doing so now. *See Int'l Game Tech., Inc. v. Second Jud. Dist. Ct.* ("*McAndrews*"), 124 Nev. 193, 197-98, 179 P.3d 556, 558 (2008) (en banc). Plaintiffs' answering brief is unpersuasive on the first ground and contradicts their prior position on the second.

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

Plaintiffs do not dispute that motions for reconsideration are rarely appropriate, *see Moore v. City of Las Vegas*, 92 Nev. 402, 405, 551 P.2d 244, 246 (1976), and may be granted only if (1) an intervening development demands a different outcome or (2) the original decision "is clearly erroneous," *Peddie v. Spot Devices, Inc.*, 134 Nev. 994, 427 P.3d 125, 2018 WL 4781617, at *8 (No. 72721, Oct. 2, 2018) (unpublished disposition) (citation omitted). Plaintiffs' brief confirms that the first circumstance was not present here. That is, Plaintiffs do not identify any development they presented to Judge Krall that was not available in the original

proceeding before Judge Earley. Nothing changed between the two motions other than the identity of the trial judge.

With that in mind, Plaintiffs' position rests entirely on their claim that Judge Earley's original ruling was clear error. AB 9-22. But Plaintiffs' brief cannot meet this exacting standard. It does nothing to show that Judge Earley clearly erred in finding that Plaintiffs could not show the required "direct harm," *Del Webb Communities, Inc. v. Partington*, 652 F.3d 1145, 1153 (9th Cir. 2011) (quotation marks omitted), suffered "at the hands" of Reynolds, *Fairway Chevrolet Co. v. Kelley*, 134 Nev. 935, 429 P.3d 663, 2018 WL 5906906, at *1 (2018) (unpub.), in a products-liability case where Reynolds's advertisements and other actions did *not* convince Ms. Camacho to purchase or use even a single Reynolds cigarette and where her laryngeal cancer allegedly was caused by her use of *other* companies' products. Although the NDTPA has been around for nearly 50 years now, Plaintiffs cannot point to a single Nevada appellate decision that has allowed a nonuse NDTPA claim to go forward against a product manufacturer. In fact, even though they accuse Judge Earley of committing clear error, Plaintiffs cannot cite a case from *any* jurisdiction in the United States where a similar statute was interpreted to allow a plaintiff alleging injury from a product to sue the manufacturer of a product the plaintiff did not use. And that is no surprise. Neither the NDTPA nor any other similar statute was enacted to jettison long-settled products-liability law.

Unable to find any case law to support their unique position, Plaintiffs hang their hat on a single observation: NRS 598.094 indicates that the proscriptions of the NDTPA also cover attempted sales, not just actual sales. AB 10-11, 14-16. True enough, but this observation cannot and does not support Plaintiffs' position that they have standing to bring a private NDTPA lawsuit against Reynolds, let alone that Judge Earley's ruling was clear error. Several points show why:

1. As an initial matter, Plaintiffs did not make this "attempted sale" argument before Judge Earley. Plaintiffs never mentioned it or NRS 598.094 in their response to Reynolds's original motion to dismiss. *See* 1 PA 117–76. Nor did Plaintiffs make any mention of it during the lengthy hearing before Judge Earley, *see* 1 PA 0185–250, even though it was available at the time. It therefore cannot constitute a basis for rehearing. *See Moore v. City of Las Vegas*, 92 Nev. 402, 405, 551 P.2d 244, 246 (1976) (holding that a district court should only grant a motion for reconsideration where "*new* issues of fact or law are raised supporting a ruling contrary to the ruling already reached" (emphasis added)); *Wallis v. J.R. Simplot Co.*, 26 F.3d 885, 892 n.6 (9th Cir. 1994) (for purposes of a motion to reconsider, "[e]vidence is not newly discovered if it was in the party's possession at the time of summary judgment or could have been discovered with reasonable diligence").

2. Even further, Judge Krall's order granting reconsideration does not mention the "attempted sale" argument. *See* 6 PA 1174-77. Nothing in the order concerns an

"attempted sale" or NRS 598.094, much less suggests that this provision could help Plaintiffs establish standing for a private NDTPA lawsuit. *See id*. Indeed, Judge Krall's order does not address the threshold requirement of standing *at all*. *See id*. Nor did Judge Krall address that topic or the "attempted sale" argument in her brief remarks during the hearing on Plaintiffs' motion for reconsideration. *See* 6 PA 1153:19-25, 1154:1-2. It strains credulity for Plaintiffs to claim that this argument supports Judge Krall's grant of reconsideration when Judge Krall never mentioned it.

3. Plaintiffs' "attempted sale" argument also misses the point on the merits. It does not answer the threshold question of standing under NRS 41.600 (1), which requires that a private plaintiff be a "victim" of consumer fraud who suffered direct harm at the hands of the defendant. *Del Webb*, 652 F.3d at 1153; *Fairway*, 2018 WL 5906906, at *1. Plaintiffs confuse the broad, regulatory proscriptions of the NDTPA with the limited scope of the private right of action that the Legislature created in NRS 41.600 (1). They reason that because NRS 41.600 (2)(e) references a "deceptive trade practice as defined in NRS 598.0915 to 598.0925," anyone alleging a violation of those NDTPA sections automatically has standing for a private lawsuit. AB 14-16. But that is a non-sequitur.

For one, NRS 41.600 does not even reference NRS 598.094—which is the premise of Plaintiffs' "attempted sale" argument. Plaintiffs' attempt to establish

standing by cross-reference thus fails right out of the box. For another, the cross reference to the substantive NDTPA proscriptions does not mean that anyone and everyone asserting an NDTPA violation qualifies as a "victim" in the sense that word is used in NRS 41.600. After all, the plaintiff in *Fairway* alleged a violation of the NDTPA and tried to obtain standing under the same "attempted sale" rationale that Plaintiffs are invoking here. Br. of Respondent at 30, *Fairway*, 134 Nev. 935 (No. 80160), 2017 WL 5069301, at *38–41. But that argument failed there just as it fails here. Merely alleging that the defendant violated the NDTPA does not mean that the plaintiff suffered direct harm at the hands of the defendant. Plaintiffs' answering brief dedicates an entire section to *Fairway* (*see* AB 21-23) but never acknowledges—much less reconciles—that the *Fairway* plaintiff tried and failed to obtain standing with the same "attempted sale" argument.

4. Plaintiffs try to distinguish *Fairway* by pointing to their complaint, claiming that it alleges "actual, substantial" harm that was "directly caused by RJR's decision." AB 23. But to support that notion, Plaintiffs then direct the reader to Reynolds's co-signing of the Frank Statement in 1954 (*id*., citing 1 PA 62)—which was almost 20 years before the NDTPA was enacted in 1973 and thus cannot give rise to an NDTPA violation. What is more, Ms. Camacho was only eight years old in 1954—and Plaintiffs fail to allege with any particularity whether she saw the Frank Statement or how Reynolds's signature on this document influenced her. *See*

Rocker v. KPMG LLP, 122 Nev. 1185, 1187, 148 P.3d 703, 704 (2006) (fraud-based allegations must be pleaded with particularity under NRCP 9(b)); *Occhiuto v. Occhiuto*, 97 Nev. 143, 146 n.3, 625 P.2d 22 568, 570 (1981) ("In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity."); *see also, e.g.*, *Horner v. Mortg. Elec. Registration Sys., Inc.*, 711 F. App'x 817 (9th Cir. 2017) (applying the FRCP 9(b), upon which NRCP 9(b) is based, to claims arising under the NDTPA).

The same disconnect also renders Plaintiffs' remaining allegations unhelpful. They allege that, along with other tobacco industry executives, Reynolds's CEOs testified before Congress in 1982 and in 1994 and denied the addictive and dangerous nature of cigarettes. AB 23 (citing 1 PA 68, 86). But those allegations do not address with sufficient particularity Plaintiffs' NDTPA claim against Reynolds—they are instead part of the common law fraud claims that Plaintiffs are asserting only against PM USA and Liggett, the companies whose products Ms. Camacho actually used. As to Reynolds, there is no explanation—let alone with particularity—how Reynolds's statements to Congress (which were constitutionally protected activity in any event) could have "directly harmed" Ms. Camacho when she never smoked a single Reynolds cigarette and likely never even saw the congressional testimony, much less detrimentally relied on it. *See Rivera v. Philip Morris, Inc*., 395 F.3d 1142, 1155 (9th Cir. 2005) (rejecting a justifiable reliance

theory where plaintiff "could not identify any misrepresentation by Philip Morris that his late wife saw or relied upon in deciding to smoke cigarettes in general and Marlboro cigarettes in particular").

Further straining to characterize Ms. Camacho as a "victim" of Reynolds, Plaintiffs also point to various sections in the complaint alleging that Ms. Camacho "acted in reliance upon Defendants' promises" or that she "was unaware of the dangers of smoking and 'justifiably relied upon Defendants to disseminate the superior knowledge and information it [sic] possessed regarding the dangers of cigarettes.'" AB 20. But those statements again appear only in the common law counts asserted against PM and Liggett. And, more important, it turns the law upside down to suggest that Reynolds had a duty to "disseminate" any information to Ms. Camacho or that Ms. Camacho could justifiably rely on Reynolds to provide information when she never bought a Reynolds product at all. It is well-established that "mere pervasiveness of the advertisements is insufficient" to demonstrate justifiable reliance. *Rivera*, 395 F.3d at 1155. Plaintiffs cite no case from anywhere in the United States where a consumer protection statute has been held to impose such duties on a product manufacturer as a premise for a private lawsuit.

5. The cases that Plaintiffs do cite are not helpful to them. In *Betsinger v. DR Horton*, 126 Nev. 162, 232 P.3d 433 (2010), this Court held that the clear and convincing evidence standard does not apply in NDTPA cases because the statute

does not mention this standard. *Id*. at 162. In *Poole v. Nevada Auto Dealership Investment, LLC*, 135 Nev. 280, 449 P.3d 479 (Ct. App. 2019), the Court of Appeals held that the word "knowingly" in the NDTPA connotes general intent (as opposed to specific intent) because that interpretation is consistent with how the same term has been interpreted in other Nevada statutes. *Id*. at 284–85.

Plaintiffs believe that *Betsinger* and *Poole* somehow undermine Reynolds's argument in this case. AB 12-14. But it's difficult to see why. Reynolds is not asking this Court to read anything into the statute or to give a term an unusual meaning. Reynolds is instead relying on a common-sense reading of the term "victim" in a case about injury caused by a product in light of case law already defining the same term as someone who was directly harmed at the hands of the defendant. *See Del Webb*, 652 F.3d at 1153; *Fairway*, 2018 WL 5906906, at *1. A plaintiff claiming injury caused by a product cannot be said to have been directly harmed at the hands of a product manufacturer when she never even used the manufacturer's product and instead was allegedly injured by products manufactured by *other* entities. At most, Ms. Camacho is alleging *indirect* harm from something Reynolds did.

Plaintiffs' discussion (AB 17) of *Sears v. Russell Rd Food & Beverage, LLC*, 460 F. Supp. 3d 1065 (D. Nev. 2020), is even less persuasive. In that case, a federal district court concluded that a group of models could show the required direct harm

where a gentlemen's club used their images without permission. *Id*. at 1070. Ms. Camacho cannot possibly make a comparable showing—her suing Reynolds for injuries allegedly caused by other companies' products is tantamount to the famous models suing the club because it used the images of *other* people.

The same is true for Plaintiffs' citation to *S. Serv. Corp. v. Excel Bldg. Servs., Inc.*, 617 F. Supp. 2d 1097 (D. Nev. 2007), where a cleaning service brought an NDTPA claim against a competitor who was able to underbid the plaintiff as a result of having engaged in business practices that allegedly violated the NDTPA. *Id*. at 1098. Because the plaintiff could show direct harm (*i.e*., a loss of business profits) stemming from the defendant's NDTPA violations, the district court allowed the claim to go forward. *Id*. at 1099. Of course, *Excel Building Services* is a federal decision, and this Court has never held that anyone other than consumers qualify as victims under the NDTPA—but, more importantly, nothing in *Excel Building Services* changes the fundamental requirement that a plaintiff must show direct harm at the hands of the defendant. And as already discussed in detail, Plaintiffs here cannot make such a showing where Ms. Camacho never used a Reynolds product.

That conclusion is confirmed by the lone products-liability case that Plaintiffs cite in their answering brief. As Plaintiffs acknowledge (AB 19), the federal district court in *Prescott v. Slide Fire Solutions, LP*, 410 F. Supp. 3d 1123 (D. Nev. 2019), concluded that the plaintiff's causation theory was "too attenuated" to constitute the

required "direct harm" where the defendant-manufacturer allegedly violated the NDTPA through false representations concerning bump stock devices but the plaintiffs' injuries resulted from the sale of the bump stock device "*and* its subsequent use by the shooter." *Id*. at 1145 (emphasis in original).

So too here. Whatever Reynolds said did not convince Ms. Camacho to buy a Reynolds product, let alone cause her to suffer direct harm. It was, instead, her "subsequent use" of PM and Liggett products that allegedly caused her to contract laryngeal cancer. Her vague theory against Reynolds is too attenuated to constitute "direct harm" suffered "at the hands of" Reynolds. *See Guerra v. Dematic Corp*, No. 3:18-CV-0376-LRH-CLB, 2020 WL 8831583, at *3 (D. Nev. Sept. 9, 2020); *Fairway*, 2018 WL 5906906, at *1; *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). No case supports Plaintiffs' theory of "direct" harm, much less shows that Judge Earley committed clear error in rejecting Plaintiffs' theory.

6. Plaintiffs' answering brief offers no response on the conspiracy claim. They make no argument that Judge Earley committed clear error in dismissing the derivative conspiracy claim.

* * *

Plaintiffs do not show that Judge Earley's original decision was clearly erroneous. Their brief does not even try to defend the reconsideration order Judge Krall actually entered. It instead rests entirely on an "attempted sale" argument that (i) Plaintiffs never presented to Judge Earley, (ii) appears nowhere in Judge Krall's order granting reconsideration, and (iii) lacks merit in any event for the numerous reasons outlined above. Plaintiffs' answering brief thus confirms that Judge Krall arbitrarily and capriciously exercised her discretion when she reconsidered Judge Earley's original decision. This alone warrants a writ of mandamus.

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

Plaintiffs' answering brief does not dispute that this case presents an important issue of law that is recurring in Nevada tobacco cases. Plaintiffs, not Reynolds, originally presented this question to this Court by filing an application for writ in which they asked this Court to resolve the issue *immediately* to give guidance to lower courts and to litigants. 2 PA 410–48. Plaintiffs decided this question was not suitable for this Court's immediate review only after they convinced the trial court to grant reconsideration. AB 23-24. Under Plaintiffs' view, the same question required urgent resolution when they were on the losing end in the district court—but it is no longer urgent now that Reynolds lost below and is facing the prospect of going through a needless trial if forced to wait for a final appeal. Plaintiffs' attempt

(AB 24) to distinguish the two scenarios falls flat—in either scenario the parties may proceed to an improper trial if appellate resolution is delayed. Plaintiffs' self-serving "heads we win; tails they lose" approach disregards the burden imposed on Reynolds by having to prepare for and then go through an entire trial based on a legal theory that no Nevada appellate court has ever accepted.

As Plaintiffs' own chart confirms, the question presented has divided the lower courts in five other tobacco cases. *See* AB 25-26 (indicating a two to three split). And just in the instant case before the Court now, two district court judges also reached diametrically different results. This question is not only recurring and fully teed up—it is fully teed up because of Plaintiffs' own actions. The time to resolve it is now, as anything else would be a waste of public and private resources.

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CONCLUSION

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

Dated this 28th day of January 2022.

Respectfully submitted,

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VERIFICATION

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

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

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

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

EXECUTED on this 28th day of January, 2022.

/s/ Dennis L. Kennedy
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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:

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

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

[X] Proportionately spaced, has a typeface of 14 points or more and contains 2955 words;

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

that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 28th day of January 2022.

BAILEY❖KENNEDY

By: /s/ Dennis L. Kennedy
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CERTIFICATE OF SERVICE

I certify that I am an employee of BAILEY❖KENNEDY and that on the 28th day of January, 2022, service of REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS OR PROHIBITION was made by electronic service through the Nevada Supreme Court's electronic filing system, hand delivery, and/or depositing a true and correct copy in the U.S. Mail, first class postage prepaid, and addressed to the following at their last known address:

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