

**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

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**ANSWER TO R.J. REYNOLDS'  
PETITION FOR REHEARING**

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## **INTRODUCTION**

Petitioner, R.J. Reynolds (“RJR”), files a petition for rehearing after the Court held that a private plaintiff does not need to show product use in order to sue a defendant under the NDTPA, as long as she can show that she was directly harmed by consumer fraud. *See R.J. Reynolds Tobacco Co. v. Eighth Jud. Dist. Court*, 138 Nev. Adv. Op. 55, 514 P.3d 425 (2022). Importantly, the Court’s opinion is based upon the plain language of certain provisions within NRS Chapter 598. This issue arose from the District Court’s denial of RJR’s motion to dismiss. Now that this Court has ruled against RJR in a published opinion, it asks the Court to grant rehearing so that RJR can petition the en banc panel for reconsideration. But, RJR fails to appreciate that it must actually satisfy the rehearing standard under NRAP 40 and cannot lightly toss aside a published opinion from this Court. In fact, if it is RJR’s plan to pursue its position before the en banc panel, this Court should, instead, deny RJR’s petition for rehearing.

## **LEGAL ARGUMENT**

### **I. STANDARD FOR REHEARING.**

NRAP 40(c)(2) outlines the two grounds upon which this Court may consider rehearing: “(A) When the court has overlooked or misapprehended a material fact in the record or a material question of law in the case, or (B) When the court has overlooked, misapplied or failed to consider a statute, procedural rule, regulation or

decision directly controlling a dispositive issue in the case.” According to NRAP 40(a)(2), “[a]ny claim that the court has overlooked or misapprehended a material fact shall be supported by a reference to the page of the transcript, appendix or record where the matter is to be found; any claim that the court has overlooked or misapprehended a material question of law or has overlooked, misapplied or failed to consider controlling authority shall be supported by a reference to the page of the brief where petitioner has raised the issue. And, NRAP 40(c)(1) prohibits petitioners from rearguing or raising new issues in the petition for rehearing.

## **II. RJR’S PETITION CONSTITUTES PROHIBITED REARGUMENT.**

Here, each one of RJR’s arguments is a mere reiteration of the arguments in its November 5, 2021, Petition for Writ of Mandamus or Prohibition. Pet. at 11-13 (“direct-harm” test argument); 13-14 (NDTPA’s public vs. private enforcement argument); 14-16 (common law fraud argument relying on *Moretti*<sup>1</sup> and *Baymiller*<sup>2</sup>); 18-19 (factual insufficiency argument on how RJR’s conduct did not impact Mrs. Camacho); and 9-10, 22-23 (procedural arguments). RJR’s petition for rehearing expressly violates NRAP 40(c)(1), which prohibits reargument, and does not make the requisite showing under NRAP 40(c)(2) to demonstrate that this Court

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<sup>1</sup> *Moretti v. Wyeth, Inc.*, No. 2:08-CV-00396-JCMGWF, 2009 WL 749532 (D. Nev. Mar. 20, 2009).

<sup>2</sup> *Baymiller v. Ranbaxy Pharms., Inc.*, 894 F. Supp. 2d 1302 (D. Nev. 2012).

overlooked or misapprehended some material fact or law. Accordingly, the Court should deny RJR's petition for rehearing on this initial basis.

Most NDTPA cases do not arise from a half-century long, industry-wide conspiracy, where competitors co-author misrepresentations, co-steer disinformation campaigns, and co-fund front groups and scientists to maintain the size of their total market share. Such sophistication is unique to the tobacco industry. The Court's opinion simply clarifies that the NDTPA allows private claims in this unique situation; it does not disturb the established law on the types of consumer fraud Nevada courts commonly deal with. Thus, RJR's policy arguments simply do not satisfy the rehearing standard.

### **III. THE COURT DID NOT OVERLOOK OR MISAPPREHEND ANY LEGAL OR FACTUAL ISSUES.**

Under NRAP 40(a)(2), RJR's petition for rehearing should be denied because RJR failed to demonstrate any legal or factual issues that the Court overlooked or misapprehended.

First, the "direct harm" test does not require product use. The Court's holding is consistent with this Court's decision in *Betsinger v. D.R. Horton, Inc.*, 126 Nev. 162, 232 P.3d 433 (2010), which requires the NDTPA to be liberally construed, and proscribes courts from reading additional burdens into this remedial statute absent any legislative directive. *See R.J. Reynolds Tobacco Co.*, 138 Nev. Adv. Op. 55, 514 P.3d at 431. The Court's holding is also consistent with all the available case

law on this narrow issue from both the federal courts and Nevada Court of Appeals. *See id.* at 429-430.

Second, Mrs. Camacho was not a mere “bystander” acting “as a private attorney general.” Pet. at 3. She alleged that RJR’s deceptive conduct directly impacted her. For example, RJR founded the conspiracy along with other tobacco manufacturers in 1954 by collectively promising to seek and publish the truth behind smoking’s health hazards. 1 Petitioner’s Appendix (“PA”) 62. Then RJR deliberately acted to maintain the industry-wide concealment of unfavorable scientific research results. *Id.* at 63-70, 99-101. RJR even co-founded front-groups with its co-conspirators to challenge and undermine public health officials’ warnings to consumers, including Mrs. Camacho. *Id.* As a result of these deceptive practices, Mrs. Camacho began and continued to smoke, and became addicted to cigarettes, which eventually caused her cancer. *Id.* at 57, 101. These allegations are either specifically stated in paragraphs 212-216 or incorporated into the NDTPA claim via paragraph 206. *Id.* at 98-100. The panel did not overlook or misapprehend anything because RJR’s conduct in these allegations constitutes deceptive trade practices. *See* NRS 598.0915(5) (a defendant is liable for consumer fraud if he or she “[k]nowingly makes a false representation” as to the product “for sale,” including products the defendant attempts to sell). Indeed, the Court’s opinion diligently quotes Mrs. Camacho’s amended complaint at length and provides specific

examples of RJR's representations that directly harmed Mrs. Camacho. *See R.J. Reynolds Tobacco Co.*, 138 Nev. Adv. Op. 55, 514 P.3d at 430. Therefore, RJR mischaracterizes the record by claiming that "no part of the NDTPA allegations...contends that she saw any materials produced by Reynolds." Pet. at 4.

Third, the Court also correctly rejected RJR's arguments based on common law fraud because "[s]tatutory offenses that sound in fraud are separate and distinct from common law fraud." *Leigh-Pink v. Rio Properties, LLC*, 138 Nev. Adv. Op. 48, 512 P.3d 322, 328 (2022). Here, the elements of an NDTPA claim differ from those of common law fraud because the NDTPA is a remedial statute intended to avail protections and claims that are easier to raise than common law fraud. *See R.J. Reynolds Tobacco Co.*, 138 Nev. Adv. Op. 55, 514 P.3d at 428. Unlike common law fraud, the NDTPA's requirements are defined in the statute's plain language, and the Legislature never required product use for the claim Mrs. Camacho brought. In fact, both the legislative history and federal courts' interpretation of the NDTPA make clear that the NDTPA claim requires neither proof of privity nor product use. *See Ans. to Pet.* at 12, 16-20.

Finally, RJR cites two news articles to suggest a parade of horrors if the Court's opinion is allowed to stand. Yet, the Court's opinion merely reaffirms the remedial purpose and protective function of the NDTPA. Each District Judge still holds the power to dismiss claims that are deemed to be insufficiently supported by

evidence of direct harm or causation in subsequent stages of the litigation beyond the pleading stage. RJR's hyperbolic claim that Nevada would become a "go-to jurisdiction for attenuated claims brought by private attorneys looking for a quick buck" (Pet. at 2), ignores the robust procedural safeguards in Nevada's civil procedural rules and overexaggerates the impact of the Court's opinion, particularly where the Court largely followed the plain language of several statutory provisions within NRS Chapter 598. Thus, the Court has not overlooked or misapprehended any material fact or law.

### **CONCLUSION**

In summary, the Court should deny RJR's petition for rehearing because RJR offers only prohibited reargument in violation of NRAP 40(c)(1). RJR's arguments also do not rise to the level of demonstrating that this Court overlooked or misapprehended some material fact or law under NRAP 40(a)(2). Therefore, the Court should deny RJR's petition for rehearing.

DATED this 7th day of October 2022.

CLAGGETT & SYKES LAW FIRM

/s/ Micah S. Echols

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## CERTIFICATE OF COMPLIANCE

I hereby certify that this answer 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 answer in a proportionally-spaced typeface using Microsoft Word 2016 in 14-point Times New Roman font.

I further certify that this answer complies with the page- or type-volume limitations of NRAP 40 or 40A because it is either:

☒ proportionally spaced, has a typeface of 14 points or more and contains 2,083 words; or

☐ does not exceed \_\_\_\_\_ pages.

Finally, I hereby certify that I have read this answer, 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 answer 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 answer is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 7th day of October 2022.

CLAGGETT & SYKES LAW FIRM

/s/ Micah S. Echols

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## CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing **ANSWER TO R.J. REYNOLDS' PETITION FOR REHEARING** with the Supreme Court of Nevada on the 7th day of October 2022. I shall make electronic service of the foregoing document in accordance with the Master Service List as follows:

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