In the Supreme Court of Nevada

Case No. _____



PHILIP MORRIS USA INC., a foreign corporation,

Petitioner,

*vs.*

THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; and the HONORABLE VERONICA M. BARISICH,

Respondents,

and

DOLLY ROWAN, AS AN INDIVIDUAL, AS SPECIAL ADMINISTRATOR OF THE ESTATE OF NOREEN THOMPSON; NAVONA COLLISON, AS AN INDIVIDUAL; RUSSELL THOMPSON, AS AN INDIVIDUAL; R.J. REYNOLDS TOBACCO COMPANY, A FOREIGN CORPORATION; LIGGETT GROUP LLC, A FOREIGN CORPORATION; QUICK STOP MARKET, LLC, A DOMESTIC LIMITED LIABILITY COMPANY; JOE'S BAR, INC., A DOMESTIC CORPORATION; THE POKER PALACE, A DOMESTIC CORPORATION; SILVER NUGGET GAMING, LLC D/B/A SILVER NUGGET CASINO, A DOMESTIC LIMITED LIABILITY COMPANY; AND JERRY'S NUGGET, A DOMESTIC CORPORATION,

Real Parties in Interest

District Court
Case No. A-19-807653-C

# PHILIP MORRIS USA INC.'S PETITION FOR WRIT OF MANDAMUS OR, ALTERNATIVELY, PROHIBITION

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## PETITION FOR WRIT OF MANDAMUS OR, ALTERNATIVELY, PROHIBITION

Real Parties in Interest Dolly Rowan, Navona Collison, and Russell Thompson ("Plaintiffs") filed this case against Philip Morris USA Inc. ("PM USA"), Liggett Group LLC ("Liggett"), R.J. Reynolds Tobacco Company ("Reynolds"), and five retailer defendants[1] seeking damages for Decedent Noreen Thompson's ("Decedent") lung cancer and death.[2] 18–23 Petitioner's Appendix ("PA") 1073–1227. Plaintiffs have not alleged that Decedent purchased or smoked any cigarettes manufactured by PM USA. 18 PA 1080–81. Nonetheless, Plaintiffs asserted claims against PM USA on the basis of alleged violations of the

[1] Plaintiffs filed suit against the following retailer defendants, who are Real Parties in Interest to this Petition: Quick Stop Market, LLC; Joe's Bar, Inc.; The Poker Palace; Silver Nugget Gaming, LLC d/b/a Silver Nugget Casino; and Jerry's Nugget. 18–23 PA 1073–1227.

[2] This case was originally filed as a personal injury action. 1 PA 1–69. Following Decedent's death on June 19, 2020, the Court entered an order granting in part and denying in part Plaintiffs' Motion for Leave to File Amended Wrongful Death Complaint and Plaintiffs' Motion to Substitute Parties on March 11, 2021. 2 PA 300–09. Plaintiffs then filed their Second Amended Complaint (asserting claims for wrongful death, among other causes of action) on January 11, 2022. 18–23 PA 1073–1227. Given this procedural history, PM USA has chosen to use the plural "Plaintiffs" throughout for clarity to reflect the current procedural posture of this case.

Nevada Deceptive Trade Practices Act ("NDTPA"). 22–23 PA 1198–1217. Plaintiffs also pleaded a cause of action for civil conspiracy against PM USA, but acknowledge that their conspiracy claim is derivative of their NDTPA claims. 21–22 PA 1180–98.

The district court granted a motion to dismiss filed by PM USA as to all claims alleged against it. 4 PA 633–41. Specifically, the district court concluded that because Decedent did not use cigarettes that were manufactured, marketed, or sold by PM USA, Plaintiffs could not make a showing of alleged duty to Decedent by PM USA. Consequently, due to the lack of a showing of duty, all claims against PM USA necessarily failed, including Plaintiffs' civil conspiracy claim, as it is a derivative claim. 4 PA 635.

Following the district court's ruling on PM USA's motion to dismiss, Plaintiffs filed a motion for reconsideration of the district court's order. 5 PA 650–72. Following briefing and oral argument, the district court granted Plaintiffs' motion for reconsideration, concluding that the NDTPA "is a remedial statutory scheme [that] . . . must be construed liberally." 35 PA 1485–91. The district court determined Plaintiffs could "arguably show that [D]ecedent was misled by false public statements

made by a tobacco manufacturer, or groups created by them, which included [PM USA]." 35 PA 1487. Further, "[a]s a result of this misrepresentation, Plaintiff[s] can arguably show that [D]ecedent used tobacco, which resulted in harm to [D]ecedent." *Id.*

Judges within Nevada's Eighth Judicial District Court have reached inconsistent conclusions regarding whether the NDTPA requires product use to state cognizable claims, and, subsequently, whether such claims support civil conspiracy claims when devoid of any product use. With five tobacco and health cases currently pending in the Eighth Judicial District, including this case,[3] and the district courts in conflict, guidance is needed on this issue.

[3] *Timothy A. Geist v. Philip Morris USA Inc.*, et al., Case No. A-19-807653-C; *Paul L. Speed v. Philip Morris USA Inc.*, et al., Case No. A-20-819040-C; *Sandra Camacho, individually, and Anthony Camacho, individually, v. Philip Morris USA Inc., et al.*, Case No. A-19-807650-C; *Martin Tully, individually, and Debra Tully, individually, v. Philip Morris USA Inc.*, et al., Case No. A-19-807657-C.

## NRAP 26.1 DISCLOSURE

Counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a) and must be disclosed in order that the judges of this Court may evaluate possible disqualification or recusal.

1. The parent company of Philip Morris USA Inc. is Altria Group, Inc.

2. Altria Group, Inc. is the only publicly held corporation that owns 10% or more of Philip Morris USA Inc.'s stock.

3. Philip Morris USA Inc. has no publicly traded subsidiaries or affiliates (except as described in paragraph 2, *supra*).

4. Philip Morris USA Inc. has been represented in this litigation by D. Lee Roberts, Jr. and Howard J. Russell of Weinberg, Wheeler, Hudgins, Gunn & Dial, LLC, and Lindsey Heinz of Shook, Hardy & Bacon, L.L.P., admitted pro hac vice.

DATED this 31st day of May, 2022.

WEINBERG, WHEELER, HUDGINS, GUNN & DIAL, LLC

By: */s/D. Lee Roberts, Jr.*
D. LEE ROBERTS, JR., ESQ.
*Attorney for Petitioner*
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## I. ROUTING STATEMENT

This matter is not presumptively assigned to the Court of Appeals pursuant to NRAP 17(b). Petitioner PM USA respectfully requests that the Nevada Supreme Court retain this case pursuant to NRAP 17(a)(11)–(12), as this case presents both "a principal issue [involving] a question of first impression" and "a question of statewide public importance" regarding the NDTPA. Petitioner PM USA further advises the Court that a Petition addressing the same legal issues was retained by the Nevada Supreme Court in *Camacho v. Eighth Judicial District Court*, Supreme Court Case No. 83724.

## II. ISSUES PRESENTED

1. Did the district court err in finding that Plaintiffs stated a cause of action against PM USA under NRS 41.600 and the NDTPA even though the Complaint does not allege that Decedent Noreen Thompson ever purchased or used a PM USA product?
2. Did the district court err in finding that Plaintiffs stated civil conspiracy claims against PM USA, even though Plaintiffs conceded the civil conspiracy claims are derivative of their NDTPA claims against PM USA?

## III. OVERVIEW OF RELIEF REQUESTED

Plaintiffs filed this products liability action alleging that Decedent contracted lung cancer and died after decades of smoking cigarettes manufactured and sold by Reynolds and Liggett. Although Decedent *never* purchased or used a product manufactured by PM USA, Plaintiffs nonetheless named PM USA as a defendant under the theory that it had violated the NDTPA through its advertisements and other statements about its products.

But, as this Court persuasively recognized in *Fairway Chevrolet Company v. Kelley*, 134 Nev. 935, 429 P.3d 663, No. 72444, 2018 WL 5906906 (Nov. 9, 2018) (unpublished),[4] the Nevada Legislature limited private actions under the NDTPA to "victim[s] of consumer fraud" who were directly harmed by the defendant's NDTPA violation. Just like the plaintiff in *Fairway*, Plaintiffs here cannot show the required direct harm to Decedent from PM USA's alleged NDTPA violations because PM USA's allegedly deceptive statements never caused Decedent to purchase or use

[4] *See* NRAP 36(c)(3) ("A party may cite for its persuasive value, if any, an unpublished disposition issued by the Supreme Court on or after January 1, 2016.").

PM USA's products. Indeed, no Nevada appellate court has allowed a claim under the NDTPA to go forward where product use or a purchase or other transaction is lacking.

In other words, simply seeing allegedly deceptive statements—without acting on them by buying or using PM USA's products—does not make Decedent a "victim" of PM USA's alleged consumer fraud. Nor does it provide standing to state claims against PM USA for Decedent's lung cancer and death that Plaintiffs allege were caused by smoking cigarettes manufactured by Reynolds and Liggett. Plaintiffs cannot show a direct injury to Decedent from any action taken by PM USA. As evidenced by its use of the term "victim," the Nevada Legislature sought to limit NDTPA consumer fraud suits to individuals who actually suffered direct harm from a deceptive practice. It did not intend to authorize lawsuits by every person who views a purportedly deceptive statement from a manufacturer, regardless of whether the individual ever purchased the product that was the subject of the alleged deceptive statement. That interpretation far exceeds "any sensible definition" of "victim." *Fairway*, 2018 WL 5906906, at *1.

Indeed, product liability actions, like this one, fundamentally require product use. Regardless of how Plaintiffs label their claims, the only injury they allege is that Decedent contracted lung cancer and died from smoking cigarettes manufactured by Reynolds and Liggett. Nothing in the Nevada Legislature's use of the word "victim" evinces an intent to allow NDTPA claims against manufacturers such as PM USA that did not design, manufacture, or sell the product that caused the alleged harm. That would turn well-settled products liability law on its head and open a floodgate of private lawsuits by mere bystanders.

The district court therefore erred by reversing its original decision and declining to define the term "victim" consistently with its plain meaning, with longstanding products liability law, and with the concepts recognized by this Court in *Fairway*. Accordingly, the Court should grant PM USA's request for a writ of prohibition or mandamus.

## IV. STATEMENT OF FACTUAL BACKGROUND AND PROCEDURAL HISTORY

### A. Plaintiffs' Allegations

Plaintiffs filed this case against Reynolds, PM USA, Liggett, and five retailer defendants seeking damages for Decedent's lung cancer and death. 18–23 PA 1073–1227. Plaintiffs assert that Decedent's cancer and death were caused by smoking Pall Mall, Camel, Viceroy, and Pyramid brand cigarettes, which she allegedly smoked continuously from approximately 1953 until 2019 and to which she allegedly was addicted. 35 PA 1606, 1612–13 (Dolly Rowan Dep. Tr. at 74:9–15; Russell Thompson Dep. Tr. at 113:24–114:8). During the period when Decedent allegedly smoked them, Pall Mall, Camel, and Viceroy brand cigarettes were designed, manufactured, and sold by Reynolds. 18 PA 1080–81. And, during the period when Decedent allegedly smoked them, Pyramid brand cigarettes were designed, manufactured, and sold by Liggett. *Id.* Plaintiffs do not allege that Decedent purchased or smoked *any* cigarettes manufactured by PM USA. *See id.*

Plaintiffs nonetheless bring claims against PM USA solely on the following bases: (1) violation of the NDTPA and (2) civil conspiracy.[5] 21–23 PA 1180–1217. Plaintiffs assert claims of negligence, strict liability, fraudulent misrepresentation, and fraudulent concealment (as well as NDTPA and civil conspiracy claims) against Reynolds and Liggett, which both manufactured the only brands of tobacco products that Plaintiffs contend Decedent used: Pall Mall, Camel, Viceroy, and Pyramid brand cigarettes. 19–21 PA 1108–80. Plaintiffs also assert claims of strict product liability against each of the retailer defendants. 23 PA 1218–24.

**B. Parties' Motions and Arguments**

On March 29, 2021, PM USA moved to dismiss Plaintiffs' Amended Complaint. 4 PA 549–62. First, PM USA argued that Plaintiffs' claims, despite their label as NDTPA and civil conspiracy claims, actually are product liability claims that cannot survive without an allegation of product use. 4 PA 553–55. A plaintiff may only recover against the manufacturer of the product that caused the alleged injury. *See Allison v. Merck & Co.*, 878 P.2d 948, 952 (1994); *Holcomb v. Ga. Pac., LLC*, 289

[5] As noted above, Plaintiffs assert these claims in both the wrongful death context and as the administrator of Decedent's estate. 21–23 PA 1180–1217.

P.3d 188, 193 (Nev. 2012). This product use principle applies to *every cause of action in a product liability lawsuit* irrespective of "whether Plaintiff characterizes her claims as misrepresentation/fraud or claims arising in product liability." *Moretti v. Wyeth, Inc.*, No. 2:08-cv-00396-JCM-(GWF), 2009 WL 749532, at *4 (D. Nev. Mar. 20, 2009).

Second, PM USA argued that Plaintiffs' claims for violation of the NDTPA fail because they cannot show that Decedent was a "victim" who was directly harmed by PM USA's alleged NDTPA violations, as required by NRS 41.600, as she never purchased or used PM USA's cigarettes. 4 PA 555–57. Plaintiffs cannot establish a transaction and, therefore, cannot establish any legal relationship between Decedent and PM USA giving rise to a duty. *Id.* Similarly, without product use, Plaintiffs cannot establish the causation element of their deceptive trade practices claims. *Id.* The district court reached precisely this conclusion in its order granting PM USA's motion to dismiss. 4 PA 633–36.

Third, PM USA argued in the alternative that because Decedent started smoking in 1954, Decedent's decision to start smoking could not have been based on violations of the NDTPA, which did not exist at the time. 4 PA 557–58. For the same reason, Decedent's decision to continue

smoking prior to 1973 could not have been based on violations of the NDTPA. *Id.*

Finally, PM USA asserted that Plaintiffs' derivative civil conspiracy claims against it fail because their predicate claims, arising under the NDTPA, fail. 4 PA 558–59.

In response, Plaintiffs argued that: (1) product use is not a requirement for an NDTPA claim; (2) PM USA, Reynolds, and Liggett engaged in deceptive trade practices through mass-marketing campaigns; and (3) Plaintiffs' civil conspiracy claims survive with their underlying NDTPA claims. 4 PA 581–94. Plaintiffs never argued that their NDTPA claims should proceed because PM USA attempted a sale of their cigarettes to Decedent. *See id.*

**C. District Courts' Differing Rulings and Reasoning**

After hearing oral argument on May 13, 2021, the district court granted PM USA's motion to dismiss on August 27, 2021. 4 PA 633–41. The district court concluded that because Decedent did not use cigarettes that were manufactured, marketed, or sold by PM USA, Plaintiffs could not make a showing of alleged duty to Decedent by PM USA. Consequently, due to the lack of a showing of duty, all claims against PM

USA necessarily failed, including Plaintiffs' civil conspiracy claim, as it is a derivative claim. *Id.*

Specifically, Judge Barisich explained that:

> There is no dispute that Plaintiff did not use cigarettes that were manufactured, marketed, or sold by Defendant Philip Morris. Since she did not purchase or use Philip Morris' cigarettes, Plaintiff cannot make a showing of alleged duty by Philip Morris. Thus, due to lack of showing of duty, all claims against Philip Morris fail, except as to [the] civil conspiracy claim. However, the civil conspiracy claim against Philip Morris must also fail since this is a derivative claim. Although Plaintiff alleges that Philip Morris violated the Deceptive Trade Practices Act, which constitutes the underlying unlawful objective, since that claim is dismissed, the civil conspiracy must also necessarily be dismissed. Thus, Philip Morris' motion to dismiss must be granted.

4 PA 635.

Following the district court's ruling on PM USA's motion to dismiss, Plaintiffs filed a motion for reconsideration of the district court's order. 5 PA 650–72. After briefing and oral argument, the district court granted Plaintiffs' motion for reconsideration, concluding that the NDTPA "is a remedial statutory scheme [that] . . . must be construed liberally." 35 PA 1485–91. The district court determined Plaintiffs could "arguably show that [D]ecedent was misled by false public statements made by a tobacco

manufacturer, or groups created by them, which included [PM USA]." 35 PA 1487. Further, "[a]s a result of this misrepresentation, Plaintiff[s] can arguably show that [D]ecedent used tobacco, which resulted in harm to [D]ecedent." *Id.*

Judges within the Eighth Judicial District Court have reached different conclusions regarding whether the NDTPA requires product use for cognizable claims, and, subsequently, whether such NDTPA claims can support civil conspiracy claims. For example, in *Tully v. Philip Morris USA Inc. et al.*, No. A807657, Judge Jacqueline Bluth determined that product "use was unnecessary to prevail" on an NDTPA claim. 35 PA 1618. And, similar to the procedural history in this case, in *Camacho v. Philip Morris USA Inc. et al.*, No. A807650, Judge Kerry Earley "granted a motion to dismiss based on the same argument." 35 PA 1618 (Order Denying Defs.' Mot. to Dismiss Pl.'s Second Am. Compl. at 2 n.1). PM USA acknowledges that Judge Nadia Krall granted a motion to reconsider filed by the plaintiffs in the *Camacho* case, 35 PA 1626–32, and that there is currently a writ petition pending in the *Camacho* case on this issue. 35 PA 1618 (Order Denying Defs.' Mot. to Dismiss Pl.'s Second Am. Compl. at 2 n.1).

PM USA's writ application in this case follows.

## V. LEGAL STANDARD

When assessing the merits of a writ petition, this Court reviews de novo a district court's statutory construction. *D.R. Horton, Inc. v. Eighth Jud. Dist. Ct. ex rel. Cnty. of Clark*, 123 Nev. 468, 475, 168 P.3d 731, 737 (2007); *Carson-Tahoe Hosp. v. Bldg. & Constr. Trades Council of N. Nev.*, 122 Nev. 218, 220, 128 P.3d 1065, 1066 (2006). When "the words of the statute have a definite and ordinary meaning, this [C]ourt will not look beyond the plain language of the statute, unless it is clear that this meaning was not intended." *Carson-Tahoe Hosp.*, 122 Nev. at 220, 128 P.3d at 1066–67 (quoting *State v. Quinn*, 117 Nev. 709, 713, 30 P.3d 1117, 1120 (2001)). No part of a statute should be rendered meaningless or interpreted in a manner that leads to "absurd or unreasonable results." *Id.* (quoting *Harris Assocs. v. Clark Cnty. Sch. Dist.*, 119 Nev. 638, 642, 81 P.3d 532, 534 (2003)).

"A writ of mandamus is available to compel the performance of an act that the law requires . . . or to control an arbitrary or capricious exercise of discretion." *Int'l Game Tech., Inc. v. Second Jud. Dist. Ct.*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008) (en banc). To demonstrate the

necessity of a writ, the movant must show that the district court's interpretation or application of the law was clearly erroneous such that it was "founded on prejudice or preference rather than on reason, or contrary to the evidence or established rules of law." *State v. Eighth Jud. Dist. Ct.*, 127 Nev. 927, 931–32, 267 P.3d 777, 780 (2011) (en banc) (citations omitted).

This Court is afforded "broad discretion" to determine whether a writ should issue. *D.R. Horton*, 123 Nev. at 475, 168 P.3d at 737. The Court has used the discretion afforded "to consider issuing a writ of mandamus . . . if an important issue of law needs clarification, and public policy will be served by this [C]ourt's invocation of its original jurisdiction." *Dayside Inc. v. First Jud. Dist. Ct.*, 119 Nev. 404, 407, 75 P.3d 384, 386 (2003), *overruled on other grounds*, *Countrywide Home Loans, Inc. v. Thitchener*, 124 Nev. 725, 192 P.3d 243 (2008); *see also Bus. Comput. Rentals v. State Treasurer*, 114 Nev. 63, 67, 953 P.2d 13, 15–16 (1998). Engaging in novel statutory interpretation is one context in which this Court has granted writ petitions. *Diaz v. Eighth Jud. Dist. Ct. ex rel. Cnty. of Clark*, 116 Nev. 88, 93, 993 P.2d 50, 54 (2000) (citing

*Ashokan v. State, Dep't of Ins.*, 109 Nev. 662, 667, 856 P.2d 244, 247 (1993)).

## VI. ARGUMENT

### A. THE DISTRICT COURT SHOULD HAVE DENIED PLAINTIFFS' MOTION FOR RECONSIDERATION OF ITS ORDER DISMISSING PLAINTIFFS' NDTPA CLAIMS AGAINST PM USA.

The Court should determine that the circumstances of this case, and the statutory interpretation issues implicated, warrant the issuance of a writ of mandamus or prohibition. In granting Plaintiffs' motion for reconsideration and reversing its original ruling on PM USA's motion to dismiss, the district court here acted contrary to plain statutory language in concluding that Plaintiffs stated a cognizable claim under NRS 41.600 against a product manufacturer whose products Decedent never used or purchased. Indeed, no Nevada appellate court has ever allowed such a claim to go forward; in fact, as noted above, this Court rejected a similar claim in *Fairway*. *Fairway Chevrolet Co. v. Kelley*, 134 Nev. 935, 429 P.3d 663, No. 72444, 2018 WL 5906906 (Nov. 9, 2018) (unpublished).

The Nevada Legislature explicitly limited private civil actions under the NDTPA to "victim[s]" of consumer fraud, NRS 41.600(1); in the product liability context, this language can only include those who were

directly harmed by a product. Since Decedent never used or purchased a PM USA product, Plaintiffs do not and cannot plead facts to establish that Decedent was a victim of PM USA's alleged fraud, or that she had a legal relationship with PM USA that formed a duty and on which Plaintiffs can now premise any civil liability. Indeed, as noted above, the district court reached this conclusion in its original order granting PM USA's motion to dismiss. 4 PA 633–36.

### 1. Plaintiffs' Claims Against PM USA Fail to State a Cause of Action Under NRS 41.600.

While the NDTPA provides wide reach for *government* action against deceptive trade practices, the Nevada Legislature expressly limited *private* actions for NDTPA violations to "victim[s]" of consumer fraud. NRS 41.600(1). Although this Court has yet to define this term in a published opinion, federal courts consistently have held that a plaintiff must show she was "directly harmed" by deceptive trade practices to state a claim as a "victim" under NRS 41.600(1). *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 have not alleged, and indeed cannot allege, that Decedent was a "victim" of consumer fraud by PM USA because she was not directly harmed by PM USA's actions since Decedent never used or purchased a PM USA product. Any allegedly deceptive statements PM USA supposedly made therefore cannot support causation since they did *not* convince Decedent to purchase and use a PM USA product, much less directly cause her alleged lung cancer and death. To the contrary, Plaintiffs only assert that Decedent's lung cancer and death "was caused by smoking Pall Mall brand cigarettes, Camel brand cigarettes, Viceroy brand cigarettes, and Pyramid brand cigarettes." 18 PA 1080. Pall Mall, Camel, Viceroy, and Pyramid brand cigarettes have never been manufactured or sold by PM USA. Based on the clear statutory language discussed above, the district court should have concluded in its ruling on Plaintiffs' motion for reconsideration that Plaintiffs' claims against PM USA fail to state a cause of action for deceptive practices under NRS 41.600(1).

This Court's recent decision in *Fairway*, though unpublished, is instructive and persuasive. In *Fairway*, the plaintiff saw a television commercial in which a car dealership falsely guaranteed financing. Br. of Plaintiff at 1–3, *Fairway*, 134 Nev. 935 (No. 80160), 2017 WL 5069301, at *1. Although the plaintiff never purchased a car from the dealership, he nonetheless brought a civil action under the NDTPA. *Id.* This Court reversed the lower court's 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 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 differently, "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 *Fairway* plaintiff never purchased a car from the dealership, this Court concluded that he did not "suffer

any harm at the hands" of the dealership and thus was "not a 'victim' authorized to bring a consumer fraud action under NRS 41.600." *Id.*

This case is analogous. At best, Plaintiffs allege that PM USA made fraudulent statements—which the district court determined were sufficient allegations to support NDTPA claims in its reversal of its ruling on PM USA's motion to dismiss. However, as with the plaintiff in *Fairway*, those statements never led Decedent to buy and use a PM USA product. Thus, Decedent did not experience "direct harm" from any statements that Plaintiffs allege PM USA made.[6] 35 PA 1602–05, 1610–11, 1616 (Dolly Rowan Dep. Tr. at 32–35; Navona Collison Dep. Tr. at 65:3–17; Russell Thompson Dep. Tr. at 45:15–46:16). Nonetheless, the district court improperly relied on these allegations to conclude that Plaintiffs stated actionable NDTPA claims against PM USA. Applying this Court's reasoning in *Fairway*, the Court should grant Petitioner's request for a writ of prohibition or mandamus to correct this error.

[6] If anything, Plaintiffs' theory is even more attenuated than the one this Court rejected in *Fairway* because Plaintiffs do not even claim that Decedent saw a PM USA advertisement. Plaintiffs instead group PM USA with the other tobacco manufacturer Defendants in this case, Reynolds and Liggett, and assert that "Defendants" made various deceptive statements. 22–23 PA 1198–1217.

### 2. The District Court's Interpretation of NRS 41.600 Contradicts the Nevada Legislature's Express Language and Statutory Intent as well as Established Case Law.

The district court's ruling on Plaintiffs' motion for reconsideration would allow 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 have identified no basis to support such an anomalous and atextual reading of the term "victim" in NRS 41.600.

Indeed, Plaintiffs' proposed statutory reading would undo the Nevada 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 Nevada Legislature created a limited private right of action for individuals who were "victim[s]" of consumer fraud with respect to a subset of deceptive trade practices listed in NRS 598.091–598.092. NRS 41.600(2)(e). As this Court recognized in *Fairway* (and as federal courts have held when applying Nevada law), the Nevada Legislature's use of the term "victim" expresses

a clear intent to limit private lawsuits only to those who suffer "harm at the hands" of the defendant. *Fairway*, 2018 WL 5906906, at *1.

Plaintiffs' position also contradicts well-established law in products liability cases like this one. In Nevada, it is axiomatic that "[a]mong manufacturers of products, liability rests only with the manufacturer of the product that actually caused the alleged injury because that manufacturer profited from sales of the product and controlled its safety." *Moretti v. Wyeth, Inc.*, No. 2:08-CV-00396-JCMGWF, 2009 WL 749532, at *3–4 (D. Nev. Mar. 20, 2009) (citing *Allison v. Merck & Co.*, 110 Nev. 762, 767–68, 878 P.2d 948, 952 (1994)) (dismissing plaintiff's four fraud-based claims in part because "[p]laintiff did not purchase or ingest a Wyeth or Schwarz product and, therefore, she did not have a relationship with either defendant"); *Baymiller v. Ranbaxy Pharms., Inc.*, 894 F. Supp. 2d 1302, 1309–11 (D. Nev. 2012) (granting summary judgment in defendant's favor on plaintiff's fraud and negligent misrepresentation claims because plaintiff "did not purchase or ingest a Glaxo product" and therefore "did not have a relationship with Glaxo [who] did not owe [plaintiff] any duty to warn"). Nevada law requires the existence of a duty—*i.e.*, some form of a relationship between a plaintiff and

defendant—to succeed on a fraud-based claim. *See Dow Chem. Co. v. Mahlum*, 114 Nev. 1468, 1485–87, 970 P.2d 98, 110–11 (1998), *abrogated on other grounds by GES, Inc. v. Corbitt*, 117 Nev. 265, 21 P.3d 11 (2001) (reversing judgment against defendant on fraudulent misrepresentation claim "because it was not directly involved in the transaction from which [the] lawsuit arose, or any other transaction with the Mahlums"). The district court recognized that Plaintiffs could not make a showing of PM USA's alleged duty to Decedent because of Decedent's lack of product use. Plaintiffs cannot circumvent this bedrock principle by using the NDTPA to seek damages from PM USA for injuries and death allegedly caused by other manufacturers' products.

This Court has consistently held that a claim must be analyzed "according to its substance, rather than its label." *Otak Nev., LLC v. Eighth Jud. Dist. Ct.*, 129 Nev. 799, 809, 312 P.3d 491, 489 (2013) (en banc); *accord Nev. Power Co. v. Eighth Jud. Dist. Ct.*, 120 Nev. 948, 960, 102 P.3d 578, 586 (2004) (en banc) (per curiam). Although labeled as NDTPA claims, Plaintiffs' allegations are rooted in product liability—the only injury asserted is that Decedent contracted lung cancer and died as a result of using products manufactured by Reynolds and Liggett, as

discussed above. The nature of Plaintiffs' claims does not change simply because Plaintiffs have asserted fraud with respect to the product at issue. In both *Moretti* and *Baymiller*, the plaintiffs styled their claims as sounding in fraud, and both courts dismissed those fraud claims under Nevada law for lack of product use. *See Moretti*, 2009 WL 749532, at *4 (plaintiff's claims for misrepresentation and fraud failed because they were merely "an effort to recover for injuries caused by a product without meeting the requirements the law imposes in products liability actions"); *Baymiller*, 894 F. Supp. 2d at 1305 (dismissing plaintiffs' fraud claims because plaintiffs neither purchased nor used defendant's product).

In sum, private lawsuits against manufacturers that did not design, manufacture, or sell the product that allegedly harmed the claimant would undermine the Nevada Legislature's carefully crafted statutory scheme and flout well-settled principles of products liability law. Such an interpretation of the NDTPA's language cannot fall within "any sensible definition" of "victim," and this Court should again reject this effort to circumvent the Nevada Legislature's limitation of private NDTPA suits to "victim[s]" of the defendant's deceptive practices. *Fairway*, 2018 WL 5906906, at *1.

### 3. Alternatively, Plaintiffs' NDTPA Claims Alleging that Decedent Started Smoking and Continued Smoking In Reliance on Alleged Fraudulent Statement Prior to 1973 Should be Dismissed.

Plaintiffs claim that Decedent starting smoking in approximately 1953 (35 PA 1606 (Dolly Rowan Dep. Tr. at 74:9–15)), and that if Decedent had known the true health hazards and addictive nature of cigarettes, she would not have started smoking (35 PA 1600–01, 1607 (Dolly Rowan Dep. Tr. at 7:17–8:1, 204:12–21)). It is therefore impossible for Decedent's decision to start smoking in 1953 to be based on violations of the NDTPA—which did not exist until 1973. *See* 1973 Statutes of Nevada, Page 1483 (CHAPTER 729, AB 301).

Plaintiffs also allege that "as a direct and proximate result of" fraudulent statements violating the NDTPA, Decedent continued to smoke cigarettes which caused or contributed to her developing lung cancer. (22–23 PA 1206, 1216). Decedent's decision to continue smoking *prior to 1973* could not have been based on violations of the NDTPA.

### B. THE DISTRICT COURT SHOULD HAVE CONCLUDED IN ITS RULING ON PLAINTIFFS' MOTION FOR RECONSIDERATION THAT PLAINTIFFS' DERIVATIVE CONSPIRACY CLAIMS FAIL WITH THEIR PREDICATE NDTPA CLAIMS.

Plaintiffs' civil conspiracy claims against PM USA are entirely dependent on their NDTPA claims against PM USA. Indeed, in its ruling on PM USA's motion to dismiss, the district court recognized that Plaintiffs' civil conspiracy claims failed, as they are derivative claims based on Plaintiffs' NDTPA claims. 4 PA 635.

Because Plaintiffs' predicate NDTPA claims against PM USA fail, so too do their derivative conspiracy claims against PM USA. *See Jordan v. State ex rel. Dep't of Motor Vehicles & Pub. Safety*, 121 Nev. 44, 74–75, 110 P.3d 30, 51 (2005) (en banc) (per curiam) (underlying cause of action for fraud is a necessary predicate to a cause of action for conspiracy to defraud), *overruled on other grounds*, *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 181 P.3d 670 (2008); *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).

## VII. CONCLUSION

For the foregoing reasons, the Court should grant Petitioner's request for a writ of prohibition or mandamus.

DATED this 31st day of May, 2022.

WEINBERG, WHEELER, HUDGINS, GUNN & DIAL, LLC

By: */s/D. Lee Roberts, Jr.*
D. LEE ROBERTS, JR., ESQ.
*Attorney for Petitioner*
*Philip Morris USA Inc.*

## VERIFICATION

1. I, the undersigned, declare as follows:

2. I am a lawyer duly admitted to practice before the courts of this State, and I represent Petitioner Philip Morris USA Inc. in this proceeding.

3. I verify that I have read the foregoing writ petition and that the same is true to my own knowledge, except for those matters stated on information and belief, and as to those matters, I believe them to be true.

4. I declare under penalty of perjury under the laws of the State of Nevada that the foregoing is true and correct.

DATED this 31st day of May, 2022.

WEINBERG, WHEELER, HUDGINS, GUNN & DIAL, LLC

By: */s/D. Lee Roberts, Jr.*
D. Lee Roberts, Jr., Esq.
*Attorney for Petitioner*
*Philip Morris USA Inc.*

## CERTIFICATE OF COMPLIANCE

1. I hereby certify that this writ petition 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 it was prepared in Microsoft Word 2016 with a proportionally spaced typeface in 14-point, double-spaced Century Schoolbook font.

2. I further certify that this writ petition complies with the type-volume limitations of NRAP 21(d) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and contains 5,231 words.

3. Finally, I hereby certify that I have read this writ petition 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 writ petition 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 writ petition is

not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 31st day of May, 2022.

WEINBERG, WHEELER, HUDGINS, GUNN & DIAL, LLC

By: */s/D. Lee Roberts, Jr.*
D. Lee Roberts, Jr., Esq.
*Attorney for Petitioner*
*Philip Morris USA Inc.*

## CERTIFICATE OF SERVICE

Pursuant to NRAP 25, I hereby certify that I am an employee of Weinberg, Wheeler, Hudgins, Gunn & Dial, LLC and that on May 31, 2022, I filed the foregoing **Petition for Writ of Mandamus or, Alternatively, Prohibition** with the Clerk of the Nevada Supreme Court. The accompanying 35-volume Appendix will be electronically filed in the court under NRAP 30(f)(2). 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 U.S. Mail to the following:

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Las Vegas, Nevada 89155

*Respondent*

*/s/ Cindy Bowman*
An Employee of Weinberg,
Wheeler, Hudgins, Gunn & Dial, LLC