

**In the Supreme Court of Nevada**

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

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Case No. \_\_\_\_\_

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

**PHILIP MORRIS USA INC.'S PETITION FOR  
WRIT OF MANDAMUS OR, ALTERNATIVELY, PROHIBITION – APPENDIX  
VOL. 11**

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**DISTRICT COURT  
CLARK COUNTY, NEVADA**

DOLLY ROWAN, as Special Administrator of  
the Estate of NOREEN THOMPSON,

Plaintiff,

vs.

PHILIP MORRIS USA INC., a foreign  
corporation; R.J. REYNOLDS TOBACCO  
COMPANY, a foreign corporation,  
individually, and as successor-by-merger to  
LORILLARD TOBACCO COMPANY and as  
successor-in-interest to the United States  
tobacco business of BROWN &  
WILLIAMSON TOBACCO CORPORATION,  
which is the successor-by-merger to THE  
AMERICAN TOBACCO COMPANY;  
LIGGETT GROUP, LLC, a foreign  
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

Case No.: A-20-811091-C  
Dept. No.: V

**DEFENDANT PHILIP MORRIS USA  
INC.'S OPPOSITION TO PLAINTIFF'S  
MOTION TO RECONSIDER ORDER  
GRANTING DEFENDANT PHILIP  
MORRIS USA INC.'S MOTION TO  
DISMISS PLAINTIFF'S AMENDED  
COMPLAINT UNDER NRCP 12(b)(5)**

**Hearing Date: October 27, 2021  
Hearing Time: In Chambers**



SILVER NUGGET CASINO, a domestic  
limited liability company, JERRY'S NUGGET,  
a domestic corporation; and DOES I-X; and  
ROE BUSINESS ENTITIES XI-XX, inclusive,

Defendants.

Plaintiff's Motion to Reconsider fails to identify any legally sufficient reason why this Court should revisit its ruling to dismiss Plaintiff's product liability claims against Philip Morris USA Inc. ("PM USA"), which Plaintiff concedes never designed, manufactured, or sold any of the cigarettes allegedly smoked by Decedent Noreen Thompson. *See generally* Pl.'s Am. Compl. Plaintiff does not argue that any newly discovered facts for this case or intervening changes in controlling law should compel a different result. This Court should not entertain Plaintiff's ill-fated attempt for a second bite at the apple, especially because Plaintiff cannot demonstrate any clear error in the Court's prior ruling.

In regard to Plaintiff's NDTPA claims, it cannot be said that the Court committed "clear error" by concluding that Plaintiff is unable to bring a NDTPA claim against a product manufacturer whose products her Decedent never used or purchased. No Nevada appellate court has ever allowed such a claim to go forward; in fact, the Supreme Court of Nevada rejected a similar claim in *Fairway Chevrolet Company v. Kelley*, 134 Nev. 935, 429 P.3d 663, 2018 WL 5906906 (Nov. 9, 2018) (unpublished). The Legislature also limited private civil actions under the NDTPA to "victim[s]" of consumer fraud, NRS 41.600(1), which in the product liability context includes only those who were directly harmed by the product. Simply put, Plaintiff has not plead facts to establish Decedent was a victim of PM USA's alleged fraud or that Decedent had a legal relationship with PM USA on which Plaintiff can now premise civil liability.

As for Plaintiff's civil conspiracy claims, this Court likewise properly found that (1) those claims are derivative in nature and (2) because Plaintiff's NDTPA claims fail as to PM USA, so too do her civil conspiracy claims asserted against PM USA.

For all of these reasons, the Court should deny Plaintiff's Motion to Reconsider.

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## **BACKGROUND**

Plaintiff filed this product liability case alleging that Decedent developed lung cancer and died after decades of smoking cigarettes manufactured by R.J. Reynolds Tobacco Company (“Reynolds”) and Liggett Group LLC (“Liggett”).<sup>1</sup> Specifically, Plaintiff asserts that Decedent’s lung cancer and death were caused by smoking Pall Mall brand cigarettes (manufactured by Reynolds), Camel brand cigarettes (manufactured by Reynolds), Viceroy brand cigarettes (manufactured by Reynolds), and Pyramid brand cigarettes (manufactured by Liggett) from approximately 1954 until 2019. *See* Am. Compl. ¶¶ 19-23. Plaintiff’s Amended Complaint does not allege that Decedent ever purchased or used a product manufactured by PM USA. *See generally id.*<sup>2</sup> Despite this fact, Plaintiff named PM USA as a defendant under the theory that PM USA (1) violated the NDTPA through its advertisements and other statements about its cigarettes and (2) engaged in a civil conspiracy with other named tobacco manufacturers. *See generally id.*

PM USA moved to dismiss these claims and, in doing so, raised three related arguments. First, PM USA averred that Plaintiff’s claims, although labeled as NDTPA and civil conspiracy claims, were in fact product liability claims that cannot survive without an allegation of product use. *See* Def. PM USA’s Mot. to Dismiss Pl.’s Am. Compl. at 5-7. Second, PM USA argued that Plaintiff’s claims for violation for the NDTPA fail because, in light of the fact that Decedent never used or purchased a product manufactured by PM USA (1) PM USA owed no duty to Decedent and (2) Decedent was not a “victim” directly harmed by PM USA’s alleged NDTPA allegations, as required by NRS 41.000. *Id.* at 7-10. Third, PM USA reasoned that, due to their

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<sup>1</sup> This case was originally filed as a personal injury action. Following Ms. Thompson’s death on June 19, 2020, the Court entered an order granting in part and denying in part Plaintiff’s Motion for Leave to File Wrongful Death Complaint and Plaintiff’s Motion to Substitute Parties on March 11, 2021. Plaintiff filed an Amended Complaint (asserting claims for wrongful death, among other causes of action) on March 15, 2021.

<sup>2</sup> PM USA acknowledges that Decedent’s interrogatory responses (served May 29, 2020) state that she “occasionally” smoked Marlboro brand cigarettes, which are manufactured by PM USA. However, as this Court noted in its September 8, 2021 Order, “As a general rule, the court may not consider matters outside the pleading being attacked.” *Breliant v. Preferred Equities Corp.*, 109 Nev. 842, 847, 858 P.2d 1258, 1261 (1993).



1 derivative nature, Plaintiff's claims for civil conspiracy also fail because her underlying NDTPA  
2 claims fail. *Id.* at 10-11. In response, Plaintiff argued, among other things, that (1) product use  
3 is not a requirement for a NDTPA claim, (2) Defendants, including PM USA, engaged in  
4 deceptive trade practices through mass-marketing campaigns, and (3) Plaintiff's civil conspiracy  
5 claims survive with her underlying NDTPA claims. *See generally* Pl.'s Opp. to Def. PM USA's  
6 Mot. to Dismiss (filed Apr. 12, 2021).

7 After hearing argument on May 13, 2021, the Court dismissed Plaintiff's NDTPA and  
8 civil conspiracy claims with prejudice as to PM USA on September 8, 2021. In doing so, the  
9 Court ruled as follows:

10 There is no dispute that Plaintiff [sic] did not use cigarettes that were  
11 manufactured, marketed, or sold by Defendant Philip Morris. Since she did not  
12 purchase or use Philip Morris' cigarettes, Plaintiff cannot make a showing of  
13 alleged duty by Philip Morris. Thus, due to lack of showing of duty, all claims  
14 against Philip Morris fail, except as to civil conspiracy claim. However, the civil  
15 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 claim must also necessarily be dismissed.

16 Order Granting Def. PM USA's Mot. to Dismiss Pl.'s Am. Compl. at 3 (Sept. 8, 2021) ("Sept. 8,  
17 2021 Order").

## 18 ARGUMENT

### 19 I. LEGAL STANDARD

20 "Only in very rare instances in which new issues of fact or law are raised supporting a  
21 ruling contrary to the ruling already reached should a motion for rehearing be granted." *Moore*  
22 *v. City of Las Vegas*, 92 Nev. 402, 405, 551 P.2d 244, 246 (1976). Reconsideration is "an  
23 extraordinary remedy, to be used sparingly in the interests of finality and conservation of judicial  
24 resources." *Kona Enters., Inc. v. Estate of Bishop*, 229 F.3d 877, 890 (9th Cir. 2000) (quoting  
25 Moore's Fed. Prac. § 59.30[4] (3d ed. 2000)).<sup>3</sup> "[A] motion for reconsideration should not be

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

granted, absent highly unusual circumstances, unless the district court is presented with newly discovered evidence, committed clear error, or if there is an intervening change in the controlling law.” *Id.* (citation omitted); *see also* *Masonry & Tile Contractors Ass’n of S. Nev. v. Jolly, Urga & Wirth, Ltd.*, 113 Nev. 737, 741, 941 P.2d 486, 489 (1997) (“A district court may reconsider a previously decided issue if substantially different evidence is subsequently introduced or the decision is clearly erroneous.”).

“Points or contentions not raised in the original hearing cannot be maintained or considered on rehearing.” *Achrem v. Expressway Plaza Ltd. P’ship*, 112 Nev. 737, 742, 917 P.2d 447, 450 (1996); *accord* *Kona Enters.*, 229 F.3d at 890 (“A Rule 59(e) motion may **not** be used to raise arguments or present evidence for the first time when they could reasonably have been raised earlier in the litigation.” (emphasis in original)).

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

*Kamaka v. Goodsill Anderson Quinn & Stifel*, 176 P.3d 91, 103 (Haw. 2008) (citation omitted) (internal quotation marks omitted).

## II. THE COURT DID NOT ERR IN DISMISSING PLAINTIFF’S NDTPA CLAIMS AGAINST PM USA

Even if Plaintiff could meet the high threshold to merit reconsideration in the first instance, which she cannot, that does not entitle her to a de novo review of previously addressed legal arguments. The question here is whether this Court clearly committed an error of law, and, as addressed herein, it did not.

### A. Plaintiff Cannot Make a Showing of Alleged Duty by PM USA Because Decedent Never Smoked Cigarettes Manufactured by PM USA

The Court correctly ruled that because Decedent “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.”



1 Sept. 8, 2021 Order at 3.

2 Nevada law requires the existence of a duty—*i.e.*, some form of a relationship between  
3 plaintiff and defendant—to succeed on a fraud-based claim. *See Dow Chem. Co. v. Mahlum*, 114  
4 Nev. 1468, 1485–87, 970 P.2d 98, 110–11 (1998), *abrogated on other grounds by GES, Inc. v.*  
5 *Corbitt*, 117 Nev. 265, 21 P.3d 11 (2001). Where a product manufacturer is “not directly  
6 involved in the transaction from which [the] lawsuit arose” and did not manufacture the product  
7 that caused the alleged injury, courts have held that there is no legal relationship between the  
8 parties. *See, e.g., id.* at 111 (reversing judgment against defendant on fraudulent  
9 misrepresentation claim “because it was not directly involved in the transaction from which [the]  
10 lawsuit arose, or any other transaction with the Mahlums”); *Moretti v. Wyeth, Inc.*, No. 2:08-cv-  
11 00396-JCM-(GWF), 2009 WL 749532, at \*3 (D. Nev. Mar. 20, 2009). (dismissing plaintiff’s  
12 four fraud-based claims in part because “[p]laintiff did not purchase or ingest a Wyeth or  
13 Schwarz product and, therefore, she did not have a relationship with either defendant”);  
14 *Baymiller v. Ranbaxy Pharms., Inc.*, 894 F. Supp. 2d 1302, 1309-11 (D. Nev. 2012) (granting  
15 summary judgment in defendant’s favor on plaintiff’s fraud and negligent misrepresentation  
16 claims because plaintiff “did not purchase or ingest a Glaxo product” and therefore “did not have  
17 a relationship with Glaxo [who] did not owe [plaintiff] any duty to warn”).

18 In this case, Plaintiff’s deceptive trade practices claims fail for lack of a legal relationship  
19 and causation. Decedent did not purchase, smoke, or suffer any harm caused by cigarettes  
20 manufactured by PM USA—only allegedly Pall Mall, Camel, and Viceroy brand cigarettes,  
21 manufactured by Reynolds, and Pyramid brand cigarettes, manufactured by Liggett. *See*  
22 *generally* Am. Compl. Like the plaintiffs in *Moretti* and *Baymiller*, there was no legal  
23 relationship between Decedent and PM USA, much less one sufficient to trigger a duty to  
24 disclose any material information regarding the health effects of smoking cigarettes. The Court  
25 reached the proper decision on this point, and nothing in Plaintiff’s Motion changes this fact.

26 ///

27 ///

28 ///



1           **B.     Plaintiff Does Not Have Standing to Sue Because Decedent Was Not a**  
2           **“Victim” of Consumer Fraud Under NRS 41.600**

3           Plaintiff nevertheless argues that a non-user of PM USA’s products can be a “victim”  
4           under NRS 41.600. *See generally* Pl.’s Mot. While the NDTPA provides wide reach for  
5           **government** action against deceptive trade practices, the Legislature expressly limited **private**  
6           actions for NDTPA violations to “victim[s]” of consumer fraud. NRS 41.600(1). Although the  
7           Supreme Court of Nevada has yet to define the term “victim” in a published decision, federal  
8           courts have consistently held that a plaintiff must show she was “directly harmed” by deceptive  
9           trade practices to have standing as a “victim” under NRS 41.600(1). *See, e.g., Del. Webb*  
10          *Communities, Inc. v. Partington*, 652 F.3d 1145, 1153 (9th Cir. 2011) (quoting *S. Serv. Corp. v.*  
11          *Excel Bldg. Servs., Inc.*, 617 F. Supp. 2d 1097, 1100 (D. Nev. 2007)). More specifically, a  
12          plaintiff must plead and ultimately prove “that (1) an act of consumer fraud by the defendant (2)  
13          caused (3) damage to the [the decedent].” *Picus v. Wal-Mart Stores, Inc.*, 256 F.R.D. 651, 658  
14          (D. Nev. 2009); *Sattari v. Wash. Mut.*, 475 F. App’x 648, 648 (9th Cir. 2011) (same).

15          In this case, Plaintiff has not alleged that Decedent was a “victim” of consumer fraud by  
16          PM USA. She likewise has not pled “direct harm” from PM USA’s actions because Decedent  
17          never used or purchased a PM USA product. Whatever statements PM USA supposedly made  
18          did not convince Decedent to purchase a PM USA product, much less directly cause the harm  
19          for which Plaintiff seeks recovery in this lawsuit—Decedent’s lung cancer and death. To the  
20          contrary, Plaintiff claims that Decedent’s “lung cancer and her death therefrom were caused by  
21          smoking Pall Mall brand cigarettes, Camel brand cigarettes, Viceroy brand cigarettes, and  
22          Pyramid brand cigarettes.” Am. Compl. ¶ 19. Because these products were not manufactured  
23          or sold by PM USA (and have never been), this Court correctly found that Plaintiff has not pled  
24          facts to establish Decedent had a legal relationship with PM USA on which Plaintiff can now  
25          premise civil liability.

26          The Supreme Court of Nevada’s recent decision in *Fairway* is instructive on this point.  
27          In *Fairway*, the plaintiff saw a television commercial in which a car dealership falsely  
28          guaranteed financing. *Fairway Chevrolet*, Br. of Respondent at 1-3, 134 Nev. 935, (No. 80160),



2020 WL 4196115. Although he never actually purchased a car from the dealership, the plaintiff nonetheless brought a civil action under the NDTPA. *Id.* The Court reversed the denial of the defendants’ summary judgment motion, holding that the plaintiff did not qualify as a “victim” under NRS 41.600. *Fairway*, 2018 WL 5906906, at \*1. The Court further explained that “the definition of ‘victim’ connotes some sort of harm being inflicted on the ‘victim.’” *Id.* (quoting Black’s Law Dictionary (10th ed. 2014) (defining “victim” as “[a] person harmed by a crime, tort, or other wrong”); Merriam-Webster’s Collegiate Dictionary 1394 (11th ed. 2007) (defining “victim” as “one that is injured, destroyed, or sacrificed under any of various conditions” and “one that is tricked or duped”)). Put another way, “any sensible definition” of the term requires a showing that the claimant “suffer[ed] harm at the hands of [the defendant].” *Id.* And given that the plaintiff never purchased a car from the dealership, the Court concluded that he did not “suffer any harm at the hands” of the dealership and thus was “not a ‘victim’ authorized to bring a consumer fraud action under NRS 41.600.” *Id.*

So too here. At best, Plaintiff alleges that PM USA made fraudulent statements, but—like the plaintiff in *Fairway*—those statements never led Decedent to buy a PM USA product and she thus did not suffer “direct harm” from those statements. Even if Decedent saw a PM USA advertisement, she would not be a “victim” of PM USA’s alleged fraud because it did not persuade her to buy PM USA’s products, and thus PM USA could not have “direct[ly]” caused Decedent’s lung cancer and death, which Plaintiff blames on other manufacturers’ cigarettes.

To conclude otherwise would allow virtually any private citizen to sue a product manufacturer for money damages over any perceived “deceptive trade practice” regardless of whether the person purchased the product or the product injured her in any way. Plaintiff points to nothing to support such an anomalous and atextual reading of the term “victim” in NRS 41.600. In fact, Plaintiff’s proposed reading would undo the Legislature’s carefully crafted balance between public and private enforcement of consumer fraud. The NDTPA itself grants only the government enforcement authority—including criminal prosecutions, NRS 598.0963, and civil penalties up to \$5,000 for each violation. NRS 598.0999. Two years after enacting the NDTPA, the Legislature passed NRS 41.600 to create a limited private right of action for a





subset of individuals: those who were “victim[s]” of consumer fraud with respect to a subset of deceptive trade practices listed in NRS 598.091 through 598.092. NRS 41.600(2)(e). As the Supreme Court recognized in *Fairway* (and as federal courts have held when applying Nevada law), the Legislature’s use of the term “victim” expresses a clear intent to limit private lawsuits to only those who suffer “harm at the hands” of the defendant, 2018 WL 5906906, at \*1.

In sum, private lawsuits against manufacturers that did not design, manufacture, or sell the product that allegedly harmed the claimant would undermine the Legislature’s carefully crafted statutory scheme and flout well-settled principles of product liability law.

**C. Plaintiff’s Arguments to the Contrary Lack Merit**

Plaintiff argues that “the NDTPA’s plain language permits victims of deceptive trade practices to commence action as long as the defendant offered or attempted to sell a product.” Pl.’s Mot. at 15; *see also* Pl.’s Opp. to Def. PM USA’s Mot. to Dismiss at 11-12 (filed Apr. 12, 2021) (making a similar argument). Because “sales,” as defined in the NDTPA, includes attempted sales, Plaintiff argues she can bring a private lawsuit against PM USA even though Decedent never used PM USA’s products. Pl.’s Mot. at 15.

However, this “attempted sale” argument misses the mark—and was not accepted by the Court at the motion to dismiss phase—because it provides no answer to the threshold question of standing under NRS 41.600(1). Plaintiff offers no explanation as to how a person can qualify as a “victim[] of deceptive trade practices” if the defendant “offered or attempted to sell a product” to her, but ultimately did not so. *See generally id.* This argument also ignores the fact that Plaintiff is suing under NRS 41.600 because, as a private citizen, she has no cause of action under the NDTPA directly. As explained above, the Legislature created a private right of action only for actual victims—not “attempted victims.” The Supreme Court’s decision in *Fairway* is again instructive. The plaintiff in that case had seen the defendant’s fraudulent advertisement—in other words, there was an “attempted sale” under Plaintiff’s approach. *See Fairway*, 2018 WL 5906906, at \*1. In fact, the *Fairway* plaintiff made the same “attempted sale” argument that Plaintiff makes here. Br. of Respondent at 30, *Fairway Chevrolet*, 134 Nev. 935 (No. 80160), 2020 WL 4196115. But that argument failed because it overlooks the distinction between the



1 broad, regulatory proscriptions of the NDTPA and the limited scope of the private right of action  
2 that the Legislature created in NRS 41.600(1). Plaintiff's "attempted sale" argument simply  
3 confirms Plaintiff's inability to show direct harm from PM USA's alleged deceptive statements  
4 when Decedent never used or purchased a PM USA product and Plaintiff alleges that Decedent's  
5 injury was instead caused by other manufacturers' products.

6 Plaintiff also suggests that individuals other than purchasers may be considered "victims"  
7 under NRS 41.600. *See generally* Pl.'s Mot. at 15-19. However, the Supreme Court of Nevada  
8 has never held that non-consumers qualify as victims in the context of the NDTPA. Every case  
9 cited by Plaintiff is a federal case interpreting Nevada law without guidance from Nevada courts.  
10 *See generally id.* But even assuming NRS 41.600 could permit victims other than consumers to  
11 sue, that does not change the fact that any private plaintiff still must qualify as a "victim." Put  
12 another way, even assuming the Legislature intended to allow private suits by individuals or  
13 companies victimized by deceptive trade practices in ways other than being induced to buy or  
14 use the defendant's deceptively advertised goods or services, the plaintiff must still show that she  
15 was "directly harmed," *Guerra v. Dematic Corp.*, No. 3:18-CV-0376-LRH-CLB, 2020 WL  
16 8831583, at \*3 (D. Nev. Sept. 9, 2020), "at the hands" of the defendant. *See also Fairway*, 2018  
17 WL 5906906, at \*1. Plaintiff cannot show "direct harm" from anything PM USA did when  
18 Decedent never touched a PM USA product.

19 Finally, Plaintiff's assertion that "[c]ausation is clearly alleged" against PM USA is  
20 empty rhetoric. *See* Pl.'s Mot. at 17-18. The cited portions of Plaintiff's Amended Complaint  
21 (pages 99-106) (1) include conduct that occurred before the NDTPA was enacted in 1973 and (2)  
22 lumps PM USA in with the tobacco manufacturer defendants whose products allegedly injured  
23 Decedent. Such claims are "too attenuated" and "remote" to demonstrate the direct harm at the  
24 hands of PM USA that NRS 41.600 requires. *See Prescott v. Slide Fire Sols., LP*, 410 F. Supp.  
25 3d 1123, 1145-46 (D. Nev. 2019); *Fields v. Twitter, Inc.*, 881 F.3d 739, 745 (9th Cir. 2018); *see*  
26 *also, e.g., Katz v. Pershing, LLC*, 672 F.3d 64, 76 (1st Cir. 2012) (dismissing the plaintiff's  
27 claims that misleading advertisements by a third party caused plaintiff injury because they likely  
28 affected her decision to pay another party's artificially inflated fees).





1 The cases upon which Plaintiff relies in making these arguments merely underscore why  
2 her NDTPA claims must fail. For example, in *Del Webb Communities, Inc. v. Partington*, 652  
3 F.3d 1145, 1153 (9th Cir. 2011), Pl.’s Mot. at 15, a contractor used deceptive and fraudulent  
4 means to solicit subdivision homeowners, offering to inspect their homes and then seeking  
5 payment by encouraging the homeowners to bring false claims against Del Webb, the developer.  
6 In that case, the court permitted Del Webb to sue the contractor because Del Webb was able to  
7 clearly (1) describe the contractor’s misconduct and (2) set forth in detail how the contractor’s  
8 actions caused Del Webb concrete, economic, and direct harm. *Id.* at 1153. Plaintiff offers  
9 nothing of the sort here. Simply put, Plaintiff’s NDTPA claims lie against the manufacturers of  
10 the products that allegedly injured Decedent and caused her death, not against PM USA.

11 **III. THE COURT PROPERLY FOUND THAT PLAINTIFF’S DERIVATIVE CIVIL**  
12 **CONSPIRACY CLAIMS FALL WITH PLAINTIFF’S NDTPA CLAIMS**

13 Plaintiff has also failed to meet the high threshold to merit reconsideration as it relates to  
14 her civil conspiracy claims and, in any event, cannot demonstrate that the Court committed clear  
15 error in dismissing those claims with prejudice as to PM USA.

16 Plaintiff has made clear that her civil conspiracy claims against PM USA are entirely  
17 dependent on her NDTPA claims against PM USA. *See* Pl.’s Mot. at 20 (“This Court correctly  
18 recognized that the NDTPA claim suffices as a predicate for the civil conspiracy claim.”).

19 Consistent with that position, this Court correctly ruled that civil conspiracy “is a  
20 derivative claim.” Sept. 8, 2021 Order at 3. And because Plaintiff’s predicate NDTPA claims  
21 fail against PM USA, so too do her derivative civil conspiracy claims. *See Jordan v. State ex rel.*  
22 *Dep’t of Motor Vehicles & Pub. Safety*, 121 Nev. 44, 74-75, 110 P.3d 30, 51 (2005) (per curiam)  
23 (underlying cause of action for fraud is a necessary predicate to a cause of action for conspiracy  
24 to defraud), *overruled on other grounds, Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224,  
25 181 P.3d 670 (2008); *see also Sommers v. Cuddy*, No. 2:08-cv-78-RCJ-RJJ, 2012 WL 359339, at  
26 \*5 (D. Nev. Feb. 2, 2012) (applying Nevada law and recognizing that a cause of action for civil  
27 conspiracy to defraud requires a viable underlying cause of action for fraud); *Goodwin v. Exec.*  
28 *Tr. Servs., LLC*, 680 F. Supp. 2d 1244, 1253-54 (D. Nev. 2010) (same).



**CONCLUSION**

For these reasons, the Court should deny Plaintiff's Motion for Reconsideration.

Dated this 7th day of October, 2021.

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# CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of October, 2021, a true and correct copy of the foregoing **DEFENDANT PHILIP MORRIS USA INC.'S OPPOSITION TO PLAINTIFF'S MOTION TO RECONSIDER ORDER GRANTING DEFENDANT PHILIP MORRIS USA INC.'S MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT UNDER NRCP 12(b)(5)** was electronically filed and served on counsel through the Court's electronic service system pursuant to Administrative Order 14-2 and N.E.F.C.R. 9, via the electronic mail addresses noted below, unless service by another method is stated or noted:

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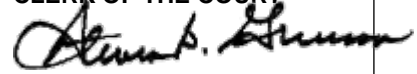
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DISTRICT COURT

CLARK COUNTY, NEVADA

DOLLY ROWAN, as Special Administrator  
of the Estate of NOREEN THOMPSON,

Plaintiff,

v.

PHILIP MORRIS USA, INC., a foreign  
corporation; R.J. REYNOLDS TOBACCO  
COMPANY, a foreign corporation,  
individually, and as successor-by-merger to  
LORILLARD TOBACCO COMPANY and as  
successor-in-interest to the United States  
tobacco business of BROWN &  
WILLIAMSON TOBACCO

CASE NO.: A-20-811091-C  
DEPT NO.: XVI

**PLAINTIFF'S REPLY TO**  
**DEFENDANT PHILIP MORRIS**  
**USA INC.'S OPPOSITION TO**  
**MOTION TO RECONSIDER**  
**ORDER GRANTING MOTION TO**  
**DISMISS PLAINTIFF'S AMENDED**  
**COMPLAINT UNDER NRCP**  
**12(b)(5)**

**Date of Hearing: 10/27/2021**  
**Time of Hearing: In Chambers**

CORPORATION, which is the successor-by-merger to THE AMERICAN TOBACCO COMPANY; LIGGETT GROUP, LLC., a foreign corporation; and ASM NATIONWIDE CORPORATION d/b/a SILVERADO SMOKES & CIGARS, a domestic corporation; and ROE BUSINESS ENTITIES XI-XX, inclusive,

Defendants.

## **I. INTRODUCTION**

A victim can be directly harmed by a wrongdoer without having bought the wrongdoer's product. NRS 41.600 contemplates that scenario in its plain language, caselaw has interpreted it as such, and this case exemplifies it. Philip Morris produced and spread false information that caused Noreen Thompson to believe cigarettes are safer than they are. This fraudulent representation caused her to begin and continue smoking until she developed lung cancer and passed away. Therefore, Ms. Thompson was directly harmed by Philip Morris—not through its products—but through its practices. Ms. Thompson's statutory standing to sue as a victim arises from the harm Philip Morris caused her through its deceptive statements, misinformation campaigns, and prominent participation in the tobacco industry's conspiracy to convince the public that cigarettes do not cause cancer.

The crux of Philip Morris' argument is that an NDTPA claim requires a plaintiff to have purchased or used the defendant's product. Opp. at 2 & 10. Since civil conspiracy is a derivative claim, the upshot is that when several corporations conspire to defraud the public as a united front with false information about a common product,

1 consumers can never hold the conspirators accountable under the NDTPA, only the  
2 manufacturer. This twisted position flouts the very purpose of the NDTPA and NRS  
3 41.600 by eviscerating the function of these remedial statutes.

4 Philip Morris' reasoning (1) confuses a statutory claim under the NDTPA for a  
5 common law fraud claim and disregards the Supreme Court's admonition in *Betsinger*  
6 *v. D.R. Horton, Inc.*, 126 Nev. 162, 232 P.3d 433 (2010); (2) betrays the legislative  
7 intent to create a private cause of consumer action that does not rely on privity; and (3)  
8 blatantly mischaracterizes the Nevada Supreme Court's decision in *Fairway Chevrolet*  
9 *Co. v. Kelley*, 134 Nev. 935, 429 P.3d 663, 2018 WL 5906906 (2018) (unpublished).

11 Therefore, Plaintiff respectfully request that this Court grant reconsideration.

## 12 **II. LEGAL ARGUMENT**

### 13 **A. PHILIP MORRIS MISTAKENLY CONFLATES A STATUTORY** 14 **CONSUMER FRAUD CLAIM WITH A COMMON LAW FRAUD** 15 **CLAIM.**

16 The NDTPA does not require Plaintiff to allege a duty based on use or purchase  
17 of Defendant's product, because it intentionally differs from common law fraud or  
18 misrepresentation. The plain language of the statute reads: "4. Any action brought  
19 pursuant to this section is not an action upon any contract underlying the original  
20 transaction." NRS 41.600(4) (1975). And that provision remained unchanged through  
21 ten legislative amendments. *See* NRS 41.600(4) (2021).

22 Philip Morris' attempt to mislead this Court is evidenced by the fact that all three  
23 cases it cites for its flagship argument address only common law fraud claims. *See*  
24

1 Defendant Philip Morris USA Opposition to Plaintiff's Motion to Reconsider, 5-6.  
2 *Dow Chem. Co. v. Mahlum*, 114 Nev. 1468 (1998), abrogated by *GES, Inc. v. Corbitt*,  
3 117 Nev. 265 (2001), *Moretti v. Wyeth, Inc.*, 2009 U.S. Dist. LEXIS 29550, 2009 WL  
4 749532 (D. Nev. Mar. 20, 2009) and *Baymiller v. Ranbaxy Pharmaceuticals, Inc.*, 894  
5 F. Supp.2d 1302 (D. Nev. 2012) are all product liability cases where the plaintiff sought  
6 relief via the common law claims of fraudulent concealment or fraud and  
7 misrepresentation. These common law claims require the plaintiff to prove that the  
8 defendant owed him a duty of care. *Moretti*, 2009 WL 749532, at \*3. This duty, "at a  
9 minimum, required some form of relationship between the parties." *Baymiller*, 894 F.  
10 Supp.2d at 1309. In a negligent misrepresentation claim, for example, this duty must  
11 arise from a business transaction. *Id.* Indeed, the federal district court's decision in  
12 these cases turned on whether the plaintiff and defendant are connected by privity:  
13

14 "In *Kite*, this Court found that **negligent misrepresentation was only available**  
15 **if a plaintiff suffered pecuniary losses in the context of a business**  
16 **transaction.** *Id.* As such, this Court's previous reasoning is in line with *Moretti*  
17 and *Foster*. Thus, this Court finds that **Glaxo does not have a duty to warn or**  
18 **otherwise disseminate information about the risks associated with their**  
19 **generic competitors' drugs because Mary Baymiller did not purchase or**  
20 **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."

21 *Baymiller*, 894 F. Supp. 2d at 1311.

22 However, the NDTPA takes the opposite stance. The NDTPA was enacted to  
23 "provide consumers with a cause of action that was easier to establish than common  
24



1 law fraud.” *Betsinger v. D.R. Horton, Inc.*, 126 Nev. 162, 232 P.3d 433, 435 (2010).  
2 Specifically, NRS 41.600 was enacted because the Legislature wished to give  
3 consumer victims the right to sue without having to establish privity. *See* Assembly  
4 History, A.B. 319, 58th Session (1975) (“A.B. 319 (chapter 629) establishes consumer  
5 fraud as a separate cause of action apart from breach of contract or other causes of  
6 action in commercial dealings.”). This is why the plain language of the statute clearly  
7 steers this Court away from “any contract underlying the original transaction.” NRS  
8 41.600(4) (2021).  
9

10 Thus, the common law fraud cases Philip Morris cites have no bearing on  
11 Plaintiff’s statutory consumer fraud claims. To the contrary, this Court must “look to  
12 the language of the statute itself to determine a party’s [standing].” *Ferguson v. Las*  
13 *Vegas Metro. Police Dep’t*, 131 Nev. 939, 952, 364 P.3d 592, 600 (2015). Since NRS  
14 41.600 does not limit standing to purchasers or users of a defendant’s product, this  
15 Court must afford the statute “liberal construction to accomplish its beneficial intent.”  
16 *Poole v. Nevada Auto Dealership Investments, LLC*, 135 Nev. 280, 449 P.3d 479, 485  
17 (Ct. App. 2019) (citing *Welfare Div. of State Dept. of Health, Welfare & Rehab. v.*  
18 *Washoe County Welfare Dept.*, 88 Nev. 635, 637, 503 P.2d 457, 458 (1972)). This  
19 Court must not impose a greater constitutional requirement for standing beyond the  
20 language of the statute. *See Ferguson*, 131 Nev. at 952, 364 P.3d 592 at 600.  
21 Therefore, the Court should reject Philip Morris’ attempts to extinguish Plaintiff’s  
22 NDTPA claims.  
23  
24

1           **B.     PHILIP MORRIS ASKS THIS COURT TO BETRAY THE**  
2           **PURPOSE OF THE NDTPA AND NRS 41.600.**

3           By asking this Court to impose the requirements of common law fraud onto a  
4 NDTPA claim, Philip Morris seeks to nullify the NDTPA’s remedial purpose. The  
5 Court of Appeals in *Poole* faced a similar request and rejected it with persuasive  
6 reasoning. The respondent in *Poole* asked the court to construe the word “knowingly”  
7 in the NDTPA as to require specific intent to defraud, which is the common law  
8 standard. *Id.* at 483. The Court of Appeals, however, chose to define “knowingly” as  
9 to require only general intent because to do otherwise would “render NDTPA and  
10 common law fraud claims redundant” and “disserve the NDTPA’s remedial purpose,  
11 and discourage claims by forcing parties to clear a significantly higher bar.” *Id.* at 485.  
12 Analyzing other jurisdictions’ treatment of the same issue, the Court of Appeals  
13 recognized that several states favored the respondent’s reading. *Id.* at 484–485. But,  
14 the Court of Appeals held steadfast: “We conclude, however, that our interpretation  
15 better serves the NDTPA’s remedial purpose. Because the NDTPA is a remedial  
16 statutory scheme, *Sellinger v. Freeway Mobile Home Sales, Inc.*, 110 Ariz. 573, 521  
17 P.2d 1119, 1122 (1974) (recognizing that remedial statutes are those that ‘are designed  
18 to redress existing grievances and introduce regulations conducive to the public good’),  
19 we ‘afford[ ] [it] liberal construction to accomplish its beneficial intent.’” *Id.* at 485.  
20  
21

22           Philip Morris’ proposed reading would deny standing to the very victim that the  
23 NDTPA was enacted to protect. If a defendant corporation harmed a consumer through  
24 fraud, it is liable under the NDTPA, regardless of its liability under common law. Ms.

1 Thompson's cancer was caused by smoking, which was caused by the misinformation  
2 campaign that spanned most of her life. The depth of the deception was possible  
3 because Philip Morris, like the other tobacco companies, conspired to present a united  
4 front. That causal link between Philip Morris' deceptive practices and Ms.  
5 Thompson's injury exists without her having used Philip Morris' product.  
6

7 This lawsuit is unique in the scale, complexity, and length of deception  
8 perpetrated by Philip Morris and its conspirators. As Judge Gladys Kessler wrote in  
9 her 1,683-page opinion finding Philip Morris and other cigarette makers in violation  
10 of civil racketeering laws:

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

20 *United States v. Philip Morris USA, Inc.*, 449 F. Supp. 2d 1, 28, 2006 U.S. Dist. LEXIS  
21 61412, 18–19 (D.D.C. Aug. 17, 2006). Common law fraud claims may be unequipped  
22 to address this type of fraudulent sophistication. But the NDTPA closed that loophole,  
23 and that is the remedial purpose this Court should protect and enforce. Therefore, the  
24 Court should rule consistently with *Poole* and the various aligned cases that confirm  
the remedial purpose of these statutes.

1           C.     **PHILIP MORRIS' RELIANCE ON *FAIRWAY* IS A STRAW MAN**  
2                   **ARGUMENT.**

3           *Fairway's* plaintiff did not suffer any harm from the defendant's conduct and  
4 admitted so. *Fairway* Opening Brief ("FOB") at 10–12, which is attached as **Exhibit**  
5 **1**. He was a consumer protection vigilante, who was never deceived by the defendant,  
6 but sued the defendant for a 30-second TV commercial that he believed was unlawful.  
7 *Id.* at 1–2. In contrast, Ms. Thompson was influenced and misled by decades of  
8 misinformation created and disseminated by Philip Morris and its conspirators. *See*  
9 Plaintiff's Amended Complaint, at 6, ¶ 23–58, ¶ 24. As a direct result of these false  
10 marketing and public relations efforts, Ms. Thompson believed cigarettes to be safer  
11 than they were and became addicted to smoking, which caused her cancer. *See*  
12 Plaintiff's Amended Complaint, at 57. To argue that these two plaintiffs are analogous  
13 is a flagrant misstatement.  
14

15           The Supreme Court's unpublished opinion in *Fairway* simply holds that when a  
16 plaintiff did not suffer any harm, NRS 41.600 provides no standing. *Id.* at \*1. The  
17 Court did not require the plaintiff to have bought or used the defendant's product. *Id.*  
18 Nor did the Court impose any definition of "victim" that is narrower than the ordinary  
19 usage. *Id.*  
20

21           In fact, *Fairway's* reasoning supports Plaintiff's position. The successful  
22 appellant in *Fairway* relied heavily on three federal cases that addressed the same issue  
23 of standing at bar in this proceeding: *Picus v. Wal-Mart Stores, Inc.*, 256 F.R.D. 651  
24 (D. Nev. 2009); *S. Serv. Corp. v. Excel Bldg. Servs., Inc.*, 617 F. Supp. 2d 1097 (D.

1 Nev. 2007); and *Del Webb Communities, Inc. v. Partington*, 652 F.3d 1145 (9th Cir.  
2 2011). **Exhibit 1**, at 15. All three cases interpreted NRS 41.600 to merely require the  
3 defendant to have caused harm to the plaintiff, but none of these cases support Philip  
4 Morris’ argument that the harm must arise from the purchase or use of a defendant’s  
5 product. Quite the opposite, *S. Serv. Corp* and *Del Webb Communities* staunchly  
6 guarded a broad and ordinary definition of “victim” against any narrow judicial  
7 construction. *S. Serv. Corp*, 617 F. Supp. 2d at 1100; *Del Webb Communities*, 652  
8 F.3d at 1152–1153. Having contemplated these cases, *Fairway* did not reject or modify  
9 these federal courts’ reading of NRS 41.600. Instead, the Court ruled consistently with  
10 the federal courts by citing BLACK’S LAW DICTIONARY and MERRIAM-WEBSTER’S  
11 COLLEGIATE DICTIONARY for the broad and ordinary definition of “victim”: “The  
12 undisputed facts of this case demonstrate that respondent was not a ‘victim’ of  
13 consumer fraud under any sensible definition of that term, as the definition of “victim”  
14 connotes some sort of harm being inflicted on the “victim.” *See, e.g.*, BLACK’S LAW  
15 DICTIONARY, 1798 (10th ed. 2014) (defining “victim” as “[a] person harmed by a  
16 crime, tort, or other wrong”); MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY, 1394  
17 (11th ed. 2007) (defining “victim” as “one that is injured, destroyed, or sacrificed under  
18 any of various conditions” and “one that is tricked or duped”). *Fairway*, 2018 WL  
19 5906906, at \*1 (emphases added).

22 If these are the meter-stick definitions of “victim,” then the Supreme Court could  
23 not have intended to deprive a victim of her standing to sue when she was tricked into  
24

1 using a harmful product, simply because the trickster did not make the product. Philip  
2 Morris' misconduct at issue here is not a false claim in its advertising about its own  
3 product, but a decades-long false narrative it perpetuated with its conspirators about a  
4 common product from which they all profited.

5 Plaintiff's Amended Complaint detailed how Philip Morris was involved in the  
6 conspiracy to deceive American consumers, like Ms. Thompson, from the very  
7 beginning. *See* Plaintiff's Amended Complaint, 11-25 (The Frank Statement was  
8 signed in 1954 by Philip Morris' president). Plaintiff not only pointed to Philip Morris'  
9 misconduct through the Tobacco Industry Research Committee and the Tobacco  
10 Institute, *See* Plaintiff's Amended Complaint, at 13, ¶ 49; 21, ¶ 84, but also provided  
11 specific false statements from Philip Morris, such as:  
12

- 13
- 14 • In 1971, Joseph Cullman, Chairman of Philip Morris, stated on Face the Nation,  
"we do not believe that cigarettes are hazardous; we don't accept that."
- 15
- 16 • In 1972 Philip Morris vice president James Bowling repeated the company's  
promise to consumers two decades earlier that "if our product is harmful, we'll  
17 stop making it."
- 18 • Bowling repeated the company's position on smoking and health in a 1976  
interview when he noted: "from our standpoint, if anyone ever identified any  
19 ingredient in tobacco smoke as being hazardous to human health or being
- 20 • A 1978 Philip Morris publication entitled "Facts About the Smoking  
Controversy" stated: "scientists have not determined what causes  
21 cancer...cigarettes have never been proven unsafe."

22 *See* Plaintiff's Amended Complaint, 84-85, ¶ 315. Plaintiff even included a photograph  
23 containing Philip Morris' CEO, William Campbell (second from the right), from a 1994  
24

1 Congressional hearing, where he denied that cigarettes are addictive or disease-causing.  
2 See Plaintiff's Amended Complaint, at 22, ¶ 88. The totality of such false  
3 representations over decades is what led Ms. Thompson to use, and become addicted  
4 to, cigarettes, which caused her cancer.

5 Contrary to Philip Morris' claim, the directness of this causal link was clearly  
6 alleged by the Plaintiff's Amended Complaint:  
7

- 8 • If NOREEN THOMPSON had known the true health hazards and addictive  
9 nature of cigarettes, she would not have started smoking, nor smoked light, low  
10 tar, and/or filtered cigarettes. nor continued to smoke for many years.
- 11 • As a direct and proximate result of these aforementioned statements, Decedent,  
12 NOREEN THOMPSON, relied upon the assurances from the tobacco industry,  
13 including statements and sworn congressional testimony from Defendants' CEOs  
and also statements from the Defendants' spokesmen and women hired by  
Defendants and their co-conspirators, and as a direct and proximate result of that  
reliance, continued to smoke cigarettes.

14 See Plaintiff's Amended Complaint, 57, ¶ 224-5 (incorporated in the NDTPA claims).

15 The desperation in Philip Morris' "attenuation" argument is easily exposed by a cursory  
16 review of its string citations. See Defendant Philip Morris USA Opposition to Plaintiff's  
17 Motion to Reconsider, 10. *Prescott v. Slide Fire Sols., LP*, 410 F. Supp. 3d 1123 (D.  
18 Nev. 2019) is a favorable case Plaintiff analyzed in detail in her Motion to Reconsider  
19 to illustrate why her Amended Complaint sufficiently pled a direct harm. Mot. at 18.  
20 *Fields v. Twitter, Inc.*, 881 F.3d 739 (9th Cir. 2018) is a federal case addressing the  
21 causation requirement under the Anti-Terrorism Act, not the NDTPA. And the only  
22 case Philip Morris even bothered to explicate, *Katz v. Pershing, LLC*, 672 F.3d 64, 77  
23



(1st Cir. 2012), is a federal case commenting on Massachusetts' consumer fraud statute. *Id.* Worse yet, *Katz* does not even stand for the proposition Philip Morris alleged. The court in *Katz* disagreed with the plaintiff's causation theory (the one Philip Morris cites) not because it was too attenuated but because it was not plausible. *Id.* ("This is not a plausible allegation that the false advertisements caused her to pay the supposedly inflated prices for NPC's services.").

Juxtaposed against the *Fairway* plaintiff's mere indignation, Ms. Thompson's harm in this case is actual, substantial, and directly caused by Philip Morris' deception. She is, in every "sensible" definition of the word, a "victim." Therefore, Plaintiff has standing to sue Philip Morris under NRS 41.600.

### III. CONCLUSION

For the above reasons, this Court should grant reconsideration and reinstate Plaintiff's NDTPA claim. Since Philip Morris concedes that Plaintiff's civil conspiracy claims should be reinstated if the NDTPA claims are viable, *See* Defendant Philip Morris USA Opposition to Plaintiff's Motion to Reconsider at 11, this Court should also reinstate the civil conspiracy claim.

DATED 20<sup>th</sup> day of October 2021.

CLAGGETT & SYKES LAW FIRM

/s/ Micah S. Echols  
Micah S. Echols, Esq.  
Nevada Bar No. 8437  
*Attorneys for Plaintiff*

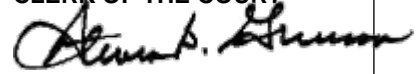


## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 20<sup>th</sup> day of October 2021 I caused to be served a true and correct copy of the **PLAINTIFF'S REPLY TO DEFENDANT PHILIP MORRIS USA INC.'S OPPOSITION TO MOTION TO RECONSIDER ORDER GRANTING MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT UNDER NRCP 12(b)(5)** on the following person(s) by the following method(s) pursuant to NRCP 5(b) and NEFCR 9:

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/s/: Moises Garcia  
An Employee of CLAGGETT & SYKES  
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**DISTRICT COURT**  
**CLARK COUNTY, NEVADA**

**DOLLY ROWAN, as Special  
Administrator of the Estate of NOREEN  
THOMPSON,**

**Plaintiff,**

**v.**

**PHILIP MORRIS USA, INC., a foreign  
corporation; R.J. REYNOLDS TOBACCO  
COMPANY, a foreign corporation,  
individually, and as successor-by-merger  
to LORILLARD TOBACCO COMPANY  
and as successor-in-interest to the United  
States tobacco business of BROWN &  
WILLIAMSON TOBACCO**

**CASE NO. A-20-811091-C**

**DEPT. NO. V**

**PLAINTIFF'S SUPPLEMENT TO  
MOTION TO RECONSIDER ORDER  
GRANTING DEFENDANT PHILIP  
MORRIS USA INC.'S MOTION TO  
DISMISS PLAINTIFF'S AMENDED  
COMPLAINT UNDER NRCP 12(b)(5)**

CORPORATION, which is the successor-by-merger to THE AMERICAN TOBACCO COMPANY; 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, JERRY'S NUGGET, a domestic corporation; and DOES I-X; and ROE BUSINESS ENTITIES XI-XX, inclusive

Defendants.

Plaintiff, DOLLY ROWAN, as Special Administrator of the Estate of NOREEN THOMPSON, by and through their counsel of record, SEAN K. CLAGGETT, ESQ., of CLAGGETT & SYKES LAW FIRM, hereby supplements her Motion to Reconsider Order Granting Defendant Philip Morris USA Inc.'s Motion to Dismiss Plaintiff's Amended Complaint Under NRCP 12(b)(5) filed on September 23, 2021.

Plaintiff is supplementing Judge Nadia Krall's Order in *Sandra Camacho v. Philip Morris USA Inc., et al.*, Case No: A-19-807650-C, that was referenced in her Motion and entered on November 4, 2021.

The Order is attached hereto.

DATED this 8<sup>th</sup> day of November 2021.

CLAGGETT & SYKES LAW FIRM

/s/ Sean K. Claggett

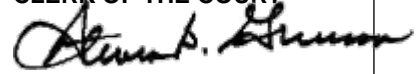
Sean K. Claggett, Esq.  
Nevada Bar No. 008407  
Attorneys for Plaintiff

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 8<sup>th</sup> day of November 2021 I caused to be served a true and correct copy of the **PLAINTIFF'S SUPPLEMENT TO MOTION TO RECONSIDER ORDER GRANTING DEFENDANT PHILIP MORRIS USA INC.'S MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT UNDER NRCP 12(b)(5)** on the following person(s) by the following method(s) pursuant to NRCP 5(b) and NEFCR 9:

<b>VIA E-SERVICE ONLY:</b> Dennis L. Kennedy, Esq. Joseph A. Liebman, Esq. BAILEY KENNEDY 8984 Spanish Ridge Avenue Las Vegas, Nevada 89148-1302 <i>Attorneys for R.J. Reynolds Tobacco Company, Quick Stop Market, Joe's Bar, Inc., The Poker Palace, Silver Nugget Gaming, LLC D/B/A Silver Nugget Casino, and Jerry's Nugget</i>	<b>VIA E-SERVICE ONLY:</b> D. Lee Roberts, Jr., Esq. Phillip N. Smith, Jr., Esq. Daniela LaBounty, Esq. WEINBERG WHEELER HUDGINS GUNN & DIAL 6385 South Rainbow Boulevard, Suite 400, Las Vegas, Nevada 89118 <i>Attorneys for Philip Morris USA, Inc. and ASM Nationwide Corporation</i>
<b>VIA E-SERVICE ONLY:</b> Daniel F. Polsenberg, Esq. J. Christopher Jorgensen, Esq. LEWIS ROCA ROTHGERBER CHRISTIE 3993 Howard Hughes Parkway, #600 Las Vegas, Nevada 89169 <i>Attorneys for Liggett Group, LLC</i>	<b>VIA E-SERVICE ONLY:</b> Kelly Anne Luther, Esq. KASOWITZ BENSON TORRES LLP 1441 Brickwell Avenue, Suite 1420 Miami, FL 33131 <i>Attorneys for Defendant Liggett Group, LLC</i>
<b>VIA E-SERVICE ONLY:</b> Valentin Leppert Esq. KING & SPALDING 1180 Peachtree Street Atlanta, GA 30309-3521 <i>Attorneys for R.J. Reynolds Tobacco Company, Quick Stop Market, Joe's Bar, Inc., The Poker Palace, Silver Nugget Gaming, LLC D/B/A Silver Nugget Casino, and Jerry's Nugget</i>	<b>VIA E-SERVICE ONLY:</b> Ursula Marie Henninger, Esq. KING & SPALDING 300 S. Tryon Street Charlotte, North Carolina 28202 <i>Attorneys for R.J. Reynolds Tobacco Company, Quick Stop Market, Joe's Bar, Inc., The Poker Palace, Silver Nugget Gaming, LLC D/B/A Silver Nugget Casino, and Jerry's Nugget</i>
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/s/: Moises Garcia  
An Employee of CLAGGETT & SYKES  
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12 *Attorneys for Plaintiffs*

DISTRICT COURT

CLARK COUNTY, NEVADA

11 SANDRA CAMACHO, individually,  
12 and ANTHONY CAMACHO, individually,

13 Plaintiffs,

14 v.

CASE NO.: A-19-807650-C

DEPT. NO.: IV

15 PHILIP MORRIS USA, INC., a foreign  
16 corporation; R.J. REYNOLDS TOBACCO  
17 COMPANY, a foreign corporation,  
18 individually, and as successor-by-merger  
19 to LORILLARD TOBACCO COMPANY  
20 and as successor-in-interest to the United  
21 States tobacco business of BROWN &  
22 WILLIAMSON TOBACCO  
23 CORPORATION, which is the successor-  
24 by-merger to THE AMERICAN TOBACCO  
25 COMPANY; LIGGETT GROUP, LLC., a  
26 foreign corporation; and ASM  
27 NATIONWIDE CORPORATION d/b/a  
28 SILVERADO SMOKES & CIGARES, a  
domestic corporation, and LV SINGHS  
INC. d/b/a SMOKES & VAPORS, a  
domestic corporation; DOES I-X; and ROE  
BUSINESS ENTITIES XI-XX, inclusive,

Defendants.

**NOTICE OF ENTRY OF ORDER**

1 PLEASE TAKE NOTICE that an Order in the above-entitled action was entered  
2 and filed on November 3, 2021.

3 A copy of which is attached hereto.

4  
5 DATED this 4th day of November, 2021.

6 CLAGGETT & SYKES LAW FIRM

7 /s/ Sean K. Claggett  
8 Sean K. Claggett, Esq.  
9 Nevada Bar No. 008407  
10 *Attorney for Plaintiffs*

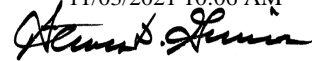
**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 4th day of November 2021, I caused to be served a true and correct copy of the foregoing **NOTICE OF ENTRY OF ORDER** on the following person(s) by the following method(s) pursuant to NRCP 5(b) and NEFCR 9:

<b>VIA E-SERVICE ONLY:</b> <i>Dennis L. Kennedy, Esq.</i> <i>Joseph A. Liebman, Esq.</i> <b>BAILEY KENNEDY</b> <i>8984 Spanish Ridge Avenue</i> <i>Las Vegas, Nevada 89148-1302</i> <i>Email: <a href="mailto:DKennedy@BaileyKennedy.com">DKennedy@BaileyKennedy.com</a></i> <i><a href="mailto:JLiebman@BaileyKennedy.com">JLiebman@BaileyKennedy.com</a></i> <i>Attorneys for R.J. Reynolds Tobacco Company</i>	<b>VIA E-SERVICE ONLY:</b> <i>D. Lee Roberts, Jr., Esq.</i> <i>Phillip N. Smith, Jr., Esq.</i> <i>Daniela LaBounty, Esq.</i> <b>WEINBERG WHEELER HUDGINS</b> <b>GUNN &amp; DIAL</b> <i>6385 South Rainbow Boulevard, Suite 400</i> <i>Las Vegas, Nevada 89118</i> <i>Attorneys for Philip Morris USA, Inc. and</i> <i>ASM Nationwide Corporation</i>
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<b>VIA E-SERVICE ONLY:</b> <i>Kelly Anne Luther, Esq.</i> <b>KASOWITZ BENSON TORRES LLP</b> <i>1441 Brickwell Avenue, Suite 1420</i> <i>Miami, FL 33131</i> <i>Email: <a href="mailto:kluther@kasowitz.com">kluther@kasowitz.com</a></i> <i>Attorneys for Defendant Liggett Group, LLC</i>	

/s/ Lindsay S. Cortez

An Employee of Claggett & Sykes Law Firm



CLERK OF THE COURT

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**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

SANDRA CAMACHO, individually, and  
ANTHONY CAMACHO, individually,

Plaintiffs,

vs.

PHILIP MORRIS USA, INC., a foreign corporation; R.J. REYNOLDS TOBACCO COMPANY, a foreign corporation, individually, and as successor-by-merger to LORILLARD TOBACCO COMPANY and as successor-in-interest to the United States tobacco business of BROWN & WILLIAMSON TOBACCO CORPORATION, which is the successor-by-merger to THE AMERICAN TOBACCO COMPANY; LIGGETT GROUP, LLC., a foreign limited liability company; and ASM NATIONWIDE CORPORATION d/b/a SILVERADO SMOKES & CIGARS, a domestic corporation; and LV SINGHS INC. d/b/a

CASE NO. A-19-807650-C

DEPT. NO. IV

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



SMOKES & VAPORS, a domestic corporation;  
DOES 1-X; and ROE BUSINESS ENTITIES  
XI-XX, inclusive,

Defendants.

**Date of Hearing: September 23, 2021**

**Time of Hearing: 9:00 a.m.**

The Court, having reviewed (1) Plaintiffs' Motion to Reconsider Order Granting R.J. Reynolds Tobacco Company's Motion to Dismiss Plaintiffs' Amended Complaint Under NRCP 12(b)(5) (filed on May 25, 2021); (2) Defendant R.J. Reynolds Tobacco Company's ("R.J. Reynolds") Opposition (filed on June 22, 2021); and (3) Plaintiffs' Reply (filed on August 3, 2021), and having heard the argument of counsel at the time of the hearing on September 23, 2021, hereby ORDERS as follows:

1. Plaintiffs' Motion to Reconsider is hereby GRANTED.

2. The effect of this Order is that Plaintiffs' claims for (1) violation of the Nevada Deceptive Trade Practices Act ("NDTPA") and (2) civil conspiracy against R.J. Reynolds are hereby reinstated.

3. The Court first notes that according to NRCP 54(b), it has the right to reconsider the prior Order Granting Defendant R.J. Reynolds Tobacco Company's Motion to Dismiss Plaintiffs' Amended Complaint Under NRCP 12(b)(5) (filed on August 27, 2020). *See, e.g., 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.").

4. The prior August 27, 2020, Order Granting Defendant R.J. Reynolds Tobacco Company's Motion to Dismiss is clearly erroneous for several reasons:

a. Plaintiffs' claim for violation of the NDTPA is based upon the plain language of the several statutory provisions. Yet, the prior August 27, 2020, Order erroneously adds language to the statutory requirements of the NDTPA by requiring Plaintiffs to "purchase or use" an R.J. Reynolds' product. Ord. at 2. The prior August 27, 2020, Order also erroneously required Plaintiffs to have a "legal relationship" with R.J. Reynolds. These requirements

1 improperly exceed the statutory requirements of NRS 41.600 and NRS Chapter 598. *See,*  
2 *e.g.*, NRS 598.0915; NRS 598.094. *See S. Nev. Homebuilders Ass’n v. Clark Cty.*, 121 Nev.  
3 446, 451, 117 P.3d 171, 174 (2005) (“[I]t is not the business of this court to fill in alleged  
4 legislative omissions based on conjecture as to what the legislature would or should have  
5 done.”). Thus, the Court grants reconsideration and concludes that Plaintiffs have properly  
6 alleged a claim for violation of the NDTPA against R.J. Reynolds to survive a challenge under  
7 NRCP 12(b)(5).

8           b. The Court’s construction of NRS 41.600 and NRS Chapter 598 in granting  
9 reconsideration is consistent with the Supreme Court’s clarification in *Betsinger v. D.R.*  
10 *Horton, Inc.*, 126 Nev. 162, 232 P.3d 433 (2010) that an NDTPA claim is easier to establish  
11 than common law fraud. The Court of Appeals also more recently confirmed, “Because the  
12 NDTPA is a remedial statutory scheme,” this Court should “afford [it] liberal construction to  
13 accomplish its beneficial intent.” *Poole v. Nevada Auto Dealership Investments, LLC*, 135  
14 Nev. 280, 286–287, 449 P.3d 479, 485 (Ct. App. 2019) (citing *Welfare Div. of State Dep’t of*  
15 *Health, Welfare & Rehab. v. Washoe Cty. Welfare Dep’t*, 88 Nev. 635, 637 (1972)). Thus,  
16 the Court concludes that Plaintiffs have standing and have sufficiently alleged a claim for  
17 violation of the NDTPA against R.J. Reynolds to survive a challenge under NRCP 12(b)(5).

18           c. Since the Court has reinstated Plaintiffs’ claim for violation of the NDTPA  
19 against R.J. Reynolds, this claim provides the necessary predicate for the Court to also  
20 reinstate Plaintiffs’ conspiracy claim against R.J. Reynolds. In Nevada, “an underlying cause  
21 of action for fraud is a necessary predicate to a cause of action for conspiracy to defraud.”  
22 *Jordan v. State ex rel. Dept. of Motor Vehicles & Pub. Safety*, 121 Nev. 44, 75, 110 P.3d 30,  
23 51 (2005), *abrogated on other grounds by Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev.  
24 224, 228 n.6, 181 P.3d 670, 672 n.6 (2008).

25           5. On the issue of discovery, the Court notes that there is an upcoming jury trial date of  
26 August 1, 2022. Despite R.J. Reynolds’ offer at the hearing that it could participate in discovery as  
27 a non-party (viewing itself as dismissed under the prior August 27, 2020, Order), the Court does not  
28 have the authority to compel a non-party to participate in discovery. Thus, as a practical matter, if

the Court were to leave R.J. Reynolds dismissed under the erroneous August 27, 2020, Order, the discovery in this case would have to be duplicated upon the reinstatement of Plaintiffs' claims against R.J. Reynolds. Thus, the Court's decision to grant Plaintiffs' motion to reconsider and reinstate Plaintiffs' claims against R.J. Reynolds more fully supports judicial economy than R.J. Reynolds' offer to voluntarily participate in discovery, while remaining dismissed from the case. Now that Plaintiffs' claims against R.J. Reynolds are reinstated, R.J. Reynolds can participate in discovery as a party to this litigation.

IT IS SO ORDERED.

Dated this 3rd day of November, 2021



3F8 F16 93CB E87D  
Nadia Krall  
District Court Judge

Respectfully Submitted by:  
Dated this 2<sup>nd</sup> day of November 2021.

CLAGGETT & SYKES LAW FIRM

/s/ Sean K. Claggett

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Reviewed as to Form and Content:  
Dated this \_\_\_\_ day of \_\_\_\_ 2021.

BAILEY KENNEDY

*Submitting Competing Order*

\_\_\_\_\_  
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1 **CSERV**

2  
3 DISTRICT COURT  
CLARK COUNTY, NEVADA

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6 Sandra Camacho, Plaintiff(s) CASE NO: A-19-807650-C  
7 vs. DEPT. NO. Department 4  
8 Philip Morris USA Inc,  
9 Defendant(s)

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11 **AUTOMATED CERTIFICATE OF SERVICE**

12 This automated certificate of service was generated by the Eighth Judicial District  
13 Court. The foregoing Order was served via the court's electronic eFile system to all  
recipients registered for e-Service on the above entitled case as listed below:

14 Service Date: 11/3/2021

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