Case No. _____

IN THE SUPREME COURT OF NEVADA

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

Petitioner,

vs.

THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK, AND THE HONORABLE NADIA KRALL, DISTRICT COURT JUDGE,

Respondents,

- and -

SANDRA CAMACHO, individually; ANTHONY CAMACHO, individually; PHILIP MORRIS USA, INC., a foreign corporation; LIGGETT GROUP, LLC, a foreign corporation; and ASM NATIONWIDE CORPORATION d/b/a SILVERADO SMOKES & CIGARS, a domestic corporation,

Real Parties in Interest.

District Court Case No. A-19-807650-C, Department IV

APPENDIX OF EXHIBITS TO PETITION FOR WRIT OF MANDAMUS OR PROHIBITION

VOLUME 3 OF 6

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APPENDIX OF EXHIBITS TO PETITION FOR WRIT OF MANDAMUS OR PROHIBITION

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EXHIBIT 14

MOT

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DISTRICT COURT

CLARK COUNTY, NEVADA

SANDRA CAMACHO, individually, and ANTHONY CAMACHO, individually, Plaintiffs, 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-19-807650-C DEPT NO.: IV **PLAINTIFFS' MOTION TO RECONSIDER ORDER GRANTING DEFENDANT R.J. REYNOLDS TOBACCO COMPANY'S MOTION TO DISMISS PLAINTIFFS' AMENDED COMPLAINT UNDER NRCP 12(B)(5)** **HEARING REQUESTED**

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.

Plaintiffs, SANDRA CAMACHO and ANTHONY CAMACHO, individually, by and through their counsel of record, SEAN K. CLAGGETT, ESQ., of CLAGGETT & SYKES LAW FIRM, hereby move this Court to reconsider the Court's August 27, 2020 Order Granting Defendant R.J. Reynolds Tobacco Company's Motion to Dismiss Plaintiffs' Amended Complaint Under NRCP 12(b)(5), attached hereto as **Exhibit 1**. This motion is made and based upon all papers, pleadings, and records on file herein, the attached memorandum of points and authorities, and any oral argument allowed at the time of the hearing.

I. INTRODUCTION

Plaintiffs ask this Court to reconsider Judge Kerry Earley's previous dismissal of Plaintiffs' NDTPA and civil conspiracy claims against defendant R.J. Reynolds, because it was clearly erroneous.

As alleged in Plaintiffs' amended complaint, Defendant R.J. Reynolds conspired with other tobacco manufacturers to conceal the dangers of smoking and disseminate misinformation to the American public in an attempt to sell cigarettes to consumers, including Ms. Camacho. Due to decades of pervasive marketing and a misinformation

campaign denying that cigarettes cause cancer, Ms. Camacho became addicted to smoking, which ultimately caused her laryngeal cancer.

The central issue before this Court is whether the NDTPA and NRS 41.600 grant standing to victims of deceptive trade practices when the victims did not purchase or use the defendant's products. As discussed below, the answer is an affirmative "yes." The plain language of the relevant statutes supports Plaintiffs' NDTPA claim. Furthermore, the Nevada Supreme Court, the Ninth Circuit, and the Nevada Federal District Court have proscribed a narrow construction of the NDTPA in similar contexts and granted standing to non-purchasers and non-users of a defendant's products. Since Plaintiffs' NDTPA claim is viable, it also suffices as a predicate for the civil conspiracy claim. Therefore, this Court should reinstate Plaintiffs' claims against R.J. Reynolds.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. THE FACTS AND CIRCUMSTANCES GIVING RISE TO PLAINTIFFS' AMENDED COMPLAINT.[1]

1. Sandra's Laryngeal Cancer Diagnosis.

In March 2018, Sandra was diagnosed with laryngeal cancer, which was caused by smoking L&M brand cigarettes, Marlboro brand cigarettes, and Basic brand cigarettes, to which she was addicted and smoked continuously from approximately 1964 until 2017. *See* Plaintiff's Amended Complaint at 57, ¶ 17, attached hereto as **Exhibit 2**. L&M cigarettes were designed, manufactured, and sold by Liggett. *See* **Exhibit 2** at 57, ¶ 18. Marlboro and Basic cigarettes were designed, manufactured, and sold by Philip Morris. *See* **Exhibit 2** at 57, ¶ 19.

[1] Plaintiffs' amended complaint provides a full statement of their allegations and claims. *See* E**xhibit 2** at 52–106. This summarized version is designed to provide context for the Court to decide the legal issues presented.

2. Defendants Purposefully and Intentionally Designed Cigarettes To Be Highly Addictive.

As Plaintiffs' amended complaint explains, Defendants purposefully and intentionally designed cigarettes to be highly addictive by, among other things, deliberately manipulating and/or adding compounds in cigarettes such as arsenic, polonium-210, tar, methane, methanol, carbon monoxide, nitrosamines, butane, formaldehyde, tar, carcinogens, and other deadly and poisonous compounds to cigarettes. *See* **Exhibit 2** at 57, ¶ 22. Defendants then concealed the addictive and deadly nature of cigarettes from Plaintiffs, the government, and the American public by making knowingly false and misleading statements and by engaging in a $250 billion conspiracy. *See* **Exhibit 2** at 57, ¶ 23.

3. Historical Allegations of Defendants' Unlawful Conduct.

Lung cancer is a disease manufactured and created by the cigarette industry, including Defendants. *See* **Exhibit 2** at 60, ¶ 31. By February 2, 1953, Defendants had concrete proof that cigarette smoking increased the risk of lung cancer. *See* **Exhibit 2** at 60, ¶ 35. As a result of mounting public awareness regarding the link between cigarette smoking and lung cancer, Defendants grew fearful that their customers would stop smoking, which would in turn bankrupt their companies. *See* **Exhibit 2** at 61, ¶ 37. Thus, in order to maximize profits, Defendants intentionally banded together, forming a conspiracy which, for over half a century, fabricated and publicized a disingenuous "open debate" to create and spread doubt about whether cigarettes were or were not harmful. *See* **Exhibit 2** at 61, ¶ 38.

Executives from every cigarette company, except for Liggett, met at the Plaza Hotel on December 14, 1953 to form the conspiracy. *See* **Exhibit 2** at 61, ¶ 40. On December 28, 1953, Defendants again met at the Plaza Hotel where they knowingly and purposefully agreed to create a fake "research committee" called the Tobacco Industry Research Committee ("TIRC") (later renamed the Council for Tobacco Research ("CTR")). *See* **Exhibit 2** at 62, ¶ 42. Paul Hahn, president of American Tobacco, was elected the temporary chairman of TIRC. *Id.* TIRC's *public* mission statement was to supposedly aid and assist with so-called "independent" research into cigarette use and health. *See* **Exhibit 2** at 62, ¶ 43. The formation and purpose of TIRC was announced on January 4, 1954, in a full-page advertisement called "A Frank Statement to Cigarette Smokers" published in 448 newspapers throughout the United States. *See* **Exhibit 2** at 62, ¶ 44.

For the next five decades, TIRC/CTR worked diligently, and quite successfully, to rebuff the public's concern about the dangers of cigarettes. Defendants, through TIRC/CTR, invented the false and misleading notion that there was an "open question" regarding cigarette smoking and health. *See* **Exhibit 2** at 63, ¶ 47. They appeared on television and radio to broadcast this message. *Id.*

In 1964, there was another dip in the consumption of cigarettes because the United States Surgeon General reported that "cigarette smoking is causally related to lung cancer in men . . . the data for women, though less extensive, points in the same direction." *See* **Exhibit 2** at 63, ¶ 51. The cigarette industry's public response, through TIRC, to the 1964 Surgeon General Report was to falsely assure the public that (i) cigarettes were not injurious to health, (ii) the industry would cooperate with the Surgeon General, (iii) more research was needed, and (iv) if there were any bad elements

discovered in cigarettes, the cigarette manufacturers would remove those elements. *See* **Exhibit 2** at 64, ¶ 52. As a result, cigarette consumption again began to rise. *Id.* Despite Defendants' public response, internally they were fully aware of the magnitude and depth of the lies and deception they were promulgating. *See* **Exhibit 2** at 64, ¶ 53. They knew and understood that they were making fake, misleading promises that would never come to fruition. *Id.* Their own internal records reveal that they knew, even back in 1964, that cigarettes were not only hazardous, but deadly. *Id.* Defendants' sole priority was to make as much money as quickly as possible, with no concern about the safety and well-being of their customers. *See* **Exhibit 2** at 65, ¶ 56.

In 1966, the United States Government mandated that a "Caution" label be placed on packs of cigarettes stating, "Cigarette Smoking May be Hazardous to Your Health." *See* **Exhibit 2** at 65, ¶ 57. The cigarette industry responded to the "Caution" label by continuing its massive public relations campaign, continuing to spread doubt and confusion, and continuing to deceive the public. *See* **Exhibit 2** at 65, ¶ 58. Throughout this period, Defendants also introduced "filtered" cigarettes—cigarettes falsely marketed, advertised, and promoted as "less tar" and "less nicotine." *See* **Exhibit 2** at 65, ¶ 59. However, internally, in Defendants' previously concealed, hidden documents, discussions regarding the true nature of filtered cigarettes were revealed—filters were just as harmful, dangerous, and hazardous as unfiltered cigarettes; in fact, they were more dangerous. *See* **Exhibit 2** at 65, ¶ 60.

Throughout the 1960s, 1970s, 1980s, and 1990s, the cigarette industry, including Defendants, spent $250 billion dollars in marketing efforts to promote the sale of cigarettes. *See* **Exhibit 2** at 66, ¶ 61. The cigarette industry spent more money on

marketing and advertising cigarettes in ***one day*** than the public health community spent in ***one year***. *See* **Exhibit 2** at 66, ¶ 62.

In 1985, four rotating warning labels were placed on packs of cigarettes which warned, for the first time, that smoking causes lung cancer, heart disease, emphysema, and may complicate pregnancy. *See* **Exhibit 2** at 67, ¶ 69. The cigarette industry, including Defendants, opposed these warning labels. *See* **Exhibit 2** at 67, ¶ 70. Throughout the 1980s, despite the warning labels having been placed on their cigarette packs, Defendants' representatives at the Tobacco Institute ("TI") publicly stated that whether smoking cigarettes caused cancer and whether cigarettes were addictive remained unknown and that, apparently, "more research was needed." *See* **Exhibit 2** at 67, ¶ 70.

In 1988, the United States Surgeon General reported that cigarettes and other forms of tobacco were addicting, and that nicotine is the drug in tobacco that causes addiction. In fact, in his report, the Surgeon General compared tobacco addiction to heroin and cocaine. *See* **Exhibit 2** at 68, ¶ 71. In response, the cigarette industry, including Defendants herein, issued a press release knowingly and disingenuously stating, "Claims that cigarettes are addictive is irresponsible and scare tactics." *See* **Exhibit 2** at 68, ¶ 72.

In 1994 CEOs from the seven largest cigarette companies, including Defendants, testified under oath before the United States Congress that, in each of their opinions, it had not been proven that cigarettes were addictive, caused disease, or caused one single person to die. *See* **Exhibit 2** at 68, ¶ 74.

This sophisticated conspiracy involved hundreds of billions of dollars spent on marketing efforts, massive deception including lying under oath before Congress and other governmental entities, forming fake organizations with fake scientists and fake research, and creating a "brilliantly conceived" public relations campaign designed to create and sustain doubt and confusion regarding a—made-up—cigarette controversy. *See* **Exhibit 2** at 70, ¶ 86. This conspiracy is memorialized through Defendants' own documents, authored by their own executives and scientists, including in over 14 million previously-concealed records. *See* **Exhibit 2** at 70, ¶ 87.

4. Plaintiffs' Claims Against Defendants.

In their amended complaint, Plaintiffs[2] asserted the following claims against Defendants: (1) negligence—Ms. Camacho against Philip Morris and Liggett (*See* **Exhibit 2** at 70–75); (2) gross negligence—Ms. Camacho against Philip Morris and Liggett (*See* **Exhibit 2** at 75–78); (3) strict products liability—Ms. Camacho against Philip Morris and Liggett (*See* **Exhibit 2** at 78–82); (4) fraudulent misrepresentation—Ms. Camacho against Philip Morris and Liggett (*See* **Exhibit 2** at 83–89); (5) fraudulent concealment—Ms. Camacho against Philip Morris and Liggett (*See* **Exhibit 2** at 90–94); (6) civil conspiracy— Ms. Camacho against Philip Morris, R.J. Reynolds, and Liggett (*See* **Exhibit 2** at 95–98); (7) violation of Deceptive Trade Practices Act (NRS 598.0903)—Ms. Camacho against Philip Morris, R.J. Reynolds, and Liggett (*See* **Exhibit 2** at 98–102); and (8) strict product liability— Ms. Camacho against ASM Nationwide Corporation d/b/a Silverado Smokes & Cigars ("ASM") and LV Singhs Inc. d/b/a Smokes & Vapors ("LV Singhs"). *See* **Exhibit 2** at 102–104.

[2] Mr. Camacho's claims sound in loss of consortium and are derivative of Ms. Camacho's claims. *See, e.g., Gunlock v. New Frontier Hotel*, 78 Nev. 182, 185 n.1, 370 P.2d 682, 684 n.1 (1962).

B. THE MOTIONS TO DISMISS FILED BY (1) PHILIP MORRIS, LIGGETT, AND ASM AND (2) R.J. REYNOLDS, AND PLAINTIFFS' OPPOSITIONS.

Philip Morris, Liggett, and ASM jointly filed a motion to dismiss Plaintiffs' amended complaint according to the dismissal standard in NRCP 12(b)(5). *See* Defendants' Philip Morris USA Inc's Motion to Dismiss Plaintiffs Amended Complaint Under NRCP 12(b)(5) **Exhibit 3** at 107–137. Essentially, this motion to dismiss argued against the substance of Plaintiffs' claims. *Id.* Plaintiffs opposed each of the arguments advanced by Philip Morris, Liggett, and ASM. *See* Plaintiffs' Opposition to Defendants' Philip Morris USA Inc's Motion to Dismiss Plaintiffs Amended Complaint Under NRCP 12(b)(5), attached hereto as **Exhibit 4.**

R.J. Reynolds also filed a motion to dismiss under NRCP 12(b)(5), arguing that because Sandra did not actually use its product, there could be no claim based upon a "disguised" product liability claim. *See* Defendants' R.J. Reynold's Motion to Dismiss Plaintiffs Amended Complaint Under NRCP 12(b)(5), attached hereto as **Exhibit 5** at 142–144. R.J. Reynolds also argued that Plaintiffs' claim for violation of the NDTPA failed, due to the lack of causation. *See* **Exhibit 5** at 144–145. R.J. Reynolds finally argued that if Plaintiffs' claims against Philip Morris and Liggett were dismissed, Plaintiffs' civil conspiracy claim against R.J. Reynolds would also need to be dismissed, due to the absence of sufficient actors to form a conspiracy claim. *See* **Exhibit 5** at 145. In response, Plaintiffs argued that their claims do not fail for lack of product use. *See* Plaintiff's Opposition to Defendant R.J. Reynolds' Motion to Dismiss Plaintiffs' Amended Complaint Under NRCP 12(b)(5), attached hereto as **Exhibit 6** at 231–234.

Additionally, Plaintiffs explained that their allegations regarding Defendants' massive conspiracy were based upon combined actors, including R.J. Reynolds, such that Plaintiffs' claims for violation of the NDTPA and civil conspiracy could not be dismissed. *See* **Exhibit 6** at 234–235.

Judge Kerry Earley heard argument on both motions to dismiss. *See* June 11, 2020 Transcript, attached hereto as **Exhibit 7** at 312–377. At the conclusion of the hearing, Judge Earley did not make a decision but took the matters under advisement. *See* **Exhibit 7** at 375–376.

C. JUDGE EARLEY'S ORDERS RESOLVING THE MOTIONS TO DISMISS.

With regard to Plaintiffs' claims against Philip Morris and Liggett, Judge Earley concluded that Plaintiffs alleged a cognizable claim for violation of the NDTPA. *See* Order Granting In Part and Denying In Part Defendants Philip Morris USA Inc.'s Motion to Dismiss Plaintiff's Amended Complaint Under NRCP 12(b)(5), attached hereto as **Exhibit 8** at 381. Similarly, Judge Earley concluded that Plaintiffs alleged a cognizable claim for civil conspiracy against Philip Morris and Liggett. *See* **Exhibit 8** at 381.

However, with respect to R.J. Reynolds, Judge Earley ruled that Sandra "did not purchase or use any R.J. Reynolds product" and had no "legal relationship with R.J. Reynolds," such that Plaintiffs had no claim against R.J. Reynolds based upon the NDTPA. *See* Order Granting Defendant R.J. Reynolds Tobacco Company's Motion to Dismiss Plaintiffs' Amended Complaint Under NRCP 12(b)(5), attached hereto as **Exhibit 1** at 464–465. Judge Earley further held that the absence of an underlying NDTPA claim also required

the dismissal of Plaintiffs' claim for civil conspiracy against R.J. Reynolds. *See* **Exhibit 1** at 465.

Plaintiffs now petition this Court to reinstate their claims against R.J. Reynolds for (1) violation of the NDTPA; and (2) civil conspiracy.

II. RECONSIDERATION STANDARD

"A district court may reconsider a previously decided issue if substantially different evidence is subsequently introduced **or the decision is clearly erroneous**." *Masonry and Tile Contractors Ass'n of S. Nev. v. Jolley, Urga & Wirth, Ltd.*, 113 Nev. 737, 741, 941 P.2d 486, 489 (1997) [Emphasis added]. "Unless and until an order is appealed, the district court retains jurisdiction to reconsider the matter." *Gibbs v. Giles*, 96 Nev. 243, 245, 607 P.2d 118, 199 (1980); *see also In re Manhattan W. Mechanic's Lien Litig.*, 131 Nev. 702, 707 n.3, 359 P.3d 125, 128 n.3 (2015) ("[The petitioner] argues that the district court erred in reconsidering the motion. [The petitioner's] argument is without merit because NRCP 54(b) permits the district court to revise a judgment that adjudicates the rights of less than all the parties until it enters judgment adjudicating the rights of all the parties.")

III. LEGAL ARGUMENT

D. JUDGE EARLEY'S DISMISSAL OF PLAINTIFFS' CLAIM AGAINST R.J. REYNOLDS FOR VIOLATION OF THE NDTPA WAS CLEARLY ERRONEOUS.

1. The Plain Language of the NDTPA Supports Plaintiffs' Claim.

The primary goal of interpreting statutes is to effectuate the Legislature's intent. *See Cromer v. Wilson*, 126 Nev. 106, 109, 225 P.3d 788, 790 (2010). Courts must

interpret clear and unambiguous statutes based on their plain meaning. *Id.* Indeed, "if a statute is unambiguous, this [C]ourt does not look beyond its plain language in interpreting it." *Westpark Owners' Ass'n v. Eighth Judicial Dist. Court*, 123 Nev. 349, 357, 167 P.3d 421, 427 (2007); *Picus v. Wal-Mart Stores, Inc.*, 256 F.R.D. 651, 657 (D. Nev. 2009).

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

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

NRS 598.0915 (emphases added).

While "transaction" is not defined by the statute, it necessarily encompasses "sales" since the Legislature used the word in a catch-all category to penalize "any other false representation." *Id.*; *see also* "transaction," BLACK'S LAW DICTIONARY, 1802 (11th ed. 2019) ("**1.** The act or an instance of conducting business or other dealings; esp., the

formation, performance, or discharge of a contract. **2.** Something performed or carried out; a business agreement or exchange. **3.** Any activity involving two or more persons. **4.** *Civil law.* An agreement that is intended by the parties to prevent or end a dispute and in which they make reciprocal concessions.").

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

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

Judge Earley erred when she read such a requirement into the NDTPA because that reading conflated claims under the statute with claims under the common law. In *Betsinger v. D.R. Horton, Inc.*, 126 Nev. 162, 232 P.3d 433 (2010), the Nevada Supreme Court rejected a request to read a similarly unmentioned requirement into the NDTPA. The defendant there argued that NDTPA claims must be proven by clear and convincing evidence since common law fraud claims require such a standard of proof. The Supreme Court declined and held that "[s]tatutory offenses that sound in fraud are separate and distinct from common law fraud." *Id.* at 166. Notably, the Supreme Court agreed with an Arizona court's analysis: "the purpose of the consumer protection statute was to

provide consumers with a cause of action that was easier to establish than common law fraud.…" *Id.* Therefore, the Supreme Court refused to add an additional burden onto the plaintiff alleging an NDTPA claim absent any legislative directive.

The same logic and principles apply to this case. Where there is no legislative directive to require product-purchase or product-use, the Court must abide by the plain language of the NDTPA, treat it distinctly from common law fraud, and not insert the Court's own requirements. *See S. Nev. Homebuilders Ass'n v. Clark Cty.*, 121 Nev. 446, 451, 117 P.3d 171, 174 (2005) ("[I]t is not the business of this court to fill in alleged legislative omissions based on conjecture as to what the legislature would or should have done."). Here, Plaintiffs properly notified R.J. Reynolds by pleading that R.J. Reynolds both offered and attempted to sell Ms. Camacho its cigarettes over several decades through aggressive marketing efforts, event sponsorships, and deceptive public relations campaigns along with other tobacco manufacturers. *See* Complaint and Jury Trial Demand, attached hereto as **Exhibit 9** at 5–19; 44–47. The pleading is sufficient; thus, Judge Earley's dismissal of the NDTPA claim was clearly erroneous.

2. <u>NRS 41.600 Provides Plaintiffs With Standing.</u>

While this Court can and, therefore, must resolve this issue on the plain language of the NDTPA, Judge Earley erroneously relied on a separate argument that must be corrected. NRS 41.600(1) grants a private right of action to victims of consumer fraud, which includes deceptive trade practices as defined in NRS 598.0915, the NDTPA provision at issue. Neither the plain language nor case law commenting on NRS 41.600 has ever required a plaintiff to allege product-purchase or product-use to gain standing

to make an NDTPA claim. Quite the opposite, case law proscribes such a narrow construction.

a. The Plain Language of NRS 41.600 Incorporates the NDTPA and, Therefore, Grants Standing to Plaintiffs, Despite Non-Use of R.J. Reynolds' Products.

The statutory language is as follows:

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

NRS 41.600 (emphasis added).

By referring to NRS 598.0915 in subsection 2(e), NRS 41.600 relies on the legislative scheme established by the NDTPA. Being a statute under Title 3, "Remedies; Special Actions and Proceedings," NRS 41.600 does not specify plaintiffs with standing in each consumer fraud scenario, but instead relies on other statutes to define their own parameters of who may sue the wrongdoer. *See Del Webb Communities, Inc. v. Partington*, 652 F.3d 1145, 1152 (9th Cir. 2011) ("NRS 41.600(2) defines the kinds of actions that constitute 'consumer fraud' not by referring to a certain type of victim, but by cross-referencing other NRS sections defining deceptive trade practices and other offenses.").

As discussed, 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. The two statutes do not conflict and the legislative intent is clear: one can be a victim of deceptive trade practices even if the deception occurred during an offer or an attempt that did not end in a purchase.

b. A Non-User of R.J. Reynolds' Product Can Be a Victim under NRS 41.600.

The interplay between the NDTPA and NRS 41.600 has been addressed by various courts. The case law proscribes a narrow definition of "victim," especially if the limitation would exclude plaintiffs who are harmed by deceptive trade practices. "Because the NDTPA is a remedial statutory scheme," this Court should "afford [it] liberal construction to accomplish its beneficial intent." *Poole v. Nevada Auto Dealership Investments, LLC*, 135 Nev. 280, 286–287, 449 P.3d 479, 485 (Ct. App. 2019) (citing *Welfare Div. of State Dep't of Health, Welfare & Rehab. v. Washoe Cty. Welfare Dep't,* 88 Nev. 635, 637 (1972)).

Previously, Judge Earley dismissed Plaintiffs' NDTPA claim because:

> It is undisputed that Plaintiff Sandra Camacho did not purchase or use any R.J. Reynolds product. Plaintiffs therefore could not plead facts sufficient to show that R.J. Reynolds caused damage to the Sandra Camacho. Further, Plaintiffs did not plead sufficient facts alleging that Sandra Camacho had any legal relationship with R.J. Reynolds, which is also necessary to support an NDTPA claim.

See **Exhibit 1** at 464. However, the existing body of case law—listed below—clearly shows that these requirements of product use/purchase and legal relationship between Ms. Camacho and R.J. Reynolds should not have been read into the NDTPA and NRS 41.600.

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

More importantly, the courts do not restrict the phrase "directly harmed" to mean only harm occurring between a seller and a consumer. Instead, individuals without any legal relationship with the wrongdoer may bring an action under the NDTPA if they suffered from deceptive trade practices. In *S. Serv. Corp*, the court granted standing to the defendant's business competitor, who lost several contracts to the defendant because the defendant's deceptive practices allowed it to reduce costs and underbid the competitor. In *Bates v. Dollar Loan Ctr., LLC*, No. 2:13-CV-1731-KJD-CWH, 2014 WL 3516260, at *3 (D. Nev. July 15, 2014), the court granted standing to a plaintiff who suffered invasion of privacy due to the defendant's deceptive practices, even though the plaintiff was not the borrower from Dollar Loan Center but merely the borrower's credit reference. Indeed, the Ninth Circuit construes the NDTPA to provide standing even beyond consumers and competitors. *See Del Webb Communities*, 652 F.3d at 1153 ("There is no basis in the text of NRS 41.600 or in *Southern Service* to limit standing to a group broader than consumers but no broader than business competitors.").

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

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

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

Id at 1145.

Whereas the plaintiffs in *Prescott* failed to claim that the defendant's false statement deprived them of their commercial business, Plaintiffs at bar enumerated a long list of deceptive practices by R.J. Reynolds and the other Defendants that concealed the dangers of smoking, addicted Ms. Camacho to cigarettes, and led to her laryngeal cancer. *See* **Exhibit 2** at 99–101. Causation is clearly alleged.

R.J. Reynolds' deceptive practices directly harmed Ms. Camacho, independent of its products. That is the basis for Plaintiffs' NDTPA claim. In light of *Del Webb Communities*, *S. Serve Corp.*, *Bates*, *Sears*, and *Prescott*, Judge Earley erred by reading restrictions into the NDTPA and NRS 41.600 where there is no legislative directive to do so and only broad construction is proper. *See S. Nev. Homebuilders Ass'n*, 121 Nev. at 451, 117 P.3d at 174 ("[I]t is not the business of this court to fill in alleged legislative omissions based on conjecture as to what the legislature would or should have done.").

E. JUDGE EARLEY ALSO ERRED BY DISMISSING PLAINTIFFS' CLAIM AGAINST R.J. REYNOLDS FOR CIVIL CONSPIRACY.

1. <u>Civil Conspiracy Extends Liability Beyond the Active Wrongdoer.</u>

"A civil conspiracy claim operates to extend, beyond the active wrongdoer, liability in tort to actors who have merely assisted, encouraged or planned the wrongdoer's acts." *Flowers v. Carville*, 266 F. Supp. 2d 1245, 1249 (D. Nev. 2003) (citing 16 AM.JUR. 2D, *Conspiracy*, § 57 (1998)).

This tort creates a cause of action against "a combination of two or more persons who, by some concerted action, intend to accomplish an unlawful objective for the purpose of harming another, and damage results from the act or acts.'" *Consol. Generator-Nevada v. Cummins Engine Co.*, 114 Nev. 1304, 1311 (1998) (citation

omitted). The essence of civil conspiracy is damages which result from the tort underlying the conspiracy, not the legal relationship between the tortfeasor and the victim. *See* 16 AM.JUR. 2D, *Conspiracy*, § 57 (1998); *Flowers*, 266 F. Supp. 2d at 1249.

As the Supreme Court of California noted and the Ninth Circuit agreed:

> In such an action the major significance of the conspiracy lies in the fact that it renders each participant in the wrongful act responsible as a joint tortfeasor for all damages ensuing from the wrong, ***irrespective of whether or not he was a direct actor and regardless of the degree of his activity***.

Doctors' Co. v. Superior Court, 49 Cal. 3d 39, 40 (1989) (emphasis added); *see also Harrell v. 20th Century Ins. Co.*, 89-56261, 1991 WL 83396 (9th Cir. 1991) (unpublished).

Plaintiffs' civil conspiracy claim against R.J. Reynolds seeks to redress the exact type of malfeasance for which this tort is designed. While Ms. Sandra Camacho has never bought or used R.J. Reynolds' cigarettes, she was harmed by its conspiratorial conduct with the other Defendants. Under this claim, Ms. Camacho does not sue R.J. Reynolds for any product liability, but for its efforts with the other tobacco manufacturers to sustain a misinformation campaign over half of a century. In this case, R.J. Reynolds is not liable for selling her cigarettes, but for conspiring to misrepresent the state of scientific knowledge and to conceal what Defendants all knew to be the harm of smoking.

2. Once this Court Recognizes the Viability of Plaintiffs' Claim for Violation of the NDTPA Against R.J. Reynolds, the Court Should Also Reinstate Plaintiffs' Conspiracy Claim Against R.J. Reynolds.

In Nevada, "an underlying cause of action for fraud is a necessary predicate to a cause of action for conspiracy to defraud." *Jordan v. State ex rel. Dept. of Motor Vehicles & Pub. Safety*, 121 Nev. 44, 75, 110 P.3d 30, 51 (2005), *abrogated on other grounds*

by Buzz Stew, LLC v. City of N. Las Vegas, 124 Nev. 224, 228 n.6, 181 P.3d 670, 672 n.6 (2008).

Judge Earley correctly recognized that the NDTPA claim suffices as a predicate for the civil conspiracy claim. In *Cadle Co. v. Woods & Erickson, LLP*, 131 Nev. 114, 118, 345 P.3d 1049, 1052 (2015), the Supeme Court clarified that the "unlawful objective" component of a civil conspiracy claim is not necessarily a tort claim. And, the "state of mind" component for a civil conspiracy claim is usually inappropriate for disposition by motion. *See Collins v. Union Fed. S&L Ass'n*, 99 Nev. 284, 303, 662 P.2d 610, 622 (1983). As such, when Judge Earley concluded that the NDTPA claim against the other two Defendants to be cognizable, it also denied their motion to dismiss the civil conspiracy claim. *See* **Exhibit 8** at 381. Since Plaintiffs' NDTPA claim against R.J. Reynolds is valid and sufficiently pled, this Court should reinstate Plaintiffs' NDTPA and civil conspiracy claims against R.J. Reynolds.

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IV. CONCLUSION

Plaintiffs' NDTPA claim is supported by the plain language of both the NDTPA and NRS 41.600. Because Judge Earley clearly erred by reading a narrower restriction into the statutes in the absence of any legislative directive and in contradiction to established caselaw, this Court should reinstate Plaintiffs' NDTPA claim. Since Plaintiffs' NDTPA claim suffices as a predicate, this Court should also reinstate their second claim for civil conspiracy.

DATED this 25th day of May 2021.

CLAGGETT & SYKES LAW FIRM

/s/ Micah S. Echols

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 25th day of May 2021 I caused to be served a true and correct copy of the **PLAINTIFFS' MOTION TO RECONSIDER ORDER GRANTING DEFENDANT R.J. REYNOLDS TOBACCO COMPANY'S MOTION TO DISMISS PLAINTIFFS' 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 LAW FIRM

Exhibit 1

ORD

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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 SMOKES & VAPORS, a domestic corporation; DOES 1-X; and ROE BUSINESS ENTITIES	Case No. A-19-807650-C Dept. No. IV **ORDER GRANTING DEFENDANT R.J. REYNOLDS TOBACCO COMPANY'S MOTION TO DISMISS PLAINTIFFS' AMENDED COMPLAINT UNDER NRCP 12(b)(5)**

XI-XX, inclusive,

Defendants.

On June 17, 2020, the Court issued a Minute Order regarding Defendant R.J. Reynolds Tobacco Company's Motion to Dismiss Plaintiffs' Sixth and Seventh Claims for Relief Under NRCP 12(b)(5). The Court, having considered Defendant's Motion, the Opposition, and Reply thereto, and arguments of counsel, hereby finds as follows:

THE COURT HEREBY FINDS that R.J. Reynolds Tobacco Company's Motion is **GRANTED**.

When deciding a Motion to Dismiss, the Court will recognize all factual allegations in the complaint as true and draw all inference in favor of the non-moving party. *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 228, 181 P.3d 670, 672 (2008). A complaint should be dismissed only if it appears beyond a doubt that it could prove no set of facts, which, if true, would entitle it to relief. *Id.* The court must accept a plaintiff's factual allegations as true, however, these allegations must be legally sufficient to constitute the elements of the claim asserted. *Garcia v. Prudential Ins. Co. of Am.*, 129 Nev. 15, 19, 293 P.3d 869, 872 (2013) (internal quotations omitted).

I. Plaintiff's Seventh Claim for Relief for Violation of Deceptive Trade Practices Act- NRS 598.0903 against Defendant R.J. Reynolds Tobacco Company

To successfully bring a claim under NRS 41.600(1) for violation of the Nevada Deceptive Trade Practices Act ("NDTPA"), a plaintiff must show that they were a victim of consumer fraud. In order to be a "victim," under NRS 41.600(1), the plaintiff must establish 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); *see also* NRS 41.600(2)(e).

It is undisputed that Plaintiff Sandra Camacho did not purchase or use any R.J. Reynolds product. Plaintiffs therefore could not plead facts sufficient to show that R.J. Reynolds caused damage to the Sandra Camacho. Further, Plaintiffs did not plead sufficient facts alleging that Sandra Camacho had any legal relationship with R.J. Reynolds, which is also necessary to support an NDTPA claim.

THEREFORE, THE COURT hereby GRANTS Defendant R.J. Reynolds Tobacco Company's

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Motion to Dismiss Plaintiff's Seventh Claim for Relief for Violation of Deceptive Trade Practices and IT IS HEREBY ORDERED Plaintiff's Seventh Claim for Relief for Violation of Deceptive Trade Practices Act NRS 598.0903 are DISMISSED WITH PREJUDICE as to Defendant R.J. Reynolds Tobacco Company.

II. Plaintiff's Sixth Claim for Relief for Civil Conspiracy against Defendant R.J. Reynolds Tobacco Company

An actionable civil conspiracy consists of a combination of two or more persons who, by some concerted action, intend to accomplish an unlawful objective for the purpose of harming another, and damage results from the act or acts. Dow Chemical Co. v. Malhum, 114 Nev. 1468, 1488, 970 P.2d 98,112 (1998).

The Court notes that Civil Conspiracy is a derivative claim in Nevada with the Plaintiff alleging the Violation of Deceptive Trade Practices Act as the underlying unlawful objective. The Court finds that Plaintiffs' did not plead a claim for Civil Conspiracy pursuant to the Court's ruling that dismiss Plaintiff's Seventh Claim for Relief for Violation of Deceptive Trade Practices.

The Court hereby GRANTS Defendant R.J. Reynolds Tobacco Company's Motion to Dismiss Plaintiff's Sixth Claim for Relief of Civil Conspiracy and it is hereby ordered that Plaintiff's Sixth Claim for relief for Civil Conspiracy is DISMISSED WITH PREJDICE as to Defendant R.J. Reynolds Tobacco Company.

DATED this ____ day of August, 2020.

Dated this 27th day of August, 2020

Kerry S Earley

DISTRICT COURT JUDGE
668 427 7482 879C
Kerry Earley
District Court Judge

CSERV

DISTRICT COURT
CLARK COUNTY, NEVADA

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

AUTOMATED CERTIFICATE OF SERVICE

This automated certificate of service was generated by the Eighth Judicial District 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:

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DISTRICT COURT

CLARK COUNTY, NEVADA

SANDRA CAMACHO, individually, and ANTHONY CAMACHO, individually,

Plaintiffs,

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 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 LV SINGHS INC. d/b/a SMOKES & VAPORS, a domestic corporation; DOES I-X; and ROE BUSINESS ENTITIES XI-XX, inclusive,

Defendants.

CASE NO.: A-19-807650-C

DEPT. NO.: IV

AMENDED COMPLAINT

JURY TRIAL DEMAND

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COMES NOW, SANDRA CAMACHO, individually, and ANTHONY CAMACHO, individually, by and through their attorney of record, CLAGGETT & SYKES LAW FIRM, complaining of Defendants and allege as follows:

JURISDICTION, VENUE, AND PARTIES

1. This Court has jurisdiction over this matter under NRS 14.065 and NRS 4.370(1), as the facts alleged occurred in Clark County, Nevada and involve an amount in controversy in excess of $15,000.00. Venue is proper pursuant to NRS 13.040, as Defendants, or any one of them, reside and/or conduct business in Clark County, Nevada at the commencement of this action.

2. Plaintiff, SANDRA CAMACHO (hereinafter "Plaintiff"), was and is at all times relevant herein, a resident of Clark County, Nevada.

3. Plaintiff, ANTHONY CAMACHO, was and is at all times relevant herein, married to Plaintiff, SANDRA CAMACHO, and was and is a resident of Clark County, Nevada.

4. Plaintiffs are informed and believe and thereon allege that at all times relevant herein, Defendant PHILIP MORRIS USA, Inc. (hereinafter "PHILIP MORRIS"), was and is a corporation authorized to do business within this jurisdiction of Clark County, Nevada, and was duly organized, created, and existing under and by virtue of the laws of the State of Virginia with its principal place of business located in the State of Virginia. Defendant, PHILIP MORRIS, resides and/or conducts business in every county within the State of Nevada and did so during all times relevant to this action.

5. Plaintiffs are informed and believe and thereon allege that at all times relevant herein, Defendant R.J. REYNOLDS TOBACCO COMPANY, Inc. (hereinafter "R.J. REYNOLDS"), was and is a corporation authorized to do business within this jurisdiction of Clark County, Nevada, and was duly organized, created, and existing under and by virtue of the laws of the State of North Carolina with its principal place of business located in the State of North Carolina. Defendant, R.J.

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REYNOLDS, resides and/or conducts business in every county within the State of Nevada and did so during all times relevant to this action.

6. R.J. REYNOLDS TOBACCO COMPANY is also the successor-by-merger to LORILLARD TOBACCO COMPANY (hereinafter "LORILLARD"), and is the successor-in-interest to the United States tobacco business of BROWN & WILLIAMSON TOBACCO CORPORATION (n/k/a Brown & Williamson Holdings, Inc.) (hereinafter "BROWN & WILLIAMSON"), which is the successor-by-merger to the AMERICAN TOBACCO COMPANY (hereinafter "AMERICAN").

7. Plaintiffs are informed and believe and thereon allege that at all times relevant herein, Defendant LIGGETT GROUP, Inc. (f/k/a LIGGETT GROUP, INC., f/k/a BROOKE GROUP, LTD., Inc., f/k/a LIGGETT & MEYERS TOBACCO COMPANY) (hereinafter "LIGGETT"), was and is a corporation authorized to do business within this jurisdiction of Clark County, Nevada, and was duly organized, created, and existing under and by virtue of the laws of the State of Delaware with its principal place of business located in the State of North Carolina. Defendant, LIGGETT, resides and/or conducts business in every county within the State of Nevada and did so during all times relevant to this action.

8. The TOBACCO INDUSTRY RESEARCH COMMITTEE ("TIRC") was formed in 1954, and later was re-named the COUNCIL FOR TOBACCO RESEARCH ("CTR"). This was a disingenuous, fake "research committee" organized by Defendants as part of their massive public relations campaign to create a controversy regarding the health hazards of cigarettes.

9. The TOBACCO INSTITUTE, INC. ("TI") was formed in 1958 and was intended to supplement the work of TIRC/CTR. TI spokespeople appeared on media/news outlets responding on behalf of the cigarette industry with misrepresentations and false statements regarding health concerns over cigarettes.

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10. Plaintiffs are informed and believe, and thereon allege that Defendant, ASM NATIONWIDE CORPORATION d/b/a SILVERADO SMOKES & CIGARS ("SILVERADO"), was and is a domestic corporation authorized to do business within this jurisdiction of Clark County, Nevada, and was duly organized, created, and existing under and by virtue of the laws of the State of Nevada. At all times material, SILVERADO'S registered agent resides at 430 E. Silverado Ranch Blvd. No 120. SILVERADO'S owns and operates a store that sells tobacco and cigarette products located at 430 E. Silverado Ranch Blvd, Ste. 120, Las Vegas NV 89123. SILVERADO'S is a retailer of tobacco and cigarette products and is registered with the State of Nevada as a licensed tobacco retailer, selling such items to the public, including Plaintiff, SANDRA CAMACHO.

11. Plaintiffs are informed and believe, and thereon allege that Defendant, LV SINGHS INC. d/b/a SMOKES & VAPES ("SMOKES & VAPES"), was and is a domestic corporation authorized to do business within this jurisdiction of Clark County, Nevada, and was duly organized, created, and existing under and by virtue of the laws of the State of Nevada. At all times material, SMOKES & VAPES' registered agent resides at 9101 w. Sahara Ave. Ste 101, Las Vegas NV 89117. SMOKES & VAPES owns and operates a store that sells tobacco and cigarette products located at 430 E. Silverado Ranch Blvd. Ste 120, Las Vegas NV 89183. ASM'S is a retailer of tobacco and cigarette products and is registered with the State of Nevada as a licensed tobacco retailer, selling such items to the public, including Plaintiff, SANDRA CAMACHO.

12. Plaintiffs further allege that Defendants, at all times material to this cause of action, through their agents, employees, executives, and representatives, conducted, engaged in and carried on a business venture of selling cigarettes in the State of Nevada and/or maintained an office or agency in this state and/or committed tortious acts within the State of Nevada and knowingly allowed the Plaintiff to be exposed to an unreasonably dangerous and addictive product, to-wit: cigarettes and/or cigarette smoke.

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13. Plaintiffs do not know the true names of Defendants Does I through X and sue said Defendants by fictitious names. Upon information and belief, each of the Defendants designated herein as Doe is legally responsible in some manner for the events alleged in this Complaint and actually, proximately, and/or legally caused injury and damages to Plaintiffs. Plaintiffs will seek leave of the Court to amend this Complaint to substitute the true and correct names for these fictitious names upon learning that information.

14. Plaintiffs do not know the true names of Defendants Roe Business Entities XI through XX and sue said Defendants by fictitious names. Upon information and belief, each of the Defendants designated herein as Roe Business Entities XI through XX, are predecessors-in-interest, successors-in-interest, and/or agencies otherwise in a joint venture with, and/or serving as an alter ego of, any and/or all Defendants named herein; and/or are entities responsible for the supervision of the individually named Defendants at the time of the events and circumstances alleged herein; and/or are entities employed by and/or otherwise directing the individual Defendants in the scope and course of their responsibilities at the time of the events and circumstances alleged herein; and/or are entities otherwise contributing in any way to the acts complained of and the damages alleged to have been suffered by the Plaintiff herein. Upon information and belief, each of the Defendants designated as a Roe Business Entity is in some manner negligently, vicariously, and/or statutorily responsible for the events alleged in this Complaint and actually, proximately, and/or legally caused damages to Plaintiff. Plaintiff will seek leave of the Court to amend this Complaint to substitute the true and correct names for these fictitious names upon learning that information.

15. All conditions precedent to the bringing of this action have been complied with or waived.

FACTS COMMON TO ALL CLAIMS

16. Plaintiffs repeat and reallege each and every allegation set forth in the preceding paragraphs, as if fully set forth herein.

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17. Plaintiff, SANDRA CAMACHO, was diagnosed on or about March of 2018 with laryngeal cancer, which was caused by smoking L&M brand cigarettes, Marlboro brand cigarettes, and Basic brand cigarettes, to which she was addicted and smoked continuously from approximately 1964 until 2017.

18. At all times material, L&M cigarettes were designed, manufactured, and sold by Defendant, Liggett.

19. At all times material, Marlboro and Basic cigarettes were designed, manufactured, and sold by Defendant, Philip Morris USA, Inc.

20. Plaintiff, SANDRA CAMACHO, purchased and smoked L&M, Marlboro, and Basic cigarettes from the SILVERADO'S in sufficient quantities to be a substantial contributing cause of her laryngeal cancer.

21. Plaintiff, SANDRA CAMACHO, purchased and smoked L&M, Marlboro, and Basic cigarettes from the SMOKES & VAPORS in sufficient quantities to be a substantial contributing cause of her laryngeal cancer.

22. At all times material, Defendants purposefully and intentionally designed cigarettes to be highly addictive. They added ingredients such as ammonia and diammonium-phosphate to "free-base" nicotine and manipulated levels of nicotine and pH in smoke to make cigarettes more addictive, better tasting, and easier to inhale. They also deliberately manipulated and/or added compounds in cigarettes such as arsenic, polonium-210, tar, methane, methanol, carbon monoxide, nitrosamines, butane, formaldehyde, tar, carcinogens, and other deadly and poisonous compounds to cigarettes.

23. Astonishingly, for over half a century, Defendants concealed the addictive and deadly nature of cigarettes from Plaintiff, the government, and the American public by making knowingly false and misleading statements and by engaging in an over two-hundred and fifty-billion-dollar conspiracy.

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24. Despite knowing internally, dating back to the 1950s, that cigarettes were deadly, addictive, and caused death and disease, Defendants, for over five decades, purposefully and intentionally lied, concealed information, and made knowingly false and misleading statements to the public, including Plaintiff, that cigarettes were allegedly *not* harmful.

25. Defendants failed to acknowledge or admit the truth until they were forced to do, as a result of litigation, in the year 2000.

26. Plaintiff's injuries arose out of Defendants' acts and/or omissions which occurred inside and outside of the State of Nevada.

27. At all times material to this action, Defendants knew or should have known the following:

a. Smoking cigarettes causes chronic obstructive pulmonary disease, also referred to as COPD, which includes emphysema and chronic bronchitis, laryngeal cancer, and lung cancer, including squamous cell carcinoma, small cell carcinoma, adenocarcinoma, and large cell carcinoma;

b. Nicotine in cigarettes is addictive;

c. Defendants placed cigarettes on the market that were defective and unreasonably dangerous;

d. Defendants concealed or omitted material information not otherwise known or available, knowing that the material was false and misleading, or failed to disclose a material fact concerning the health effects or addictive nature of smoking cigarettes, or both;

e. Defendants entered into an agreement to conceal or omit information regarding the health effects of cigarettes or their addictive nature with the intention that smokers and the public would rely on this information to their detriment;

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f. Defendants sold or supplied cigarettes that were defective;

g. Defendants are negligent;

h. Children and teenagers are more likely to become addicted to cigarettes if they begin smoking at an early age;

i. Continued and frequent use of cigarettes highly increases one's chances of becoming, and remaining, addicted;

j. Continued and frequent use of cigarettes highly increases one's chances of developing serious illness and death;

k. It is extremely difficult to quit smoking;

l. "Many, but not most, people who would like to stop smoking are able to do so" (Concealed Document, 1982);

m. "Defendants' cannot defend continued smoking as "free choice" if the person is addicted" (Concealed Document 1980);

n. It is possible to develop safe cigarettes free of nicotine, carcinogens, and other deadly and poisonous compounds;

o. "The thing Defendants' sell most is nicotine" (Concealed Document 1980);

p. Filtered, low tar, low nicotine, and "light" cigarettes are more dangerous than "regular" cigarettes;

q. "Cigarette[s] that do not deliver nicotine cannot satisfy the habituated smoker and would almost certainly fail" (Concealed Document 1966);

r. "Without the nicotine, the cigarette market would collapse, and Defendants' would all lose their jobs and their consulting fees" (Concealed Document 1977);

s. "Carcinogens are found in practically every class of compounds in smoke" (Concealed Document 1961);

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t. "Cigarettes have certain unattractive side effects . . . they cause lung cancer" (Concealed Document 1963).

28. Defendants' tortious and unlawful conduct caused consumers, including SANDRA CAMACHO, to suffer dangerous diseases and injuries.

Historical Allegations of Defendants Unlawful Conduct Giving Rise to the Lawsuit

29. Lung cancer, caused by cigarette smoking, is the number one leading cause of death in the United States.

30. Cigarettes kill more than 500,000 Americans every year. Over 20 million Americans have died from lung cancer.

31. Lung cancer is a disease manufactured and created by the cigarette industry, including Defendants herein.

32. Prior to 1900, lung cancer was virtually unknown as a cause of death in the United States.

33. By 1935, there were only an estimated 4,000 lung cancer deaths. By 1945, as a result of the rise of cigarette consumption, the number of deaths almost tripled.

34. Because of this phenomenon, scientists began conducting research and experiments regarding the link between cigarette smoking and lung cancer.

35. In addition to scientists, Defendants themselves began to conduct similar research. By February 2, 1953 Defendants had concrete proof that cigarette smoking increased the risk of lung cancer. A previously secret and concealed document by Defendant, an R.J. Reynolds' states:

> **Studies of clinical data tend to confirm the relationship between heavy smoking and prolonged smoking and incidence of cancer of the lung.**

36. Approximately six months later on December 21, 1953, Life Magazine and Reader's Digest published articles regarding a ground-breaking mouse painting study, conducted by Drs.

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Wynder and Graham, which concluded that tar from cigarettes painted on the backs of mice developed into cancer.

37. As a result of these articles and mounting public awareness regarding the link between cigarette smoking and lung cancer, Defendants grew fearful their customers would stop smoking, which would in turn bankrupt their companies.

38. Thus, in order to maximize profits, Defendants decided to intentionally ban together to form a conspiracy which, for over half a century, was devoted to creating and spreading doubt regarding a disingenuous "open debate" about whether cigarettes were or were not harmful.

39. This conspiracy was formed in December of 1953 at the Plaza Hotel in New York City. Paul Hahn, president of American Tobacco, sent telegrams to presidents of the seven largest tobacco companies and one tobacco growers' organization, inviting them to meet at the Plaza Hotel.

40. Executives from every cigarette company, except for Liggett, met at the Plaza Hotel on December 14, 1953. The executives discussed the following topics: (i) the negative publicity from the recent articles in the media, (ii) the need to hire a public relations firm, Hill & Knowlton, and (iii) the major threat to their corporations' economic future.

41. In an internal planning memorandum Hill & Knowlton assessed their cigarette clients' problems in the following manner:

> "There is only one problem -- confidence, and how to establish it; public assurance, and how to create it -- in a perhaps long interim when scientific doubts must remain. **And, most important, how to free millions of Americans from the guilty fear that is going to arise deep in their biological depths -- regardless of any pooh-poohing**

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> **logic -- every time they light a cigarette**. No resort to mere logic ever cured panic yet, whether on Madison Avenue, Main Street, or in a psychologist's office. And no mere recitation of arguments pro, or ignoring of arguments con, or careful balancing of the two together, is going to deal with such fear now. That, gentlemen, is the nature of the unexampled challenge to this office."

42. On December 28, 1953, Defendants again met at the Plaza Hotel where they knowingly and purposefully agreed to form a fake "research committee," called the Tobacco Industry Research Committee ("TIRC") (later renamed the Council for Tobacco Research ("CTR")). Paul Hahn, president of American Tobacco, was elected the temporary chairman of TIRC.

43. TIRC's *public* mission statement was to supposedly aid and assist with so-called "independent" research into cigarette use and health.

44. The formation and purpose of TIRC was announced on January 4, 1954, in a full-page advertisement called "A Frank Statement to Cigarette Smokers" published in 448 newspapers throughout the United States.

45. The Frank Statement was signed by the following domestic cigarette and tobacco product manufacturers, including Defendants herein, organizations of leaf tobacco growers, and tobacco warehouse associations that made up TIRC: American Tobacco by Paul Hahn, President; B&W by Timothy Hartnett, President; Lorillard by Herbert Kent, Chairman; Defendant, Philip Morris by O. Parker McComas, President; Defendant, R.J Reynolds by Edward A. Darr, President; Benson & Hedges by Joseph Cullman, Jr., President; Bright Belt Warehouse Association by F.S. Royster, President; Burley Auction Warehouse Association by Albert Clay, President; Burley Tobacco Growers Cooperative Association by John Jones, President; Larus & Brother Company, Inc. by W.T. Reed, Jr., President; Maryland Tobacco Growers Association by Samuel Linton, General Manager; Stephano Brothers, Inc. by C.S. Stephano, Director of Research; Tobacco Associates, Inc. by J.B. Hutson, President; and United States Tobacco by J. Whitney Peterson, President.

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46. In their Frank Statement to Cigarette Smokers, Defendants knowingly and intentionally mislead Plaintiff, the public, and the American government when they disingenuously promised to "safeguard" the health of smokers, support allegedly "disinterested" research into smoking and health, and reveal to the public the results of their purported "objective" research.

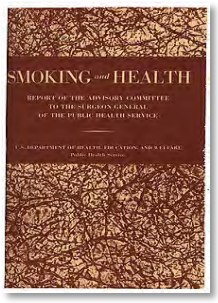
47. For the next five decades, TIRC/CTR worked diligently, and quite successfully, to rebuff the public's concern about the dangers of cigarettes. Defendants, through TIRC/CTR, invented the false and misleading notion that there was an "open question" regarding cigarette smoking and health. They appeared on television and radio to broadcast this message.

48. TIRC/CTR hired fake scientists and spokespeople to attack genuine, legitimate scientific studies. Virtually none of the so-called "research" funded by TIRC/CTR centered on the immediate questions relating to carcinogenesis and tobacco. Rather than addressing the compounds and carcinogens in cigarette smoke and their hazardous effect on the human body, TIRC/CTR instead directed its resources to alternative theories of the origins of cancer, centering on genetic factors and environmental risks.

49. The major initiative of TIRC/CTR, through their Scientific Advisory Board (SAB), was to, "create the appearance of [Defendants] devoting substantial resources to the problem without the risk of funding further 'contrary evidence.'"

50. TIRC/CTR's efforts worked brilliantly and cigarette consumption rapidly increased.

51. In 1964 there was another dip in the consumption of cigarettes because the United States Surgeon General reported, "cigarette smoking is causally related to lung cancer in men . . . the data for women, though less extensive, points in the same direction."



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52. The cigarette industry's *public* response, through TIRC, to the 1964 Surgeon General Report was to falsely assure the public that (i) cigarettes were not injurious to health, (ii) the industry would cooperate with the Surgeon General, (iii) more research was needed, and (iv) if there were any bad elements discovered in cigarettes, the cigarette manufacturers would remove those elements. As a result, cigarette consumption again began to rise.

53. Despite Defendant's *public* response, internally they were fully aware of the magnitude and depth of lies and deception they were promulgating. They knew and understood they were making fake, misleading promises that would never come to fruition. Their own internal records reveal that they knew, even back in 1964, that cigarettes were not only hazardous, but deadly:

> **"Cigarettes have certain unattractive side effects . . . they cause lung cancer"** (Concealed Document 1963).
>
> **"Carcinogens are found in practically every class of compounds in smoke"** (Concealed Document 1961).
>
> **"The amount of evidence accumulated to indict cigarette smoke as a health hazard is overwhelming. The evidence challenging such indictment is scant"** (Concealed Document 1962).

54. Furthermore, not only did Defendants know and appreciate the dangers of cigarettes, but they were also intentionally manipulating ingredients, such as nicotine, in cigarettes to make them more addictive. Their documents reveal they knew the following:

> **"Our industry is based upon design, manufacture and sale of attractive dosage forms of nicotine"** (Concealed Document 1972).
>
> **"We can regulate, fairly precisely, the nicotine . . . to almost any desired level management might require"** (Concealed Document 1963).
>
> **"Cigarette[s] that do not deliver nicotine cannot satisfy the habituated smoker and would almost certainly fail"** (Concealed Document 1966).
>
> **"Nicotine is addictive . . . We are then, in the business of selling nicotine, an addictive drug"** (Concealed Document 1963).

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> **"We have deliberately played down the role of nicotine"** (Concealed Document 1972).
>
> **"Very few consumers are aware of the effects of nicotine, i.e., it's addictive nature and that nicotine is a poison"** (Concealed Document 1978).
>
> **"Determine minimum nicotine required to keep normal smoker 'hooked.'"** (Concealed Document 1965).
>
> **"The thing we sell most is nicotine"** (Concealed Document 1980).
>
> **"Without the nicotine, the cigarette market would collapse, and Defendants' would all lose their jobs and their consulting fees"** (Concealed Document 1977).

55. Defendants deliberately added chemicals such as urea, ammonia, diammonium-phosphate, tar, nitrosamines, arsenal, polonium-210, formaldehyde, and other carcinogens to cigarettes. They "free-based" nicotine in cigarettes and manipulated levels of pH in smoke to make cigarettes more addictive and easier to inhale.

56. Defendant's sole priority was to make as much money as quickly as possible, with no concern about the safety and well-being of their customers.

57. In 1966, the United States Government mandated that a "Caution" Label be placed on packs of cigarettes stating, "Cigarette Smoking May be Hazardous to Your Health."

58. The cigarette industry responded to the "Caution" label by continuing their massive public relations campaign, continuing to spread doubt and confusion, and continuing to deceive the public.

59. Throughout this period Defendants also introduced "filtered" cigarettes – cigarettes falsely marketed, advertised, and promoted as "less tar" and "less nicotine."

60. However, internally, in Defendants' previously concealed, hidden documents, discussions regarding the true nature of filtered cigarettes was revealed – filters were just as harmful, dangerous, and hazardous as unfiltered cigarettes; In fact, they were more dangerous. In a previously

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secret document from 1976, Ernie Pepples from Brown & Williamson states, "the smoker of a filter cigarette was getting as much or more nicotine and tar as he would have gotten from a regular cigarette."

61. Throughout the 1960s, 1970s, 1980s and 1990s, the cigarette industry, including Defendants herein, spent two-hundred and fifty-billion-dollars in marketing efforts to promote the sale of cigarettes.

62. The cigarette industry spent more money on marketing and advertising cigarettes *in one day* than the public health community spent *in one year*.

63. Cigarette smoking was glamorized – celebrities smoked, athletes smoked, doctors smoked, politicians smoked – everyone smoked cigarettes.

64. As early as the 1920s, and continuing today, cigarette manufacturers, including Defendants herein, were also intentionally targeting children. Their documents reveal:

> **"School days are here. And that means BIG TOBACCO BUSINESS for somebody . . . line up the most popular students"** (Concealed Document 1927).
>
> **"SUMMER SCHOOL IS STARTING . . . lining up these students . . . as consumers"** (Concealed Document 1928).
>
> **"Today's teenager is tomorrow's potential regular customer"** (Concealed Document 1981).
>
> **"The 14-24 age group . . . represent tomorrow' cigarette business"** (Concealed Document 1974).

65. Cigarette manufacturers, including Defendants herein, also targeted and prayed upon minority populations in an effort to increase their market share and ultimately their profits.

66. Cigarettes were the number one most heavily advertised product on television until the United States Government banned television advertisements in 1972.

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67. When cigarettes advertising was banned on television Defendants turned to marketing in stadiums, sponsoring sporting events such as the Winston Cup and Marlboro 500, sponsoring concerts, utilizing print advertisements in magazines, adding product placement in movies, and more.

68. Meanwhile, internally Defendants were praising themselves for accomplishing this "brilliantly conceived" conspiracy which deceived SANDRA CAMACHO, millions of Americans, the government, and the public health community.

> **"for nearly 20 years, this industry has employed a single strategy to defend itself . . . brilliantly conceived and executed . . . a holding strategy . . . creating doubt about the health charge without actually denying it"** (Concealed Document 1972).

69. In 1985, four rotating warning labels were placed on packs of cigarettes which warned, for the first time, that smoking causes lung cancer, heart disease, emphysema, and may complicate pregnancy.

70. The cigarette industry, including Defendants herein, opposed these warning labels and throughout the 1980s, despite the warning labels being placed on their cigarettes, spoke publicly through their representatives in the Tobacco Institute (TI) that it was allegedly still unknown whether smoking cigarettes caused cancer or was addictive because, apparently, "more research was needed."

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71. In 1988 the United States Surgeon General reported that cigarettes and other forms of tobacco were addicting, and nicotine is the drug in tobacco that causes addiction. In fact, in his report, the Surgeon General compared tobacco addiction to heroine and cocaine.

72. In response, the cigarette industry, including Defendants herein, issued a press release knowingly and disingenuously stating, "Claims that cigarettes are addictive is irresponsible and scare tactics."

73. Defendants continued to publicly deny the addictive nature and health hazards of smoking cigarettes until the year 2000, after litigation was brought against them by the Attorneys Generals of multiple States and their previously concealed documents were made public.

74. In 1994 CEOs from the seven largest cigarette companies, including Defendants herein, testified under oath before the United States Congress that it was their opinion that it had not been proven that cigarettes were addictive, caused disease, or caused one single person to die.

75. Despite their own intensive research and (millions of) internal documents describing the dangers and addictive qualities of cigarettes, Defendants' negligently, willfully, maliciously, and intentionally made false and misleading statements to Congress, the public, and Plaintiff, SANDRA CAMACHO.

76. Even after Defendants knowingly lied during these Congressional hearings, Defendants continued, and still are continuing to, perpetuate their conspiracy.

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77. For example, in 1997 Liggett announced that they would voluntarily place a warning label on their cigarette packages, in addition to the labels mandated by the United States government, that smoking is addictive. Defendant, Philip Morris, immediately filed a restraining order against Liggett to prevent them from adding this warning label. Then, in 1998 Liggett sold its three major cigarette brands, L&N, Lark, and Chesterfield, to Philip Morris who immediately removed the "smoking was addictive" warning label from these products.

78. Furthermore from 2000 through 2010, Defendants continued to mislead the public by marketing and promoting "light" and "ultra-light" cigarettes despite knowing internally that such cigarettes were just as dangerous and addictive as "regular" cigarettes.

79. In 2010 after Defendants were required, by the United States government, to remove the misleading "light" and "ultra-light" labels from their cigarettes, they instead added "onserts" to their packages of cigarettes explaining that, for example, "Your Marlboro Lights pack is changing. But your cigarette stays the same. In the future, ask for 'Marlboro in the gold pack.'"

80. Additionally, as recently as 2018, Defendants have continued to oppose proposed FDA regulations which would reduce or eliminate the levels of nicotine in cigarettes.

81. As recently as 2019, Defendants do not admit or acknowledge that nicotine in their cigarette smoke "is" addictive.

82. As recently as 2019, Defendants do not admit or acknowledge that nicotine addiction can cause diseases.

83. As recently as 2019, Defendants continue to make false or misleading statements that filtered cigarettes, lights, ultra-lights and low tar are less hazardous than conventional full favored cigarettes.

84. Finally, Defendants have continued to target and prey upon children, teenagers, minorities, and other segment populations, all in the name of money.

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85. Defendants, despite being rivals and competitors, locked arms and banned together to purposefully and internationally engage in an over 65-year conspiracy to deceive the public regarding the addictive nature and health hazards of cigarette smoking.

86. This sophisticated conspiracy involved hundreds of billions of dollars spent on marketing efforts, massive deception including lying under oath before Congress and other governmental entities, forming fake organizations with fake scientists and fake research, and creating a "brilliantly conceived" public relations campaign designed to create and sustain doubt and confusion regarding a – made up – cigarette controversy.

87. This conspiracy is memorialized through Defendants' own documents authored by their own executives and scientists, including over fourteen million previously concealed records.

FIRST CLAIM FOR RELIEF

(NEGLIGENCE)

Sandra Camacho Against Defendants Philip Morris and Liggett

88. Plaintiffs repeat and re-allege the allegations as contained in paragraphs 1 through 87 and incorporate the same herein by reference.

89. Defendants owed a duty to the general public, including Plaintiff, to manufacture, design, sell, market, promote, and/or otherwise produce a product and/or any of its component parts safe and free of unreasonable and harmful defects when used in the manner and for the purpose it was designed, manufactured, and/or intended to be used.

90. Plaintiff was exposed to and did inhale smoke from cigarettes which were designed, manufactured, marketed, distributed, and/or sold by Defendants.

91. Each exposure to Defendants' cigarettes caused Plaintiff to inhale smoke which caused him to become addicted to cigarettes, and further caused him to develop pharyngeal cancer and suffer severe bodily injuries.

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92. Defendants were negligent in all the following respects, same being the proximate and/or legal cause of SANDRA CAMACHO's injuries and disabilities, including but not limited to:

a. designing and manufacturing an unreasonably dangerous and deadly product;

b. designing and manufacturing cigarettes to be addictive;

c. designing and manufacturing cigarettes to be inhalable;

d. manipulating the level of nicotine in cigarettes to make them more addictive;

e. genetically modifying nicotine in tobacco plants;

f. blending different types of tobacco to obtain a desired amount of nicotine;

g. engineering cigarettes to be rapidly inhaled into the bloodstream;

h. adding carcinogens, polonium-210, urea, arsenal, formaldehyde, nitrosamines, and other deadly, poisonous compounds to cigarettes;

i. adding and/or manipulating compounds such as ammonia and diammonium phosphate to Defendants' cigarettes to "free-base" nicotine;

j. marketing and advertising "light" and "ultra light" cigarettes as safe, low nicotine, and low tar;

k. adding "onserts" to packages of cigarettes even after the United States government banned marketing of "light" and "ultra-light" cigarettes;

l. manipulating levels of pH in Defendants' cigarettes;

m. targeting children who could not understand or comprehend the seriousness or addictive nature of nicotine and smoking;

n. targeting minority populations such as African Americans, Hispanics, and women to obtain a greater market share to increase their profits;

o. failing to develop and utilize alternative designs, manufacturing methods, and/or materials to reduce and/or eliminate harmful materials from cigarettes;

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p. continuing to manufacture, distribute, and/or sell cigarettes when Defendant knew at all times material that its products could cause, and in fact were more likely to cause, injuries including, but not limited to, emphysema, throat cancer, COPD, laryngeal cancer, lung cancer, and/or other forms of cancer when used as intended;

q. making knowingly false and misleading statements to Plaintiff, the public, and the American government that cigarettes were safe and/or not proven to be dangerous;

r. failing to remove and recall cigarettes from the stream of commerce and the marketplace upon ascertaining that said products would cause disease and death.

93. Additionally, prior to July 1, 1969, Defendants failed to warn/and or adequately warn foreseeable users, such as SANDRA CAMACHO, of the following, including but not limited to:

a. failing to warn and/or adequately warn foreseeable users, such as SANDRA CAMACHO, of the dangerous and deadly nature of cigarettes;

b. failing to warn foreseeable users, such as SANDRA CAMACHO, that they could develop fatal injuries including, but not limited to, emphysema, COPD, throat cancer, laryngeal cancer, lung cancer, and/or other forms of cancer, as a result of smoking and/or inhaling smoke from Defendants' cigarettes;

c. failing to warn foreseeable users, such as SANDRA CAMACHO, that the use of cigarettes would more likely than not lead to addiction, habituation, and/or dependence;

d. failing to warn foreseeable users, such as SANDRA CAMACHO, that quitting and/or limiting use of cigarettes would be extremely difficult, particularly if users started smoking at an early age;

e. failing to disclose to consumers of cigarettes, such as SANDRA CAMACHO, the results of genuine scientific research conducted by and/or known to Defendant that cigarettes were dangerous, defective, and addictive.

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94. Defendants breached said aforementioned duties of due and reasonable care in that they produced, designed, manufactured, sold, and/or marketed defective cigarettes and/or any of its component parts which contained risks of harm to the user/consumer and which were reasonably foreseeable to cause harm in the use or exercise of reasonable and/or ordinary care.

95. As a direct and proximate and/or legal result of Defendants' aforementioned negligence, SANDRA CAMACHO was severely injured when she was exposed to Defendants' cigarettes. Each exposure to Defendants' cigarettes caused SANDRA CAMACHO to become addicted to cigarettes and to inhale smoke which caused her to develop laryngeal cancer, in addition to other related physical conditions which resulted in and directly caused her to suffer severe bodily injuries. Each exposure to such products was harmful and caused or contributed substantially to SANDRA CAMACHO's aforementioned injuries.

96. SANDRA CAMACHO's aforementioned injuries arose out of and were connected to and incidental to the way Defendants' designed, manufactured, marketed, distributed, and/or sold its products.

97. The aforementioned damages of SANDRA CAMACHO were directly and proximately and/or legally caused by Defendants' negligence, in that it produced, sold, manufactured, and/or otherwise placed into the stream of intrastate and interstate commerce, cigarettes which it knew, or in the exercise of ordinary care should have known, were deleterious and highly harmful to SANDRA CAMACHO's health and well-being.

98. Defendants, prior to selling and/or distributing the cigarettes to which SANDRA CAMACHO was exposed, knew or should have known that exposure to cigarette smoke was harmful and caused injuries including, but not limited to, lung cancer, pharyngeal cancer, laryngeal cancer, emphysema, COPD, heart disease, other forms of cancer, and/or result in death.

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99. As a direct and proximate and/or legal cause of Defendants' aforesaid negligence, SANDRA CAMACHO was injured and experienced great pain to her body and mind, sustaining injuries and damages in a sum in excess of Fifteen Thousand Dollars ($15,000.00).

100. As a further direct and proximate and/or legal cause of Defendants' aforesaid negligence, SANDRA CAMACHO has incurred damages, both general and special, including medical expenses as a result of the necessary treatment of her injuries, and will continue to incur damages for future medical treatment necessitated by smoking-related injuries she has suffered, in a sum in excess of Fifteen Thousand Dollars ($15,000.00).

101. As a further direct and proximate and/or legal cause of Defendants' aforesaid negligence, SANDRA CAMACHO was required to, and did, employ physicians, surgeons, and other health care providers to examine, treat, and care for her and did incur medical and incidental expenses thereby. The exact amount of such expenses is unknown at this present time, but SANDRA CAMACHO alleges that she has suffered special damages in excess of Fifteen Thousand Dollars ($15,000.00)

102. As a further direct and proximate and/or legal cause of Defendants' aforesaid negligence, Plaintiff, ANTHONY CAMACHO, as SANDRA CAMACHO'S husband, has suffered and continues to suffer loss of companionship and care, emotional and moral support and/or sexual intimacy and alleges he has suffered damages in excess of Fifteen Thousand Dollars ($15,000.00).

103. Defendants' actions were taken knowingly, wantonly, willfully, and/or maliciously.

104. Defendants' conduct was despicable and so contemptible that it would be looked down upon and despised by ordinary decent people and was carried on by Defendants with willful and conscious disregard for the safety of SANDRA CAMACHO.

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105. Defendants' outrageous and unconscionable conduct warrants an award of exemplary and punitive damages pursuant to NRS 42.005 in an amount appropriate to punish and make an example of Defendants, and to deter similar conduct in the future.

106. To the extent NRS 42.007 applies, Defendants are vicariously liable for punitive damages arising from the outrageous and unconscionable conduct of its employees, agents, apparent agents, independent contractors, and/or servants, as set forth herein.

107. Defendants' actions have forced Plaintiffs to retain counsel to represent them in the prosecution of this action, and they are therefore entitled to an award of a reasonable amount as attorney fees and costs of suit.

SECOND CLAIM FOR RELIEF

(GROSS NEGLIGENCE)

SANDRA CAMACHO Against Defendant Philip Morris and Liggett

108. Plaintiffs repeat and re-allege the allegations as contained in paragraphs 1 through 87 and 88 - 107 and incorporate the same herein by reference.

109. Defendants manufactured and created an unreasonably dangerous, addictive, and defective product that caused SANDRA CAMACHO to develop laryngeal cancer. At all times material hereto, Defendants had actual knowledge of the wrongfulness of its conduct and the high probability that injury or damage to SANDRA CAMACHO would result. Despite that knowledge, the Defendants willfully and wantonly pursued a course of conduct that was so reckless or wanting in care that it constituted a conscious disregard or indifference to the life, safety or rights of SANDRA CAMACHO and Defendants actively and knowingly participated in such conduct, and/or its officers, director or managers knowingly condoned, ratified or consented to such conduct.

110. Upon information and belief, through an examination of Defendants' own previously secret internal documents, Defendants had reason to know facts which could lead a reasonable person

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to realize that their cigarettes could cause an unreasonable risk of bodily harm to others and involved a high probability that substantial harm would result. Specifically, Defendants had reason to know facts that their cigarettes caused diseases including but not limited to lung cancer, COPD, emphysema, heart disease, pharyngeal cancer, laryngeal cancer, oral cavity cancer.

111. Defendants knew there were ways to minimize the disease and destruction their product, cigarettes, caused through alternative safer designs of cigarettes including but not limited to nicotine free or reduced nicotine cigarettes.

112. Defendants willfully, purposefully, and knowingly did not make safer cigarettes and in fact manipulated the compounds in cigarettes to make them more addictive, deadly, and dangerous.

113. Defendants and their co-conspirators also purposefully and knowingly manipulated the public including SANDRA CAMACHO by marketing and promoting their filter, "light" and "low-tar" cigarettes as safer, despite knowing these cigarettes are in fact more dangerous.

114. Defendants' actions in creating, manufacturing, and selling cigarettes despite having knowledge that these actions created an unreasonable risk of bodily harm and involved a high probability that substantial harm would result, was an extreme departure from the ordinary duty of care owed and constitutes gross negligence.

115. SANDRA CAMACHO'S aforementioned injuries arose out of and were connected to and incidental to the way Defendants' designed, manufactured, marketed, distributed, and/or sold its products.

116. The aforementioned damages of SANDRA CAMACHO were directly and proximately and/or legally caused by Defendants' gross negligence, in that it produced, sold, manufactured, and/or otherwise placed into the stream of intrastate and interstate commerce, cigarettes which it knew, or in the exercise of ordinary care should have known, were deleterious and highly harmful to SANDRA CAMACHO'S health and well-being.

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117. As a direct and proximate and/or legal result of Defendants' aforementioned gross negligence, SANDRA CAMACHO was severely injured when she was exposed to Defendants' cigarettes. Each exposure to Defendants' cigarettes caused SANDRA CAMACHO to become addicted to cigarettes and to inhale smoke which caused her to develop laryngeal cancer, in addition to other related physical conditions which resulted in and directly caused her to suffer severe bodily injuries. Each exposure to such products was harmful and caused or contributed substantially to SANDRA CAMACHO'S aforementioned injuries.

118. As a direct and proximate and/or legal cause of Defendants' aforesaid gross negligence, SANDRA CAMACHO was injured and experienced great pain to her body and mind, sustaining injuries and damages in a sum in excess of Fifteen Thousand Dollars ($15,000.00).

119. As a further direct and proximate and/or legal cause of Defendants' aforesaid gross negligence, SANDRA CAMACHO has incurred damages, both general and special, including medical expenses as a result of the necessary treatment of her injuries, and will continue to incur damages for future medical treatment necessitated by smoking-related injuries she has suffered, in a sum in excess of Fifteen Thousand Dollars ($15,000.00).

120. As a further direct and proximate and/or legal cause of Defendants' aforesaid gross negligence, SANDRA CAMACHO was required to, and did, employ physicians, surgeons, and other health care providers to examine, treat, and care for her and did incur medical and incidental expenses thereby. The exact amount of such expenses is unknown at this present time, but SANDRA CAMACHO alleges that she has suffered special damages in excess of Fifteen Thousand Dollars ($15,000.00).

121. As a further direct and proximate and/or legal cause of Defendants' aforesaid negligence, Plaintiff, ANTHONY CAMACHO, as SANDRA CAMACHO'S husband, has suffered

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and continues to suffer loss of companionship and care, emotional and moral support and/or sexual intimacy and alleges he has suffered damages in excess of Fifteen Thousand Dollars ($15,000.00)

122. The actions of Defendants as complained of in this claim for relief was undertaken knowingly, wantonly, willfully, and/or maliciously.

123. Defendants' conduct was despicable and so contemptible that it would be looked down upon and despised by ordinary decent people and was carried on by Defendants with willful and conscious disregard for the safety of SANDRA CAMACHO.

124. Defendants' outrageous and unconscionable conduct warrants an award of exemplary and punitive damages pursuant to NRS 42.005, in an amount appropriate to punish and make an example of Defendants and to deter similar conduct in the future.

125. To the extent NRS 42.007 applies, Defendants are vicariously liable for punitive damages arising from the outrageous and unconscionable conduct of its employees, agents, apparent agents, independent contractors, and/or servants, as set forth herein.

126. Defendants' actions have forced Plaintiffs to retain counsel to represent them in the prosecution of this action, and they are therefore entitled to an award of a reasonable amount as attorney fees and costs of suit.

THIRD CLAIM FOR RELIEF

(STRICT PRODUCTS LIABILITY)

Sandra Camacho Against Defendants Philip Morris and Liggett

127. Plaintiffs repeat and re-allege the allegations as contained in paragraphs 1 through 87 and incorporate the same herein by reference.

128. Upon information and belief, at all times material, Defendants were/are in the business of designing, engineering, manufacturing, distributing, marketing, selling, and/or otherwise placing cigarettes into the stream of commerce.

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129. The products complained of were cigarettes designed, manufactured, marketed, distributed, and/or sold by Defendants and used by SANDRA CAMACHO.

130. The aforesaid products were distributed, sold, manufactured, and/or otherwise placed into the stream of commerce by Defendants.

131. Defendants' defective and unreasonably dangerous cigarettes reached SANDRA CAMACHO without substantial change from that in which such products were when within the possession of Defendants.

132. Defendants' cigarettes were dangerous beyond the expectation of the ordinary user/consumer when used as intended or in a manner reasonably foreseeable by Defendants.

133. The nature and degree of danger of Defendants' cigarettes were beyond the expectation of the ordinary consumer, including SANDRA CAMACHO, when used as intended or in a reasonably foreseeable manner.

134. Defendants' cigarettes were unreasonably dangerous because a less dangerous design and/or modification was economically and scientifically feasible.

135. Defendants' cigarettes were defective and unreasonably dangerous in the following ways, including but not limited to:

a. designing and manufacturing an unreasonably dangerous and deadly product;

b. designing and manufacturing cigarettes to be addictive;

c. designing and manufacturing cigarettes to be inhalable;

d. manipulating levels of nicotine in cigarettes to make them more addictive;

e. genetically modifying nicotine in tobacco plants;

f. blending different types of tobacco to obtain a desired amount of nicotine;

g. engineering cigarettes to be rapidly inhaled into the lungs;

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h. adding carcinogens, polonium-210, urea, arsenal, formaldehyde, nitrosamines, and other deadly, poisonous compounds to cigarettes;

i. adding and/or manipulating compounds such as ammonia and diammonium phosphate to Defendants' cigarettes to "free-base" nicotine;

j. manipulating levels of pH in Defendants' cigarettes;

k. utilizing deadly and harmful additives, compounds, and ingredients in their cigarette design and manufacturing process when alternative, less dangerous materials were available;

l. marketing and advertising "light" and "ultra light" cigarettes as safe, low nicotine, and low tar;

m. adding "onserts" to packages of cigarettes even after the United States government banned marketing of "light" and "ultra-light" cigarettes;

n. prior to July 1, 1969, failing to warn and/or adequately warn foreseeable users, such as SANDRA CAMACHO, of the dangerous and deadly nature of cigarettes;

o. prior to July 1, 1969, failing to warn foreseeable users, such as SANDRA CAMACHO, that they could develop fatal injuries including, but not limited to, emphysema, throat cancer, laryngeal cancer, lung cancer, and/or other forms of cancer, as a result of smoking and/or inhaling smoke from Defendants' cigarettes;

p. prior to July 1, 1969, failing to warn foreseeable users, such as SANDRA CAMACHO, that the use of cigarettes would more likely than not lead to addiction, habituation and/or dependence;

q. prior to July 1, 1969, failing to warn foreseeable users, such as SANDRA CAMACHO, that quitting and/or limiting use of cigarettes would be extremely difficult, particularly if users started smoking at an early age;

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r. prior to July 1, 1969, failing to disclose to consumers of cigarettes, such as SANDRA CAMACHO, the results of scientific research conducted by and/or known to Defendant that cigarettes may be dangerous, defective, and/or addictive.

136. SANDRA CAMACHO was unaware of the defective and unreasonably dangerous condition of Defendants' cigarettes, and at a time when such products were being used for the purposes for which they were intended, was exposed to, breathed smoke from, and inhaled Defendants' cigarettes.

137. Defendants knew their cigarettes would be used without inspection for defects, and by placing them on the market, represented that they would be safe.

138. SANDRA CAMACHO was unaware of the hazards and defects in Defendants' cigarettes, to-wit: That exposure to said products would cause SANDRA CAMACHO to become addicted and develop laryngeal cancer.

139. As a direct and proximate and/or legal cause of the aforesaid defective and unreasonably dangerous condition of Defendants' cigarettes, SANDRA CAMACHO was injured. SANDRA CAMACHO thereby experienced great pain to her body and mind, and sustained injuries and damages in a sum in excess of Fifteen Thousand Dollars ($15,000.00).

140. As a further direct and proximate and/or legal cause of the defective and unreasonably dangerous condition of Defendants' cigarettes, SANDRA CAMACHO has incurred damages, both general and special, including medical expenses as a result of the necessary treatment of her injuries, and will continue to incur damages for future medical treatment necessitated by smoking-related injuries she has suffered, in a sum in excess of Fifteen Thousand Dollars ($15,000.00).

141. As a further direct and proximate and/or legal cause of the aforementioned defective and unreasonably dangerous condition of Defendants' cigarettes, SANDRA CAMACHO was required to, and did, employ physicians, surgeons, and other health care providers to examine, treat,

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and care for her and did incur medical and incidental expenses thereby. The exact amount of such expenses is unknown at this present time, but SANDRA CAMACHO alleges that she has suffered special damages in excess of Fifteen Thousand Dollars ($15,000.00).

142. As a further direct and proximate and/or legal cause of Defendants' aforesaid defective and unreasonably dangerous condition of Defendants' cigarettes, Plaintiff, ANTHONY CAMACHO, as SANDRA CAMACHO'S husband, has suffered and continues to suffer loss of companionship and care, emotional and moral support and/or sexual intimacy and alleges he has suffered damages in excess of Fifteen Thousand Dollars ($15,000.00).

143. Defendants' actions were taken knowingly, wantonly, willfully, and/or maliciously.

144. Defendants' conduct was despicable and so contemptible that it would be looked down upon and despised by ordinary decent people and was carried on by Defendants with willful and conscious disregard for the safety of SANDRA CAMACHO.

145. Defendants' outrageous and unconscionable conduct warrants an award of exemplary and punitive damages pursuant to NRS 42.005, in an amount appropriate to punish and make an example of Defendants, and to deter similar conduct in the future.

146. To the extent NRS 42.007 applies, Defendants are vicariously liable for punitive damages arising from the outrageous and unconscionable conduct of its employees, agents, apparent agents, independent contractors, and/or servants, as set forth herein.

147. Defendants' actions have forced Plaintiffs to retain counsel to represent them in the prosecution of this action, and they are therefore entitled to an award of a reasonable amount as attorney fees and costs of suit.

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FOURTH CLAIM FOR RELIEF

(FRAUDULENT MISREPRESENTATION)

Sandra Camacho Against Defendants Philip Morris and Liggett

148. Plaintiffs repeat and re-allege each and every allegation as contained in paragraphs 1 through 87 and incorporate the same herein by reference.

149. Beginning at an exact time unknown to Plaintiff, and continuing even today, the cigarette manufacturers, including Defendants herein, have carried out, and continue to carry out a campaign designed to deceive the public, including SANDRA CAMACHO, the government, and others as to the health hazards and addictive nature of cigarettes, through false statements and/or misrepresentations of material facts.

150. Defendants made intentional misrepresentations, false promises, concealed information, and failed to disclose material information to SANDRA CAMACHO, the public, and the American government.

151. Defendants carried out its campaign of fraud, false statements, and/or misrepresentations in at least six ways:

a. Defendants falsely represented to SANDRA CAMACHO that questions about smoking and health would be answered by an unbiased, trustworthy source;

b. Defendants misrepresented and confused facts about health hazards of cigarettes and addiction;

c. Defendants, along with other cigarette manufacturers, spent billions of dollars hiring lawyers, fake scientists, and public relations firms to misdirect purported "objective" scientific research;

d. Defendants discouraged meritorious litigation by engaging in "scorched earth" tactics – in fact in a previously secret 1988 document they commented "to paraphrase General

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Patton, the way we won these cases was not by spending all of [their] money, but by making that other son of a bitch spend all of his;"

e. Defendants suppressed and distorted evidence to protect its existence and profits

f. Defendants designed, marketed, and sold "filtered" and "light" cigarettes despite knowing internally that such cigarettes were just as addictive, dangerous, and deadly as "regular" cigarettes.

152. Cigarette manufacturers, including Defendants herein, knew cigarettes were dangerous and addictive. It became their practice, purpose, and goal to question any scientific research which concluded cigarettes were dangerous. They did this through misleading media campaigns, mailings to doctors and other scientific professionals, and testimony before governmental bodies.

153. Defendants made multiple misrepresentations to SANDRA CAMACHO including misrepresentations and misleading statements in advertisements, news programs and articles, media reports, and press releases.

154. These misrepresentations and false statements include, but are not limited to, the aforementioned statements and conduct contained in the *Historical Allegations of Defendants Unlawful Conduct Giving Rise to the Lawsuit* section above.

155. These misrepresentations and false statements also include the following statements which were heard, read, and relied upon by Plaintiff, SANDRA CAMACHO, including but not limited to

a. In 1953, Cigarette manufacturers, including Defendants herein, took out a full-page advertisement called the "Frank Statement to Cigarette Smokers" which falsely assured the public, the American government, and SANDRA CAMACHO, that the cigarette manufacturers, including Defendant herein, would purportedly "safeguard" the health

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of smokers, support allegedly "disinterested" research into smoking and health, and reveal to the public the results of their alleged "objective" research

b. Beginning in 1953 and continuing for decades, Cigarette manufacturers, including Defendants herein, falsely assured the public that TIRC/CTR was an "objective" research committee when internal company document reveal that TIRC/CTR functioned not for the promotion of scientific goals, but for public relations, politics, and positioning for litigation;

c. In the 1950s and 1960s, Cigarette manufacturers, including Defendants herein, sponsored, were quoted in, and helped publish articles to mislead the public including but not limited to the following: "Smoke-Cancer Tie Termed Obscure" (1955), "Study of Smoking is Inconclusive" (1956), "Cigarette Threat Called Unproven," (1962), "Tobacco Spokesmen Dispute Lung Study" (1962), "Tobacco Cancer Scare Fading in Smoke Ring (1964), and "Smokers Assured In Industry Study" (1962);

d. In response to the 1964 Surgeon General Report which linked cigarette smoking to health, the cigarette industry falsely assured the public that (i) cigarettes were not injurious to health, (ii) the industry would cooperate with the Surgeon General, (iii) more research was needed, and (iv) if there were any bad elements discovered in cigarettes, the cigarette manufacturers would remove those elements;

e. In the 1950s and 1960s, the Cigarette manufacturers, including Defendants herein, advertised and promoted cigarettes on television and radio as safe and glamorous, to the extent that cigarette advertising was the number one most heavily advertised product on television;

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f. Falsely advertised and promoted "filtered" and "light" cigarettes as "low tar" and "low nicotine" through print advertisements in magazines and newspapers throughout the 1950s, 1960s, 1970s, 1980s, 1990s, and even into the 2000s;

g. Knowingly made false and misleading statements to governmental entities, including in 1982 when the CEO of Defendant R.J. Reynolds, Edward Horrigan, disingenuously stated during a governmental hearing, "there is absolutely no proof that cigarettes are addictive;

h. In 1984, continuing to purposefully target children yet openly in press releases falsely claim, "We don't advertise to children . . . Some straight talk about smoking for young people;"

i. In 1988, in response to the United States Surgeon General's report that cigarettes are addictive and nicotine is the drug in tobacco that causes addiction, issuing a press release knowingly and disingenuously stating, "Claims that cigarettes are addictive is irresponsible and scare tactics;"

j. Through representatives in the Tobacco Institute, making countless publicized appearances on television and radio disingenuously denying cigarettes were addictive and claimed smoking was a matter of free choice and smokers could quit smoking if they wanted to;

k. In 1994 CEOs from the seven largest cigarette companies, including Defendants herein, knowingly providing false and misleading testimony under oath before the United States Congress that it had not been proven that cigarettes were addictive, caused disease, or caused one single person to die.

156. Defendants made intentional misrepresentations to Plaintiff, SANDRA CAMACHO, in the following ways:

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a. The aforementioned representations were regarding material facts about cigarettes and were knowingly false;

b. Defendants knew said representations were false at the time they made such statements;

c. Defendants knew SANDRA CAMACHO did not hold sufficient information to understand or appreciate the dangers of cigarettes;

d. Defendants intended to induce SANDRA CAMACHO, and did indeed induce SANDRA CAMACHO, to rely upon the aforementioned false representations/acts/statements;

e. SANDRA CAMACHO was unaware of the falsity of Defendants' aforementioned false representations/acts/statements;

f. CLEVELAND CALRK was justified in relying upon Defendants' misrepresentations because they were made by Defendants who possessed superior knowledge regarding the health hazards and addictive nature of cigarettes;

g. As a direct and proximate and/or legal cause of Defendants' intentional misrepresentations, SANDRA CAMACHO became addicted to cigarettes and developed laryngeal cancer.

157. Furthermore, Defendants made false promises to Plaintiff, SANDRA CAMACHO, in the following ways:

a. Defendants made false promises to the public, including SANDRA CAMACHO to (i) cooperate with public health, including the Surgeon General, (ii) conduct allegedly "objective" research regarding the addictive nature and health hazards of cigarettes, (ii) remove any harmful elements to cigarettes, if there were any, (iv) form purported "objective" research committees dedicated to undertaking an interest in health as its

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"basic responsibility paramount to every other consideration," (v) falsely pledging to provide aid and assistance to research cigarette use and health and others;

b. At all times material, Defendants did not intend to keep its promises;

c. Defendants made its promises with the intent to induce Plaintiff to begin and continue smoking;

d. Plaintiff was unaware of Defendants' intention not to perform their promises;

e. Plaintiff acted in reliance upon Defendants' promises;

f. Plaintiff was justified in relying upon Defendants' promises;

g. As a direct and proximate and/or legal cause of Defendants' false promises, SANDRA CAMACHO became addicted to cigarettes and developed laryngeal cancer.

158. As a direct and proximate and/or legal cause of Defendants' fraudulent acts and misrepresentations, SANDRA CAMACHO was injured. SANDRA CAMACHO thereby experienced great pain to her body and mind, sustaining injuries and damages in a sum in excess of Fifteen Thousand Dollars ($15,000.00).

159. As a further direct and proximate and/or legal cause of Defendants' fraudulent acts and misrepresentations, SANDRA CAMACHO has incurred damages, both general and special, including medical expenses as a result of the necessary treatment of her injuries, and will continue to incur damages for future medical treatment necessitated by smoking-related injuries she has suffered, in a sum in excess of Fifteen Thousand Dollars ($15,000.00).

160. As a further direct and proximate and/or legal cause of Defendants' fraudulent acts and misrepresentations, SANDRA CAMACHO was required to, and did, employ physicians, surgeons, and other health care providers to examine, treat, and care for her and did incur medical and incidental expenses thereby. The exact amount of such expenses is unknown at this present time, but SANDRA

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CAMACHO alleges that she has suffered special damages in excess of Fifteen Thousand Dollars ($15,000.00).

161. As a further direct and proximate and/or legal cause of Defendants' aforesaid fraudulent acts and misrepresentations, Plaintiff, ANTHONY CAMACHO, as SANDRA CAMACHO'S husband, has suffered and continues to suffer loss of companionship and care, emotional and moral support and/or sexual intimacy and alleges he has suffered damages in excess of Fifteen Thousand Dollars ($15,000.00).

162. Defendants' actions were taken knowingly, wantonly, willfully, and/or maliciously.

163. Defendants' conduct was despicable and so contemptible that it would be looked down upon and despised by ordinary decent people and was carried on by Defendants with willful and conscious disregard for the safety of SANDRA CAMACHO.

164. Defendants' outrageous and unconscionable conduct warrants an award of exemplary and punitive damages pursuant to NRS 42.005, in an amount appropriate to punish and make an example of Defendants, and to deter similar conduct in the future.

165. To the extent NRS 42.007 applies, Defendants are vicariously liable for punitive damages arising from the outrageous and unconscionable conduct of its employees, agents, apparent agents, independent contractors, and/or servants, as set forth herein.

166. Defendants' actions have forced Plaintiffs to retain counsel to represent them in the prosecution of this action, and they are therefore entitled to an award of a reasonable amount as attorney fees and costs of suit.

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FIFTH CLAIM FOR RELIEF

(FRAUDULENT CONCEALMENT)

Sandra Camacho Against Defendants Philip Morris and Liggett

176. Plaintiffs repeat and re-allege each and every allegation as contained in paragraphs 1 through 87 and paragraphs 148-175 and incorporate the same herein by reference.

177. Beginning at an exact time unknown to SANDRA CAMACHO, and continuing today, cigarette manufacturers, including Defendants herein, have carried out, and continue to carry out, a campaign designed to deceive the public, including SANDRA CAMACHO, physicians, the government, and others as to the true danger of cigarettes.

178. Cigarette manufacturers, including Defendants herein, carried out their plan by concealing and suppressing facts, information, and knowledge about the dangers of smoking, including addiction.

179. Defendants carried out its scheme by concealing its knowledge concerning the dangers of cigarettes and its addictive nature as set forth in the *Historical Allegations of Defendants Unlawful Conduct Giving Rise to the Lawsuit* allegations referenced above.

180. Defendants also carried out such scheme by concealing its knowledge concerning, but not limited to, the following:

a. the highly addictive nature of nicotine cigarettes;

b. the design of cigarettes to make them more addictive and easier to inhale;

c. the manipulating and controlling of nicotine content of their products to create and perpetuate users' addiction to cigarettes;

d. the manufacturing and engineering process of making cigarettes, including adding tar, carcinogens, arsenal, polonium-210, formaldehyde, nitrosamines, and other compounds;

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e. the deliberate use of ammonia technology and/or certain tobacco;

f. blends to boost the pH of cigarette smoke to "free base" nicotine in cigarettes;

g. its intentional use of tobacco high in nitrosamines–a potent carcinogen not found in natural, green tobacco leaf, but created during the tobacco curing process;

h. its scheme to target and addict children to replace customers who were dying from smoking cigarettes;

i. the true results of its research regarding the dangers posed by smoking cigarettes. For example, in response to the 1965 Surgeon General report that related cigarette smoking to lung cancer in men, the cigarette manufacturers, including Defendant herein, concealed their research, from the year prior, which concluded:

> Moreover, nicotine is addictive. We are, then in the business of selling nicotine, an addictive drug effective in the release of stress mechanisms ... But cigarettes - we assume the Surgeon General's Committee to say - despite the beneficent effect of nicotine, have certain unattractive side effects:
>
> 1. They cause, or predispose to, lung cancer.
> 2. They contribute to certain cardiovascular disorders.
> 3. They may well be truly causative in emphysema, etc.

j. the risks of contracting cancer, including but not limited to laryngeal cancer, esophageal cancer, other head and neck cancers, oral cancer, emphysema, COPD, lung cancer, heart disease, strokes, bladder cancer, other forms of cancer;

k. filtered, low tar, low nicotine, and/or "light" cigarettes were not safe, safer, or less dangerous than "regular" cigarettes;

l. the Federal Trade Commission ("FTC") method of measuring "tar & nicotine" levels underestimated and did not accurately reflect the levels of tar and nicotine delivered to a smoker.

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181. Cigarette manufacturers, including Defendants herein, also concealed and/or made fraudulent statements and misrepresentations to the public, including SANDRA CAMACHO, through their actions, funding, and involvement with TIRC/CTR, including but not limited to the following:

a. falsely concealing the true purpose of TIRC/CTR was public relations, politics, and positioning for litigation;

b. falsely pledging to provide aid and assistance to research cigarette use and health;

c. expressly undertaking a disingenuous interest in health as its "basic responsibility paramount to every other consideration;"

d. affirmatively assumed a (broken) promise to truthfully disclose adverse information regarding the health hazards of smoking;

e. purposely created the illusion that scientific research regarding the dangers of cigarettes was being conducted and the results of which would be made public;

f. concealing information regarding the lack of bona fide research being conducted by TIRC/CTR and the lack of funds being provided for research;

g. concealing that TIRC/CTR was nothing more than a "public relations" front and shield.

182. Defendants made false promises to Plaintiff, SANDRA CAMACHO, in the following ways:

a. Defendants assumed the responsibility to provide SANDRA CAMACHO, and the public, accurate and truthful information about their own products

b. Defendants concealed and/or suppressed the aforementioned material facts about the dangers of cigarettes;

c. Defendants were under a duty to disclose material facts about the dangers of cigarettes to Plaintiff;

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d. Defendants knew it was concealing material facts about the dangers of cigarettes from Plaintiff;

e. Defendants intended to induce Plaintiff to smoke and become addicted to cigarettes;

f. Plaintiff was unaware of the dangerous and addictive nature of cigarettes, and would not have begun or continued to smoke had he known the aforementioned concealed and/or suppressed information Defendants' possessed;

g. Plaintiff was unaware of the danger of Defendants' cigarettes, the addictive nature of Defendants' cigarettes, and that low tar, low nicotine, "light," and/or filtered cigarettes were just as dangerous as unfiltered and "regular" cigarettes;

h. Plaintiff justifiably relied upon Defendants to disseminate the superior knowledge and information it possessed regarding the dangers of cigarettes;

i. The concealment and/or suppressed of material facts regarding the hazards of cigarettes caused Plaintiff to become addicted to cigarettes, and also caused her to develop laryngeal cancer.

183. As a direct and proximate and/or legal cause of Defendants' fraudulent concealment, SANDRA CAMACHO was injured and experienced great pain to her body and mind, sustaining injuries and damages in a sum in excess of Fifteen Thousand Dollars ($15,000.00).

184. As a further direct and proximate and/or legal cause of Defendants' fraudulent concealment, SANDRA CAMACHO has incurred damages, both general and special, including medical expenses as a result of the necessary treatment of her injuries, and will continue to incur damages for future medical treatment necessitated by smoking-related injuries she has suffered, in a sum in excess of Fifteen Thousand Dollars ($15,000.00).

185. As a further direct and proximate and/or legal cause of Defendants' fraudulent concealment, SANDRA CAMACHO was required to, and did, employ physicians, surgeons, and other

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health care providers to examine, treat, and care for her and did incur medical and incidental expenses thereby. The exact amount of such expenses is unknown at this present time, but SANDRA CAMACHO alleges that she has suffered special damages in excess of Fifteen Thousand Dollars ($15,000.00).

186. As a further direct and proximate and/or legal cause of Defendants' aforesaid fraudulent concealment, Plaintiff, ANTHONY CAMACHO, as SANDRA CAMACHO'S husband, has suffered and continues to suffer loss of companionship and care, emotional and moral support and/or sexual intimacy and alleges he has suffered damages in excess of Fifteen Thousand Dollars ($15,000.00).

187. Defendants' actions were taken knowingly, wantonly, willfully, and/or maliciously.

188. Defendants' conduct was despicable and so contemptible that it would be looked down upon and despised by ordinary decent people and was carried on by Defendants with willful and conscious disregard for the safety of SANDRA CAMACHO.

189. Defendants' outrageous and unconscionable conduct warrants an award of exemplary and punitive damages pursuant to NRS 42.005, in an amount appropriate to punish and make an example of Defendants, and to deter similar conduct in the future.

190. To the extent NRS 42.007 applies, Defendants are vicariously liable for punitive damages arising from the outrageous and unconscionable conduct of its employees, agents, apparent agents, independent contractors, and/or servants, as set forth herein.

191. Defendants' actions have forced Plaintiffs to retain counsel to represent them in the prosecution of this action, and they are therefore entitled to an award of a reasonable amount as attorney fees and costs of suit.

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SIXTH CLAIM FOR RELIEF

(CIVIL CONSPIRACY)

Sandra Camacho Against Defendants Philip Morris; R.J. Reynolds; and Liggett

192. Plaintiffs repeat and re-allege the allegations as contained in paragraphs 1 through 87, paragraphs 148 – 191 and incorporate the same herein by reference.

193. Defendants acted in concert to accomplish an unlawful objective for the purposes of harming Plaintiff, SANDRA CAMACHO. Defendants' actions include, but are not limited to the following:

a. Defendants, along with other cigarette manufacturers, and CTR, TIRC, and TI, along with attorneys and law firms retained by Defendants, unlawfully agreed to conceal and/or omit, and did in fact conceal and/or omit, information regarding the health hazards of cigarettes and/or their addictive nature with the intention that smokers and the public would rely on this information to their detriment. Defendants agreed to execute their scheme by performing the abovementioned unlawful acts and/or by doing lawful acts by unlawful means;

b. Defendants, along with other entities including TIRC, CTR, TI and persons including their in-house lawyers and outside retained counsel, entered into a conspiracy in 1953 to conceal the harms of smoking cigarettes;

c. Defendants, through their executives, employees, agents, officers and representatives made numerous public statements from 1953 through 2000 directly denying the health hazards and addictive nature of smoking cigarettes.

194. After the year 2000, Defendants continued their conspiratorial acts in furtherance of their conspiracy related to the harms of smoking including but not limited to the following acts:

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a. Marketing and/or advertising filters as safer or less hazardous to health than non-filtered cigarettes;

b. Marketing and/or advertising low tar cigarettes as safer or less hazardous to health;

c. Marketing and/or advertising lights and ultra-light cigarettes as safer or less hazardous to health;

d. Knowingly concealing from the public that filtered, low tar, lights, and ultra-lights cigarettes were no safer or even less hazardous than other cigarettes;

e. Adding "onserts" to packages of cigarettes even after the United States government banned marketing of "light" and "ultra-light" cigarettes;

f. Opposing, and continuing to oppose proposed FDA regulations to reduce or eliminate levels of nicotine in cigarettes;

g. Continuing to market and prey upon children and teenagers who are not able to understand or appreciate the risks and dangers associated with cigarette smoking.

195. Defendants' actions, as they relate to their acts in furtherance of their conspiracy as alleged in this complaint, continues through the present.

196. Two or more of the cigarette manufacturers, including Defendants herein, by their aforementioned concerted actions, intended to accomplish, and did indeed accomplish, an unlawful objective of misleading and deceiving the public, for the purpose of harming Plaintiff.

197. As a direct proximate and/or legal cause of Defendants' concerted actions, SANDRA CAMACHO was injured and experienced great pain to her body and mind, sustaining injuries and damages in a sum in excess of Fifteen Thousand Dollars ($15,000.00).

198. As a further direct and proximate and/or legal cause of Defendants' concerted actions, SANDRA CAMACHO has incurred damages, both general and special, including medical expenses as a result of the necessary treatment of her injuries, and will continue to incur damages for future

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medical treatment necessitated by smoking-related injuries she has suffered, in a sum in excess of Fifteen Thousand Dollars ($15,000.00).

199. As a further direct and proximate and/or legal cause of Defendants' concerted actions, SANDRA CAMACHO was required to, and did, employ physicians, surgeons, and other health care providers to examine, treat, and care for her and did incur medical and incidental expenses thereby. The exact amount of such expenses is unknown at this present time, but SANDRA CAMACHO alleges that she has suffered special damages in excess of Fifteen Thousand Dollars ($15,000.00).

200. As a further direct and proximate and/or legal cause of Defendants' aforesaid concerted actions, Plaintiff, ANTHONY CAMACHO, as SANDRA CAMACHO'S husband, has suffered and continues to suffer loss of companionship and care, emotional and moral support and/or sexual intimacy and alleges he has suffered damages in excess of Fifteen Thousand Dollars ($15,000.00).

201. Defendants' concerted actions were taken knowingly, wantonly, willfully, and/or maliciously.

202. Defendants' conduct was despicable and so contemptible that it would be looked down upon and despised by ordinary decent people and was carried on by Defendants with willful and conscious disregard for the safety of SANDRA CAMACHO.

203. Defendants' outrageous and unconscionable conduct warrants an award of exemplary and punitive damages pursuant to NRS 42.005, in an amount appropriate to punish and make an example of Defendants, and to deter similar conduct in the future.

204. To the extent NRS 42.007 applies, Defendants are vicariously liable for punitive damages arising from the outrageous and unconscionable conduct of their employees, agents, apparent agents, independent contractors, and/or servants, as set forth herein.

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205. Defendants' actions have forced Plaintiffs to retain counsel to represent them in the prosecution of this action, and they are therefore entitled to an award of a reasonable amount as attorney fees and costs of suit.

SEVENTH CLAIM FOR RELIEF

(VIOLATION OF DECEPTIVE TRADE PRACTICES ACT – NRS 598.0903)

Sandra Camacho Against Defendants Philip Morris; R.J. Reynolds; And Liggett

206. Plaintiffs repeat and re-allege the allegations contained in the preceding paragraphs herein and incorporate the same herein by reference.

207. At all times relevant herein, there was a statute in effect entitled Nevada Deceptive Trade Practices Act, NRS 598.0903 et. seq.

208. Defendants are subject to the provisions of the Nevada Deceptive Trade Practices Act, and Plaintiff is one of the persons the Act was enacted to protect.

209. Plaintiffs bring this claim pursuant to NRS 41.600, which entitles any person who is the victim of consumer fraud to bring an action. A deceptive trade practice as defined in NRS 598.0915 to 598.0925 constitutes consumer fraud.

210. NRS 598.0915 states that a person engages in a deceptive trade practice if, in the course of his or her business or occupation:

> ****
> 2. Knowingly makes a false representation as to the source, sponsorship, approval or certification of goods or services for sale or lease.
>
> 3. Knowingly makes a false representation as to affiliation, connection, association with or certification by another person.
>
> ****
> 5. Knowingly makes a false representation as to the characteristics, ingredients, uses, benefits, alterations or quantities of goods or services for sale or lease or a false representation as to the sponsorship, approval, status, affiliation or connection of a person therewith.
>
> 7. Represents that goods or services for sale or lease are of a particular

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> standard, quality or grade, or that such goods are of a particular style or model, if he or she knows or should know that they are of another standard, quality, grade, style or model.
>
> ****
>
> 15. Knowingly makes any other false representation in a transaction.

211. Upon information and belief, Defendants knowingly violated NRS 598.0915 by making the following false and misleading statements and representations, including but not limited to:

212. Upon information and belief, Defendants knowingly violated NRS 598.0915 by making the following false and misleading statements and representations, including but not limited to:

a. making countless publicized appearances on television and radio disingenuously denying cigarettes were addictive and claimed smoking was a matter of free choice and smokers could quit smoking if they wanted to;

b. representing to the public that it was not known whether cigarettes were harmful or caused disease;

c. falsely advertising and promoting cigarettes as safe, not dangerous, and not harmful;

d. falsely advertising and promoting "filtered" and "light" cigarettes as "low tar" and "low nicotine" through print advertisements in magazines and newspapers throughout the 1950s, 1960s, 1970s, 1980s, 1990s, and even into the 2000s;

e. falsely representing that questions about smoking and health would be answered by an allegedly unbiased, trustworthy source;

f. misrepresenting and confusing facts about health hazards of cigarettes and addiction;

g. creating a made up "cigarette controversy;

h. taking out a full page advertisement called the "Frank Statement to Cigarette Smokers"

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which falsely assured the public, the American government, and SANDRA CAMACHO, that would purportedly "safeguard" the health of smokers, support allegedly "disinterested" research into smoking and health, and reveal to the public the results of their alleged "objective" research;

i. falsely assuring the public that TIRC/CTR was an "objective" research committee when internal company documents reveals that TIRC/CTR functioned not for the promotion of scientific goals, but for public relations, politics, and positioning for litigation;

j. sponsoring, being quoted in, and helping publish articles to mislead the public including but not limited to the following: "Smoke-Cancer Tie Termed Obscure" (1955), "Study of Smoking is Inconclusive" (1956), "Cigarette Threat Called Unproven," (1962), "Tobacco Spokesmen Dispute Lung Study" (1962), "Tobacco Cancer Scare Fading in Smoke Ring (1964), and "Smokers Assured In Industry Study" (1962);

k. responding to the 1964 Surgeon General Report which linked cigarette smoking to health, by falsely assuring the public that (i) cigarettes were not injurious to health, (ii) the industry would cooperate with the Surgeon General, (iii) more research was needed, and (iv) if there were any bad elements discovered in cigarettes, the cigarette manufacturers would remove those elements;

l. advertising and promoting cigarettes on television and radio as safe and glamorous, to the extent that cigarette advertising was the number one most heavily advertised product on television;

m. making knowingly false and misleading statements during a governmental hearing, including stating that, "there is absolutely no proof that cigarettes are addictive;"

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n. purposefully targeting children yet openly in press releases falsely claiming, "We don't advertise to children . . . Some straight talk about smoking for young people;"

o. responding the 1988 United States Surgeon General's report that nicotine is the drug in tobacco that causes addiction, by issuing press releases stating, "Claims that cigarettes are addictive is irresponsible and scare tactics;"

p. lying under oath before the United States Congress in 1994 that it was their opinion that it had not been proven that cigarettes were addictive, caused disease, or caused one single person to die.

213. As a direct and proximate and/or legal cause of Defendants' aforementioned acts, SANDRA CAMACHO was injured and experienced great pain to her body and mind, sustaining injuries and damages in a sum in excess of Fifteen Thousand Dollars ($15,000.00).

214. As a further direct and proximate and/or legal cause of Defendants' aforementioned acts, SANDRA CAMACHO has incurred damages, both general and special, including medical expenses as a result of the necessary treatment of her injuries, and will continue to incur damages for future medical treatment necessitated by smoking-related injuries she has suffered, in a sum in excess of Fifteen Thousand Dollars ($15,000.00).

215. As a further direct proximate and/or legal cause of Defendants' aforementioned acts, SANDRA CAMACHO was required to, and did, employ physicians, surgeons, and other health care providers to examine, treat, and care for her and did incur medical and incidental expenses thereby. The exact amount of such expenses is unknown at this present time, but SANDRA CAMACHO alleges that she has suffered special damages in excess of Fifteen Thousand Dollars ($15,000.00).

216. As a further direct and proximate and/or legal cause of Defendants' aforementioned acts, Plaintiff, ANTHONY CAMACHO, as SANDRA CAMACHO'S husband, has suffered and continues to suffer loss of companionship and care, emotional and moral support and/or sexual

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intimacy and alleges he has suffered damages in excess of Fifteen Thousand Dollars ($15,000.00).

217. Defendants' actions were taken knowingly, wantonly, willfully, and/or maliciously.

218. Defendants' conduct was despicable and so contemptible that it would be looked down upon and despised by ordinary decent people and was carried on by Defendants with willful and conscious disregard for the safety of SANDRA CAMACHO.

219. Defendants' outrageous and unconscionable conduct warrants an award of exemplary and punitive damages pursuant to NRS 42.005, in an amount appropriate to punish and make an example of Defendants, and to deter similar conduct in the future.

220. To the extent NRS 42.007 applies, Defendants are vicariously liable for punitive damages arising from the outrageous and unconscionable conduct of their employees, agents, apparent agents, independent contractors, and/or servants, as set forth herein.

221. Defendants' actions have forced Plaintiffs to retain counsel to represent them in the prosecution of this action, and they are therefore entitled to an award of a reasonable amount as attorney fees and costs of suit.

EIGHTH CLAIM FOR RELIEF

(STRICT PRODUCT LIABILITY)

Sandra Camacho Against Defendant, ASM Nationwide Corporation d/b/a Silverado Smokes & Cigars and LV Singhs Inc. d/b/a Smokes & Vapors

222. Plaintiffs repeat and re-allege the allegations contained in paragraphs 1 and 87 and paragraphs 127 - 147 and incorporate the same herein by reference.

223. Defendants, SILVERADO and SMOKES & VAPORS, are in the business of distributing, marketing, selling, or otherwise placing cigarette into the stream of commerce.

224. Defendants, SILVERADO and SMOKES & VAPORS' sold cigarettes to the public, including Plaintiff SANDRA CAMACHO.

225. The aforesaid products were distributed, sold and/or otherwise placed into the stream of

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commerce by Defendants, SILVERADO and SMOKES & VAPORS.

226. Defendants, SILVERADO and SMOKES & VAPORS', defective and unreasonably dangerous cigarettes reached SANDRA CAMACHO without substantial change from that in which such products were when within the possession of Defendants.

227. Defendants, SILVERADO and SMOKES & VAPORS' cigarettes were dangerous beyond the expectation of the ordinary user/consumer when used as intended or in a manner reasonably foreseeable by Defendants.

228. The nature and degree of danger of Defendants, SILVERADO and SMOKES & VAPORS' cigarettes were dangerous beyond the expectation of the ordinary consumer, including SANDRA CAMACHO, when used as intended or in a reasonably foreseeable manner.

229. Defendants, SILVERADO and SMOKES & VAPORS' cigarettes were unreasonably dangerous because a less dangerous design and/or modification was economically and scientifically feasible.

230. As a direct and proximate and/or legal cause of the aforesaid defective and unreasonably dangerous condition of cigarette products sold by Defendants, SILVERADO and SMOKES & VAPORS, SANDRA CAMACHO was injured. SANDRA CAMACHO thereby experienced great pain to her body and mind, and sustained injuries and damages in a sum in excess of Fifteen Thousand Dollars ($15,000.00).

231. As a further direct and proximate and/or legal cause of the defective and unreasonably dangerous condition of Defendants' cigarettes, SANDRA CAMACHO has incurred damages, both general and special, including medical expenses as a result of the necessary treatment of her injuries, and will continue to incur damages for future medical treatment necessitated by smoking-related injuries she has suffered, in a sum in excess of Fifteen Thousand Dollars ($15,000.00).

232. As a further direct and proximate and/or legal cause of the aforementioned defective

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and unreasonably dangerous condition of Defendants' cigarettes, SANDRA CAMACHO was required to, and did, employ physicians, surgeons, and other health care providers to examine, treat, and care for her and did incur medical and incidental expenses thereby. The exact amount of such expenses is unknown at this present time, but SANDRA CAMACHO alleges that she has suffered special damages in excess of Fifteen Thousand Dollars ($15,000.00).

233. As a further direct and proximate and/or legal cause of Defendants' aforesaid defective and unreasonably dangerous condition of Defendants' cigarettes, Plaintiff, ANTHONY CAMACHO, as SANDRA CAMACHO'S husband, has suffered and continues to suffer loss of companionship and care, emotional and moral support and/or sexual intimacy and alleges he has suffered damages in excess of Fifteen Thousand Dollars ($15,000.00).

234. Defendants' actions were taken knowingly, wantonly, willfully, and/or maliciously.

235. Defendants' conduct was despicable and so contemptible that it would be looked down upon and despised by ordinary decent people and was carried on by Defendants with willful and conscious disregard for the safety of SANDRA CAMACHO.

236. Defendants' outrageous and unconscionable conduct warrants an award of exemplary and punitive damages pursuant to NRS 42.005, in an amount appropriate to punish and make an example of Defendants, and to deter similar conduct in the future.

237. To the extent NRS 42.007 applies, Defendants are vicariously liable for punitive damages arising from the outrageous and unconscionable conduct of their employees, agents, apparent agents, independent contractors, and/or servants, as set forth herein.

238. Defendants' actions have forced Plaintiffs to retain counsel to represent them in the prosecution of this action, and they are therefore entitled to an award of a reasonable amount as attorney fees and costs of suit.

WHEREFORE, Plaintiffs, SANDRA CAMACHO and ANTHONY CAMACHO expressly

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reserving the right to amend this Complaint at the time of trial to include all items of damage not yet ascertained, demand judgment against Defendants, PHILIP MORRIS USA, INC.; R.J. REYNOLDS TOBACCO COMPANY, 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.; ASM NATIONWIDE CORPORATION d/b/a SILVERADO SMOKES & CIGARS; LV SINGHS INC. d/b/a SMOKES & VAPORS;DOES I-X; and ROE BUSINESS ENTITIES XI-XX as follows:

1. For general damages in excess of Fifteen Thousand Dollars ($15,000.00), to be set forth and proven at the time of trial;

2. For special damages in excess of Fifteen Thousand Dollars ($15,000.00), to be set forth and proven at the time of trial;

3. For exemplary and punitive damages in excess of Fifteen Thousand Dollars ($15,000.00);

4. For reasonable attorneys' fees;

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5. For costs of suit incurred;

6. For a jury trial on all issues so triable; and

7. For such other relief as to the Court seems just and proper.

DATED this 26th day of February 2020.

CLAGGETT & SYKES LAW FIRM

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Exhibit 3

MDSM
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Attorney for Defendants Philip Morris USA Inc. and ASM Nationwide Corporation

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 corporation; and ASM NATIONWIDE CORPORATION d/b/a SILVERADO SMOKES & CIGARS, 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.	Case No.: A-19-807650-C Dept. 4 **(Hearing Requested)** **DEFENDANTS PHILIP MORRIS USA INC., LIGGETT GROUP LLC, AND ASM NATIONWIDE CORPORATION'S MOTION TO DISMISS PLAINTIFFS' AMENDED COMPLAINT UNDER NRCP 12(b)(5)**

Defendants Philip Morris USA Inc. ("PM USA"), Liggett Group LLC ("Liggett"), and ASM Nationwide Corporation (d/b/a Silverado Smokes & Cigars) ("Silverado") (collectively, "Defendants"), by and through their counsel of record, hereby file this Motion to Dismiss

Plaintiffs' Amended Complaint under Nevada Rules of Civil Procedure 8(a), 9(b), and 12(b)(5) (the "Motion").[1]

Defendants base this motion upon the pleadings and papers on file here, the following Memorandum of Points and Authorities, and any oral argument allowed at the time of hearing on this matter.

Dated: March 23, 2020.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiffs Sandra Camacho, and her spouse, Anthony Camacho, ("Plaintiffs") allege that Ms. Camacho smoked L&M, Marlboro, and Basic cigarettes from approximately 1964 until 2017 and became addicted. Plaintiffs claim that Ms. Camacho's addiction to L&M, Marlboro, and Basic cigarettes caused her laryngeal cancer, diagnosed in March 2018. Plaintiffs allege eight causes of action against three tobacco manufacturers and two retailers. Plaintiffs assert claims against PM USA and Liggett for negligence (Count I); gross negligence (Count II); strict

[1] Defendants adopt fully by reference Defendant R.J. Reynolds Tobacco Company's contemporaneously-filed Motion to Dismiss Plaintiff's Amended Complaint Under NRCP 12(b)(5).

products liability (Count III); fraudulent misrepresentation (Count IV); fraudulent concealment (Count V); civil conspiracy (Count VI); and violation of the Nevada Deceptive Trade Practices Act (NDTPA) (Count VII). Plaintiffs allege strict products liability against retailers Silverado and LV Singhs Inc. (d/b/a Smokes & Vapors) (Count VIII), and they also assert Counts VI and VII against R.J. Reynolds Tobacco Company.

All of Plaintiffs' claims fail for four major reasons. *First*, to the extent that Plaintiffs fault Defendants for simply manufacturing and selling cigarettes, federal law preempts such claims. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 139 (2000). In other words, federal law precludes Plaintiffs from claiming that *all* cigarettes are defective or inherently and unreasonably dangerous simply because they are manufactured and sold. Thus, to succeed in their allegations, Plaintiffs must specifically allege that Ms. Camacho smoked *defective L&M, Marlboro, and Basic* cigarettes and that *the L&M, Marlboro, and Basic-specific defect(s) caused Ms. Camacho's subsequent addiction and laryngeal cancer*. However, Plaintiffs' conclusory allegations fail to put Defendants on notice of any *specific* defect(s) in the L&M, Marlboro, or Basic cigarettes. *See*, *e.g.*, *Hall v. SSF, Inc.*, 112 Nev. 1384, 1391, 930 P.2d 94, 98 (1996) (explaining that "Nevada is a notice pleading jurisdiction" and that pleadings must "place matters into issue which are fairly noticed to the adverse party") (citation omitted). Consequently, Counts I, II, III, and VIII therefore fail as a matter of law.

Second, Plaintiffs' fraud-dependent claims, including civil conspiracy and violation of the NDTPA, fail because they do not comport with the heightened particularity required under Nevada Rule of Civil Procedure 9(b). *See Occhiuto v. Occhiuto*, 97 Nev. 143, 146 n.3, 625 P.2d 568, 570 (1981) ("In all averments of fraud or mistake, the circumstances constituting fraud or mistake *shall be stated with particularity*." (emphasis added) (citing NRCP 9(b)).

Third, a civil conspiracy claim generally is predicated on an underlying tort. *See*, *e.g.*, *Jordan v. State ex rel. Dep't of Motor Vehicles & Pub. Safety*, 121 Nev. 44, 75, 110 P.3d 30, 52 (2005) ("[A]n underlying cause of action for fraud is a ***necessary predicate*** to a cause of action for conspiracy to defraud." (emphasis added)), *disavowed in part on other grounds*, *Buzz Stew, Ltd. Liab. Co. v. City of N. Las Vegas*, 124 Nev. 224, 228 n.6, 181 P.3d 670, 672 (2008). Here,

Plaintiffs' claim for civil conspiracy fails because the allegations for the underlying fraud tort are insufficiently particular to survive dismissal. Furthermore, Plaintiffs' conclusory allegations do not support the standalone tort of civil conspiracy.

Fourth and lastly, Plaintiffs' NDTPA claim fails because Plaintiffs did not allege any facts to show that Ms. Camacho was a "victim of consumer fraud," as mandated by NRS § 41.600(1). Accordingly, Counts IV, V, and VII fail.

In sum, Plaintiffs cannot sustain their Amended Complaint for the reasons discussed above and articulated in more detail below. The Court therefore should dismiss Plaintiffs' Amended Complaint (Counts I to VIII) in its entirety.

II. ARGUMENT

A. Standard of Review

A party may move for the dismissal of a pleading on the grounds that the pleading fails to state a claim upon which relief may be granted. *See* NRCP 12(b)(5). For purposes of a Rule 12(b)(5) motion, the "court accepts the plaintiffs' factual allegations as true, but the allegations must be legally sufficient to constitute the elements of the claim asserted." *Sanchez v. Wal-Mart Stores, Inc.*, 125 Nev. 818, 823, 221 P.3d 1276, 1280 (2009) (citation omitted); *see also, e.g.*, *Simpson v. Mars Inc.*, 113 Nev. 188, 190, 929 P.2d 966, 967 (1997). "The test for determining whether the allegations of a cause of action are sufficient to assert a claim for relief is whether the allegations give fair notice of the nature and basis of the claim and the relief requested." *Ravera v. City of Reno*, 100 Nev. 68, 70, 675 P.2d 407, 408 (1984) (citations omitted); *see also Hall*, 112 Nev. at 1391, 930 P.2d at 98. While notice pleading "relieve[s] the pleader from the niceties of the dotted i and the crossed t and the uncertainties of distinguishing in advance between evidentiary and ultimate facts," a plaintiff still must "set out sufficient factual matter to outline the elements of [their] cause of action or claim, proof of which is essential to [their] recovery." *Ravera*, 100 Nev. at 70, 675 P.2d at 408 (citation omitted).

Accordingly, to survive a motion to dismiss for failure to state a claim, a plaintiff's complaint must allege facts sufficient to establish all necessary elements of each cause of action upon which recovery is sought. *Danning v. Lum's, Inc.*, 86 Nev. 868, 870, 478 P.2d 166, 167

(1970) (citations omitted). If it appears from the pleadings that plaintiff can prove no set of facts that can entitle him or her to relief, the complaint should be dismissed. *See*, *e.g.*, *Cohen v. Mirage Resorts, Inc.*, 119 Nev. 1, 22, 62 P.3d 720, 734 (2003) (citing *Edgar v. Wagner*, 101 Nev. 226, 228, 699 P.2d 110, 112 (1985)). Dismissal is appropriate if the complaint fails to "allege[] facts necessary to establish" a cause of action under Nevada law. *Snyder v. Viani*, 110 Nev. 1339, 1344, 885 P.2d 610, 613 (1994) (affirming trial court's grant of a motion to dismiss because the plaintiff "ha[d] not alleged facts necessary to establish contract formation" to support a "breach of contract claim").

B. The Doctrines of Express and Implied Preemption Bar Plaintiffs' Failure-to-Warn, Fraudulent Concealment, Negligence, and Strict Liability Claims as a Matter of Law.

1. Express Preemption Bars Plaintiffs' Fraudulent Concealment Claim (Count V).

Express preemption operates to bar Plaintiffs' claims as a matter of law when "Congress expressly preempts state law when it explicitly states that intent [to do so] in a statute's language." *Renfroe v. Lakeview Loan Servicing, LLC*, 133 Nev. 358, 359, 398 P.3d 904, 906 (2017). Stated differently, express preemption occurs when Congress explicitly conveys in a federal statute language of its intent to preempt state law or state-based theories of liability. *See*, *e.g.*, *FDIC v. Rhodes*, 130 Nev. 893, 899, 336 P.3d 961, 965 (2014). Here, the federal law at issue is the Federal Cigarette Labeling and Advertising Act ("Labeling Act"), 15 U.S.C. §§ 1331, *et. seq.* Congress enacted the Labeling Act in 1965 for the purposes of "(1) adequately informing the public that cigarette smoking may be hazardous to health, and (2) *protecting the national economy from the burden imposed by diverse, nonuniform, and confusing cigarette labeling and advertising regulations*." *Cipollone v. Liggett Grp.*, 505 U.S. 504, 514 (1992) (emphasis added). The Labeling Act contains an express preemption provision:

> *No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter*.

15 U.S.C. §1334(b) (emphasis added). As the U.S. Supreme Court explained, the Labeling Act

expressly preempts *any* state law claim that would "require a showing that [defendant's] post-1969 advertising or promotions should have included additional, or more clearly stated, warnings." *Cipollone*, 505 U.S. at 524. *Cipollone* directly addressed theories based on "statements" or imagery in marketing that "downplay the dangers of smoking" and thus "minimize" or otherwise "neutralize[] the effect of federally mandated warning labels," holding that they, too, are extinguished by the Labeling Act's preemption provision. 505 U.S. at 527.

In *Lorillard Tobacco Co. v. Reilly*, the Court upheld the broad preemption provision of the Labeling Act and reinforced its *Cipollone* holding. 533 U.S. 525 (2001). The Court found that the Labeling Act's preemption provision "reaches all 'requirements' and 'prohibitions' imposed under State law." *Id.* at 548. The Court explained further that the Labeling Act expressly preempts not just claims based on statements in advertising, but also claims that different or additional health information should have been delivered to Plaintiffs or to the general public. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 489 n.9 (1996) (noting that Congress deemed the warnings in the Labeling Act "both necessary and sufficient").

In light of this authority, Plaintiffs' fraudulent concealment claim fails as a matter of law through express preemption.[2] A fraudulent concealment claim is, in essence, a failure-to-warn claim where Plaintiffs assert that PM USA and Liggett have a *duty* which requires them to disclose certain information to Plaintiffs. *See*, *e.g.*, *Summit Growth Mgmt., LLC v. Marek*, No. 3:12–cv–170–RCJ–WGC, 2012 WL 3886089, at *6 (D. Nev. Sept. 12, 2012) ("Nevada generally does not recognize an action for fraud based on nondisclosure unless the plaintiff demonstrates that *the defendant had a duty to disclose the fact at issue*." (emphasis added)); *see also Dow Chem. Co. v. Mahlum*, 114 Nev. 1468, 1486, 970 P.2d 98, 110 (1998) ("For a mere omission to constitute actionable fraud, a plaintiff must first demonstrate that the defendant had a duty to disclose the fact at issue." (citation omitted)).

[2] By its express terms, Plaintiffs' Amended Complaint is devoid of any failure-to-warn allegations post-1969. *See* Compl. at ¶¶ 88–147. However, to the extent that any of Plaintiffs' premise any of their claims on Defendants' failure to warn after July 1, 1969; their post-1969 advertising, promotion, and marketing of cigarettes; or the adequacy of post-1969 federally mandated warnings, express preemption bars any such claims.

Thus, to survive a motion to dismiss, Plaintiffs must plead sufficient and particular facts to show that PM USA and Liggett had "a duty to disclose a certain material fact" to Ms. Camacho. *See Ace Am. Ins. Co. v. Hallier*, No. 2:14-cv-00703-APG-NJK, 2015 WL 1326499, at *2 (D. Nev. Mar. 25, 2015) (applying Nevada law) (quotation omitted). "A duty to disclose may arise when a fiduciary relationship exists between the parties or where the parties enjoy a 'special relationship,' that is, where a party reasonably imparts special confidence in the defendant and the defendant would reasonably know of this confidence." *Id.*; *see also Mackintosh v. Jack Matthews & Co.*, 109 Nev. 628, 634–35, 855 P.2d 549, 553 (1993); *Marek*, 2012 WL 3886089, at *6 (same).

Plaintiffs, however, allege only that PM USA and Liggett "were under a duty to disclose material facts about the dangers of cigarettes to Plaintiff." Compl. at ¶ 182(c). Plaintiffs did not state or explain the basis for any such duty. *See Rivera v. Philip Morris*, 125 Nev. 185, 191, 209 P. 3d 271, 275 (2009) ("[T]he plaintiff carries both the burden of production and the burden of persuasion." (citing *Shoshone Coca-Cola v. Dolinsk*i, 82 Nev. 439, 443, 420 P.2d 855, 857–58 (1966)). Indeed, numerous courts have held that no fiduciary or confidential relationship exists between a cigarette manufacturer and a consumer of cigarettes. *See, e.g.*, *Burton v. R.J. Reynolds Tobacco Co.*, 397 F.3d 906, 911–12 (10th Cir. 2005) (holding that "a buyer/seller relationship does not create a fiduciary duty" and "we do not believe that Kansas would extend . . . fraudulent concealment claims against a manufacturer of cigarettes"); *Jeter v. Brown & Williamson Tobacco Corp.*, 113 F.App'x 465, 469 (3rd Cir. 2004) (stating that "no fiduciary relationship or confidential relationship exists between a manufacturer of cigarettes and consumers of cigarettes, which gives rise to a duty to speak or disclose information").

Accordingly, Plaintiffs' fraudulent concealment (Count V) claim, in the absence of any pleading with particularity as to why PM USA or Liggett each have a duty to disclose information to Plaintiffs, is simply a failure-to-warn claim in disguise. However, as discussed *supra* Section II.B.1, the Labeling Act bars as a matter of law any post-1969 failure-to-warn claims. Moreover, as discussed in greater detail below, Plaintiffs' pre-1969 failure-to-warn claims do not state a viable cause of action as to either negligence or strict liability. *See infra*

Section II.C.4. The Court should dismiss Plaintiff's fraudulent concealment claim (Count V).

2. Conflict Preemption Bars Certain of Plaintiffs' Negligence (Count I), Gross Negligence (Count II), and Strict Liability (Counts III & VIII) Claims.

In addition to express preemption, another preemption doctrine—implied preemption—also operates to preclude Plaintiffs' state-based claims when they conflict with the federal statutory scheme. The Nevada Supreme Court explained implied preemption:

> When Congress does not include statutory language expressly preempting state law, Congress's intent to preempt state law nonetheless may be implied in two circumstances known as field preemption and conflict preemption. First, under field preemption, preemption is implied when congressional enactments so thoroughly occupy a legislative field, or touch a field in which the federal interest is so dominant, that Congress effectively leaves no room for states to regulate conduct in that field. To determine whether Congress has preempted a field of law, the entire regulatory scheme must be examined to determine whether, based on its level of comprehensiveness or the nature of the field regulated, Congress intended to preclude states from also imposing requirements on that field. If, based on that examination, it can be inferred that Congress intended to occupy that legislative field, state requirements are preempted regardless of any specific law's conflict.
>
> Second, even when Congress's enactments do not pervade a legislative field or regulate an area of uniquely federal interest, Congress's intent to preempt state law is implied to the extent that federal law actually conflicts with any state law. Conflict preemption analysis examines the federal statute as a whole to determine whether a party's compliance with both federal and state requirements is impossible or whether, in light of the federal statute's purpose and intended effects, state law poses an obstacle to the accomplishment of Congress's objectives.

Nanopierce Techs., Inc. v. Depository Tr. & Clearing Corp., 123 Nev. 362, 371–72, 168 P.3d 73, 79–80 (2007).

In *FDA v. Brown & Williamson Tobacco Corp.*, the U.S. Supreme Court recognized *Congress's intent to permit cigarettes to remain in interstate commerce*:

> Congress' decisions to regulate labeling and advertising and to

> adopt the express policy of protecting "commerce and the national economy . . . to the maximum extent" reveal its intent that tobacco products remain on the market. Indeed, *the collective premise of these statutes is that cigarettes and smokeless tobacco will continue to be sold in the United States. A ban of tobacco products by the FDA would therefore plainly contradict congressional policy*.

529 U.S. 120, 139 (2000) (emphasis added) (ellipsis in original). In sum, the U.S. Supreme Court, through a number of cases, has held that Congress intended to permit the continued manufacture and sale of tobacco products and to regulate the labeling and warnings on cigarette cartons and packages. Consequently, implied preemption principles dictate that states may not impose liability on cigarette labeling and warning after July 1, 1969 or ban the sale of tobacco products outright.

State and other federal courts when presented with the issue also have concluded that manufacturers and sellers may not be held liable for merely manufacturing or selling cigarettes. *See, e.g.*, *Reilly*, 533 U.S. at 542 (2001) ("Congress further precludes States or localities from imposing any requirement or prohibition based on smoking and health with respect to the advertising and promotion of cigarettes. Without question, the second clause is more expansive than the first; it employs far more sweeping language to describe the state action that is pre-empted." (internal citation omitted)); *Evans v. Lorillard Tobacco Co.*, 990 N.E.2d 997, 1016 (2013) ("[A] jury may not impose categorical liability on all cigarettes." (citation omitted)); *Liggett Grp., Inc. v. Davis*, 973 So. 2d 467, 472 (Fla. Dist. Ct. App. 2007) ("We therefore conclude that the negligence claim based on [the] mere continuing to manufacture cigarettes is barred by conflict preemption. We can find no authority for a claim for negligently continuing to manufacture cigarettes."); *Badon v. R. J. Reynolds Tobacco Co.*, 05-1048 (La. App. 3 Cir 07/12/06), 934 So. 2d 927, 934 (affirming trial court that federal law preempts "a ruling that ha[s] the effect of imposing a ban on the manufacture/sale of cigarettes where Congress has not enacted a ban"); *Jeter ex rel. Smith v. Brown & Williamson Tobacco Corp.*, 294 F. Supp. 2d 681, 685 (W.D. Pa. 2003) ("In response to the health risks of cigarette smoking, Congress chose to regulate the sale of cigarettes instead of completely banning them." (citation omitted)); *Cruz*

Vargas v. R.J. Reynolds Tobacco Co., 218 F. Supp. 2d 109, 118 (D.P.R. 2002) ("Congress has foreclosed the removal of tobacco products from the market."); *Insolia v. Philip Morris Inc.*, 128 F. Supp. 2d 1220, 1224–25 (W.D. Wis. 2000) ("Just as it would have interfered with the federal government's policy on air bags to allow state tort actions against automobile manufacturers who relied on the safety standard to omit air bags from their vehicles, allowing tort actions against cigarette manufacturers and sellers for the allegedly negligent act of continuing to make and sell cigarettes would interfere with Congress's policy in favor of keeping cigarettes on the market.").

Although the Nevada Supreme Court has not spoken on the issue, the Court recently cited specifically to *Brown & Williamson* for the rule that "courts must interpret statutes 'as a symmetrical and coherent regulatory scheme.'" *Dezzani v. Kern & Assocs.*, 134 Nev. 61, 65, 412 P.3d 56, 59–60 (2018) (citing 529 U.S. at 133). And the federal regulatory scheme, as explained by the U.S. Supreme Court, precludes any state claims that require Defendants to stop manufacturing or selling cigarettes. Consequently, to the extent Plaintiffs' premise their negligence claim on the mere manufacture or sale of cigarettes, Plaintiffs' claim must fail.

a. Implied Preemption Bars Plaintiffs' Negligence Cause of Actions against PM USA and Liggett (Counts I and II) for Merely Manufacturing or Selling Cigarettes.

Implied preemption, as discussed above, bars Plaintiffs' negligence claim to the extent they base their allegations on the premise that *all* cigarettes are defective and should not be manufactured or sold. Plaintiffs' Amended Complaint appears to do just that. For instance, Plaintiffs assert that PM USA and Liggett:

> produced, designed, manufactured, sold, and/or marketed defective cigarettes and/or any of its component parts which contained risks of harm to the user/consumer and which were reasonably foreseeable to cause harm in the use or exercise of reasonable and/or ordinary care.
>
> . . .
>
> Defendants, prior to selling and/or distributing the cigarettes to which SANDRA CAMACHO was exposed, knew or should have known that exposure to cigarette smoke was harmful and caused injuries including, but not limited to, lung cancer, pharyngeal cancer, laryngeal cancer, emphysema, COPD, heart disease, other forms of cancer, and/or result in death.

Compl. at ¶¶ 94, 98. These generic assertions are applicable to *all* cigarettes, and Plaintiffs made no attempt to distinguish the L&M, Marlboro, and Basic cigarettes that Ms. Camacho smoked from any other commercially available cigarette. Stated simply, Plaintiffs' claim is no more than a claim that *all* cigarettes are defective and dangerous and thus subject to civil liability. In such a situation, the only way to avoid civil liability is to stop manufacturing and selling cigarettes—*i.e.*, a *de facto* ban. Plaintiffs fail to plead how any *specific* defects in L&M, Marlboro, or Basic cigarettes caused Ms. Camacho's laryngeal cancer. Accordingly, Plaintiffs' negligence claim seeks to impose liability for the sole reason that Defendants continue to manufacture and sell cigarettes. Implied federal preemption bars this claim. Consequently, the Court must dismiss Plaintiffs' negligence claim (Count I).

Further, because conflict preemption bars Plaintiffs' negligence claim, the doctrine also bars Plaintiffs' claim for gross negligence. Under Nevada law, "[o]rdinary negligence and gross negligence are degrees of the same conduct, and . . . '[o]rdinary and gross negligence differ in degree of inattention.'" *Cornella v. Churchill Cnty.*, 132 Nev. 587, 593–94, 377 P.3d 97, 102 (2016) (quoting *Hart v. Kline*, 61 Nev. 96, 101, 116 P.2d 672, 674 (1941)). To the extent that Plaintiffs allege that PM USA and Liggett were grossly negligent for continuing to manufacture and sell cigarettes, Plaintiffs' still premise this claim on the wholesale prohibition of cigarettes as a class. As such, conflict preemption operates to bar Plaintiffs' gross negligence claim against PM USA and Liggett. Consequently, the Court must dismiss Plaintiffs' negligence and gross negligence claims (Counts I and II).

b. Implied Preemption Bars Strict Liability Causes of Action against Defendants (Counts III and VIII) for Merely Manufacturing or Selling Cigarettes.

Implied preemption also bars Plaintiffs' strict liability claims to the extent they claim that *all* cigarettes are inherently dangerous. Plaintiffs allege that Defendants are strictly liable for selling cigarettes because, among other thing, PM USA and Liggett "design[ed] and manufactur[ed] an unreasonably dangerous and deadly product." Compl. at ¶ 135(a). Plaintiffs enumerate a laundry list of design characteristics that purportedly make cigarettes unreasonably dangerous, including that cigarettes are: addictive, inhalable, and manufactured from

genetically-modified nicotine in tobacco plants. *Id.* at ¶¶ 135(b)–(k). However, none of these characteristics are unique to the L&M, Marlboro, and Basic cigarettes that Ms. Camacho allegedly smoked, and Plaintiffs fail to claim that the cigarette design defects are specific to L&M, Marlboro, and Basic cigarettes instead of all commercially-available cigarettes. Furthermore, Plaintiffs fail to allege a link between any specific defect in L&M, Marlboro, or Basic cigarettes and Ms. Camacho's laryngeal cancer. Plaintiffs' failure to describe specific design defects in L&M, Marlboro, and Basic cigarettes in causing Ms. Camacho's cancer reflect the reality that Plaintiffs, in essence, allege only that *all* cigarettes are *inherently* dangerous. Plaintiffs may not do so under conflict preemption, and the Court must therefore dismiss Plaintiffs' strict liability claims (Counts III & VIII).[3]

Here, Plaintiffs did not allege that anything was *wrong* with L&M, Marlboro, and Basic cigarettes that caused them to be unreasonably dangerous beyond containing tobacco that is burned and inhaled. In other words, they fail to point to any specific defects in the L&M, Marlboro, and Basic cigarettes that Ms. Camacho allegedly smoked that caused her laryngeal cancer. Rather, they simply claim that all cigarettes *are* unreasonably dangerous due to the inherent health risks associated with smoking. Compl. at ¶¶ 135(a)–(k). For instance, Plaintiffs allege that PM USA and Liggett's L&M, Marlboro, and Basic cigarettes were "defective and unreasonably dangerous," *see, e.g.*, Compl. ¶¶ 131, and that PM USA and Liggett's cigarettes in general were defective due a laundry list of defects, including: genetic modification of tobacco plants, *id.* at ¶¶ 92(e); 135(e); manipulation of nicotine to make them more addictive, *id.* at ¶¶ 92(d); 135(d); blending of different types of tobacco, *id.* at ¶¶ 92(f); 135(f); engineering for rapid inhalation into the lungs, *id.* at ¶¶ 92(g); 135(g); and designing cigarettes to be inhalable, *id.* at

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[3] Furthermore, in adopting section 402A of the Restatement (Second) of Torts, the Nevada Supreme Court made clear that Plaintiffs may not claim that all cigarettes—or even the L&M, Marlboro, and Basic cigarettes that Ms. Camacho smoked—are inherently defective. Rather, Plaintiffs must identify a defect, which "must have been present when the product left the manufacturer or he cannot be held liable." *Ginnis v. Mapes Hotel Corp.*, 86 Nev. 408, 414, 470 P.2d 135, 138 (1970) (citations omitted); *see also Dolinski*, 82 Nev. at 443, 420 P.2d at 858 ("[The plaintiff] must still establish that *his injury was caused by a defect in the product, and that such defect existed when the product left the hands of the defendant*." (emphasis added)); Restatement (Second) of Torts § 402A, cmt. i (1965) ("[T]obacco is not unreasonably dangerous merely because the effects of smoking may be harmful . . . .").

¶¶ 92(c); 135(c). But Plaintiffs fail to identify the defects with any specificity, and they fail to allege a connection between a defect and Ms. Camacho's addiction and subsequent development of laryngeal cancer. The Restatement (Second) of Torts—adopted by Nevada—is clear: makers of products that are inherently dangerous, like cigarettes, are not automatically responsible for the harm that accompanies them. Cigarettes must have something wrong with them—*e.g.*, a design defect—for Plaintiffs to claim strict liability. Consequently, to the extent that Plaintiffs' premise their strict liability claims on the view that all cigarettes are inherently and unreasonably dangerous, federal preemption and Nevada law bar the claims.

In sum, express and implied preemption together bars Plaintiffs' failure-to-warn (Counts I-III), negligence (Count I), gross negligence (Count II), strict liability (Counts III & VIII), and fraudulent concealment causes of actions. The Court must dismiss these claims as a matter of law.

C. Plaintiffs Did Not Sufficiently Plead Any *Specific* Design Defects in the L&M, Marlboro, and Basic Cigarettes that Ms. Camacho Allegedly Smoked to Sustain Their Negligence (Count I), Gross Negligence (Count II), and Strict Liability Claims (Counts III & VIII).

As discussed above, Plaintiffs' Amended Complaint contains nothing more than generic allegations of defects and dangerousness that inherently applies to all cigarettes—instead of any defects specific to the L&M, Marlboro, and Basic cigarettes that Ms. Camacho allegedly smoked—that Plaintiffs allege caused Ms. Camacho's laryngeal cancer. However, Defendants anticipate that Plaintiffs nevertheless will disclaim that they seek to impose liability on Defendants for merely manufacturing or selling cigarettes. To the extent that Plaintiffs purport to allege *specific* design defects in the L&M, Marlboro, and Basic cigarettes that Ms. Camacho allegedly smoked, the conclusory or generic allegations in their Amended Complaint fail to give Defendants "fair notice of the nature and basis of the claim and the relief requested." *Ravera*, 100 Nev. at 70, 675 P.2d at 408. Under Nevada law, to make a *prima facie* showing of a product defect claim based on either negligence or strict liability, Plaintiffs "must show that: 1) the product had a defect which rendered it unreasonably dangerous; 2) the defect existed at the time the product left the manufacturer; and 3) the defect caused the plaintiff's injury." *Fyssakis v. Knight Equip. Corp.*, 108 Nev. 212, 214, 826 P.2d 570, 571 (1992) (citing *Ginnis*, 86 Nev. at

413, 470 P.2d at 138). Here, because Plaintiffs' Amended Complaint fails to plead a specific defect in L&M, Marlboro, and Basic cigarettes—as opposed to allegations of generic harms in all cigarettes—they fail to make *prima facie* showings for negligence and strict liability; the Court accordingly should dismiss those claims.

1. Plaintiffs Did Not Allege Specific Defects in the L&M, Marlboro, and Basic Cigarettes that Ms. Camacho Allegedly Smoked.

Plaintiffs' Amended Complaint is devoid of any allegations of specific defects in the L&M, Marlboro, and Basic cigarettes that Ms. Camacho allegedly smoked and caused her laryngeal cancer. "[I]n order to impose legal liability . . . the plaintiff must show that the design defect in the product was a substantial factor in causing his injury." *Price v. Blaine Kern Artista, Inc.*, 111 Nev. 515, 520, 893 P.2d 367, 370 (1995); *see also Dolinski*, 82 Nev. at 443, 420 P.2d at 857–58 ("Our acceptance of strict tort liability against the manufacturer and distributor . . . does not mean that the plaintiff is relieved of the burden of proving a case. He must still establish that his injury was caused by a defect in the product."). Stated plainly, Plaintiffs must allege (1) a specific defect and (2) that the "defect caused the plaintiff's injury." *Fyssakis*, 108 Nev. at 214, 826 P.2d at 571.

Plaintiffs' Amended Complaint, however, contains nothing more than general allegations. For instance, Plaintiffs allege that PM USA's Marlboro and Basic cigarettes, as well as Liggett's L&M cigarettes, were "defective and unreasonably dangerous," *see*, *e.g.*, Compl. ¶¶ 27(c), 131, and that PM USA and Liggett's cigarettes in general were defective due a laundry list of defects, including: genetic modification of tobacco plants, *id.* at ¶¶ 92(e); 135(e); manipulation of nicotine to make them more addictive, *id.* at ¶¶ 92(d); 135(d); blending of different types of tobacco, *id.* at ¶¶ 92(f); 135(f); engineering for rapid inhalation into the lungs, *id.* at ¶¶ 92(g); 135(g); and designing cigarettes to be inhalable, *id.* at ¶¶ 92(c); 135(c). But Plaintiffs fail to allege whether, and if so, how, these purported "defects" affected the L&M, Marlboro, and Basic cigarettes caused Ms. Camacho's injuries. More importantly, Plaintiffs did not state, as they must, how these "defects" are *specific* to the L&M, Marlboro, and Basic cigarettes smoked by Ms. Camcho and not simply an indictment of *all* cigarettes. This deficiency applies to all other "defects" Plaintiffs allege. *Id.* at ¶¶ 92(a)–(i); 135(a)–(k).

Consequently, Plaintiffs fail to plead a specific product defect, the core requirement for their claims for negligent design and strict liability, as required by well-established Nevada law. *Fyssakis*, 108 Nev. at 214, 826 P.2d at 571. The Court therefore should dismiss those claims (Counts I, II, III, and VII).

2. Plaintiffs' Alternative Design Allegations Do Not Support the Existence of Design Defects in PM USA's or Liggett's Cigarettes.

Under Nevada law, one method to demonstrate the existence of a design defect in a product is to show the existence of alternative safer product designs. *See, Ford Motor Co. v. Trejo*, 133 Nev. 520, 528, 402 P.3d 649, 655 (2017) (" . . . we note that while proof of an alternative design is not required, in most cases, evidence of an alternative design is the most expedient method for a plaintiff to prove that the product at issue was unreasonably dangerous"); *see also Robinson v. G.G.C., Inc.*, 107 Nev. 135, 140, 808 P.2d 522, 525 (1991) ("[A]lternative *safer* designs are a factor in determining the existence of a design defect." (emphasis added) (citing *McCourt v. J.C. Penney Co.*, 103 Nev. 101, 734 P.2d 696 (1987)); *McCourt*, 103 Nev. at 104, 734 P.2d at 698 (stating that the jury may consider evidence of alternative design when evaluating a products liability claim); *Michaels v. Pentair Water Pool & Spa*, 131 Nev. 804, 818, 357 P.3d 387, 397 (2015) (same). Here, Plaintiffs based their negligence and strict liability claims in part on the allegations that PM USA and Liggett could have manufactured their cigarettes using an unspecified "alternative" or "less dangerous design." Compl. at ¶ 92(o) (alleging that PM USA and Liggett "fail[ed] to develop and utilize alternative designs"); *id.* at ¶ 134 (alleging that "a less dangerous design and/or modification was economically and scientifically feasible").

However, Plaintiffs fail to allege any facts to support such a defect theory. They did not allege what the safer design or modification was, when this unspecified alternative design or modification was available, whether it was feasible to implement the design, and how the safer design would have reduced or eliminated the harms of the L&M, Marlboro, and Basic cigarettes Ms. Camacho allegedly smoked. *See*, *e.g.*, *Robinson*, 107 Nev. at 139, 808 P.2d at 524–25. Nor did Plaintiffs allege that Ms. Camacho would have chosen to use the safer alternative design or that she would have avoided her injuries had she used it. Without alleging these facts, Plaintiffs

cannot establish a causal connection between PM USA and Liggett's failure to utilize an unspecified safer alternative design and Ms. Camacho's injury. The Court should dismiss Plaintiffs' negligence and strict liability claims to the extent they are based on a safer alternative design.

3. Plaintiffs' Negligence, Gross Negligence, and Strict Liability Marketing Allegations Have No Connection to Ms. Camacho.

Here, Plaintiffs stated that PM USA and Liggett "market[ed] and advertis[ed] 'light' and 'ultra light' cigarettes as safe, low nicotine and low tar," *id.* at ¶¶ 92(j)–(k); *id.* ¶¶ 135(l)–(m), but they did not allege that Ms. Camacho smoked "light" or "ultra light" L&Ms, Marlboros, or Basics. Plaintiffs also allege that PM USA and Liggett targeted its marketing to children and minorities, *id.* at ¶¶ 92(m)–(n), but they did not allege that PM USA or Liggett's purported youth marketing caused Ms. Camacho to start smoking L&M, Marlboro, or Basic cigarettes as a child, or that Ms. Camacho is a member of one of the minority groups allegedly targeted.[4] *See Cascade Drinking Waters v. Cent. Tel. Co.*, 90 Nev. 234, 235–36, 523 P.2d 837 (1974) (per curiam) (affirming the district court's dismissal of the plaintiff's complain because there was "[n]o substantial, relevant authority" to support a negligent advertising cause of action).Accordingly, the Court should dismiss Plaintiffs' negligence and strict liability claims to the extent they are based on marketing.

In sum, although Plaintiffs may argue that they allege specific defects in the L&M, Marlboro, and Basic cigarettes that Ms. Camacho smoked, the plain language of the Amended Complaint demonstrates that they did not plead any specific design defects or specific alternative safer designs. Consequently, the Court should dismiss Plaintiffs' negligence (Count I), gross negligence (Count II), and strict liability claims (Counts III & VIII) for the additional and independent reason that Plaintiffs fail to plead any specific marketing allegations regarding the L&M, Marlboro, and Basic cigarettes that Ms. Camacho smoked and purportedly caused her laryngeal cancer.

[4] Furthermore, Nevada does not recognize "negligent advertising" as a cause of action. Plaintiffs also did not plead any claim for negligent misrepresentation.

4. Plaintiff's Allegations of Pre-1969 Failure to Warn Do Not State a Viable Cause of Action for Negligence (Count I), Gross Negligence (Count II), and Strict Liability (Counts III and VIII).

Similarly, Plaintiffs predicated their negligence and strict liability claims, in part, on allegations that PM USA and Liggett did not warn Ms. Camacho about certain health risks of smoking before July 1, 1969.[5] Plaintiffs allege, for example, that Defendants were negligent and are strictly liable for "failing to warn foreseeable users" before July 1, 1969 about the dangers of smoking or the potential health hazards associated with smoking. *See* Compl. at ¶¶ 93(a)-(e), 135(n)-(r).

But, Plaintiffs did not allege any facts about Ms. Camacho's smoking behavior before July 1, 1969 other than to allege that she started smoking in "approximately 1964." *Id.* at ¶ 17. Nothing in Plaintiffs' Amended Complaint alleges that Ms. Camacho would have changed her smoking behavior between 1964 and 1969 and thus avoided injuries had PM USA or Liggett warned her that cigarettes were dangerous. Similarly, there are no allegations that Ms. Camacho would not have started smoking or would have quit in that five-year period, but for PM USA and Liggett's failure to provide additional warnings. Indeed, Ms. Camacho chose to start or to continue smoking despite (1) the highly publicized release, in January 1964, of the Surgeon General's Report concluding that smoking causes lung cancer and (2) the mandatory health warnings placed on all cigarette packs beginning January 1, 1966. Accordingly, the Court should dismiss Plaintiff's allegations of negligence and strict liability based on a failure to warn before July 1, 1969 as legally insufficient.

D. Plaintiffs' Gross Negligence Claim (Count II) Also Irredeemably Fails Because PM USA and Liggett Do Not Owe a Legal Duty to Plaintiffs.

Plaintiff's gross negligence claim fails as a matter of law because PM USA and Liggett do not owe Plaintiffs any legal duty. *Cornella*, 132 Nev. at 594, 377 P.3d at 102 ("Gross negligence 'is an act or omission *respecting legal duty* of an aggravated character *as distinguished from a mere failure to exercise ordinary care.*'" (emphases added) (citation

[5] As explained above, any claim that PM USA or Liggett did not warn Ms. Camacho about the health risks of smoking after July 1, 1969 is expressly preempted by the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. §§ 1331, et. seq. *See supra* Section II.B.1.

omitted)). Gross negligence "amounts to indifference to present *legal duty*, and to utter forgetfulness of legal obligations so far as other persons may be affected. It is a heedless and palpable violation of *legal duty* respecting the rights of others." *Hart*, 61 Nev. at 100, 116 P.2d at 674.

Here, Plaintiffs allege that PM USA and Liggett:

> had actual knowledge of the wrongfulness of its conduct and the high probability that injury or damage to SANDRA CAMACHO would result. Despite that knowledge, the Defendants willfully and wantonly pursued a *course of conduct that was so reckless* or wanting in care that it constituted a conscious disregard or indifference to the life, safety or rights of SANDRA CAMACHO and the Defendants actively and knowingly participated in such conduct . . . .

Compl. at 100. However, Plaintiffs did not allege that PM USA or Liggett owed them any legal duty, as Nevada law requires. *See id.* at 108–126. Nor could they claim any such legal duty. The Nevada Supreme Court expressly rejected the idea that because a manufacturer had "superior knowledge" about its product, the manufacturer has a legal duty to disclose it to its consumers. *Dow Chem. Co. v. Mahlum*, 114 Nev. 1468, 1487, 970 P.2d 98, 111 (1998) ("[The defendant] *had no duty to disclose* to the [plaintiffs] *any superior knowledge* it may have had regarding the safety of [its] products, however, *because it was not directly involved in the transaction from which this lawsuit arose, or any other transaction* with the [plaintiffs]." (emphases added)). As in *Mahlum*, Plaintiffs, PM USA, and Liggett were not involved in any direct transaction from which a legal duty to disclose arose. And, as discussed above, multiple courts have held that the arms-length relationship between a cigarette manufacturer and consumer does not give rise to any fiduciary or special—*i.e.*, legal—duty. *See, e.g.*, *Burton*, 397 F.3d at 911–12; *Jeter*, 134 F.App'x at 469. The Court must dismiss Count II.

E. Alternately, Plaintiffs' Gross Negligence Claim (Count II) Should Be Dismissed or Stricken as Redundant of Plaintiffs' Negligence Claim (Count I).

Pursuant to NRCP Rule 12(f), the "court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." If the Court does not

dismiss Plaintiffs' negligence claim (Count I) and Plaintiffs' gross negligence claim (Count II) for the reasons set forth above, the Court should dismiss or strike Plaintiffs' gross negligence claim (Count II) because it is unnecessary, prejudicial and redundant of Count I.

The Nevada Supreme Court has traditionally analyzed whether a defendant acted with gross negligence *only* in the limited circumstances where gross negligence is a specific element of a claim or defense, see, e.g., *Cornella*, 132 Nev. at 594, 377 P.3d at 102 (Applying simple negligence standard, definition of gross negligence discussed as background only); *Hart v. Kline*, 61 Nev. 96, 116 P.2d 672, 673 (1941) (Nevada Vehicle Guest Statute provided no right of recovery except in for injury or death "resulting from the intoxication, willful misconduct, or gross negligence"); *Batt v. State*, 111 Nev. 1127, 1131, 901 P.2d 664, 667 (1995) ("To be guilty of this crime Batt must have lit a fire or set a fire in a manner that was grossly negligent"); *Bearden v. City of Boulder City*, 89 Nev. 106, 109, 507 P.2d 1034, 1035 (1973) ("NRS 41.034 provided municipalities and their policemen and firemen with immunity from civil suits for their acts in the course of their employment unless those employees acted with gross negligence or were guilty of wilful and wanton misconduct"). Unlike these cases, gross negligence is not a specific element to any claim or defense at issue in the litigation.

In *Hernandez v. D.C.*, 845 F. Supp. 2d 112 (D.D.C. 2012), the Plaintiff alleged claims for both negligence (Count II) and gross negligence (Count III). Plaintiff asserted that "because courts in the District of Columbia have distinguished between gross negligence and ordinary negligence in particular instances, 'gross negligence,' necessarily, 'and should be a separate claim ... because gross negligence calls for a higher degree of deviation from the standard of care and a wanton disregard for the rights and safety of others.'" *Id*. at 115. The court rejected this argument, pointing out that courts in the past distinguished gross negligence from ordinary negligence because the statute required such a distinction, not "because the tort of gross negligence is itself a separate basis of liability under District of Columbia law". *Id*. at 116. Because plaintiff had already alleged a negligence claim, and considering that gross negligence is neither a specific element to any claim or defense at issue in the litigation, the court dismissed as duplicative plaintiff's claim for gross negligence."

Traditionally, the law distinguishes between ordinary and gross negligence as "a rule of policy that … will give rise to legal consequences harsher than those arising from negligence …." *See Donnelly v. S. Pac. Co*., 18 Cal. 2d 863, 871, 118 P.2d 465, 469 (1941). Under the facts of this case, however, there is no Nevada statute or caselaw which would allow a jury to treat the Defendants "more harshly." Plaintiffs cannot recover greater damages under the facts of this case by proving gross negligence. This includes punitive damages, as the Nevada Supreme Court has held that proving gross negligence is not sufficient to justify an award of punitive damages. *See Countrywide Home Loans, Inc. v. Thitchener*, 124 Nev. 725, 743, 192 P.3d 243, 255 (2008) ("…we conclude that NRS 42.001 (1) denotes conduct that, at a minimum, must exceed mere recklessness or gross negligence").

Allowing Plaintiffs to argue gross negligence, where it does not entitle Plaintiffs to different or additional damages, will encourage prejudicial arguments likely to inflame and confuse the jury. And it is fully redundant of the claim for ordinary negligence and should therefore be dismissed.

F. Plaintiffs' Strict Liability Claims (Counts III & VIII) Fail the Consumer Expectation Test.

Even assuming that Plaintiffs adequately allege *specific* design defects, which they do not, Plaintiffs' strict liability claims also fails for an additional, independent reason—Plaintiffs did not allege how the purported design defects in L&M, Marlboro, and Basic cigarettes fail to meet consumer expectations, a requisite in showing strict product liability under Nevada law. *See, e.g.*, Compl. at ¶¶ 92(a)–(i), (l); 131-134; 135(a)–(k). To hold a manufacturer or distributor strictly liable for a product design defect, a plaintiff must show not only the product defect but also that the "defective product[] is 'more dangerous than would be contemplated by the ordinary user having the ordinary knowledge available in the community.'" *Trejo*, 133 Nev. at 521, 402 P.3d at 650 (quoting *Ginnis*, 86 Nev. at 413, 470 P.2d at 138). Ordinary knowledge is common knowledge, "which rests upon the premise that a product is not ***unreasonably*** dangerous if everyone knows of its inherent dangers." *Rivera v. Philip Morris, Inc.*, 395 F.3d 1142, 1151 (9th Cir. 2005) (emphasis added); *accord Summers v. McWane, Inc.*, No. 2:15-CV-1239 JCM (GWF), 2019 WL 1117895, at *4 (D. Nev. Mar. 11, 2019). "Several courts" across

the country have taken judicial notice of the "common knowledge of the general disease-related health risks associated with smoking, *including the risk of contracting cancer, as of 1964*," and that "by 1969 there was common knowledge of the evils of smoking." *Rivera*, 395 F.3d at 1152 (quoting *Guilbeault v. R.J. Reynolds Tobacco Co.*, 84 F. Supp. 2d 263 (D.R.I. 2000)) (emphasis added) (quotation omitted); *cf. Soliman v. Philip Morris Inc.*, 311 F. 3d 966, 975 (9th Cir. 2002) (noting that under California law, "it has been a matter of common knowledge since at least 1965 that cigarette smoking is not healthy" and smoker-plaintiff was "charged with the obvious inferences he should have drawn about the consequences of his conduct"); *Barker v. Brown & Williamson Tobacco Corp.*, 88 Cal. App. 4th 42, 51 (2001) ("[I]t has been a matter of common knowledge since at least 1965 that cigarette smoking is not healthy. That is when Congress required health warnings on cigarette packages."); see also *Lohr*, 518 U.S. at 489 n.9 (1996) (noting that Congress deemed the warnings in the Labeling Act "both necessary and sufficient"). These cases expressly recognize that ordinary consumers have understood for decades that cigarettes are inherently dangerous products.

Here, Plaintiffs' Amended Complaint contains only the conclusory allegations that PM USA and Liggett's cigarettes fail the consumer expectation test because they have addictive properties and cause disease. *See, e.g.*, Compl. at ¶¶ 135(a)–(k). Without more, Plaintiffs' allegations are merely allegations that *all* cigarettes fail the consumer expectation test. As discussed *supra* in Section II.B, federal preemption principles bar claims that cigarettes as a class of products are defective or unreasonably dangerous. And Plaintiffs' defect allegations, *see id.* at ¶ 135, simply state (for the most part) ways that cigarettes *in general* are harmful, but not defective. Indeed, Plaintiffs Amended Complaint does not allege how L&M, Marlboro, and Basic cigarettes fail the consumer expectation test by containing some specific defect about which the general public is unaware. The Court therefore should dismiss Plaintiffs' strict liability claims for the additional reason that Plaintiffs' Amended Complaint fails to provide Defendants adequate notice on *how* the L&M, Marlboro, and Basic cigarettes that Ms. Camacho allegedly smoked were defective and *how* they were unreasonably dangerous beyond the expectations of the ordinary consumer, compared to cigarettes in general. *See Trejo*, 133 Nev. at

539, 402 P.3d at 663 (discussing common knowledge as part of the consumer expectations test); *Rivera*, 395 F.3d at 1151–52 (predicting that Nevada courts would distinguish between general health risks and specific risks; reversing summary judgment where expert evidence regarding consumer knowledge about specific risks created an issue of fact).

G. Plaintiffs Did Not Plead Their Claims for Fraudulent Misrepresentation (Count IV) and Fraudulent Concealment (Count V) with Particularity.

The Court should also dismiss Plaintiffs' fraudulent misrepresentation and fraudulent concealment claims because their allegations fail to meet the particularized pleading requirements of Rule 9(b) of the Nevada Rules of Civil Procedure. A plaintiff asserting a claim for fraudulent misrepresentation or fraudulent concealment must "state with *particularity the circumstances constituting fraud or mistake*." NRCP 9(b) (emphasis added). Plaintiffs must state "the time, the place, the identity of the parties involved, and the nature of the fraud or mistake." *Brown v. Kellar*, 97 Nev. 582, 583–84, 636 P.2d 874, 874 (1981) (citation omitted); *see also Morris v. Bank of Am. Nev.*, 110 Nev. 1274, 1276 n.1, 886 P.2d 454, 455 (1994). Plaintiffs also must allege with particularity justifiable reliance on the fraudulent conduct, an "essential element" of both fraudulent misrepresentation and fraudulent concealment claims. *See, e.g.*, *Collins v. Burns*, 103 Nev. 394, 397, 741 P.2d 819, 821 (1987) ("Lack of justifiable reliance bars recovery in an action at law for damages for the tort of deceit. . . . The test is whether the recipient has information which would serve as a danger signal and a red light to any normal person of his intelligence and experience." (citations omitted)); *Lubbe v. Barba*, 91 Nev. 596, 599, 540 P.2d 115, 117 (1975) (citation omitted). To sufficiently plead reliance, Plaintiffs must allege with particularity that a "false representation" by Defendants "played a material and substantial part" in Ms. Camacho's decisions to start, continue, or fail to quit smoking. *Blanchard v. Blanchard*, 108 Nev. 908, 911, 839 P.2d 1320, 1322 (1992) (quoting *Lubbe*, 91 Nev. at 600, 540 P.2d at 118). Here, because Plaintiffs did not allege with particularity the circumstances of the fraudulent misrepresentation or concealment, as well as Ms. Camacho's justifiable reliance on the purported fraudulent conduct, the Court should dismiss Plaintiffs' fraud-based claims (Counts IV, V, and VI). *See, e.g.*, *Rush v. Nev. Indus. Comm'n*, 94 Nev. 403,

407, 580 P.2d 952, 954 (1978) (affirming trial court's dismissal of fraud claims for failure to state the claims with particularity as required by NRCP 9(b)).

1. Plaintiffs Did Not Plead Fraudulent Misrepresentation with Particularity.

To state a claim for fraudulent misrepresentation, Plaintiffs must plead with particularity

> (1) a false representation made by the defendant; (2) defendant's knowledge or belief that its representation was false or that defendant has an insufficient basis of information for making the representation; (3) defendant intended to induce plaintiff to act or refrain from acting upon the misrepresentation; and (4) damage to the plaintiff as a result of relying on the misrepresentation.

Barmettler v. Reno Air, Inc., 114 Nev. 441, 447, 956 P.2d 1382, 1386 (1998); *see also Lubbe*, 91 Nev. at 599, 540 P. 2d at 117. Plaintiffs fail to meet this heightened pleading burden. As an initial matter, the Amended Complaint does not allege with particularity the time and place in which the fraudulent misrepresentations were made or the circumstances in which Ms. Camacho allegedly heard, read, and relied upon them. Instead, Plaintiffs allege *generally* that PM USA and Liggett carried out a "campaign of fraud, false statements, and/or misrepresentation in at least six ways," and they provided a laundry list of supposed conduct and statements that they allege Ms. Camacho "heard, read, and relied upon." Compl. at ¶¶ 151, 153, 155. But these generic allegations fail to identify with particularity the misrepresentations, to specify the circumstances in which Ms. Camacho allegedly saw, heard, and relied on them, or both. The vague and conclusory allegations fail to plead reliance—let alone justifiable reliance—with particularity because they do not show how a false representation "played a material and substantial part" in Ms. Camacho's decision to start or continue smoking. *Blanchard*, 108 Nev. at 911, 839 P.2d at 1322; *see also Rivera v. Philip Morris, Inc.*, 395 F.3d 1142, 1155 (9th Cir. 2005) (noting the failure of plaintiff's fraud claim because "he was unable to point to a specific statement in any advertisement or public communication from [the defendant] which influenced [the smoker's] decision to start, continue or fail to quit smoking").

Finally, some of the allegedly fraudulent misrepresentations occurred years before Ms. Camacho began smoking in 1964. *See id.* at ¶¶ 17, 155(a)–(b). Even if the allegedly tortious

conduct occurred after Ms. Camacho began smoking, those allegations nevertheless are insufficient to state a claim for fraudulent misrepresentation. For example, Plaintiffs allege that PM USA and Liggett "[f]alsely advertised and promoted 'filtered' and 'light' cigarettes as 'low tar' and 'low nicotine'" *id.* at ¶ 155(f), but they do not claim that Ms. Camacho smoked any of these types of cigarettes. *See id.* at ¶¶ 17, 20–21 (alleging that Ms. Camacho smoked only L&M, Marlboro, and Basic cigarettes). And other allegedly fraudulent conduct, such as statements to government entities, *e.g.*, *id.* at ¶ 155(g) ("Knowingly made false and misleading statements to governmental entities"); *id.* at ¶ 155(k) ("knowingly providing false and misleading testimony . . . before the United States Congress"), cannot form the basis for liability under the *Noerr-Pennington* doctrine, which protects PM USA and Liggett's First Amendment rights to advocate, petition, and lobby their government. *See*, *e.g.*, *E. R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 137–44 (1960) (holding that the defendants could not be held liable for attempting to influence legislative and executive officials concerning the passage and enforcement of legislation, even if their methods were deceptive or otherwise unsavory); *Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 513 (1972) (holding that "[m]isrepresentations [are] condoned in the political arena"); *United Mine Workers of Am. v. Pennington*, 381 U.S. 657, 669–70 (1965) (reaffirming that efforts to influence public officials do not give rise to liability "regardless of intent or purpose").

In sum, Plaintiffs did not plead their fraudulent misrepresentation claim with sufficient particularity. The Court therefore should dismiss Count IV of Plaintiffs' Amended Complaint. *See, e.g.*, *Rush*, 94 Nev. at 407, 580 P.2d at 954.

2. Plaintiffs Did Not Plead Fraudulent Concealment with Particularity.

To survive dismissal on a fraudulent concealment claim, Plaintiffs must plead with particularity that:

> (1) the defendant concealed or suppressed a material fact; (2) the defendant was under a duty to disclose the fact to the plaintiff; (3) the defendant intentionally concealed or suppressed the fact with the intent to defraud the plaintiff; that is, the defendant concealed or suppressed the fact for the purpose of inducing the plaintiff to act differently than [he] would have if [he] had known the fact; (4) the plaintiff was unaware of the fact and would have acted

> differently if [he] had known of the concealed or suppressed fact; (5) and, as a result of the concealment or suppression of the fact, the plaintiff sustained damages.

Dow Chem. Co. v. Mahlum, 114 Nev. 1468, 1486, 970 P.2d 98, 110 (1998) (citing *Nevada Power Co. v. Monsanto Co.*, 891 F. Supp. 1406, 1415 (D. Nev. 1995)), *abrogated on other grounds*, *GES, Inc. v. Corbitt*, 117 Nev. 265, 21 P.3d 11 (2001). As with fraudulent misrepresentation, justifiable reliance is an "essential element" of a fraudulent concealment claim that Plaintiffs must plead with particularity. *See Rivera*, 395 F.3d at 1155.

Here, Plaintiffs did not adequately allege a fraudulent concealment claim against PM USA or Liggett because they did not state with particularity how and when Ms. Camacho "would have acted differently if there had not been fraudulent concealment." *Id.* From the outset, Plaintiffs did not allege with particularity that PM USA or Liggett owed them any duty to disclose information post-1969 beyond what the Labeling Act requires. Plaintiffs also did not plead with particularity the other essential elements of their fraudulent concealment claim. As with their misrepresentation claim, they fail to adequately connect any of the laundry list of allegedly concealed information to Ms. Camacho, to the L&Ms, Marlboros, and Basics she purportedly smoked, or to any justifiable reliance by her. For example, Plaintiffs allege that PM USA and Liggett concealed their knowledge that cigarettes were designed "to make them more addictive and easier to inhale." Compl. at ¶ 180(b). But they did not allege that Ms. Camacho would not have smoked cigarettes and thus avoided her injury had she known they were, as Plaintiffs allege, designed to be addictive and easier to inhale. The remainder of Plaintiffs' generic allegations also suffers from the same fatal lack of particularity defect. *See id.* at ¶ 180(a)–(l). Because Plaintiffs did not plead these allegations with particularity or allege how any of the purportedly concealed information affected Ms. Camacho's smoking-related decisions, the Court should dismiss Plaintiff's fraudulent concealment claim.

H. Plaintiffs' Civil Conspiracy Claim Fails Because Their Underlying Fraud Claim Fails and Because Their Conspiracy Allegations Lack Particularity.

Plaintiffs allege that PM USA, Liggett, and Reynolds conspired to fraudulently conceal the health hazards and addictive nature of smoking cigarettes. Compl. at ¶ 193(a)–(c). To

maintain a claim for civil conspiracy, Plaintiffs must allege with particularity: "(1) a conspiracy agreement, *i.e.*, a combination of two or more persons who, by some concerted action, intend to accomplish an unlawful objective for the purpose of harming another; (2) an overt act of fraud in furtherance of the conspiracy; and (3) resulting damages to the plaintiff." *Jordan*, 121 Nev. at 74–75, 110 P.3d at 51. Nevada law requires "an underlying cause of action for fraud [a]s a *necessary predicate* to a cause of action for conspiracy to defraud." *Id.* at 74 (emphasis added); *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); *J&J Sports Productions, Inc. v. Moreno*, No. 2:17-cv-00680-MMD-NJK, 2018 WL 4512048, at *6 (D. Nev. 2018) (concluding that under Nevada law, failure to state a viable underlying tort "is also fatal to [a] civil conspiracy claim because the civil conspiracy claim lacks the requisite underlying tort"); *Lagos v. Monster Painting, Inc.*, No. 2:11-CV-00331-LRHGWF, 2012 WL 2415417, at *3 (D. Nev. 2012) (applying Nevada law and dismissing a claim for civil conspiracy where the underlying claim failed); *Goodwin v. Exec. Trustee Servs., LLC*, 680 F. Supp. 2d 1244, 1253-54 (D. Nev. 2010) (noting that an underlying cause of action for fraud is necessary predicate to a cause of action for conspiracy to defraud); *Flowers v. Carville*, 266 F. Supp. 2d 1245, 1249 (D. Nev. 2003) (stating that the "essence of civil conspiracy is damages" that "result from the tort underlying the conspiracy") (quotation marks omitted). Thus, if the Court dismisses Plaintiffs' fraud claims—and it should for the reasons stated above—then it also must dismiss Plaintiffs' claim for conspiracy to commit fraud.

The Court also should dismiss Plaintiffs' claim for conspiracy to commit fraud for the separate and independent reason that Plaintiffs did not plead the claim with the requisite particularity under NCRP 9(b). *See Goodwin*, 680 F. Supp. 2d at 1254 ("A claim for conspiracy to commit fraud must be pled with the same particularity as the fraud itself."); *Arroyo v. Wheat*, 591 F. Supp. 136, 149 (D. Nev. 1984) ("Where the plaintiffs allege a conspiracy to defraud them, Rule 9(b) particularity is required."). Here, Plaintiffs' allege in their Amended Complaint that Defendants conspired to conceal "information regarding the health hazards of cigarettes and/or

their addictive nature" through "abovementioned unlawful acts" and/or "by doing lawful acts by unlawful means." Compl. at ¶ 193(a). Plaintiffs also allege that Defendants carried out the conspiracy by making "numerous public statements" over a period of almost 50 years. *Id.* at ¶ 193(c). However, Plaintiffs fail to state with particularity the specific conspiratorial acts by each Defendant, the "numerous public statements," or how and when Ms. Camacho would have acted differently if there had not been a conspiracy to conceal. *See Rivera*, 395 F. 3d at 1154; *see also Goodwin*, 680 F. Supp. 2d at 1254 (finding plaintiffs failed to plead conspiracy to commit fraud with particularity in part because "the Complaint lumps multiple Defendants together without differentiating between them or the allegations against them").

Plaintiffs likewise did not allege how Ms. Camacho could have been harmed by any supposed conspiracy to commit fraud related to filtered, low tar, light, or ultra-light cigarettes, Compl. at ¶¶ 194(a)–(e), because nothing in the Amended Complaint alleges that Ms. Camacho ever smoked these kinds of cigarettes. Likewise, Plaintiffs did not allege that Ms. Camacho was a minor when she began smoking in 1964. *Id.* at ¶ 17. Consequently, Plaintiffs' allegation that Defendants conspired to target their marketing to children and teenagers after 2000, *id.* at ¶ 194(g), fails to allege any connection to Ms. Camacho, let alone with particularity. Furthermore, Plaintiffs allege that Defendants "continued their conspiratorial acts" after the year 2000 by "[o]pposing and continuing to oppose FDA regulations." *Id.* at ¶ 194(f). But Plaintiffs again did not state how these actions affected Ms. Camacho.[6]

In sum, Plaintiffs' civil conspiracy claim fails for two independent reasons: (1) because Plaintiffs' underlying claims of fraudulent misrepresentation and fraudulent concealment fail, and (2) because their Amended Complaint fails to allege their conspiracy to defraud claim with the required particularity under NCRP 9(b). The Court therefore should dismiss Plaintiffs' civil conspiracy claim (Count VI).

[6] In any case, Defendants' exercise of their First Amendment right to challenge proposed FDA regulations cannot be a basis for liability. *See supra* Section II.D.1 (explaining the *Noerr-Pennington* doctrine and citing *Noerr Motor Freight*, 365 U.S. at 137–44; *Pennington*, 381 U.S. at 669–70); *see also Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 346–50, 353 (2001) (holding that federal law preempts state law claims based on interactions between the FDA and the entities it regulates).

I. Plaintiffs' Claim under the Nevada Deceptive Trade Practices Act (NDTPA) Fails Because the Claim Lacks Particularity and Because Plaintiffs Do Not Claim Ms. Camacho Was a Victim.

Plaintiffs assert a consumer fraud claim under the NDTPA, NRS § 41.600, based on allegations that PM USA, Liggett, and Reynolds knowingly made false representations in connection with the sale of cigarettes. Compl. ¶¶ 206-221. "Claims of consumer fraud, brought under NRS § 41.600, 'must satisfy NRCP 9(b)'s heightened pleading standards.'" *Gage v. Cox Communs., Inc*., No. 2:16-cv-02708-KJD-GWF, 2017 WL 1536219, at *2 (D. Nev. Apr. 26, 2017), at *2 (quoting *Davenport v. Homecomings Financial, LLC*, 2014 Nev. Unpub. LEXIS 508, 2014 WL 1318964 *2 (Mar. 31, 2014)); *see also Betsinger v. D.R. Horton, Inc.*, 126 Nev. 162, 165–66, 232 P.3d 433, 435–36 (2010) (recognizing that NDTPA claims are fraud claims). Plaintiffs therefore must plead with particularity the time, place, and content of each false representation and that they are "victim[s] of consumer fraud." NRS § 41.600.

Here, Plaintiffs' consumer fraud claim fails for the same reasons their other fraud claims fail: they did not plead with particularity the facts essential to their claim. Specifically, Plaintiffs "failed to allege the required time, place, and content of the alleged fraud . . . a deceptive trade practice as defined in NRS § 598." *Gage*, 2017 WL 1536219, at *2 (applying Rule 9(b)). Nor did they plead with particularity how they are "victims" of the consumer fraud—*i.e.*, how Ms. Camacho would have acted differently and avoided her injury but for the allegedly false misrepresentations made by Defendants.[7] For example, Plaintiffs allege that Ms. Camacho was part of "the public" allegedly deceived by the "Frank Statement to Cigarette Smokers," a 1954 advertisement, Compl. at ¶ 212(h), despite the fact that Ms. Camacho allegedly did not start smoking until 1964—an entire decade later. *See id.* at ¶ 17. Indeed, it is unclear—*i.e.*, lacking in particularity—if Ms. Camacho even saw the Frank Statement, much less that she was able to understand and comprehend its meaning in 1954.

Plaintiffs again recite a laundry list of generic "false and misleading statements and

[7] Plaintiffs indeed did not allege any fact to support the claim that Defendants knowingly misrepresented "the source, sponsorship, approval, or certification" of their cigarettes or any "affiliation, connection, association with or certification by another person." Compl. at ¶ 210.

misrepresentations" but fail to allege with any specificity: (1) which Defendants made the statements or misrepresentations; (2) how or when Ms. Camacho saw or heard these statements; and (3) how she relied on them. These generic and conclusory allegations of conduct by the tobacco industry cannot support a consumer fraud claim against the Defendants in this case. Plaintiffs allege that Defendants "ma[de] countless publicized appearances on television and radio," but, as with the other allegations, did not specify the dates, times, or locations of the appearances or how Ms. Camacho relied on those specific statements to make her smoking-related decisions. *Id.* at ¶ 212(a). Additionally, Plaintiffs claim that Defendants "falsely advertis[ed] and promot[ed] 'filtered' and 'light' cigarettes as 'low tar' and 'low nicotine,'" *id.* at ¶ 212(d), but they did not allege that Ms. Camacho smoked any of these types of cigarettes.

Plaintiffs likewise fail to "satisfy NRCP 9(b)'s heightened pleading standards," *Gage*, 2017 WL 1536219, at *2, with vague and conclusory allegations that Defendants created "a made up 'cigarette controversy,'" Compl. at ¶ 212(g), or "confus[ed] facts about health hazards of cigarettes," *id.* at ¶ 212(f), because these allegations again did not specify the time, place, and content of the fraud. Further, Plaintiffs made no allegation that Ms. Camacho began smoking as a minor, *id.* at ¶ 212(n); nor did they allege that Ms. Camacho began smoking because of any supposed ads that portrayed smoking as "glamorous," *id.* at ¶ 212(l). Likewise, Plaintiffs' allegations that Defendants made misleading statements "before the United States Congress," *id.* at ¶ 212(p) or "during a governmental hearing," *id.* at ¶ 212(m), cannot serve as a basis for liability, as such statements to government entities are protected by the First Amendment under the *Noerr-Pennington* doctrine. *See supra* Section II.D.1 (citing *Noerr Motor Freight*, 365 U.S. at 137–44; *Pennington*, 381 U.S. at 669–70).

Because Plaintiffs did not satisfy Rule 9(b)'s heightened pleading standard for consumer fraud claims and did not state with particularity how Ms. Camacho was a "victim of consumer fraud," the Court should dismiss Count VII of Plaintiffs' Amended Complaint.

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III. CONCLUSION

For the stated reasons, Defendants respectfully move the Court to dismiss Plaintiffs' Amended Complaint in its entirety.

Dated this 23rd day of March, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of March, 2020, a true and correct copy of the foregoing **DEFENDANTS PHILIP MORRIS USA INC., LIGGETT GROUP LLC, AND ASM NATIONWIDE CORPORATION'S MOTION TO DISMISS PLAINTIFFS' 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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DISTRICT COURT
CLARK COUNTY, NEVADA

SANDRA CAMACHO, individually, and ANTHONY CAMACHO, individually,

Plaintiffs,

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 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 LV SINGHS INC. d/b/a SMOKES & VAPORS, a domestic corporation; DOES I-X; and ROE BUSINESS ENTITIES XI-XX, inclusive,

Defendants.

CASE NO.: A-19-807650-C

DEPT. NO.: IV

PLAINTIFFS' OPPOSITION TO DEFENDANTS' PHILIP MORRIS USA INC., LIGGETT GROUP LLC, AND ASM NATIONWIDE CORPORATION d/b/a SILVERADO SMOKES & CIGARS' MOTION TO DISMISS PLAINTIFFS' AMENDED COMPLAINT UNDER NRCP 12(b)(5)

Hearing Date: April 30, 2020
Hearing Time: 09:00 a.m.

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MEMORANDUM OF POINTS AND AUTHORITIES[1]

I. INTRODUCTION

This case arises out of one of the most egregious, expensive, decades-long acts of fraud and conspiracy this country has ever seen. This sophisticated and complex conspiracy involved false and misleading claims regarding the health hazards and highly addictive nature of cigarettes and was perpetrated by the cigarette industry, including Defendant herein. Plaintiff, SANDRA CAMACHO, was one of the millions of Americans who was deceived by the cigarette industry. Mrs. Camacho began smoking cigarettes in approximately 1964 and continued to smoke until approximately 2017. In 2018 Mrs. Camacho developed laryngeal cancer as a result of smoking cigarettes manufactured by Defendants Philip Morris USA Inc. ("Philip Morris") and Liggett Group LLC ("Liggett"). Mrs. Camacho purchased cigarettes from Defendants, ASM NATIONWIDE CORPORATION d/b/a SILVERADO SMOKES & CIGARS ("Silverado"), and LV SINGHS INC. d/b/a SMOKES & VAPORS ("LV SINGHS") from the mid-2000s through 2017 in sufficient quantities to be a substantial contributing cause of her laryngeal cancer. Defendants, Philip Morris and Liggett, conspired with Defendant R.J. Reynolds Tobacco Company ("R.J. Reynolds") to conceal the true nature of the health hazards and deadly and addictive nature of cigarettes from the American public, including SANDRA CAMACHO.

Mrs. Camacho and her husband, ANTHONY CAMACHO, (collectively "Plaintiffs") bring this action alleging claims of negligence and strict liability based on Defendants' manufacture and sale of cigarettes that it purposefully designed to be unreasonably dangerous, as well as counts of deceptive trade practice and civil conspiracy based on the decades-long campaign Defendants and their co-conspirators waged to deceive the public and smokers such as Mrs. Camacho. Contrary to Defendants allegations, as explained below, none of Plaintiffs' claims are barred by federal

[1]Plaintiffs hereby adopt and incorporate all arguments contained in their response to Defendant R.J. Reynolds' Motion to Dismiss Plaintiffs' Amended Complaint Under NRCP 12(b)(5) filed contemporaneously with this pleading.

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preemption. Furthermore, Plaintiffs have sufficiently plead each of their claims and thus Defendants' motion should be denied in its entirety.

II. BRIEF STATEMENT OF THE FACTS

a. Cigarette Industry's Two Hundred and Fifty Billion Dollar Conspiracy

Defendants, Philip Morris, Liggett, and R.J. Reynolds, along with other cigarette manufacturers, embarked on a nation-wide campaign, beginning in the 1950s, to deceive the American public, including Plaintiff, SANDRA CAMACHO, about the true nature of cigarettes – e.g. the corporations deliberate and intentional manipulation and manufacturing of cigarettes to, among other things, increase the levels of pH and ammonia in cigarettes, make cigarettes easier to inhale, and purposefully make them more addictive, dangerous, and deadly. These corporations band together to conceal their knowledge that cigarettes were dangerous, addictive, and caused lung cancer and death all in the name of profit. This conspiracy has been described as the most-deadly conspiracy in the history of this country – there has never been a conspiracy so broad in its scope, devious in its purpose, and devastating in its results, still killing a half million people every year.

Defendants accomplished this goal through a highly complex, nation-wide, two-hundred-and-fifty-billion-dollar marketing campaign which involved, among other things, television advertisements (until the 1970s when these were banned), billboards, newspaper advertisements, coupons, public relations companies, branded merchandise, free samples, fake scientists and fake scientific organizations, sponsorship of sporting events, tobacco institute spokesmen and spokeswomen, celebrity endorsements, and the list goes on. The cigarette manufacturers, who were fierce competitors all vying for the same market-share of consumers – cigarette smokers – deliberately linked arms to form an alliance to deceive the American public, including SANDRA CAMACHO. This conspiracy would not have worked on the massive, nation-wide scale it did if it was not for the cigarette industry's ***joint efforts.***

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b. Defendants' Concerted Actions Harmed Sandra Camacho

Defendants and their co-conspirators' concerted efforts and mass marketing campaign harmed Plaintiff, SANDRA CAMACHO, who began smoking cigarettes in 1964 when she was 18 years old. Mrs. Camacho became addicted to nicotine in cigarettes and as a result developed laryngeal cancer. Mrs. Camacho's continued smoking lead to her addiction, which ultimately lead to her laryngeal cancer. Mrs. Camacho continued to smoke cigarettes for over 50 years because, she, along with millions and millions of Americans, did not know cigarettes were harmful, addictive, or could cause disease and death. And when Mrs. Camacho finally learned about the true nature of cigarettes, she unfortunately was too addicted to the powerful drug – nicotine – that she was not able to quit smoking.

Mrs. Camacho did not know the true nature of cigarettes because R.J. Reynolds, Philip Morris, and Liggett, did not want her to know. The ongoing debate regarding whether cigarettes were safe or whether they were not safe was not a one-off marketing campaign or a singular advertisement or appearance on television. This was one of the largest, most expensive and wide-spread marketing efforts this county has ever seen. Unlike Defendants imply in their motion to dismiss, Philip Morris and Liggett did not act alone. They needed help and cooperation from R.J. Reynolds and others to perpetuate this very expensive, massive campaign. The conspiracy and the public perception about cigarettes would never have worked unless all of the cigarette manufacturers worked together to spread the same message. Thus, as a result of the concerted efforts of Philip Morris, Liggett, R.J. Reynolds, and others, Mrs. Camacho began smoking cigarettes, continued to smoke for over 50 years, became addicted to nicotine in cigarettes, and ultimately developed laryngeal cancer as a result of her smoking.

c. This Identical Motion Was Denied by Judge Jim Crockett Earlier This Month

Just last month on March 10, 2020 the Honorable Judge Jim Crockett ruled upon the identical issues raised in this Motion to Dismiss in the *Clark v. R.J. Reynolds et al.*, Case No. A-19-802987 matter. The Complaint and the Motions to Dismiss in the *Clark* matter were substantively the same,

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involving similar counts of Negligence, Strict Liability, Fraudulent Concealment, Fraudulent Misrepresentation, Civil Conspiracy, and Deceptive Trade Practices. After extensive briefings and a hearing before Judge Crockett, the Court denied both Defendant R.J. Reynolds's Motion to Dismiss as well as Defendants Philip Morris and Liggett Motion to Dismiss.[2] Furthermore, similar motions have likewise been denied in courts across the County including in Florida, Massachusetts, Portland, and others.[3]

III. LEGAL STANDARD FOR MOTIONS TO DISMISS

NRCP 8 governs the general rules of pleading. NRCP 8(a) requires a complaint "contain a short and plain statement of the claim showing that the pleader is entitled to relief." NRCP 8(a); *see also Crucil v. Carson City*, 95 Nev. 583, 585, 600 P. 2d 216, 217 (1979) (quoting NRCP 8(a)). A complaint need only, "set forth sufficient facts to establish all necessary elements of a claim for relief so that the adverse party has adequate notice of the nature of the claim and relief sought." *Hay v. Hay*, 100 Nev. 196, 198, 678 P.2d 672, 674 (1984) (internal citations omitted); *see also Western States Const., Inc. v. Michoff* 108 Nev. 931 (Nev. 1992) (citing *Ravera v. City of Reno*, 100 Nev. 68, 70, 675 P.2d 407, 408 (1984) ("test for determining whether the allegations of a cause of action are sufficient to assert [a] claim is whether allegations give fair notice of nature and basis of claim and relief requested.").

The pleading of a conclusion, either of law or fact, is sufficient so long as the pleading gives fair notice of the nature and basis of the claim. *Crucil*, 95 Nev. at 585, 600 P. 2d at 217 (1979) (citing *Taylor v. State and Univ.,* 73 Nev. 151, 152, 311 P. 2d 733, 734 (1957)). "Because Nevada is a notice-

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[2] In *Clark v. R.J. Reynolds et al.*, Judge Crockett granted a limited Motion for More Definite Statement regarding Plaintiffs' two fraud claims. The *Clark* Complaint did not contain a Gross Negligence count. *See* Order and Transcript E**xhibit 1.**

[3] *See* Order Denying Defendants' Motion to Dismiss Second Amended Complaint, Harcourt v Philip Morris et al., Case No. 17-20297, Seventeenth Judicial Circuit Court Florida, January 16, 2020; Order Denying in Part Motion to Dismiss, Thorpe v. Philip Morris et al., Case No. 18VC36607, Circuit Court for the State of Oregon, February 20, 2019; Order Denying Defendant's Motion to Dismiss Counts II-VIII of Plaintiff's Complaint and in part Order Granting Defendants' Motion for More Definite Statement, Gentile v. R.J. Reynolds et al., Case No. 50201CA540XXXXMB Fifteenth Judicial Circuit Court Florida, January 20, 2016.

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pleading jurisdiction, [its] courts liberally construe pleadings to place into issue matters which are fairly noticed to the adverse party." *Hay*, 100 Nev. at 198, 678 P. 2d at 674 (citing *Chavez v. Robberson Steel Co.,* 94 Nev. 597, 599, 584 P. 2d 159, 160 (1978)).

"A district court order granting a motion to dismiss is **'rigorously reviewed.'**" *Kahn v. Dodds (In re AMERCO Derivative Litig.),* 252 P.3d 681, 692 (Nev. 2011) (emphasis added) (quoting *Shoen v. SAC Holding Corp.*, 122 Nev. 621, 634-35, 137 P.3d 1171, 1180 (2006)*; see also Holcomb Condo. Homeowners' Ass'n v. Stewart Venture, LLC,* 300 P.3d 124, 128 (Nev. 2013) (**stating that the standard for dismissal under NRCP 12(b)(5) "is a rigorous standard"**) (emphasis added). To survive a motion to dismiss under NRCP 12(b)(5), a complaint must contain some "set of facts which, if true, would entitle the plaintiff to relief." *Buzz Stew, LLC v. City of N. Las Vegas,* 124 Nev. 224, 228, 181 P.3d 670, 672 (2008). When reviewing a NRCP 12(b)(5) motion, all factual allegations in the complaint must be regarded as true. *Hampe v. Foote*, 118 Nev. 405, 408, 47 P.3d 438, 439 (2002). In fact, the court "must accept as true the complaint's allegations and draw all reasonable inferences in [plaintiff's] favor." *Shoen*, 122 Nev. at 635, 137 P.3d at 1180; *Simpson v. Mars, Inc.*, 113 Nev. 188, 190, 929 P.2d 966, 967 (1997) (holding that the court must construe the pleadings liberally and draw every fair inference in favor of the non-moving party); *Squires v. Sierra Nev. Educ. Found.,* 107 Nev. 902, 905, 823 P.2d 256, 257 (1991) (stating that the court must construe the pleadings liberally and draw every fair inference in favor of the non-moving party). Therefore, dismissal is not proper unless it appears beyond a reasonable doubt that the plaintiff could prove no set of facts, which, if true, would entitle him to relief. *Hampe*, 118 Nev. at 408, 47 P.3d at 439.

IV. PLAINTIFF'S CLAIMS FOR NEGLIGENCE AND STRICT LIABILITY ARE NOT PREEMPTED UNDER FEDERAL LAW

Defendants first incorrectly allege that all of Plaintiffs claims for negligence and strict liability should be dismissed as they are allegedly preempted under Federal Law. Defendants' position is without merit and should be denied in its entirety.

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i. Plaintiffs' claims are not preempted by the Federal Cigarette Labeling and Advertising Act

Defendants' motion to dismiss first improperly alleges that Plaintiffs claims are preempted by the Federal Cigarette Labeling and Advertising Act ("Labeling Act") based on failure to warn after July 1, 1969. Although Defendants' motion is ostensibly directed to Plaintiffs' negligence and strict liability claims in Counts I, II and III it also implicitly attacks Plaintiffs' claims of fraudulent misrepresentation, fraudulent concealment, and civil conspiracy Counts IV through VI. Therefore, Plaintiffs will explain why the Labeling Act does not preempt *any* of Plaintiffs' claims.

Defendants' only accurate statement concerning the Labeling Act is that it preempts claims based on a failure to warn after July 1, 1969 and preempts claims that challenge the adequacy of post-1969 warning labels. *See Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 524 (1992). ***But Plaintiffs have not pleaded any such claims.*** Rather, Plaintiffs have only alleged failures to warn *prior* to July 1, 1969. *See Amended Complaint,* ¶92(a-3) and ¶115(n-r). Those claims are not preempted. *See id.*; *Carter v. Brown & Williamson Tobacco Corp*., 778 So. 2d 932, 940-41 (Fla. 2000).

To the contrary, the United States Supreme Court has held that the Labeling Act does *not* preempt state-law claims against tobacco companies for fraudulently misrepresenting or fraudulently concealing material facts, even if those claims are based on misleading statements contained in cigarette advertisements. *See Altria Group, Inc. v. Good*, 555 U.S. 70, 81-83 (2008); *Cipollone*, 505 U.S. at 528-29. *See also*, *Laschke v. Brown & Williamson Tobacco Corp.,* 766 So. 2d 1076 (Fla. 2nd DCA 2000) ("**Negligence and strict liability claims based on design defects and conspiracy through misrepresentation brought against cigarette manufacturer were not preempted by Federal Cigarette Labeling and Advertising Act**."). The Labeling Act also does not preempt claims of *conspiracy* to misrepresent or conceal material facts. *See Cipollone*, 505 U.S. at 530.

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In another tobacco-related lawsuit, the Supreme Court of California addressed this identical issue and held that the Labeling Act did not preempt claims for conspiracy or concealment. *In re Tobacco Cases II*, 41 Cal. 4th 1257 (Cal. 2007).

> For similar reasons, **the *Cipollone* plurality concluded that the FCLAA [Federal Cigarette Labeling and Advertising Act] did not preempt the claim for conspiracy to misrepresent or conceal material facts concerning the health hazards of smoking,** because "[t]he predicate duty underlying this claim is a duty not to conspire to commit fraud," which was "not a prohibition 'based on smoking and health' as that phrase is properly construed." (*Cipollone*, supra, 505 U.S. at p. 530, 112 S.Ct. 2608 (plur. opn. of Stevens, J.).)

Id. (emphasis added).

Furthermore, another court in Arizona similarly analyzed *Cipollone* and also held that a cigarette smoker's product liability claims were not barred by Federal preemption. *Hearn v. R.J. Reynolds Tobacco Company,* 279 F. Supp. 2d 1096, 1110 (U.S. Dist. Ct. Arizona 2003).

> In *Cipollone v. Liggett Group, Inc.,* the Supreme Court determined the boundaries of federal preemption of state law claims brought under the Federal Labeling Act. 505 U.S. 504, 112 S.Ct. 2608, 120 L.Ed.2d 407 (1992) ("Act"). According to the Supreme Court, the Act impliedly preempts certain state law damage actions relating to smoking and health which challenge the adequacy of warnings on cigarette packages or the propriety of a manufacturer's advertising or promotion of cigarettes. Id. at 511, 112 S. Ct. 2608. **More specifically, the Court held that (1) the 1965 Act does not preempt state law damage actions in general; (2) the 1969 Act does preempt claims based on a failure to warn and on the neutralization of federally mandated warnings to the extent that such claims rely on omissions or inclusions in a manufacturer's advertising or promotions; and (3) the 1969 Act does not preempt claims based on express warranty, intentional fraud and misrepresentation, or conspiracy.** *Id*. at 530–31, 112 S. Ct. 2608.
>
> ***
> The Supreme Court in *Cipollone* also addressed preemption of fraudulent concealment claims.
>
> ***
>
> Therefore, this Court concludes that the Plaintiffs' post–1969 fraudulent concealment claims are preempted only to the extent that they rely on Defendants' duty to issue additional warnings through advertising and promotion. **Plaintiffs' post–1969 fraudulent concealment claims are not preempted to the extent that**

they rely on a state-law duty to disclose such facts through channels of communication other than advertising or promotion.

Id. at 1110, 1112. (emphasis added).

ii. Plaintiffs' Negligence and Strict Liability Causes of Action are Not Barred under "Implied Preemption"

Defendants next improperly argue Plaintiffs' claims of strict liability are barred by the doctrine of "implied preemption." First, Defendants argue Plaintiffs' claim are barred because they are only premised on the fact that "all cigarettes are defective and should not be manufactured or sold." *Def Mot.* at 10. This argument is meritless and is not a correct recitation of the allegations set forth in Plaintiffs' Amended Complaint.

Defendants' argument revolves around the *FDA v. Brown & Williamson Tobacco Corp.* case. Notably, nowhere in that case does the Court hold Plaintiffs' are not allowed to bring negligence and strict liability claims against tobacco companies. All that case stands for is that cigarettes should not be banned by the FDA and that cigarettes are legal product. Plaintiffs do not dispute that either of those facts are the current state of the law in the United States. Nor do Plaintiffs attempt to hold the Defendants liable for any violation of those facts in their Amended Complaint.

Further, unlike Defendants' argue in their motion, Plaintiffs' do not attempt to hold Philip Morris and Liggett liable simply because they sell cigarettes or because their cigarettes are dangerous products. Instead, Plaintiffs' Amended Complaint alleges Defendants' cigarettes are <u>*unreasonably*</u> dangerous and defective and such defect was a direct cause of Mrs. Camacho becoming addicted to cigarettes, continuing to smoke cigarettes for over 50 years, and eventually developing laryngeal cancer. Plaintiffs' are holding Defendants accountable for purposefully and intentionally manipulating cigarettes from dangerous products to <u>*unreasonably*</u> dangerous and defective attractive doses of nicotine. The cigarettes Mrs. Camacho smoked were not simply tobacco plucked from the farm – the

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cigarettes and the chemical compounds in the cigarettes were intentionally manipulated to artificially create a highly addictive, deadly nicotine delivery devises.

Moreover, Defendants fail to acknowledge that this exact argument has been rejected by the Florida Supreme Court in *Marotta*, 214 So. 3d at 597-99; and by the Eleventh Circuit Court of Appeals in *Graham*, 857 F.3d at 1189-91 ("**R.J. Reynolds and Philip Morris would have us presume that Congress established a right to sell cigarettes based on a handful of federal labeling requirements. We decline to do so. We discern no 'clear and manifest purpose' to displace tort liability based on the dangerousness of all cigarettes manufactured by the tobacco companies**.") and *Griffin v. Philip Morris USA, Inc.* 730 Fed. Appx. 848, fn 1 (11th Cir. 2018) ("Defendant argues that federal law preempts the strict liability and negligence claims brought under Florida law. **In *Graham*, we held that "federal tobacco laws do not preempt state tort claims based on the dangerousness of all the cigarettes manufactured by the tobacco companies.**"). Moreover, the United States Supreme Court recently denied Defendants' petition for certiorari review of *Graham*. *R.J. Reynolds Tobacco Co. v. Graham*, 138 S. Ct. 646, 199 L. Ed. 2d 530 (2018).

The only claim that has been held to be pre-empted by Federal law is a claim that Defendant is negligent for merely continuing to manufacture cigarettes. ***But, as explained above, Plaintiffs are not bringing such a claim.*** *Liggett Grp., Inc. v. Davis*, 973 So. 2d 467, 472 (Fla. 4th DCA 2007). Similarly, in *Philip Morris USA, Inc. v. Arnitz*, Florida's Second District Court of Appeal affirmed a judgment in favor of the Plaintiff and further held that Plaintiff's claims were not pre-empted by Federal law:

> Further, Philip Morris argues that Arnitz's design defect claim is barred by federal preemption principles. Arnitz contended that Philip Morris brand cigarettes had a design defect because Philip Morris placed additives in its cigarettes to make them more inhalable than natural tobacco; Philip Morris flue cured the tobacco, heightening the cancer risk; and some of the additives Philip Morris used changed the nicotine to freebase nicotine. **We conclude that federal law does not preempt the design defect claim.**

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Philip Morris USA, Inc. v. Arnitz, 933 So. 2d 693, 698-99 (Fla. 2d DCA 2006) (citations omitted) (emphasis added).

iii. Philip Morris and Liggett Have Litigated These Identical Preemption Issues, In Multiples States, and Lost, Multiple Times

Defendants Philip Morris and Liggett, along with several other tobacco companies, have litigated these same issues over and over, year after year, in multiple states, without success.[4] Indeed, the United States Court of Appeals for the Ninth Circuit has also already decided this issue and held that Plaintiff's strict liability failure-to-warn and fraudulent concealment claims were not barred by Federal Preemption. *Rivera v. Philip Morris, Inc.*, 395 F. 3d 1142 (11th Cir. 2005). Additionally, in *Ferlanti v. Liggett Group Inc.,* 929 So. 2d 1172 (Fla. 4th DCA 1172), Florida's Fourth District Court of Appeal held, "**to the extent appellant's claims are based on a design defect in the cigarettes smoked by the decedent, her claims are not barred by the doctrine of conflict preemption**." *Ferlanti v. Liggett Grp., Inc.*, 929 So. 2d 1172, 1174 (Fla. 4th DCA 2006) (emphasis added); *see also Philip Morris USA, Inc. v. Arnitz*, 933 So. 2d 693, 699 (Fla. 2d DCA 2006) ("We conclude that federal law does not preempt the design defect claim."); *See Liggett Group, Inc. v. Davis*, 973 So. 2d 467 (Fla. 4th DCA 2007).

The issue of pre-emption was further addressed in *Liggett Grp., Inc. v. Davis*, where the Fourth District Court of Appeal stated: "**Nevertheless, not only our court in *Ferlanti* but also the Second District in *Philip Morris USA, Inc., v. Arnitz,* 933 So.2d 693 (Fla. 2d DCA 2006), has held that a design defect claim against a cigarette manufacturer is not preempted by Federal statutes. This is the prevailing position of courts which have addressed this issue.**" *Liggett Grp., Inc. v. Davis*, 973 So. 2d 467, 472 (Fla. Dist. Ct. App. 2007) (emphasis added).

[4] *See supra; In re Tobacco Cases II*, 41 Cal. 4th 1257 (Cal. 2007); *Laschke v. Brown & Williamson Tobacco Corp.,* 766 So. 2d 1076 (Fla. 2nd DCA 2000); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 524 (1992); *Hearn v. R.J. Reynolds Tobacco Company,* 279 F. Supp. 2d 1096, 1108 (U.S. Dist. Ct. Arizona 2003); *Carter v. Brown & Williamson Tobacco Corp*., 778 So. 2d 932, 940-41 (Fla. 2000).

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Finally, another example of where this issue has already been decided is in the United States District Court for the Middle District of Florida in *Harris v. R.J. Reynolds Tobacco Company*, 383 F. Supp. 3d 1315 (U.S. District Court, M.D. Fla., 2019). In *Harris*, the court held that Plaintiff's negligence and strict liability claims were not preempted by Federal law.

> Defendants also argue that the Federal Cigarette Labeling and Advertising Act ("Labeling Act"), 15 U.S.C. §§ 1331, et seq., expressly preempts Plaintiff's claims to the extent her theory of liability is based on inadequate labeling or advertising after July 1, 1969. The Labeling Act requires tobacco companies to include specific warnings on cigarette packages, but preempts any "requirement or prohibition based on smoking and health" from "be[ing] imposed under State law with respect to the advertising and promotion of any cigarettes." However, the Labeling Act does not preempt other common law claims outside the scope of the preemption clause, *Cipollone*, 505 U.S. at 517, 112 S.Ct. 2608, such as defective design claims, id. at 523, 112 S.Ct. 2608. **Plaintiff's negligence and strict liability claims were based primarily on the theory that Defendants designed, manufactured, and sold cigarettes that were unreasonably dangerous. Because Plaintiff's negligence and strict liability claims did not depend simply on a failure-to-warn theory, her claims are not preempted.**

Id. at 1328-1329 (citations omitted) (emphasis added). Thus, based on the foregoing, Defendants' preemption arguments should be denied in their entirety.

V. PLAINTIFFS ADEQUATELY PLEADED THEIR CLAIMS FOR NEGLIGENCE AND STRICT LIABILITY

Next, Defendants allege Plaintiffs failed to plead the *prima facie* elements of negligence and strict liability. As demonstrated below, Plaintiffs have plead more than sufficient facts to defeat a NRCP 12(b)(5) motion.

i. Plaintiffs Adequately Pleaded a Specific Defect In L&M, Basic, and Marlboro Cigarettes Which Caused Mrs. Camacho's Injury

Defendants make the demonstrably false claim that Plaintiffs fail to allege a specific defect in L&M, Basic, and Marlboro cigarettes which caused Mrs. Camacho's injury. Plaintiffs' Amended Complaint is replete with concrete, specific examples of defects contained in L&M, Basic, and Marlboro brand cigarettes which Mrs. Camacho smoked, which lead to her addiction and ultimately her laryngeal cancer. These defects include, but are not limited to the following:

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- designing and manufacturing an unreasonably dangerous and deadly product;
- designing and manufacturing cigarettes to be addictive;
- designing and manufacturing cigarettes to be inhalable;
- manipulating the level of nicotine in cigarettes to make them more addictive;
- genetically modifying nicotine in tobacco plants;
- blending different types of tobacco to obtain a desired amount of nicotine;
- engineering cigarettes to be rapidly inhaled into the bloodstream;
- adding carcinogens, polonium-210, urea, arsenal, formaldehyde, nitrosamines, and other deadly, poisonous compounds to cigarettes;
- adding and/or manipulating compounds such as ammonia and diammonium phosphate to Defendant's cigarettes to "free-base" nicotine;
- marketing and advertising "light" and "ultra-light" cigarettes as safe, low nicotine, and low tar;
- adding "onserts" to packages of cigarettes even after the United States government banned marketing of "light" and "ultra-light" cigarettes;
- manipulating levels of pH in Defendants' cigarettes;
- targeting children who could not understand or comprehend the seriousness or addictive nature of nicotine and smoking;
- targeting minority populations such as African Americans, Hispanics, and women to obtain a greater market share to increase their profits;
- failing to develop and utilize alternative designs, manufacturing methods, and/or materials to reduce and/or eliminate harmful materials from cigarettes;
- continuing to manufacture, distribute, and/or sell cigarettes when Defendant knew at all times material that its products could cause, and in fact were more likely to cause, injuries including, but not limited to, emphysema, throat cancer, COPD, laryngeal cancer, lung cancer, and/or other forms of cancer when used as intended;
- making knowingly false and misleading statements to Plaintiff, the public, and the American government that cigarettes were safe and/or not proven to be dangerous;
- failing to remove and recall cigarettes from the stream of commerce and the marketplace upon ascertaining that said products would cause disease and death.

See Amended Complaint ¶92 (a-r). These are just a few examples of the multiple defects in the cigarettes Mrs. Camacho smoked, namely that these cigarettes were specifically designed and manufactured to be highly addictive, inhalable, dangerous, and deadly. *Id.* As Plaintiffs' Amended Complaint states, these defects, together, all caused and contributed to Mrs. Camacho's continued smoking, her addiction, and her laryngeal cancer. *See Amended Complaint* ¶¶94-98. Furthermore,

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NRCP 8(a) merely requires a complaint "contain a short and plain statement of the claim showing that the pleader is entitled to relief." Plaintiffs have far exceeded this standard and have plead more than sufficient facts supporting multiple, specific examples of how Defendants' defective and unreasonably dangerous cigarettes lead to Mrs. Camacho's injury. Thus, Defendants' argument fails.

ii. Plaintiffs Consumer Expectation and Alternative Design Allegations Properly Support the Existence of Design Defects in Philip Morris and Liggett's Cigarettes

Defendants improperly argue Plaintiffs fail to adequately plead the consumer expectation and alternative design test. As explained below, Defendant's allegations lack merit and should be denied.

a. Consumer Expectation Test

Defendants argue Plaintiffs must allege it was "common knowledge" that people did not know the inherent dangers of cigarettes. ***In fact, that is exactly what Plaintiffs plead, multiple times, throughout their Amended Complaint***. *See Plaintiff's Amended Complaint.*

- [Defendant] fail[ed] to disclose to consumers of cigarettes, such as SANDRA CAMACHO, the results of genuine scientific research conducted by and/or known to Defendant that cigarettes were dangerous, defective, and addictive. *Amended Complaint* ¶93(e).

- Defendants cigarettes were dangerous beyond the expectation of the ordinary user/consumer when used as intended or in a manner reasonably foreseeable by Defendants. *Amended Complaint* ¶132

- The nature and degree of danger of Defendant's cigarettes were beyond the expectation of the ordinary consumer, including SANDRA CAMACHO, when used as intended or in a reasonably foreseeable manner. *Amended Complaint* ¶133.

Further, Defendants allege that, "ordinary consumers have understood for decades that cigarettes are inherently dangerous." First, as Plaintiffs allege throughout their Amended Complaint, Defendants, Philip Morris, Liggett and their co-conspirators had far superior knowledge regarding the health hazards of cigarettes than Mrs. Camacho, or the American public, had. How were consumers, such as Mrs. Camacho, supposed to have the "common knowledge" that cigarettes were deadly and addictive, when the cigarette manufacturers themselves were appearing on television and testifying,

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under oath before Congress, all the way through the mid-1990s that "it had not been proven that cigarettes are addictive, caused disease, or cause a single person to die." *See Amended Complaint* ¶74. In fact, Defendants did not admit cigarettes were addictive until the year 2000. ***Defendants' argument defies logic.*** Mrs. Camacho was allegedly supposed to ascertain a "common knowledge" about cigarettes while the Defendants own public statements, sworn Congressional testimony, and advertisements ***stated the exact opposite***. Plaintiffs have pleaded more than sufficient facts to prevail on a NRCP 12(b)(5) motion under the consumer expectation test.

Defendants also cite (and misstates) a string of irrelevant, miscellaneous cases purporting to argue that the dangers of smoking were "known to the public" for decades. This is one of the pivotal arguments in this case and cannot be decided in a NRCP 12(b)(5) motion to dismiss which is based on the four-corners of Plaintiff's Amended Complaint, not arguments and irrelevant case law discussed in a motion to dismiss. Moreover, Defendants completely misstate the law in *Rivera*. Defendants allege, ""[s]everal courts" across the country have taken judicial notice of the "common knowledge of the general disease-related health risks associated with smoking, *including the risk of contracting cancer, as of 1964*," and that "by 1969 there was common knowledge of the evils of smoking." *Rivera*, 395 F.3d at 1152."" *Def. Mot. at pg. 20.*

In fact, *Rivera* undergoes a lengthy discussion, applying Nevada State law, concluding **"such an inquiry [regarding the health risks associated with smoking] is a question of fact to be decided by a jury."** *Rivera*, 395 F. 3d at 1153 (emphasis added). Further, *Rivera* holds, **"it is at least premature on this record to take judicial notice of the fact that the link between smoking and specific illnesses allegedly caused by smoking was common knowledge during the relevant time."** *Id.* (emphasis added). Thus, *Rivera* stands for the ***opposite*** position Defendants argue – i.e. the "common knowledge" regarding whether health risk of cigarettes was known by 1969 is a question for ***the jury*** and thus logically can be inferred is not an appropriate argument for a NRCP 12(b)(5)

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motion. Similarly, Defendants neglect to note the United States District Court for Arizona similarly declined to exercise judicial notice as to when the risks associated with smoking became common knowledge. *Hearn v. R.J. Reynolds Tobacco Company,* 279 F. Supp. 2d 1096, 1108 (U.S. Dist. Ct. Arizona 2003) ("**This Court will also decline at this time to exercise judicial notice which would require selection of an arbitrary date for when the risks (i.e. lung cancer) associated with smoking became common knowledge.** "[T]he simple fact that courts disagree about [the appropriate date] further illustrates ... this fact is subject to considerable dispute, **such that taking judicial notice of it would be improper**.") (emphasis added).

Furthermore, Defendants conveniently overlooked the enormous mountain of evidence, case law, and internal, previously secret and concealed documents from their own company and their own executives, which completely contradicts every quotation they cite in their motion. In fact, one Federal Judge, the Honorable Gladys Kessler, in a 1,683-page opinion, cites countless examples which refute Defendants' allegation that, "ordinary consumers have understood for decades that cigarettes are inherently dangerous products." *See United States v. Philip Morris*, 449 F. Supp. 2d 1, 3-4 (D.D.C. 2006) ("[This case] is about an industry, and in particular these Defendants, that survives, and profits, from selling a highly addictive product which causes diseases that lead to a staggering number of deaths per year, an immeasurable amount of human suffering and economic loss, and a profound burden on our national health care system. ***Defendants have known many of these facts for at least 50 years or more. Despite that knowledge, they have consistently, repeatedly and with enormous skill and sophistication, denied these facts to the public, to the Government, and to the public health community.****")*.

b. Alternative Design Test

Defendants next argue that Plaintiffs failed to plead alternative design fails for similar reasons. Plaintiffs have adequately and properly plead multiple examples of safer, alternative designs of

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cigarettes that Defendants failed to implement. *See Amended Complaint* ¶¶92(o), 135(k), ("failing to develop and utilize alternative designs, manufacturing methods, and/or materials to reduce and/or eliminate harmful materials from cigarettes"; "utilizing deadly and harmful additives, compounds, and ingredients in their cigarette design and manufacturing process when alternative, less dangerous materials were available.).

Defendants attempt to insert additional pleading requirements, which are not required nor necessary at this stage of the lawsuit where a complaint need only "set forth sufficient facts to establish all necessary elements of a claim for relief so that the adverse party has adequate notice of the nature of the claim and relief sought." *Hay v. Hay*, 100 Nev. 196, 198, 678 P.2d 672, 674 (1984). Interestingly, Defendants never cite any authority to support their alleged proposition that Plaintiffs must plead, "what the safer design or modification was, when this unspecified alternative design or modification was available, whether it was feasible to implement the design, and how the safer design would have reduced or eliminated the harms of the L&M, Marlboro, and Basic cigarettes Mrs. Camacho allegedly smoked." *Def. Mot.* at pg. 15. According to Defendants, Plaintiffs must present their detailed closing arguments in order to establish the *prima facie* elements of an alternative design claim. Clearly, Defendants argument lacks credibility and Plaintiffs have well surpassed the pleading requirements pursuant to Nevada law. Thus, this argument should be denied.

iii. Plaintiffs Adequately Pleaded Mrs. Camacho Was Impacted by Philip Morris and Liggett and Their Co-Conspirators' Mass Marketing Campaign

Next, Defendants incorrectly argue that their mass marketing campaign had no connection to Mrs. Camacho. Throughout her life, Mrs. Camacho was exposed to mass marketing of cigarettes which was perpetuated by Philip Morris, Liggett and other cigarette manufacturers. As Plaintiffs allege in their Amended Complaint in the *Historical Allegations of Defendants Unlawful Conduct Giving Rise to the Lawsuit* ¶¶29 – 87, all of Defendants' marketing efforts, combined, created a false and misleading public perception regarding the health hazards of cigarettes. This false perception is highly

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relevant and important to understand the world Mrs. Camacho grew up in to determine the core issues in this case – i.e. why Mrs. Camacho began smoking cigarettes and why she continued smoking cigarettes. Any argument that the mass marketing and billions of dollars Defendants and their co-conspirators spent had no effect or zero impact on Mrs. Camacho is absurd and quite frankly, impossible. As Plaintiffs' cigarette industry experts will testify at trial, Defendants and their co-conspirators marketing efforts were so pervasive it was analogous to wallpaper – i.e. cigarette advertising and marketing were simply everywhere you would look. As explained above, when reviewing a NRCP 12(b)(5) motion, all factual allegations in the complaint must be regarded as true and the court, "must accept as true the complaint's allegations and draw all reasonable inferences in [plaintiff's] favor." *Hampe*, 118 Nev. At 408; *Shoen*, 122 Nev. at 635. Thus, Plaintiffs have far exceeded this standard and have plead more than adequate factual allegations to defeat a 12(b)(5) motion.

iv. Plaintiffs Adequately Pleaded the Pre-1969 Failure to Warn Claims for Negligence, Gross Negligence, and Strict Liability

Finally, Defendants improperly argue that Counts I, II, III, and VIII to state a cause of action for negligence, gross negligence or strict liability because Plaintiffs allegedly do not state facts supporting Mrs. Camacho's smoking behavior before 1969. Again, this argument fails. Plaintiffs pleaded Mrs. Camacho began smoking in 1964 and continued to smoke for over 50 years until approximately 2017. *See Amended Complaint* ¶17. Furthermore, Plaintiffs specifically alleged multiples examples of how Defendants failed to warn Plaintiff, SANDRA CAMACHO, before 1969 of the dangers of cigarettes. *See Amended Complaint* ¶93(a-e); ¶135(n-4). Thus, Defendants argument lacks merit.

VI. PLAINTIFFS' PROPERLY PLEADED THEIR GROSS NEGLIGENCE CLAIM

i. Plaintiffs' Properly Alleged a Legal Duty to Stratify Their Gross Negligence Counts

Defendants allege Plaintiffs' gross negligence count fails because Philip Morris and Liggett

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allegedly owed no "legal duty" to Plaintiffs. This claim is likewise meritless. First, this argument defies common sense. Defendants cannot willfully and intentionally manufacture, market, and sell an unreasonably dangerous and defective product and not be held accountable for the injuries and deaths that result from people using that product. Defendants had "actual knowledge of the wrongfulness of its conduct and the high probability that injury or damage to SANDRA CAMACHO would result." *Amended Complaint* ¶109. Further, "Defendants knew there were ways to minimize the disease and destruction their product, cigarettes, caused through alternative safer designs of cigarettes." *Amended Complaint* ¶110.

Moreover, Defendants' reliance on *Dow Chem. Co. v. Mahlum* is misplaced. Unlike the Defendants in *Mahlum*, the Defendants in this case ***created*** a duty to by making false and misleading promises to the American public, including Mrs. Camacho by reassuring the public, the healthcare community, and Mrs. Camacho that there was "no proof" that cigarettes were addictive or were linked to lung cancer and death. For example, in 1954 Philip Morris, R.J. Reynolds, and other tobacco companies took out a full page advertisement in newspapers across the country falsely promising the following: **"[Defendants will] accept an interest in people's health as a basic responsibility, paramount to every other consideration in our business"; "We always have and always will cooperate closely with those whose task it is to safeguard the public health"; "We are pledging aid and assistance to the research effort into all phases of tobacco use and health."** *See the Frank Statement to Cigarette Smokers.* Then, a decade later in 1964, Howard Cullman, tobacco representative on behalf of all companies, appeared on CBS news again promising "**the industry does not believe there are any bad elements . . . if there are any bad elements . . . they will be removed**." These false and broken promises ***created*** a duty to the American public, including Mrs. Camacho.

Furthermore, to imply there is no relationship between the manufacturer of a product and its end-user is unfounded. "A duty to disclose may arise when a fiduciary relationship exists between the

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parties ***or where the parties enjoy a "special relationship", that is, where a party reasonably imparts a special confidence in the defendant and the defendant would reasonably know of this confidence.***" *Ace Am. Ins. Co. v. Hallie.* Mrs. Camacho had every reason to rely on Defendants public statements about cigarettes because, unlike Mrs. Camacho, Defendants manufactured and designed cigarettes and was in the best position to talk about the health risks associated with them.

Finally, Philip Morris and Liggett were in a superior position to Mrs. Camacho and had far more knowledge regarding their own products. As the manufacturer of a consumer product, Defendants had an obligation to its consumers to reveal the true nature of their cigarettes e.g. that cigarettes are addictive, dangerous, and deadly. Thus, there is no dispute that Plaintiffs properly plead their gross negligence count.

ii. Plaintiffs' Gross Negligence Count Should Not be Dismissed or Stricken as Redundant to Plaintiffs' Negligence Claim

Defendants' argue Plaintiffs cannot plead both negligence and gross negligence as they are "redundant." This argument defies logic and common sense. Negligence and Gross Negligence are two different causes of action, Defendants' cite no authority to support their position. Defendants cannot carve out how and why Plaintiffs plead certain claims in their case. Defendants' conduct in this instance is the most egregious form of corporate malfeasance and all elements of Gross Negligence are properly alleged in Plaintiffs' Amended Complaint.

VII. PLAINTIFFS' ADEQUATELY PLEADED THEIR CLAIMS FOR FRAUDULENT MISPRESENTATION AND FRADULENT CONCEALMENT

Defendants next improperly challenge the fraudulent misrepresentation and fraudulent concealment claims in Counts IV and V. According to the Supreme Court of Nevada in *Davenport,* in order to state a claim for fraud, a plaintiff must allege the following: (1) a false representation made by the defendant; (2) defendant's knowledge or belief that its representation was false or that defendant has an insufficient basis of information for making the representation; (3) defendant intended to induce

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plaintiff to act or refrain from acting upon the misrepresentation; and (4) damage to the plaintiff as a result of relying on the misrepresentation. *Davenport v. GMAC Mortg.*, 2013 WL 5437119 *D. Dev. Sept 26, 2014).[5] As explained below, Plaintiffs properly meet this burden and established the *prima facie* elements for fraud.

i. Plaintiffs' Established the *Prima Facie* Elements of Fraudulent Misrepresentation and Fraudulent Concealment

Defendants improperly argue Plaintiffs did not meet their burden of pleading the "particular circumstances constituting fraud or mistake." This allegation is, again, false. Plaintiffs repeatedly, alleged specific, concrete, examples of the multiple types of fraud Defendants engaged in. For example, Plaintiffs plead the following:

> 151. Defendant carried out its campaign of fraud, false statements, and/or misrepresentations in at least six ways:
>
> a. Defendants falsely represented to SANDRA CAMACHO that questions about smoking and health would be answered by an unbiased, trustworthy source;
> b. Defendants misrepresented and confused facts about health hazards of cigarettes and addiction;
> c. Defendants, along with other cigarette manufacturers, spent billions of dollars hiring lawyers, fake scientists, and public relations firms to misdirect purported "objective" scientific research;
> d. Defendants discouraged meritorious litigation by engaging in "scorched earth" tactics – in fact in a previously secret 1988 document they commented "to paraphrase General Patton, the way we won these cases was not by spending all of [their] money, but by making that other son of a bitch spend all of his;"
> e. Defendants suppressed and distorted evidence to protect its existence and profits;
> f. Defendants designed, marketed, and sold "filtered" and "light" cigarettes despite knowing internally that such cigarettes were just as addictive, dangerous, and deadly as "regular" cigarettes.

[5] Conveniently, Defendant also cites to *Davenport* as its principal case to support its alleged proposition that Plaintiffs did not properly plead their fraud counts. However, in *Davenport* the Supreme Court of Nevada held the reason plaintiff's claims failed is because they did not allege any misrepresentations from defendant GMAC, but instead alleged misrepresentations from another defendant, Grimm. Thus, because there was no specific misrepresentation alleged against GMAC the Supreme Court held that plaintiff's claims were not sufficient. *See Davenport* at *2. As explained in this opposition brief, unlike the plaintiff in *Davenport,* Mrs. Camacho in this case clearly and distinctly plead multiple examples of specific misrepresentations from Defendants Philip Morris and Liggett.

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See Amended Complaint ¶151(a-f).

155. These misrepresentations and false statements also include the following statements which were heard, read, and relied upon by Plaintiff, SANDRA CAMACHO, including but not limited to:

a. In 1953, Cigarette manufacturers, including Defendant herein, took out a full-page advertisement called the "Frank Statement to Cigarette Smokers" which falsely assured the public, the American government, and SANDRA CAMACHO, that the cigarette manufacturers, including Defendant herein, would purportedly "safeguard" the health of smokers, support allegedly "disinterested" research into smoking and health, and reveal to the public the results of their alleged "objective" research;
b. Beginning in 1953 and continuing for decades, Cigarette manufacturers, including Defendant herein, falsely assured the public that TIRC/CTR was an "objective" research committee when internal company document reveal that TIRC/CTR functioned not for the promotion of scientific goals, but for public relations, politics, and positioning for litigation;
c. In the 1950s and 1960s, Cigarette manufacturers, including Defendant herein, sponsored, were quoted in, and helped publish articles to mislead the public including but not limited to the following: "Smoke-Cancer Tie Termed Obscure" (1955), "Study of Smoking is Inconclusive" (1956), "Cigarette Threat Called Unproven," (1962), "Tobacco Spokesmen Dispute Lung Study" (1962), "Tobacco Cancer Scare Fading in Smoke Ring (1964), and "Smokers Assured In Industry Study" (1962);
d. In response to the 1964 Surgeon General Report which linked cigarette smoking to health, the cigarette industry falsely assured the public that (i) cigarettes were not injurious to health, (ii) the industry would cooperate with the Surgeon General, (iii) more research was needed, and (iv) if there were any bad elements discovered in cigarettes, the cigarette manufacturers would remove those elements.
e. In the 1950s and 1960s, the Cigarette manufacturers, including Defendant herein, advertised and promoted cigarettes on television and radio as safe and glamorous, to the extent that cigarette advertising was the number one most heavily advertised product on television;
f. Falsely advertised and promoted "filtered" and "light" cigarettes as "low tar" and "low nicotine" through print advertisements in magazines and newspapers throughout the 1950s, 1960s, 1970s, 1980s, 1990s, and even into the 2000s;
g. Knowingly made false and misleading statements to governmental entities, including in 1982 when the CEO of Defendant R.J. Reynolds, Edward Horrigan, disingenuously stated during a governmental hearing, "there is absolutely no proof that cigarettes are addictive;"
h. In 1984, continuing to purposefully target children yet openly in press releases falsely claim, "We don't advertise to children . . . Some straight talk about smoking for young people;"
i. In 1988, in response to the United States Surgeon General's report that cigarettes are addictive and nicotine is the drug in tobacco that causes

addiction, issuing a press release knowingly and disingenuously stating, "Claims that cigarettes are addictive is irresponsible and scare tactics;"

j. Through representatives in the Tobacco Institute, making countless publicized appearances on television and radio disingenuously denying cigarettes were addictive and claimed smoking was a matter of free choice and smokers could quit smoking if they wanted to;

In 1994 CEOs from the seven largest cigarette companies, including Defendant herein, knowingly providing false and misleading testimony under oath before the United States Congress that it had not been proven that cigarettes were addictive, caused disease, or caused one single person to die. *See Amended Complaint* ¶155(a-k).

ii. Plaintiffs Properly Satisfied NRCP 9 By Pleading the Time, Place, and Identity of the Parties Involved

Defendants also improperly argue Plaintiffs did not plead their fraud counts with the requisite "particularity" because they allegedly did not state the "time, place, identify of the parties involved, and the nature of the fraud or mistake." *Def. mot. at pg. 22.* First of all, this allegation is false as demonstrated by the specific examples above where Plaintiffs specifically plead the time, place, and identify of the parties. Furthermore, as Defendants are well aware, the nature of this type of cigarette litigation is unique in the respect that there is such an enormous amount of information concerning their corporation's and their co-conspirators long-lasting and pervasive conduct. There are literally tens of millions of documents spanning over half a century detailing countless instances of fraud and reprehensible conduct. It is unnecessary, and impossible, to allege the precise details of every instance of fraud perpetuated by the tobacco industry.[6]

For example, Florida courts, which have been litigating cigarette lawsuits for over ten years, have universally recognized this reality and have held plaintiffs in tobacco cases are not required to prove they relied upon any specific misleading statements to establish their claims of fraudulent

[6]This pervasive, multi-faceted, and long-lasting campaign of deception is described in multiple court opinions, including *Philip Morris USA, Inc. v. Boatright*, 217 So. 3d 166, 169-70 (Fla. 2d DCA 2017); *United States v. Philip Morris USA, Inc.*, 566 F.3d 1095, 1106-08 (D.C. Cir. 2009); *Berger v. Philip Morris USA, Inc.*, 101 F. Supp. 3d 1228, 1232-33 (M.D. Fla. 2015); and *Engle v. R.J. Reynolds Tobacco Co.*, 2000 WL 33534572, at **2-3 (Fla. 11th Jud. Cir. Nov. 6, 2000), *reversed*, 853 So. 2d 434 (Fla. 3d DCA 2003), *approved in part and quashed in part*, 945 So. 2d 1246 (Fla. 2006); as well as Counts IV-VII of the Amended Complaint.

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concealment—rather, it is sufficient to show the plaintiff generally relied on the false controversy that the cigarette companies created. *See Putney*, 199 So. 3d at 469-70 (Fla. 4th DCA 2016); *Evers v. R.J. Reynold Tobacco Co.*, 195 So. 3d 1139, 1140-41 (Fla. 2d DCA 2015); *R.J. Reynolds Tobacco Co. v. Martin*, 53 So. 3d 1060, 1069-70 (Fla. 1st DCA 2010), *disagreed with on other grounds*, *R.J. Reynolds Tobacco Co. v. Brown*, 70 So. 3d 707, 716 (Fla. 4th DCA 2011).

iii. Plaintiffs Sufficiently Plead How Mrs. Camacho's Reliance on Defendant's Fraud Caused or Contributed to Her Injury

Defendants next argue Plaintiffs have not alleged Mrs. Camacho "justifiably relied" on Defendants omissions and that this reliance caused or contributed to her injury This is also false. Plaintiffs specifically alleged the following:

> **a. SANDRA CAMACHO was justified in relying upon Defendants misrepresentations because they were made by Defendants who possessed superior knowledge regarding the health hazards and addictive nature of cigarettes;**

See Amended Complaint ¶156(a-g) (emphasis added).

> **a. Plaintiff acted in reliance upon Defendants promises;**
> **b. Plaintiff was justified in relying upon Defendants promises;**

See Amended Complaint ¶157(a-g) (emphasis added).

> **a. Plaintiff justifiably relied upon Defendants to disseminate the superior knowledge and information it possessed regarding the dangers of cigarettes;**

See Amended Complaint ¶182(a-i) (emphasis added). Furthermore, Defendants improperly allege Plaintiffs' "do not state or explain the basis for any such duty [to disclose material facts about the dangers of cigarettes'" *Def. Mot. at pg. 7.* To begin with, Defendants manufactured, designed, and sold cigarettes to the extent they ended up in the stream of commerce where Mrs. Camacho purchased, smoked, and was injured by said cigarettes. To imply there is no relationship between the manufacturer of a product and its end-user is unfounded. Defendants' reliance on *Ace Am. Ins. Co. v. Hallier* stands for that exact proposition – "A duty to disclose may arise when a fiduciary relationship exists between

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the parties ***or where the parties enjoy a "special relationship", that is, where a party reasonably imparts a special confidence in the defendant and the defendant would reasonably know of this confidence.***" Mrs. Camacho had every reason to rely on Defendants public statements about cigarettes because, unlike Mrs. Camacho, Philip Morris and Liggett actually manufactured and designed cigarettes and was in the best position to talk about the health risks associated with them.

Finally, as explained in this brief and in Plaintiffs' Amended Complaint, Defendants were in a superior position to Mrs. Camacho and had far more knowledge regarding their own products. As the manufacturer of a consumer product, Defendants had an obligation to its consumers to reveal the true nature of their cigarettes e.g. that cigarettes are unreasonably addictive, dangerous, and deadly. Thus, there is no dispute Plaintiffs properly plead their fraudulent misrepresentation and fraudulent concealment claims.

VII. PLAINTIFFS ADEQUATELY PLEAD THEIR CLAIM FOR CIVIL CONSPIRACY

Defendants next incorrectly argue that if the Court dismisses Plaintiffs' fraud claims, then it should dismiss their civil conspiracy claim. But, as discussed above, there is no valid reason to dismiss either of Plaintiffs fraud claims.

Defendants also argue Plaintiffs fail to allege how Mrs. Camacho was harmed by Defendants civil conspiracy. Nevada Standard Jury Instructions lay out the specific elements a Plaintiff must prove in order to prevail on a claim for civil conspiracy.

> To prove a claim of civil conspiracy, plaintiff has the burden of proving each of the following:
>
> 1. Two or more persons or entities, who, by some concerted action, intended to accomplish an unlawful objective for the purpose of harming plaintiff; and
> 2. Plaintiff suffered damages as a result of this act or acts.

Nevada Standard Jury Instruction 6.9. Furthermore, the Nevada District Court in *Picus* held that to prevail under a NDTPA claim, a plaintiff must show: (1) the defendant engaged in a consumer fraud of which the plaintiff was a victim, (2) causation, and (3) the plaintiff sustained damages as a result.

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Picus v. Wal-Mart Stores, Inc., 256 F.R.D. 651, 657 (D. Nev. 2009) (citing *Giles v. Gen. Motors Acceptance Corp.,* 494 F.3d 865, 872 (9th Cir. 2007)).

Plaintiffs adequately plead sufficient facts to prove each of these elements – i.e. how the cigarette industry's efforts as a whole, including Philip Morris and Liggett, caused or contributed to Mrs. Camacho beginning to smoke, continuing to smoke, becoming addicted to cigarettes, and ultimately her laryngeal cancer. But for Defendants and their co-conspirators, the massive conspiracy and public deception would never have worked. But for the billions and billions of dollars the cigarette industry, including Philip Morris and Liggett spent (and continues to spend), the mass marketing campaign would never have been as successful as it was. It was ***the Defendants' actions*** that caused the public, including Mrs. Camacho, to continue to smoke cigarettes which, unbeknownst to her, were specifically manufactured and designed to be highly addictive, dangerous, and deadly, and eventually caused her to develop laryngeal cancer. Thus, Defendants arguments regarding the civil conspiracy count should be denied.

VIII. PLAINTIFFS DID NOT FAIL TO STATE A CLAIM FOR VIOLATION OF THE NEVADA DECEPTIVE TRADE PRACTICES ACT

i. Plaintiff's NDTPA Claim Was Pleaded with Sufficient "Particularity"

Finally, Plaintiffs have properly plead a violation of Nevada's Deceptive Trade Practice Act, NRS 598.0903 et. seq. Under Nevada's Deceptive Trade Practices Act, "[a]n action may be brought by any person who is a victim of consumer fraud." Nev**.** Rev. Stat. § 41.600(1). The Nevada Supreme Court has not yet provided the elements for a claim under the NDTPA, nor has the Court clarified whether or not a plaintiff must prove causation or reliance to have a cognizable cause of action. Nevada District Courts, however, have attempted to predict how the Nevada Supreme Court would rule on this issue. *Picus v. Wal-Mart Stores, Inc.*, 256 F.R.D. 651, 657 (D. Nev. 2009) (citing *Giles v. Gen. Motors Acceptance Corp.,* 494 F.3d 865, 872 (9th Cir. 2007)).

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In *Picus*, the Nevada District Court held that to prevail under a NDTPA claim, a plaintiff must show: (1) the defendant engaged in a consumer fraud of which the plaintiff was a victim, (2) causation, and (3) the plaintiff sustained damages as a result. *Id.* In the present case, Plaintiffs properly plead violations of Nevada's Deceptive Trade Practices Act, NRS 598.0903 et. seq.

Specifically, Plaintiffs pleaded a violation under the following sections of the NDTPA. *See Amended Complaint* ¶210; NRS 598.0915. As to the specific factual allegations in this case, Plaintiffs pleaded:

> 212. Upon information and belief, Defendants knowingly violated NRS 598.0915 by making the following false and misleading statements and representations, including but not limited to:
>
> a. making countless publicized appearances on television and radio disingenuously denying cigarettes were addictive and claimed smoking was a matter of free choice and smokers could quit smoking if they wanted to;
> b. representing to the public that it was not known whether cigarettes were harmful or caused disease;
> c. falsely advertising and promoting cigarettes as safe, not dangerous, and not harmful;
> d. falsely advertising and promoting "filtered" and "light" cigarettes as "low tar" and "low nicotine" through print advertisements in magazines and newspapers throughout the 1950s, 1960s, 1970s, 1980s, 1990s, and even into the 2000s;
> e. falsely representing that questions about smoking and health would be answered by an allegedly unbiased, trustworthy source;
> f. misrepresenting and confusing facts about health hazards of cigarettes and addiction;
> g. creating a made up "cigarette controversy;"
> h. taking out a full page advertisement called the "Frank Statement to Cigarette Smokers" which falsely assured the public, the American government, and SANDRA CAMACHO, that would purportedly "safeguard" the health of smokers, support allegedly "disinterested" research into smoking and health, and reveal to the public the results of their alleged "objective" research;
> i. falsely assuring the public that TIRC/CTR was an "objective" research committee when internal company documents reveals that TIRC/CTR functioned not for the promotion of scientific goals, but for public relations, politics, and positioning for litigation;
> j. sponsoring, being quoted in, and helping publish articles to mislead the public including but not limited to the following: "Smoke-Cancer Tie Termed Obscure" (1955), "Study of Smoking is Inconclusive" (1956), "Cigarette Threat Called Unproven," (1962), "Tobacco Spokesmen

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Dispute Lung Study" (1962), "Tobacco Cancer Scare Fading in Smoke Ring (1964), and "Smokers Assured In Industry Study" (1962);

k. responding to the 1964 Surgeon General Report which linked cigarette smoking to health, by falsely assuring the public that (i) cigarettes were not injurious to health, (ii) the industry would cooperate with the Surgeon General, (iii) more research was needed, and (iv) if there were any bad elements discovered in cigarettes, the cigarette manufacturers would remove those elements.
l. advertising and promoting cigarettes on television and radio as safe and glamorous, to the extent that cigarette advertising was the number one most heavily advertised product on television;
m. making knowingly false and misleading statements during a governmental hearing, including stating that, "there is absolutely no proof that cigarettes are addictive;"
n. purposefully targeting children yet openly in press releases falsely claiming, "We don't advertise to children . . . Some straight talk about smoking for young people;"
o. responding the 1988 United States Surgeon General's report that nicotine is the drug in tobacco that causes addiction, by issuing press releases stating, "Claims that cigarettes are addictive is irresponsible and scare tactics;"
p. lying under oath before the United States Congress in 1994 that it was their opinion that it had not been proven that cigarettes were addictive, caused disease, or caused one single person to die.

See Amended Complaint ¶212 (a-p).

Nonetheless, despite the *prima facie* elements Plaintiffs pleaded in their Amended Complaint, Defendants improperly argue, "Plaintiffs' failed to allege the required time, place, and content of the alleged fraud . . . a deceptive trade practice as defined in NRS 598." *Def. Mot. pg. 28*. This allegation is improper. Specifically, Plaintiffs plead Defendants' false statements were intended to mislead Mrs. Camacho and **did mislead Mrs. Camacho**. Thus, but for Defendant's violation of the NDTPA, Mrs. Camacho would not have begun smoking cigarettes, continued smoking cigarettes, become addicted to cigarettes, and ultimately develop laryngeal cancer as a result of smoking cigarettes. Plaintiffs have exceeded the pleading requirements under NRCP 9(b) on this claim.

ii. Plaintiffs' NDTPA Claim Likewise Does Not Fail Because Plaintiff, Mrs. Camacho, Was a Victim

Defendants also argue Plaintiffs' "did not state with particularity how Ms. Camacho was a 'victim of consumer fraud.'" *Def mot. at p. 29.* This argument is meritless. Mrs. Camacho was exposed to Defendants' massive conspiracy which included mass marketing and mass deception (i.e. advertisements on billboards, advertisements on Television, until 1971, advertisements in magazines

and newspapers, sponsorship of sporting events, appearances on national and local television programs and radio stations, public relations companies, spokesmen and women, fake scientists and researchers, and more). And as a result of her exposure, relied upon the statements and advertisements which influenced when she smoked, how often she smoked, what brands she smoked, and why she smoked. Thus, there is no genuine dispute that Mrs. Camacho was a victim as of Defendants' consumer fraud.

IX. CONCLUSION

Based on the foregoing, none of Plaintiffs' claim are preempted by Federal Law and Plaintiffs have far exceeded the pleading requirements under Nevada law and have alleged *prima facie* elements for all of their claims. Thus, Plaintiffs respectfully request the Court deny Defendants Motion in its entirety.

DATED this 6th day of April, 2020.

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/s/: Sean Claggett

_____

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT on the 6th day of April 2020, I served a true and correct copy of the foregoing **PLAINTIFFS' OPPOSITION TO DEFENDANT PHILIP MORRIS USA INC., LIGGETT GROUP, AND ASM'S MOTION TO DISMISS PLAINTIFFS' AMENDED COMPLAINT UNDER NRCP 12(B)(5)** is served on the following person(s) by electronic service pursuant to NRCP 5(b) and NEFCR 9:

VIA E-SERVICE ONLY:
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Exhibit 1

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DISTRICT COURT

CLARK COUNTY, NEVADA

CLEVELAND CLARK, individually, and YVONNE CLARK, 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	Case No. A-19-802987-C Dept. No. XXIV **ORDER: (1) DENYING R.J. REYNOLDS TOBACCO COMPANY'S MOTION TO DISMISS; and (2) GRANTING IN PART R.J. REYNOLDS TOBACCO COMPANY'S MOTION FOR MORE DEFINITE STATEMENT**

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; LAKHVIR HIRA d/b/a JOHN'S SMOKE SHOP; SURJIT SINGH a/k/a RICKY SINGH, individually and as Executor of the Estate of HARJINDER S. HIRA d/b/a JOHN SMOKE SHOP & GIFT SHOP; and M J SMOKE SHOP +, LLC, a domestic limited liability corporation, d/b/a SMOKE SHOP +,

Defendants.

On January 21, 2020, the Court heard Defendant R.J. Reynolds' Motion to Dismiss Plaintiffs' Complaint. Sean K. Claggett, Esq., Matthew S. Granda, Esq., Micah S. Echols, Robert W. Kelley, Esq., and Kimberly L. Wald, Esq. appeared on behalf of Plaintiff; Val Leppert, Esq. and Dennis L. Kennedy, Esq. appeared on behalf of R.J. Reynolds Tobacco Company, Lakhvir Hira d/b/a John's Smoke Shop, Surjit Singh a/k/a Ricky Singh as Executor of the Estate of Harjinder S. Hira d/b/a John's Smoke Ship & Gift Shop, and M J Smoke Shop + LLC; Lee Roberts Esq., appeared on behalf of Philip Morris USA Inc.; and Kelly A. Luther appeared on behalf of Liggett Group LLC. The Court, having considered Defendant's Motion, the Joinders, the Opposition, and Reply thereto, and arguments of counsel, hereby finds as follows:

IT IS HEREBY ORDERED that Defendant R.J. Reynolds' Tobacco Company's Motion to Dismiss is **DENIED.**

THE COURT HEREBY FURTHER FINDS that to the extent Defendant's Motion seeks a more definite statement on certain factual allegations, the Court will treat the Motion to Dismiss as a Motion for More Definite Statement in regard to Paragraphs 130-160 of the Complaint.

IT IS HEREBY ORDERED that Defendant's Motion for More Definite Statement is **GRANTED IN PART** as to paragraphs 130-160 in Plaintiffs' Complaint. Therefore, Plaintiff shall file a more definite statement as to paragraphs 130-160 within 14 days of the date of this order.

IT IS HEREBY FURTHER ORDERED that Defendants Lakhvir Hira d/b/a John's Smoke Shop, Surjit Singh a/k/a Ricky Singh as Executor of the Estate of Harjinder S. Hira d/b/a John's

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Smoke Ship & Gift Shop, M J Smoke Shop + LLC, Philip Morris USA Inc., and Liggett Group LLC's Joinder motions are also hereby **DENIED.**

DATED this 9th day of February, 2020.

J. Charles Thompson
DISTRICT COURT JUDGE
MS

Submitted by:

Senior Judge J. Charles Thompson
for Judge Jim Crockett

BAILEY❖KENNEDY

By: _____
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DISTRICT COURT

CLARK COUNTY, NEVADA

CLEVELAND CLARK, individually, and YVONNE CLARK, 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 corporation; LAKHVIR HIRA d/b/a JOHN'S SMOKE SHOP; SURJIT SINGH a/k/a RICKY SINGH individually and as Executor of the Estate of HARJINDER S. HIRA d/b/a JOHN SMOKE SHOP & GIFT SHOP; and M J SMOKE SHOP +, LLC, a domestic limited liability corporation, d/b/a SMOKE SHOP + Defendants.	Case No. A-19-802987-C Dept No.: 24 **ORDER**

On January 21, 2020, the Court heard Defendant, Philip Morris USA Inc. and Liggett Group, LLC's Motion to Dismiss Plaintiffs' Complaint. Sean K. Claggett, Esq., Matthew S. Granda, Esq., Micah S. Echols. Robert W. Kelley, Esq. and Kimberly L. Wald, Esq. appeared on behalf of Plaintiff; Val Leppert, Esq. and Dennis L. Kennedy, Esq. appearing on behalf of R.J. Reynolds Tobacco Company, Lakhvir Hira d/b/a John's Smoke Shop, Ricky Singh d/b/a John Smoke Ship & Gift Shop, and M J Smoke Shop + LLC; Lee Roberts Esq., appeared on behalf of Philip Morris USA Inc., and Kelly A. Luther appeared on behalf of Liggett Group LLC. The Court, having considered Defendant's Motion, the Opposition, and Reply thereto, and arguments of counsel:

IT IS HEREBY ORDERED that Defendants Philip Morris USA Inc. and Liggett Group, LLC's Motion to Dismiss Plaintiffs' Complaint Under NRCP 12(b)(5) is **DENIED.**

THE COURT HEREBY FURTHER FINDS that to the extent Defendant's Motion seeks a more definite statement on certain factual allegations, the Court will treat the Motion to Dismiss as a Motion for More Definite Statement in regard to Paragraphs 130-160 of the Complaint.

IT IS HEREBY ORDERED that Defendant's Motion for More Definite Statement is **GRANTED IN PART** as to paragraphs 130-160 in Plaintiffs' Complaint. Therefore, Plaintiff shall file a more definite statement as to paragraphs 130-160 within 14 days of the date of this order.

Dated this 13 day of February, 2020.

District Court Judge

Submitted by:
WEINBERG, WHEELER, HUDGINS, GUNN & DIAL, LLC

D. Lee Roberts, Jr., Esq.
Attorney for Defendant Philip Morris USA Inc.

IN THE EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

CLEVELAND CLARK, Plaintiff, vs. PHILIP MORRIS USA, INC., et al. Defendants.	CASE NO. A-19-802987 DEPT. NO. 24

REPORTER'S TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE JIM CROCKETT

TUESDAY, JANUARY 21, 2020

APPEARANCES:

For the Plaintiffs:

MICAH ECHOLS, ESQ.
SEAN K. CLAGGETT, ESQ.
MATTHEW GRANDA, ESQ.

For the Defendants as named in the body of the transcript:

D. LEE ROBERTS, JR., ESQ.
VALENTIN LEPPERT, ESQ.
DENNIS KENNEDY, ESQ.
MARIA RUIZ, ESQ.
KELLY LUTHER, ESQ.
CHRIS JORGENSEN, ESQ.
PHILLIP SMITH, ESQ.
DANIELA LABOUNTY, ESQ.

REPORTED BY: DANA J. TAVAGLIONE, RPR, CCR No. 841

LAS VEGAS, NEVADA, TUESDAY, JANUARY 21, 2020

* * * * *

THE CLERK: Cleveland Clark vs. Philip Morris, A-802987.

THE COURT: While you're assembling here, before you all check in, I was going to suggest that we advance all the motions to associate counsel and I grant them because everything I read -- it's not scheduled until February 4th or something.

But everything I read indicated to me that nobody has any objection to the various associations of counsel that have been proposed, and I think that would facilitate the individuals making oral argument today if they were allowed to associate.

Does anybody have any objection to that?

MR. CLAGGETT: No, Your Honor.

MR. ECHOLS: No, Your Honor.

MR. ROBERTS: No, Your Honor.

THE COURT: I hear no objections voiced.

So the motions to associate counsel are advanced to this morning, and they are granted.

And so when you announce your appearance, for the record, please also tell us whether or not you are duly associated counsel and whether or not

you will be arguing on behalf of your client.

We'll just start left to right.

Mr. Claggett.

MR. CLAGGETT: Sean Claggett for the plaintiff. I'm not going to be arguing this morning.

MR. GRANDA: Matthew Granda, G-R-A-N-D-A, for the plaintiff. I will not be arguing.

MS. WALD: Kimberly Wald. We will associated counsel. I'm not arguing.

MR. KELLEY: Good morning, Your Honor. My name is Bob Kelley. I'm from Fort Lauderdale. I had a pending Pro Hac, and I may be arguing this morning.

THE COURT: Okay.

MS. RUIZ: Maria Ruiz, R-U-I-Z. I represent Liggett as associated counsel. I do not expect to be arguing this morning.

MR. ECHOLS: Good morning, Your Honor. Micah Echols. I'm Nevada counsel, and I will be arguing. Claggett & Sykes.

MS. LUTHER: Good morning, Your Honor. Kelly Luther, on behalf of Liggett Group, LLC.

And I was just admitted. I do not anticipate arguing, but it's a possibility.

THE COURT: Okay.

MR. JORGENSEN: Good morning, Your Honor. Chris Jorgensen, from Lewis & Rocha, on behalf of Liggett. And I will not be arguing.

MR. ROBERTS: Good morning, Your Honor. Lee Roberts for Philip Morris USA, Nevada counsel.

With me in the box are my partners, Phillip Smith and Daniela LaBounty. I am not planning to argue this morning on behalf of Philip Morris, Your Honor.

THE COURT: Okay.

MR. KENNEDY: Dennis Kennedy on behalf of R.J. Reynolds and others.

I will not be arguing. I'm co-counsel with Mr. Leppert, who will be arguing and who was admitted Pro Hac this morning.

THE COURT: Okay.

MR. LEPPERT: Good morning, Your Honor.

Val Leppert, and I'm from Atlanta, Georgia, was just admitted into the case. I will be arguing on behalf of R.J. Reynolds Tobacco Company.

THE COURT: All right. Well, if you guys can find a seat, I was going to tell you what my thoughts were after having read your briefs.

All right. So the first motion in my notes

is a Motion to Dismiss by Defendants Philip Morris, USA, and the Liggett Group.

These defendants seek to dismiss the plaintiff's case since the plaintiff claims he always smoked Kool brand cigarettes, K-O-O-L. And the defendant says: 'We never manufactured Kool brand cigarettes. So the plaintiff can't show use of our product. So no claim can be pursued against us.'

Plaintiff opposes, saying: 'We sued you not because you manufactured Kool cigarettes but because of your involvement in a conspiracy of tobacco manufacturers to defraud and mislead consumers to use tobacco products manufactured by your coconspirators, leaving you exposed to claims for fraud, conspiracy, deceptive trade practices, et cetera.

So having read that Motion to Dismiss and the Opposition and Reply, my inclination is to deny the Motion to Dismiss. But I'm happy to hear any supplemental points that counsel wish to make by way of oral argument.

Mr. Roberts.

MR. ROBERTS: Thank you, Your Honor.

I would like to focus the Court's attention

to the requirement of duty, which is a fundamental element of any tort action. So the question before this Court is: Have they adequately alleged a duty? And in a product defect case, the duty typically flows from the product use. Where there is no product use, there is no duty, and the claim must fail. And we've cited the Court to several federal decisions from the District Court of Nevada.

THE COURT: I read those.

MR. ROBERTS: Who have interpreted Nevada law.

THE COURT: I read those. But I have a question for you.

MR. ROBERTS: Yes, sir.

THE COURT: Does that mean that somebody who didn't manufacture a product could, with impunity, join in to help another defendant in the same industry conspire to defraud and mislead consumers into using the product?

MR. ROBERTS: I believe that it would determine -- it would rest on the facts alleged. But under Nevada law, and I would cite the Court to "Dow Chemical," which is 114 Nevada 1468, which is cited in our brief. And there you had Dow Chemical, who had performed testing and made public

representations about the safety and the inert nature of silicone used in implants. And then you had a different "Dow," who was found who actually sold the implants.

The jury found that Dow Chemical was guilty and was acting in concert. The Court explained that acting in concert really had the same standard as a civil conspiracy. And they reversed the jury verdict against Dow Chemical; and in reversing, they said the duty to disclose requires, at a minimum, some form of relationship between the parties.

They also discussed the requirement for actual cause and proximate cause as the element of any tort. And actual cause was proven in that case by the implant. The jury found that the implant had caused harm, and that was enough to sustain the verdict against the Dow, who was in privity with the consumer and the plaintiff.

But Dow Chemical had published these things to the public saying it's inert. They subsequently knew it wasn't inert, and they said "You had a duty. This is negligence." Well, it was a fraudulent concealment of their new funds. And the Court simply said that's too far. Because proximate causation, unlike "actual causation," is a policy

decision to only hold people liable for certain things that are reasonably foreseeable and have a reasonably close nexus to the action.

Here, Mr. Clark started smoking Kools sometime in the 2000s. Most of these conspiracy allegations began in 1954 and predate the 2000s, when he began smoking Kools. They must plead fraud with specificity. And in this case, merely having these general allegations that we conspired to defraud the public as a whole in believing that cigarettes aren't dangerous, long before Mr. Clark made his decision to start smoking Kools, that's just too remote under these facts. There's no relationship.

And the facts that must be pled with specificity under Rule 9(b), because a civil conspiracy to defraud is like fraud pled with specificity, simply aren't there. I would challenge the plaintiffs, when they stand up and respond, to point to the paragraph where they specifically allege not just generally defendants, but that this defendant, Philip Morris, did something which caused Mr. Clark to start smoking Kools in the mid-2000s because it's simply not there, Your Honor.

And while I could conceive that there could

be a conspiracy --

THE COURT: Except, except when two or more people act in concert, each of them becomes responsible for the result. The simplest example is you've got two people in cars drag racing. And the person in Car No. A gets way out of ahead of Car No. B and strikes and kills a pedestrian who's lawfully in a crosswalk. Driver B did not have any contact with the pedestrian whatsoever -- in fact, was remote in distance in my hypothetical -- and yet he will be held co-responsible for the injury as a single indivisible result proximately caused by the actions in concert of two people.

The argument you were making sounds to me like the argument you would be making to the jury in this case on the proximate cause jury instructions, and it may be a very effective one too. But I don't think this is a case where, as a matter of law, I can say that Philip Morris and Liggett Group are immune from suit if, in fact, they engaged in fraud and deceit in an effort to bolster the tobacco using market, not for their immediate benefit on Kool brand cigarettes, but in their overall benefit for tobacco users.

MR. ROBERTS: And acknowledging, for the

purposes of argument, that it's possible to allege a civil conspiracy against a nonproduct manufacturer under Nevada law, I don't believe it was done here. If you look at the --

THE COURT: Okay. So that's important there. You acknowledge that it is possible to allege a conspiracy and you're just saying that they didn't did do it correctly here.

MR. ROBERTS: Yes. And I will acknowledge the law about the drag racing, and one commentator pointed out that that type of extreme liability seems to be limited to the actions of teenagers in rural areas because it has been so closely circumscribed by the Court.

But in looking at what it takes to allege a conspiracy under Nevada law --

THE COURT: You know, if you think about that though, and I'm just talking about allegations; I have no idea what the evidence is going to show. But what is more egregious, an industry misleading the public, actively encouraging them to smoke and use tobacco products when they know that, in fact, they're harmful and addictive -- or two yahoos in a rural area having a drag race involving an injury to a single person.

And I'm not saying one is better or worse than the other. I'm just saying can we really put those on a spectrum and say that the drag racing youngsters are corrupt and terrible, but the industry that would engage in this kind of conduct gets a pass.

MR. ROBERTS: And I'm not going to argue that point with you, assuming your facts are true.

But, again, bringing the Court back to this Complaint, in this case, and the requirements of Nevada law under "Dow Chemical," which stated that proof of an agreement alone is not sufficient, however, because it is essential that the conduct of each tortfeasor be in itself tortious.

So now the allegations here, he started smoking Kool brand cigarettes, another product, in the 2000s. If the Court will look at page 72 of the -- paragraph 72, page 17 of 54: "The defendants continue to publicly deny the addictive nature and health hazards of smoking cigarettes until the year 2000, and other paragraphs allege that we admitted the addictive nature and health hazards of cigarettes in the year 2000.

So despite all the wrongful conduct alleged beginning in 1954, if Philip Morris admitted the

health hazards of smoking cigarettes in the year 2000 and Mr. Clark began smoking cigarettes sometime in the 2000s that he alleged caused his harm, how could he have reasonably relied on any representations made prior to Philip Morris admitting the addictive nature and health hazards of the cigarettes?

THE COURT: It's the magic word you just used, the "addictive nature." To encourage people to become addicted to the product, you've now created a totally different monster. This is not just a product they're using; this is a product they've become addicted to.

MR. ROBERTS: I understand, Your Honor.

THE COURT: Okay.

MR. ROBERTS: With regard to the second cause of action, though, Your Honor, under the Nevada Deceptive Trade Practices Act, under Nevada case law we've cited to the Court, that's clearly a fraud claim with all the elements of a fraud claim. The only difference is that under the statutory claim, the burden of proof is relaxed from clear and convincing to a preponderance of the evidence.

We haven't even been named. Philip Morris has not even been named in the fraud count that's

pled against R.J. Reynolds, the product use defendant. I would suggest that even if the Court keeps Philip Morris in under the conspiracy allegations, it's proper to dismiss the Deceptive Trade Practices Act because of the lack of causation, specific product causation as to Philip Morris.

THE COURT: Okay. Thank you, Mr. Roberts.

MR. ROBERTS: Thank you, Your Honor.

THE COURT: Does the plaintiff wish to respond?

MR. KELLEY: Yes. Just briefly, Your Honor. First of all, just as a --

(Reporter request.)

MR. KELLEY: I'm sorry. I apologize. My name is Bob Kelley, and I represent the plaintiff in this action, along with Sean and his law firm.

So just to start off, Your Honor, with a point of clarification, Mr. Roberts misspoke when he said our client began smoking in the mid-2000s. Actually at close reading of the Complaint, it says throughout the Complaint that our client began smoking in 1964, began smoking Kool cigarettes back in 1964. And so as a result of that, he was subjected to the nationwide conspiracy that was

perpetrated by the entire tobacco industry on the American public and on the government of the United States, that conspiracy of which Philip Morris and Reynolds and Liggett are all part, has been described by, I think Judge -- or actually David Kessler, who was a former FDA commissioner, as the most deadly conspiracy in the history of this country.

There has never been a conspiracy so broad in its scope, devious in its purpose, and devastating in its results, still killing a half million people every year. We think that in our Complaint, we have set forth more than enough specific facts and allegations about that conspiracy, where it started, at the Plaza Hotel in New York, in December of 1953, and carried on through right up until the end of the last millennium. So we think we have stated a cause of action.

Obviously there's going to be more details, more facts as we go further into this case, and Your Honor would become more educated on what has happened and what the conspiracy actually consisted of. But we think, for purposes of pleading, we have stated a cause of action. So we would ask that their motion be denied.

THE COURT: What about the Deceptive Trade Practices argument Mr. Roberts made?

MR. KELLEY: I'm going to defer to my local counsel on that because he's the specialist on Nevada law.

THE COURT: Okay. And just so you don't brand yourself as a lawyer from another --

MR. KELLEY: Oh, "Nevada"?

THE COURT: -- it's "Nevada"

MR. KELLEY: Let me restate that. He's the specialist in "Nevada" law.

THE COURT: You will see lay people on the jury cringe when they hear "Nevada" come out, even though that's probably the correct pronunciation.

MR. KELLEY: Thank you, Your Honor.

MR. ECHOLS: Good morning, Your Honor. Micah Echols from Claggett & Sykes.

So I think the case that counsel is talking about, the deceptive trade practices is the "Metzinger vs. D.R. Horton" case, and I don't read "Metzinger" the same way the defense does. I read "Metzinger" saying you have a fraud claim under common law; you have a deceptive trade practices claim under the statute, and the only thing the Supreme Court did, that I can see in the opinion, is

they said: Well, under the common law, it's clear and convincing standard of proof. Under the statute, since it doesn't say that, it's not a directive from the legislature, we're going to just make it a preponderance. But they didn't say "And all the elements have to be proven." They didn't engraft the entire common law into the statute. And so that's my reading of it.

THE COURT: Yeah. The way I see that, Mr. Roberts, is it's kind of like getting instructions on wrongful death and loss of a chance, you know. For the jury to decide whether or not you proved wrongful death as opposed to loss of a chance. You could pursue both theories but perhaps only recover on one.

And the difference in this case, if it goes as it currently is, would be that the jury would be instructed that, if you're going to find under one instruction for fraud, it would have to be clear and convincing evidence; if it's deceptive trade practices, it would be preponderance of the evidence, and that's the distinction.

And, of course, that could be confounding for not just a jury but for the lawyers and the judge. But I think that's correct.

Mr. Roberts, anything you wanted to add in rebuttal or reply?

MR. ROBERTS: Yes. First, I apologize. I did take one allegation out of context. I see the allegation that he began smoking earlier than that, and I apologize to the Court.

With regard to deceptive trade practices, I think that the issue there is that a conspiracy claim is the alternative theory to avoid the requirement of proving product use. The Deceptive Trade Practices Act is a fraud-based action which falls squarely within the two District Court decisions that we've cited, which say that you can't plead fraud as an alternative around proving specific product causation under Nevada law.

Conspiracy gives them a theory which allows them to avoid that under the way they've argued the cases. But there simply is no reasonable argument that would allow them to pursue a fraud claim, which is what a Deceptive Trade Practices Act claim is in the absence of specific product causation. Because, without specific product causation, you cannot prove the statutory elements of the claim.

THE COURT: Okay. But I don't think that fraud and deceptive trade practices are synonymous

or entirely overlapping, and I think that's evidenced by the different standard of proof that's required. So I disagree with that.

So on the Motion to Dismiss, I am going to deny the Motion to Dismiss for the reasons that I've articulated this morning. In preparing the order denying the Motion to Dismiss, do you feel that you need the transcript of today's hearing in order to guide you?

(No audible response.)

THE COURT: Okay. If not, I need that order within ten days, in accordance with Eighth District Court Rule 7.21.

Okay. And the joinders to that Motion to Dismiss are, of course, also necessarily denied.

So the next Motion to Dismiss I have is R.J. Reynolds Tobacco's Motion to Dismiss.

This defendant moves to dismiss the first six claims for relief in plaintiff's Complaint. Claims for relief seven and eight are for strict product liability against Defendant, John Smoke Shop and DMJ Smoke Shop.

Defendant RJ&R claims that plaintiff's claims for negligence and strict product liability are preempted by federal law. Plaintiff says

federal law only preempts claims based upon failure to warn, and we have pleaded no such claims. And plaintiff says: 'Courts have held that claims of a design defect are not preempted by the Doctrine of Conflict Preemption. The 2007 case of 'Liggett Group vs. Davis' says this is the prevailing view.

I've reviewed the defendant and plaintiff's citations to authority on this issue, and I'm of the opinion that the more enlightened view is that the plaintiff's claims for negligence and strict product liability, as pleaded in this Complaint, are not preempted by the federal law or otherwise foreclosed by federal law. With regard to the fraud-based claims, the Court is satisfied that the plaintiff has adequately pleaded these claims with the required specificity to withstand this Motion to Dismiss.

With regard to the claim for civil conspiracy, I believe this is sufficiently pleaded also to survive this Motion to Dismiss. With regard to plaintiff's claims for violation of the Deceptive Trade Practices Act, I think this is an appropriate application of this consumer protection law and survives the Defendant's Motion to Dismiss.

So my inclination is to deny the Motion to Dismiss and the joinders, in all respects, being persuaded by the reasoning of plaintiffs' brief in opposition. But I'm happy to hear from counsel.

MR. LEPPERT: Thank you, Your Honor. May it please the Court. Val Leppert, on behalf of R.J. Reynolds. With the Court's permission, I would like to focus my argument on Count 3, which is the fraudulent misrepresentation claim.

Your Honor, you have a copy of the Complaint with you?

THE COURT: Not out here, but I reviewed it.

MR. LEPPERT: Okay. So I have a copy here in case it's helpful. Basically, Rule 9 governs that claim, and we have to have specificity of what did we say, when did we say it, who said it, and then we have to tie it to Mr. Cleveland Clark. You cannot just say at a $35,000 (phonetic) foot level that tobacco companies have said bad things, have all this misconduct that is alleged in this Complaint. That is not sufficient to tie it together.

I'll point the Court to the Ninth Circuit's opinion in "Rivera," applying Nevada law where the Court held Nevada does not allow a fraud claim that

is based on this pervasiveness of tobacco, advertising tobacco messages, but instead the plaintiff will have to prove reliance on specific statements from the defendant that matters, and that's important because we can get lost here a little bit.

THE COURT: Well, "have to prove" is one thing. But let's talk about whether the allegations are specific under Rule 9.

MR. LEPPERT: Exactly. And that's with respect to reliance, the reliance element, they're anything but specific. They're in page -- excuse me -- paragraph 136, which is on page 32 out of 54. And it says right here: "We intended to induce Cleveland Clark and did induce Cleveland Clark to rely upon the aforementioned false statements and representations."

There's nothing particular about that. That is boilerplate language that comes out of a law school outline that will not get credit because there's no fact law application. There is no specification as to how he relied, specifically the type of evidence that the Ninth Circuit was looking at. Here, at this juncture, they only need to say it, and Your Honor will take it as true.

But there needs to be -- below that, there needs to be facts that say what did he hear; why did he start smoking; why did he continue to start smoking; did he ever even try to quit smoking; how was he deceived; what were his beliefs about smoking and health? All they have on reliance is this boilerplate paragraph.

And I think then there's another one, another boilerplate paragraph, that's (F), 136(F), that he was "justified in relying upon the misrepresentations because they were made by defendants who possessed superior knowledge." Again, boilerplate language.

We have to plead facts, certainly when we're under Rule 9(b), facts as to how that's a plausible claim on the law here. Different than "Rivera," which is summary judgment case, but the allegations are not even here as to how it relates to Mr. Cleveland Clark at this particular point.

If we take it one step and we look at the allegations of statements that we made, they are in paragraph 135. They have to be pled with particularity. There is one statement here that is pled with particularity, and that's from 1953. That's in 135(a), the so-called "Frank Statement."

That is pled with particularity.

But Mr. Clark didn't even start smoking until much later, until 1964. There's no allegation heard that Frank Statement or with any specificity that he would have been impacted by. He was probably a little kid, at that point in time, when that statement was made.

THE COURT: And little kids wouldn't be impressionable, would they?

MR. LEPPERT: Pardon?

THE COURT: I said, "Little kids wouldn't be impressionable, would they?"

MR. LEPPERT: They may be impressionable, Judge, but that would be nice to plead. If you're going to meet Rule 9(b), plead it. Tell us. There's lots of allegations in here that we targeted minorities. There's no allegation that this man is a minority. There's that we targeted woman. There's no allegation that he is a woman.

These are irrelevant. There are allegations about light cigarettes, right, with respect to lights and low-tar cigarettes. That is 135(F). No allegation that this man ever touched a light cigarette. So that's the disconnect here, that whatever is pled with particularity, they

cannot tie to Mr. Cleveland Clark in the allegations, and that's all they have to do here, but they're not doing it.

(B) talks about we continue to make statements from 1953, for decades, through the TIRC. No particularity in that statement. And when we look at that, Your Honor, what's important to remember is R.J. Reynolds is the only use defendant in this case. The only product that's been alleged are Kool cigarettes. They were manufactured by a company called Brown & Williamson Tobacco Corporation until 2003. That is when my client purchased the company or acquired the assets of the company and now has successor liability.

But there is not a single statement from Brown & Williamson Tobacco Corporation that predates 2003, 2004. Remember, the allegation is he started in '64. It is attributed to Brown & Williamson. It says on this date, they made X-statement, and he heard it, and he relied on it. That statement just isn't there. Instead, you have studies from the 1950s and '60s. No allegations that he read those studies, that he was misled by them, much less that they came from Brown & Williamson. Then in '64 --

THE COURT: Does he claim that he read or

relied upon the studies or that, armed with the knowledge of the tobacco history he had on the studies, they shouldn't have made the representations they were making?

Which way does that go?

MR. LEPPERT: So this particular allegation says that the articles itself misled the public; in other words, that they were false and misleading. Again, cites to studies, they're from the 1950s, from the early 1960s, and there's no allegation that he read it.

In other words, then you have the response to the certain general support in 1964. Again, it doesn't say who made what statement, at what point in time. Was it Brown & Williamson? It doesn't say that he heard it, that he relied on it, and there's the light cigarette allegation, which we know is off target; right?

Then there's a 1982 statement, with particularity from Ed Horrigan, CEO of R.J. Reynolds from '82. Again, at that point, they're not owning the Kool brand. They're separate companies at that point in time, but that won't qualify. But, also, there's no allegation that, in 1982, he's watching Night Line Television and he hears Ed Horrigan say

this and, because of that, he continues smoking. He started smoking.

Then there's something in the statement regarding: "We don't advertise to children." Again, it's not attributed to Brown & Williamson, the actual defendant. Again, how does that relate to him? That's the kind of evidence that the "Rivera" court was looking for, and they haven't pled it. In 1984, he's been smoking for 20 years. What does a statement whether we advertise to children have anything to do with him? At this point, he's not anywhere a youth anymore. At that point in time, he's a grown man at that point.

So that's basically the reason why this Complaint does not satisfy Rule 9 and that it's just basically -- you have to, at least allege it, with particularity, the statements from Brown & Williamson that he relied on and that he -- how it affected him is not pled with particularity.

Unless the Court has questions about Count 3, I would like an opportunity to talk about Count 4 for a minute, which is concealment.

THE COURT: Sure. Go right ahead.

MR. LEPPERT: Thank you, Your Honor.

So concealment, there are two issues with

this. Again, this is both. This is Count 4, which is also subject to Rule 9 under Nevada law, and there are two issues: One really is a question of law for the Court to address. The second is very similar to what I just addressed, a failure to plead the connection to Mr. Clark with specificity, particularity.

So let me lay out the first one first, and that is the concept with duty to disclose, and it is pled in this Complaint in boilerplate language. It simply says, 152: That we affirmatively assumed a broken promise to truthfully disclose adverse information, that we had a duty to disclose information -- "duty," of course, being an element of concealment of a claim; right?

Under Nevada law, if we laid out in the "Davenport" case, for example, or in the American, "Ace American Insurance" case, there is no duty to disclose under the law of fraud unless there is a fiduciary relationship, which we don't have here. It's not alleged here; or some kind of what they call a "special relationship," a confidential relationship.

All of the cases we've cited to you, we don't have tobacco case from the Nevada Supreme

Court on this particular issue. But that is a very narrow doctrine that has never been imposed between the manufacturer of a product -- sits in North Carolina, or Brown & Williamson was in Louisville, Kentucky -- and the end consumer. I mean, obviously it goes through a chain of retailers. That kind of confidential special relationship is something like the accountant, the lawyer, or something like that, to that nature. That's usually what it means.

In the tobacco context, that special relationship theory of a duty to disclose is rejected. Cited to Your Honor the Third Circuit's opinion in "Jeter." Cited to you the Tenth Circuit decision in "Burton." In Florida, we just had it rejected by the First District Court of Appeals in "Whitmire" that basically that kind of special relationship does not exist between the manufacturer on one end and the end consumer on the other.

So there's no duty to -- in other words, this boilerplate allegation doesn't get them there because it doesn't explain how that duty would have arisen under Nevada law for us to disclose. The only theory that they give us in response is they say, "Well, special relationship," and they read American -- the "Ace American Insurance" case a lot

differently than I do, respectfully. Because what the Court then goes on to say is: We have refused to impose such a duty, for example, on an insurer with the insured.

That relationship is a lot closer between the insurer and the insured than the tobacco manufacturer and the end consumer. To the extent they're trying to create a duty because we have entered the debate, the tobacco companies have talked about the issues; correct? I mean, they do allege that. They do allege the tobacco companies went out and talked about smoking health issues. I've not read a Nevada case that creates a duty based on that itself.

I have read Florida cases that do create a duty based on that. But, again, that duty requires that Mr. Cleveland Clark heard us make one of those statements, right, and that he relied on that. Now he's justified in relying on us to provide him information because we would have assumed such a duty.

Again, the only statement that I know that would create such a duty, at best, would be that Frank Statement from 1953. The statement where the companies are saying "We're hiring research

scientists; we're going to look at this, at this question." Again, there's no allegation that, in 1953, he heard that statement, that created a duty. And I'm unaware of a case under Nevada law that even would recognize a duty that's created in that fashion.

Now, I just want to be clear. A manufacturer has a duty under a failure to warn theory, which is the negligence and strict liability theory. I'm not trying to say the manufacturer has never any obligation to tell anything to the customers. Of course it does, but that's negligence and strict liability and so on.

But so that's the duty part, and that's really a question of law, Your Honor. I guess it's a fact-law question because I don't think they can survive under Rule 9 by simply saying "They had a duty and they didn't fulfill that duty." That's not Rule 9.

Second element is -- and this, again, goes back to the "Rivera" case -- when they address in the court there, under Nevada law, addresses the concealment claim, it says: The plaintiff must prove that, but for the concealment, Mr. Clark -- or in that case, it was Rivera, but here Mr. Clark --

would have acted differently, would have not started smoking and/or would have quit smoking.

And, again, here, we're at the pleading stage, but we're under Rule 9, that has to be pled with particularity. And when we look at that particular allegation, it's, again, boilerplate. It's 153(F). And it says: "Plaintiff was unaware of the dangerous and addictive nature of cigarettes and would not have begun or continued to smoke had he known the aforementioned concealed and suppressed facts."

That is boilerplate language. It simply repeats the element. If that's sufficient, then there's no distinction between Rule 8 and Rule 9. There has to be a difference. You have to tell us how and why, and that's when the "Rivera" court goes to -- again, that's at the summary judgment proceedings, but they go through the type of evidence that would have to be produced here.

And here, what's missing -- and that's, I guess, the overall theme as to why we object to this Complaint. You have to tie it to Mr. Cleveland Clark. The only thing they've alleged about this gentleman is that he started smoking in 1964, and he smoked Kool cigarettes through 2017. There's no

allegation that he ever even tried to quit, that this man ever made any effort to quit.

So the idea -- so based on the four corners of this Complaint that Your Honor has in front of the Court, this man did not react to oust that information. Even when all the healthers (phonetic) were disclosed to him, and that's alleged here that, in 2000, the companies told everybody: Here's what we believe. And there were warnings on the pack, beginning in 1966. They were strengthened in '69. They were strengthened again in '85. All of those things did not make one bit of difference according to the four corners of this Complaint.

And we wish we had more information about it. But if all you can see, all you can view from this Complaint is that, for Cleveland Clark, it didn't make one bit of difference because there is no allegation that he ever quit. The story that's alleged here is '64 Kool cigarettes all the way until 2017. You have to allege something particular about Cleveland Clark as to how this would have made a difference; otherwise, it just doesn't satisfy Rule 9.

That's all I have on the fraud counts, and I know it's a lot. I have arguments on the other

counts. But I don't know if you want to hear from other opposing counsel first or what the Court's preference is.

THE COURT: Well, what are your other arguments?

MR. LEPPERT: The other arguments pertain to the product liability counts, which are negligence and strict liability counts.

Do you want me start with those now?

THE COURT: You can, but I think I've addressed those.

MR. LEPPERT: Okay. If the Court is not -- if it's not helping the Court, I won't do that.

THE COURT: Okay. All right.

MR. LEPPERT: Thank you.

THE COURT: Does the plaintiff wish to respond?

MR. ECHOLS: Yes, Your Honor. So I think a lot of our argument was conceded by counsel today. The "Rivera" case mentioned, it's a Ninth Circuit case, at a summary judgment stage. Here we're at the pleading stage, Your Honor. And there's a lot of cases cited in the briefs. But really the best one is "Buzz Stew vs. City of North Las Vegas." It's a 2015 case.

THE COURT: Can you spell that for the court reporter.

MR. ECHOLS: Yes, Your Honor. B-U-Z-Z. And then "Stew" is S-T-E-W.

"Buzz Stew" changed the standard for motions to dismiss. It made it a much higher standard to a beyond-doubt standard, and in the process of doing that, the Supreme Court overruled a bunch of cases that used the old standard that says: Hey, from now forward, we have to use this beyond-doubt standard. They haven't done that, Your Honor.

With regard to the Rule 9 particularity, here's what Rule 9(B) says: "In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally."

There's another factor here at play, Your Honor. So counsel just conceded to this Court today that the Frank Statement may create a duty; although, the assumption is that it's a factual issue. Now, we've put a lot of information in our Complaint, and there's a lot more information that's going to come out in discovery, Your Honor.

Some of the more particular information that we will get is in the possession of the defendants, and that's what we all, a lot of times call "Rocker discovery" because it's based upon the "Rocker" case. And I have citation for that. It's "Rocker" R-O-C-K-E-R, vs. KPMG, and it's 122 Nevada 1185. It's a 2006 case.

THE COURT: All right. But I have a question. Counsel raised the point that the Complaint alleges targeting women and targeting minorities, and we're assuming that Cleveland Clark is not a woman.

MR. ECHOLS: Uh-huh.

THE COURT: I think that's correct, and we don't know whether or not Mr. Clark is minority. But I agree with counsel that talking about the targeting of women and minorities may be relevant in certain situations, but I don't know that it would be relevant to Mr. Clark's case. And so what I'm wondering is, as I was listening to --

Is it "Leppert"? Mr. Leppert?

MR. LEPPERT: Yes, Your Honor.

THE COURT: As I was listening to Mr. Leppert, I thought, well, everything he's talking about sounds like it could be remedied by

amending some of those paragraphs between paragraph 132 and 160 to address the specificity, and then it becomes a nonissue.

I do agree with you that the "Buzz Stew" case says the standard for Motion to Dismiss is, without a doubt, no set of circumstances could ever be proven that would support claim as alleged. I agree with that completely.

But I think some of the criticism Mr. Leppert leveled at the allegations are legitimate. And while I'm not shocked by boilerplate language, because I see it in both pleadings and I see it all the time, I can understand why they may wish to have the Complaint focus their attention more narrowly on the specifics of the fraud in this case, at least to the extent articulated by Mr. Leppert this morning.

So would you be able to amend those paragraphs to address the Court's concerns he's articulated today, including removal of allegations regarding targeting women and, if Mr. Clark is not a minority, targeting minorities?

MR. ECHOLS: Yes, Your Honor. Certainly.

And that's an important point I think the Court makes. The remedy is not dismissal, but it's

just a more particular statement, and we're happy to do that.

THE COURT: Okay. All right. Anything else for me to decide?

MR. ROBERTS: Yes, Your Honor. Philip Morris joined in R.J. Reynolds' motion, and to the extent that the R.J. Reynolds' fraud forms part of the basis of the conspiracy alleged against Philip Morris, we'd request that the Court's order for a more specific statement also apply to Philip Morris.

THE COURT: Okay. Fair enough.

MR. ROBERTS: Thank you, Your Honor.

THE COURT: Yes, ma'am.

MS. LUTHER: Your Honor, Kelly Luther on behalf of Liggett Group. We also joined in Reynolds' motion and would request the same relief.

One point that I would like to raise with the Court, and it's contained within the pleadings, to the extent that the parties are taking the position that the Frank Statement may have set up a duty to disclose, Liggett was not a participant in that Frank Statement.

THE COURT: I don't know that the plaintiffs alleged that that created the basis for

the duty. I think that counsel -- sorry.

MS. KELLY: Mr. Leppert.

THE COURT: Mr. Leppert --

MR. LEPPERT: Just like the animal.

THE COURT: All right. Mr. Leppert suggested in this argument that, to the extent that the Frank Statement is considered, it might be relevant to the issue of duty. But I don't think that he was saying that's what the plaintiffs alleged. So here's --

MS. KELLY: Understood. Thank you.

THE COURT: So my inclination here is to deny the Motion to Dismiss as a Motion to Dismiss and, instead, treat it as a Motion for More Definite Statement, focusing attention on the paragraphs numbered 130 through 160. It sounds like that brackets the paragraphs that were being referenced by Mr. Leppert.

If I'm incorrect, please let me know, and we'll fix that.

MR. LEPPERT: Sounds correct, Your Honor.

THE COURT: Okay. All right. So the plaintiff is given leave to amend the Complaint in terms of those paragraphs 130 to 160 to provide more particularity and specificity to address the issues

of fraud and active concealment.

I'm not prohibiting the use of boilerplate assertions, but they must be augmented with specifics and particularity that address the concerns voiced here this morning.

Also, I think that it would be appropriate to remove allegations talking about targeting of women and, if Mr. Clark is not a member of a minority, targeting minorities.

So that's my ruling. Is there anything else anybody wants to add or seek clarification on?

And, necessarily, any joinders are part of that same decision. All right?

All right. I think that that's all I have in front of me this morning.

Was there anything else?

MR. LEPPERT: No, Your Honor.

MR. ECHOLS: No, Your Honor.

THE COURT: Okay. I need the orders within ten days, per EDCR 7.21. If, after you leave court, you decide that you do want to have the transcript to assist you in preparing any of these orders, let me know, and the requirement will be that I need the order in my office within ten days after you receive the transcript.

MR. ECHOLS: Thank you, Your Honor.
THE CLERK: Counsel, I need all of your Bar numbers.
MR. CLAGGETT: Sean Claggett, 8407.
MR. ECHOLS: Micah Echols 8437.
MR. ROBERTS: Lee Roberts, 8877.
MR. KENNEDY: Dennis Kennedy, 1462.
MR. JORGENSEN: Chris Jorgensen, 5382.
MR. GRANDA: Matthew Granda, 12753.
THE CLERK: Thank you.
MR. CLAGGETT: Your Honor, for purposes of the transcript for ordering it, can we just talk to --
THE COURT: Of course.
MR. CLAGGETT: The court reporter will provide that to us. You can just send that to us. Sean Claggett. Claggett & Sykes.
THE REPORTER: I'll contact you.
THE COURT: She's going to contact you because she'll want to know whether you want expedited or ordinary course.
MR. CLAGGETT: Thank you.

(The proceedings concluded at 10:01 a.m.)
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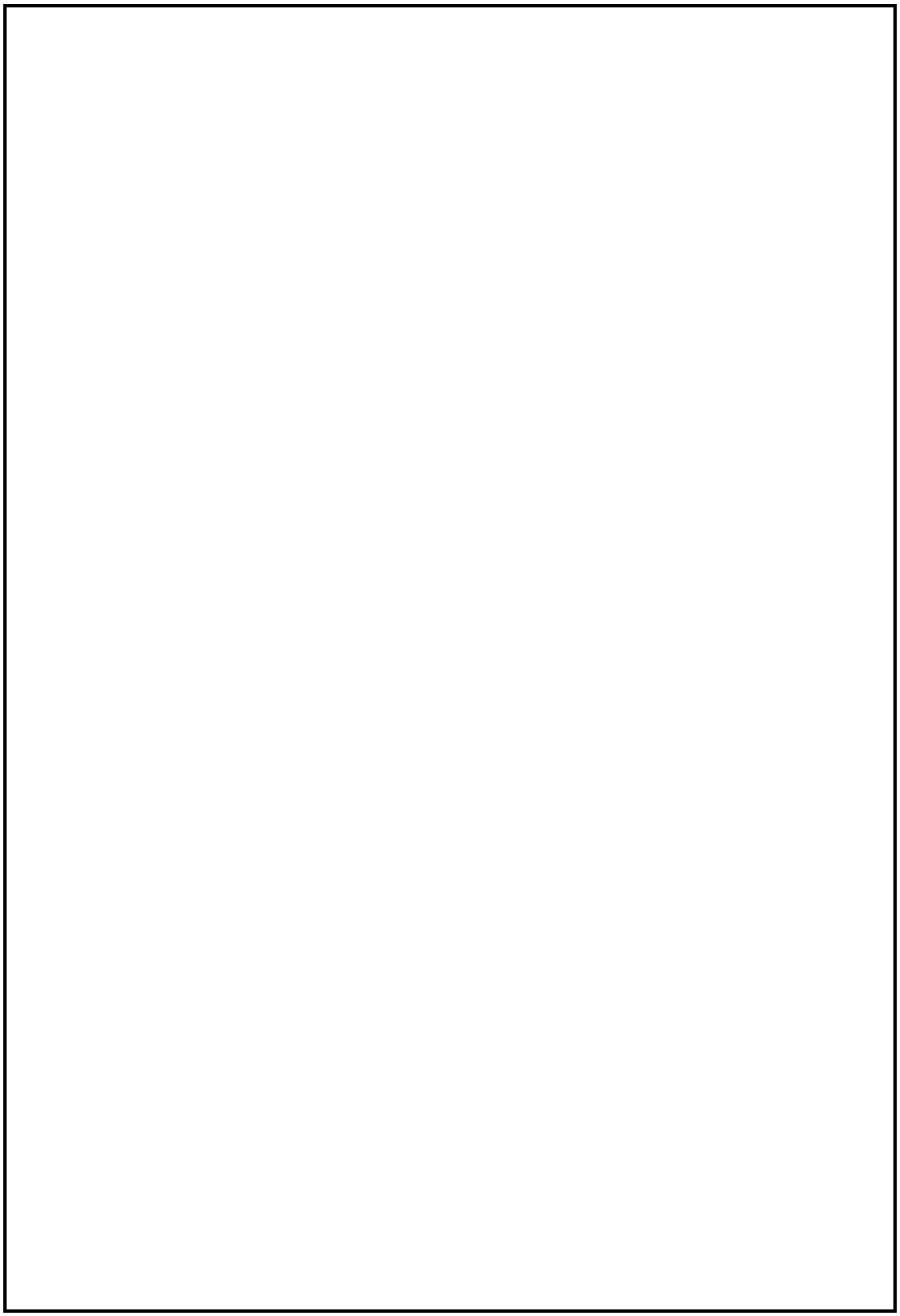

CERTIFICATE OF REPORTER

STATE OF NEVADA)
)SS:
COUNTY OF CLARK)

I, Dana J. Tavaglione, a duly commissioned and licensed Court Reporter, Clark County, State of Nevada, do hereby certify: That I reported the proceedings had in the above-entitled matter at the place and date indicated.

That I thereafter transcribed my said shorthand notes into typewriting and that the typewritten transcript of said proceedings is a complete, true and accurate transcription of said shorthand notes.

IN WITNESS HEREOF, I have hereunto set my hand, in my office, in the County of Clark, State of Nevada, this 31st day of January 2020.

/s/ Dana J. Tavaglione
_____
DANA J. TAVAGLIONE, RPR, CCR NO. 841

Exhibit 5

MOT (CIV)
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Attorneys for Defendant
R.J. REYNOLDS TOBACCO COMPANY

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

Defendants.

Case No. A-19-807650-C
Dept. No. IV

(Hearing Requested)

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

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

Pursuant to Nevada Rules of Civil Procedure 8(a), 9(b), and 12(b)(5), Defendant R.J. Reynolds Tobacco Company ("Reynolds"), by and through its undersigned counsel of record, hereby files this Motion to Dismiss Plaintiffs' sixth claim for relief (civil conspiracy) and seventh claim for relief (violation of the Nevada Deceptive Trade Practices Act).

This Motion is made and based on the pleadings and papers on file here, the following Memorandum of Points and Authorities, and any oral argument allowed at the time of hearing on this matter.[1]

DATED this 23rd day of March, 2020.

BAILEY❖KENNEDY

By: */s/ Joseph A. Liebman*
DENNIS L. KENNEDY
JOSEPH A. LIEBMAN

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[1] Reynolds also adopts in full and incorporates by reference Defendants Philip Morris USA Inc. ("Philip Morris"), Liggett Group, LLC ("Liggett") and ASM Nationwide Corporation's (d/b/a Silverado Smokes & Cigars) Motion to Dismiss Plaintiffs' Amended Complaint Under NRCP 12(b)(5) (filed contemporaneously herewith) ("Philip Morris and Liggett's Motion to Dismiss").

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This is a product liability action. Plaintiffs Sandra Camacho and Anthony Camacho ("Plaintiffs") have sued three tobacco manufacturers and two retail smoke shops for injuries allegedly resulting from Sandra Camacho's purchase and use of L&M, Marlboro, and Basic brand cigarettes.[2] Each and every claim for relief is based solely on the purchase and use of L&M, Marlboro, and Basic brand cigarettes. Yet based on Plaintiffs' Amended Complaint, Reynolds never sold, distributed, nor manufactured L&M, Marlboro, and Basic brand cigarettes. In fact, based on Plaintiffs' Amended Complaint, Reynolds never sold, distributed, nor manufactured any product that Mrs. Camacho purchased or used. Similarly, based on Plaintiffs' Amended Complaint, Reynolds never sold, distributed, nor manufactured any product which caused Plaintiffs' alleged injuries. Simply put, there is no relationship of any kind between Mrs. Camacho and Reynolds.

Despite the lack of any factual allegations indicating that Mrs. Camacho ever purchased or used Reynolds-brand cigarettes, Plaintiffs asserted two claims for relief against Reynolds—civil conspiracy and violation of the Nevada Deceptive Trade Practices Act ("NDTPA"). Although these are distinct claims under Nevada law, the Court is required to look beyond the label of the claim and instead toward its substance. In this instance, these are disguised product liability claims. These disguised claims (like all of Plaintiffs' claims) center on an allegedly defective product: L&M, Marlboro, and Basic brand cigarettes. In Nevada, product use is a fundamental requirement in any product liability action, regardless of the label of the claim. *See Moretti v. Wyeth, Inc.*, No. 2:08-cv-00396-JCM-(GWF), 2009 WL 749532, at *4 (D. Nev. Mar. 20, 2009); *see also Baymiller v. Ranbaxy Pharms., Inc.*, 894 F. Supp. 2d 1302, 1309–11 (D. Nev. 2012). Product use is plainly lacking with respect to Reynolds. To permit Plaintiffs to pursue these claims against Reynolds, who undisputedly did not manufacture, distribute, or sell the product that allegedly harmed Mrs. Camacho, goes against the bedrock legal principles supporting product liability claims. For these

[2] Only Mrs. Camacho is alleged to have used the products at issue. Although the Amended Complaint is unclear, Plaintiff Anthony Camacho appears to have asserted only a loss of consortium claim.