

IN THE SUPREME COURT OF THE STATE OF NEVADA

Electronically Filed
Nov 22 2022 02:22 PM
Elizabeth A. Brown
Clerk of Supreme Court

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

PETITION FOR EN BANC REHEARING

DENNIS L. KENNEDY, Nevada Bar No. 1462
JOSEPH A. LIEBMAN, Nevada Bar No. 10125
REBECCA L. CROOKER, Nevada Bar No. 15202

BAILEY ♦ KENNEDY

8984 Spanish Ridge Avenue
Las Vegas, Nevada 89148-1302
Telephone: 702.562.8820
Facsimile: 702.562.8821
DKennedy@BaileyKennedy.com
JLiebman@BaileyKennedy.com
RCrooker@BaileyKennedy.com

VALENTIN LEPPERT

(Admitted Pro Hac Vice)

KING & SPALDING LLP

1180 Peachtree Street, NE
Atlanta, Georgia 30309
Telephone: 404.572.4600
Facsimile: 404.572.5100
VLeppert@kslaw.com

URSULA MARIE HENNINGER

(Admitted Pro Hac Vice)

KING & SPALDING LLP

300 S. Tryon Street, Suite 1700
Charlotte, North Carolina 28202
Telephone: 704.503.2631
Facsimile: 704.503.2622
UHenninger@kslaw.com

*Attorneys for Petitioner
R.J. Reynolds Tobacco Company*

November 22, 2022

INTRODUCTION

The *en banc* Court should vacate the panel’s merits determination. As Justice Pickering explained in her concurrence on mandamus review, whether the NDTPA provides a private cause of action against a product manufacturer, even when the plaintiff never bought or used the manufacturer’s product, “presents a close, open, and to some extent fact-dependent question of Nevada law.” *R.J. Reynolds Tobacco Co. v. Eighth Jud. Dist. Ct. in & for Cnty. of Clark*, 138 Nev. Adv. Op. 55, 514 P.3d 425, 435 (2022) (Pickering, J., concurring in result only). The panel thus should have denied the writ petition “on procedural grounds” or, “if the court is to reach the merits of the substantive issue presented, that should be done by the en banc court, not a split panel.” *R.J. Reynolds Tobacco Co. v. Eighth Jud. Dist. Ct. in & for Cnty. of Clark*, No. 83724 (Pickering, J., concurring in part and dissenting in part) (Oct. 25, 2022).

But the majority nevertheless answered the merits of this close question “by a two-to-one vote of a three-justice panel,” and one of those two justices has since retired. *Reynolds*, 514 P.3d at 434. In so doing, the majority misapprehended important issues that the full Court should address. The full Court therefore should grant Reynolds’s en banc petition for rehearing to either (1) deny mandamus review on procedural grounds, vacate the majority’s merits decision, and leave the merits for plenary review by the full Court on direct appeal, or (2) grant mandamus and

permit the full Court to review the merits questions at issue and find in favor of Reynolds.

BACKGROUND

Plaintiffs filed this case against Liggett, Philip Morris USA, and Reynolds seeking damages for Mrs. Camacho's laryngeal cancer. 1 Petitioners' Appendix ("PA") 1–106. Plaintiffs assert that Mrs. Camacho's cancer was caused by smoking L&M, Marlboro, and Basic brand cigarettes, none of which were designed, manufactured, or sold by Reynolds or any of its corporate predecessors in interest. *See id.* Plaintiffs nonetheless sued Reynolds alleging a violation of the NDTPA and a conspiracy to violate the NDTPA. 1 PA 95–102.

Reynolds moved to dismiss the claims against it because Plaintiffs did not sufficiently allege that Ms. Camacho was a "victim" who was directly harmed by Reynolds's alleged NDTPA violations as required by NRS 41.600(1). After all, Ms. Camacho never touched a Reynolds cigarette in her life; so Reynolds's supposedly deceptive trade practices did not convince her to use a Reynolds cigarette, let alone directly harm her.

Judge Earley agreed and dismissed the claims against Reynolds on August 27, 2020, 2 PA 393, and Plaintiffs filed a writ of mandamus review. 2 PA 410–48. Nine months later, after Judge Krall took over the case, Plaintiffs moved for reconsideration. 4 PA 649–845. Judge Krall granted that motion, bringing Reynolds

back into the case, 6 PA 1175, and forcing Reynolds to file this writ petition. Reynolds proceeded through discovery and recently prevailed on summary judgment. *See Camacho v. Philip Morris USA Inc.*, No. A807650 (Oct. 26, 2022), attached hereto as **Exhibit A**.

STANDARD OF REVIEW

This Court may consider rehearing en banc when the panel has overlooked or misapprehended a material fact in the record or a material question of law in the case, or when it has overlooked, misapplied, or failed to consider law directly controlling a dispositive issue in the case. NRAP 40(c)(2).

ARGUMENT

A. The Full Court Should Vacate the Panel’s Merits Decision.

Justice Pickering was right to conclude that, by the time the panel had the opportunity to review Reynolds’s mandamus petition, the case had “sufficiently advanced that the advantages plenary review on direct appeal affords outweigh the need for immediate writ review.” *Reynolds*, 514 P.3d at 437. Reynolds filed its petition over a year ago, on November 4, 2021, immediately after Judge Krall’s reconsideration decision brought Reynolds back into the case—and well after this Court had already been considering the same issues raised by Plaintiffs in their original petition for mandamus, which was filed about twenty months ago, on March 23, 2021. Reynolds’s petition raised two procedural arguments, *see Reynolds Pet.* at 9-10; 22-23, that, had the panel agreed, would have led to quick resolution of an

already pending mandamus petition and could have saved Reynolds the burden of needlessly proceeding through discovery and pretrial motion practice.

Now, due to the passage of time, the balance of considerations decidedly weighs against mandamus review. As Justice Pickering noted, “the proceedings in district court have progressed well beyond the motion-to-dismiss stage.” *Reynolds*, 514 P.3d at 434. Indeed, Reynolds was forced to proceed through discovery and recently prevailed on summary judgment on both the NDTPA and the civil conspiracy claims. *See* Exh. A. Accordingly, this Court should grant Reynolds’s en banc petition so that it may vacate the panel’s merits decision and wait to decide these issues on plenary review.

B. If The Full Court Reaches the Merits, It Should Find That The Panel Majority Misapprehended the Law When It Found that Ms. Camacho Qualified as a Victim Under NRS 41.600(1).

If the full Court is inclined to consider the merits of this case, then it should conclude that the panel overlooked important legal and factual consideration in need of correction.

1. The NDTPA’s “direct-harm” test for private claims requires a causal link stronger than what Plaintiffs pleaded in their complaint and the majority held in its decision. *See Reynolds Pet.* at 11-13. To meet NRS 41.600(1)’s standing requirements, a victim must have suffered “direct harm” from the deceptive practice. *Del Webb Communities, Inc. v. Partington*, 652 F.3d 1145, 1152 (9th Cir. 2011).

The alleged “deception and injury cannot be too attenuated.” *Guerra v. Dematic Corp.*, No. 3:18-CV-0376-LRH-CLB, 2020 WL 5995496, at *3 (D. Nev. Oct. 8, 2020). The majority of the panel found that the “Camachos also allege that Sandra relied on [Reynolds’s alleged] representations to smoke generally.” 514 P.3d at 431. But Reynolds’s advertisements and other actions did not convince Ms. Camacho to purchase or use even a single Reynolds cigarette and Plaintiffs do not plead otherwise. Actions that allegedly contributed to Mrs. Camacho’s decision to “smoke generally” and use a different manufacturer’s product are far too attenuated to qualify as direct harm.

The full Court should consider whether “direct harm” requires a closer nexus. Under the panel majority’s broad understanding of this term, the NDTPA allows virtually anyone to bring a private cause of action for what may be considered an unfair trade practice. All that needs to be alleged is that the claimant was aware of the defendants’ practices and somehow suffered some type of harm—regardless of whether the alleged harm flowed “directly” from the defendants’ practices to the claimant.

2. Similarly, the panel majority failed to consider whether an expansive reading of who qualifies as a victim under NRS 41.600(1) comports with the Legislature’s carefully crafted balance between public and private enforcement of consumer fraud. *See Reynolds Pet.* at 14-15. As Justice Pickering notes, this

distinction between private and governmental action matters; it also explains why NRS 598.094's "attempt to sell" reference "applies to government enforcement actions, not private actions by victims seeking damages." *Reynolds*, 514 P.3d at 437. The panel holding allows virtually anyone to obtain standing under the NDTPA. The full Court should assess whether the Legislature intended to allow any bystander to act as a private attorney general and initiate a civil lawsuit under the NDTPA. *Id.*

3. The panel majority also failed to consider Reynolds's argument that the "NDTPA should be construed consistent with the common law because nothing in its text directs otherwise," which Justice Pickering thought merited further consideration from the full Court. *Reynolds*, 514 P.3d at 437; *see* Reynolds Pet. at 14-16. Well-established common law requires a showing of product use to maintain a products liability claim. *See, e.g., Moretti v. Wyeth, Inc.*, No. 2:08-CV-00396-JCMGWF, 2009 WL 749532, at *4 (D. Nev. Mar. 20, 2009); *Baymiller v. Ranbaxy Pharms., Inc.*, 894 F. Supp. 2d 1302, 1305 (D. Nev. 2012). While the majority found that Reynolds's "alleged knowing misrepresentation of the dangers of smoking . . . is distinct from a products-liability claim," *Reynolds*, 514 P.3d at 432, it did not consider statutory commands and precedent directing the Court to interpret the NDTPA consistent with the common law. *See* NRS 1.030; *Leigh-Pink v. Rio Props., LLC*, 138 Nev., Adv. Op. 48, 512 P.3d 322, 328 (2022).

4. The majority summarily stated that Plaintiffs “pleaded sufficient facts of a direct harm, as they contended that Sandra would not have smoked cigarettes and developed cancer but for all defendants’ including Reynolds’[s]-deceptive trade practices.” *Reynolds*, 514 P.3d at 432. But the majority provided no citation to the complaint in support of its conclusion. That is because none exists. *See Reynolds* Pet. at 18-19. Plaintiffs’ complaint neither identifies a single allegedly deceptive statement made by Reynolds nor explains how Reynolds’s alleged NDTPA violation supposedly impacted Mrs. Camacho. None of the NDTPA allegations in the complaint even contends that she saw any materials produced by Reynolds. 1 PA 99–101. In fact, even assuming *arguendo* that an “attempt to sell” can confer NDTPA standing to a private litigant, no allegation in the complaint even indicates how Reynolds attempted to sell Mrs. Camacho its product. The majority misapprehended what Plaintiffs actually alleged, as opposed to what they claimed in their appellate briefs.

As these legal and factual questions make clear, if the en banc Court does not vacate its decision on the merits now, it risks “creating confusion and inconsistency,” as Justice Pickering cautioned, “should the issue come to the en banc court on appeal from an eventual final judgment” and the full Court decides to “depart from or refine the panel’s merits determination.” *Id.* (cleaned up). And that risk is high. These cases implicate significant policy considerations that are being closely watched throughout

the country. *See* Michael A. Mora, *Florida Lawyer Beats Big Tobacco in Nevada Supreme Court, Creating Nationwide Blueprint*, DBR.com (Aug. 3, 2022, 03:04 PM), <https://bit.ly/3SzuTLn>; Debra Cassens Weiss, *Smoker can sue tobacco company for consumer fraud, even though she didn't use its products, state supreme court says*, ABAJournal.com (Aug. 4, 2022, 10:47 AM), <https://bit.ly/3SLLlbt>. Plenary review, by the full Court, would be the more appropriate vehicle to weigh in on these questions in the first instance.

C. Summary Judgment In Reynolds's Favor Does Not Moot This Petition.

While Reynolds recently succeeded on the merits of Plaintiffs' NDTPA and conspiracy claims at summary judgment, *see Camacho v. Philip Morris USA Inc.*, No. A807650 (Oct. 26, 2022), that should not foreclose this Court from reviewing either the procedural or the merits questions at issue here.

As a threshold matter, although the trial court has dismissed Reynolds from the case after summary judgment, Reynolds could be brought back at any time until a final judgment is reached. *See Reynolds*, 514 P.3d at 429 n.2 (permitting the trial court to "implicitly" enlarge the time for a party to seek reconsideration of an order under EDCR 2.24 by nearly 7 months). Therefore, the issues raised in Reynolds's petition are not moot.

But even if summary judgment mooted the merits determination in this appeal, the *en banc* Court should still review the panel's decision to remedy the

panel's procedural and substantive errors that are of widespread importance and capable of repetition. This Court will review an otherwise moot appeal "if it involves a matter of widespread importance that is capable of repetition, yet evading review." *See Personhood Nev. v. Bristol*, 126 Nev. 599, 602, 245 P.3d 572, 574 (2010). The party seeking review must prove "that (1) the duration of the challenged action is relatively short, (2) there is a likelihood that a similar issue will arise in the future, and (3) the matter is important." *Bisch v. Las Vegas Metro. Police Dep't*, 129 Nev. 328, 334-35, 302 P.3d 1108, 1113 (2013).

The issues presented in Reynolds's petition meet this standard. First, given the fluid nature of NRCP 54(b) (which permits the trial court to revisit and revise any of its prior orders "at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities"), parties may be dismissed from a case, brought back in, and then dismissed again on summary judgment before this Court has the opportunity to review. This case is the perfect example of that timeliness consideration.

Second, there is a high likelihood that a similar issue will arise in the future. *See Valdez-Jimenez v. Eighth Jud. Dist. Ct. in & for Cnty. of Clark*, 136 Nev. 155, 159, 460 P.3d 976, 982 (2020). Both Reynolds as well as other tobacco companies have already faced suits brought by non-use plaintiffs, and there are certainly more to come. *See, e.g., Tully v. Philip Morris USA Inc.*, No. A807657 (July 8, 2020)

(finding that “use was unnecessary to prevail” on an NDTPA claim); *Clark v. Philip Morris USA Inc.*, No. A802987 (April 20, 2021) (concluding that “any person” is permitted to bring an action pursuant to the NDTPA and that Plaintiff had sufficiently pleaded NDTPA violations, fraud claims, and derivative civil conspiracy claims); *Rowan v. Philip Morris USA Inc.*, No. A811091 (Sept. 8, 2021) (dismissing NDTPA and civil conspiracy claims against non-use defendant), (April 19, 2022) (reversing dismissal on reconsideration).

The “issue of whether a nonuser of a product may qualify as a victim with standing to bring an NDTPA suit against a product manufacturer presents a novel legal question of statewide importance requiring clarification.” *Reynolds*, 514 P.3d at 429. The scope and applicability of the NDTPA impacts anyone that widely distributes products and has competitors. It “implicates substantial public-policy concerns regarding the scope of liability for deceptive trade practices . . . and district courts are reaching different conclusions on this very issue.” *Id.* This issue should not be decided by only two members of this Court, one of whom has now retired. Either the Court should grant this petition for en banc review to vacate the panel’s grant of mandamus and wait to address these questions on plenary review, or it should grant the petition so that the full Court has the opportunity to review the merits questions now. *See Archon Corp. v. Eighth Judicial Dist. Court*, 133 Nev. 816, 822-23, 407 P.3d 702, 708 (2017) (permitting mandamus “to address the rare

question that is ‘likely of significant repetition prior to effective review,’ so that our opinion would assist other jurists, parties, or lawyers”).

CONCLUSION

For the foregoing reasons, the Court should grant Reynolds’s petition for en banc rehearing.

DATED this 22nd day of November, 2022.

Respectfully submitted,

BAILEY ❖ KENNEDY

By: /s/ Dennis L. Kennedy

DENNIS L. KENNEDY

JOSEPH A. LIEBMAN

REBECCA L. CROOKER

VAL LEPPERT

Admitted Pro Hac Vice

URSULA MARIE HENNINGER

Admitted Pro Hac Vice

KING & SPALDING LLP

Attorneys for Petitioner

R.J. REYNOLDS TOBACCO

COMPANY

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

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

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

[X] Proportionately spaced, has a typeface of 14 points or more and contains 2931 words;

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

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

DATED this 22nd day of November, 2022.

BAILEY ❖ KENNEDY

By: /s/ Dennis L. Kennedy

DENNIS L. KENNEDY

JOSEPH A. LIEBMAN

REBECCA L. CROOKER

VAL LEPPERT

Admitted Pro Hac Vice

URSULA MARIE HENNINGER

Admitted Pro Hac Vice

KING & SPALDING LLP

Attorneys for Petitioner

R.J. REYNOLDS TOBACCO
COMPANY

CERTIFICATE OF SERVICE

I certify that I am an employee of BAILEY ♦ KENNEDY and that on the 22nd day of November, 2022, service of the foregoing **PETITION FOR EN BANC REHEARING** was made by electronic service through the Nevada Supreme Court's electronic filing system and/or by depositing a true and correct copy in the U.S. Mail, first class postage prepaid, and addressed to the following at their last known address:

Sean K. Claggett, Esq.
Matthew S. Granda, Esq.
Micah S. Echols, Esq.
CLAGGETT & SYKES LAW FIRM
4101 Meadows Lane, Suite 100
Las Vegas, Nevada 89107
sclaggett@claggettlaw.com
mgranda@claggettlaw.com
michah@claggettlaw.com

Kimberly L. Wald, Esq.
Michael A. Hersh, Esq.
KELLEY I UUSTAL
500 N. Federal Highway, Ste. 200
Fort Lauderdale, Florida 33301
klw@kulaw.com
mah@kulaw.com

Attorneys for Real Parties in Interest Sandra Camacho and Anthony Camacho

D. Lee Roberts, Jr., Esq.
Phillip N. Smith, Jr., Esq.
Daniela LaBounty, Esq.
WEINBERG, WHEELER, HUDGINS,
GUNN & DIAL, LLC
6385 South Rainbow Blvd., Suite 400
Las Vegas, Nevada 89118
lroberts@wwhgd.com
psmith@wwhgd.com
dlabounty@wwhgd.com

Jennifer Kenyon, Esq.
Brian A. Jackson, Esq.
Bruce R. Tepikian, Esq.
SHOOK, HARDY & BACON L.L.P.
2555 Grand Boulevard
Kansas City, MO 64108
jbkenyon@shb.com
bjackson@shb.com
btepikian@shb.com

*Attorneys for Real Parties in Interest
Philip Morris USA, Inc. and ASM
Nationwide Corporation*

*Attorneys for Real Party in Interest
Philip Morris USA, Inc.*

Daniel F. Polsenberg, Esq.
J Christopher Jorgensen, Esq.
LEWIS ROCA ROTHGERBER
CHRISTIE LLP
3993 Howard Hughes Parkway
Suite 600
Las Vegas, Nevada 89169
dpolsenberg@lrrc.com
cjorgensen@lrrc.com

*Attorneys for Real Party in Interest
Liggett Group, LLC*

Kelly Anne Luther, Esq.
Admitted Pro Hae Vice
KASOWITZ BENSON TORRES LLP
1441 Brickell Avenue, Suite 1420
Miami, FL 33131
kluther@kasowitz.com

*Attorneys for Real Party in Interest
Liggett Group, LLC*

I further certify that the foregoing **PETITION FOR EN BANC
REHEARING** was mailed via U.S. Mail to the following:

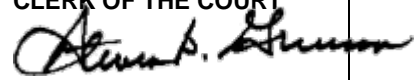
Honorable Nadia Krall, District Court Judge
Eighth Judicial District Court
Department 4
200 Lewis Avenue
Las Vegas, Nevada 89155

Respondents

/s/ Samantha T. Kishi
Employee of BAILEY ♦ KENNEDY

EXHIBIT A

EXHIBIT A



NEOJ (CIV)

DENNIS L. KENNEDY

Nevada Bar No. 1462

JOSEPH A. LIEBMAN

Nevada Bar No. 10125

REBECCA L. CROOKER

Nevada Bar No. 15202

BAILEY ♦ KENNEDY

8984 Spanish Ridge Avenue

Las Vegas, Nevada 89148-1302

Telephone: 702.562.8820

Facsimile: 702.562.8821

DKennedy@BaileyKennedy.com

JLiebman@BaileyKennedy.com

RCrooker@BaileyKennedy.com

VALENTIN LEPPERT

(Admitted Pro Hac Vice)

SERGIO ALEJANDRO GALVAN

(Admitted Pro Hac Vice)

KING & SPALDING LLP

1180 Peachtree Street, NE, Suite 1600

Atlanta, Georgia 30309

Telephone: 404.572.4600

Facsimile: 404.572.5100

VLeppert@kslaw.com

AGalvan@kslaw.com

URSULA MARIE HENNINGER

(Admitted Pro Hac Vice)

KING & SPALDING LLP

300 S. Tryon Street, Suite 1700

Charlotte, North Carolina 28202

Telephone: 704.503.2631

Facsimile: 704.503.2622

UHenninger@kslaw.com

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-

Case No. A-19-807650-C
Dept. No. IV

**NOTICE OF ENTRY OF ORDER
GRANTING DEFENDANT
R.J. REYNOLDS TOBACCO
COMPANY'S MOTION FOR
SUMMARY JUDGMENT ON
PLAINTIFFS' CLAIMS FOR
DECEPTIVE TRADE PRACTICES
AND CIVIL CONSPIRACY**

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.

**NOTICE OF ENTRY OF ORDER GRANTING DEFENDANT R.J. REYNOLDS
TOBACCO COMPANY'S MOTION FOR SUMMARY JUDGMENT ON PLAINTIFFS'
CLAIMS FOR DECEPTIVE TRADE PRACTICES AND CIVIL CONSPIRACY**

PLEASE TAKE NOTICE that an Order Granting Defendant R.J. Reynolds Tobacco
Company's Motion for Summary Judgment on Plaintiffs' Claims for Deceptive Trade Practices and
Civil Conspiracy was entered in the above-captioned action on October 26, 2022, a true and correct
copy of which is attached hereto.

DATED this 26th day of October, 2022.

BAILEY ♦ KENNEDY

By: /s/ Joseph A. Liebman
DENNIS L. KENNEDY
JOSEPH A. LIEBMAN
REBECCA L. CROOKER

AND

KING & SPALDING LLP
VALENTIN LEPPERT
(Admitted Pro Hac Vice)
URSULA MARIE HENNINGER
(Admitted Pro Hac Vice)
SERGIO ALEJANDRO GALVAN
(Admitted Pro Hac Vice)

Attorneys for Defendant
R.J. REYNOLDS TOBACCO COMPANY

CERTIFICATE OF SERVICE

I certify that I am an employee of BAILEY❖KENNEDY and that on the 26th day of October, 2022, service of the foregoing **NOTICE OF ENTRY OF ORDER GRANTING DEFENDANT R.J. REYNOLDS TOBACCO COMPANY'S MOTION FOR SUMMARY JUDGMENT ON PLAINTIFFS' CLAIMS FOR DECEPTIVE TRADE PRACTICES AND CIVIL CONSPIRACY** was made by mandatory electronic service through the Eighth Judicial District Court's electronic filing system and/or by depositing a true and correct copy in the U.S. Mail, first class postage prepaid, and addressed to the following at their last known address:

SEAN K. CLAGGETT
WILLIAM T. SYKES
MATTHEW S. GRANDA
MICAH ECHOLS
CLAGGETT & SYKES LAW FIRM
4101 Meadows Lane, Suite 100
Las Vegas, Nevada 89107

Email: sclaggett@claggettlaw.com
wsykes@claggettlaw.com
mgranda@claggettlaw.com
micah@Claggettlaw.com

Attorneys for Plaintiffs
SANDRA CAMACHO and ANTHONY CAMACHO

D. LEE ROBERTS, JR.
HOWARD J. RUSSELL
PHILLIP N. SMITH, JR.
DANIELA LABOUNTY
**WEINBERG WHEELER HUDGINS
GUNN & DIAL**
6385 South Rainbow Boulevard, Suite 400
Las Vegas, Nevada 89118

Email: lroberts@wwhgd.com
hrussell@wwhgd.com
psmithjr@wwhgd.com
dlabounty@wwhgd.com

Attorneys for Defendants
PHILIP MORRIS USA, INC. and
ASM NATIONWIDE CORPORATION

DANIEL F. POLSENBERG
J. CHRISTOPHER JORGENSEN
**LEWIS ROCA ROTHGERBER
CHRISTIE**
3993 Howard Hughes Parkway, #600
Las Vegas, Nevada 89169

Email: dpolsenberg@lrrc.com
cjorgensen@lrrc.com

Attorneys for Defendant
LIGGETT GROUP, LLC

JENNIFER KENYON
BRUCE R. TEPIKIAN
BRIAN ALAN JACKSON
SHOOK, HARDY & BACON, LLP
2555 Grand Boulevard
Kansas City, Missouri 64108

Email: jbkenyon@shb.com
btepiikian@shb.com
bjackson@shb.com

Attorneys for Defendant
PHILIP MORRIS USA, INC.

KELLY ANNE LUTHER
GISELLE GONZALEZ MANSEUR
KASOWITZ BENSON TORRES LLP
1441 Brickell Avenue, Suite 1420
Miami, Florida 33131

Email: kluther@kasowitz.com
gmanseur@kasowitz.com

Attorneys for Defendant
LIGGETT GROUP, LLC

KIMBERLY L. WALD
MICHAEL A. HERSH
FAN LI
MATTHEW M. DELLABETTA
KELLY UUSTAL, PLC
500 North Federal Highway, Suite 200
Fort Lauderdale, Florida 33304

Email: klw@kulaw.com
mah@kulaw.com
fli@kulaw.com
mdb@kulaw.com

Attorneys for Plaintiffs
SANDRA CAMACHO and ANTHONY
CAMACHO

PETER M. HENK
SHOOK HARDY & BACON L.L.P.
600 Travis Street, Suite 3400
Houston, Texas 77002

Email: phenk@shb.com

Attorney for Defendant
PHILIP MORRIS USA, INC.

HASSIA T. DILOMBI
SHOOK HARDY & BACON L.L.P.
201 South Biscayne Boulevard, Suite 3200
Miami, Florida 33131

Email: hdiolomni@shb.com

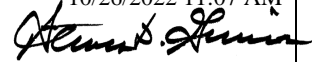
Attorney for Defendant
PHILIP MORRIS USA, INC.

JOSEPH M. FASI, II
FASI & DIBELLO
150 SE 2d Avenue, Suite 1010
Miami, Florida 33131

Email: fasi@fasidibellolaw.com

Attorney for Defendant
PHILIP MORRIS USA, INC.

/s/ Sharon L. Murnane
Employee of BAILEY ♦ KENNEDY


CLERK OF THE COURT

BAILEY ♦ KENNEDY
8984 SPANISH RIDGE AVENUE
LAS VEGAS, NEVADA 89148-1302
702.562.8820

OGSJ (CIV)

DENNIS L. KENNEDY

Nevada Bar No. 1462

JOSEPH A. LIEBMAN

Nevada Bar No. 10125

REBECCA L. CROOKER

Nevada Bar No. 15202

BAILEY ♦ KENNEDY

8984 Spanish Ridge Avenue

Las Vegas, Nevada 89148-1302

Telephone: 702.562.8820

Facsimile: 702.562.8821

DKennedy@BaileyKennedy.com

JLiebman@BaileyKennedy.com

RCrooker@BaileyKennedy.com

VALENTIN LEPPERT

(Admitted Pro Hac Vice)

SERGIO ALEJANDRO GALVAN

(Admitted Pro Hac Vice)

KING & SPALDING LLP

1180 Peachtree Street, NE, Suite 1600

Atlanta, Georgia 30309

Telephone: 404.572.4600

Facsimile: 404.572.5100

VLeppert@kslaw.com

AGalvan@kslaw.com

URSULA MARIE HENNINGER

(Admitted Pro Hac Vice)

KING & SPALDING LLP

300 S. Tryon Street, Suite 1700

Charlotte, North Carolina 28202

Telephone: 704.503.2631

Facsimile: 704.503.2622

UHenninger@kslaw.com

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

Case No. A-19-807650-C
Dept. No. IV

**ORDER GRANTING DEFENDANT R.J.
REYNOLDS TOBACCO COMPANY'S
MOTION FOR SUMMARY JUDGMENT
ON PLAINTIFFS' CLAIMS FOR
DECEPTIVE TRADE PRACTICES AND
CIVIL CONSPIRACY**

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.

THIS MATTER came before the Court on August 29, 2022, on Defendant R.J. Reynolds Tobacco Company's Motion for Summary Judgment on Plaintiffs' Claims for Deceptive Trade Practices and Civil Conspiracy (the "Motion for Summary Judgment"). The Parties appeared as follows:

- For Plaintiffs Sandra Camacho and Anthony Camacho ("Plaintiffs"): Matthew Granda of Claggett & Sykes, Fan Li of Kelley Uustal, and John Uustal of Kelley Uustal (admitted Pro Hac Vice).
- For Defendant R.J. Reynolds Tobacco Company ("Reynolds"): Dennis Kennedy of Bailey❖Kennedy, and Ursula Henninger of King & Spalding (admitted Pro Hac Vice).
- For Defendant Philip Morris USA Inc. ("Philip Morris"): D. Lee Roberts of Weinberg Wheeler Hudgins Gunn & Dial, Peter Henk of Shook Hardy & Bacon (admitted Pro Hac Vice), Hassia Diolombi of Shook Hardy & Bacon (admitted Pro Hac Vice), and Alexandra Sorenson of Shook Hardy & Bacon (admitted Pro Hac Vice).
- For Defendant ASM Nationwide Corporation: D. Lee Roberts of Weinberg Wheeler Hudgins Gunn & Dial.
- For Defendant Liggett Group, LLC ("Liggett"): J. Christopher Jorgenson of Lewis Roca Rothgerber Christie, Daniel Polsenberg of Lewis Roca Rothgerber Christie, Kelly Anne Luther of Kasowitz Benson Torres, and Maria Ruiz of Kasowitz Benson Torres.

The Court, having heard oral argument, having reviewed the papers, exhibits, and pleadings on file, and having considered the same, and for the reasons stated upon the record, finds as follows.

UNDISPUTED MATERIAL FACTS

1. Plaintiffs asserted two claims against Reynolds: (1) violation of the Nevada Deceptive Trade Practices Act – NRS 598.0903 et. seq. and NRS 41.600 (“NDTPA”); and (2) civil conspiracy.¹
2. Ms. Camacho never purchased or used a product (*i.e.*, cigarettes) manufactured or sold by Reynolds.
3. Ms. Camacho smoked Liggett brand cigarettes (L&M) from 1964 to 1990, and Philip Morris brand cigarettes (Marlboro and Basic) from 1990 to 2017.
4. Ms. Camacho lived in Illinois from 1964 (the year she started smoking) through 1990. In 1990, Plaintiffs moved to Las Vegas, Nevada.
5. Plaintiffs’ NDTPA claim against Reynolds is based on the premise that Reynolds allegedly fraudulently misrepresented and/or failed to disclose material facts regarding the safety and harm of smoking cigarettes.
6. Plaintiffs’ civil conspiracy claim is based on the same premise as their NDTPA claim, and Plaintiffs have conceded that their NDTPA claim against Reynolds is the underlying wrong supporting their civil conspiracy claim against Reynolds.
7. Plaintiffs’ own expert has conceded that neither Reynolds, Philip Morris, nor Liggett have ever represented that smoking cigarettes is safe.
8. Plaintiffs have failed to present any evidence that Mrs. Camacho was aware of any fraudulent misrepresentations that were made by Reynolds regarding the safety and harm of smoking cigarettes. In fact, there is no evidence that Ms. Camacho ever saw or heard any statements by Reynolds.
9. Likewise, Plaintiffs have failed to identify any alleged fraudulent omissions by Reynolds which would have played a material and substantial part in leading Ms. Camacho to choose

¹ Mrs. Camacho is the only party who has asserted claims based on her purchase and use of cigarettes. Mr. Camacho’s claims are based entirely on the fact that he was and is married to Mrs. Camacho (*i.e.*, loss of consortium).

not to begin smoking or to later quit smoking.

CONCLUSIONS OF LAW

1. The Court “shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” NRCp 56; *Wood v. Safeway, Inc.*, 121 Nev. 724, 731, 121 P.3d 1026, 1031 (Nev. 2005).² When the movant has made and supported its motion as required, the non-moving party must, “by affidavit or otherwise, set forth specific facts demonstrating the existence of a genuine factual issue.” *Id.* The non-movant “may not rest upon general allegations and conclusions” and “is not entitled to build a case on the gossamer threads of whimsy, speculation, and conjecture.” *Id.* 121 Nev. at 731–32, 121 P.3d 1030–31.
2. NRS 41.600 provides a private cause of action for “any person who is a victim of consumer fraud.” NRS 41.600. “Consumer fraud” means: . . . a deceptive trade practice as defined in NRS 598.0915 to 598.0925, inclusive.” *Id.* at § (2)(e). To succeed on a claim under the NDTPA, Plaintiffs must prove by a preponderance of the evidence that “(1) an act of consumer fraud by the [Defendants] (2) caused (3) damage to the [P]laintiff.” *Picus v. Wal-Mart Stores, Inc.*, 256 F.R.D. 651, 658 (D. Nev. 2009); *Sattari v. Wash. Mut.*, 475 F. App’x 648, 648 (9th Cir. 2011) (same); *see also Betsinger v. D.R. Horton, Inc.*, 126 Nev. 162, 165, 232 P.3d 433, 435 (2010) (noting that deceptive trade practices claims are subject to a preponderance of the evidence standard).
3. When an NDTPA claim is based on alleged fraudulent misrepresentations and omissions, reliance is an essential element of the claim. *See, e.g., Bank of New York Mellon as Tr. for Certificateholders of CWALT, Inc., Alternative Loan Tr. 2005-57CB, Mortg. Pass-through Certificates, Series 2005-57CB v. Sunrise Ridge Master Homeowners Ass’n*, No. 217CV00233, 2020 WL 2064065, at *6 (D. Nev. Apr. 28, 2020) (granting summary judgment in favor of defendant where plaintiff could not show that defendant’s representations were knowingly false, or that plaintiff “acted in reliance on such

² The Nevada Supreme Court has adopted the federal summary judgment standard. *See Wood*, 121 Nev. at 731, 121 P.2d at 1031.

- representations”); *Schmidt v. C.R. Bard, Inc.*, No. 2:11-CV-00978-PMP, 2013 WL 3802804, at *3 (D. Nev. July 22, 2013) (“Defendants’ Deceptive Trade Practices Act claim fails because Plaintiff cannot prove justifiable reliance on any alleged deceptive or false representation on the part of Defendant”); *see also ImageKeeper LLC v. Wright Nat’l Flood Ins. Servs. LLC*, No. 220CV01470, 2021 WL 4466312, at *8 (D. Nev. Sept. 29, 2021) (finding an NDTPA claim plausibly pleaded where plaintiff alleged that he acted “in reliance on” defendant’s misrepresentation); *Rimini St., Inc. v. Oracle Int’l Corp.*, No. 2:14-CV-1699, 2017 WL 5158658, at *9 (D. Nev. Nov. 7, 2017) (same).
4. Further, the Nevada Supreme Court has held that “[l]ack of justifiable reliance bars recovery in an action at law for damages for the tort of deceit.” *Pac. Maxon, Inc. v. Wilson*, 96 Nev. 867, 870, 619 P.2d 816, 817 (1980).
5. The Court rejects Plaintiffs’ argument that they need not prove reliance for their NDTPA claim. Plaintiff cites various precedent which address the threshold issue of standing under the NDTPA, but none of those cases indicate that reliance is not necessary to prove causation and direct harm, especially when Plaintiffs’ NDTPA claim is premised on alleged fraudulent statements and/or omissions—at it is here.³
6. In order to establish justifiable reliance, a plaintiff must show that the false representation or omission “played a material and substantial part in leading the plaintiff to adopt his particular course; and when he was unaware of it at the time that he acted, or it is clear that he was not in any way influenced by it, and would have done the same thing without it for other reasons, his loss is not attributed to the defendant.” *See Lubbe v. Barba*, 91 Nev. 596, 600, 540 P.2d 115, 118 (1975).
7. As such, to establish justifiable reliance here with respect to any alleged fraudulent misrepresentations by Reynolds, Plaintiffs “must show that an alleged false representation

³ Plaintiffs cite an unpublished disposition from 2013, *Hirji v. State*, 2013 WL 7158555, 129 Nev. 1122 (Nov. 1, 2013), to argue that the “Nevada Supreme Court has previously rejected the reliance requirement Defendants attempt to inject in the NDTPA.” Not only is this an unpublished disposition which may not be cited under NRAP 36(c)(3), it is irrelevant considering *Hirji* was initiated by the State of Nevada—not a private litigant like Plaintiffs. The elements for an NDPTA claim brought by the State of Nevada are markedly different than for a private litigant because a private litigant must show they are a victim under NRS 41.600.

- played a material and substantial part in leading [Ms. Camacho] to adopt her particular course” and “reliance on an alleged misrepresentation presumes that [Ms. Camacho] had actually read or heard the alleged misrepresentation.” *Rivera v. Philip Morris, Inc.*, 395 F.3d 1142, 1155 (9th Cir. 2005).
8. To establish justifiable reliance with respect to any alleged fraudulent omissions, Plaintiffs must show Ms. Camacho was “unaware of the fact and would have acted differently if [she] had known of the concealed or suppressed fact.” *Rivera*, 395 F.3d at 1154; *see also Nevada Power Co. v. Monsanto Co.*, 891 F. Supp. 1406, 1415 (D. Nev. 1995); *Dow Chemical Co. v. Mahlum*, 114 Nev. 1468, 970 P.2d 98, 110 (1998) (overruled on other grounds by *GES, Inc. v. Corbitt*, 117 Nev. 265, 21 P.3d 11, 15 (2001)).⁴
9. Plaintiffs have failed to present any evidence showing that Ms. Camacho saw or heard any allegedly fraudulent statements by Reynolds. Ms. Camacho could not have justifiably relied on a fraudulent statement by Reynolds that she never saw or heard.
10. Likewise, Plaintiffs have failed to present any evidence showing that Ms. Camacho was unaware of any material fact regarding cigarettes and would have acted differently if she had known.
11. Plaintiffs have presented no evidence indicating that Ms. Camacho decided to start smoking, switched to a particular brand of cigarettes, refrained from quitting, or made any decision related to her smoking because of a statement made by Reynolds. The undisputed fact that Ms. Camacho never purchased or smoked Reynolds’ cigarettes further shows that she did not rely—justifiably or otherwise—on statements by Reynolds.
12. The fact that Plaintiffs did not move to Nevada until 1990 further confirms the lack of justifiable reliance in this case. The Court finds, and the Plaintiffs do not dispute, that for the purposes of the NDPTA claim, all of Plaintiffs’ pre-1990 allegations are immaterial because Plaintiffs did not reside in Nevada at that time.
13. Accordingly, the Court finds that Plaintiffs have failed to present sufficient evidence of

⁴ Plaintiffs incorrectly argue in their Opposition that “[c]ommon law frauds like fraudulent concealment...does not require proof of reliance.” As shown by the precedent above, that is an incorrect statement as a matter of law.

justifiable reliance that could raise a genuine issue of material fact for the jury. Accordingly, Ms. Camacho has failed to create a genuine issue of material fact as to whether she is a victim under NRS 41.600. *Fairway Chevrolet Co. v. Kelley*, 134 Nev. 935, 429 P.3d 663, 2018 WL 5906906 (2018).

14. Plaintiffs did not provide any independent arguments and/or evidence in support of their civil conspiracy claim. To the contrary, Plaintiffs agree with Reynolds that if their NDPTA claim were to be dismissed, their derivative civil conspiracy claim—which is based on their NDTPA claim against Reynolds—should be dismissed as well. *See Jordan v. State ex rel. Dep’t of Motor Vehicles & Pub. Safety*, 121 Nev. 44, 74–75, 110 P.3d 30, 51 (2005) (en banc) (per curiam) (underlying cause of action for fraud is a necessary predicate to a cause of action for conspiracy to defraud), *overruled on other grounds, Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 181 P.3d 670 (2008); *see also Sommers v. Cuddy*, No. 2:08-cv-78-RCJ-RJJ, 2012 WL 359339, at *5 (D. Nev. Feb. 2, 2012) (applying Nevada law and recognizing that a cause of action for civil conspiracy to defraud requires a viable underlying cause of action for fraud).

///

///

///

///

///

///

///

///

///

///

///

///

///

ORDER

Based upon the foregoing findings of fact and conclusions of law, **IT IS HEREBY ORDERED** that the Motion for Summary Judgment is GRANTED. The Court enters summary judgment in favor of Reynolds and against Plaintiffs Sandra Camacho and Anthony Camacho, and dismisses, with prejudice, the following claims for relief against Reynolds:

- Violation of the Nevada Deceptive Trade Practices Act – NRS 598.0903 et. seq. and NRS 41.600.
- Civil Conspiracy.

As a result of this Order, Reynolds is completely dismissed from this litigation.

Dated this 26th day of October, 2022



83A 0B0 E5C9 F499
Nadia Krall
District Court Judge

Submitted by:

BAILEY ♦ KENNEDY

By /s/ Joseph A. Liebman
JOSEPH A. LIEBMAN
Attorneys for Defendant, R.J. Reynolds Tobacco Company

1 **CSERV**

2
3 DISTRICT COURT
CLARK COUNTY, NEVADA

4
5
6 Sandra Camacho, Plaintiff(s)

CASE NO: A-19-807650-C

7 vs.

DEPT. NO. Department 4

8 Philip Morris USA Inc,
9 Defendant(s)

10
11 **AUTOMATED CERTIFICATE OF SERVICE**

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

14 Service Date: 10/26/2022

15 Reception E-File

reception@claggettlaw.com

16 Audra Bonney

abonney@wwhgd.com

17 D. Lee Roberts

lroberts@wwhgd.com

18 Howard Russell

hrussell@wwhgd.com

19 Kelly Pierce

kpierce@wwhgd.com

20 Joseph Liebman

jliebman@baileykennedy.com

21 Dennis Kennedy

dkennedy@baileykennedy.com

22 Bailey Kennedy, LLP

bkfederaldownloads@baileykennedy.com

23 Matthew Granda

mgranda@claggettlaw.com

24 Moises Garcia

mgarcia@claggettlaw.com

25 Ryan Gormley

rgormley@wwhgd.com

26
27
28

1	Daniela LaBounty	dlabounty@wwhgd.com
2	Phillip Smith, Jr.	psmithjr@wwhgd.com
3	Flor Gonzalez-Pacheco	FGonzalez-Pacheco@wwhgd.com
4	Micah Echols	micah@claggettlaw.com
5	Jennifer Kenyon	SHBNevada@shb.com
6	Kelley Trial Attorneys	nvtobacco@kulaw.com
7	Kelley Trial Attorneys	nvtobacco@kulaw.com
8	Kelley Trial Attorneys	nvtobacco@kulaw.com
9	Kelly Luther	kluther@kasowitz.com
10	Maria Ruiz	mruiz@kasowitz.com
11	Bruce Tepikian	btepikian@shb.com
12	Brian Jackson	bjackson@shb.com
13	Christopher Jorgensen	cjorgensen@lrrc.com
14	Jessica Helm	jhelm@lrrc.com
15	Annette Jaramillo	ajaramillo@lrrc.com
16	Philip Holden	tobacco@integrityforjustice.com
17	Philip Holden	tobacco@integrityforjustice.com
18	Philip Holden	tobacco@integrityforjustice.com
19	Andrea Nayeri	anayeri@shb.com
20	Kari Grace	kgrace@shb.com
21	Jennifer Kenyon	JBKENYON@shb.com
22	Maxine Rosenberg	Mrosenberg@wwhgd.com
23	Appeals Team	appeals@claggettlaw.com
24	LV Filings	LVFilings@lewisroca.com
25	Alex Galvan	agalvan@kslaw.com
26		
27		
28		

KATHRYN LEHMAN	klehman@kslaw.com
Nancy Anderson	NANDERSON@SHB.COM
Alexandra Sorenson	asorenson@shb.com
Peter Henk	PHENK@shb.com
Joseph Fasi	fasi@fasidibellolaw.com
Hassia Diolombi	hdiolombi@shb.com
Daffney Sharp	dsharp@shb.com
Michelle Rivas	michelle@claggettlaw.com
SPENCER DIAMOND	sdiamond@kslaw.com
KINGSPALDING NEVADA	KSNebraska@kslaw.com
Rachel Slaton	rslaton@kslaw.com

If indicated below, a copy of the above mentioned filings were also served by mail via United States Postal Service, postage prepaid, to the parties listed below at their last known addresses on 10/27/2022

D Roberts	6385 S Rainbow BLVD STE 400 Las Vegas, NV, 89118
-----------	---