

In the Supreme Court of Nevada

PHILIP MORRIS USA INC., a foreign corporation,

Petitioner,

vs.

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

Respondents,

and

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

Real Parties in Interest

Electronically Filed
Jun 02 2022 09:41 a.m.
Elizabeth A. Brown
Clerk of Supreme Court

Case No. _____

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

**PHILIP MORRIS USA INC.'S PETITION FOR
WRIT OF MANDAMUS OR, ALTERNATIVELY, PROHIBITION – APPENDIX
VOL. 4**

D. Lee Roberts, Jr., Esq.
Nevada Bar No. 8877
WEINBERG, WHEELER, HUDGINS,
GUNN & DIAL, LLC
6385 S. Rainbow Blvd., Ste. 400
Las Vegas, NV 89118
(702) 938-3838
lroberts@wwhgd.com
*Attorney for Petitioner Philip Morris
USA Inc.*

INDEX TO PETITIONER'S APPENDIX - CHRONOLOGICAL

DOCUMENT DESCRIPTION	Date	Vol.	Page
Plaintiff's Complaint	02/25/2020	1	1–69
Defendant Philip Morris USA Inc.'s Motion to Dismiss Plaintiff's Complaint Under NRCP 12(b)(5)	04/02/2020	1	70–81
Plaintiff's Opposition to Defendant Philip Morris USA Inc.'s Motion to Dismiss Plaintiff's Complaint Under NRCP 12(b)(5)	04/14/2020	1	82–93
Defendant Philip Morris USA Inc.'s Reply to Plaintiff's Opposition to Its Motion to Dismiss Plaintiff's Complaint Under NRCP 12(b)(5)	05/07/2020	1	94–105
Plaintiff's Notice of Serving Supplemental Authority	06/16/2020	1	106–12
Defendants' Notice of Serving Supplemental Exhibit in Support of Defendants' Motion to Dismiss	06/17/2020	1	113–22
Order Denying Philip Morris USA Inc.'s Motion to Dismiss Plaintiff's Complaint Under NRCP 12(b)(5)	08/25/2020	1	123–36
Stipulation Regarding Plaintiff's Amended Complaint	08/25/2020	1	137–44
Suggestion of Death Upon the Record	09/03/2020	1	145–47
Errata to Plaintiff's Motion for Leave to File Amended Wrongful Death	11/30/2020	2	148–280

DOCUMENT DESCRIPTION	Date	Vol.	Page
Complaint and Plaintiff's Motion to Substitute Parties			
Defendant Philip Morris USA Inc.'s Opposition to Plaintiff's Motion for Leave to File Amended Wrongful Death Complaint and Plaintiff's Motion to Substitute Parties	12/10/2020	2	281-94
Plaintiff's Reply to Defendant Philip Morris USA Inc.'s Opposition to Plaintiff's Motion for Leave to File Amended Wrongful Death Complaint and Plaintiff's Motion to Substitute Parties	12/30/2020	2	295-99
Order Granting in Part and Denying in Part Plaintiff's Motion for Leave to File Amended Wrongful Death Complaint, and Plaintiff's Motion to Substitute Parties	03/11/2021	2	300-09
Plaintiff's Amended Complaint	03/15/2021	3	310-438
Answer, Defenses, and Jury Demand of Defendant Joe's Bar, Inc. to Plaintiff's Amended Complaint	03/29/2021	3	439-60
Answer, Defenses, and Jury Demand of Defendant Jerry's Nugget to Plaintiff's Amended Complaint	03/29/2021	3	461-82
Answer, Defenses, and Jury Demand of Defendant Quick Stop Market, LLC to Plaintiff's Amended Complaint	03/29/2021	3	483-504

DOCUMENT DESCRIPTION	Date	Vol.	Page
Answer, Defenses, and Jury Demand of Defendant The Poker Palace to Plaintiff's Amended Complaint	03/29/2021	3	505–26
Answer, Defenses, and Jury Demand of Defendant Silver Nugget Gaming, LLC d/b/a Silver Nugget Casino to Plaintiff's Amended Complaint	03/29/2021	3	527–48
Defendant Philip Morris USA Inc.'s Motion to Dismiss Plaintiff's Amended Complaint Under NRCP 12(b)(5)	03/29/2021	4	549–62
Defendants' Motion to Strike the Lawyer-Related Allegations in Plaintiff's Amended Complaint	03/29/2021	4	563–71
Plaintiff's Opposition to Defendant Philip Morris USA Inc.'s Motion to Dismiss Plaintiff's Amended Complaint	04/12/2021	4	572–96
Plaintiff's Opposition to Defendants' Motion to Strike the Lawyer-Related Allegations to Plaintiff's Amended Complaint	04/12/2021	4	597–610
Defendant Philip Morris USA Inc.'s Reply to Plaintiff's Opposition to Defendant Philip Morris USA Inc.'s Motion to Dismiss Plaintiff's Amended Complaint Under NRCP 12(b)(5)	04/22/2021	4	611–24
Defendants' Reply in Support of Their Motion to Strike the Lawyer-Related Allegations in Plaintiff's Amended Complaint	04/27/2021	4	625–30

DOCUMENT DESCRIPTION	Date	Vol.	Page
Letters of Special Administration	08/31/2021	4	631–32
Order Granting Defendant Philip Morris USA Inc.’s Motion to Dismiss Plaintiff’s Amended Complaint Under NRCP 12(b)(5)	09/08/2021	4	633–41
Order Denying Defendants’ Motion to Strike the Lawyer-Related Allegations in Plaintiff’s Amended Complaint	09/12/2021	4	642–49
Plaintiff’s Motion to Reconsider Order Granting Defendant Philip Morris USA Inc.’s Motion to Dismiss Plaintiff’s Amended Complaint Under NRCP 12(b)(5)	09/23/2021	5	650–72
Answer, Defenses, and Jury Demand of Defendant R.J. Reynolds Tobacco Company to Plaintiff’s Amended Complaint	10/04/2021	5-9	673–761
Liggett Group LLC’s Answer and Affirmative Defenses to Plaintiff’s Amended Complaint	10/04/2021	10	762–806
Defendant Philip Morris USA Inc.’s Opposition to Plaintiff’s Motion to Reconsider Order Granting Defendant Philip Morris USA Inc.’s Motion to Dismiss Plaintiff’s Amended Complaint Under NRCP 12(b)(5)	10/07/2021	11	807–20
Plaintiff’s Reply to Defendant Philip Morris USA Inc.’s Opposition to Motion to Reconsider Order Granting	10/20/2021	11	821–33

DOCUMENT DESCRIPTION	Date	Vol.	Page
Motion to Dismiss Plaintiff's Amended Complaint Under NRCP 12(b)(5)			
Plaintiff's Supplement to Motion to Reconsider Order Granting Defendant Philip Morris USA Inc.'s Motion to Dismiss Plaintiff's Amended Complaint Under NRCP 12(b)(5)	11/08/2021	11	834-46
Defendant Philip Morris USA Inc.'s Notice of Filing of Petitions for Writs of Prohibition or Mandamus Before the Nevada Supreme Court	11/09/2021	12	847-926
Plaintiff's Motion for Leave to File Second Amended Complaint	12/21/2021	12-17	927-1065
Stipulation and Order Regarding Plaintiff's Motion for Leave to File Second Amended Complaint	01/07/2022	18	1066-72
Plaintiffs' Second Amended Complaint	01/11/2022	18-23	1073-1227
Answer, Defenses, and Jury Demand of Defendant Quick Stop Market, LLC to Plaintiffs' Second Amended Complaint	01/31/2022	23-24	1228-50
Answer, Defenses, and Jury Demand of Defendant The Poker Palace to Plaintiffs' Second Amended Complaint	01/31/2022	24-25	1251-73
Answer, Defenses, and Jury Demand of Defendant Joe's Bar, Inc. to Plaintiffs' Second Amended Complaint	01/31/0222	25-26	1274-95

DOCUMENT DESCRIPTION	Date	Vol.	Page
Answer, Defenses, and Jury Demand of Defendant Jerry's Nugget to Plaintiffs' Second Amended Complaint	01/31/2022	26-27	1296–1318
Answer, Defenses, and Jury Demand of Defendant Silver Nugget Gaming, LLC to Plaintiffs' Second Amended Complaint	01/31/2022	27-28	1319–41
Liggett Group LLC's Answer and Affirmative Defenses to Plaintiffs' Amended Complaint	10/04/2021	28-30	1342–88
Answer, Defenses, and Jury Demand of Defendant R.J. Reynolds Tobacco Company to Plaintiffs' Second Amended Complaint	01/31/2022	30-35	1389–1484
Order Granting Plaintiffs' Motion to Reconsider Order Granting Defendant Philip Morris USA Inc.'s Motion to Dismiss Plaintiff's Amended Complaint Under NRCP 12(b)(5)	04/19/2022	35	1485–91
Philip Morris USA Inc.'s Answer to Plaintiffs' Second Amended Complaint	05/03/2022	35	1492–1597
Transcript Excerpts from Depositions of Plaintiff Dolly Rowan (taken December 6, 2021); Plaintiff Russell Thompson (taken February 17, 2022); and Plaintiff Navona Collison	02/15/2022	35	1598–1616
Order Denying Defendants Philip Morris USA Inc.'s and Liggett Group LLC's Motion to Dismiss Plaintiff's	04/20/2021	35	1617–1625

DOCUMENT DESCRIPTION	Date	Vol.	Page
Second Amended Complaint (<i>Tully</i> , No. A-19-802987-C)			
Order Granting Plaintiffs' Motion to Reconsider Order Granting Defendant R.J. Reynolds Tobacco Company's Motion to Dismiss Plaintiffs' Amended Complaint Under NRCP 12(b)(5) (<i>Camacho</i> , No. A-19-807650-C)	11/03/2021	35	1626–1632

INDEX TO PETITIONER'S APPENDIX - ALPHABETICAL

DOCUMENT DESCRIPTION	Date	Vol.	Page
Answer, Defenses, and Jury Demand of Defendant Jerry's Nugget to Plaintiff's Amended Complaint	03/29/2021	3	461-82
Answer, Defenses, and Jury Demand of Defendant Joe's Bar, Inc. to Plaintiff's Amended Complaint	03/29/2021	3	439-60
Answer, Defenses, and Jury Demand of Defendant The Poker Palace to Plaintiff's Amended Complaint	03/29/2021	3	505-26
Answer, Defenses, and Jury Demand of Defendant Quick Stop Market, LLC to Plaintiff's Amended Complaint	03/29/2021	3	483-504
Answer, Defenses, and Jury Demand of Defendant R.J. Reynolds Tobacco Company to Plaintiff's Amended Complaint	10/04/2021	5-9	673-761
Answer, Defenses, and Jury Demand of Defendant Silver Nugget Gaming, LLC d/b/a Silver Nugget Casino to Plaintiff's Amended Complaint	03/29/2021	3	527-48
Answer, Defenses, and Jury Demand of Defendant Jerry's Nugget to Plaintiffs' Second Amended Complaint	01/31/2022	26-27	1296-1318
Answer, Defenses, and Jury Demand of Defendant Joe's Bar, Inc. to Plaintiffs' Second Amended Complaint	01/31/2022	25-26	1274-95

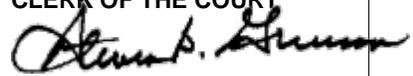
DOCUMENT DESCRIPTION	Date	Vol.	Page
Answer, Defenses, and Jury Demand of Defendant The Poker Palace to Plaintiffs' Second Amended Complaint	01/31/2022	24-25	1251-73
Answer, Defenses, and Jury Demand of Defendant Quick Stop Market, LLC to Plaintiffs' Second Amended Complaint	01/31/2022	23-24	1228-50
Answer, Defenses, and Jury Demand of Defendant R.J. Reynolds Tobacco Company to Plaintiffs' Second Amended Complaint	01/31/2022	30-35	1389-1484
Answer, Defenses, and Jury Demand of Defendant Silver Nugget Gaming, LLC to Plaintiffs' Second Amended Complaint	01/31/2022	27-28	1319-41
Defendants' Motion to Strike the Lawyer-Related Allegations in Plaintiff's Amended Complaint	03/29/2021	4	563-71
Defendants' Notice of Serving Supplemental Exhibit in Support of Defendants' Motion to Dismiss	06/17/2020	1	113-22
Defendant Philip Morris USA Inc.'s Motion to Dismiss Plaintiff's Amended Complaint Under NRCP 12(b)(5)	03/29/2021	4	549-62
Defendant Philip Morris USA Inc.'s Notice of Filing of Petitions for Writs of Prohibition or Mandamus Before the Nevada Supreme Court	11/09/2021	12	847-926
Defendant Philip Morris USA Inc.'s Opposition to Plaintiff's Motion for	12/10/2020	2	281-94

DOCUMENT DESCRIPTION	Date	Vol.	Page
Leave to File Amended Wrongful Death Complaint and Plaintiff's Motion to Substitute Parties			
Defendant Philip Morris USA Inc.'s Opposition to Plaintiff's Motion to Reconsider Order Granting Defendant Philip Morris USA Inc.'s Motion to Dismiss Plaintiff's Amended Complaint Under NRCP 12(b)(5)	10/07/2021	11	807-20
Defendant Philip Morris USA Inc.'s Reply to Plaintiff's Opposition to Defendant Philip Morris USA Inc.'s Motion to Dismiss Plaintiff's Amended Complaint Under NRCP 12(b)(5)	04/22/2021	4	611-24
Defendants' Reply in Support of Their Motion to Strike the Lawyer-Related Allegations in Plaintiff's Amended Complaint	04/27/2021	4	625-30
Errata to Plaintiff's Motion for Leave to File Amended Wrongful Death Complaint and Plaintiff's Motion to Substitute Parties	11/30/2020	2	148-280
Letters of Special Administration	08/31/2021	4	631-32
Liggett Group LLC's Answer and Affirmative Defenses to Plaintiff's Amended Complaint	10/04/2021	10	762-806
Liggett Group LLC's Answer and Affirmative Defenses to Plaintiffs' Amended Complaint	10/04/2021	28-30	1342-88

DOCUMENT DESCRIPTION	Date	Vol.	Page
Order Denying Defendants' Motion to Strike the Lawyer-Related Allegations in Plaintiff's Amended Complaint	09/12/2021	4	642-49
Order Denying Defendants Philip Morris USA Inc.'s and Liggett Group LLC's Motion to Dismiss Plaintiff's Second Amended Complaint (<i>Tully</i> , No. A-19-802987-C)	04/20/2021	35	1617-1625
Order Denying Philip Morris USA Inc.'s Motion to Dismiss Plaintiff's Complaint Under NRCP 12(b)(5)	08/25/2020	1	123-36
Order Granting in Part and Denying in Part Plaintiff's Motion for Leave to File Amended Wrongful Death Complaint, and Plaintiff's Motion to Substitute Parties	03/11/2021	2	300-09
Order Granting Plaintiffs' Motion to Reconsider Order Granting Defendant Philip Morris USA Inc.'s Motion to Dismiss Plaintiff's Amended Complaint Under NRCP 12(b)(5)	04/19/2022	35	1485-91
Order Granting Plaintiffs' Motion to Reconsider Order Granting Defendant R.J. Reynolds Tobacco Company's Motion to Dismiss Plaintiffs' Amended Complaint Under NRCP 12(b)(5) (<i>Camacho</i> , No. A-19-807650-C)	11/03/2021	35	1626-1632
Plaintiff's Amended Complaint	03/15/2021	3	310-438
Plaintiff's Motion for Leave to File Second Amended Complaint	12/21/2021	12-17	927-1065

DOCUMENT DESCRIPTION	Date	Vol.	Page
Plaintiff's Motion to Reconsider Order Granting Defendant Philip Morris USA Inc.'s Motion to Dismiss Plaintiff's Amended Complaint Under NRCPC 12(b)(5)	09/23/2021	5	650-72
Plaintiff's Notice of Serving Supplemental Authority	06/16/2020	1	106-12
Plaintiff's Opposition to Defendant Philip Morris USA Inc.'s Motion to Dismiss Plaintiff's Amended Complaint	04/12/2021	4	572-96
Plaintiff's Opposition to Defendants' Motion to Strike the Lawyer-Related Allegations to Plaintiff's Amended Complaint	04/12/2021	4	597-610
Plaintiff's Reply to Defendant Philip Morris USA Inc.'s Opposition to Plaintiff's Motion for Leave to File Amended Wrongful Death Complaint and Plaintiff's Motion to Substitute Parties	12/30/2020	2	295-99
Plaintiff's Reply to Defendant Philip Morris USA Inc.'s Opposition to Motion to Reconsider Order Granting Motion to Dismiss Plaintiff's Amended Complaint Under NRCPC 12(b)(5)	10/20/2021	11	821-33
Plaintiffs' Second Amended Complaint	01/11/2022	18-23	1073-1227
Plaintiff's Supplement to Motion to Reconsider Order Granting Defendant Philip Morris USA Inc.'s Motion to	11/08/2021	11	834-46

DOCUMENT DESCRIPTION	Date	Vol.	Page
Dismiss Plaintiff's Amended Complaint Under NRCP 12(b)(5)			
Stipulation and Order Regarding Plaintiff's Motion for Leave to File Second Amended Complaint	01/07/2022	18	1066-72
Stipulation Regarding Plaintiff's Amended Complaint	08/25/2020	1	137-44
Suggestion of Death Upon the Record	09/03/2020	1	145-47
Transcript Excerpts from Depositions of Plaintiff Dolly Rowan (taken December 6, 2021); Plaintiff Russell Thompson (taken February 17, 2022); and Plaintiff Navona Collison	02/15/2022	35	1598-1616



WEINBERG WHEELER
HUDGINS GUNN & DIAL



1 **MDSM**
2 D. Lee Roberts, Jr., Esq.
3 lroberts@wwhgd.com
4 Nevada Bar No. 8877
5 Howard J. Russell, Esq.
6 hrussell@wwhgd.com
7 Nevada Bar No. 8879
8 Phillip N. Smith, Jr., Esq.
9 psmithjr@wwhgd.com
10 Nevada Bar No. 10233
11 Daniela LaBounty, Esq.
12 dlabounty@wwhgd.com
13 Nevada Bar No. 13169
14 WEINBERG, WHEELER, HUDGINS,
15 GUNN & DIAL, LLC
16 6385 South Rainbow Blvd., Suite 400
17 Las Vegas, Nevada 89118
18 Telephone: (702) 938-3838
19 Facsimile: (702) 938-3864

20 *Attorneys for Defendant Philip Morris USA Inc.*

21 **DISTRICT COURT**
22 **CLARK COUNTY, NEVADA**

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

25 Plaintiff,

26 vs.

27 PHILIP MORRIS USA INC., a foreign
28 corporation; R.J. REYNOLDS TOBACCO
COMPANY, a foreign corporation,
individually, and as successor-by-merger to
LORILLARD TOBACCO COMPANY and as
successor-in-interest to the United States
tobacco business of BROWN &
WILLIAMSON TOBACCO CORPORATION,
which is the successor-by-merger to THE
AMERICAN TOBACCO COMPANY;
LIGGETT GROUP, LLC., a foreign
corporation; QUICK STOP MARKET, LLC, a
domestic limited liability company; JOE'S
BAR, INC., a domestic corporation; THE
POKER PALACE, a domestic corporation;
SILVER NUGGET GAMING, LLC d/b/a

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

HEARING REQUESTED

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



1 SILVER NUGGET CASINO, a domestic
2 limited liability company, JERRY’S NUGGET,
3 a domestic corporation; and DOES I–X; and
4 ROE BUSINESS ENTITIES XI–XX, inclusive,
5
6 Defendants.

7 **DEFENDANT PHILIP MORRIS USA INC.’S**
8 **MOTION TO DISMISS PLAINTIFF’S AMENDED COMPLAINT**

9 Defendant Philip Morris USA Inc., by and through its counsel of record, hereby files this
10 Motion to Dismiss Plaintiff’s Amended Complaint Under NRCPC 12(b)(5) (the “Motion”).

11 This Motion is made and based upon the pleadings and papers on file here, the following
12 Memorandum of Points and Authorities, and any oral argument allowed at the time of hearing on
13 this matter.

14 **MEMORANDUM OF POINTS AND AUTHORITY**

15 **INTRODUCTION**

16 Plaintiff Dolly Rowan brings 14 causes of action in this lawsuit for negligence, strict
17 liability, fraudulent misrepresentation, fraudulent concealment, civil conspiracy to defraud, and
18 deceptive trade practices.¹ All of these claims seek to recover damages for the same alleged
19 injury: Decedent Noreen Thompson’s lung cancer and death allegedly caused by smoking Pall
20 Mall, Camel, Viceroy, and Pyramid brand cigarettes. It is undisputed that Defendant R.J.
21 Reynolds Tobacco Company (“Reynolds”) is the *sole* manufacturer of the Pall Mall, Camel, and
22 Viceroy brand cigarettes that allegedly caused Decedent’s lung cancer and death. It also is
23 undisputed that Defendant Liggett Group LLC is the *sole* manufacturer of the Pyramid brand
24 cigarettes that allegedly caused Decedent’s lung cancer and death. Nevertheless, Plaintiff
25 includes Philip Morris USA Inc. (“PM USA”) as a Defendant in her claims for civil conspiracy
26 to defraud and deceptive trade practices, despite failing to allege that Decedent ever purchased or
27 smoked its cigarettes.

28 As such, both of these causes of action fail to state claims upon which this Court can

¹ Plaintiff brings these specific claims under both the Nevada Wrongful Death and Survival Statutes for 14 separate causes of action.



1 grant relief. *First*, in a product liability lawsuit (such as this one) a plaintiff only can recover
2 against the defendant that manufactured the product that caused the alleged injuries (or at least
3 an entity in the manufacturer’s direct chain of sale and distribution). This principle applies to
4 every cause of action in a product liability lawsuit, irrespective of how a plaintiff decides to label
5 his or her claims. Plaintiff’s claims against PM USA therefore fail because there are no
6 allegations that Decedent ever purchased or smoked its cigarettes, much less that its cigarettes
7 caused her lung cancer and death. *Second*, absent allegations that Decedent actually purchased
8 and smoked PM USA’s cigarettes, it is undisputed that there has never been a transaction
9 between PM USA and Decedent, and Plaintiff cannot establish (i) the existence of any legal
10 relationship between Decedent and PM USA or (ii) the causation element of her deceptive trade
11 practices claims. *Finally*, Plaintiff’s civil conspiracy to defraud claim is derivative of her
12 deceptive trade practices claim and therefore fails as well.

13 Importantly, in another smoking-and-health case pending in the Eighth Judicial District,
14 Judge Kerry Earley dismissed *with prejudice* the plaintiffs’ civil conspiracy to defraud and
15 deceptive trade practices claims against R.J. Reynolds for these very reasons; *i.e.* there was no
16 allegation that R.J. Reynolds products were purchased or used by the injured party (R.J.
17 Reynolds was a “Non-Use Defendant”). Order, *Camacho v. Philip Morris USA, Inc.*, No. A-19-
18 807650-C (8th Jud. Dist. Ct.) (entered Aug. 27, 2020) (“*Camacho Order*”) (Ex. A); *see also*
19 Order, *Kelly v. Philip Morris USA Inc.*, No. A-20-820112-C (8th Jud. Dist. Ct.) (entered Dec. 30,
20 2020) (granting a substantially similar motion to dismiss a plaintiff’s deceptive trade practices
21 claims in a smoking-and-health case where plaintiff did not purchase or smoke a defendant’s
22 cigarettes) (“*Kelly Order*”) (Ex. B).

23 In its Order Denying Defendants Philip Morris USA Inc’s Motion to Dismiss Plaintiffs’
24 Complaint Under NRCP 12(b)(5) (“*Prior Order*”) filed on August 25, 2020, the Court denied the
25 motion to dismiss a prior Complaint in this action, but treated the motion as an NRCP 12(e)
26 motion for more definite statement and granted it. In doing so, the Court explained that:

27 Plaintiff Thompson acknowledges that she did not use the cigarettes
28 manufactured, distributed or sold by Philip Morris. Thus, the factual basis of
 Philip Morris’ liability is unclear.

1 Prior Order at 5:1–6. In this Amended Complaint, Plaintiff does nothing to satisfy the Court’s
2 concerns. All Plaintiff does differently is add additional detail to the same allegations. The
3 Amended Complaint is devoid of any factual allegation which, if true, would establish a legal
4 relationship between Decedent and PM USA.

5 PM USA respectfully requests that this Court rule accordingly and dismiss Counts IX, X,
6 XI, and XII of Plaintiff’s Amended Complaint against PM USA with prejudice.

7 ARGUMENT

8 **A. Pleading Standard.**

9 A party may move for the dismissal of a pleading because it fails to state a claim upon
10 which relief may be granted. *See* NRCP 12(b)(5). For purposes of a Rule 12(b)(5) motion, the
11 “court accepts the plaintiffs’ factual allegations as true, but the allegations must be legally
12 sufficient to constitute the elements of the claim asserted.” *Sanchez v. Wal-Mart Stores, Inc.*,
13 125 Nev. 818, 823, 221 P.3d 1276, 1280 (2009) (internal citation omitted). “The test for
14 determining whether the allegations of a cause of action are sufficient to assert a claim for relief
15 is whether the allegations give fair notice of the nature and basis of the claim and the relief
16 requested.” *Ravera v. City of Reno*, 100 Nev. 68, 70, 675 P.2d 407, 408 (1984) (internal
17 citations omitted). While notice pleading “relieve[s] the pleader from the niceties of the dotted i
18 and the crossed t and the uncertainties of distinguishing in advance between evidentiary and
19 ultimate facts,” a plaintiff still must “set out sufficient factual matter to outline the elements of
20 [her] cause of action or claim, proof of which is essential to [his] recovery.” *Danning v. Lum’s,*
21 *Inc.*, 86 Nev. 868, 870, 478 P.2d 166, 167 (1970) (internal citation omitted). In other words, a
22 plaintiff’s complaint must allege facts sufficient to establish all necessary elements of each cause
23 of action upon which the plaintiff seeks recovery. Dismissal is appropriate if the complaint fails
24 to “allege[] facts necessary to establish” a cause of action under Nevada law. *Snyder v. Viani,*
25 110 Nev. 1339, 1344, 885 P.2d 610, 613 (1994) (affirming grant of a motion to dismiss because
26 the plaintiff “ha[d] not alleged facts necessary to establish contract formation” to support a
27 “breach of contract claim”).

28 ///

1 **B. Plaintiff’s Claims Against PM USA Fail Because Decedent Did Not Smoke—**
2 **and Therefore Was Not Harmed By—Its Cigarettes.**

3 In a product liability lawsuit (*i.e.*, where a specific product caused an alleged injury), a
4 plaintiff only may recover against the manufacturer of the product that caused the alleged injury.
5 *See Allison v. Merck & Co.*, 110 Nev. 762, 767, 878 P.2d 948, 952 (1994); *Holcomb v. Ga. Pac.*,
6 *LLC*, 128 Nev. 614, 621–22, 289 P.3d 188, 193 (2012) (“Regardless of the cause of action,
7 causation—encompassing both medical causation and sufficient exposure—is a necessary
8 element in proving appellants’ case [A]ppellants must demonstrate that a *particular*
9 *defendant* sufficiently exposed [the appellants] to asbestos in order to establish adequate
10 causation to hold that defendant liable.” (emphasis added) (citations omitted)). This principle
11 applies to every cause of action in a product liability lawsuit irrespective of “whether Plaintiff
12 characterizes her claims as misrepresentation/fraud or claims arising in product liability.”
13 *Moretti v. Wyeth, Inc.*, No. 2:08-cv-00396-JCM-(GWF), 2009 WL 749532, at *4 (D. Nev. Mar.
14 20, 2009). Therefore, a defendant who did not manufacture the product that caused a plaintiff’s
15 alleged injury cannot be liable in a product liability lawsuit for those alleged injuries. *Id.* at *3–4
16 (granting summary judgment in defendants’ favor on plaintiff’s four fraud-based claims in part
17 because plaintiff did not purchase or ingest their prescription medication); *Baymiller v. Ranbaxy*
18 *Pharms., Inc.*, 894 F. Supp. 2d 1302, 1309–11 (D. Nev. 2012) (relying on *Moretti* and granting
19 summary judgment in defendant’s favor on plaintiff’s fraud and negligent misrepresentation
20 claims because plaintiff “did not purchase or ingest a Glaxo product”). The *Moretti* case
21 illustrates this principle.

22 In *Moretti*, the plaintiff asserted 13 different product liability claims against four
23 manufacturers (*i.e.*, Wyeth, Schwarz, Pilva, and Teva) for injuries allegedly caused by ingesting
24 a “generic” prescription drug medication. *Moretti*, 2009 WL 749532, at *2. However, the
25 plaintiff did not ingest any medications manufactured by Wyeth or Schwarz and therefore
26 conceded entry of summary judgment on nine of her 13 product liability claims against Wyeth
27 and Schwarz for this reason. *Id.* Conversely, the plaintiff maintained that she could pursue her

27 ///

28 ///



1 four fraud-based claims² against both Wyeth and Schwarz because her doctor allegedly relied on
2 a label attached to their “name brand” product to prescribe plaintiff’s medication. *Id.* at *3. The
3 court disagreed and granted summary judgment in Wyeth and Schwarz’s favor on the plaintiff’s
4 four fraud-based claims. *Id.* The court reasoned that only the defendant who “manufactured or
5 distributed the product that injured [the] [p]laintiff” could be liable in a product liability lawsuit
6 for the plaintiff’s alleged injuries. *Id.* at *4. The court emphasized that this principle applied to
7 all of the plaintiff’s claims irrespective of “whether [the] [p]laintiff characterizes [them] as
8 misrepresentation/fraud or claims arising in product liability” because bringing fraud-based
9 claims in a product liability lawsuit is simply “an effort to recover for injuries caused by a
10 product without meeting the requirements the law imposes in product liability actions.” *Id.*
11 (*quoting Foster v. Am. Home Prod. Corp.*, 29 F.3d 165, 168 (4th Cir. 1994)).

12 Here, Plaintiff’s claims for civil conspiracy to defraud and deceptive trade practices fail
13 against PM USA for lack of product use. Like in *Moretti*, Plaintiff does not allege that Decedent
14 ever purchased or smoked cigarettes manufactured by PM USA. *See generally* Compl. Nor
15 does he allege, like in *Moretti*, that PM USA’s cigarettes caused Decedent’s lung cancer and
16 death. *Id.* Rather, Plaintiff only alleges that Decedent purchased, smoked, and subsequently was
17 injured by cigarette brands manufactured by Reynolds (*i.e.*, Pall Mall, Camel, and Viceroy) and
18 Liggett (*i.e.*, Pyramid). *Id.* at ¶¶ 19–23. Plaintiff therefore cannot maintain claims for civil
19 conspiracy to defraud or deceptive trade practices against PM USA. Indeed, as the *Moretti* court
20 emphasized, the fact that Plaintiff has attempted to characterize her claims as sounding in fraud
21 is irrelevant. What matters is that Plaintiff alleges that Decedent was injured by the use of a
22 product—which makes this a **product liability case** no matter how Plaintiff tries to characterize
23 her cause of action in an attempt to avoid **the requirement of product use**.

24 Plaintiff alleges that Decedent only smoked Pall Mall, Camel, Viceroy, and Pyramid
25 brand cigarettes manufactured by Reynolds and Liggett. *Id.* Accordingly, Plaintiff’s causes of
26

27
28 ² Plaintiff’s four fraud-based claims were (i) misrepresentation by omission, (ii) constructive fraud,
(iii) negligent misrepresentation, and (iv) fraud by concealment.



1 action against manufacturers who did not manufacture Pall Mall, Camel, Viceroy, and Pyramid
2 brand cigarettes—*i.e.*, PM USA—fail for this reason alone.

3 **C. Plaintiff’s Nevada Deceptive Trade Practices Claims also Fail for Lack of**
4 **Any Legal Relationship and Causation.**

5 Plaintiff alleges that PM USA engaged in various levels of misconduct that constitute
6 “deceptive trade practice” under Nevada law. *See* Compl. ¶¶ 383–425. But, NRS 41.600(1)
7 dictates that a deceptive trade practices claim must be “brought by [a] person who is a victim of
8 consumer fraud.” NRS 41.600(1). To succeed on a deceptive trade practices claim pursuant to
9 Section 41.600(1), a plaintiff must establish that “(1) an act of consumer fraud by the defendant
10 (2) caused (3) damage to the plaintiff.” *Picus v. Wal-Mart Stores, Inc.*, 256 F.R.D. 651, 658 (D.
11 Nev. 2009). Nevada law also requires the existence of a duty—*i.e.*, some form of a relationship
12 between plaintiff and defendant—to succeed on a fraud-based claim. *See Dow Chem. Co. v.*
13 *Mahlum*, 114 Nev. 1468, 1485–87, 970 P.2d 98, 110–11 (1998), *abrogated on other grounds*
14 *by GES, Inc. v. Corbitt*, 117 Nev. 265, 21 P.3d 11 (2001). Where a product manufacturer is “not
15 directly involved in the transaction from which [the] lawsuit arose” and did not manufacture the
16 product that caused the alleged injury, courts have held that there is no legal relationship between
17 the parties. *See, e.g., id.* at 111 (reversing judgment against defendant on fraudulent
18 misrepresentation claim “because it was not directly involved in the transaction from which [the]
19 lawsuit arose, or any other transaction with the Mahlums”); *Moretti*, 2009 WL 749532, at *3
20 (dismissing plaintiff’s four fraud-based claims in part because “[p]laintiff did not purchase or
21 ingest a Wyeth or Schwarz product and, therefore, she did not have a relationship with either
22 defendant”); *Baymiller*, 894 F. Supp. 2d at 1309–11 (granting summary judgment in defendant’s
23 favor on plaintiff’s fraud and negligent misrepresentation claims because plaintiff “did not
24 purchase or ingest a Glaxo product” and therefore “did not have a relationship with Glaxo [who]
25 did not owe [plaintiff] any duty to warn”).

26 Here, Plaintiff’s deceptive trade practices claims fail for lack of a legal relationship and
27 causation. As previously stated, Plaintiff did not purchase, smoke, or suffer any harm caused by
28 cigarettes manufactured by PM USA—only allegedly Pall Mall, Camel, and Viceroy brand

1 cigarettes, manufactured by Reynolds, and Pyramid brand cigarettes, manufactured by Liggett.
2 *See generally* Compl. Like the plaintiffs in *Moretti* and *Baymiller*, there was no legal
3 relationship between Decedent and PM USA, much less one sufficient to trigger a duty to
4 disclose any material information regarding the health effects of smoking cigarettes.

5 Likewise, since Decedent did not smoke any cigarettes manufactured by PM USA,
6 Plaintiff has failed to plead facts sufficient to show that PM USA’s alleged deceptive trade
7 practices actually caused harm to Decedent. In other words, without ever purchasing and
8 smoking cigarettes manufactured by PM USA, Decedent could not have been damaged by PM
9 USA cigarettes or any trade practices connected with their sale. Indeed, Judge Earley applied
10 this same rationale to dismiss the plaintiffs’ deceptive trade practices claims against Non-Use
11 Defendant R.J. Reynolds in the *Camacho* smoking-and-health case:

12 It is undisputed that Plaintiff Sandra Camacho did not purchase or
13 use any R.J. Reynolds product. Plaintiffs therefore could not plead
14 facts sufficient to show that R.J. Reynolds caused damage to []
15 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.

16 *See Camacho* Order at 2 (Ex. A); *see also generally Kelly* Order (granting a substantially similar
17 motion to dismiss a plaintiff’s deceptive trade practices claims in a smoking-and-health case
18 where plaintiff did not purchase or smoke a defendant’s cigarettes) (Ex. B).

19 Plaintiff’s claims under the Nevada Deceptive Trade Practices Act also fail for the
20 closely related reason that there was no sale of goods or other “transaction” involving PM USA.
21 Just as any claim for fraud requires a legal relationship establishing a duty, *Dow Chem. Co. v.*
22 *Mahlum*, 970 P. 2d 98, 110–11 (1998), a statutory claim under the NDTPA requires a transaction
23 between the parties as a necessary element of a valid cause of action. The transaction creates the
24 legal relationship and the duty. The legislative history and the plain meaning of the statutory
25 language make this clear.

26 The Nevada Deceptive Trade Practices Act was first enacted in 1973. *See* 1973 Statutes
27 of Nevada, Page 1482 (CHAPTER 729, AB 301). When the Act was first passed, it applied to a
28 “sale of goods.” *Id.* The legislative history for the 1999 amendments shows that the Legislature

1 understood that there could be no liability under the then existing version of the NDTPA without
2 a sale of goods:

3 Sections 4, 5, and 6, described the unfair and deceptive trade
4 practice law, *which currently did not make anything illegal unless*
5 *a sale of goods took place.* A major loophole was left open
6 because leasing was not included. Section 6, page 3, paragraph 14,
added another deceptive trade practice: “knowingly making a false
representation.”

7 AB 431 – 1999 at 7, [https://www.leg.state.nv.us/Division/Research/Library/LegHistory/LHs/
8 1999/AB431,1999pt1.pdf](https://www.leg.state.nv.us/Division/Research/Library/LegHistory/LHs/1999/AB431,1999pt1.pdf).

9 In order to close this perceived “loophole,” the 1999 amendments to the Nevada
10 Deceptive Trade Practices Act expanded the application of the act to leases, amending multiple
11 parts of the Act to apply whether the transaction was a “sale or lease.” *See* 1999 Statutes of
12 Nevada, Pages 3280–81 (CHAPTER 604, AB 431). The legislature also added the broad
13 deceptive trade practice referenced in the legislative history quoted above, “knowingly making a
14 false representation.” But the exact language used by the legislature acknowledges that the false
15 representation still has to be made as part of a transaction with the defendant:

16 Sec. 2. NRS 598.0915 is hereby amended to read as follows:

17 598.0915 A person engages in a “deceptive trade practice” if, in
18 the course of his business or occupation, he:

19 * * *

20 14. Knowingly makes any other false representation in a
transaction.

21 *See* 1999 Statutes of Nevada, Pages 3280–81 (CHAPTER 604, AB 431), still included in the
22 current statute at NRS 598.0915(16). Accordingly, even after the expansive 1999 amendments,
23 a person does not engage in a deceptive trade practice *unless* he makes false representations “in a
24 transaction.” Plaintiff alleges no transaction between Decedent and PM USA, and her cause of
25 action fails.

26 The Court should dismiss with prejudice Plaintiff’s deceptive trade practices claims
27 against PM USA. Alternatively, at a minimum, the Court should dismiss the allegations that any
28 representation in violation of the Nevada Deceptive Trade Practices Act caused Decedent to start

1 smoking and continue smoking prior to 1973. Plaintiff alleges that Decedent “was addicted and
2 smoked continuously from approximately 1954 until 2019.” *See* Compl. ¶ 19. Plaintiff also
3 alleges that “Defendants’ following false and misleading marketing and advertisements of
4 cigarettes, . . . caused her to start and continue smoking” *See* Compl. ¶ 253; *see also*
5 Compl. ¶¶ 254, 257. The fatal flaw in Plaintiff’s allegations is that the NDTPA was not enacted
6 until 1973 and was not effective until 12:02 a.m. on July 1, 1973. *See* 1973 Statutes of Nevada,
7 Page 1489 (CHAPTER 729, AB 301) at Sec. 34. Even if true, PM USA’s alleged conduct could
8 not have violated an Act that did not exist. Plaintiff cannot prove a violation of the NDTPA by
9 alleging conduct and causation that occurred *prior* to the effective date of the Act.

10 **D. Plaintiff’s Claims for Civil Conspiracy to Defraud Also Fail Because Her**
11 **Underlying Deceptive Trade Practices Claims Fail.**

12 Under Nevada law, an actionable claim for civil conspiracy to defraud exists when the
13 following elements are present: “(1) a conspiracy agreement, *i.e.*, a combination of two or more
14 persons who, by some concerted action, intend to accomplish an unlawful objective for the
15 purpose of harming another; (2) an overt act of fraud in furtherance of the conspiracy; and (3)
16 resulting damages to the plaintiff.” *Jordan v. State ex rel. Dep’t of Motor Vehicles & Pub.*
17 *Safety*, 121 Nev. 44, 74–75, 110 P.3d 30, 51 (2005), *overruled on other grounds*, 124 Nev. 224,
18 181 P.3d 670 (2008). However, civil conspiracy to defraud is a derivative claim and therefore
19 “an underlying cause of action for fraud is a *necessary predicate* to a cause of action for
20 conspiracy to defraud.” *Id.* at 51 (emphasis added); *see also Goodwin v. Exec. Tr. Servs., LLC*,
21 680 F. Supp. 2d 1244, 1255 (D. Nev. 2010) (courts should look to “[t]he substance of [the]
22 allegations” when determining whether a plaintiff has pleaded such a claim properly).

23 Just as a plaintiff cannot assert a claim for product liability if she cannot establish that a
24 particular manufacturer’s product caused an alleged injury, a plaintiff similarly cannot sustain a
25 civil conspiracy claim against a manufacturer whose product did not harm the plaintiff. In
26 *Chavers v. Gatke Corporation*, 107 Cal. App. 4th 606, 612, 132 Cal. Rptr. 2d 198, 201 (2003),
27 *as modified* (Apr. 25, 2003), the plaintiff asserted a conspiracy claim and product liability causes
28 of action based on allegations that Gatke was part of an industry-wide effort to suppress

1 information concerning the hazards of asbestos. However, the plaintiff was unable to prove that
2 a product Gatke manufactured caused the injury at issue. The court explained that “[a] duty,
3 however, independent of the conspiracy itself, must exist in order for substantive liability to
4 attach.” *Id.* at 202. Without sufficient product identification evidence, the defendant owed no
5 duty to the plaintiff, and without such a duty, no basis existed to find the manufacturer liable for
6 conspiracy. *Id.* “[B]efore one can be held liable for civil conspiracy, he must be capable of
7 being *individually liable for the underlying wrong as a matter of substantive tort law*. And that
8 requirement, of course, means he must have owed a legal duty of care to the plaintiff, one that
9 was breached to the latter’s injury.” *Id.* at 201 (emphasis in original); *see also Applied Equip.*
10 *Corp. v. Litton Saudi Arabia Ltd.*, 7 Cal. 4th 503, 514, 869 P.2d 454, 459 (1994) (“Conspiracy is
11 not an independent tort; it cannot create a duty or abrogate an immunity. It allows tort recovery
12 only against a party who already owes the duty and is not immune from liability based on
13 applicable substantive tort law principles.”).

14 These California cases are particularly persuasive because Nevada drew its elements of
15 the cause of action for civil conspiracy from California law. *See Collins v. Union Fed. Sav. &*
16 *Loan Ass’n*, 99 Nev. 284, 303, 662 P.2d 610, 622 (1983) (*citing Wise v. S. Pac. Co.*, 223 Cal.
17 App. 2d 50, 35 Cal. Rptr. 652 (1963)).

18 Here, because Plaintiff’s deceptive trade practices claims fail for lack of a legal
19 relationship and causation, there is no actionable fraud claim against PM USA to support her
20 claim for civil conspiracy to defraud. *See supra* at 6–8. Plaintiff’s civil conspiracy to defraud
21 claim fails against PM USA as a result. Indeed, Judge Earley applied this same reasoning to
22 dismiss plaintiff’s claim alleging civil conspiracy to defraud against Non-Use Defendant R.J.
23 Reynolds in *Camacho*. *Camacho* Order at 3 (dismissing the plaintiff’s civil conspiracy to
24 defraud claim against the defendant whose cigarettes the plaintiff did not smoke because “[c]ivil
25 [c]onspiracy is a derivative claim in Nevada with the Plaintiff alleging the Violation of
26 Deceptive Trade Practices Act as the underlying unlawful objective”) (Ex. A).

27 ///

28 ///



1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

CONCLUSION

For the reasons stated above, Philip Morris USA Inc. respectfully requests that the Court enter an order dismissing Counts IX, X, XI, and XII of Plaintiff’s Amended Complaint against it with prejudice.

Dated this 29th day of March, 2021.

WEINBERG, WHEELER, HUDGINS,
GUNN & DIAL, LLC

/s/ D. Lee Roberts, Jr.

D. Lee Roberts, Jr., Esq.
Howard J. Russell, Esq.
Phillip N. Smith, Jr., Esq.
Daniela LaBounty, Esq.
6385 South Rainbow Blvd., Suite 400
Las Vegas, Nevada 89118
Attorney for Defendant Philip Morris USA Inc.



1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of March, 2021, a true and correct copy of the foregoing **DEFENDANT PHILIP MORRIS USA INC.’S MOTION TO DISMISS PLAINTIFF’S AMENDED COMPLAINT UNDER NRCP 12(b)(5)** was electronically filed and served on counsel through the Court’s electronic service system pursuant to Administrative Order 14-2 and N.E.F.C.R. 9, via the electronic mail addresses noted below, unless service by another method is stated or noted:

Sean K. Claggett, Esq.
sclaggett@claggettlaw.com
William T. Sykes, Esq.
wsykes@claggettlaw.com
Matthew S. Granda, Esq.
mgranda@claggettlaw.com
CLAGGETT & SYKES LAW FIRM
4101 Meadows Lane, Suite 100
Las Vegas, NV 89107
(702) 655-2346
(702) 655-3763 FAX

Kimberly Lauren Wald, Esq.
Admitted Pro Hac Vice
klw@kulaw.com
KELLEY UUSTAL, PLC
500 North Federal Highway, Suite 200
Fort Lauderdale, FL 33301
(305) 444-7675
(305) 444-0075 FAX

Attorneys for Plaintiff

Dennis L. Kennedy, Esq.
DKennedy@baileykennedy.com
Joseph A. Liebman, Esq.
JLiebman@baileykennedy.com
BAILEY ❖ KENNEDY
8984 Spanish Ridge Ave.
Las Vegas, Nevada 89148
(702) 562-8820
(702) 562-8821 FAX

Valentin Leppert, Esq.
Admitted Pro Hac Vice
VLeppert@kslaw.com
Spencer Miles Diamond, Esq.
SDiamond@kslaw.com
Admitted Pro Hac Vice
KING & SPALDING
1180 Peachtree Street NE, Suite 16090
Atlanta, GA 30309
(404) 572-3578
(404) 572-5100 FAX

Ursula Marie Henninger, Esq.
Admitted Pro Hac Vice
UHenninger@kslaw.com
KING & SPALDING
300 S. Tryon Street
Charlotte, NC 28202
(704) 503-2631
(704) 503-2622 FAX

*Attorneys for Defendants
RJ Reynolds Tobacco Company, Quick Stop
Market, LLC, Joe’s Bar, Inc., The Poker
Palace, Silver Nugget Gaming, LLC d/b/a
Silver Nugget Casino, and Jerry’s Nugget*



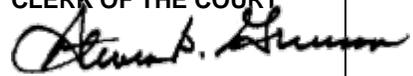
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

J Christopher Jorgensen, Esq.
CJorgensen@lrrc.com
LEWIS ROCA ROTHGERBER CHRISTIE LLP
3993 Howard Hughes Parkway, Suite 600
Las Vegas, Nevada 89169
(702) 949-8200

Kelly Ann Luther
Pro Hac Vice
kluther@kasowitz.com
KASOWITZ BENSON TORRES LLP
1441 Brickwell Avenue, Suite 1420
Miami, Florida 33131
Phone: 786-587-1045

*Attorneys for Defendant
Liggett Group, LLC*

/s/ Kelly L. Pierce
An employee of WEINBERG, WHEELER,
HUDGINS, GUNN & DIAL, LLC



1 **MSTR (CIV)**

DENNIS L. KENNEDY
2 Nevada Bar No. 1462

3 JOSEPH A. LIEBMAN
Nevada Bar No. 10125

4 **BAILEY ❖ KENNEDY**

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

7
8 VALENTIN LEPPERT
(ADMITTED PRO HAC VICE)
SPENCER MILES DIAMOND
9 (ADMITTED PRO HAC VICE)

10 **KING & SPALDING**

11 1180 Peachtree Street NE, Suite 16090
Atlanta, Georgia 30309
Telephone: 404.572.3578
Facsimile: 404.572.5100
12 VLeppert@kslaw.com
SDiamond@kslaw.com

13
14 URSULA MARIE HENNINGER
(ADMITTED PRO HAC VICE)

15 **KING & SPALDING**

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

18 *Attorneys for Defendant*

R.J. REYNOLDS TOBACCO COMPANY

19
20 DISTRICT COURT
CLARK COUNTY, NEVADA

21
22 DOLLY ROWAN, as Special Administrator of
the Estate of NOREEN THOMPSON.

23 Plaintiff,

24 vs.

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

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

HEARING REQUESTED

DEFENDANTS' MOTION TO STRIKE
THE LAWYER-RELATED
ALLEGATIONS IN PLAINTIFF'S
AMENDED COMPLAINT

1 BROWN & WILLIAMSON TOBACCO
2 CORPORATION, which is the successor-by-
3 merger to THE AMERICAN TOBACCO
4 COMPANY; LIGGETT GROUP, LLC., a
5 foreign corporation; QUICK STOP MARKET,
6 LLC, a domestic limited liability company; JOES
7 BAR, INC., a domestic corporation; THE
8 POKER PALACE, a domestic corporation;
9 SILVER NUGGET GAMING, LLC d/b/a
10 SILVER NUGGET CASINO, a domestic limited
11 liability company, JERRY'S NUGGET, a
12 domestic corporation; and DOES 1-X; and ROE
13 BUSINESS ENTITIES XI-XX. inclusive,

Defendants.

**DEFENDANTS' MOTION TO STRIKE THE LAWYER-RELATED
ALLEGATIONS IN PLAINTIFF'S AMENDED COMPLAINT**

14 Defendants R.J. Reynolds Tobacco Company; Philip Morris USA, Inc.; and Liggett Group
15 LLC (collectively "Defendants"), by and through their undersigned counsel of record, hereby file
16 this Motion to Strike the Lawyer-Related Allegations in Plaintiff's Amended Complaint (the
17 "Motion"). This Motion is made and based on the pleadings and papers on file here, the following
18 Memorandum of Points and Authorities, and any oral argument allowed at the time of hearing on
19 this matter.

20 ///
21 ///
22 ///
23 ///
24 ///
25 ///
26 ///
27 ///
28 ///

1 DATED this 29th day of March, 2021.

2 BAILEY ❖ KENNEDY

3
4 By: /s/ Joseph A. Liebman
DENNIS L. KENNEDY
JOSEPH A. LIEBMAN

5
6 KING & SPALDING
VALENTIN LEPPERT
(ADMITTED PRO HAC VICE)
7 URSULA MARIE HENNINGER
(ADMITTED PRO HAC VICE)
8 SPENCER MILES DIAMOND
(ADMITTED PRO HAC VICE)

9
10 *Attorneys for Defendant R.J. Reynolds
Tobacco Company*

11
12 WEINBERG, WHEELER, HUDGINS,
GUNN & DIAL, LLC

13
14 By: /s/ D. Lee Roberts, Jr.
D. Lee Roberts, Jr., Esq.
(NSB #8877)
15 Phillip N. Smith, Jr., Esq.
(NSB #10233)
16 Daniela LaBounty, Esq.
(NSB #13169)

17
18 *Attorneys for Defendant Philip Morris
USA Inc.*

19
20 LEWIS ROCA ROTHGERBER
CHRISTIE LLP

21
22 By: /s/ J. Christopher Jorgensen
DANIEL F. POLSENBERG
(NSB #2376)
23 J. CHRISTOPHER JORGENSEN
(NSB #5382)

24
25 *Attorneys for Defendant Liggett Group
LLC*

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiff's Amended Complaint includes new allegations that baselessly attack opposing
4 counsel and impugn Defendants for defending themselves in lawsuits such as this one. Specifically,
5 Plaintiff's Amended Complaint includes a new series of paragraphs that allege the "Conspiratorial
6 Involvement by Defendants' Lawyers." Am. Compl. (filed Mar. 15, 2021) ¶¶ 106-114. Plaintiff
7 then re-alleges these allegations in each individual count of Plaintiff's Amended Complaint, and
8 adds additional, similar allegations in Plaintiff's counts for fraudulent misrepresentation and
9 fraudulent concealment. *Id.* at ¶¶ 115, 137, 155, 179, 198, 214-216, 235, 247-249, 267, 284-286,
10 304, 319-321, 338, 363, 383. These allegations include those that seek to incriminate a number of
11 non-party law firms that have served—and, in some instances, continue to serve—as outside counsel
12 to Defendants. *Id.* at ¶¶ 106, 108, 109.

13 The role of outside counsel in the defense of other tobacco cases is irrelevant to the
14 substantive claims that Plaintiff asserts in this case. It thus amounts to nothing more than a
15 transparent attack on defense counsel. Plaintiff is trying to lay the groundwork for her trial theme,
16 which is to paint tobacco company defense lawyers as villains that the jury should not trust. This
17 tactic is improper and invades Nevada's litigation privilege. The Court should accordingly strike
18 these allegations as improper, immaterial, impertinent, and scandalous under Rule 12(f).

19 **II. ARGUMENT**

20 Nevada Rule of Civil Procedure 12(f) allows a court to strike "immaterial, impertinent, or
21 scandalous matter[s]." NRCP 12(f); *see also Goldman v. Clark County Sch. Dist.*, No. A-18-778230,
22 2019 Nev. Dist. LEXIS 364, at *11 (Nev. 8th J.D. 2019) ("Whether to grant a motion to strike lies
23 within the sound discretion of the district court"). Nevada courts have employed Rule 12(f) to strike
24 scandalous allegations and arguments. *See, e.g., Wainwright v. Dunseath*, 46 Nev. 361, 376-77
25 (1923) (striking pleadings suggesting that the presiding judge "was prompted by unworthy motives
26 in rendering judgment"). Nevada courts have also used Rule 12(f) to strike allegations that are "in
27 dispute, involve non-parties to this action and/or are completely immaterial to the stated causes of
28 action." *Goldman*, 2019 Nev. Dist. LEXIS 364, at *11. Further, as Judge Crockett previously

1 recognized, even if allegations could be permissible against one party, the same allegations can still
2 be “scurrilous and impertinent if not scandalous” against another party, *let alone a non-party lawyer*
3 *or law firm*. Cf. *Mahon v. Newman*, No. A-18-779686-C, 2020 Nev. Dist. LEXIS 427, at *10 (Nev.
4 8th J.D. 2020) (holding that the “[c]omplaint filed by [p]laintiffs . . . show[ed] that [p]laintiffs’
5 claims were really against” one defendant and granting attorneys’ fees to another defendant where
6 the “allegations of racketeering, extortion, ransom, embezzlement, etc. amounted to nothing more
7 than scurrilous and impertinent if not scandalous allegations as to” that party).

8 Here, Plaintiff’s attacks on the conduct of counsel are scandalous and impertinent, and the
9 Court should not allow Plaintiff to plead them. These include the outrageous allegation that
10 Defendants’ outside lawyers and law firms “conspired with Defendants and acted as agents . . . in
11 furtherance of the conspiracy.” Am. Compl. ¶ 110. In labeling these non-party lawyers and law
12 firms as co-conspirators, Plaintiff seeks to paint the very defense of lawsuits as fraudulent, simply
13 because Plaintiff would prefer if Defendants uniformly capitulated. For instance, she criticizes
14 certain aspects of the legal representation of Defendants such as (i) public relations consulting, (ii)
15 litigation strategy, (iii) attending meetings, and (iv) expert witness development, and characterizes
16 these activities as playing a “central role in creating, sustaining and perpetuating the Defendants’
17 and the tobacco industry’s conspiracy.” *Id.* at ¶¶ 111-114. Plaintiff then goes on to allege numerous
18 times in her Amended Complaint that Defendants:

- 19 • “**when sued** . . . claimed that smoking was a matter for free choice and that smokers could
20 simply quit smoking if they so wanted,”
- 21 • “claimed attorney-client privilege . . . to shield . . . documents . . . from disclosure,” and
- 22 • “**when sued** . . . conducted the litigation in such a way as to cause the maximum expenditure
23 of time and resources by the claimant for the purposes of exhausting their adversaries’
resources and to discourage other meritorious litigation.”

24 *Id.* at ¶¶ 214-216, 247-249, 284-286, 319-321 (emphasis added). These allegations have no bearing
25 on Plaintiff’s claims—Decedent Noreen Thompson could not have been injured by actions taken in
26 the defense of other lawsuits. To the extent that Plaintiff’s new allegations seek to bolster or reassert
27 already-pled claims for fraud and conspiracy, it is entirely immaterial whether the alleged acts
28 involved lawyers or law firms. Instead, the real purpose of this theme is to make the jury mistrust

1 defense counsel for the tobacco companies by vilifying them for the defense of tobacco lawsuits and
2 implying that the ongoing defense of cases such as this one is a continuation of the alleged
3 conspiracy.

4 But defending lawsuits is not fraud—not now and not in the past. In fact, any such alleged
5 conduct by law firms is protected by the absolute litigation privilege. *See Clark County School Dist.*
6 *v. Virtual Educ. Software, Inc.*, 125 Nev. 374, 382-382 (2009) (stating that the absolute privilege
7 applies to current, and contemplated, proceedings and affords the same protections from liability to
8 both attorneys and parties) (internal citations omitted); *Fink v. Oshins*, 118 Nev. 428, 433-434
9 (2002) (“The scope of the absolute privilege is quite broad. . . . and courts should apply the absolute
10 privilege liberally, resolving any doubt ‘in favor of its relevancy or pertinency.’”) (internal citation
11 omitted); *Bailey v. City Attorney's Office of N. Las Vegas*, No. 2:13-cv-343-JAD-CWH, 2015 U.S.
12 Dist. LEXIS 97152, at *8-10 (D. Nev. 2015) (stating that the absolute privilege applies to tort claims
13 beyond defamation claims) (internal citations omitted); *Travelers Cas. & Sur. Co. v. Pengilly*
14 *Robbins Slater Law Firm*, 2014 U.S. Dist. LEXIS 39339, at *8-9 (D. Nev. 2014) (stating that the
15 absolute privilege encompasses not only communications but also conduct) (internal citations
16 omitted). Thus, neither Defendants nor the judicial system should have to bear these scurrilous,
17 baseless attacks.

18 Numerous Nevada courts have held that similar statements such as those asserted by
19 Plaintiff, impugning the conduct or character of opposing counsel, are “fundamentally prejudicial”
20 and “clearly misconduct by an attorney.” *See Born v. Eisenman*, 114 Nev. 854, 862 (Nev. 1998)
21 (further citing *Davis v. Sams*, 542 P.2d 943, 944 (Okla. 1975) (“Where an attorney attacks opposing
22 counsel in the presence of the jury, it constitutes grounds for a new trial if it appears that prejudice
23 may have resulted.”)).¹ The Nevada Supreme Court has further held that “it is not only improper to

24
25 ¹ Similar arguments in other smoking and health cases outside of Nevada have generated multiple appellate
26 opinions granting new trials and otherwise chastising such efforts to impugn defense efforts in litigation. *See, e.g., R.J.*
27 *Reynolds Tobacco Co. v. Gafney*, 188 So. 3d 53, 59 (Fla. 4th DCA 2016) (“The insinuation that appellants’ attorneys
28 were engaged in a conspiracy with either the defendants or third parties to mislead, conceal, or manipulate as part of an
on-going scheme did not merely push the envelope, but instead went wholly beyond the pale.”); *see also, e.g., R.J.*
Reynolds Tobacco Co. v. Calloway, 201 So. 3d 753, 760 (Fla. 4th DCA 2016) (en banc) (reversible error “for counsel to
suggest . . . that a defendant should be punished for contesting damages at trial or that defending a claim in court is
improper” (citation omitted)); *R.J. Reynolds Tobacco Co. v. Robinson*, 216 So. 3d 674, 683 (Fla. 1st DCA 2017)
(reversible error to allow plaintiff to “utterly vilify their opponent”); *Cohen v. Philip Morris USA, Inc.*, 203 So. 3d 942,

1 DATED this 29th day of March, 2021.

2 Respectfully submitted,

3 BAILEY ❖ KENNEDY

4
5 By: /s/ Joseph A. Liebman

6 DENNIS L. KENNEDY
7 JOSEPH A. LIEBMAN

8 KING & SPALDING

9 VALENTIN LEPPERT
10 (ADMITTED PRO HAC VICE)
11 URSULA MARIE HENNINGER
12 (ADMITTED PRO HAC VICE)
13 SPENCER MILES DIAMOND
14 (ADMITTED PRO HAC VICE)

15 *Attorneys for Defendants R.J. Reynolds*
16 *Tobacco Company*

17 WEINBERG, WHEELER, HUDGINS,
18 GUNN & DIAL, LLC

19 By: /s/ D. Lee Roberts, Jr.

20 D. Lee Roberts, Jr., Esq.
21 (NSB #8877)
22 Phillip N. Smith, Jr., Esq.
23 (NSB #10233)
24 Daniela LaBounty, Esq.
25 (NSB #13169)

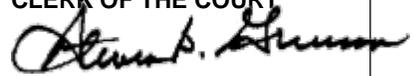
26 *Attorneys for Defendant Philip Morris*
27 *USA Inc.*

28 LEWIS ROCA ROTHGERBER CHRISTIE
LLP

By: /s/ J. Christopher Jorgensen

DANIEL F. POLSENBERG
(NSB #2376)
J. CHRISTOPHER JORGENSEN
(NSB #5382)

Attorneys for Defendant Liggett Group LLC



1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24

CLAGGETT & SYKES
LAW FIRM

RSPN
Sean K. Claggett, Esq.
Nevada Bar No. 008407
Matthew S. Granda, Esq.
Nevada Bar No. 012753
Micah S. Echols, Esq.
Nevada Bar No. 008437
CLAGGETT & SYKES LAW FIRM
4101 Meadows Lane, Suite 100
Las Vegas, Nevada 89107
(702) 655-2346 – Telephone
(702) 655-3763 – Facsimile
sclaggett@claggettlaw.com
mgranda@claggettlaw.com
micah@claggettlaw.com

Kimberly L. Wald, Esq. (admitted pro hac vice)
Florida Bar. No. 112263
KELLEY | UUSTAL
500 North Federal Highway, Suite 200
Fort Lauderdale, FL 33301
Attorneys for Plaintiff

DISTRICT COURT

CLARK COUNTY, NEVADA

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

Plaintiff,

v.

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

CASE NO. A-20-811091-C

DEPT. NO. V

**PLAINTIFF'S OPPOSITION TO
DEFENDANT PHILIP MORRIS USA
INC.'S MOTION TO DISMISS
PLAINTIFF'S AMENDED
COMPLAINT**

Hearing Date: April 29, 2021

Hearing Time: 09:30 a.m.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24

foreign corporation; QUICK STOP MARKET, LLC, a domestic limited liability company; JOE'S BAR, INC., a domestic corporation; THE POKER PALACE, a domestic corporation; SILVER NUGGET GAMING, LLC d/b/a SILVER NUGGET CASINO, a domestic limited liability company, JERRY'S NUGGET, a domestic corporation; and DOES I-X; and ROE BUSINESS ENTITIES XI-XX, inclusive

Defendants.

Plaintiff, DOLLY ROWAN, as Special Administrator of the Estate of NOREEN THOMPSON, by and through her attorneys of record, hereby submits this Opposition to Defendant Philip Morris USA Inc.'s Motion to Dismiss Plaintiff's Amended Complaint.

This Opposition is based upon the pleadings and papers on file in this action, the points and authorities set forth herein, and argument to be made by counsel at the time of the hearing.

Dated this 12th day of April, 2021.

CLAGGETT & SYKES LAW FIRM

/s/ Sean K. Claggett
Sean K. Claggett, Esq.
Nevada Bar No. 008407
Matthew S. Granda, Esq.
Nevada Bar No. 012753
Micah S. Echols, Esq.
Nevada Bar No. 008437
Attorneys for Plaintiff

1

2 **MEMORANDUM OF POINTS AND AUTHORITIES**

3 **I. INTRODUCTION**

4 This case arises out of one of the most egregious, expensive, decades-long acts of
5 fraud and conspiracy this country has ever seen. This sophisticated and complex
6 conspiracy involved false and misleading claims regarding the health hazards and
7 highly addictive nature of cigarettes and was perpetrated by the cigarette industry,
8 including Defendants herein. Decedent, NOREEN THOMPSON, was one of the
9 millions of Americans who was deceived by the cigarette industry. Ms. Thompson began
10 smoking cigarettes in approximately 1954 and continued to smoke until approximately
11 2019. In 2019 Ms. Thompson developed lung cancer as a result of smoking cigarettes
12 manufactured by Defendants, R.J. Reynolds Tobacco Company (“R.J. Reynolds”) and
13 Liggett Group LLC (“Liggett”). Ms. Thompson unfortunately passed away in June of
14 2020 during the pendency of this lawsuit. Ms. Thompson purchased cigarettes from
15 Defendants, Quick Stop Market, LLC (“Quick Stop”), Joe’s Bar, Inc. (“Joe’s Bar”), The
16 Poker Palace, Silver Nugget Gaming, LLC (“Silver Nugget”), and Jerry’s Nugget in
17 sufficient quantities to be a substantial contributing cause of her lung cancer.
18 Defendants, R.J. Reynolds and Liggett, conspired with Defendant Philip Morris USA
19 Inc. (“Philip Morris”) to conceal the true nature of the health hazards and deadly and
20 addictive nature of cigarettes from the American public, including Ms. Thompson.

21 Ms. Thompson’s daughter, DOLLY ROWAN, brings this action alleging claims of
22 negligence and strict liability based on Defendants’ manufacture and sale of cigarettes
23 that it purposefully designed to be unreasonably dangerous, as well as counts of
24

1
2 deceptive trade practice and civil conspiracy based on the decades-long campaign
3 Defendants waged to deceive the public and smokers such as Ms. Thompson. Contrary
4 to Defendants' allegations, as explained below, Plaintiff has sufficiently pled each of her
5 claims and thus Defendant's motion should be denied in its entirety.

6 **II. PROCEDURAL BACKGROUND**

7 Ms. Noreen Thompson originally brought this lawsuit on February 25, 2020.
8 Defendants, R.J. Reynolds Tobacco Company, Philip Morris, and Liggett all moved to
9 dismiss Plaintiff' complaint. Philip Morris presented the exact same arguments it
10 presents now with identical factual and legal analysis. After being briefed on these same
11 issues, this Court denied all of Defendants' motions to dismiss. *See attached Exhibit 1*
12 *Order Denying Philip Morris Motion to Dismiss* and *Order Denying Liggett and RJR*
13 *Motion to Dismiss*. Subsequently, Ms. Rowan was appointed personal representative of
14 Ms. Thompson's estate and now brings this amended complaint as a wrongful death
15 action. Now Philip Morris seeks to take advantage of Ms. Thompson's passing to
16 relitigate a host of issues already adjudicated by this Court. As the merits of this motion
17 to dismiss have already been extensively litigated, briefed, and ruled on, Plaintiff
18 respectfully requests this Court to, yet again, deny Philip Morris' motion.

19 **III. BRIEF STATEMENT OF THE FACTS**

20 **A. CIGARETTE INDUSTRY'S TWO HUNDRED AND FIFTY BILLION DOLLAR** 21 **CONSPIRACY**

22 Defendants, R.J. Reynolds, Philip Morris, and Liggett, along with other cigarette
23 manufacturers, embarked on a nation-wide campaign, beginning in the 1950s, to
24

1
2 deceive the American public, including Decedent, NOREEN THOMPSON, about the
3 true nature of cigarettes – e.g. the corporations’ deliberate and intentional manipulation
4 and manufacturing of cigarettes to, among other things, increase the levels of pH and
5 ammonia in cigarettes, make cigarettes easier to inhale, and purposefully make them
6 addictive, dangerous, and deadly. These corporations banded together to conceal their
7 knowledge that cigarettes were dangerous, addictive, and caused lung cancer and death
8 all in the name of profit.

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

20 **B. DEFENDANT’S CONCERTED ACTIONS HARMED NOREEN THOMPSON**

21
22 Defendants concerted efforts and mass marketing campaign harmed Decedent,
23 NOREEN THOMPSON, who began smoking cigarettes in 1954 when she was 15 years
24 old. Ms. Thompson became addicted to nicotine in cigarettes and as a result developed

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24

lung cancer and died during the pendency of this lawsuit. Ms. Thompson’s continued smoking lead to her addiction, which ultimately lead to her lung cancer and death. Ms. Thompson continued to smoke cigarettes for over 60 years was because, she, along with millions and millions of Americans, did not know cigarettes were harmful, addictive, or could cause disease and death. And when Ms. Thompson 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.

Ms. Thompson did not know about the true nature of cigarettes because R.J. Reynolds, Philip Morris, and Liggett did not want Ms. Thompson 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 what Defendants imply in their motion to dismiss, none of the tobacco companies acted alone and none can claim innocence. R.J. Reynolds and Liggett needed help and cooperation from Philip Morris and others to perpetuate this very expensive, massive campaign. The conspiracy and the public perception about cigarettes would never have flourished but for all of the cigarette manufacturers working together to spread and sustain the same message. Thus, as a result of the concerted efforts of R.J. Reynolds, Philip Morris, and Liggett, Ms. Thompson began smoking cigarettes, continued to smoke for over 60 years, became addicted to nicotine in cigarettes, and developed lung cancer caused by smoking, which ultimately killed her.

1
2 **C. NEARLY IDENTICAL MOTIONS HAVE BEEN DENIED NOT ONLY BY THIS**
3 **COURT BUT OTHER JUDGES IN THIS DISTRICT**

4 As previously stated, this Court has already ruled on this very issue in this very
5 case in August 2020. Defendant Philip Morris is now trying to take advantage of Ms.
6 Thompson's death—which was caused directly by smoking, the underlying conspiracy,
7 and deceptive trade practices this lawsuit alleges—by now attempting to re-litigate an
8 issue that has already been heard, briefed, and ruled upon by this Court. This is
9 entirely improper. Defendants cannot now seek a second bite at the apple merely
10 because they disagreed with this Court's first ruling.

11 Moreover, other Courts in this district have similarly heard, briefed, and ruled
12 upon these identical issues in favor of Plaintiff. For example, Judges Jacqueline Bluth
13 and Jim Crockett were faced with nearly identical motions to dismiss and ruled against
14 Defendants.¹ Furthermore, similar motions have likewise been denied in courts across
15 the country including in Florida, Portland, and others.²

16 ¹ See Orders Denying Motions to Dismiss in *Tully v. Philip Morris USA, Inc., et al.*, Case No. A-19-807657,
17 attached as **Exhibit 2**, and Order Denying Motions to Dismiss in *Geist v. Philip Morris USA, Inc. et al.*,
Case No. A-19-807653-C, attached as **Exhibit 3**.

18 ² See orders attached as **Exhibit 4**. May 29, 2018 Order, *Lane v. Philip Morris USA, Inc., et al.*, CACE
19 17-011591 (21) (Fla. 17th Circ. Ct.) (denying Defendants' motion as to negligence, strict liability, fraud,
20 and conspiracy claims, and denying only a claim for willful, wanton and reckless misconduct); June 14,
21 2018 Order, *Bennett v. Philip Morris USA, Inc., et al.*, CACE 17-023046 (19) (Fla. 17th Circ. Ct.) (denying
22 Defendants' motion in its entirety); June 14, 2018 Order, *Williams v. Philip Morris USA, Inc., et al.*,
CACE 17-021672 (19) (Fla. 17th Circ. Ct.) (denying Defendants' motion in its entirety); June 14, 2018
23 Order, *Da Silva v. Philip Morris USA, Inc., et al.*, CACE 17-021672 (19) (Fla. 17th Circ. Ct.) (denying
24 Defendants' motion in its entirety); June 14, 2018 Order, *Baron v. v. Philip Morris USA, Inc., et al.*, CACE
17-023133 (19) (Fla. 17th Circ. Ct.) (denying Defendants' motion in its entirety); August 10, 2018 Order,
Feld v. Philip Morris USA, Inc., et al., CACE 17-020119 (3) (Fla. 17th Circ. Ct.) (denying Defendants'
motion in its entirety); June 27, 2018 Order, *Principe v. Philip Morris USA, Inc., et al.*, No. 17-25772-CA-
25 (Fla. 11th Circ. Ct.) (denying Defendants' motion in its entirety); May 17, 2018 Order, *Rackinacv.*
Philip Morris USA, Inc., et al., No. 17-014839-CA-01 (Fla. 11th Circ. Ct.) (denying Defendants' motion to
dismiss); May 25, 2018 Agreed Order, *Rackinac v. Philip Morris USA, Inc., et al.*, No. 17-014839-CA-31
(Fla. 11th Circ. Ct.) (requiring plaintiff to provide more definite statement regarding smoking history and
brands smoked by agreement); June 13, 2019 Order, *Gonzalez v. Philip Morris USA, Inc., et al.*, No. 18-

IV. LEGAL ARGUMENT

A. LEGAL STANDARD FOR MOTIONS TO DISMISS

NRCP 8 governs the general rules of pleading. NRCP 8(a) requires that 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 Constr., 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-pleading jurisdiction, [its] courts liberally

36558-CA-22 (Fla. 11th Circ. Ct.) (denying Defendants’ motion with exception of striking one subparagraph in complaint regarding continuing marketing and sale of cigarettes, and requiring more definite statement on brand history and starting/ending dates of use); June 21, 2019 Order, *Mendez v. Philip Morris USA, Inc., et al.*, No. 18-042377-CA-32 (Fla. 11th Circ. Ct.) (denying Defendants’ motion to dismiss, and granting motion for more definite statement only as to fraud and conspiracy claims); August 21, 2019 Order, *Ryan v. R.J. Reynolds Tobacco Company*, CACE 08-022579 (21) (Fla. 17th Circ. Ct.) (denying motion to dismiss fraud claims); January 16, 2020 Order, *Harcourt v. Philip Morris USA, Inc. et al.*, CACE 17-20297 (08) (denying Defendants’ motion in its entirety); August 11, 2020 Order, *Barnes v. Philip Morris USA, Inc. et al.*, 20-CA-000870 (Fla. 8th Cir. Ct.) (denying Defendants’ motion to dismiss and motion for more definite statement), October 26, 2020 Order, *Nicholson v. R.J. Reynolds Tobacco Company, et al.*, 20-14354-CA23 (Fla. 11th Cir. Ct.), February 5, 2020 Order, *Ochoa v. Philip Morris USA Inc., et al.*, 20-023314-CA01 (Fla. 11th Cir. Ct.).

1
2 construe pleadings to place into issue matters which are fairly noticed to the adverse
3 party.” *Hay*, 100 Nev. at 198, 678 P. 2d at 674 (citing *Chavez v. Robberson Steel Co.*, 94
4 Nev. 597, 599, 584 P. 2d 159, 160 (1978)).

5 “A district court order granting a motion to dismiss is **‘rigorously reviewed.’**”
6 *Kahn v. Dodds_(In re AMERCO Derivative Litig.)*, 252 P.3d 681, 692 (Nev. 2011)
7 (emphasis added) (quoting *Shoen v. SAC Holding Corp.*, 122 Nev. 621, 634-35, 137 P.3d
8 1171, 1180 (2006)); *see also Holcomb Condo. Homeowners’ Ass’n v. Stewart Venture,*
9 *LLC*, 300 P.3d 124, 128 (Nev. 2013) (**stating that the standard for dismissal under**
10 **NRCP 12(b)(5) “is a rigorous standard”**) (emphasis added). To survive a motion to
11 dismiss under NRCP 12(b)(5), a complaint must contain some “set of facts which, if true,
12 would entitle the plaintiff to relief.” *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev.
13 224, 228, 181 P.3d 670, 672 (2008). When reviewing a NRCP 12(b)(5) motion, all factual
14 allegations in the complaint must be regarded as true. *Hampe v. Foote*, 118 Nev. 405,
15 408, 47 P.3d 438, 439 (2002). In fact, the court “must accept as true the complaint’s
16 allegations and draw all reasonable inferences in [plaintiff’s] favor.” *Shoen*, 122 Nev.
17 at 635, 137 P.3d at 1180; *Simpson v. Mars, Inc.*, 113 Nev. 188, 190, 929 P.2d 966, 967
18 (1997) (holding that the court must construe the pleadings liberally and draw every fair
19 inference in favor of the non-moving party); *Squires v. Sierra Nev. Educ. Found.*, 107
20 Nev. 902, 905, 823 P.2d 256, 257 (1991) (stating that the court must construe the
21 pleadings liberally and draw every fair inference in favor of the non-moving party).
22 Therefore, dismissal is not proper unless it appears beyond a reasonable doubt that the
23
24

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24

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.

B. PLAINTIFF’S CLAIMS DO NOT FAIL FOR LACK OF PRODUCT USE

Defendant alleges that Plaintiff’s claims for civil conspiracy and deceptive trade practice fail because of “lack of product use.” *Def. Mot* at page 5. This theory is not only unsupported by any statute, but is a baseless requirement proscribed by caselaw. Contrary to Defendant’s argument, both the Nevada Deceptive Trade Practices Act (“NDTPA”) and NRS 41.600 support Plaintiff’s claims and grant Plaintiff standing.

1. The Plain Language of the NDTPA Supports Plaintiff’s 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.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24

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

1
2 contrary, the definition of “sale” includes offers and attempts which need not be
3 completed. *Id.* In short, the plain language of the statute prohibits and penalizes not
4 only deceptive trade practices resulting in an eventual purchase or use by a plaintiff,
5 but also those committed in an offer or attempt to transact with a plaintiff. The
6 legislative intent on this particular issue has always been unambiguous because the
7 definition of “sale” has stood unchanged since the enactment of the NDTPA in 1973. *Id.*

8 Reading such a requirement into the NDTPA would be clearly erroneous because
9 it would conflate claims under this statute with claims under the common law. In
10 *Betsinger v. D.R. Horton, Inc.*, 126 Nev. 162, 232 P.3d 433 (2010), this Court rejected a
11 request to read a similarly unmentioned requirement into the NDTPA. The defendant
12 there argued that NDTPA claims must be proven by clear and convincing evidence since
13 common law fraud claims require such a standard of proof. This Court declined and
14 held that “[s]tatutory offenses that sound in fraud are separate and distinct from
15 common law fraud.” *Id.* at 166. Notably, the Nevada Supreme Court agreed with an
16 Arizona court’s analysis: “the purpose of the consumer protection statute was to provide
17 consumers with a cause of action that was easier to establish than common law
18 fraud....” *Id.* Therefore, the court refused to add an additional burden onto the plaintiff
19 alleging an NDTPA claim absent any legislative directive.

20 The same logic and principles apply to this case. Where there is no legislative
21 directive to require product-purchase or product-use, the Court must abide by the plain
22 language of the NDTPA, treat it distinctly from common law fraud, and not insert the
23

1
2 Defendant's suggested requirements. *See S. Nev. Homebuilders Ass'n v. Clark Cty.*, 121
3 Nev. 446, 451, 117 P.3d 171, 174 (2005) ("[I]t is not the business of this court to fill in
4 alleged legislative omissions based on conjecture as to what the legislature would or
5 should have done."). Here, Plaintiff properly notified Philip Morris by pleading that
6 Philip Morris both offered and attempted to sell Ms. Thompson its cigarettes over
7 several decades through aggressive marketing efforts, event sponsorships, and
8 deceptive public relations campaigns along with other tobacco manufacturers.
9 *Plaintiff's Amended Complaint* at pages 106-122. The pleading is sufficient; thus, this
10 Court should deny Philip Morris' motion to dismiss the NDTPA claim.
11
12

13 **2. NRS 41.600 Provides Plaintiff with Standing**

14 Furthermore, NRS 41.600(1) grants a private right of action to victims of
15 consumer fraud, which includes deceptive trade practices as defined in NRS 598.0915,
16 the NDTPA provision at issue. Neither the plain language nor case law commenting
17 on NRS 41.600 has ever required a plaintiff to allege product-purchase or product-use
18 to gain standing to make an NDTPA claim. Quite the opposite, case law proscribes
19 such a narrow construction.

20 **a. The Plain Language of NRS 41.600 Incorporates the** 21 **NDTPA and, Therefore, Grants Standing to Plaintiff,** 22 **Despite Non-Use of Philip Morris' Products.**

23 The statutory language is as follows:

- 24 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:

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24

- (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.

///
///
///

1
2 **b. A Non-User of Philip Morris’ Product Can Be a Victim**
3 **under NRS 41.600.**

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

12 The existing body of case law—listed below—clearly shows that these
13 requirements of product use/purchase and legal relationship between Ms. Thompson
14 and Philip Morris should not be read into the NDTPA and NRS 41.600.

15 In both *Sears v. Russell Rd. Food & Beverage, LLC*, 460 F.Supp.3d 1065, 1070
16 (D. Nev. 2020) and *S. Serv. Corp. v. Excel Bldg. Servs., Inc.*, 617 F.Supp.2d 1097, 1100
17 (D. Nev. 2007), the Nevada Federal District Court rejected the defendants’ argument
18 that the NDTPA only provides consumers a right of action. Citing to the Ninth Circuit
19 opinion in *Del Webb Communities*, the district court held that “the role of an individual
20 in a transaction is irrelevant so long they are a ‘victim of consumer fraud...[T]o be a
21 victim under this statute, the plaintiff need only have been ‘directly harmed’ by the
22 defendant.” *Sears* at 1070. Therefore, the NDTPA does not require the plaintiff to be in
23 any legal relationship with the defendant, as Philip Morris argues in the case at bar.
24

1
2 More importantly, the courts do not restrict the phrase “directly harmed” to mean
3 only harm occurring between a seller and a consumer. Instead, individuals without any
4 legal relationship with the wrongdoer may bring an action under the NDTPA if they
5 suffered from deceptive trade practices. In *S. Serv. Corp.*, the court granted standing to
6 the defendant’s business competitor, who lost several contracts to the defendant because
7 the defendant’s deceptive practices allowed it to reduce costs and underbid the
8 competitor. In *Bates v. Dollar Loan Ctr., LLC*, No. 2:13-CV-1731-KJD-CWH, 2014 WL
9 3516260, at *3 (D. Nev. July 15, 2014), the court granted standing to a plaintiff who
10 suffered invasion of privacy, due to the defendant’s deceptive practices, even though the
11 plaintiff was not the borrower from Dollar Loan Center but merely the borrower’s credit
12 reference. Indeed, the Ninth Circuit construes the NDTPA to provide standing even
13 beyond consumers and competitors. *See Del Webb Communities*, 652 F.3d at 1153
14 (“There is no basis in the text of NRS 41.600 or in *Southern Service* to limit standing to
15 a group broader than consumers but no broader than business competitors.”).

16 Philip Morris’ argument flies in the face of these decisions. If the NDTPA does
17 not restrict standing to only consumers, how can it restrict standing to a subset of
18 consumers (either purchasers or users)? *See* “consumer” BLACK’S LAW DICTIONARY, 395
19 (11th ed. 2019) (“**1.** Someone who buys goods or services for personal, family, or
20 household use, with no intention of resale; a natural person who uses products for
21 personal rather than business purposes. **2.** Under some consumer-protection statutes,
22 any individual.”).

1
2 The Nevada Federal District Court’s analysis in *Prescott v. Slide Fire Sols., LP*,
3 410 F.Supp.3d 1123, 1145–1146 (D. Nev. 2019) is particularly instructive because it
4 highlights the difference between the too-attenuated commercial injuries the plaintiff
5 suffered there and the direct harm Ms. Thompson suffered in the case at bar. *Prescott*
6 arose from the mass shooting that occurred during the Route 91 Harvest Music Festival
7 in 2017. Dismissing the NDTPA claim, the court wrote:

8 courts have found standing under NRS 41.600 beyond just “business
9 competitors” of a defendant or “consumers” of a defendant’s goods or services....

10 Here, Plaintiffs allege that Slide Fire... caused them commercial injury by: (1)
11 creating the “false and misleading impression that the bump stock device could
12 be used by members of the public for a lawful, safe purpose”; and (2) “displaying
13 the ‘ATF approved’ legend on its homepage ... [thereby] knowingly creat[ing] the
14 false and misleading impression that the ATF letter was an official approval of
15 the legality of the bump stock.” ... These allegations do not, however, reveal a
16 direct harm of commercial injury by Slide Fire’s actions. According to the
17 Amended Complaint, it was not the false statement about the lawfulness of a
18 bump stock device or ATF’s approval that “deprived Plaintiffs of their commercial
19 business”; it was the “emotional trauma they experienced as a result of
20 defendants’ sale of the bump stock device *and* its subsequent use by the shooter.”
21 ...Thus, while NRS 598.0915(5) is not limited to only consumers or competitors
22 of a defendant, Plaintiffs’ alleged commercial injuries here are too attenuated to
23 establish standing for this claim.

17 *Id* at 1145.

18 Whereas the plaintiffs in *Prescott* failed to claim that the defendant’s false
19 statement deprived them of their commercial business, Plaintiff at bar enumerated a
20 long list of deceptive practices by Philip Morris and the other Defendants that concealed
21 the dangers of smoking, addicted Ms. Thompson to cigarettes, and led to her lung cancer
22 and eventual death. *Plaintiff’s Amended Complaint* at pages 99-106. Causation is
23 clearly alleged.

1
2 Philip Morris' deceptive practices directly harmed Ms. Thompson, independent
3 of its products. That is the basis for Plaintiff's NDTPA claim. In light of *Del Webb*
4 *Communities, S. Serve Corp., Bates, Sears, and Prescott*, this Court would commit clear
5 error by reading restrictions into the NDTPA and NRS 41.600 where there is no
6 legislative directive to do so and broad construction is proper. See *S. Nev. Homebuilders*
7 *Ass'n*, 121 Nev. at 451, 117 P.3d at 174 ("[I]t is not the business of this court to fill in
8 alleged legislative omissions based on conjecture as to what the legislature would or
9 should have done.").

10 **c. Philip Morris' Argument Finds No Support in**
11 ***Baymiller and Moretti*.**

12 All of the case law Philip Morris relies upon to support its alleged "product-use"
13 requirement deal with causes of action for negligence, strict products liability, or fraud
14 and misrepresentation. None of those cases support the position that "product-use" is a
15 necessary and required element for civil conspiracy and deceptive trade practice claims.
16 For example, in supporting its proposition, Philip Morris relies on two ***non-binding***
17 ***Federal trial judge orders: Baymiller v. Ranbaxy Pharmaceuticals***, 894 F. Supp. 2d
18 1302 (U.S. District Court Nevada 2012) and *Moretti v. Wyeth*, 2009 WL 49532 (U.S.
19 District Court Nevada 2009).

20 Philip Morris clearly and blatantly misstates the law and the holdings in
21 *Baymiller* which is, in fact, a completely unrelated and unhelpful case. First of all, the
22 court in *Baymiller* was deciding a Motion for Summary Judgment, not an NRCP 12(b)(5)
23 Motion to Dismiss. Secondly, the facts of *Baymiller* are lightyears apart from the facts
24 in Ms. Thompson's case. In *Baymiller* the disputed issues involved one pharmaceutical

1
2 company manufacturing one drug—as opposed to the entire cigarette industry spending
3 two-hundred-and-fifty-billion dollars over 50 years to engineer a massive campaign to
4 deceive the American public, including Ms. Thompson. Furthermore, the Defendant in
5 *Baymiller*, Glaxo, argues that Plaintiff’s negligence, strict products liability, fraud and
6 negligent misrepresentation, and elder abuse claims fail because Glaxo did not
7 manufacture or sell the product to Plaintiff. ***Nowhere in Baymiller does the court***
8 ***address any civil conspiracy or deceptive trade practice claim.*** *Id.* at 1306-1307
9 (“The issue in this case is whether Nevada law recognizes negligent
10 misrepresentation/fraud claims against brand-name manufacturers who did not
11 manufacture or sell the generic drug that allegedly caused Plaintiff’s injuries.”). In fact,
12 the words “conspiracy” and “deceptive trade practice” are nowhere to be found in the
13 entire *Baymiller* opinion. Importantly, Ms. Rowan is ***only*** alleging civil conspiracy and
14 deceptive trade practice against Philip Morris, and has not plead any of the claims
15 *Baymiller* actually addresses. Thus, any reliance on *Baymiller* is misguided and should
16 not be considered.

17 Next, Philip Morris inappropriately relies on *Moretti*. Again, the court in *Moretti*
18 is addressing a Motion for Summary Judgment and not a NRCP 12(b)(5) Motion to
19 Dismiss. Furthermore, this is a ***Federal trial judge interpreting Minnesota***
20 ***deceptive trade practice law.*** Additionally, like *Baymiller*, the core issue in *Moretti*
21 dealt with Plaintiff’s misrepresentation and fraud claims, not whether there was a
22 “product-use” requirement necessary for the deceptive trade practice claims. *Moretti* at
23 *2. (“The sole legal issue presented is whether Nevada law recognizes Plaintiff’s
24

1
2 misrepresentation/fraud claims against Wyeth and Scharz, both brand name drug
3 manufacturers who did not manufacture or sell the generic drug that allegedly caused
4 Plaintiff's injuries."). Thus, it is clear that these cases do not stand for the proposition
5 that there is a "product-use" requirement in Nevada for civil conspiracy or deceptive
6 trade practice claims. As Plaintiff explains below, Ms. Rowan pled more than sufficient
7 elements to satisfy the pleading requirements for these claims and thus Philip Morris'
8 motion should be denied.

9 **C. PLAINTIFF'S CIVIL CONSPIRACY CLAIM AGAINST PHILIP MORRIS IS**
10 **VALID AND PROPERLY PREDICATED ON THE NDTPA CLAIM**

11 "A civil conspiracy claim operates to extend, beyond the active wrongdoer,
12 liability in tort to actors who have merely assisted, encouraged or planned the
13 wrongdoer's acts." *Flowers v. Carville*, 266 F. Supp. 2d 1245, 1249 (D. Nev. 2003) (citing
14 16 AM.JUR. 2D, *Conspiracy*, § 57 (1998)).

15 This tort creates a cause of action against "a combination of two or more persons
16 who, by some concerted action, intend to accomplish an unlawful objective for the
17 purpose of harming another, and damage results from the act or acts." *Consol.*
18 *Generator-Nevada v. Cummins Engine Co.*, 114 Nev. 1304, 1311 (1998) (citation
19 omitted). The essence of civil conspiracy is damages which result from the tort
20 underlying the conspiracy, not the legal relationship between the tortfeasor and the
21 victim. *See* 16 AM.JUR. 2D, *Conspiracy*, § 57 (1998); *Flowers*, 266 F. Supp. 2d at 1249.

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

23 In such an action the major significance of the conspiracy lies in the fact that it
24 renders each participant in the wrongful act responsible as a joint tortfeasor for

1
2 all damages ensuing from the wrong, irrespective of whether or not he was a
3 direct actor and regardless of the degree of his activity.

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

7 Plaintiff's civil conspiracy claim against Philip Morris seeks to redress the exact
8 type of malfeasance for which this tort is designed. While Decedent has never bought
9 or used Philip Morris' cigarettes, she was harmed by its conspiratorial conduct with the
10 other Defendants. Under this claim, Plaintiff does not sue Philip Morris for any product
11 liability, but for its efforts with the other tobacco manufacturers to sustain a
12 misinformation campaign over half of a century. In this case, Philip Morris is not liable
13 for selling Ms. Thompson cigarettes, but for conspiring to misrepresent the state of
14 scientific knowledge and to conceal what Defendants all knew to be the harm of
15 smoking.

16 In Nevada, "an underlying cause of action for fraud is a necessary predicate to a
17 cause of action for conspiracy to defraud." *Jordan v. State ex rel. Dept. of Motor Vehicles*
18 *& Pub. Safety*, 121 Nev. 44, 75, 110 P.3d 30, 51 (2005), *abrogated on other grounds*
19 *by Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 228 n.6, 181 P.3d 670, 672 n.6
20 (2008). Since Plaintiff's NDTPA claim is validly and adequately pled, as discussed
21 above, it suffices as a predicate for the civil conspiracy claim.

22 **D. PLAINTIFF ADEQUATELY PLED HER CLAIM FOR CIVIL CONSPIRACY**

23 Finally, Philip Morris incorrectly argues that Plaintiff's claim for civil conspiracy
24 fails because, apparently, this claim is allegedly a fraud claim masked as a claim for

1
2 civil conspiracy. *Def. Mot* at page 9. This argument fails because it is abundantly clear
3 Plaintiff pled the proper and necessary elements for a civil conspiracy claim, not a fraud
4 claim, and thus have exceeded the requirements to defeat a NRCP 12(b)(5) motion to
5 dismiss. In fact, Plaintiff's complaint tracks the specific language in Nevada's Standard
6 Jury Instruction on civil conspiracy. *See Nevada Standard Jury Instruction 6.9.*
7 Defendants' actions, as it relates to their acts in furtherance of their conspiracy as
8 alleged in this complaint, continues through the present. ("Two or more of the cigarette
9 manufacturers, including Defendants herein, by their aforementioned concerted
10 actions, intended to accomplish, and did indeed accomplish, an unlawful objective of
11 misleading and deceiving the public, for the purpose of harming Plaintiff.") *Plaintiff's*
12 *Amended Complaint at page 93.*

13 "Civil conspiracy" is defined as "[a]n agreement between two or more persons to
14 commit an unlawful act that causes damage to a person or property." BLACK'S LAW
15 DICTIONARY, 387 (11th ed. 2019). Nevada law is in line with this definition. *See Consol.*
16 *Generator-Nevada v. Cummins Engine Co.*, 114 Nev. 1304, 1311, 971 P.2d 1251, 1256
17 (1998) ("An actionable civil conspiracy 'consists of a combination of two or more persons
18 who, by some concerted action, intend to accomplish an unlawful objective for the
19 purpose of harming another, and damage results from the act or acts.'") (citing *Hilton*
20 *Hotels v. Butch Lewis Productions*, 109 Nev. 1043, 1048, 862 P.2d 1207, 1210 (1993);
21 *Sutherland v. Gross*, 105 Nev. 192, 196, 772 P.2d 1287, 1290 (1989)). More recently, in
22 *Cadle Co. v. Woods & Erickson, LLP*, 131 Nev. 114, 118, 345 P.3d 1049, 1052 (2015),
23 this Court clarified that the "unlawful objective" component of a civil conspiracy claim
24

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24

CONCLUSION

Thus, based on the foregoing, Plaintiff has far exceeded the pleading requirements under Nevada law and have alleged *prima facie* elements for all of her claims. Therefore, Plaintiff respectfully requests the Court to deny Defendant Philip Morris' Motion in its entirety.

Dated this 12th day of April, 2021.

CLAGGETT & SYKES LAW FIRM

/s/ Sean K. Claggett

Sean K. Claggett, Esq.
Nevada Bar No. 008407
4101 Meadows Lane, Suite 100
Las Vegas, Nevada 89107

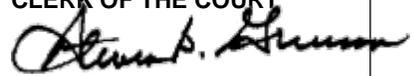
Kimberly L. Wald, Esq. (admitted pro hac vice)
Florida Bar. No. 112263
KELLEY | UUSTAL
500 North Federal Highway, Suite 200
Fort Lauderdale, FL 33301
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

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

<p style="text-align: center;">VIA E-SERVICE ONLY: Dennis L. Kennedy, Esq. Joseph A. Liebman, Esq. BAILEY KENNEDY 8984 Spanish Ridge Avenue Las Vegas, Nevada 89148-1302 <i>Attorneys for R.J. Reynolds Tobacco Company, Quick Stop Market, Joe's Bar, Inc., The Poker Palace, Silver Nugget Gaming, LLC D/B/A Silver Nugget Casino, and Jerry's Nugget</i></p>	<p style="text-align: center;">VIA E-SERVICE ONLY: D. Lee Roberts, Jr., Esq. Phillip N. Smith, Jr., Esq. Daniela LaBounty, Esq. WEINBERG WHEELER HUDGINS GUNN & DIAL 6385 South Rainbow Boulevard, Suite 400 Las Vegas, Nevada 89118 <i>Attorneys for Philip Morris USA, Inc. and ASM Nationwide Corporation</i></p>
<p style="text-align: center;">VIA E-SERVICE ONLY: Daniel F. Polsenberg, Esq. J. Christopher Jorgensen, Esq. LEWIS ROCA ROTHGERBER CHRISTIE 3993 Howard Hughes Parkway, #600 Las Vegas, Nevada 89169 <i>Attorneys for Liggett Group, LLC</i></p>	<p style="text-align: center;">VIA E-SERVICE ONLY: Spencer M. Diamond Esq. KING & SPALDING LLP 1180 Peachtree Street, N.E. Atlanta, GA 30309 <i>Attorneys for R.J. Reynolds Tobacco Company, Quick Stop Market, Joe's Bar, Inc., The Poker Palace, Silver Nugget Gaming, LLC D/B/A Silver Nugget Casino, and Jerry's Nugget</i></p>
<p style="text-align: center;">VIA E-SERVICE ONLY: Valentin Leppert Esq. KING & SPALDING 1180 Peachtree Street Atlanta, GA 30309-3521 <i>Attorneys for R.J. Reynolds Tobacco Company, Quick Stop Market, Joe's Bar, Inc., The Poker Palace, Silver Nugget Gaming, LLC D/B/A Silver Nugget Casino, and Jerry's Nugget</i></p>	<p style="text-align: center;">VIA E-SERVICE ONLY: Ursula Marie Henninger, Esq. KING & SPALDING 300 S. Tryon Street Charlotte, North Carolina 28202 <i>Attorneys for R.J. Reynolds Tobacco Company, Quick Stop Market, Joe's Bar, Inc., The Poker Palace, Silver Nugget Gaming, LLC D/B/A Silver Nugget Casino, and Jerry's Nugget</i></p>
<p style="text-align: center;">VIA E-SERVICE ONLY: Kelly Anne Luther, Esq. KASOWITZ BENSON TORRES LLP 1441 Brickwell Avenue, Suite 1420 Miami, FL 33131 <i>Attorneys for Defendant Liggett Group, LLC</i></p>	<p style="text-align: center;">VIA E-SERVICE ONLY: Katherine Heinz, Esq. SHOOK, HARDY AND BACON, LLP 2555 Grand Boulevard Kansas City, MO 64108 <i>Attorneys for Philip Morris USA, Inc.</i></p>

/s/: Moises Garcia
 An Employee of CLAGGETT & SYKES
 LAW FIRM



1 **OPPS**

2 Sean K. Claggett, Esq.
3 Nevada Bar No. 008407
4 Matthew S. Granda, Esq.
5 Nevada Bar No. 012753
6 Micah S. Echols, Esq.
7 Nevada Bar No. 008437
8 **CLAGGETT & SYKES LAW FIRM**
9 4101 Meadows Lane, Suite 100
10 Las Vegas, Nevada 89107
11 (702) 655-2346 – Telephone
12 (702) 655-3763 – Facsimile
13 sclaggett@claggettlaw.com
14 mgranda@claggettlaw.com
15 micah@claggettlaw.com

16 Kimberly L. Wald, Esq. (admitted pro hac vice)
17 Florida Bar. No. 112263
18 **KELLEY | UUSTAL**
19 500 North Federal Highway, Suite 200
20 Fort Lauderdale, FL 33301
21 *Attorneys for Plaintiff*

22 **DISTRICT COURT**
23 **CLARK COUNTY, NEVADA**

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

Plaintiff,

v.

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

CASE NO. A-20-811091-C

DEPT. NO. V

PLAINTIFF'S OPPOSITION TO
DEFENDANTS' MOTION TO
STRIKE THE LAWYER-RELATED
ALLEGATIONS TO PLAINTIFF'S
AMENDED COMPLAINT

Hearing Date: May 4, 2021
Hearing Time: 09:00 a.m.

1 foreign corporation; QUICK STOP
2 MARKET, LLC, a domestic limited
3 liability company; JOE'S BAR, INC., a
4 domestic corporation; THE POKER
5 PALACE, a domestic corporation; SILVER
6 NUGGET GAMING, LLC d/b/a SILVER
7 NUGGET CASINO, a domestic limited
8 liability company, JERRY'S NUGGET, a
9 domestic corporation; and DOES I-X; and
10 ROE BUSINESS ENTITIES XI-XX,
11 inclusive

12 Defendants.

13 Plaintiff, DOLLY ROWAN, as Special Administrator of the Estate of NOREEN
14 THOMPSON, by and through her attorneys of record, hereby submits this Opposition to
15 Defendants' Motion to Strike the Lawyer-Related allegations in Plaintiff's Amended
16 Complaint.

17 This Opposition is based upon the pleadings and papers on file in this action, the
18 points and authorities set forth herein, and argument to be made by counsel at the time
19 of the hearing.

20 Dated this 12th day of April, 2021.

21 CLAGGETT & SYKES LAW FIRM

22 /s/ Sean K. Claggett
23 Sean K. Claggett, Esq.
24 Nevada Bar No. 008407
4101 Meadows Lane, Suite 100
Las Vegas, Nevada 89107

Kimberly L. Wald, Esq. (admitted pro hac vice)
Florida Bar. No. 112263
KELLEY | UUSTAL
500 North Federal Highway, Suite 200
Fort Lauderdale, FL 33301

1 the pleadings in *Wainright*, the allegations in this current matter are grounded in
2 historical facts supported by the Defendants' own previously secret and confidential
3 documents which go to the heart of the issues to be tried in this case.

4 II. PROCEDURAL BACKGROUND

5 Decedent, Noreen Thompson, originally brought this lawsuit on February 25,
6 2020. Defendants, R.J. Reynolds Tobacco Company, Philip Morris, and Liggett all moved
7 to dismiss her complaint. All motions to dismiss were denied. *See attached Exhibit 1*
8 *Order Denying Philip Morris Motion to Dismiss* and *Exhibit 2 Order Denying Liggett*
9 *and RJR Motion to Dismiss*. Subsequently, Mrs. Thompson unfortunately passed away
10 before her case could proceed to trial. Therefore, her daughter, Ms. Dolly Rowan, was
11 appointed personal representative of Ms. Thompson's estate and now brings this
12 amended complaint as a wrongful death action.

13 In March 2021, this Court already considered this very issue in this case regarding
14 Plaintiff's lawyer-related allegations. *See attached Exhibit 3 Order on Defendants'*
15 *Motion to Strike*. All parties were afforded a chance to fully brief the issue, make
16 arguments before this Court, and present evidence. Defendants presented nearly
17 identical arguments and analysis for striking Plaintiff's lawyer-related allegations in
18 their Joint Opposition to Plaintiff's Motion for Leave to File Amended Wrongful Death
19 Complaint.

20 At the hearing, as a show of good faith, and to assure that the lawyer-related
21 allegations are *not* an unfair trial tactic but a material part of the conspiracy and fraud
22 claims, Plaintiff volunteered to remove all mentioning of specific law firms' and lawyers'
23 names.

1 This Court ruled:

2 The Court FINDS and CONCLUDES that Defendants joint opposition under
3 NRCP 12(f), *Born v. Eisenman*, 114 Nev. 854 (1997) and *Butler v. State*, 120
4 Nev. 879 (2004) is procedurally defective. As the Plaintiff has stipulated at the
5 hearing to remove the mention of the specific law firms previously involved in
6 prior tobacco litigations from the proposed Amended Complaint, the correct
7 procedure is to allow Plaintiff to file her Amended Complaint, with the changes
8 stipulated at the hearing, and if Defendants wish to make similar objections,
9 they may then do so.

10 Most recently, on April 8, 2021, Judge Jessica Peterson deliberated on the exact
11 same issue and came to the same remedy Plaintiff offered in this case. Furthermore,
12 Judge Peterson ruled that:

13 the lawyer-related allegations are material to the claims sought by Plaintiff, and
14 do not unduly prejudice Defendants' current counsel or defense in this case.
15 Additionally, Defendants' arguments regarding absolute litigation privilege are
16 premature and should be addressed after further discovery in a motion in limine
17 hearing.

18 *See attached Exhibit 4 Order on Lawyer-Related Allegations by Judge Peterson.*

19 Despite Plaintiff's offer to resolve this issue by fair stipulation, Defendants now
20 renew their objections, which aim to eviscerate a core part of Plaintiff's claims.

21 III. ARGUMENT

22 Plaintiff's Amended Complaint is sufficient and meets and exceeds all pleading
23 requirements under Nevada law. The disputed allegations set forth in Plaintiff's
24 Amended Complaint are factual and historical statements central to Plaintiff's
conspiracy and fraud claims. Every single one of these lawyer-related allegations in
Plaintiff's Amended Complaint is supported by Defendants' own internal, previously
secret, but now exposed documents. Defendants cannot and did not deny either the
veracity of these statements or the critical role lawyers played in their decades-long

1 conspiracy. As such, these statements are not scandalous or impertinent, but truthful
2 and relevant to the litigation at bar.

3 Notwithstanding the string of inapposite cases Defendants cite in their motion, or
4 their attempt to mischaracterize the purpose of Plaintiff's allegations, the truth is that
5 these Defendants could not have so craftily and successfully accomplished a vast
6 conspiracy without the key participants named in these allegations. The fact that these
7 participants happen to be lawyers and law firms does not require this Court to grant a
8 NRCP 12(f) motion to strike, especially since Plaintiff has already removed the identity
9 of the lawyers and law firms from her Amended Complaint.

10 ***Plaintiff is not commenting on, attacking, or criticizing the lawyers***
11 ***defending this pending matter***

12 Any allegation that Plaintiff's new allegations amount to nothing more than a
13 transparent attack on defense counsel is completely false. To support this claim,
14 Defendants improperly cite a string of irrelevant case law which refer to lawyers in a
15 pending litigation attacking or criticizing the presiding judge or opposing counsel who
16 are ***currently*** defending the case.¹ This could not be further from what Plaintiff alleged

17 ¹ See *Davis v. Sams*, 542 P.2d 943, 944 (Okla. 1975) which is an Oklahoma case where the court held
18 that parties cannot attack opposing counsel ***in the presence of the jury***. This case is clearly
19 inapplicable as it is dealing with comments made directly against opposing counsel in a courtroom in
20 front of a jury, not, as here, dealing with factual allegations, from decades ago, pled in a complaint
21 which are all supported by Defendants' own records; see also *Butler v. State*, 120 Nev. 879, 898 (Nev.
22 2004) where the Nevada Supreme Court held that parties cannot disparage ***defense tactics***. Again, this
23 case is referring to strategies regarding defending a ***present litigation***, not, as in this case, conduct
24 taken on behalf of the Defendants decades ago which directly correlate to the fraud and conspiracy at
issue and do not relate to how the current defense attorneys are litigating the present matter; see also
In re Grasso, No. G-16-043377-A, 2017 Nev. Dist. LEXIS 108, at *6 (Nev. 8th J.D. Mar. 29, 2017)
where the Court held that parties cannot engage in a "line of personal attacks upon opposing counsel"
which, again, is completely inapposite to what Plaintiff has pled in her Amended Complaint.

1 in her proposed Amended Complaint. In fact, in Plaintiff's Amended Complaint on page
2 26, footnote 1, Plaintiff specifically states that "**the allegations herein are not**
3 **directed to Defendants' current counsel and/or their representation as part of**
4 **their lawful defense in this case.**" The allegations in Plaintiff's Amended Complaint
5 clearly and distinctly relate to conduct from Defendants' lawyers and co-conspirators
6 from the 1950s through the 1990s and does not implicate nor impugn the character or
7 reputation of the fine and upstanding lawyers defending the tobacco companies in this
8 current litigation.

9 *Plaintiff's allegations are material to the claims sought*

10 Next, Defendants cite *Goldman*, where allegations against non-parties which
11 were "immaterial" to the stated causes of action were struck from a complaint. *Goldman*
12 *v. Clark County Sch. Dist.* 2019 Nev. Dist. LEXIS 364. However, this case is inapposite
13 since Plaintiff's lawyer-related allegations in the present matter are directly related—
14 and at times central to—the causes of action in Plaintiff's Amended Complaint. Plaintiff
15 alleges counts against the Defendants for fraudulent misrepresentation, fraudulent
16 concealment, civil conspiracy, and violation of deceptive trade practices. Further,
17 Plaintiff is seeking punitive damages to punish the Defendants for their reprehensible
18 conduct and to deter these corporations from engaging in similar conduct in the future.
19 Since the Defendants' attorneys and representatives played critical and active roles in
20 this massive conspiracy created and perpetuated by the Defendants from the 1950s
21 through the 1990s, Plaintiff's allegations regarding the lawyers' conduct are directly
22 relevant, material, and essential to the heart of this litigation.

23 ///

24

1 ***Defendants Improperly Cite to Prior Tobacco Cases***

2 Finally, in a last attempt to falsely discredit Plaintiff’s complaint, Defendants cite
3 another string of irrelevant case law involving prior tobacco litigation which, again,
4 refers to parties allegedly disparaging opposing counsel who are currently litigating a
5 case. As stated previously, this is completely inapposite to what Plaintiff alleges in her
6 Amended Complaint.

7 For example, in *R.J. Reynolds Tobacco Co. v. Gafney*, 188 So. 3d 53, 59 (Fla. 4th
8 DCA 2016), when the Court held that “the insinuation that appellants’ attorneys were
9 engaged in a conspiracy with either the defendants or third parties to mislead, conceal,
10 or manipulate as part of an on-going scheme did not merely push the envelope, but
11 instead went wholly beyond the pale,” the Court was referring to arguments the
12 plaintiff’s counsel made during *closing arguments* before a jury and to comments
13 allegedly disparaging the way the current attorney litigated or defended the case.

14 Defendants also cite to *R.J. Reynolds Tobacco Co. v. Calloway*, 201 So. 3d 753, 760
15 (Fla. 4th DCA 2016) where the Court held that it was reversible error “for counsel to
16 suggest . . . that a defendant should be punished for contesting damages at trial or that
17 defending a claim in court is improper.” This referred to remarks made by the plaintiff’s
18 counsel during closing arguments, and has no bearing on what is appropriate or
19 allowable in an Amended Complaint. Further, those comments allegedly referred to how
20 the defense attorneys in that specific *Calloway* case were contesting damages, not the
21 Defendants’ lawyers from the 1950s or what they did to create and further the
22 Defendants’ conspiracy and fraud.

1 Defendants make the same mistake in their reliance on *R.J. Reynolds Tobacco*
2 *Co. v. Robinson*, 216 So. 3d 674 (Fla. 1st DCA 2017) and *Cohen v. Philip Morris USA,*
3 *Inc.*, 203 So. 3d 942, 947-48 (Fla. 4th DCA 2016) where Courts held that the plaintiff's
4 counsel could not disparage the defendants for defending themselves. Again, nowhere
5 in Plaintiff's Amended Complaint does she attempt to disparage the current lawyers
6 defending this case, and in fact explains in a footnote that "[the] allegations herein are
7 not directed to Defendants' current counsel and/or their representation as part of their
8 lawful defense in this case."

9
10 ***Plaintiff's Allegations are Nearly Identical to Three Other Tobacco***
11 ***Lawsuits Where the Same Defendants Did Not Oppose The "Conspiratorial***
12 ***Allegations" Language***

13 Moreover, it is clear Defendants' joint opposition is a smokescreen and is not
14 proper as three Plaintiffs in similar tobacco lawsuits, recently filed in Clark County, filed
15 almost identical and, in fact, even more detailed allegations regarding conspiratorial
16 involvement by Defendants' lawyers, yet the same Defendant tobacco companies did not
17 file NRCP 12(f) motions or oppose anything about those allegations in those cases. See
18 *Kelly v. Philip Morris et. al*, Case No. A-20-820112-C; *Speed v. Philip Morris et. al*, Case
19 No. A-20-819040-C; *Geist v. Philip Morris et. al*, Case No. A-19-807653-C.

20 ***Plaintiff's Allegations do not invade Nevada's litigation privilege or***
21 ***attorney immunity doctrine***

22 Finally, Defendants argue that the factual allegations in Plaintiffs Amended
23 Complaint violate Nevada's litigation privilege and attorney immunity doctrine. First
24 of all, this argument is premature and is not procedurally appropriate to be raised in a
motion to strike. In fact, as Judge Peterson recently ruled in the *Clark v. R.J. Reynolds*

1 *Tobacco Company et al.* matter that this issue is premature at this stage of the
2 proceedings, since Defendants’ argument applies more to admissibility than pleading
3 requirements, and any ruling on this issue should be deferred and ruled upon if and
4 when an appropriate *motion in limine* is filed. Thus, this Court does not have sufficient
5 discovery at this juncture to make a ruling that could have significant impact on the
6 evidence at trial.

7 Nevertheless, if this Court is inclined to hear the merits of this argument, it will
8 find that this argument is unsupported by either case law or the specific facts alleged in
9 Plaintiff’s Amended Complaint. Litigation privilege protects “communications uttered
10 or published in the course of judicial proceedings.” *Greenberg Traurig v. Frias Holding*
11 *Co.*, 130 Nev. 627, 630, 331 P.3d 901, 903 (2014). It does not protect Defendants’ previous
12 counsels’ efforts in shaping a fraudulent conspiracy through misinformation campaigns,
13 destruction of critical documents, or coaching witnesses to mislead both the courts and
14 the legislature. More importantly, litigation privilege does not apply to these lawyers’
15 collective plan to fund and direct scientific research for the tobacco companies so they
16 could hide unfavorable findings under the aegis of work-product and attorney-client
17 privileges. These fraudulent acts and communications did not take place in the course
18 of judicial proceedings. In fact, had the conspiracy succeeded and the internal documents
19 stayed unrevealed, there would have been no judicial proceedings. Therefore, on its face,
20 Defendants’ litigation privilege argument fails because the allegations in Plaintiff’s
21 Amended Complaint (titled “Conspiratorial Involvement by Defendants’ Lawyers”) are
22 not communications uttered or published in the course of judicial proceedings.

23
24

1 Furthermore, Defendants' previous counsels' false assertion of attorney-client
2 privilege also warrants no protection if such assertion was a key component of the
3 fraudulent conspiracy. Attorney-client privilege is not absolute and is subject to the
4 crime-fraud exception. See *United States v. Zolin*, 109 S. Ct. 2619 (1989). Many courts
5 across America have examined Defendants' previous counsels' unethical conduct and
6 rejected their invocation of attorney-client privilege. An instructive summary and
7 analysis can be found in Judge Gladys Kessler's 1682-page opinion in 2006, finding that
8 nine tobacco companies—including the Defendants in this case—violated and continued
9 to violate the RICO Act by conspiring to deceive the American public:

10 a word must be said about the role of lawyers in this fifty-year history of
11 deceiving smokers, potential smokers, and the American public about the
12 hazards of smoking and second hand smoke, and the addictiveness of
13 nicotine. At every stage, lawyers played an absolutely central role in the
14 creation and perpetuation of the Enterprise and the implementation of its
15 fraudulent schemes. They devised and coordinated both national and
16 international strategy; they directed scientists as to what research they
17 should and should not undertake; they vetted scientific research papers
18 and reports as well as public relations materials to ensure that the
19 interests of the Enterprise would be protected; they identified "friendly"
20 scientific witnesses, subsidized them with grants from the Center for
21 Tobacco Research and the Center for Indoor Air Research, paid them
22 enormous fees, and often hid the relationship between those witnesses
23 and the industry; and they devised and carried out document destruction
24 policies and took shelter behind baseless assertions of the attorney client
privilege.

What a sad and disquieting chapter in the history of an honorable and
often courageous profession.

United States v. Philip Morris USA, Inc., 449 F. Supp. 2d 1, 28 (D.D.C. 2006).

Judge Kessler followed her reproach with a 15-page analysis and summary of
various courts' rulings on this issue, including: *Florida v. American Tobacco*, Civ. Action
No. CL 95-1466 AH (Palm Beach Cty. Fla., filed Feb. 21, 1995); *State of Minnesota v.*
Philip Morris, No. C1-94-8565, 1998 WL 257214, at *9 (Minn. Dist. Ct. Mar. 7, 1998);

1 *Washington v. American Tobacco*, No. 96-2-15056-8 SEA (King Cty. Sup. Ct. 1998);
2 *Sackman v. Liggett Group*, 173 F.R.D. 358, 362-64 (E.D.N.Y. 1997); *Burton v. R.J.*
3 *Reynolds*, 170 F.R.D. 481, 490 (D. Kan. 1997); *Carter v. Brown & Williamson*, Case No.
4 95-00934 CA (Duval Cty. Cir. Ct., Fla., Tran. July 26, 1996, at 1329-32); *Haines v. Liggett*
5 *Group*, 140 F.R.D. 681, 689 (D.N.J. 1992); (*Re Mowbray*) *Brambles Australia Ltd. v.*
6 *British American Tobacco Australia Services Ltd.* [2006] NSWDDT 15. See attached
7 **Exhibit 5** Page 1464-1478 of Judge Kessler's Opinion.

8 As these courts have made clear, Defendants' previous counsels' participatory
9 conduct in the conspiracy is not subject to any privilege or protection. So while
10 Defendants are correct in that "defending lawsuits is not fraud," the acts Plaintiff
11 described in her lawyer-related allegations are. These cleverly premeditated plans to
12 cover up a fraudulent conspiracy with attorney-client privilege were consummated at
13 litigation when the lawyers made false assertions of the privilege. Since that is the final
14 culmination of these lawyers' efforts to commit fraud with the Defendants, the lawyers'
15 actions cannot warrant protection under any privilege.

16 Striking these allegations would deprive Plaintiff her right to state her case in
17 full. In light of the fact that Plaintiff voluntarily removed the identity of the conspiring
18 lawyers and law firms from her Amended Complaint, this Court should allow Plaintiff
19 to make allegations as necessary to present her case.

20 ///

21 ///

22 ///

23 ///

24

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24

IV. CONCLUSION

Thus, based on the foregoing, Plaintiff respectfully requests this Court deny Defendants' Motion to Strike.

Dated this 12th day of April, 2021.

CLAGGETT & SYKES LAW FIRM

/s/ Sean K. Claggett
Sean K. Claggett, Esq.
Nevada Bar No. 008407
4101 Meadows Lane, Suite 100
Las Vegas, Nevada 89107

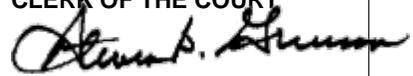
Kimberly L. Wald, Esq. (admitted pro hac vice)
Florida Bar. No. 112263
KELLEY | UUSTAL
500 North Federal Highway, Suite 200
Fort Lauderdale, FL 33301

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 12th day of April 2021 I caused to be served a true and correct copy of the **PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO STRIKE THE LAWYER-RELATED ALLEGATIONS TO PLAINTIFF'S AMENDED COMPLAINT** on the following person(s) by the following method(s) pursuant to NRCP 5(b) and NEFCR 9:

<p>VIA E-SERVICE ONLY: Dennis L. Kennedy, Esq. Joseph A. Liebman, Esq. BAILEY KENNEDY 8984 Spanish Ridge Avenue Las Vegas, Nevada 89148-1302 <i>Attorneys for R.J. Reynolds Tobacco Company, Quick Stop Market, Joe's Bar, Inc., The Poker Palace, Silver Nugget Gaming, LLC D/B/A Silver Nugget Casino, and Jerry's Nugget</i></p>	<p>VIA E-SERVICE ONLY: D. Lee Roberts, Jr., Esq. Phillip N. Smith, Jr., Esq. Daniela LaBounty, Esq. WEINBERG WHEELER HUDGINS GUNN & DIAL 6385 South Rainbow Boulevard, Suite 400 Las Vegas, Nevada 89118 <i>Attorneys for Philip Morris USA, Inc. and ASM Nationwide Corporation</i></p>
<p>VIA E-SERVICE ONLY: Daniel F. Polsenberg, Esq. J. Christopher Jorgensen, Esq. LEWIS ROCA ROTHGERBER CHRISTIE 3993 Howard Hughes Parkway, #600 Las Vegas, Nevada 89169 <i>Attorneys for Liggett Group, LLC</i></p>	<p>VIA E-SERVICE ONLY: Spencer M. Diamond Esq. KING & SPALDING LLP 1180 Peachtree Street, N.E. Atlanta, GA 30309 <i>Attorneys for R.J. Reynolds Tobacco Company, Quick Stop Market, Joe's Bar, Inc., The Poker Palace, Silver Nugget Gaming, LLC D/B/A Silver Nugget Casino, and Jerry's Nugget</i></p>
<p>VIA E-SERVICE ONLY: Valentin Leppert Esq. KING & SPALDING 1180 Peachtree Street Atlanta, GA 30309-3521 <i>Attorneys for R.J. Reynolds Tobacco Company, Quick Stop Market, Joe's Bar, Inc., The Poker Palace, Silver Nugget Gaming, LLC D/B/A Silver Nugget Casino, and Jerry's Nugget</i></p>	<p>VIA E-SERVICE ONLY: Ursula Marie Henninger, Esq. KING & SPALDING 300 S. Tryon Street Charlotte, North Carolina 28202 <i>Attorneys for R.J. Reynolds Tobacco Company, Quick Stop Market, Joe's Bar, Inc., The Poker Palace, Silver Nugget Gaming, LLC D/B/A Silver Nugget Casino, and Jerry's Nugget</i></p>
<p>VIA E-SERVICE ONLY: Kelly Anne Luther, Esq. KASOWITZ BENSON TORRES LLP 1441 Brickwell Avenue, Suite 1420 Miami, FL 33131 <i>Attorneys for Defendant Liggett Group, LLC</i></p>	<p>VIA E-SERVICE ONLY: Katherine Heinz, Esq. SHOOK, HARDY AND BACON, LLP 2555 Grand Boulevard Kansas City, MO 64108 <i>Attorneys for Philip Morris USA, Inc.</i></p>

/s/ Moises Garcia
An Employee of CLAGGETT & SYKES
LAW FIRM



1 **ROPP**

D. Lee Roberts, Jr., Esq.

2 lroberts@wwhgd.com

Nevada Bar No. 8877

3 Howard J. Russell, Esq.

hrussell@wwhgd.com

4 Nevada Bar No. 8879

Phillip N. Smith, Jr., Esq.

5 psmithjr@wwhgd.com

Nevada Bar No. 10233

6 Daniela LaBounty, Esq.

dlabounty@wwhgd.com

7 Nevada Bar No. 13169

WEINBERG, WHEELER, HUDGINS,

8 GUNN & DIAL, LLC

6385 South Rainbow Blvd., Suite 400

9 Las Vegas, Nevada 89118

Telephone: (702) 938-3838

10 Facsimile: (702) 938-3864

11 *Attorneys for Defendant Philip Morris USA Inc.*

12
13 **DISTRICT COURT**

14 **CLARK COUNTY, NEVADA**

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

17 Plaintiff,

18 vs.

19 PHILIP MORRIS USA INC., a foreign
20 corporation; R.J. REYNOLDS TOBACCO
21 COMPANY, a foreign corporation,
22 individually, and as successor-by-merger to
23 LORILLARD TOBACCO COMPANY and as
24 successor-in-interest to the United States
25 tobacco business of BROWN &
26 WILLIAMSON TOBACCO CORPORATION,
27 which is the successor-by-merger to THE
28 AMERICAN TOBACCO COMPANY;
LIGGETT GROUP, LLC., a foreign
corporation; QUICK STOP MARKET, LLC, a
domestic limited liability company; JOE'S
BAR, INC., a domestic corporation; THE
POKER PALACE, a domestic corporation;
SILVER NUGGET GAMING, LLC d/b/a
SILVER NUGGET CASINO, a domestic

Case No.: A-20-811091-C

Dept. No.: V

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

Hearing Date: April 29, 2021

Hearing Time: 9:30 a.m.



1 limited liability company, JERRY’S NUGGET,
2 a domestic corporation; and DOES I–X; and
3 ROE BUSINESS ENTITIES XI–XX, inclusive,

4
5 Defendants.

6 Defendant Philip Morris USA Inc., by and through its counsel of record, hereby files this
7 Reply to Plaintiff’s Opposition to Defendant Philip Morris USA Inc.’s Motion to Dismiss
8 Plaintiff’s Amended Complaint Under NRCP 12(b)(5) (“Pl.’s Opp.”).

9 This Reply is made and based upon the pleadings and papers on file here, the following
10 Memorandum of Points and Authorities, and any oral argument allowed at the time of hearing on
11 this matter.

12 Dated this 22nd day of April, 2021.

13
14 WEINBERG, WHEELER, HUDGINS,
15 GUNN & DIAL, LLC

16 */s/ D. Lee Roberts, Jr.*

17 D. Lee Roberts, Jr., Esq.

18 Howard J. Russell, Esq.

19 Phillip N. Smith, Jr., Esq.

20 Daniela LaBounty, Esq.

21 6385 South Rainbow Blvd., Suite 400

22 Las Vegas, Nevada 89118

23 *Attorney for Defendant Philip Morris USA Inc.*



1 MEMORANDUM OF POINTS AND AUTHORITY

2 **I. INTRODUCTION**

3 Plaintiff alleges that Defendant Philip Morris USA Inc. (“PM USA”) “seeks to take
4 advantage of Ms. Thompson’s passing to relitigate a host of issues already adjudicated by this
5 Court.” Plaintiff’s Opposition at 4:15–16. Plaintiff further contends that “the merits of this
6 motion to dismiss have already been extensively litigated, briefed, and ruled on.” *Id.* at 4:17–18.
7 These claims are demonstrably false. This Court has not yet reached the merits of this motion.
8 In fact, although Judge Bare denied PM USA’s Motion to Dismiss the original Complaint, he
9 acknowledged that the original Complaint did not clearly set forth a cause of action against PM
10 USA and ordered Plaintiff to amend her Complaint to set forth the basis of its claims in more
11 detail:

12 The Court finds that specifically as to Defendant Philip Morris USA
13 Inc.’s (“Philip Morris”) Motion, the only causes of action alleged
14 against Philip Morris are civil conspiracy and violation of the
15 Nevada Deceptive Trade Practices Act. However, *Plaintiff
16 Thompson acknowledges that she did not use the cigarettes
17 manufactured, distributed or sold by Philip Morris. Thus, the
18 factual basis of Philip Morris’ alleged liability is unclear.* Thus,
19 treating Philip Morris’ motion as a NRCP 12(e) motion for a more
20 definite statement, the motion should be granted as to that basis on
21 claims for civil conspiracy and violation of the Nevada Deceptive
22 Trade Practices Act.

19 ORDER DENYING DEFENDANTS PHILIP MORRIS USA INC.’S MOTION TO DISMISS
20 PLAINTIFF’S COMPLAINT UNDER NRCP 12(b)(5), filed 08/25/2020, attached to Plaintiff’s
21 Opposition as Ex. 1 (emphasis added).

22 After Plaintiff Dolly Rowan sought leave to file this Amended Complaint, PM USA did
23 oppose the motion on the basis that the proposed Amended Complaint failed to state a cause of
24 action against PM USA. Once again, however, the Court declined to reach the merits of this
25 issue and expressly invited PM USA to file a motion to dismiss if it wished to test the allegations
26 of the Amended Complaint:

27 As Plaintiff points out in the reply, additional factual allegations
28 regarding Philip Morris USA, Inc.’s alleged role in civil conspiracy



1 and violation of Nevada Deceptive Trade Practices Act were made.
2 Defendant Philip Morris USA, Inc. has not had a chance to respond
3 to those points. ***Thus, again, the correct procedure is to allow
Plaintiff to file her Amended Complaint and if Philip Morris
USA, Inc. wishes to file a motion to dismiss, it may do so.***

4 ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFF’S MOTION FOR
5 LEAVE TO FILE AMENDED WRONGFUL DEATH COMPLAINT, AND PLAINTIFF’S
6 MOTION TO SUBSTITUTE PARTIES, filed 03/11/2021, attached as Exhibit A.

7 As the case now stands, Judge Bare has previously found that because decedent admitted
8 that “she did not use the cigarettes manufactured, distributed or sold by Philip Morris,” that “the
9 factual basis of Philip Morris’ alleged liability is unclear.” Plaintiff has now amended her
10 Complaint, but has failed to set forth materially different factual allegations. All Plaintiff has
11 done is add additional detail to the same factual allegations which Judge Bare has already found
12 insufficient, and repeated the same arguments that did convince Judge Bare.

13 Plaintiff still does not—and cannot—dispute that PM USA did not, and never has,
14 manufactured Pall Mall, Camel, Viceroy, or Pyramid brand cigarettes, which allegedly caused
15 Decedent Noreen Thompson’s lung cancer in April 2019. Under well-settled Nevada law and
16 the laws of most American jurisdictions, recovery predicated on harm caused by a product
17 requires proof of ***specific product causation***. In other words, to recover from a specific
18 defendant, Plaintiff must prove (1) the ***use*** of that defendant’s product, and (2) ***causation*** of
19 injury resulting from the use of the alleged product. *See, e.g., Holcomb v. Ga. Pac., LLC*, 128
20 Nev. 614, 621–22, 289 P.3d 188, 193 (2012) (“Regardless of the cause of action, causation—
21 encompassing both medical causation and sufficient exposure—is a necessary element in
22 proving appellants’ case [A]ppellants must demonstrate that a ***particular defendant***
23 sufficiently exposed [the appellants] to asbestos in order to establish adequate causation to hold
24 that defendant liable.” (emphasis added) (citations omitted)). Plaintiff acknowledged as much—
25 the Amended Complaint expressly excluded PM USA from Plaintiff’s claims for negligence,
26 strict products liability, fraudulent misrepresentation, and fraudulent concealment because
27 Decedent never smoked cigarettes manufactured by PM USA.

28 But, Plaintiff tries to avoid the requirement of specific product causation by arguing that



1 claims under the Nevada Deceptive Trade Practices Act (“NDTPA”) and for civil conspiracy do
2 not require proof of specific product causation. Plaintiff is wrong. There is no dispute that her
3 claim under NDTPA is based on fraud. *See* Pl.’s Opp. at 13–15. Under Nevada law, an NDTPA
4 fraud claim has identical elements as the common law fraud tort. The sole difference between
5 statutory and common law fraud is in the burden of proof—NDTPA-based fraud requires only a
6 preponderance of the evidence instead of clear and convincing evidence required by common
7 law fraud. *See Betsinger v. D.R. Horton, Inc.*, 126 Nev. 162, 165–67, 232 P.3d 433, 435–36
8 (2010) (characterizing NDTPA claims as statutory fraud claims).

9 Accordingly, to assert statutory fraud under the NDTPA, Plaintiff must allege that,
10 among other things, Decedent justifiably relied on PM USA’s knowing misrepresentation to her
11 detriment. *Bulbman, Inc. v. Nev. Bell*, 108 Nev. 105, 110–12, 825 P.2d 588, 592 (1992); *see*
12 *also, e.g., J.A. Jones Constr. Co. v. Lehrer McGovern Bovis, Inc.*, 120 Nev. 277, 290–91, 89 P.3d
13 1009, 1018 (2004); *Picus*, 256 F.R.D. at 658 (concluding that NDTPA causation “includes
14 reliance”). Here, nothing in Plaintiff’s Amended Complaint shows that Decedent detrimentally
15 relied on PM USA’s misrepresentations to start or to continue smoking Pall Mall, Camel,
16 Viceroy, or Pyramid brand cigarettes. If anything, Plaintiff admits in her Amended Complaint
17 that PM USA’s utter lack of inducement—detrimental or otherwise—because Decedent chose to
18 smoke cigarette brands *not* manufactured by PM USA. Consequently, Plaintiff’s claims against
19 PM USA under the NDTPA fail as a matter of law.

20 *Second*, Plaintiff’s civil conspiracy claim also fails. Well-established Nevada law
21 mandates that a civil conspiracy claim is viable *only* if supported by an actionable underlying
22 tort. *See, e.g., Jordan v. State ex rel. Dep’t of Motor Vehicles & Pub. Safety*, 121 Nev. 44, 75,
23 110 P.3d 30, 51 (2005) (“[A]n underlying cause of action for fraud is a *necessary predicate* to a
24 cause of action for conspiracy to defraud.” (emphasis added)), *overruled on other grounds*, 124
25 Nev. 224, 181 P.3d 670 (2008). Here, Plaintiff’s NDTPA claims against PM USA cannot serve
26 as the predicate for her civil conspiracy claim because Plaintiff does not have a viable NDTPA
27 claim against PM USA, as discussed above. And, while Plaintiff claimed that her fraudulent
28 misrepresentation claims against Defendants R.J. Reynolds Tobacco Company (“Reynolds”) and

1 Liggett Group LLC (“Liggett”) can serve as alternative predicates for the civil conspiracy
2 allegations, this argument fails as both a matter of law and logic, because Plaintiff asserted that
3 only Reynolds and Liggett made fraudulent misrepresentations that Decedent relied upon to her
4 detriment. Accordingly, Plaintiff’s Amended Complaint on its face fails to allege an underlying
5 actionable fraud by PM USA. In the absence of this necessary predicate, *Jordan*, 110 P.3d at 51,
6 Plaintiff’s civil conspiracy claim against PM USA fails as a matter of law.

7 For these reasons, articulated further below, PM USA respectfully requests that the Court
8 enter an order dismissing Plaintiff’s Amended Complaint as to the claims asserted against it.

9 II. ARGUMENT

10 A. Plaintiff’s Alternative Theories Are Nothing More than an Attempt to Avoid 11 the Requirement to Show Specific Product Use Under Nevada Law.

12 It is well-established that product use is a fundamental requirement in any product
13 liability action. *See Moretti v. Wyeth, Inc.*, No. 2:08-cv-00396-JCM-(GWF), 2009 WL 749532,
14 at *4 (D. Nev. Mar. 20, 2009). Plaintiff asks this Court to disregard *Moretti* because that case
15 was interpreting “Minnesota deceptive trade practice law.” Pl.’s Opp. at 19. This representation
16 is puzzling at best, because the federal court itself framed the issue as “. . . *whether Nevada law*
17 *recognizes Plaintiff’s misrepresentation/fraud claims* against Wyeth and Scharz, both brand
18 name drug manufacturers who did not manufacture or sell the generic drug that allegedly caused
19 Plaintiff’s injuries.” *Moretti* at *2 (emphasis added). More importantly, the *Moretti* court relied
20 on Nevada law for the premise that “[a]mong manufacturers of products, *liability rests only with*
21 *the manufacturer of the product that actually caused the alleged injury because that*
22 *manufacturer profited from sales of the product and controlled its safety.*” *Id.* at *4 (citing
23 *Allison v. Merck & Co.*, 110 Nev. 762, 766–68, 878 P.2d 948, 952 (1994)).

24 Plaintiff also asks this Court to ignore *Moretti* and the Nevada authority it relies upon,
25 together with similar holdings in *Baymiller v. Ranbaxy Pharms., Inc.*, 894 F. Supp. 2d 1302,
26 1309–11 (D. Nev. 2012), because *Moretti* and *Baymiller* did not involve claims of civil
27 conspiracy or deceptive trade practices. This argument ignores the fundamental point that these
28 cases are making—under Nevada law, *only the manufacturer of the product that actually*

1 *harmed the plaintiff may be held liable.* See, e.g., *Allison*, 878 P.2d at 952 (“Among
2 manufacturers of products, liability rests only with the manufacturer of the product that actually
3 caused the alleged injury because that manufacturer profited from sales of the product and
4 controlled its safety.”). Further, a plaintiff may not escape this requirement to show specific
5 product causation by pleading creative alternative theories rather than a traditional product
6 liability cause of action, because allegations of misrepresentation are simply “an effort to recover
7 for injuries caused by a product without meeting the requirements the law imposes in products
8 liability actions.” *Moretti*, at *4 (quoting *Foster v. Am. Home Prod. Corp.*, 29 F.3d 165, 168 (4th
9 Cir. 1994)).

10 While Plaintiff attempts to argue that her conspiracy and deceptive trade practice claims
11 are dissimilar from those in the fraud and misrepresentation cases PM USA has cited, this simply
12 is not true. In the absence of underlying fraud, these claims fail. See, e.g., *Tuttle v. Lorillard*
13 *Tobacco Co.*, 377 F.3d 917, 926 (8th Cir. 2004) (“Because the common law fraud claim is
14 legally insufficient for want of proof that Tuttle relied on the smokeless tobacco manufacturers’
15 and the STC’s representations, we agree with the district court’s ruling that the civil conspiracy
16 claim, which depends on a viable underlying tort, must fail as well.” (first citing *Harding v. Ohio*
17 *Cas. Ins. Co.*, 230 Minn. 327, 337, 41 N.W.2d 818, 824 (1950) (declaring “[t]he gist of the
18 action is not the conspiracy charged, but the tort working damage to the plaintiff”) (citation
19 omitted); then citing *D.A.B. v. Brown*, 570 N.W.2d 168, 172 (Minn. Ct. App. 1997) (holding
20 “conspiracy count fails because it is not supported by an underlying tort”).

21 In the absence of product use, there is no duty. Without product use, there can be no
22 causation. These fundamental requirements of tort law control Plaintiff’s claims under the facts
23 alleged here, where Plaintiff has clearly alleged the manufacturer of the products Decedent used.

24 **B. Plaintiff’s Claim for Deceptive Trade Practices Fails Because Decedent**
25 **Never Used a PM USA-Brand Product.**

26 Plaintiff alleged that PM USA engaged in various levels of misconduct that constitutes
27 “deceptive trade practice” under Nevada law. Section 41.600(1), Nevada Revised Statutes,
28 provides that “[a]n action may be brought by any person who is a victim of consumer fraud.”



1 Nev. Rev. Stat. §41.600(1). While Plaintiff quibbled that nothing in the NDTPA requires
2 product use, she neglects the plain language of the statute, which requires claimants to fall *victim*
3 to the alleged consumer fraud. In other words, a deceptive trade practices claim requires proof
4 that the *defendant committed* consumer fraud *causing damage to the plaintiff*. *Picus*, 256
5 F.R.D. at 652 (emphasis added). To succeed on this claim, a plaintiff must show that “(1) an act
6 of consumer fraud by the defendant (2) caused (3) damage to the plaintiff.” *Id.* at 658; *Holcomb*,
7 289 P.3d at 193 (“Regardless of the cause of action, causation—encompassing both medical
8 causation and sufficient exposure—is a necessary element in proving appellants’ case
9 [A]ppellants must demonstrate that a *particular defendant* sufficiently exposed [the appellants]
10 to asbestos in order to establish adequate causation to hold that defendant liable.” (emphasis
11 added) (citations omitted)); *see also* Nev. Rev. Stat. § 41.600(2)(e).

12 In *Betsinger v. D.R. Horton, Inc.*, the Nevada Supreme Court concluded that the
13 difference between statutory fraud (such as that alleged by Plaintiff under the NDTPA) and
14 common law fraud lies only in the standard of proof. 232 P.3d at 435–36 (“*[T]he purpose of the*
15 *consumer protection statute was to provide consumers with a cause of action that was easier to*
16 *establish than common law fraud*, and therefore, statutory fraud must only be proven by a
17 preponderance of the evidence.” (emphasis added) (agreeing with the rationale in *Dunlap v.*
18 *Jimmy GMC of Tucson, Inc.*, 666 P.2d 83, 88–89 (Ariz. Ct. App. 1983))). Thus, *Betsinger*
19 recognized that statutory fraud has the same elements as common law fraud but carries a lower
20 burden of proof. *Id.* There is no dispute that under Nevada law, product causation is a necessary
21 prerequisite to common law fraud. *Bulbman*, 825 P.2d at 592 (“These elements are: 1. A false
22 representation made by the defendant; 2. Defendant’s knowledge or belief that the representation
23 is false (or insufficient basis for making the representation); 3. Defendant’s intention to induce
24 the plaintiff to act or to refrain from acting in reliance upon the misrepresentation; 4. Plaintiff’s
25 justifiable reliance upon the misrepresentation; and 5. Damage to the plaintiff resulting from
26 such reliance.” (quotation omitted)); *see also Picus*, 256 F.R.D. at 658 (“[T]he Court concludes
27 *causation includes reliance in this [NDPTA] case.*” (citation omitted)); *Chattem v. BAC Home*
28 *Loan Servicing LP*, No. 2:11-cv-1727-KJD-RJJ, 2012 WL 2048199, at *2 (D. Nev. June 5,



1 2012) (“A claim under the NDTPA sounds in fraud”) (citations and internal quotation
2 marks omitted)). Consequently, to succeed on her NDTPA claim against PM USA, Plaintiff
3 must allege detrimental justifiable reliance—which simply cannot be present without an
4 allegation of specific product causation.

5 The cases Plaintiff relies on to establish that Decedent was a victim of PM USA’s alleged
6 NDTPA violations are wholly distinguishable from the allegations here because they address
7 claims that defendants **directly harmed** the plaintiffs involved. *See Sears v. Russell Road Food*
8 *& Beverage, LLC*, 460 F. Supp. 3d 1065, 1070 (D. Nev. 2020) (applying the Ninth Circuit’s
9 conclusion that “[t]o be a victim under this statute, the plaintiff need only have been “**directly**
10 **harmed**” by the defendant.”) (emphasis added) (quoting *Del Webb Cmtys., Inc. v. Partington*,
11 652 F.3d 1145, 1153 (9th Cir. 2011)); *S. Serv. Corp. v. Excel Bldg. Servs., Inc.*, 617 F. Supp. 2d
12 1097, 1099–1100 (D. Nev. 2007) (court only considering “whether a business competitor may be
13 a victim of consumer fraud” when “**directly harmed** by the defendant’s deceptive trade
14 practices” (emphasis added)); *Bates v. Dollar Loan Ctr., LLC*, No. 2:13-CV-1731-KJD-CWH,
15 2014 WL 3516260, at *2–3 (D. Nev. July 15, 2014) (determining that a defendant’s “call [to the
16 plaintiff] resulting in invasion of his privacy, and the accrual of additional cellular phone charges
17 or losing allotted cellular phone minutes,” sufficed to establish direct harm to the plaintiff).
18 Here, PM USA caused no direct harm to Plaintiff, as required by all of the case authorities on
19 which Plaintiff relies.

20 Rather, Plaintiff’s claims here are analogous to those that the court in *Prescott v. Slide*
21 *Fire Solutions, LP*, 410 F. Supp. 3d 1123 (D. Nev. 2019), found to be “too attenuated to establish
22 standing” under the NDTPA. 410 F. Supp. 3d at 1145–46. In *Prescott*, the plaintiffs alleged that
23 the defendant’s misleading statements about bump stock devices caused them harm when a
24 shooter used such a device during the mass shooting at the Route 91 Harvest Music Festival. *Id.*
25 at 1145. With respect to the plaintiffs’ NDTPA claims, however, the court concluded that the
26 “allegations [did] not . . . **reveal a direct harm of commercial injury** by [the defendant’s]
27 actions.” *Id.* (emphasis added). Here, as in *Prescott*, PM USA caused no direct harm to Plaintiff
28 because Plaintiff did not allege that Decedent ever purchased or smoked cigarettes manufactured



1 by PM USA. *See generally* Compl. Indeed, Plaintiff unambiguously alleges that Decedent’s
2 alleged lung cancer and death “were caused by smoking Pall Mall brand cigarettes, Camel brand
3 cigarettes, Viceroy brand cigarettes, and Pyramid brand cigarettes, to which she was addicted
4 and smoked continuously from approximately 1954 until 2019.” *Id.* ¶ 19. Thus, without
5 Decedent ever having purchased or smoked PM USA cigarettes, no connection exists between
6 the alleged deceptive trade practice as it relates to the health risk of PM USA’s particular
7 products and Decedent’s lung cancer and death.

8 Furthermore, Plaintiff’s claim also fails because PM USA did not knowingly make
9 misrepresentations about Pall Mall, Camel, Viceroy, and Pyramid brand cigarettes, the products
10 that allegedly caused Decedent’s injuries. Because Decedent did not smoke any other cigarette
11 brands, she never was a victim—as required by Nev. Rev. Stat. § 41.600(2)(e)—of any alleged
12 knowing misrepresentation by PM USA.

13 Finally, Plaintiff does not dispute that the NDTPA requires a “transaction” in order to
14 state a cause of action. Instead, Plaintiff argues that an “attempted sale” is a transaction. Even
15 assuming *arguendo* that this is correct, Plaintiff’s claim still fails for lack of alleged causation.
16 In fact, the same argument that an attempted sale is sufficient to state a cause of action under the
17 NDTPA was rejected by the Nevada Supreme Court in *Fairway Chevrolet Co. v. Kelley*,
18 429 P.3d 663 (Nev. 2018) (unreported). In *Fairway Chevrolet*, the Plaintiff/Respondent
19 contended that Judge Corey had properly denied a motion for summary judgment on claims
20 brought under the NDTPA even though no actual sale had taken place. First,
21 Plaintiff/Respondent argued that as a threshold matter, the definition of “sale” under the NDTPA
22 “. . . includes any sale, **offer for sale** or attempt to sell any property for any consideration.”
23 Respondent Allen Kelley’s Answering Brief at 39, 2018 WL 721543 (Nev.) citing NRS 598.094
24 (emphasis in original). Answering Brief attached as Exhibit B. Plaintiff/Respondent also argued
25 that “[i]f the Legislature intended to narrow its application to only apply when there was an
26 “actual sale” of a good or service, they would have drafted NRS 598.0923(3) to require an actual
27 sale to have occurred for its provisions to apply, but the Legislature clearly chose not to limit the
28 scope of this provision in such a manner.” *Id.* at 40–41.



1 The Nevada Supreme Court rejected these arguments, and found that the motion for
2 summary judgment should have been granted because in the absence of an actual sale Plaintiff
3 was not a “victim” and could not have suffered actual harm within the meaning of the NDTPA:

4 NRS 41.600(1) provides that “[a]n action may be brought by any
5 person who is a *victim* of consumer fraud.” (Emphasis added.)
6 The undisputed facts of this case demonstrate that respondent was
7 not a “victim” of consumer fraud under any sensible definition of
8 that term, as the definition of “victim” connotes some sort of harm
9 being inflicted on the “victim.” *See, e.g., Victim*, Black’s Law
10 Dictionary (10th ed. 2014) (defining “victim” as “[a] person
11 harmed by a crime, tort, or other wrong”); *Merriam-Webster’s*
12 *Collegiate Dictionary* 1394 (11th ed. 2007) (defining “victim” as
13 “one that is injured, destroyed, or sacrificed under any of various
14 conditions” and “one that is tricked or duped”).

15 Because respondent knew he would not and could not (and more
16 importantly, did not) suffer any harm at the hands of appellant, he
17 was not a “victim” authorized to bring a consumer fraud action
18 under NRS 41.600. *Harris Assocs. v. Clark Cty. Sch. Dist.*, 119
19 Nev. 638, 641–42, 81 P.3d 532, 534 (2003) (“When the words of
20 the statute have a definite and ordinary meaning, this court will not
21 look beyond the plain language of the statute, unless it is clear that
22 this meaning was not intended.” (internal quotation marks and
23 footnotes omitted)). Accordingly, the district court erred in
24 denying appellant’s motion for summary judgment.

25 134 Nev. 935, 429 P.3d 663 (2018) (footnotes omitted). A full copy of this decision is attached
26 as Exhibit C. Similarly, Plaintiff here has not alleged an actual sale of PM USA products and
27 has not sufficiently alleged that she was a victim who suffered harm based on PM USA’s alleged
28 violations of the NDTPA.

Consequently, Plaintiff’s claims against PM USA under the NDTPA fail as a matter of
law. As such, the Court should dismiss these claims.

**C. Plaintiff’s Claims for Civil Conspiracy to Defraud (Ninth and Tenth Claims
for Relief) Fail Under Nevada Law as to PM USA Because Plaintiff Did Not
Plead an Underlying Tort as to PM USA.**

Under Nevada law, an actionable civil conspiracy to defraud claim exists when there is:
“(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) damages resulting to the plaintiff.”
Jordan, 110 P.3d at 51. “[A]n underlying cause of action for fraud is a *necessary predicate* to a



1 cause of action for conspiracy to defraud.” *Id.* (emphasis added); *see also Sommers v. Cuddy*,
2 No. 2:08-cv-78-RCJ-RJJ, 2012 WL 359339, at *5 (D. Nev. Feb. 2, 2012) (applying Nevada state
3 law and recognizing that a cause of action for civil conspiracy to defraud requires a viable
4 underlying cause of action for fraud); *Goodwin v. Exec. Tr. Servs., LLC*, 680 F. Supp. 2d 1244,
5 1253–54 (D. Nev. 2010); *Fausto v. Sanchez-Flores*, 2019 Nev. Dist. LEXIS 1046, at *4 (Nev.
6 Dist. Ct. Oct. 16, 2019) (“Further, a plaintiff must show the commission of an actionable
7 underlying tort to establish a civil conspiracy claim.”); *Klementi v. Spencer*, 2018 Nev. Dist.
8 LEXIS 934, at *10 (Nev. Dist. Ct. Aug. 28, 2018) (same); *Slaughter v. State*, 2017 Nev. Dist.
9 LEXIS 2118, at *6 (Nev. Dist. Ct. Oct. 20, 2017) (same).

10 Here, Plaintiff claimed that her NDTPA claim suffices to support her civil conspiracy
11 claim. However, as discussed above, Plaintiff’s NDTPA claim fails as a matter of law for her
12 irremediable failure to allege product causation. And, Plaintiff’s claims of fraud against *only*
13 Defendants Reynolds and Liggett likewise cannot serve as the underlying torts for civil
14 conspiracy. Consequently, no actionable tort claim supports Plaintiff’s claims for civil
15 conspiracy. For these reasons, the Court also should dismiss Plaintiff’s civil conspiracy causes
16 of action.

17 **III. CONCLUSION**

18 For the reasons stated above, Philip Morris USA Inc. respectfully requests that the Court
19 enter an order dismissing Plaintiff’s Amended Complaint as to the claims asserted against it.

20 Dated this 22nd day of April, 2021.

21
22 WEINBERG, WHEELER, HUDGINS,
GUNN & DIAL, LLC

23
24 */s/ D. Lee Roberts, Jr.*

25 D. Lee Roberts, Jr., Esq.

26 Howard J. Russell, Esq.

27 Phillip N. Smith, Jr., Esq.

28 Daniela LaBounty, Esq.

6385 South Rainbow Blvd., Suite 400

Las Vegas, Nevada 89118

Attorney for Defendant Philip Morris USA Inc.



CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of April, 2021, a true and correct copy of the foregoing **DEFFENDANT PHILIP MORRIS USA INC.’S REPLY TO PLAINTIFF’S OPPOSITION TO DEFENDANT PHILIP MORRIS USA INC.’S MOTION TO DISMISS PLAINTIFF’S AMENDED COMPLAINT UNDER NRCP 12(b)(5)** was electronically filed and served on counsel through the Court’s electronic service system pursuant to Administrative Order 14-2 and N.E.F.C.R. 9, via the electronic mail addresses noted below, unless service by another method is stated or noted:

Sean K. Claggett, Esq.
sclaggett@claggettlaw.com
William T. Sykes, Esq.
wsykes@claggettlaw.com
Matthew S. Granda, Esq.
mgranda@claggettlaw.com
CLAGGETT & SYKES LAW FIRM
4101 Meadows Lane, Suite 100
Las Vegas, NV 89107
(702) 655-2346
(702) 655-3763 FAX

Kimberly Lauren Wald, Esq.
Admitted Pro Hac Vice
klw@kulaw.com
KELLEY UUSTAL, PLC
500 North Federal Highway, Suite 200
Fort Lauderdale, FL 33301
(305) 444-7675
(305) 444-0075 FAX

Attorneys for Plaintiff

Dennis L. Kennedy, Esq.
DKennedy@baileykennedy.com
Joseph A. Liebman, Esq.
JLiebman@baileykennedy.com
BAILEY ❖ KENNEDY
8984 Spanish Ridge Ave.
Las Vegas, Nevada 89148
(702) 562-8820
(702) 562-8821 FAX

Valentin Leppert, Esq.
Admitted Pro Hac Vice
VLeppert@kslaw.com
Spencer Miles Diamond, Esq.
SDiamond@kslaw.com
Admitted Pro Hac Vice
KING & SPALDING
1180 Peachtree Street NE, Suite 16090
Atlanta, GA 30309
(404) 572-3578
(404) 572-5100 FAX

Ursula Marie Henninger, Esq.
Admitted Pro Hac Vice
UHenninger@kslaw.com
KING & SPALDING
300 S. Tryon Street
Charlotte, NC 28202
(704) 503-2631
(704) 503-2622 FAX

*Attorneys for Defendants
RJ Reynolds Tobacco Company, Quick Stop
Market, LLC, Joe’s Bar, Inc., The Poker
Palace, Silver Nugget Gaming, LLC d/b/a
Silver Nugget Casino, and Jerry’s Nugget*



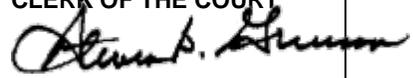
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

J Christopher Jorgensen, Esq.
CJorgensen@lrrc.com
LEWIS ROCA ROTHGERBER CHRISTIE LLP
3993 Howard Hughes Parkway, Suite 600
Las Vegas, Nevada 89169
(702) 949-8200

Kelly Ann Luther
Pro Hac Vice
kluther@kasowitz.com
KASOWITZ BENSON TORRES LLP
1441 Brickwell Avenue, Suite 1420
Miami, Florida 33131
Phone: 786-587-1045

*Attorneys for Defendant
Liggett Group, LLC*

/s/ Kelly L. Pierce
An employee of WEINBERG, WHEELER,
HUDGINS, GUNN & DIAL, LLC



1 **RIS (CIV)**
DENNIS L. KENNEDY
2 Nevada Bar No. 1462
JOSEPH A. LIEBMAN
3 Nevada Bar No. 10125
BAILEY ❖ KENNEDY
4 8984 Spanish Ridge Avenue
Las Vegas, Nevada 89148-1302
5 Telephone: 702.562.8820
Facsimile: 702.562.8821
6 DKennedy@BaileyKennedy.com
JLiebman@BaileyKennedy.com

7
8 VALENTIN LEPPERT
(ADMITTED PRO HAC VICE)
SPENCER MILES DIAMOND
9 (ADMITTED PRO HAC VICE)
KING & SPALDING
10 1180 Peachtree Street NE, Suite 16090
Atlanta, Georgia 30309
11 Telephone: 404.572.3578
Facsimile: 404.572.5100
12 VLeppert@kslaw.com
SDiamond@kslaw.com

13
14 URSULA MARIE HENNINGER
(ADMITTED PRO HAC VICE)
KING & SPALDING
15 300 S. Tryon Street
Charlotte, North Carolina 28202
16 Telephone: 704.503.2631
Facsimile: 704.503.2622
17 UHenninger@kslaw.com

18 *Attorneys for Defendant*
R.J. REYNOLDS TOBACCO COMPANY

20 DISTRICT COURT
CLARK COUNTY, NEVADA

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

24 Plaintiff,

25 vs.

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

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

**DEFENDANTS' REPLY IN SUPPORT
OF THEIR MOTION TO STRIKE THE
LAWYER-RELATED ALLEGATIONS
IN PLAINTIFF'S AMENDED
COMPLAINT**

**Hearing Date: May 4, 2021
Hearing Time: 9:00 A.M.**

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

1 BROWN & WILLIAMSON TOBACCO
2 CORPORATION, which is the successor-by-
3 merger to THE AMERICAN TOBACCO
4 COMPANY; LIGGETT GROUP, LLC., a
5 foreign corporation; QUICK STOP MARKET,
6 LLC, a domestic limited liability company; JOES
7 BAR, INC., a domestic corporation; THE
8 POKER PALACE, a domestic corporation;
9 SILVER NUGGET GAMING, LLC d/b/a
10 SILVER NUGGET CASINO, a domestic limited
11 liability company, JERRY'S NUGGET, a
12 domestic corporation; and DOES 1-X; and ROE
13 BUSINESS ENTITIES XI-XX. inclusive,

Defendants.

14 **DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION TO STRIKE THE**
15 **LAWYER-RELATED ALLEGATIONS IN PLAINTIFF'S AMENDED COMPLAINT**

16 Plaintiff's Opposition confirms that her newly added attack on defense counsel should be
17 stricken from her Amended Complaint. It fails to come to grips with the numerous Nevada cases
18 cited in Defendants' Motion that stand for the proposition that litigation conduct cannot give rise to
19 liability in subsequent lawsuits. *See* Defs.' Mot. at 6. Instead, Plaintiff's Opposition attempts to
20 limit the scope of the privilege by arguing that it only applies to "communications uttered or
21 published in the course of judicial proceedings." *See* Pl.'s Opp. at 10-11. As an initial matter, some
22 of the Plaintiff's allegations pertain precisely to what defense counsel said or did in the course of
23 other judicial proceedings. For example, Plaintiff alleges that the way defense counsel defended past
24 lawsuits—by arguing that smoking was a matter of free choice, protecting privileged documents
25 from disclosure, and vigorously defending Defendants—is a basis for liability in this subsequent
26 lawsuit. Am. Compl. at ¶¶ 214-216, 247-249, 284-286, 319-321.

27 Beyond that, the privilege is much broader than Plaintiff acknowledges. It also applies to
28 conduct during, and in anticipation of, litigation. *See Fink v. Oshins*, 118 Nev. 428, 433-434 (2002)
("The scope of the absolute privilege is quite broad. . . . [and] courts should apply the absolute
privilege liberally, resolving any doubt 'in favor of its relevancy or pertinency.'"); *Clark County*
School Dist. v. Virtual Educ. Software, Inc., 125 Nev. 374, 382-382 (2009) (stating that the absolute
privilege applies to current, and contemplated, proceedings and affords the same protections from
liability to both attorneys and parties) (internal citations omitted); *Travelers Cas. & Sur. Co. v.*

1 *Pengilly Robbins Slater Law Firm*, 2014 U.S. Dist. LEXIS 39339, at *8-9 (D. Nev. 2014) (stating
2 that the absolute privilege encompasses not only communications but also conduct) (internal
3 citations omitted); *Searcy v. Esurance Ins. Co.*, 243 F. Supp. 3d 1146, 1155 (D. Nev. 2017) (stating
4 that the privilege applies to litigation conduct, such as retaining experts).

5 Plaintiff's Opposition even concedes that "defending lawsuits is not fraud." *See* Pl.'s Opp. at
6 12. But again, Plaintiff's Opposition ignores that her own Amended Complaint contains several new
7 allegations in each of her fraud counts that specifically attack Defendants and their lawyers for what
8 they supposedly did "**when sued**" in other cases and for the manner in which they "conducted the
9 litigation" in those prior cases. Am. Compl. at ¶¶ 214-216, 247-249, 284-286, 319-321 (emphasis
10 added). These allegations thus seek to hold Defendants liable for what they did in prior litigation,
11 which is squarely barred by Nevada's absolute litigation privilege. Plaintiff's failure to specifically
12 address these allegations speaks volumes.

13 Plaintiff attempts to mitigate her attacks by claiming that they are not "directed to
14 Defendants' current counsel and/or their representation as part of their lawful defense in this case."
15 Pl.'s Opp. at 7 (quoting Am. Compl. at 26 n. 1). But that does not circumvent the litigation privilege
16 either. As the cases cited above make clear, the privilege prevents *subsequent* liability for litigation
17 conduct in *prior* cases. *See supra*, at 2 (citing *e.g., Virtual Educ. Software*, 125 Nev. at 382). In
18 other words, Plaintiff cannot use this lawsuit to hold Defendants liable for their defense of past
19 lawsuits. Thus, her attempt to limit her attack to the defense of past lawsuits only emphasizes that it
20 is barred by Nevada's absolute litigation privilege.

21 The practical reality confirms that conclusion as well. It strains credulity to say that a jury
22 would be able to distinguish between the defense of past tobacco lawsuits and the defense of this
23 present tobacco lawsuit—especially considering that Plaintiff's allegations malign some of the same
24 defense themes that the jury will hear in this case. For example, Plaintiff claims that the lawyers
25 furthered the conspiracy on behalf of Defendants when they asserted, during litigation, a defense that
26 "smoking was a matter for free choice and that smokers could simply quit smoking if they so
27 wanted." Am. Compl. at ¶¶ 214, 247, 284, 319. But these are the very same defense themes that the
28 jury will hear in this case. A jury thus cannot easily distinguish between the defense of past tobacco

1 lawsuits and defense of this present tobacco lawsuit.

2 The real purpose of these allegations is to make the jury mistrust defense counsel for the
3 tobacco companies. Plaintiff’s Opposition offers no explanation how the defense of other lawsuits
4 could be relevant to her case. She states that “allegations regarding the lawyers’ conduct are directly
5 relevant, material, and essential to the heart of this litigation.” Pl.’s Opp. at 7. But that does not
6 explain how the defense of lawsuits in the 1960s, ‘70s, ‘80s, or ‘90s could possibly have injured
7 Plaintiff’s mother, thereby confirming that these claims are “completely immaterial to the stated
8 causes of action” and should be stricken from Plaintiff’s Amended Complaint. *Goldman v. Clark*
9 *County Sch. Dist.*, No. A-18-778230, 2019 Nev. Dist. LEXIS 364, at *11 (Nev. 8th J.D. 2019).

10 Plaintiff’s Opposition also cites to Judge Kessler’s decision and case law discussing the
11 crime-fraud exception. See Pl.’s Opp at 11-12. However, that case law is inapplicable here. The
12 crime-fraud exception pertains to whether the attorney-client and work product privileges can be
13 lifted—not the absolute litigation privilege. To be sure, there is no fraud exception to an absolute
14 privilege. See *Hampe v. Foote*, 118 Nev. 405, 409, 47 P.3d 438, 440 (2002), *overruled in part on*
15 *other grounds by, Buzz Stew, LLC v. City of N. Las Vegas*, 181 P.3d 670, 672 n. 6 (Nev. 2008). (“An
16 absolute privilege bars any civil litigation based on the underlying communication.”); *Crockett &*
17 *Myers, Ltd. v. Napier, Fitzgerald & Kirby, LLP*, 440 F. Supp. 2d 1184, 1196 (D. Nev. 2006) (stating
18 that the litigation privilege applies to all civil tort actions, including fraud, with the sole exception of
19 an action for malicious prosecution) (internal citation omitted); *Alexander v. Meiling*, Case. No.
20 3:16-cv-00572-MMD-CLB, 2020 U.S. Dist. LEXIS 128780, at *11 (D. Nev. July 21, 2020) (The
21 “litigation privilege is absolute and can extend to ‘statements made with knowledge of falsity and
22 malice.’”) (internal citation omitted). Additionally, Judge Kessler’s decision and the crime-fraud
23 exception do not apply to situations like how Defendants and their counsel defended past lawsuits
24 “when sued.”

25 At bottom, these allegations are a thinly veiled attempt to malign the defense of tobacco
26 lawsuits to make the jury dislike and mistrust the lawyers defending this tobacco lawsuit. That is
27 improper and squarely violates Nevada’s absolute litigation privilege. The Court should strike these
28 allegations from the Amended Complaint.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

CONCLUSION

For the reasons set forth herein and in their moving papers, Defendants request that their Motion be granted and that these allegations be stricken from Plaintiff's Amended Complaint.

DATED this 27th day of April, 2021.

BAILEY ❖ KENNEDY

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

KING & SPALDING
VALENTIN LEPPERT
(ADMITTED PRO HAC VICE)
URSULA MARIE HENNINGER
(ADMITTED PRO HAC VICE)
SPENCER MILES DIAMOND
(ADMITTED PRO HAC VICE)

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

WEINBERG, WHEELER, HUDGINS,
GUNN & DIAL, LLC

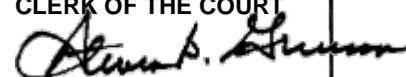
By: /s/ D. Lee Roberts, Jr.
D. Lee Roberts, Jr., Esq.
(NSB #8877)
Phillip N. Smith, Jr., Esq.
(NSB #10233)
Daniela LaBounty, Esq.
(NSB #13169)

*Attorneys for Defendant Philip Morris
USA Inc.*

LEWIS ROCA ROTHGERBER
CHRISTIE LLP

By: /s/ J. Christopher Jorgensen
DANIEL F. POLSENBERG
(NSB #2376)
J. CHRISTOPHER JORGENSEN
(NSB #5382)

*Attorneys for Defendant Liggett Group
LLC*



1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

LETT

Laura E. Stubberud
Nevada Bar No. 4765
Law Offices of
Laura E. Stubberud
2831 St. Rose Pkwy
Henderson, NV 89052
(702) 625-9260
Laura@stubberudlaw.com

**DISTRICT COURT
CLARK COUNTY, NEVADA**

In the Matter of the Estate of

NOREEN THOMPSON

Case No. : P-20-103649-E
Dept. No. : PC-1

LETTERS OF SPECIAL ADMINISTRATION

On the 6th day of August, 2020 the Court entered an Order appointing DOLLY ROWAN Special Administrator of Decedent's Estate. The Order includes:

- A directive of no bond. Any money received shall be placed into attorney trust account
- A directive for the establishment of blocked accounts;
- A directive for the posting of bond in the amount of \$_____;
- A directive for both the establishment of blocked accounts for sums in excess of \$ and the posting of bond in the sum of \$_____.

The Special Administrator, having duly qualified, may act and has the authority and duties of Administrators.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

In testimony of which, I have this date signed these Letters and affixed the seal of the Court.

STEVEN D. GRIERSON
CLERK OF COURT

By: Robyn Rodriguez 9/1/2020
Deputy Clerk Date
Robyn Rodriguez

OATH

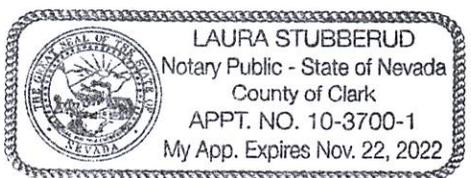
I, Dolly Rowan, whose mailing address is 3766 Waynesville St., Las Vegas, NV 89122, solemnly affirm that I will faithfully perform according to law the duties of Special Administrator, and that all matters stated in any petition or paper filed with the Court by me are true of my own knowledge or, if any matters are stated on information and belief, I believe them to be true.

Dolly Rowan
DOLLY ROWAN

SUBSCRIBED AND SWORN to before me

this 31st day of Aug, 2020

Laura Stubberud
Notary Public
County of Clark
State of Nevada



///
///

WEINBERG WHEELER
HUDGINS GUNN & DIAL



1 **OGM**
2 D. Lee Roberts, Jr., Esq.
3 lroberts@wwhgd.com
4 Nevada Bar No. 8877
5 Howard J. Russell, Esq.
6 hrussell@wwhgd.com
7 Nevada Bar No. 8879
8 Phillip N. Smith, Jr., Esq.
9 psmithjr@wwhgd.com
10 Nevada Bar No. 10233
11 Daniela LaBounty, Esq.
12 dlabounty@wwhgd.com
13 Nevada Bar No. 13169
14 WEINBERG, WHEELER, HUDGINS,
15 GUNN & DIAL, LLC
16 6385 South Rainbow Blvd., Suite 400
17 Las Vegas, Nevada 89118
18 Telephone: (702) 938-3838
19 Facsimile: (702) 938-3864
20
21 *Attorneys for Defendant Philip Morris USA Inc.*

DISTRICT COURT
CLARK COUNTY, NEVADA

22 DOLLY ROWAN, as Special Administrator of
23 the Estate of NOREEN THOMPSON,
24
25 Plaintiff,
26
27 vs.
28
29 PHILIP MORRIS USA INC., a foreign
30 corporation; R.J. REYNOLDS TOBACCO
31 COMPANY, a foreign corporation,
32 individually, and as successor-by-merger to
33 LORILLARD TOBACCO COMPANY and as
34 successor-in-interest to the United States
35 tobacco business of BROWN &
36 WILLIAMSON TOBACCO CORPORATION,
37 which is the successor-by-merger to THE
38 AMERICAN TOBACCO COMPANY;
39 LIGGETT GROUP, LLC., a foreign
40 corporation; QUICK STOP MARKET, LLC, a
41 domestic limited liability company; JOE'S
42 BAR, INC., a domestic corporation; THE
43 POKER PALACE, a domestic corporation;
44 SILVER NUGGET GAMING, LLC d/b/a
45 SILVER NUGGET CASINO, a domestic

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

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

1 limited liability company, JERRY’S NUGGET,
2 a domestic corporation; and DOES I–X; and
ROE BUSINESS ENTITIES XI–XX, inclusive,

3 Defendants.

4 On August 27, 2021, the Court issued a Minute Order regarding Defendant Philip Morris
5 USA Inc.’s Motion to Dismiss Plaintiff’s Amended Complaint Under NRCP 12(b)(5). The
6 Court, having considered Defendant’s Motion, the Opposition, and Reply thereto, and arguments
7 of counsel, hereby finds as follows:

8 THE COURT HEREBY FINDS that Philip Morris USA Inc.’s Motion is **GRANTED**.

9 NRCP 12(b)(5) governs a motion to dismiss for failure to state a claim upon which relief
10 can be granted. The court must accept all factual allegations in the complaint as true, and draw
11 all inferences in the plaintiff’s favor. *Buzz Stew, LLC v. City of Las Vegas*, 124 Nev. 224, 227-
12 28, 181 P.3d 670, 672 (2008). The test for determining whether the allegations of a complaint
13 are sufficient to assert a claim for relief is whether the allegations give fair notice of the nature
14 and basis of the legally sufficient claim and relief requested. *Breliant v. Preferred Equities*
15 *Corp.*, 109 Nev. 842, 846, 858 P.3d 1258, 1260 (1993). Dismissal is proper “if it appears
16 beyond a doubt that [plaintiff] could prove no set of facts, which, if true, would entitle it to
17 relief.” *Buzz Stew*, 124 Nev. at 228, 181 P.3d 672. Additionally, NRCP 8(a) allows notice
18 pleading, where all that is required in a complaint is a short and plain statement of the grounds
19 for the court’s jurisdiction, claim showing that the pleader is entitled to relief, a demand for the
20 relief sought, and at least \$15,000 in monetary damages sought.

21 “As a general rule, the court may not consider matters outside the pleading being
22 attacked.” *Breliant v. Preferred Equities Corp.*, 109 Nev. 842, 847, 858 P.2d 1258, 1261 (1993).
23 “However, the court may take into account matters of public record, orders, items present in the
24 record of the case, and any exhibits attached to the complaint when ruling on a motion to dismiss
25 for failure to state a claim upon which relief can be granted.” *Id.* Additionally, “a document is
26 not outside the complaint if the complaint specifically refers to the document and if its
27 authenticity is not questioned.” *Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir. 1994), *overruled*
28 *on other grounds by Galbraith v. Cnty. of Santa Clara*, 307 F.3d 1119, 1125 26 (9th Cir. 2002).

1 Material which is properly submitted as part of the complaint may be considered on a motion to
2 dismiss. *Hal Roach Studios Inc. v. Richard Feiner & Co.*, 896 F.2d 1542, 1555 n.19 (9th Cir.
3 1990). If matters outside the pleadings are presented to and not excluded by the court, the
4 motion must be treated as one for summary judgment under Rule 56. All parties must be given a
5 reasonable opportunity to present all the material that is pertinent to the motion. NRCP 12(d). A
6 party may move for summary judgment at any time and must be granted if the pleadings and
7 affidavits show that there is no genuine issue as to any material fact and that the moving party is
8 entitled to a judgment as a matter of law. *Villescas v. CNA Ins. Companies.*, 109 Nev. 1075,
9 1078, 864 P.2d 288, 290 (1993).

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

19 THEREFORE, THE COURT hereby grants Defendant Philip Morris USA Inc.'s Motion
20 to Dismiss Plaintiff's Amended Complaint Under NRCP 12(b)(5).

21 IT IS HEREBY ORDERED that Plaintiff's Eleventh and Twelve Claims for Relief for
22 Violation of Deceptive Trade Practices Act are DISMISSED with prejudice as to Defendant
23 Philip Morris USA Inc.

24 ///

25 ///

26 ///

27 ///

28 ///



1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

IT IS HEREBY ORDERED that Plaintiff's Ninth and Tenth Claims for Relief for Civil Conspiracy are DISMISSED with prejudice as to Defendant Philip Morris USA Inc.

Dated this 8th day of September, 2021

689 BC7 A0D5 2CB6
Veronica M. Barisich
District Court Judge

Respectfully Submitted By:

/s/ Howard J. Russell
D. Lee Roberts, Jr., Esq.
Howard J. Russell, 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
Attorney for Defendant Philip Morris USA Inc.

Approved as to form and content:
Dated this 7th day of September, 2021.

Dated this 7th day of September, 2021.

/s/ Kimberly L. Wald
Kimberly L. Wald, Esq.
KELLEY UUSTAL
500 North Federal Highway, Suite 200
Fort Lauderdale, FL 33301
Sean K. Claggett, Esq.
William T. Sykes, Esq.
Matthew S. Granda, Esq.
CLAGGETT & SYKES LAW FIRM
4101 Meadows Lane, Suite 100
Las Vegas, NV 89107
Attorneys for Plaintiff

/s/ Joseph A. Liebman
Dennis L. Kennedy, Esq.
Joseph A. Liebman, Esq.
BAILEY ♦ KENNEDY
8984 Spanish Ridge Ave.
Las Vegas, Nevada 89148
Attorneys for Defendants RJ Reynolds Tobacco Company, Quick Stop Market, LLC, Joe's Bar, Inc., The Poker Palace, Silver Nugget Gaming, LLC d/b/a Silver Nugget Casino, and Jerry's Nugget

Dated this 7th day of September, 2021.

/s/ J. Christopher Jorgensen
J. Christopher Jorgensen, Esq.
LEWIS ROCA ROTHGERBER CHRISTIE LLP
3993 Howard Hughes Parkway, Suite 600
Las Vegas, Nevada 89169
Attorneys for Defendant Liggett Group, LLC

Pierce, Kelly L.

From: Kimberly L. Wald <klw@kulaw.com>
Sent: Friday, September 03, 2021 11:11 AM
To: Heinz, Lindsey (SHB); Fan Li; Michael Hersh; mgranda@claggettlaw.com
Cc: Russell, Howard; Jackson, Brian (SHB); Kenyon, Jennifer (SHB); Tepikian, Bruce (SHB); Pierce, Kelly L.
Subject: RE: [EXTERNAL] Thompson (Clark County, NV) -- Draft Order on PM USA's MTD

This Message originated outside your organization.

Lindsey,
No objection for Plaintiff.

Kelley | Uustal

TRIAL ATTORNEYS

Kimberly L. Wald, Esq.
500 N. Federal Highway, Suite 200
Fort Lauderdale, FL 33301
www.kulaw.com



tollfree: 888.522.6601
tel: 954.522.6601
fax: 954.522.6608
email: klw@kulaw.com

From: Heinz, Lindsey (SHB) <LHEINZ@shb.com>
Sent: Friday, September 3, 2021 1:10 PM
To: Kimberly L. Wald <klw@kulaw.com>; Fan Li <fli@kulaw.com>; Michael Hersh <mah@kulaw.com>; mgranda@claggettlaw.com
Cc: 'Russell, Howard' <HRussell@wwhgd.com>; Jackson, Brian (SHB) <BJACKSON@shb.com>; Kenyon, Jennifer (SHB) <JBKENYON@shb.com>; Tepikian, Bruce (SHB) <BTEPIKIAN@shb.com>; Pierce, Kelly L. <KPierce@wwhgd.com>
Subject: [EXTERNAL] Thompson (Clark County, NV) -- Draft Order on PM USA's MTD

Counsel,

Attached please find a draft Order Granting PM USA's MTD in the Thompson case. Please review and confirm if you agree to the form and content.

Thanks,
Lindsey

Lindsey K. Heinz
Partner
Shook, Hardy & Bacon L.L.P.

816-559-2681 | lhein@shb.com



Pierce, Kelly L.

From: Joseph Liebman <JLiebman@baileykennedy.com>
Sent: Saturday, September 04, 2021 9:36 AM
To: Pierce, Kelly L.
Cc: Rebecca Crooker; Dennis Kennedy; Stephanie Kishi; SDiamond@kslaw.com; Jaramillo, Annette (AJaramillo@lewisroca.com); Helm, Jessica (JHelm@lewisroca.com); Jorgensen, J. Christopher (CJorgensen@lewisroca.com); jabrego@claggettlaw.com; malvarez@claggettlaw.com; mgranda@claggettlaw.com; Moises Garcia; Jocelyn@claggettlaw.com; Michael.Williams2@sedwick.com; klw@kulaw.com; anna@claggettlaw.com; tobacco@integrityforjustice.com; Nvtobacco@kulaw.com; L. Heinz; Roberts, Lee; Russell, Howard; Bonney, Audra R.
Subject: Re: Thompson v. Philip Morris USA Inc. - Proposed Order

This Message originated outside your organization.

Approved.

Sent from my iPhone

On Sep 3, 2021, at 2:39 PM, Pierce, Kelly L. <KPierce@wwhgd.com> wrote:

Good Afternoon All,

Please see the attached proposed Order Granting Philip Morris USA Inc.'s Motion to Dismiss Plaintiff's Amended Complaint Under NRCP 12(b)(5). Plaintiff's counsel has already approved the attached order.

Please review and let us know whether we have your approval to affix your e-signature.

Thank you.

<REVISEE-sig2020_b7a30d72-9d40-4ed5-bf26-e7fc27c0af64.png>

Kelly L. Pierce, Legal Secretary
Weinberg Wheeler Hudgins Gunn & Dial
6385 South Rainbow Blvd. | Suite 400 | Las Vegas, NV
89118
D: 702.938.3840 | F: 702.938.3864
www.wwhgd.com | vCard

The information contained in this message may contain privileged client confidential information. If you have received this message in error, please delete it and any copies immediately.

<Thompson - Proposed Order.pdf>

Pierce, Kelly L.

From: Jorgensen, J. Christopher <CJorgensen@lewisroca.com>
Sent: Tuesday, September 07, 2021 4:10 PM
To: Pierce, Kelly L.; 'rcrooker@baileykennedy.com'; 'JLieberman@baileykennedy.com'; 'DKennedy@BaileyKennedy.com'; 'smkishi@baileykennedy.com'; 'SDiamond@KSLAW.com'; Jaramillo, Annette; Helm, Jessica
Cc: 'jabrego@claggettlaw.com'; 'malvarez@claggettlaw.com'; 'mgranda@claggettlaw.com'; 'Moises Garcia'; 'Jocelyn@claggettlaw.com'; 'Michael.Williams2@sedwick.com'; 'klw@kulaw.com'; 'anna@claggettlaw.com'; 'tobacco@integrityforjustice.com'; 'Nvtobacco@kulaw.com'; 'L. Heinz'; Roberts, Lee; Russell, Howard; Bonney, Audra R.
Subject: RE: Thompson v. Philip Morris USA Inc. - Proposed Order

This Message originated outside your organization.

Kelly,
You may use my signature on behalf of Liggett for the proposed Thompson Order.
Thank you
Chris

Christopher Jorgensen
Partner

cjorgensen@lewisroca.com
D. 702.474.2642

LEWIS  **ROCA**

From: Pierce, Kelly L. <KPierce@wwhgd.com>
Sent: Tuesday, September 7, 2021 2:50 PM
To: 'rcrooker@baileykennedy.com' <rcrooker@baileykennedy.com>; 'JLieberman@baileykennedy.com' <JLieberman@baileykennedy.com>; 'DKennedy@BaileyKennedy.com' <DKennedy@BaileyKennedy.com>; 'smkishi@baileykennedy.com' <smkishi@baileykennedy.com>; 'SDiamond@KSLAW.com' <SDiamond@KSLAW.com>; Jaramillo, Annette <AJaramillo@lewisroca.com>; Helm, Jessica <JHelm@lewisroca.com>; Jorgensen, J. Christopher <CJorgensen@lewisroca.com>
Cc: 'jabrego@claggettlaw.com' <jabrego@claggettlaw.com>; 'malvarez@claggettlaw.com' <malvarez@claggettlaw.com>; 'mgranda@claggettlaw.com' <mgranda@claggettlaw.com>; 'Moises Garcia' <MGarcia@claggettlaw.com>; 'Jocelyn@claggettlaw.com' <Jocelyn@claggettlaw.com>; 'Michael.Williams2@sedwick.com' <Michael.Williams2@sedwick.com>; 'klw@kulaw.com' <klw@kulaw.com>; 'anna@claggettlaw.com' <anna@claggettlaw.com>; 'tobacco@integrityforjustice.com' <tobacco@integrityforjustice.com>; 'Nvtobacco@kulaw.com' <Nvtobacco@kulaw.com>; 'L. Heinz' <lhein@shb.com>; Roberts, Lee <LRoberts@wwhgd.com>; Russell, Howard <HRussell@wwhgd.com>; Bonney, Audra R. <ABonney@wwhgd.com>
Subject: RE: Thompson v. Philip Morris USA Inc. - Proposed Order

[EXTERNAL]

Hello Everyone,

1 **CSERV**

2
3 DISTRICT COURT
CLARK COUNTY, NEVADA

4		
5		
6	Noreen Thompson, Plaintiff(s)	CASE NO: A-20-811091-C
7	vs.	DEPT. NO. Department 5
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 Granting Motion 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: 9/8/2021

15	Jackie Abrego	jabrego@claggettlaw.com
16	Maria Alvarez	malvarez@claggettlaw.com
17	Reception E-File	reception@claggettlaw.com
18	Audra Bonney	abonney@wwhgd.com
19	D. Lee Roberts	lroberts@wwhgd.com
20	Howard Russell	hrussell@wwhgd.com
21	Kelly Pierce	kpierce@wwhgd.com
22	Joseph Liebman	jliebman@baileykennedy.com
23	Dennis Kennedy	dkennedy@baileykennedy.com
24	Bailey Kennedy, LLP	bkfederaldownloads@baileykennedy.com
25	Matthew Granda	mgranda@claggettlaw.com

1	Moises Garcia	mgarcia@claggettlaw.com
2	Jessie Helm	jhelm@lewisroca.com
3		
4	Daniela LaBounty	dlabounty@wwhgd.com
5	J Christopher Jorgensen	cjorgensen@lewisroca.com
6	Annette Jaramillo	ajaramillo@lewisroca.com
7	Phillip Smith, Jr.	psmithjr@wwhgd.com
8	Rebecca Crooker	rcrooker@baileykennedy.com
9	Flor Gonzalez-Pacheco	FGonzalez-Pacheco@wwhgd.com
10		
11	Kelly Gaez	kgaez@wwhgd.com
12	Jocelyn Abrego	Jocelyn@claggettlaw.com
13	Micah Echols	micah@claggettlaw.com
14	Kimberly Wald	klw@kulaw.com
15	Anna Gresl	anna@claggettlaw.com
16	Philip Holden	tobacco@integrityforjustice.com
17	Stephanie Kishi	smkishi@baileykennedy.com
18		
19	Kelley Trial Attorneys	Nvtobacco@kulaw.com
20	Spencer Diamond	SDiamond@kslaw.com
21	Maxine Rosenberg	Mrosenberg@wwhgd.com
22	Lindsey Heinz	LHeinz@shb.com
23	Andrea Nayeri	anayeri@shb.com
24	Kari Grace	kgrace@shb.com
25		
26		
27		
28		

CLAGGETT & SYKES
LAW FIRM

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24

ORD
Sean K. Claggett, Esq.
Nevada Bar No. 008407
Matthew S. Granda, Esq.
Nevada Bar No. 012753
Micah S. Echols, Esq.
Nevada Bar No. 008437
CLAGGETT & SYKES LAW FIRM
4101 Meadows Lane, Suite 100
Las Vegas, Nevada 89107
(702) 655-2346 – Telephone
(702) 655-3763 – Facsimile
sclaggett@claggettlaw.com
mgranda@claggettlaw.com
micah@claggettlaw.com

Kimberly L. Wald, Esq.
Nevada Bar. No. 15830
Michael A. Hersh, Esq.
Nevada Bar No. 15746
Fan Li, Esq.
Nevada Bar No. 15771
KELLEY | UUSTAL
500 North Federal Highway, Suite 200
Fort Lauderdale, FL 33301

DISTRICT COURT
CLARK COUNTY, NEVADA

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

Plaintiff,

v.

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

CASE NO. A-20-811091-C

DEPT. NO. V

**ORDER DENYING DEFENDANTS'
MOTION TO STRIKE THE
LAWYER-RELATED ALLEGATIONS
IN PLAINTIFF'S AMENDED
COMPLAINT**

1 CORPORATION, which is the successor-
2 by-merger to THE AMERICAN TOBACCO
3 COMPANY; LIGGETT GROUP, LLC., a
4 foreign corporation; QUICK STOP
5 MARKET, LLC, a domestic limited
6 liability company; JOE'S BAR, INC., a
7 domestic corporation; THE POKER
8 PALACE, a domestic corporation; SILVER
9 NUGGET GAMING, LLC d/b/a SILVER
10 NUGGET CASINO, a domestic limited
11 liability company, JERRY'S NUGGET, a
12 domestic corporation; and DOES I-X; and
13 ROE BUSINESS ENTITIES XI-XX,
14 inclusive

Defendants.

15 Defendants' Motion to Strike the Lawyer-Related Allegations in Plaintiff's Amended
16 Complaint ("Motion") came before the Court on August 27, 2021.

17 APPEARANCES

18 The Parties appeared as follows:

- 19 ➤ For Plaintiff Noreen Thompson – Matthew Granda, Esq. and Kimberly Wald, Esq.
- 20 ➤ For R.J. Reynolds Tobacco Company, Quick Stop Market, LLC, Joe's Bar, Inc., The Poker Palace,
21 Silver Nugget Gaming, LLC d/b/a Silver Nugget Casino, and Jerry's Nugget – Valentin Leppert,
22 Esq., and Joseph Liebman, Esq.
- 23 ➤ For Philip Morris USA, Inc. – D. Lee Roberts, Esq.
- 24 ➤ For Liggett Group LLC – Christopher Jorgensen, Esq. and Kelly Luther, Esq.

25 ORDER

26 THE COURT HEREBY FINDS that Defendants' R.J. REYNOLDS TOBACCO COMPANY
27 and LIGGETT GROUP LLC.'s Motion is **Denied**.

28 After hearing the oral arguments, the Court took the matter under advisement. After a review
29 of the pleadings, oral arguments at the hearing, and good cause shown, the Court FINDS and ORDERS
30 as follows:

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24

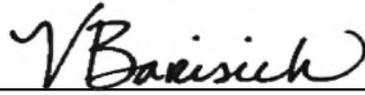
Under NRCP 12(f), a court may strike any redundant, immaterial, impertinent, or scandalous matter from the pleading. Making improper comments by counsel which may prejudice the jury against the other party is clearly misconduct by an attorney. Such statement is "fundamentally prejudicial." *Born v. Eisenman*, 114 Nev. 854, 862, 962 P.2d 1227, 1232 (1998). It is not only improper to disparage defense counsel personally, but also to disparage defense tactics. *Butler v. State*, 120 Nev. 879, 898, 102 P.3d 71, 84 (2004).

The Court FINDS and CONCLUDES that Defendants' Motion to Strike raises disputes over paragraphs 106-114, 214-216, 247-249, 284-286, and 319-321 in the Amended Complaint. It is noted that Plaintiff removed the references to the specific law firms and names of the lawyer involved from the Complaint. Although absolute litigation privilege may be applicable, it is premature to determine whether it is indeed applicable at this stage. Thus, Defendants' Motion to Strike is DENIED without prejudice.

Defendants R.J. Reynolds Tobacco Company and Liggett Group LLC shall have 20 days from the filing of the Notice of Entry of this Order to answer Plaintiff's Amended Complaint.

Dated this 12th day of September, 2021

DATED this ____ day of September 2021.



DISTRICT COURT JUDGE
C6B 30D 4E38 668B
Veronica M. Barisich
District Court Judge

<p>Respectfully Submitted By: Dated this 9th September 2021 CLAGGETT & SYKES LAW FIRM</p> <p><i>/s/ Sean K. Claggett</i></p> <hr/> <p>Sean K. Claggett, Esq. Nevada Bar No. 008407 Matthew S. Granda, Esq. Nevada Bar No. 012753 Micah S. Echols, Esq. Nevada Bar No. 008437 4101 Meadows Lane, Suite 100 Las Vegas, Nevada 89107</p> <p>Kimberly L Wald, Esq. Florida Bar No. 112263</p>	<p>Reviewed as to Form and Content: Dated this 9th September 2021 BAILEY KENNEDY</p> <p><i>/s/ Joseph Liebman</i></p> <hr/> <p>Dennis L. Kennedy Joseph A. Liebman 8984 Spanish Ridge Avenue Las Vegas, Nevada 89148 <i>Attorneys for Defendant, R.J. Reynolds Tobacco Company and Quick Stop Market, LLC, Joe's Bar, Inc., The Poker Palace, Silver Nugget Gaming, LLC d/b/a Silver Nugget Casino, and Jerry's Nugget</i></p>
--	---

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24

Nevada Bar. No. 15830 500 North Federal Highway, Suite 200 Fort Lauderdale FL 33301 <i>Attorneys for Plaintiff</i>	
Reviewed as to Form and Content: Dated this 9 th September 2021 LEWIS ROCA ROTHGERBER CHRISTIE <i>/s/ Kelly Anne Luther</i> <hr/> J. Christopher Jorgensen, Esq. Nevada Bar No. 5382 3993 Howard Hughes Parkway, #600 Las Vegas, Nevada 89169 Kelly Anne Luther, Esq. KASOWITZ BENSON TORRES LLP 1441 Brickwell Avenue, Suite 1420 Miami, FL 33131 <i>Attorneys for Defendant, Liggett Group, LLC</i>	

Moises Garcia

From: Kimberly L. Wald <klw@kulaw.com>
Sent: Thursday, September 09, 2021 10:43 AM
To: Moises Garcia; Matt Granda
Cc: Fan Li; Kimberly Wald
Subject: FW: Thompson/Rowan - Proposed Order re: MTS
Attachments: Order on D Motion to Strike Lawyer Related Allegations-718400.docx

Follow Up Flag: Follow up
Flag Status: Flagged

Moises,
Can you please submit this to the court?

Kelley | Uustal

TRIAL ATTORNEYS

Kimberly L. Wald, Esq.
500 N. Federal Highway, Suite 200
Fort Lauderdale, FL 33301
www.kulaw.com



tollfree: 888.522.6601
tel: 954.522.6601
fax: 954.522.6608
email: klw@kulaw.com

From: Kelly Anne Luther <KLuther@kasowitz.com>
Sent: Thursday, September 9, 2021 1:41 PM
To: Spencer Diamond <SDiamond@KSLAW.com>; Kimberly L. Wald <klw@kulaw.com>; Deana Foster <deana@kulaw.com>; 'Nicholas Reyes' <Nick@talf.law>; Michael Hersh <mah@kulaw.com>; mgranda@claggettlaw.com; Micah Echols <Micah@claggettlaw.com>; Fan Li <fli@kulaw.com>; Moises Garcia <MGarcia@claggettlaw.com>
Cc: Ursula Henninger <uhenninger@KSLAW.com>; Jason Keehfus <JKeefus@KSLAW.com>; Ryan Kearney <RKearney@KSLAW.com>; Dennis Kennedy <DKennedy@baileykennedy.com>; Joseph Liebman <JLiebman@baileykennedy.com>; Kenyon, Jennifer (SHB) <JBKENYON@shb.com>; Heinz, Lindsey (SHB) <LHEINZ@shb.com>; Tepikian, Bruce (SHB) <BTEPIKIAN@shb.com>; Jackson, Brian (SHB) <BJACKSON@shb.com>; Roberts, Lee <LRoberts@wwhgd.com>; Jorgensen, J. Christopher <CJorgensen@lrrc.com>
Subject: RE: Thompson/Rowan - Proposed Order re: MTS

You can use my e-signature for Liggett.

From: Spencer Diamond [<mailto:SDiamond@KSLAW.com>]
Sent: Thursday, September 9, 2021 1:36 PM
To: Kelly Anne Luther <KLuther@kasowitz.com>; Kimberly L. Wald <klw@kulaw.com>; Deana Foster <deana@kulaw.com>; 'Nicholas Reyes' <Nick@talf.law>; Michael Hersh <mah@kulaw.com>; mgranda@claggettlaw.com; Micah Echols <Micah@claggettlaw.com>; Fan Li <fli@kulaw.com>; Moises Garcia <MGarcia@claggettlaw.com>
Cc: Ursula Henninger <uhenninger@KSLAW.com>; Jason Keehfus <JKeefus@KSLAW.com>; Ryan Kearney <RKearney@KSLAW.com>; Dennis Kennedy <DKennedy@baileykennedy.com>; Joseph Liebman <JLiebman@baileykennedy.com>; Kenyon, Jennifer (SHB) <JBKENYON@shb.com>; Heinz, Lindsey (SHB) <LHEINZ@shb.com>; Tepikian, Bruce (SHB) <BTEPIKIAN@shb.com>; Jackson, Brian (SHB) <BJACKSON@shb.com>;

Roberts, Lee <LRoberts@wwhgd.com>; Jorgensen, J. Christopher <CJorgensen@lrrc.com>

Subject: RE: Thompson/Rowan - Proposed Order re: MTS

Kim

Once Kelly's redlines are incorporated, the order is good to go from Reynolds's perspective. You also have our permission to include Joseph Liebman's e-signature in the order on behalf of Reynolds. Thanks.

Spencer

From: Kelly Anne Luther <KLuther@kasowitz.com>

Sent: Thursday, September 9, 2021 1:32 PM

To: Kimberly L. Wald <klw@kulaw.com>; Spencer Diamond <SDiamond@KSLAW.com>; Deana Foster <deana@kulaw.com>; 'Nicholas Reyes' <Nick@talf.law>; Michael Hersh <mah@kulaw.com>; mgranda@claggettlaw.com; Micah Echols <Micah@claggettlaw.com>; Fan Li <fli@kulaw.com>; Moises Garcia <MGarcia@claggettlaw.com>

Cc: Ursula Henninger <uhenninger@KSLAW.com>; Jason Keehfus <JKeehfus@KSLAW.com>; Ryan Kearney <RKearney@KSLAW.com>; Dennis Kennedy <DKennedy@baileykennedy.com>; Joseph Liebman <JLiebman@baileykennedy.com>; Kenyon, Jennifer (SHB) <JBKENYON@shb.com>; Heinz, Lindsey (SHB) <LHEINZ@shb.com>; Tepikian, Bruce (SHB) <BTEPIKIAN@shb.com>; Jackson, Brian (SHB) <BJACKSON@shb.com>; Roberts, Lee <LRoberts@wwhgd.com>; Jorgensen, J. Christopher <CJorgensen@lrrc.com>

Subject: RE: Thompson/Rowan - Proposed Order re: MTS

CAUTION: MAIL FROM OUTSIDE THE FIRM

Minor corrections in redline.

Kelly Anne Luther
Kasowitz Benson Torres LLP
1441 Brickell Avenue
Suite 1420
Miami, Florida 33131
Tel. (786) 587-1045
Fax. (305) 675-2218
KLuther@kasowitz.com

This e-mail and any files transmitted with it are confidential and may be subject to the attorney-client privilege. Use or disclosure of this e-mail or any such files by anyone other than a designated addressee is unauthorized. If you are not an intended recipient, please notify the sender by e-mail and delete this e-mail without making a copy.

From: Kimberly L. Wald [<mailto:klw@kulaw.com>]

Sent: Thursday, September 9, 2021 1:23 PM

To: Spencer Diamond <SDiamond@KSLAW.com>; Deana Foster <deana@kulaw.com>; 'Nicholas Reyes' <Nick@talf.law>; Michael Hersh <mah@kulaw.com>; mgranda@claggettlaw.com; Micah Echols <Micah@claggettlaw.com>; Fan Li <fli@kulaw.com>; Moises Garcia <MGarcia@claggettlaw.com>

Cc: Ursula Henninger <uhenninger@KSLAW.com>; Jason Keehfus <JKeehfus@KSLAW.com>; Ryan Kearney <RKearney@KSLAW.com>; Dennis Kennedy <DKennedy@baileykennedy.com>; Joseph Liebman <JLiebman@baileykennedy.com>; Kenyon, Jennifer (SHB) <JBKENYON@shb.com>; Heinz, Lindsey (SHB) <LHEINZ@shb.com>; Tepikian, Bruce (SHB) <BTEPIKIAN@shb.com>; Jackson, Brian (SHB) <BJACKSON@shb.com>; Roberts, Lee <LRoberts@wwhgd.com>; Kelly Anne Luther <KLuther@kasowitz.com>; Jorgensen, J. Christopher <CJorgensen@lrrc.com>; Kimberly L. Wald <klw@kulaw.com>

Subject: RE: Thompson/Rowan - Proposed Order re: MTS

1 **CSERV**

2
3 DISTRICT COURT
CLARK COUNTY, NEVADA

4
5
6 Noreen Thompson, Plaintiff(s) | CASE NO: A-20-811091-C
7 vs. | DEPT. NO. Department 5
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: 9/12/2021

15 Jackie Abrego jabrego@claggettlaw.com
16 Maria Alvarez malvarez@claggettlaw.com
17 Reception E-File reception@claggettlaw.com
18 Audra Bonney abonney@wwhgd.com
19 D. Lee Roberts lroberts@wwhgd.com
20 Howard Russell hrussell@wwhgd.com
21 Kelly Pierce kpierce@wwhgd.com
22 Joseph Liebman jliebman@baileykennedy.com
23 Dennis Kennedy dkennedy@baileykennedy.com
24 Bailey Kennedy, LLP bkfederaldownloads@baileykennedy.com
25 Matthew Granda mgranda@claggettlaw.com

1	Moises Garcia	mgarcia@claggettlaw.com
2	Jessie Helm	jhelm@lewisroca.com
3		
4	Daniela LaBounty	dlabounty@wwhgd.com
5	J Christopher Jorgensen	cjorgensen@lewisroca.com
6	Annette Jaramillo	ajaramillo@lewisroca.com
7	Phillip Smith, Jr.	psmithjr@wwhgd.com
8	Rebecca Crooker	rcrooker@baileykennedy.com
9	Flor Gonzalez-Pacheco	FGonzalez-Pacheco@wwhgd.com
10		
11	Kelly Gaez	kgaez@wwhgd.com
12	Jocelyn Abrego	Jocelyn@claggettlaw.com
13	Micah Echols	micah@claggettlaw.com
14	Kimberly Wald	klw@kulaw.com
15	Anna Gresl	anna@claggettlaw.com
16	Philip Holden	tobacco@integrityforjustice.com
17	Stephanie Kishi	smkishi@baileykennedy.com
18		
19	Kelley Trial Attorneys	Nvtobacco@kulaw.com
20	Spencer Diamond	SDiamond@kslaw.com
21	Maxine Rosenberg	Mrosenberg@wwhgd.com
22	Lindsey Heinz	LHeinz@shb.com
23	Andrea Nayeri	anayeri@shb.com
24	Kari Grace	kgrace@shb.com
25		
26		
27		
28		