IN THE SUPREME COURT OF THE STATE OF NEVADA

SANDRA CAMACHO; AND ANTHONY CAMACHO,
Petitioners,
vs.
THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE NADIA KRALL, DISTRICT JUDGE,
Respondents,
and
PHILIP MORRIS USA, INC., a foreign corporation; R.J. REYNOLDS TOBACCO COMPANY, a foreign corporation, individually, and as successor-by-merger to LORILLARD TOBACCO COMPANY and as successor-in-interest to the United States tobacco business of BROWN & WILLIAMSON TOBACCO CORPORATION, which is the successor-by-merger to THE AMERICAN TOBACCO COMPANY; LIGGETT GROUP, LLC., a foreign corporation; and ASM NATIONWIDE CORPORATION d/b/a SILVERADO SMOKES & CIGARS, a domestic corporation; LV SINGHS NC. d/b/a SMOKES & VAPORS, a domestic corporation,
Real Parties in Interest.

PETITIONERS' APPENDIX VOLUME 58 (NOS. 8807-8964)

Sean K. Claggett, Esq.
Nevada Bar No. 8407
Micah S. Echols, Esq.
Nevada Bar No. 8437
Matthew S. Granda, Esq.
Nevada Bar No. 12753
David P. Snyder, Esq.
Nevada Bar No. 15333
CLAGGETT & SYKES LAW FIRM
4101 Meadows Ln., Ste. 100
Las Vegas, Nevada 89107
(702) 655-2346 – Telephone
micah@claggettlaw.com
david@claggettlaw.com

Fan Li, Esq.
Nevada Bar No. 15771
KELLEY | UUSTAL
500 N. Federal Hwy., Ste. 200
Fort Lauderdale, Florida 33301
(954) 522-6601 – Telephone
klw@kulaw.com

Attorneys for Petitioners, Sandra Camacho and Anthony Camacho

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Steven D. Grierson
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DISTRICT COURT

CLARK COUNTY, NEVADA

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SANDRA CAMACHO, ANTHONY CAMACHO, Plaintiffs, vs. PHILIP MORRIS USA, INC., RJ REYNOLDS TOBACCO COMPANY, LIGGETT GROUP, LLC, ASM NATIONWIDE CORPORATION, Defendants.	)	CASE NO. A-19-807650-C DEPT. NO. IV **Transcript of Proceedings**

BEFORE THE HONORABLE NADIA KRALL, DISTRICT COURT JUDGE

ALL PENDING MOTIONS

MONDAY, AUGUST 29, 2022

APPEARANCES:

SEE PAGE 2 FOR APPEARANCES

RECORDED BY: MELISSA BURGENER, DISTRICT COURT
TRANSCRIBED BY: KRISTEN LUNKWITZ

Proceedings recorded by audio-visual recording; transcript produced by transcription service.

Case Number: A-19-807650-C

APPEARANCES:

For the Plaintiffs: FAN LI, ESQ.

JOHN UUSTAL, ESQ.

MATTHEW S. GRANDA, ESQ.

For the Defendants: D. LEE ROBERTS, ESQ.

J. CHRISTOPHER JORGENSEN, ESQ.

DANIEL F. POLSENBERG, ESQ.
[Via BlueJeans]

KELLY A. LUTHER, ESQ.

MARIA RUIZ, ESQ.

DENNIS L. KENNEDY, ESQ.

URSULA M. HENNINGER, ESQ.

PETER M. HENK, ESQ.

HASSIA T. DIOLOMBI, ESQ.
[Via BlueJeans]

ALEXANDRA L. SORENSON, ESQ.

MONDAY, AUGUST 29, 2022, AT 10:44 A.M.

THE COURT: Good morning, everyone.

THE ATTORNEYS: Good morning, Your Honor.

THE COURT: Please be seated.

Thank you for providing your briefs and everything. So, we're going to call *Camacho versus Philip Morris USA*, A-19-807650-C. Bless you.

Counsel, please state your appearance for the record. We'll start with plaintiff.

MR. LI: Good morning, Your Honor. Fan Li on behalf of the plaintiffs.

THE COURT: Mr. Li, good morning.

MR. UUSTAL: John Uustal on behalf of the plaintiffs, Your Honor.

THE COURT: Mr. Uustal, good morning.

MR. GRANDA: Good morning. Matthew Granda on behalf of the plaintiff.

THE COURT: Mr. Granda, good morning.

MR. ROBERTS: Good morning, Your Honor. Lee Roberts here on behalf of Philip Morris USA and the retailer ASM Nationwide Corporation.

THE COURT: Mr. Roberts, good morning.

MR. ROBERTS: Thank you. Good morning, Your Honor.

MR. HENK: Good morning, Your Honor. Pete Henk on behalf of Philip Morris USA. And I'm admitted pro hac, Your Honor.

THE COURT: Mr. Henk, good morning.

MR. KENNEDY: Good morning, Your Honor. Dennis Kennedy on behalf of defendant RJ Reynolds.

THE COURT: Mr. Kennedy, good morning.

MS. HENNINGER: Good morning, Your Honor. Ursula Henninger, admitted pro hac vice, also on behalf of RJ Reynolds Tobacco Company.

THE COURT: Ms. Henninger, good morning.

MS. HENNINGER: Good morning.

MR. JORGENSEN: Good morning, Your Honor. Chris Jorgensen on behalf of Liggett Group.

THE COURT: Mr. Jorgensen, good morning.

MS. RUIZ: Good morning, Your Honor. Maria Ruiz on behalf of Liggett Group.

THE COURT: Ms. Ruiz, good morning.

MS. LUTHER: Good morning, Judge. Kelly Luther, also --

MR. POLSENBERG: Good morning, Your Honor. Dan Polsenberg, also for Liggett.

THE COURT: Mr. Polsenberg, good morning.

MR. POLSENBERG: Good morning.

MS. LUTHER: And, Your Honor, Kelly Luther on

behalf of Liggett as well.

THE COURT: Ms. Luther, good morning.

Ms. SORENSON: Good morning, Your Honor. Alex Sorenson, also on behalf of defendant Philip Morris USA, Incorporated, and also admitted pro hac vice.

THE COURT: Ms. Sorenson, good morning.

Is that everyone?

THE COURT RECORDER: We have somebody else on the line.

MR. KENNEDY: Your Honor, Philip Morris --

MS. DIOLOMBI: Your Honor? Sorry. Good morning, Your Honor. Hassia Diolombi on behalf of Philip Morris USA. I am admitted pro hac vice.

THE COURT: Can you spell that?

MS. DIOLOMBI: Yes. Of course, Your Honor. First name is Hassia, H-A-S-S, as in Sam, I-A. And my last name is Diolombi, D, as in David, I-O-L-O-M, as in Mary, B, as in boy, I.

THE COURT: Ms. Diolombi, good morning.

Is that everyone? Okay. Great.

So, what we're going to do is we're going to start with the Motions for Summary Judgment first. And, then, we're going to go into the Motions in Limine. The Court's read everything, so please be mindful of that when you're making your argument. The Court understands that you have

arguments that you want to make for appellate purposes. But, when you are framing your argument to the Court, just please be mindful that the Court has read all the Exhibits, and all of the pleadings, and all of the Joinders.

So, what we're going to do is we're going to start with Plaintiffs' Motion for Partial Summary Judgment on Medical Causation. Then we're going to move into RJ Reynolds's Motions. And, then, we're going to go into Liggett's Motions. And, then, we're going to move into Philip Morris's Motions for Summary Judgment. And, once we complete that, then we'll do the Motions in Limine.

Do the parties have any questions on that order? No. No questions.

Also, just so the parties are aware, how this is going to proceed is that the person who's bringing the Motion will argue first. The person who's opposing the Motion will then argue. The person who then filed a Joinder can then argue. And, then, after that, the person who originally filed the Motion can do the final rebuttal. At that time, the Court will issue its ruling and request once side to prepare the Order.

At that time, once the Court issues its ruling, there's no further argument to the Court. Any additional argument needs to be submitted to the Supreme Court of the State of Nevada. Do the parties understand that? Thank

you.

All right. So, the first Motion, Plaintiffs' Motion for Partial Summary Judgment on Plaintiffs' Medical Causation Claim. Mr. Li?

MR. LI: Good morning, Your Honor.

THE COURT: Good morning.

MR. LI: Would you prefer me to stand right here or go to the podium?

THE COURT: Whatever your preference.

THE COURT RECORDER: Right here, please.

MR. LI: I'll go up to the podium. Thanks.

Good morning, Your Honor. This is the only Motion for Summary Judgment the plaintiffs filed. It's pretty simple. There is no factual dispute about medical causation here. Ms. Camacho smoked for over 54 years, one to two packs a day, and it would be pretty absurd for any medical expert to say that's not a substantive cause or substantial causation. And, so, because there's no genuine dispute of material fact on that issue, we're asking for the Summary Judgment Motion to be granted.

The only thing that I would add -- and this might save time so I don't have to do a reply, is that, upon seeing the response from the defendants, the only real technical catch there is that our medical expert, Dr. Ruckdeschel, did not use the so-called magical words or

magical phrase of substantial contribution. And, so, he did do a Declaration and we put that in there in order to make sure the evidence is complete.

But, beyond that, I don't have any other arguments.

THE COURT: Thank you, Mr. Li.

MR. LI: Thank you, Your Honor.

THE COURT: Mr. Roberts?

MR. ROBERTS: Thank you, Your Honor.

Your Honor, we acknowledge that their experts do give an opinion. And, based on the Declaration, that opinion, if given in front of the jury, could cause a jury to find causation. But causation is always for the jury.

And, in this case, under the standard instruction given in Nevada, they can disregard everything the experts say, including our expert. The jury is not bound by those opinions. And, just because everyone knows that smoking is the highest risk factor, and everyone knows that you can get cancer from smoking, that doesn't mean that the Court can find that the jury -- has to direct the jury to find that their experts are believable and have satisfied their burden of proof.

THE COURT: Okay. Thank you, Mr. Roberts. Just find a seat for him.

UNIDENTIFIED SPEAKER: I'm doing some IT, Judge.

THE COURT: Okay.

Do you have any additional argument, Mr. Roberts?

MR. ROBERTS: No. Only that even their expert admits that there could be other causes. And there is actually another cause in the record. And just because they could be concurrent causes doesn't mean that they are concurrent causes. And it's also possible, as their expert acknowledged, that the GERD could be the sole cause. And, so, this is a question for the jury, Your Honor. Thank you.

THE COURT: Thank you.

Does anyone else want to argue who filed a Joinder? No. Mr. Li, do you have any final rebuttal?

MR. LI: Just one sentence.

No expert, either ours or theirs, said anything that would dispute the fact that smoking is a substantial causation. Whether GERD is a possible causation or not does not impact the fact that smoking is a substantial causation. Thank you.

THE COURT: Thank you. The Court's read everything and read the Expert Reports. Pursuant to *Williams versus Eighth Judicial District Court*, 127 Nevada Advanced Opinion 45:

At the time of trial, the defendant is permitted to do the following: One, cross-examine the

plaintiff's expert; two, present defendant's own expert; or, three, present an alternative theory of causation.

Based upon the controlling Nevada Supreme Court case, the Court is going to deny Plaintiffs' Motion for Partial Summary Judgment on Plaintiffs' Medical Causation Claim. The defense is permitted, pursuant to the law, to proffer their own alternative theories of causation or to cross-examine the witness, even if they have not retained their own expert. Although, the expert clearly testified that GERD could be a potential cause of the cancer.

Who would like to prepare this Order?

MR. ROBERTS: I'll prepare the order, Your Honor. Thank you.

THE COURT: Okay. Thank you, Mr. Roberts.

Next is Defendant RJ Reynolds Tobacco Company's Motion for Summary Judgment on Plaintiffs' Claims for Deceptive Trade Practices and Civil Conspiracy. Mr. Kennedy?

MR. KENNEDY: Thank you, Your Honor. Dennis Kennedy for Defendant RJ Reynolds Tobacco.

As the Court knows, the Nevada Supreme Court panel issued an opinion, a 2 to 1 opinion, and purports to state -- does state, actually, that for 12(b)(5) purposes, a claim has been stated under the Deceptive Trade Practices

Act. This -- although, that was a part of the Motion for Summary Judgment, it's not the entire Motion for Summary Judgment. The second half of the Motion for Summary Judgment, even assuming, as we must, that it's been properly pleaded to get past 12(b)(5), there is more to this Motion than whether it's been properly pleaded.

And that is, does -- has a claim actually been stated under the Deceptive Trade Practices Act? In other words, has the plaintiff presented evidence of justifiable reliance on any particular representation made by Reynolds? And, quoting from the cases: That was material or a substantial part in leading Ms. Camacho to keep smoking?

In other words, did Ms. Camacho hear or see anything specifically said, or written, or put out publicly by Reynolds that caused her to keep smoking, or the other side of the coin is not to quit? And, the fact is, there is no evidence of that. If you look at the excerpts of deposition that were cited by the plaintiff, there's some general undifferentiated: Well, this is what I thought, this is what I heard, this is what I saw. That doesn't get you there when you're making a particular claim against a specific defendant.

What you have to say, o, show, is some evidence that something that this defendant did. And we don't have that in this case. That's the basis of the second half of

the Motion for Summary Judgment. What have you got on Reynolds? And all we have is the undifferentiated statement of: Well, I generally heard this; I generally thought this. That doesn't get you there at this point on a Motion for Summary Judgment. In other words, you can't go to the jury and say: There's a lot of stuff out there that I heard. And I heard people talking and etcetera, etcetera.

And, at this point, they don't have anything that Reynolds did or said that this plaintiff says, I heard it, I relied on it, it caused me to quit -- to keep smoking or not to quit. That's the basis of the Motion for Summary Judgment.

THE COURT: Thank you, Mr. Kennedy.

Mr. Li?

MR. LI: Your Honor, I think what defense counsel just argued for is, essentially, they're claiming that there's not enough facts in the record for reliance evidence. On page 8 to 10 of our response, we cited multiple snippets from her deposition where Ms. Camacho had mentioned why she kept on smoking, what she believed, and the misrepresentations she believed. I'll just cite one because I know you have read all the briefings.

Question: Is there anything anyone could have told you to make you quit smoking sooner?

Answer: The truth; that cigarettes were harmful.

The entire holding from the Supreme Court of Nevada on that Petition for Writ by the RJR is relying on the fact that there is a unifying -- there's a unifying conspiracy. Nobody broke ranks for half a century.

And, so, I respectfully disagree with defense counsel that we would have to specify a specific thing that Ms. Camacho heard. And, then, have to prove somehow that had she heard other things, she would have stopped smoking sooner or she would have not smoked at all.

The fact is RJR was one of the main contributors in the conspiracy. And if RJR broke the ranks and told the truth, Ms. Camacho would not have smoked. And that is a reasonable inference from the records. And, so, there's a fact in dispute and we believe that goes to the jury. Thank you.

THE COURT: Thank you.

On defendant RJ Reynolds Tobacco Company's Motion for Summary Judgment on Plaintiff's Claims for Deceptive Trade Practices and Civil Conspiracy, the Court grants the Motion. The Court finds there is not justifiable reliance. In reading the entire deposition transcript of Ms. Camacho, she never stated once that she relied on any statement by RJ Reynolds themselves. She actually testified that she switched to -- well, actually, she never bought RJ Reynolds

cigarettes. That was Philip Morris.

But, looking at the *Fairway Chevrolet case versus Kennedy*, 134 Nevada 935, the Court finds that Ms. Camacho is not a victim because, there, in that case, the plaintiff saw a television commercial in which a car dealership falsely guaranteed financing. In that case, the Nevada Supreme Court did not qualify that person as a victim because he did not purchase the actual vehicle.

In this case, Ms. Camacho: One, did not purchase cigarettes from RJ Reynolds; and, two, there's actually no evidence in the record that she heard any statement by RJ Reynolds specifically. And, therefore, there's no justifiable reliance that can go to the jury.

Mr. Roberts, will you prepare the Order?

MR. ROBERTS: Yes, Your Honor.

THE COURT: Thank you.

Next Motion -- is that all your Motions, Mr. Kennedy, for the summary judgment?

MR. KENNEDY: Yeah. That -- do you want me to prepare the Order?

THE COURT: No, no. I'll ask Mr. Roberts. It's up to you.

MR. ROBERTS: I'll work with you guys.

MR. KENNEDY: Okay. Okay.

THE COURT: All right. I just want to make sure

that's all your Motions, Mr. Kennedy.

MR. KENNEDY: Yeah. That is.

THE COURT: Great.

The next is Liggett's Motions. So, Defendant Liggett Groups, LLC's Motion for Partial Summary Judgment on Plaintiffs' Claims for Fraudulent Misrepresentation, Fraudulent Concealment. Mr. Jorgensen, Ms. Ruiz?

MS. RUIZ: That's me, Your Honor. If it pleases the Court? I know Your Honor has read everything. So, I'll try to kind of abbreviate the argument.

Liggett's Motion for Summary Judgment on this -- on these issues is very simple. Plaintiff was not exposed to any misleading statements by Liggett and could not have relied on any. Given the timing of her smoking history, even if she could show reliance, reliance would not be justified.

So, I know Your Honor's read this stuff. The timeline is important here. So, the Surgeon General's Report came out in January 1964. All of this is in the record. Ms. Camacho began smoking after her 18th birthday, in April 1964. So, after the Surgeon General Report comes out. Her first cigarette was given to her by a girlfriend. Why did she smoke that first cigarette? Because her girlfriend gave it to her.

When she was asked why she continued to smoke L&M

brand, which is the Liggett brand at issue here, she said simply: It's the brand I knew. She hasn't purchased anything, including cigarettes, based on an advertisement. Those are her words, not the words of an expert speculating as to what her reasons might have been for smoking one brand or another. After 1966, of course, every cigarette that Ms. Camacho smoked had a warning label on it.

Plaintiffs' response to Liggett's Motion for Summary Judgment makes a very big deal about the Miracle Tip advertisement. And they inserted copies of the ads in their Opposition. The fact of the matter is, Ms. Camacho didn't smoke L&M because she saw an ad for a Miracle Tip. She made clear, again, that she smoked it very simply because that's the brand her friend gave her, that's the brand she knew. She could not identify any statement made by Liggett concerning smoking and health.

After 1990, Ms. Camacho switched to another brand. And why did she move away from L&M? Not because of any advertisement. It's just because she couldn't find the brand when she moved to Las Vegas. Had she quit smoking in 1990 rather than switching to another brand, we very likely would not be here. That's plaintiffs' expert's own opinion.

The record is replete with times when Ms. Camacho was told she should quit smoking. And, for one reason or

another, she didn't. She just didn't want to. Those are the facts. And they lack any evidence of a statement by Liggett on which plaintiff justifiably relied.

So, we've got the two claims at issue, the fraudulent misrepresentation and the fraudulent concealment. Both require a duty from Liggett to the plaintiffs. We've briefed the issue.

The fact of the matter is, even the *Dow* case on which both parties rely, holds that in order for there to have been a duty from Liggett, there had to have been a transaction between Liggett and the plaintiff. Here, plaintiff never bought a cigarette directly from Liggett. She bought it from retailers who have been sued in this case. No direct relationship.

Even if you could show a duty, as Your Honor just heard on the Deceptive Trade Practices Act claim, Ms. Camacho didn't rely on any statements from Liggett. And, absent reliance, plaintiffs cannot make out a fraudulent concealment or fraudulent misrepresentation claim.

Those are the cases. Very clear, there must be a connection between whatever the statement is and whatever the plaintiffs -- whatever the plaintiffs' damages are. And that's just absent in this case in terms of the concealment and misrepresentation claims. Thank you.

THE COURT: Thank you, Ms. Ruiz.

Mr. Li?

MR. LI: Your Honor, I refer to page 10 of our response, from the bottom of page 11 -- or, the top. This is Ms. Camacho's testimony in deposition.

Question: Do you know what brand the first cigarette was?

Answer: L&M.

Question: Why did you choose that brand?

Answer: Because I thought they were safe.

Question: Where did you get that information?

Answer: I saw billboards, magazines, and the longer filter cigarettes. I thought they were safer than nonfilter.

And this was then followed by additional testimony later on in the deposition, where she did recognize and identify the L&M filter tip ads that we put into the Motion -- or, our briefs, on page 9.

That, I think, is more than sufficient to produce both direct evidence as well as reasonable inference as she did see Liggett ads; that the Liggett ads did mislead her. She relied on it, reasonably, believing the filters advertised as safe were safe. And, unfortunately, they were not.

I want to address briefly the fraudulent concealment claim. I don't think the law in Nevada excuses

a manufacturer, which begins the chain of sales and distribution, simply because they were not the actual person or entity that eventually sold cigarettes to a consumer. But, more importantly, that's a fact issue for the jury to decide. We had talked about this in our briefing, cited cases.

The duty issue is created by the fact that consumers and even government officials could not access the research data that was only privy to the tobacco industry during the time period we're talking about. And, so, even if there's not a direct privity issue in favor of the plaintiff, there is a duty created when they chose not to review any of the internal research data that shows their product is harmful to their consumers. And they chose to conceal that from the public and from the government.

In addition to that, they've certainly incurred enough duty onto themselves to correct any problems, any misinformation that's out there when they issued the Frank Statement in 1954, when they agreed over and over again, through multiple spokespersons throughout the decades, from the Tobacco Institute, over and over again, saying we're doing research. The industry is interested in finding out what's wrong with our product, if anything's wrong with it.

It's hard to believe that there could be a jury

that doesn't think a duty is created when the company stands out into the public and, for multiple decades saying: We take upon ourselves to figure it out and give you the information we get.

And, so, that, I think, is, again, supported by the fact in the record and is a question for the jury.

THE COURT: Thank you, Mr. Li.

MR. LI: Thank you.

THE COURT: Ms. Ruiz?

MS. RUIZ: I'd like to address a couple of points.

First, on the duty issue. And I know Your Honor's looked at this stuff. We cited to the *Dow* case. We've, in our brief, cited to other cases under similar rules from other jurisdictions. It is not true that just by choosing to speak, you create a duty. The *Dow* case was very clear that you need a special relationship. And you don't have a special relationship when in an ordinary arm's length transaction.

The *Dow* case involved a breast implant manufacturer and its parent company. The *Dow* case held that the parent company, even though it had all of this knowledge, owed no duty to the ultimate patient because it wasn't the seller. That's the *Dow* case.

We've cited a bunch of other cases where they did find a duty. What are those cases? Homebuyer/home seller,

cases of that nature. When you have an ordinary retail transaction, a duty does not lie.

If you look at the *Burton* case and the *Jeter* [phonetic] case, which we've cited in our papers, those cases recognize that it's always the case that a manufacturer is going to know more about a product than the buyer. That does not, in and of itself, create a duty. And, if you'll see the *Dow* case, it precisely held a -- you don't have an action for fraud in a simple case of nondisclosure. So, that's duty.

If we go over to reliance, plaintiff, again, made much ado of the Miracle Tip. That advertisement, Your Honor, was from the 1950s. Plaintiff testified she thought they were safe. She saw things on billboards. They. No mention of Liggett. No mention of Liggett.

Everything he was talking about, the tobacco companies getting together and deciding amongst themselves to do whatever it is they did, that's an argument for the conspiracy case, which we'll get to. But, on the direct tort claim of fraudulent concealment and misrepresentation, plaintiff must identify something from Liggett on which she relied.

And, on this record, all she's got is: They told me this, they lied, they did this. I will say, even with the advertisements that she pointed out, this is what --

this is her saying, I saw advertisements like those, not these precise advertisements. Nor did she say, I continued to smoke the Liggett brand because I saw whatever statement was in those advertisements, because she very simply could not identify them.

This is a fraud claim, as Your Honor knows. Even when you plead at the pleading stage, you have to plead those claims with particularity. She couldn't identify anything. Summary judgment on those claims, Your Honor, is appropriate for Liggett.

THE COURT: Thank you, Ms. Ruiz.

MS. RUIZ: Thank you.

THE COURT: Defendant Liggett Group, LLC's Motion for Partial Summary Judgment on Plaintiffs' Claims for Fraudulent Misrepresentation and Fraudulent Concealment, the Court grants the Motion. The Court notes that there's no special relationship between the plaintiff and Liggett, pursuant to *Burton versus RJ Reynolds*. That's 397 Federal 3d 906.

Also, with respect to the ads, plaintiffs' own expert testified the cigarette companies never said cigarettes were safe. So, Ms. Camacho saying that she saw ads allegedly, from whoever, she doesn't know exactly, that cigarettes were safe, flies in the face of her own expert's testimony. So, she could not have relied on any more from

ads from someone saying they were safe because her own expert says that's patently untrue.

Also, in this case, the Court will point out that all of her use happened in Illinois. And, so, the Court feels it doesn't even have jurisdiction for these claims because none of the transactions happened in the state of Nevada.

Also, the Surgeon General provided his Report in January of 1964. It's undisputed that Ms. Camacho started smoking on or after April of 1964.

It's also undisputed that the reason why Ms. Camacho chose L&M cigarettes was because a girlfriend gave them to her and she thought they were cool. Ms. Camacho testified she never purchased any cigarette whatsoever in her entire life based on any advertisement whatsoever.

That would apply to Liggett in this case. She did not rely on any advertisement. There's no reliance. There's no justifiable reliance. There's no actual statement by Liggett that Ms. Camacho relied on.

So, for her statements regarding the Miracle Tip and the safeness, when the Court looks at those ads, they don't actually say that they were safe.

Also, Dr. Ruckdeschel testified that if Ms. Camacho had quit smoking when she switched brands, her risk of cancer would have been that of a nonsmoker. So, from

that perspective as well, the Court is granting Liggett's Motion.

Ms. Ruiz, would you prepare the Order?

MS. RUIZ: Yes, Your Honor.

THE COURT: Thank you.

Next is Liggett Group, LLC's Partial Motion for Summary Judgment on Plaintiffs' Claims Pursuant to the Nevada Deceptive Trade Practices Act. Ms. Ruiz?

MS. LUTHER: You get me this time, Judge.

THE COURT: Okay.

MS. LUTHER: May it please the Court? Good morning, Your Honor. Kelly Luther on behalf Liggett Group.

THE COURT: Morning.

MS. LUTHER: Since you've read everything, you know that plaintiffs have acknowledged that they do not have a claim with respect to deceptive trade practice as to Liggett before Ms. Camacho moved to Nevada in 1990. So, I'm only going to address their claim that they do have a cause of action against Liggett with respect to the Nevada Deception Trade Practice Act after 1990.

And both RJ Reynolds's argument with respect to Nevada Deceptive Trade Practice and Ms. Ruiz's argument with respect to fraudulent misrepresentation and concealment kind of dovetails into that argument. And I'm not going to belabor it. You have a very good handle of

the facts.

The bottom line is that Ms. Camacho, if she did smoke a Liggett product in Nevada after she moved here in 1990, it was for a very short period of time. She testified that she couldn't find L&M brand cigarettes here. So, she switched to a Philip Morris product, once she moved to Nevada.

There is absolutely no evidence in this record that she saw, heard, or relied on any statement made by Liggett, once she moved to Nevada, with respect to any of her smoking related decisions. We think that's dispositive of this Motion with respect to that portion of it that remains. And we would rely on our briefing on this issue.

THE COURT: Thank you, Ms. Luther.

Mr. Li?

MR. LI: Your Honor, if we're talking about the NDTPA and not the common law fraught misrepresentation, then this Court is to construe the NDTPA fairly broad because it's a remedial statute. And the NDTPA does not require the plaintiff to identify specific statements by specific defendants. And this certainly does not force someone to remember things from 30, 40 years ago in order to make the claim based on direct or circumstantial evidence that there was deceptive trade practices.

The -- I'm not sure if I'm explaining the

participant's role in the conspiracy clearly enough. When -- before I was talking about it. It's not just that everybody kept their mouth shut about the internal data and internal research they conducted, which shows cigarette smoking is dangerous. It's that, as a group, with all their general counsel or their top attorneys together in what is called the Committee of Counsel, they were controlling all messaging to the public regarding smoking and health.

That relates to anything any one of their staff, agents, CEO, or even spokespeople that were bought, spokespeople that were established, into that institute, or the Council for Tobacco Research. Any messaging from the industry, any messaging possibly put out from that side of the fence is controlled by the Counsel, by the Committee of Counsel.

And, so, while there may not very well be a particular statement that is identifiably linked to Liggett Group from 1990 to 2000, there's certainly multiple see -- multiple acts of concealment. There are multiple acts of disinformation pumped out constantly by the Tobacco Institute, by the spokesperson there. And that makes a huge difference in not just how Ms. Camacho's smoking behavior was, but, in terms of the whole public's smoking behavior. And, so, that is the deceptive trade practice

that we claim, not a specific misrepresentation but the general control and the general misinformation campaign.

And, so, I think there was enough evidence in our response to show that Liggett was integrally involved in the conspiracy and certainly was a major participant and have major sway in the Committee Counsel.

And the argument here boils down to one thing, which is that, is all that -- is the misinformation campaign deceptive trade practice under Nevada law? And, if so, then we have a genuine dispute of material facts. And I believe there is, --

THE COURT: Thank you.

MR. LI: -- based on all the records.

THE COURT: Thank you, Mr. Li.

MR. LI: Especially the Expert Reports. Thank you.

THE COURT: Ms. Luther?

MS. LUTHER: Thank you, Your Honor.

We're in the exact same situation as RJ Reynolds was, that plaintiff cannot point to a single misstatement of fact made by Liggett on which Ms. Camacho saw, heard, read, or relied after 1990. And, if you look at the things that they want you to rely on to find some sort of statement, it, for the most part, predates 1990. And they've conceded that they don't have a claim for that.

So, --

THE COURT: Okay.

MS. LUTHER: -- we believe it's appropriate to grant this Motion --

THE COURT: Thank you.

MS. LUTHER: -- in its entirety.

THE COURT: Thank you.

Liggett's -- does any -- anyone who have brought a Joinder want to argue? No.

Liggett Group, LLC's Partial Motion for Summary Judgment on Plaintiffs' Claim Pursuant to the Nevada Deceptive Trade Practices Act is going to be granted pursuant to the reasons the Court set forth in the prior ruling.

Ms. Luther, can you prepare the Order?

MS. LUTHER: Yes, ma'am.

THE COURT: The next Motion is Defendant Liggett Group, LLC's Motion for Judgment on the Pleadings as to Plaintiffs' Claims for Civil Conspiracy. Ms. Ruiz?

MS. RUIZ: Good morning, Your Honor.

THE COURT: Good morning.

MS. RUIZ: First and foremost, this is a Motion for Judgment on the Pleadings. It's directed only to the pleadings. But I would also note that, in order for there to be a conspiracy claim, you need an underlying tort.

Your Honor has already found there's been no reliance. So, for that reason, the conspiracy count can't stand. But I'll argue the Motion for Judgment on the Pleadings.

And it's important to note that Liggett moved under 12(c), which is directed only towards the pleadings. This is not a Motion for Summary Judgment. For that reason, we didn't cite to record evidence. We only cited to the allegations in the pleadings.

For a plaintiff to succeed on a conspiracy claim, they have to prove conspiracy, an agreement. That's one of the elements of a conspiracy claim. Plaintiffs' failure to allege Liggett's agreement in their Complaint is dispositive of this Motion.

If you go through the Complaint, plaintiffs allege that the conspiracy was formed in 1953 in the Plaza Hotel in New York. That's at paragraphs 38 and 39 of the Complaint. Next paragraph, plaintiffs concede that Liggett was not present at that meeting. That's paragraph 40 of the Complaint. If you move further along into the Complaint and into plaintiffs' timeline, you don't get to a Liggett allegation until 1997.

Then, according to Plaintiffs' Complaint, Liggett announced that it would voluntarily place a warning label on its cigarette packages, beyond what was required by the government. That's at paragraph 76 of the Complaint.

Plaintiff fails to allege the who, what, where, when, and how of Liggett's membership and participation in the conspiracy.

To the contrary, they plead that Liggett wasn't present when the conspiracy was formed. And, then, they believed some good conduct in 1997. Plaintiffs' blanket references to defendants or conclusory allegations in the Complaint that Liggett participated in the conspiracy do not save the claim. We cited a case, *Swartz versus KPMG* in our papers. Plaintiffs cannot lump defendants together without differentiating between them when you're talking about a conspiracy.

Plaintiffs' response to this Motion goes beyond the Pleadings, of course, and cites only to materials in the record, which, of course, is not the point on a 12(c) Motion. If you look just on the allegations in the pleadings, this motion should be granted. But if Your Honor is going to go to the record evidence, there's no evidence that Liggett directed the conduct of any of these groups that plaintiff pointed the Court to in her Opposition.

We already talked about filter fraud. They also pointed that out in the -- in their Opposition. Plaintiffs' experts agree, as Your Honor noted, that none of the ads that were talking about filters said anything

about the safety of cigarettes. And, so, for that reason, that doesn't save plaintiffs' conspiracy claim either.

So, even if Your Honor was going to go outside what's in the pleadings, the Motion should be granted.

THE COURT: Thank you, Ms. Ruiz.

MS. RUIZ: Thank you.

THE COURT: Mr. Li?

MR. LI: Your Honor, the first thing I'd like to address is the filter fraud. It is true our experts testified that the tobacco companies never explicitly say filters make things safe. But this is exactly the problem with the conspiracy and fraud. The filter device, which they knew to be not safety producing or risk reducing, is an implicit assurance for safety. Dr. Proctor talked about this at length in his Report.

The study and the research he's done clearly shows in his Report that when the filter devised, the filter tip was first invented, it was a response to the fact that they suspect public officials and legitimate scientific research was revealing more and more the causation link between smoking and cancer. And what it shows, also, is that people, even today, believe that the filter keeps you safer. The word itself suggests a risk reduction.

What is a filtration if it's not filtration -- filtering out bad things? And the fact that they tried to

make these filters as white as possible, as clean as possible, as suggestive as possible to health, and freshness, and safety, that is the implicit reassurance that smoking is not cancerous, smoking is not harmful.

And, so, I cannot emphasize enough why that matters in this case. It's because we do have direct testimony from Ms. Camacho saying: I thought the filter is safe because the ads I saw. And we showed the ads, to make the reasonable inference that those ads with the Miracle Tip is suggestive of exactly what Ms. Camacho ended up believing.

The other thing I want to address here is, I understand -- and I know Your Honor doesn't want me to rehash the argument we just did. So, I won't. But, on the conspiracy claim alone, there's still -- there is still a problem here. Even without the NDTPA claim, there is still a problem of fraud and there is still a problem with conspiracy. That is largely based on the COC, the Committee of Counsel. And I've already talked about how important that committee is to the overall conspiracy. Just because in the Complaint we did not put in all the details, it does not mean those details did not actually occur.

And, so, I understand that because you dismissed, effectively, all of the fraud claims, the NDTPA claim, that

the conspiracy no longer has an underlying claim. But I want to -- I want to ask Your Honor, I suppose, to reconsider the fact that the COC's role is not just -- it's not a background organization, while everybody else is actively producing misrepresentations or public statements. It's a controlling directive organization. It's the brain and the heart of the conspiracy, where top lawyers were actively, essentially, creating censorship among the industry actors on what can or cannot be said and what must be held together as ranked -- as ranking members.

So, I hope Your Honor would reconsider that fact and deny this Motion.

THE COURT: Thank you, Mr. Li.

MR. LI: Thank you.

THE COURT: Ms. Ruiz?

MS. RUIZ: I should have followed Ms. Luther who's been standing back here.

So, just to reorient the Court, this is a Motion for Judgment on the Pleadings on the Conspiracy Count. Plaintiff did not point the Court to any allegations in the Complaint about Liggett's participation in the conspiracy. Specifically, no agreement with the other defendants to do all of the things that plaintiff alleges were done.

Liggett putting a filter on its cigarette may have something to do with the product liability claim. It may

have something to do with a lot of other claims. But it's certainly not evidence of an agreement to do anything. If anything, it's Liggett manufacturing its own product.

So, that's all I have to say on the Motion. I am not going to reargue some of the items that Mr. Li asked Your Honor to reconsider. I'm happy to answer any questions if the Court has any.

THE COURT: The Court doesn't have any questions, Ms. Ruiz. Thank you.

MS. RUIZ: Thank you, Your Honor.

THE COURT: Defendant Liggett Group, LLC's Motion for Judgment on the Pleadings as to Plaintiffs' Claims for Civil Conspiracy, the Court is going to grant the Motion. There's no evidence of an agreement, which is required to sustain a civil conspiracy charge. Liggett was not present at the December 1953 meeting that plaintiff discussed in the pleadings.

Also, pursuant to *In Re Citric Acid Litigation*, 191 F.3d 1090, a 1999 case:

> Trade association membership alone is insufficient to prove a conspiracy.

Also, the Court finds that any alleged conduct at issue would have occurred in Illinois, not Nevada. So, the Court does not have jurisdiction over those allegations.

Mr. Ruiz, will you prepare the Order?

MS. RUIZ: Yes, Your Honor.

THE COURT: Thank you.

MR. KENNEDY: Your Honor, could I -- just, in light of the last couple of comments that were made going back to RJ Reynolds' Motion for Summary Judgment, it -- you granted summary judgment on both claims. Correct?

THE COURT: Yes.

MR. KENNEDY: Okay. Just so the record is clear. Thank you.

THE COURT: Thank you.

Next Motion is Defendant Liggett Group, LLC's Motion for Partial Summary Judgment on Plaintiffs' Negligence and Strict Liability Claims.

Ms. Luther?

MS. LUTHER: Good morning again, Judge.

THE COURT: Good morning.

MS. LUTHER: I'm going to start with post '69 and, then, work my way back to pre '69 claims. After July of 1969, -- well, let me backtrack.

So, we've got two claims. We've got a failure to warn negligence and strict liability. And we've got a design defect negligence and strict liability claim. I'm going to talk about the failure to warn first. And, then, I'll go into the design defect.

After July of 1969, the Federal Cigarette Labeling

Act went into effect. And, under that statute, as well as caselaw that derives from that statute, the defendants were not required to give any warnings to smokers, other than the congressionally mandated warnings that appeared on cigarettes. So, any failure to warn claim after July 1969 is preempted.

With respect to plaintiffs' claim that Liggett had a duty to disclose after 1969 that didn't have to do with advertising and promotion, but it's really not clear to me what Liggett was required to do to warn the plaintiffs of. And that kind of goes back to what Ms. Ruiz was talking about with respect to the fraudulent concealment claim. Liggett didn't have a duty to voluntarily disclose any information.

They talk about negligently testing and negligent research. But, separate and apart from statements made in their advertising and promotion, I'm really not sure what plaintiffs are referring to there. So, perhaps Mr. Li can clear that up and I can address it on reply.

With respect to pre '69, we know that Ms. Camacho started smoking in April -- or, we don't know it's in April. We know it's after April because she turned 18 in April of 1964. And she had her first cigarette when she was 18 years old already.

In order for them to prevail on their failure to

warn claim with respect to Ms. Camacho's smoking between 1964 and 1969, they have to show that any warning that might have been given would have changed her conduct in some way.

They testify -- or they proffer testimony from Ms. Camacho that says: Well, if I had known how bad cigarettes were, I never would have started smoking. Or: I would have done something different. But that's self-serving testimony. And her deposition flies in the face of her actual actions during those periods of time. And Your Honor has actually touched on this.

We know that the Surgeon General's Report came out in January of 1964, months before she even had her first cigarette. We know that warnings went on the packs starting in 1966. And she didn't try to quit when those warnings went on the packs. Those warnings said: Caution, smoking may be hazardous to your health. Then, in 1969, the warning changed again and said: Surgeon General's warning, it has been determined that smoking is hazardous to health. I'm paraphrasing. That's not an exact quote. She didn't try to quit smoking in 1969 when those warnings changed.

In 1972, cigarette advertising went off of television. And the warnings went on advertisements, print advertisements. She didn't try to quit smoking. We know

she didn't try to quit smoking for the very first time until after she moved to Nevada in the fall of 1990. That is clear from her testimony.

In 1997, Liggett announced publicly, and to great fanfare, that smoking is in fact hazardous, and causes disease, and is addictive. And they added a voluntary warning label to their cigarette packs that smoking is addictive. Ms. Camacho did not attempt to try smoke -- to quit smoking in 1997 when that occurred.

So, plaintiffs' pre 1969 claims fail as an initial matter because there's no special relationship between Liggett and plaintiff that would require Liggett to give her a warning. But, separate and apart from that, they fail because no warning that could have been given to her would have changed her conduct.

Plaintiff doesn't address, in its Opposition to Liggett's Motion, this particular Motion, the lack of a relationship between Liggett and plaintiff. With respect to whether she would have changed her conduct, they do offer the testimony that she says self-servingly in her depo that she never would have started smoking if she had known. And I think I've covered that.

With respect to the design defect claims, plaintiffs must show that there is something wrong with the design of the L&M brand that plaintiff smoked. There is no

testimony specific to L&M in this record. All the testimony regarding design defect in this record is to cigarettes generally. And that testimony I'd from Dr. Proctor and Dr. Kyriakoudes.

There is a Motion in Limine attacking the ability of these historians to offer design defect testimony. We believe that any testimony they offer on the subject should be excluded. I know we're not there yet. But they're historians. They don't have any information with regard to the science of designing cigarettes. So, we don't believe they're qualified.

But, separate and apart from that, what these testimony -- what this testimony attacks are conventional cigarettes generally. They don't differentiate between the design of a L&M brand versus a Marlboro brand. And they are different cigarettes. And they are designed differently. So, plaintiffs' case is lacking an essential element of identifying a Liggett-specific defect. And, then, linking that defect to the development of Ms. Camacho's laryngeal cancer. And, absent that connection, the design defect claims are deficient as well.

THE COURT: Thank you, Ms. Luther.

MS. LUTHER: Thank you.

THE COURT: Mr. Li?

MR. LI: Your Honor, I'll address the claims in

order that defense counsel did.

So, for the post-1969 failure to warn claims, I believe Ms. Luther said she's not sure what exactly we're alleging as a basis for the claim. We're alleging failure to warn on evidence besides advertising promotion. And, specifically, the Ninth Circuit in *Rivera* had talked about research activities and voluntary activities.

So, once again, this goes back to -- this goes back to the fact that the tobacco industry, including Liggett, over and over again, promised that they're doing research. They're trying to figure out if, in fact, their products are killing people and that they would review that information to their consumers, which is how the industry, including Liggett, has agreed to essentially hold back this loss in market share since legitimate scientific research and public officials began to warn people.

And the relationship, the special relationship that generates the duty, on that issue, I refer to *Dow Chemical* and the specific quote we put on our response on page 7. Quote:

> Even when the parties are dealing at arm's length, a duty to disclose may arise from the existence of material facts, peculiarly within knowledge of the parties sought to be charged, and not within the fair and reasonable reach of the other party.

There's no way Ms. Camacho or most of the consumers could have possibly known what the industry research was generating, could possibly have known about the design defect, could have possibly known about all the additives that even today in discovery process they hold to be proprietary. Today, we still do not know -- and Ms. Camacho still does not know, the exact quantity, the exact proportion of the particular additives that may all be carcinogenic.

And, so, this is the situation that *Dow Chemical* envisioned. A situation where one party has such superior knowledge, has really the only access, because the government did not even have the full access. And, even the government back in the '70s and '80s did not know how much harm cigarettes were doing. Even the machines the government used to test cigarettes for tar level, for potential harm, were tricked by the designs on the cigarettes.

And, so, this is a situation where there is a relationship not only because the cigarette companies came out and said: We take it upon ourselves, do the research and show it to you. But, also, because there is such a disparity in informational power. And, so, the post '69 defect -- or, I should be more specific. The post July 1st, '69 claims for failure to warn, those are based on the

research and volunteer activities, which are not preempted by the caselaw.

For the pre-July 1st, 1969 failure to warn claims, every single thing Ms. Luther said is a factual dispute. Every single time there is a mention of how the warning label definitively dismisses that claim because there's no way somebody could read the warning label and still not believe it. That is a factual dispute. That argument highlights how factual that question is.

Yes, in 1964, the year that Ms. Camacho began to smoke, that's when the 1964 Surgeon General Report came out. But, are we to believe that between January and April, a 17 year old was reading the Surgeon General's Report, or had appreciation of what that Report meant, or could possibly understand the scientific findings, or, more importantly, have enough wherewithal to counteract essentially decades of priming, advertising, decades worth of disinformation?

Remember, the conspiracy began in 1954. So, by 1964, there has already been 10 years where the tobacco industry has put their foot forward before the Surgeon General could write its Report, its definitive Report. So, before the Surgeon General had a chance to warn Ms. Camacho, there's already been 10 years of disinformation put out there. That is a factual question.

And, finally, I know we're going to get to all these data and the stats in a later Motion. But I believe, Your Honor, if you have read it, you'll know that there was numerous studies from the Surgeon General in the '80s, in the '90s, even now, showing that people did not believe. The labels did not work. The warning labels, had they worked in 1966 when it first came out, they would never have changed it. It did not work. And it still doesn't work.

And, so, the fact is, yes, pre '69, there were some labeling from '66 to '69. But, no, it is not definitive that nobody in the world, that Ms. Camacho, could not have possibly disregarded that. That's completely a dispute that the jury has to find based on the facts, based on what Ms. Camacho says.

And, like all parties, every single party's representative, or the plaintiff, or the defendant, when they testify, it can all be characterized or classified as self-serving testimony. But that's what the record is made of. It's made of self-serving testimony that generates a dispute of facts. And that's what we have here.

I want to address the design defect briefly. There are two major flaws in the defense argument. The first is that the defect does not need to be brand specific. If General Motors and Ford both make cars that

explode because a fuel tank is not protected, that could be a shared similar defect by two different companies, two different makes and models of cars. And an expert can come up and say: That defect exists in three other brands. That does not preclude the expert from giving enough information to survive summary judgment.

And, so, in the tobacco industry, some of the major defects are shared by more than one defendant. And that is okay by the law. There's no caselaw, certainly no statutory law in Nevada, that says you can't -- you can only bring a claim for defective design if it is unique to one single defendant.

The other major flaw in the defendants' argument is that they claim we are essentially making a blanket statement that all cigarettes are defective. That's not true. First, the definition of cigarettes, under federal law, is just tobacco matter wrapped in paper or wrapped in a substance that is not tobacco matter. And, so, what that means is that a cigarette, in its most natural and unadulterated form, is plucked from the field, a tobacco leaf, rolled into something that's not tobacco, like a piece of paper. That constitutes a cigarette. We are not claiming that that cigarette is defective.

We're not claiming that a cigarette is not harmful either. We are claiming that that cigarette might have

some level of harm that the ordinary consumer fairly expects, and fairly knows, and maybe even knows from the '50s onwards. But the defendants' cigarettes are not that. They're not natural tobacco, organically plucked, organically treated, organically rolled into a piece of paper. It is carefully designed, sophisticatedly researched. It is a thing that they process from plucking it, flue-curing it, chopping it up, pulping it, making it into a constituted sheet. The reconstituted tobacco gets shredded. There's chemical added to it for all sorts of purposes.

And, so, the difference here is that just because a lot of cigarettes on the market, perhaps even the majority of the market share, are by the defendants, that does not necessarily mean that we are claiming all cigarettes must be illegal. And that's really -- that's really key here because their preemption argument is a mischaracterization of our claim.

And, so, on the fact that they're saying -- plaintiffs are saying, all cigarettes indistinguishable are illegal or defective, not true. If there is a defendant or if there's a tobacco manufacturer out there that are processing tobacco without all the additives, without all the flue-curing, without all the potential carcinogens being added into it, and without designing it in such a way

purely for the fact of addicting people, or mostly for the fact of addicting people, if it's just naturally organic tobacco rolled in paper, we would be not be bringing that suit. It would not be a defective claim. Thank you.

THE COURT: Mr. Li, the Court has one question.

MR. LI: Yes.

THE COURT: So, the Court looked at all of the Exhibits. The Court found that the plaintiff had four experts: Two historians, a medical doctor, and a psychologist. The Court did not see any expert, engineer, or chemist, or cigarette design. Is there some expert on those aspects?

MR. LI: Your Honor, I'm happy to answer that. But I think we're dovetailing into the Cigarette Design Motion.

THE COURT: No. It's very, very relevant --

MR. LI: Okay.

THE COURT: -- to the strict products liability claims. It is so relevant. And no one's addressed it.

MR. LI: In that case, yeah. In that case, Your Honor, I'm happy to address it.

So, Dr. Proctor is more than qualified to talk about cigarette design. First, let me lay out his qualification. And, then, I'm happy to talk about why he is the person for the job. And, then, I will also talk

about why there's really not another person that could possibly do this kind of work.

So, the first thing is that he's not just a historian. He's a historian of science. He has an undergrad degree in biology. He was accepted to MIT for physical chemistry as graduate work, and he turned that down to go to Harvard and pursue a Ph.D. in History of Science.

The reason why he's the right person for the job is because he has already been both vetted and accepted by multiple -- not just Courts, but public authority, governmental authority, health authorities, where he talked about cigarette design. I briefed this and I'm happy to -- I'm happy to take out material in a bit and read out all the things he did in order to talk about cigarette design for all these entities.

The reason why he's the man for the job is because he has both context as well as current knowledge. The historical context is important. Right? If we pull some random chemist or engineer off the street right now and just say, test the work the tobacco industry did, they might not know what to look for. They might not know what to test for. But, because Proctor has had essentially most of his career combing through tobacco industry documents, reading scientific documents, he understands how most of

the features, for example, ammoniation, which free bases nicotine, how that developed over the decades, why that was developed over the decades.

The market research -- the internal scientific research by the tobacco industry themselves, he has read those documents to know why the cigarettes are designed the way they are and how those design features evolved over time, which is why he can say, for example: There are documents in the past showing ammoniation causes free basing. Free basing is correlated with more addiction. And, then, that translates into: If we were to make cigarettes safer, one thing we could do is not add ammonia. One thing we could do is not free base the nicotine because then we know it will reduce the addictiveness.

So, similarly, he has talked about how flue-curing increased the sugar content, which changes the PH in the smoke, which makes it more inhalable. Whereas, you can inhale some smoke going into your mouth, some smoke into your upper lungs, some all the way down. Right? You can now talk about, in order to make the cigarette design safer, we now change the PH so much from the natural content, so then now it can be deeply inhaled. Right?

So, a lot of these things he studied informs him of why the cigarettes are designed the way they were and how they can be made safer. And that's why he is uniquely

qualified to talk about this.

I think it would be a very, very narrow construction of the Nevada rule for expert witness testimony to only allow what, essentially, the defendants are suggesting, which is that somebody must have had design experience, essentially an industry player is the only person that can come out here and say: I'm an expert qualified to testify about cigarette design. But that's not -- that's not all what the law requires. It just requires education, training, and experience in order to make him helpful in assistance of the jurors.

THE COURT: Okay. So, we're going to take a quick lunch break. When we come back, you can continue arguing. You're not -- the Court's not cutting you off, Mr. Li. So, we'll come back at 12:30. Is that enough time or do the parties need a full hour? No. All right. So, we'll come back at 12:30. And, then, Mr. Li will resume. And, then, Ms. Luther will do final rebuttal.

MR. LI: Thank you.

MS. LUTHER: Thank you.

THE COURT: Okay.

[Recess taken at 11:52 a.m.]

[Hearing resumed at 12:34 p.m.]

THE COURT: Thank you, counsel. Please be seated. We're back on the record.

Mr. Li?

MR. LI: Thank you, Your Honor.

THE COURT: And, Mr. Li, also for this Motion, if you could address the jurisdictional arguments as well on the strict products liability?

MR. LI: I'm sorry? I didn't hear the last part.

THE COURT: On the strict products liability, if you could address the jurisdictional arguments?

MR. LI: Oh because, before 1990, she was smoking outside of Nevada?

THE COURT: Yes.

MR. LI: Understood.

Your Honor, just to continue with what I was telling you about Dr. Proctor. The term historian is misleading because, as I mentioned before, he's a historian of science, which requires him to be -- which makes him a scientist. Because, in order to be a historian of science, he has to be a master of the subject matter, the underlying science itself. Otherwise, he can't possibly understand the history of it and evolution of it.

There is no reputable college or university, academic institution out there that offers a course or a degree in cigarette design. And, so, the only way for a legitimate scientist like Dr. Proctor to become an expert in cigarette design is through exactly what he's been

doing, studying the history of it, understanding why those features were evolved the way that it did.

And, so, I mentioned before that I would tell you -- or at least I will highlight for you in his CV the particular items that I think would bear a lot of weight on this matter. And I'll just quote a few. One of Dr. Proctor's major works is called, the Golden Holocaust Origins of the Cigarette Catastrophe and the Case for Abolition. And it includes recommendations for less deadly cigarette designs. So, there is a whole section on cigarette design in that particular work.

In 2013, he was invited to lecture on, quote: The history of cigarettes and cigarette design. In 2014, Dr. Proctor served as a senior scientific reviewer for the 50th anniversary of Surgeon General's Report. In 2008, he published a peer-reviewed article on cigarette design, specifically on the process of nicotine free basing. And he also addressed cigarette design in other peer-reviewed articles.

In 2007, he was invited to give a keynote address to the World Health Organization's regulatory group for designing protocols that would specify design limits for cigarettes. And he participated in drafting part of the protocol. He has also made proposals for cigarette designs to the FDA and has, in fact, educated the FDA by lecturing

on cigarette design. And that was at the FDA's request.

And all of that is to say, Your Honor, he is the leading expert on this matter. Lacking somebody who is going to come from within the industry all of the sudden today and say: I can, you know, take the stand and essentially be a whistleblower. This is the only person with this kind of unique expertise and knowledge. And that's why the majority of the litigations that have happened across the country, he has always been allowed, he has always been admitted as an expert on all subject matters, including cigarette design.

And the last thing I will say on that issue is, Your Honor, you have asked if we have other witnesses who can testify about cigarette design. We do have at least two others. There is Dr. Jack Henningfield, who is the chief of pharmacology for the National Institute of Drug Abuse. The Surgeon General actually relied on his work.

THE COURT: How do you spell his name?

MR. LI: Henningfield, H-E-N-N-I-N-G-F-I-E-L-D. And the Surgeon General relied on his work and his opinions, and concluded that cigarettes are, in fact, addictive.

The second expert we also do have is William Farone. Last name is spelled F-A-R-O-N-E. Dr. Farone was a former Director of Applied Research for Philip Morris.

So, --

THE COURT: And will you address the jurisdictional arguments?

MR. LI: I'm sorry, Your Honor?

THE COURT: Will you address the jurisdictional arguments?

MR. LI: Yes, Your Honor.

So, for strict liability, I agree for NDTPA, for the purpose of today's argument, I'm not arguing that before '90 the NDTPA applies to any misconduct. But, for the strict liability argument, the jurisdiction here is that any Nevada resident get to seek justice in a Nevada Court. And harm that was done over a stretch of period of time by a company that designed products that hurt their resident, that resident's rights for that claim does not accrue in Illinois where she was -- you know, in the 1989, for example. She didn't have her cancer diagnosis. Her rights did not accrue.

Where it accrues is where the jurisdiction is captured. And, so, because the diagnosis happened here in 2018, this is where we're litigating the case. And, as a Nevada resident, she has to have the right to pursue her claim after it accrues where she resides.

THE COURT: Thank you.

MR. LI: Thank you.

THE COURT: Ms. Luther?

MS. LUTHER: I'm going to start where Mr. Li left off and that is with respect to Doctors Henningfield and Farone.

They were not tendered in Opposition to this Motion. None of their testimony was offered in Opposition to Liggett's Motion. So, I don't believe it's appropriate for me to be addressing what they may or may not have said with respect to whether Liggett's cigarettes were defective. Neither of them, I believe, have anything to do with a failure to warn claim.

With respect to Dr. Proctor, we stand by our position that Dr. Proctor and Dr. Kyriakoudes are not qualified to offer opinions with respect to design of cigarettes. They are historians. Dr. Prochaska is a psychologist. She is not qualified to offer design defect opinions either.

The Motion in Limine is very detailed as to why these people are not qualified, both with respect to their qualifications but, also, with respect to their -- I'm having a brain fart here. With respect to the -- their methodology. And how their methodology with respect to how they came to the conclusions that they offer with regard to the defect came about.

On our lunch break, I pulled Plaintiffs'

Complaint. And it's important to note, for purposes of this Motion, that plaintiffs do not assert a failure to warn claim after 1969. The allegations of the Complaint -- and, just for example, Your Honor, if you look at paragraph 135 at subsections n through r, they all start with: Before 1969, the defendants failed to warn with respect to X, Y, and Z. And, with respect to the pre-1969 claims, as I've already stated, there was no duty on behalf of Liggett to tender any information to Ms. Camacho.

Plaintiff tries to hang their hat on a false premise that Liggett somehow undertook to disclose information to Ms. Camacho. And the verbiage that Mr. Li recited to the Court in support of that proposition was a paraphrase of a document called the Frank Statement. And, as you've already heard this morning, Liggett was not a signatory to the Frank Statement. We do not believe that the Frank Statement does give rise to a duty to disclose. But, even if it did, Liggett had nothing to do with that document. So, that cannot be the basis for a voluntary duty to disclose on the part of Liggett.

And that leaves us with Nevada law, which is that a manufacturer does not have a duty to disclose. We do not have a duty to speak under these circumstances.

THE COURT: Thank you.

MS. LUTHER: Thank you.

THE COURT: Defendant Liggett, LLC's Motion for Partial Summary Judgment on Plaintiffs' Negligence and Strict Product Liability Claims is going to be denied in part and granted in part. It will be granted with respect to the negligence claims and denied with respect to the strict liability claims.

Ms. Luther, if you can prepare the Order?

MS. LUTHER: Yes, ma'am.

THE COURT: Thank you.

The next Motion is Philip Morris. That should be the last of the Liggett Motions. Is that correct, Ms. Luther?

MS. LUTHER: It is, Your Honor. We did join in Philip Morris's Motion for Summary Judgment on Punitive Damages and the Motion for Judgment on the Pleadings on the Nevada Deceptive Trade Practices Act claim, which is now moot in light of your rulings.

THE COURT: Thank you.

So, the next Motion, it appears that this one is moot. But it's Defendant ASM Nationwide Corporation's Motion for Partial Summary Judgment on Plaintiffs' Punitive Damages Claim. Is that correct, Mr. Roberts?

MR. ROBERTS: Yes. We believe it's moot, in light of their admission that they don't plan on seeking punitive damages. They're still in the pleadings, which is why it

wasn't withdrawn. But we believe that if we can get an Order on that, it will be undisputed at that point.

MR. LI: I agree.

THE COURT: Okay. Mr. Roberts, will you prepare the Order?

MR. ROBERTS: Yes, Your Honor.

THE COURT: All right. Next Motion is Defendant Philip Morris USA and RJ Reynolds Tobacco Company's Motion for Judicial Notice. Mr. Roberts? Mr. Henk?

MR. HENK: So, Your Honor, we filed this motion just out of an abundance of caution. Mr. Roberts is going to argue the summary judgment motion on punitive damages. And he was going to explain this, in part. But I don't want to make the same argument twice.

Basically, the gist of it is, Your Honor, that Mr. Roberts is going to explain why summary judgment should be granted based on res judicata. And we don't believe Your Honor actually has to look at the MSA itself, the Master Settlement Agreement. But we filed this Motion because, in a different case, a Judge ruled initially that the Court could not take judicial notice of the MSA. And, so, we filed this because of that, again, just out of an abundance of caution.

We don't believe that anytime a defendant is asserting res judicata, Your Honor, it always depends upon

matters from another litigation. By the nature of the defense, you can't have a res judicata defense unless there's been an adjudication in a different case. So, you're always going to be looking at something from another case. And, so, it's not hearsay. It's an operative document. So, you're not using it for that purpose.

But all we're saying here is if Your Honor thinks that you do need to look at the MSA, then we believe it is appropriate to take judicial notice. Because all you're looking at for judicial notice is, within the four corners of this document: Can they dispute contents of it? And our position is, Your Honor: It says what it says. And, so, Your Honor could take judicial notice of it. But we submit you don't need to.

That's it, Your Honor.

THE COURT: Thank you, Mr. Henk.

Mr. Li?

MR. LI: Your Honor, the very first thing I want to do is to just give Your Honor an update on the case that defense counsel -- Mr. Henk alluded to. So, previous to all the briefings were filed in this particular case, on this particular issue, there was an argument in the *Tolby* [phonetic] case. And, what had happened is that Justice -- former Chief Justice Mark Gibbons heard the oral argument. And, afterwards, Judge Villani signed the Order denying the

MSJ on punitive damages. And the reason for that denial is procedural, is that he believes the admissibility of the MSA is questionable. And, therefore, it's procedurally barred on a Motion for Summary Judgment.

Afterwards, the defense filed a Motion for Reconsideration and we obviously responded. And Justice -- former Justice Gibbons this time issued a ruling, again denying, but the denial is a little different. There's an additional procedural element and there's an additional substantive element. I can wait for the actual argument for a Motion for Summary Judgment on Punitive Damages to talk about the substantive.

But, for the purpose of this Motion, on the procedural issue, what former Justice Gibbons held is that the reason why the admissibility is questionable, or the reason why he's not taking judicial notice of the MSA for the purpose of the Motion for Summary Judgment, is because it isn't just a question of law. It isn't just a question of contract dispute or contract interpretation. It is a mixture of facts and law.

And part of the reason that led to that -- part of the process that led to that decision is that we had argued in our briefing that both the Nevada Supreme Court, the Fifth Circuit, Sixth Circuit, and the Eighth Circuit, they had had mentioned that determination of privity for

preclusion purposes is a factual question. And, so, that is the additional procedural ruling former Justice Gibbons made on the *Tolby* case. And I think that applies square to here because they're identical Motions being filed by the defense.

So, it doesn't change the procedural argument. It only changes the support for it. So, it's no longer just the fact that the MSA on its own says that it is inadmissible. But, also, the fact that you cannot take judicial notice when there's varied interpretation. And, third, you cannot take judicial notice when what they're asking for is not just to take the facts into notice but, also, to interpret it in a particular way. And, to interpret privity into it, you have to examine the circumstantial evidence, which is disputed fact.

But the other reason why this is not judicially noticeable is simply because you have an exclusionary clause. The MSA contains a, quote: Non-admissibility clause. What had happened is that when the Attorney General and the defendants here contracted for a resolution of pretty much all 50 states, suits against them back in 1998, 1997, clearly the defendants did not admit liability at all. The MSA specifically talks about how no part of this negotiation, no part of this settlement agreement, no part of the consent decree, no part of any of this process

in 1998 is to be taken as the cigarette manufacturers admitting liability, or admitting fault, or taking punishment for any of their misconduct in the past.

And, so, in order to make -- in order for that MSA and the negotiation, all that background not to be entered into private litigations such as this one, they had to make sure there is a non-admissibility clause that talks about how in future proceedings that's not related to essentially the healthcare case, the State -- the AG case, this document and all of the background, or, this document, and the consent decree, and the negotiation, all of that is not admissible.

What they're doing now is they want to have their cake and eat it, too. Right? They want to say: We don't want any of that to come in back then. But, now, we see an opportunity to leverage it. And, so, we want to take judicial notice -- or we want the Court to take judicial notice of that.

That's not fair -- that's not a fair process. And the document itself contracted for non-admissibility.

THE COURT: Thank you, Mr. Li.

Mr. Henk?

MR. HENK: The only thing I'm going to clarify, Your Honor, we're not seeking admission of the MSA. All we're saying, this -- just a Motion for Judicial Notice, is

if Your Honor thinks that you need to look at the MSA to resolve the Summary Judgment Motion that Mr. Roberts is arguing, then we submit you can look at it. That's only -- our only position on this. Not that the jury would ever see it, that Your Honor can look at it. Thank you.

THE COURT: Thank you.

On Defendant Philip Morris USA, Inc., and RJ Reynolds Tobacco Company's Motion for Judicial Notice, the Motion will be denied.

Mr. Henk, can you prepare the Order?

MR. HENK: Yes, Your Honor.

THE COURT: Thank you.

The next Motion is Defendant Philip Morris USA and RJ Reynold Tobacco Company's Motion for Partial Summary Judgment on Plaintiffs' Punitive Damages Claim.

Mr. Roberts?

MR. ROBERTS: Thank you, Your Honor.

And as we have just previewed, our request for judicial notice was made to the extent the Court found that it was necessary to consider the MSA in determining our Motion for Summary Judgment. But our Motion for Summary Judgment does not fail because you have denied our request for judicial notice. And that is because the MSA resolved a lawsuit, which was filed by the State. That lawsuit resulted in a consent decree in final Judgment. Therefore,

our Motion for Summary Judgment is based on the doctrine of res judicata, which defendants' not on this Court taking notice of the MSA, but on this Court determining the res judicata effect of a Judgment validly entered pursuant to Nevada law.

At page 5 of our brief, we cite the elements of res judicata. The parties are -- their privies are the same, The final Judgment is valid, and the subsequent action is based on the same claims or any part of them that were or could have been brought in the first case.

We acknowledge that the party in the first lawsuit was the State. And that's a different party here. But it's the parties or their privies. And, from the face of the Complaint, we can see that this lawsuit was brought by the Nevada Attorney General, on behalf of the people of Nevada, to vindicate the public interest in punishing Philip Morris for the conduct, which is, in part, alleged here.

So, even though the claims are different in the sense that, obviously, the damages alleged and the injury alleged to Ms. Camacho were not in front of the Court at that time, there is no doubt that the claims in part are based on the same facts in that Attorney General lawsuit as they are in this case. In fact, that case was based in the Complaint, which sets forth the allegations which were

resolved in the consent decree, that defendants:

> Have unreasonably injured and endangered the comfort, repose, health, and safety of the residents of the state by selling tobacco products, which are dangerous to human life and health, and cause injury, disease, and sickness. Conspiracy caused smokers in the state to take up or continue smoking, and, importantly, delivered cigarettes and tobacco products to the residents of the state of Nevada in a condition that was unreasonably dangerous to the users.

So, that's exactly the allegation here, that Philip Morris should be punished for its conduct in delivering defective products to the people of the state of Nevada.

THE COURT: Mr. Roberts, do you have the Jury Instruction on punitive damages in Nevada?

MR. ROBERTS: I am familiar with it. But I don't have it in front of me, Your Honor.

THE COURT: Okay. Maybe Mr. Henk can look it up for you. Go ahead.

MR. ROBERTS: And I'm familiar with the fact that we're being punished for the injury caused to Ms. Camacho, which I take is what the Court is referring to as part of that instruction. And that they cannot punish us for injury caused to others. However, once you get into

reprehensibility, that line blurs.

And, in this case, for example, they want to present evidence of the number of people that died due to smoking nationwide, the number of people who died in Nevada. They want to compare it to other diseases to show the reprehensibility of the conduct for the purpose of inflating the punitive award.

THE COURT: Mr. Roberts, do you believe that punitive damages are to compensate the plaintiff?

MR. ROBERTS: No, Your Honor. They are to vindicate a public interest, which is what makes this Motion valid, as compared to other states. Some other states where punitive damages vindicate a private interest, Nevada follows the public interest rule. And there are several states, which we cited in our brief, that also apply that public interest interpretation on punitive damages, who have granted similar motions.

So, I -- and, Your Honor, I understand the point that you make with our Jury Instruction. But, the fact is, Philip Morris paid billions of dollars, a billion of which went to the state of Nevada and continues to go into the state of Nevada, pursuant to the consent decree. And, as part of that, -- and I know the Court didn't take judicial notice of the MSA. But the MSA itself says that part of the rationale is:

The unconditional release of future claims for civil penalties and punitive damages for past conduct in any way related to cigarette manufacturing and marketing.

I mean, that's what Philip Morris thought it was paying billions of dollars to get, a release of future punitive damage claims to vindicate the public interest, which the State was attempting to vindicate in this settlement.

It's just fundamentally unfair to subject Philip Morris to punitive damages again, after its already paid the state of Nevada a billion dollars in punishment for that same past conduct.

THE COURT: Do you have the Jury Instruction in front of you, Mr. Roberts?

MR. ROBERTS: I do, Your Honor.

THE COURT: Does it mention in the Jury Instruction to vindicate a public interest?

MR. ROBERTS: It does not, Your Honor.

THE COURT: Can I see a copy of it?

MR. ROBERTS: I don't believe it does.

[Pause in proceedings]

THE COURT: The Jury Instruction does say: The amount of punitive damages, which will serve the purposes of punishment and deterrence.

All right. Thank you.

MR. ROBERTS: Thank you, Your Honor.

THE COURT: So, Mr. Roberts, on the MSA, it said:

The unconditional release of punitive damages.

What page was that on? In the MSA.

MR. ROBERTS: Page 2, I believe, Your Honor, is what I have in my notes.

THE COURT: Page 2?

MR. ROBERTS: Yes, Your Honor.

THE COURT RECORDER: Does someone have a cell phone on a table? Thank you.

THE COURT: Where on page 2?

MR. ROBERTS: Court's indulgence.

THE COURT: Of course.

MR. ROBERTS: Let me pull up that Exhibit.

[Pause in proceedings]

THE COURT: Mr. Henk, do you have that page?

MR. HENK: Almost, Your Honor.

[Pause in proceedings]

MR. ROBERTS: And, Your Honor, on page 2, the whereas clause:

Whereas the settling states and the participating manufacturers was to avoid the further expense, delayed inconvenience, burden, and uncertainty of continued litigation, and have agreed to settle their respective

lawsuits and potential claims pursuant to which this will achieve for the settling states, etcetera, etcetera.

And, then, if you go to page 7, you can see that the definition of claims includes punitive damages, I believe. Claims under subsection n:

> Claims means any and all manner of civil, i.e., noncriminal claims, demands, actions, suits, causes of action, damages whenever incurred, liabilities of any nature, including civil penalties and punitive damages, as well as costs, expenses, and attorneys' fees, known or unknown, suspected or unsuspected, accrued or unaccrued, whether legal, equitable, or statutory.

THE COURT: Thank you. Thank you. The Court doesn't have anymore questions.

MR. ROBERTS: Thank you, Your Honor.

THE COURT: Mr. Li? Mr. Li, in your argument, can you address *Siggelkow*, which is S-I-G-G-E-L-K-O-W, *versus Phoenix Insurance Corp*, 109 Nevada 42, a 1993 case? It's cited on page 7 of Philip Morris and RJ Reynolds's Reply regarding that, quote, punitive damages, quote:

> Has its underlying purpose public policy concerns unrelated to the compensatory entitlements of the injured party. End quote.

MR. LI: Your Honor, yes. Happy to address that.

THE COURT: Okay.

MR. LI: So, I don't dispute that punitive damages have a punitive purpose. And I understand that punitive damages for punitive purposes and deterrent purposes sounds like it has a public orientation to it. That is all perfectly fine. It does not change my argument. And, in fact, I think it -- the only thing I need to highlight here is that there's two sets of punitive damages talked about here. The defendants want to conflate everything all together. But they are actually two different pots.

There's the case by the AG suing effectively for healthcare but, also, for other purposes. But the main thing they were suing for was to recoup the healthcare costs induced by defendants' products. In that case, they sought punitive damages for all the harm they did to the state and to the public at the time for the healthcare suit. That is a different thing from the punitive damages here. Because, in Nevada, punitive damages is not a claim, is not a standalone claim, but is merely an element. Right? An issue attached to a claim.

And, so, punitive damages here is just what the defendants' misconduct did to Ms. Camacho, the oppression, the malice, the deception, all the things that caused her specific damages. And this goes to why these are two such different cases.

Not only is there totally different evidence in this particular case, there's also the fact that, since 1998 onwards, there's additional bad acts that we are suing for, that we're using as underlying claims and underlying cause of action, that the Attorney General could not have used.

But there's also the fact that one of the things the Supreme Court of Nevada looks at to identify if the claims are identical is whether they used the same facts -- if they arise out of the same facts and circumstances. Well, one of the most critical facts here is that she got diagnosed with cancer. And that didn't happen back in 1998. That happened two decades later. So, the very critical fact, the kernel that gives this whole action the right to even come to Court, did not occur back in 1998. So, these could not have possibly been the same claim.

Now, what the defendants want the Court to think is that because there's overlapping evidence, these are somehow the same claim. But that's not true. Once again, evidence can overlap among many different cases. Right? Again, the same auto defect can cause harm to 6,000 different people. But that doesn't mean those 6,000 people have the same claim.

And, so, very similarly, yes, we might share documents with the Attorney General. Yes, a lot of

documents from the ’50s, and ’60s, and ’70s, and ’80s may be used in this situation in this trial. But her claim, Ms. Camacho’s claim, is entirely distinct and separate.

And I want to go to the -- I believe it’s exactly the same section of the MSA that you were looking at, which is the definition of releasing parties. In the definition of releasing parties, the MSA specifically talks about how this does not apply to, quote:

> Private or individual relief for separate and distinct injuries.

The MSA contemplated the fact that by settling with the State AGs, there may still be outstanding and future private litigations in tobacco, such as the one we have now. Private individuals who are going to find out that they have cancer due to defendants’ product, decades after the MSA was signed, can still bring claims. That was not precluded. And that’s why here there is a punitive damage attached to Ms. Camacho’s own action, which is separate and distinct from the punitive damage attached to the AG’s.

I want to talk briefly about two other main issues. One is because punitive damages is not a standalone claim in Nevada, and because -- and I won’t go into all the details because I know Your Honor has read the briefings. But, because punitive damages is not a

standalone claim, because it's only a part of a claim, it's a right attached to a claim, it is rightly attached to particularly the person that suffers. The Jury Instruction talked about the oppression and malice to the victim, basically.

Because of all that, this is not a claim preclusion issue. They brought it under claim preclusion because they knew -- the defendants knew, they cannot satisfy the requirements under issue preclusion. Because, unlike claim preclusion, issue preclusion talks about how you have to have an actually litigated legal issue. This was never litigated. In fact, as I mentioned earlier, during settlement period time, the negotiation led to this particular section of the MSA that talks about how this is not to be taken as anyone accepting responsibility or admitting liability.

And the third issue, Your Honor, is that there is the *Williams* case from the Supreme Court of the United States. I understand the defense is very focused on convincing the Court that in Nevada, like in New York or maybe even in Georgia, punitive damages is for -- is a public right. And, therefore, it's for the public. And, therefore, somehow that creates a situation where the MSA has precluded us from asking for it.

But, in *Williams*, the dissenting justice, Justice

Stevens, used that exact argument. He said -- so, *Williams* is tobacco case that came up from Oregon. And, in Oregon, a large percentage of punitive damages actually goes to the State Treasurer. And, so, Justice Stevens, in his dissent, talked about how: Look, this is clearly for the public's sake. Right? How can you have a statutory scheme where a major percentage of punitive damages go to the State Treasury and yet you claim this is only for a private purpose? The majority rejected that argument. It didn't stick. And that was an argument that Philip Morris brought.

The *Williams* case is a case where Philip Morris won because they had made the proper argument against their own position now today. So, the majority took Philip Morris's argument, rejected Justice Stevens's dissenting argument, and here we are.

And this flows into the two State Court cases that they cite. I won't -- I only want to talk about the Georgia one, briefly, because the Georgia case came a year before the *Williams* decision from U.S. Supreme Court. And, essentially, the Georgia Court had a statutory scheme where a percentage of the punitive damages go to the state. And they held that: Look, because of that, we believe this is an only publicly oriented statutory scheme. And, therefore, punitive damages is precluded under the MSA.

I believe, had the Georgia Supreme Court weighed on the issue after the *Williams* decision, they might have had a very different outcome, knowing how Justice Stevens advanced the same argument in a state like Oregon, where the punitive damages scheme is very similar to Georgia, and how that argument was rejected.

And, of course, as you know, in Nevada, there is no requirement where the punitive damages go to the State Treasury. And, so, Nevada, unlike Georgia, and much more like all the other states that have denied this particular Motion for Summary Judgment, Nevada statutory scheme is even further away from Oregon than the *Williams* case.

And this is why I believe the -- you know, alluding back to former Justice Gibbons's second opinion now. There's the procedural. And, then, there was the substantive reason for denial. And, as I mentioned, the procedural is still the admissibility of the MSA but with a different caveat. And, here, with the substantive, what Justice -- former Justice Gibbons said, is that -- and I'll read it directly from the Order:

> Even if Nevada defines punitive damages as a public right, the New York and the Georgia cases are still not binding.

And, so, taking all those arguments in total, Your Honor, I would ask you to, one, not find that punitive

damages scheme, statutory scheme in Nevada is a purely publicly oriented right. Two, it is tied very much to the individual claim. It is tied to the cause of action. And that cause of action is not healthcare for the state, is not anything that has to do with Attorney General's case, but it has to do with Ms. Camacho's personal suffering, personal pain, and personal cancer diagnosis that occurred in 2018.

And, finally, I would ask you to deny the Motion because it is fundamentally on the wrong vehicle under the wrong analysis. It is an issue preclusion analysis that should be applied here and they cannot meet all the elements.

THE COURT: Thank you, Mr. Li.

MR. LI: Thank you.

THE COURT: Mr. Roberts?

MR. LI: By the way -- sorry, Your Honor. I did bring three copies of the Order from the *Tolby* case because we couldn't file it before the pleadings were filed. If you want a copy, I'm happy -- I have a copy for defense as well.

THE COURT: Sure.

MR. LI: May I approach?

THE COURT: Yes. You can give it to me.

MR. LI: Okay.

THE COURT: Thank you, Mr. Li.

MR. LI: Thank you.

THE COURT: Mr. Roberts?

MR. ROBERTS: Thank you, Your Honor.

First of all, I'd like to point the Court to one more section of the MSA. I referred to you recitals in the definition of claim. But I forgot to direct you to the actual release, which is found at page 110 under Roman Numeral XII, Settling States Release, Discharge, and Covenant. Section A1 under release is:

> Upon the occurrence of state-specific finality in the settling state, such settling state shall absolutely and unconditionally release and forever discharge all released parties from all released claims that the releasing parties directly or indirectly, derivatively, or in any other capacity, ever had, now have, or hereafter can, shall, or may have.

So, if we look at the definition of claims, it includes all claims accrued and unaccrued, known and unknown. And, on behalf of the citizens of Nevada, there is a full release of all claims which the State, on behalf of its citizens, ever had, now have, or ever can, shall, or may have, for punitive damages. And Philip Morris paid a billion dollars to the State of Nevada for that release.

And if we look, even though it's hard to find the

exact language, we do cite the *Lemler* case from Nevada, which says:

> The concept of punitive damages rests upon a presumed public policy. And an award should be an amount that would promote the public interest without financially annihilating the defendant.

So, if Nevada is of the type of state which says punitive damages are to vindicate a public interest and promote a public interest, that's exactly what the Attorney General vindicated previously, not only for past claims but, also, for any future claims arising out of the recited conduct in the Complaint, which includes the exact type of claim here, that cigarettes are defective and caused injuries and damages to the citizens of Nevada.

THE COURT: What page was that on, the *Lemler* case, in your briefing?

MR. ROBERTS: Our quote on *Lemler* is in the last paragraph on page 14 of 17.

THE COURT: In your original Motion?

MR. ROBERTS: In the original Motion. Yes, Your Honor.

THE COURT: Okay.

MR. ROBERTS: And we also cited this *Siggelkow* case on the same page, 846 Pacific 2d at 305, which indicates that:

Punitive damages awards provide a benefit to society by punishing undesirable conduct that is not punishable by criminal law.

THE COURT: Mr. Roberts, in this Order from former Justice Gibbons, in paragraph 4 it says that he concluded that:

Whether the Attorney General provided adequate representation in the MSA litigation was a mixed issue of law and fact.

Can you address that? No one's addressed it here.

MR. ROBERTS: Your Honor, I might be speculating if I address that. Because I don't believe he -- I was at the hearing where this was argued. And I don't recall that issue being discussed. It -- but it sounds like there's a -- it's a mixed question of law and fact, whether to enforce the agreement and whether the Attorney General provided adequate representation.

I'm not familiar with any law which says res judicata doesn't apply if the plaintiff wasn't adequately represented by its representative in the litigation. That might result in a malpractice claim against the Attorney General. But I don't know how that could affect a res judicata argument.

THE COURT: Thank you.

Defendant Philip Morris USA and RJ Reynolds

Tobacco Company's Motion for Partial Summary Judgment on Plaintiffs' Punitive Damages Claims is granted. In Nevada, punitive damages vindicate a public interest and punitive damages are not to compensate a plaintiff. In *Siggelkow Phoenix Insurance Company*, 109 Nevada 42, a 1993 case, the Nevada Supreme Court explained that:

> Punitive damages have their underlying purpose on public policy concerns unrelated to the compensatory entitlements of the injured party.

In looking at the *Williams* case from the U.S. Supreme Court, that's *Philip Morris USA versus Williams*, 549 U.S. 346, a 2007 case, that case was actually the complete opposite of the case today. When the Court read the *Williams* case from U.S. Supreme Court, punitive damages were awarded against Philip Morris, that Philip Morris argued were unrelated to the case at issue. Here, we have the complete reverse.

And the issue in *Williams* was there was no privity. It had to be the same parties. Here, it's the same parties through the Attorney General. So, the Motion is granted.

Mr. Roberts, if you can prepare the Order?

MR. ROBERTS: Yes, Your Honor.

MS. LUTHER: Your Honor, may I clarify on behalf of Liggett, since we joined in that Motion, that your

ruling extends to Liggett as well?

THE COURT: It extends to all defendants.

MS. LUTHER: Thank you.

THE COURT: The next Motion is Defendant Philip Morris USA's Motion for Partial Summary Judgment on Plaintiffs' Claims for Fraudulent Misrepresentation and Fraudulent Concealment.

Mr. Roberts or Mr. Henk?

MR. ROBERTS: That would be me, Your Honor.

THE COURT: Thank you.

MR. ROBERTS: Your Honor, I believe that this motion is substantially similar to the Deceptive Trade Practices Act Motions that have previously been granted by the Court today. I think that the same logic the Court's applied to the Deceptive Trade Practices Act apply even more strongly to these claims.

This appears to be on all fours with the *Rivera v. Philip Morris* decision from the Ninth Circuit, which we cite. And, as there were several decisions arising out of that case, I'm looking at 395 F.3d 1142. And, under headnote 15 and 16 in that case, the Court recited the elements of fraud under Nevada law, which materially include a false representation made by defendant and for plaintiff's justifiable reliance upon the misrepresentation.

And, really, the issue becomes the same here as it was in *Philip Morris*, where the Court -- the Ninth Circuit sustained summary judgment for Philip Morris because the record contained no admissible evidence identifying what statements attributable to Philip Morris the decedent actually saw, heard, or read, and relied upon to support her decision to start and continue smoking. And, during discovery, the plaintiffs in that case, similarly, were unable to point to any specific statement in any advertisement or public communication from Philip Morris, which influenced Ms. Rivera's decision to start, continue, or fail to quit smoking.

And, for the same reasons the Courts previously ruled, the broad statement that she thought she heard something from a cigarette company saying that cigarettes were safe, is the only thing that they've really got as far as specific misrepresentation. And not only can that not be tied to Philip Morris specifically as required by *Rivera*, but, as the Court previously noted, there's unrebutted evidence that Philip Morris never made such a statement.

Therefore, we would ask the Court to grant summary judgment on the fraud claim for the same reason as the Court has previously granted the Deceptive Trade Practices Claim Motions.

Turning to the fraudulent concealment, the *Rivera* case also discussed that and noted that Rivera was required to present evidence showing that the fraud victim would have acted differently if there had not been fraudulent concealment. And the record was void of any evidence that Ms. Rivera would have acted differently if the omitted information had been disclosed.

So, if we turn to the allegations, which the plaintiff has come forward with here, what they say as far as reliance is that she said that she would have tried harder. I think that was the only statement that they're relying upon in their actual Opposition to this Motion, that she would have tried harder to quit had the defendant Philip Morris told the truth.

So, as a threshold matter in order to frame the issue -- and we may not have adequately explained that in the Complaint, but in the *Dow Chemical versus Mahlum* case, which we cited in our brief and which was overturned on other grounds unrelated to this point, the Supreme Court of Nevada dismissed a fraudulent concealment claim against a related company that was not in privity with the purchaser of the particular product in that case. And, while the person in privity may have had a duty to disclose, the Court said, quote:

The duty to disclose requires, at a minimum, some

form of relationship between the parties.

There has to be some kind of relationship. And, without that, there could be no duty to disclose. And, as a result, no liability for fraudulent concealment attaches to the non-disclosing party.

So, if we want to frame this issue, we have to look at the first time she said she smoked a cigarette from Philip Morris, the first time she bought a cigarette from Philip Morris was 1990. So, that frames it. No duty to disclose under the fraudulent concealment cause of action could have arisen until there was that relationship in 1990.

And we also know that Philip Morris publicly admitted the dangers of smoking and the addiction associated with that in 2000. And what do we further know? We know that after Philip Morris admitted everything and fully disclosed all the dangers of smoking, she did not quit. And, in fact, the medical evidence seems to show that her risks would be close to nonsmoker had she quit at the time that we fully disclosed the dangers and risks of smoking to the public.

And, because of that, for the same reasons summary judgment was granted in *Rivera*, we believe that there simply is no evidence from which a jury could find a justifiable reliance in this case.

This is further bolstered by the fact that this claim has to be proven by clear and convincing evidence, as set forth in the *Rivera* decision. And we cite the *Carson Meadows* case, which says that:

> The appellants contend the finding of fraud is not supported by the evidence. Of course, it was the plaintiff's burden to support their contention of fraud by clear and convincing proof. Our task is to examine the evidence in this light.

So, our Supreme Court has said: When it comes to a directed verdict, you have to examine the evidence in light of the burden of proof. Could a reasonable juror find justifiable reliance based on clear and convincing evidence, is the question this Court has to use in examining the evidence.

And, if I could give the Court one additional citation, which is not in our brief, that is the *Orme, O-R-M-E, School v. Reeves* case from the Nevada Supreme Court sitting en banc, where it looked at this very issue. And it extended that general rule as far as the Court -- what the Court looks at for a directed verdict in light of the burden of proof, and extended that to summary judgment.

And the interesting and persuasive quote is that:

> Given this rule, in cases in which the burden is greater than a preponderance of the evidence,

analytical constructs that turn on such concepts is until the evidence and slightest doubt are no longer useful.

That, in looking at summary judgment where they have the burden of proof is clear and convincing, the Court has to determine: Is there enough here that a jury could find by clear and convincing proof, justifiable reliance on some statement that was concealed? And that citation is 802 Pacific 2d 1000, a 1990 decision from the Supreme Court of Arizona, which is persuasive in light of the Supreme Court of Nevada's decision in *Carson Meadow*.

And I think that one other thing the Court should look at is when they had their duty to come forward -- and we said there's no evidence to support this, and they had a duty to come forward with evidence from which a reasonable jury could make these inferences and findings by a clear and convincing standard, what they looked at and what they put forward were several statements about affirmative conduct, affirmative representations, which omitted dangers of smoking. But neither of the statements, which they quoted in their Opposition brief, could attribute any statement to Philip Morris. It referenced just the tobacco companies.

And, as a matter of Nevada law, we can't be held liable for some general statement, which she recalls

perhaps seeing from a tobacco company. It has to be a statement attributed to us, to hold us responsible under the principles of due process.

THE COURT: Thank you, Mr. Roberts.

MR. ROBERTS: Thank you, Your Honor.

THE COURT: Mr. Li?

MR. LI: Your Honor, I want to address the concealment issue first. And I know we've already argued back and forth several times about the duty issue. I just want to supplement my previous argument one thing.

The conspiracy started in 1954. Philip Morris was one of the main founders of the conspiracy. They did sign onto the Frank Statement. So, we respectfully disagree with the Court's ruling in terms of the Liggett issue. But, even given that ruling, Philip Morris is in a different position than Liggett. They were at the beginning of the conspiracy, they were in it from the get-go, and they issued the Frank Statement, along with the other conspirators.

And, so, to talk about what a special relationship is, there has to be a factual analysis. There has to be a circumstantial evidence analysis. Is privity alone enough? Does there have to be something else? And, if there is something else that's needed, then the question is: Do we have enough in the record to show that Philip Morris has

put out enough information to put a duty on themselves to disclose? And, I believe, in the hundreds of pages of Expert Reports, there's ample evidence to show that Philip Morris did make a promise to tell the truth, failed to tell the truth, and intentionally covered up the truth.

And I think, because of the -- again, the disparity in information knowledge, because of the total disparity in power dynamics, and because Philip Morris is in a unique position, so unique that even the government does not have access to their internal knowledge, that they bought themselves that theory.

On the issue of reliance, I want to cite to *Epperson v. Roloff*. This is 102 Nevada 206:

> A Defendant may be found liable for misrepresentation even when the defendant has not made an express misrepresentation. But, instead, makes a representation which is misleading because it partially suppresses or conceals information.

Two things flow from that. One is that the Nevada Supreme Court clearly does not require there to be an identification of the verbatim lie in order for a fraud or for an NDTPA claim to come to fruition. There is contemplation by the Court that some misrepresentations is much more informational, environmental, atmospheric. It is the kind of thing that we are addressing here.

This is not a fraud that is adjudicated on by most Judges, by most juries, because this is a unique fraud. Very, very few times is there's a case where the whole industry get together includes for half a century. Very few cases come out of this incredible discovery of -- treasure trove of internal industry documents that shows such a sophisticated conspiracy.

And that's the problem here, is that a ruling in the defense favor effectively signals that every single plaintiff, for any kind of fraud, even sophisticated fraud like this one, has to bear this incredibly high burden of identifying the exact misrepresentation delivered, you know, 40, 50 years ago.

It's almost impossible for most plaintiffs/victims 40 years later to: A, remember the quote; B, identify the person who spoke. Because the spokesperson could very well be the CEO or the chairman in a public release. It could easily be some scientist purchased, pocketed by the industry. It could easily be one of the industry's front organization, such as the Counsel for Tobacco Research, or Tobacco Institute. It could be a variety of sources. It is incredibly difficult and all but impossible for a plaintiff to be able to meet that kind of burden. And which is why I believe the Supreme Court contemplated a situation where an express misrepresentation isn't

available. But there is misleading representations over the course of X number of years.

And the second thing that comes out of the *Epperson* quote is that the Court clearly contemplates situations in which because a representation was made that was misleading, a duty then is created for the defendant to review information. And if you read that quote again:

> Defendant does not make an express misrepresentation. But, instead, makes a representation which is misleading because it partially suppresses or conceals the information.

Why would the defendant be found liable for doing that if there was no duty, period? Right? It has to be that when you mislead people affirmatively and intentionally. And, in a situation like this, when that lie clearly causes harm, there has to be a duty to fix the lie, to correct the misrepresentation. And, so, I would ask Your Honor to reconsider the -- on that issue.

The only other thing I want to talk about is the requirement for a clear and convincing analysis here. I think -- I haven't had a chance to read that case because I think Mr. Roberts mentioned that that wasn't in his briefings. But, from hearing the quotes he drew from that case, to me, it's clear that that is a factual analysis. That is a factual question. Right? At what level does the

evidence land as a merely preponderance? Is it high enough for clear and convincing? That goes to the weight of the evidence.

And, if there's enough on the record, and we believe there is, if there's enough on the record for the question to go to the jury, then it is up to the jury to decide if the experts are credible, if the evidence is convincing, and if it meets the fraud standard.

So, for both fraudulent misrepresentation and the fraudulent concealment claim, I ask Your Honor to deny the Motion for Summary Judgment and leave the question for the jury.

THE COURT: Thank you, Mr. Li.

Mr. Roberts?

MR. ROBERTS: Thank you, Your Honor.

So, going first to the references back to the Frank Statement and the conspiracy. Under Nevada law, for fraudulent concealment, which is the claim we're talking about here, we're not talking about a conspiracy claim, the claim is fraudulent concealment. And, under the *Dow Chemical v. Mahlum* case, there clearly has to be some relationship before someone has a duty to disclose superior knowledge. This is not about misrepresentations. This is about an affirmative duty when you get to fraudulent concealment. And the *Malum* case says:

The duty to disclose requires, at a minimum, some form of relationship between the parties. Without some kind of relationship, there can be no duty to disclose. Absent such relationship, notice duty to disclose arises. And, as a result, no lability for fraudulent concealment attaches to the non-disclosing party.

So, because she did not buy our product -- and, in this case, in the *Mahlum* case, they acknowledge that the sale directly or indirectly of a product creates as a type of relationship, which is why they found liability for the party that actually made the sale and affirmed that. But, in this case, there was no sale until 1990. So, all of the conspiracy claims, the -- what they claim to be fraudulent misrepresentations in the '50s, '60s, '70s, none of that really applies to this until a duty to disclose arises.

And, as I pointed out, it's undisputed that we did come forward and fix those prior misstatements. We fully admitted in 2000 the dangers and addictiveness of smoking cigarettes. And we did that in a point where she could have still stopped smoking and eliminated her risk of smoking.

So, I think that that's the reason I believe the Court should focus here on: Is there enough evidence of justifiable reliance? Is there enough evidence that if we had fully disclosed the dangers of smoking 10 years

earlier, when she bought her first pack of Philip Morris cigarettes, would she have quit? And there simply isn't any evidence of that. Just like in the *Rivera* case, there's no credible evidence that she would have quit had she known the dangers. Because, once she did know the dangers and Philip Morris came clean, she still didn't stop smoking.

THE COURT: Thank you, Mr. Roberts.

MR. ROBERTS: Thank you, Your Honor.

THE COURT: Defendant Philip Morris USA's Motion for Partial Summary Judgment on Claims that Plaintiff has Brought for Fraudulent Misrepresentation and Fraudulent Concealment is granted. It's granted pursuant to *Rivera versus Philip Morris*, 395 F.3d 1142, a Ninth Circuit case from 2005.

In this case, there's no evidence that plaintiff's decision to start or continue smoking Philip Morris cigarettes were related to any statement made by Philip Morris. Even though Ms. Camacho said a tobacco company on TV said they were safe, her expert, Dr. Proctor, says that, in fact, Philip Morris never made such a statement.

Pursuant to the caselaw, pervasiveness of advertising is insufficient to bring a claim. And plaintiff admitted she never purchased a single cigarette because of any advertising.

In 2000, Philip Morris publicly admitted cigarettes were addictive and cause cancer. And plaintiffs' own expert said if she had quit smoking in 2003, her cancer risk would be that of a nonsmoker.

Also, plaintiff testified that she only smoked Marlboro due to their availability. And that was from Dr. Ruckdeschel. And she smoked basic due to price.

Plaintiff is arguing Florida law that no specific statement is necessary. But, when the Court looks at Nevada law, a specific statement from the defendant is necessary to sustain fraudulent misrepresentation and fraudulent concealment claims.

We're going to take a brief 15-minute recess. We'll come back on the deceptive trade practices and civil conspiracy claims.

[Recess taken at 1:43 p.m.]

[Hearing resumed at 2:01 p.m.]

THE COURT: Thank you, counsel. Please be seated.

Our next Motion is Defendant Philip Morris USA and RJ Reynold Tobacco Company's Motion for Partial Summary Judgment on Plaintiffs' Claims for Deceptive Trade Practices and Civil Conspiracy.

MR. HENK: Yes. Good afternoon, Your Honor. Pete Henk for Philip Morris.

I'm going to be very brief on this. The -- as

Your Honor's recognized, as to the NDTPA claim, the claim has to be proved individually against each defendant with evidence in terms of starting with representation of each defendant. That doesn't exist in this record. Therefore, there cannot be any justifiable reliance.

And, because of the same findings Your Honor's made already on the record and the reasoning, therefore, there's no underlying tort claim for the conspiracy claim. So, that claim fails as well. And I don't have anything to add, Your Honor.

THE COURT: Thank you.

Mr. Li?

MR. LI: Your Honor, I'll do it from right here because it's going to be brief, too.

There is a catch-22 in the defendants' argument. Or the argument is trying to place any plaintiff in this position in a catch-22. If the fraud itself is a group effort, if the fraud itself is everybody get together and we're going to produce the same fraudulent statement to make sure the market size stayed the same and make sure we don't lose customers, then, here, the argument from the defense is that because that means there's no specifically identifiable fraud per each defendant, there is no fraud.

And, then, their second argument would be: You know what, that -- you know what the behavior is? It's

conspiracy. But, then, their follow-up to that is: You can't have a conspiracy. You can't have a conspiracy because there was no predicated fraud anymore.

So, in effect, the argument is that an industry, a bunch of manufacturers can get together, commit a group fraud, and completely be immune from civil claims because there's no fraud since, according to them, it has to be specifically identifiable. And, then, there's no conspiracy because there's no fraud to predicate it on.

I think that's the illogical conclusion that flows from their argument. And I'll ask Your Honor to reject that argument and deny their Motion.

THE COURT: Thank you, Mr. Li.

MR. LI: Thank you.

THE COURT: Mr. Henk?

MR. HENK: Just briefly, Your Honor.

Under *Epperson*, the Nevada Supreme Court said there has to be a representation. There's not a representation at all here. So, that's all I'll say, Your Honor.

THE COURT: Thank you.

Defendant Philip Morris USA, Inc., and RJ Reynolds Tobacco Company's Motion for Partial Summary Judgment on Plaintiffs' Claims for Deceptive Trade Practices and Civil Conspiracy is granted. There's no evidence of causation on

the elements, specifically that plaintiff saw any false misrepresentation by the defendant. Also, in her deposition on pages 298 to 299, plaintiff testified that her girlfriend told her that L&M cigarettes were safe, not that the cigarette manufacturers told her it was safe.

They're actually has to be a false statement in an advertisement. So, the caselaw says: The advertisement itself must contain a false statement. There was never a false statement in any advertisement.

There was also no evidence of an agreement to defraud. Because the civil conspiracy derives out of the NDTPA, that claim fails.

Ms. Camacho testified that the ads made smoking look cool. But she never bought a cigarette due to an advertisement. So, the Motion is granted.

Mr. Henk, will you prepare the Order?

MR. HENK: Yes, Your Honor.

THE COURT: Thank you.

The next Motion is Defendants' Motion for Partial Summary Judgment on Plaintiffs' Negligence Claim.

Mr. Henk or Mr. Roberts?

MR. HENK: Yes, Your Honor. That's me. I believe, Your Honor, the grounds are the same as Liggett presented with respect to that Motion. So, unless Your Honor has additional questions, the only other thing I was

going to point out is that plaintiff, against Philip Morris, would have to prove this claim post-1990 for the reasons that Mr. Roberts just said, that there was no Philip Morris product used prior to 1990.

So, for all the reasons that Your Honor granted the Motion as to Liggett as to negligence, we respectfully submit the ruling should be the same here.

THE COURT: Just for the Court's clarification, Mr. Henk, so, with respect to Philip Morris on the negligence claims, duty, breach, causation, damages, your argument is the duty only arises if there's a special relationship. Is that correct?

MR. HENK: That's correct, Your Honor.

THE COURT: All right. Thank you.

Mr. Li?

MR. LI: Your Honor, if I may ask for clarification? On the -- on Liggett's Motion where you had dismissed our negligence claim, is it possible for the Court to clarify the reason for that? Because I don't think you said it on the record. And I just want to address any potential concerns you might have since it sounds like Philip Morris has a similar argument, too.

THE COURT: On Liggett's Motion, the Court found there is no special relationship between the parties. Therefore, the duty element on negligence -- because

there's four elements, duty, breach, causation, and damages, does not apply.

Also, the Court finds that post-1969, the Federal Cigarette Labeling Advertising Act, 15 U.S., Section 1331, preempts any advertising after 1969. But the element of duty wasn't established. That's why the Court asked Mr. Henk about the special relationship claim in this case.

MR. LI: I understand, Your Honor. And thank you for doing that.

THE COURT: Of course.

MR. LI: Given Your Honor's ruling, I'll just make this brief.

Since the use of Philip Morris products is post-1969, I just want to be very clear that, once again, we're not asking for the jury to find Philip Morris liable because of the mere advertising or promotion of their cigarettes. We're asking for the jury to find that they're liable because all the -- all of the misrepresentations that they've made, all of the things they've said, either through front groups, spokespersons, or their own staff member, all the things they've put out into the media in order to change the consumer expectation. And those are expressly not precluded by preemption.

As for the duty issue, I believe the argument has already been made. We just -- you know, we respectfully

disagree. We do believe there is a duty, especially between a manufacturer and a user, who is trusting the manufacturer to give her the information.

And the last thing, Your Honor, is that I want to flesh out one very just quick causational issue here, which is that you had identified early on that in deposition, Ms. Camacho testified her girlfriend told her L&M cigarette is safe. But I have also cited to parts of the deposition where she said that she believed L&M cigarettes were safe because of the advertising she saw in billboards, and magazines, and so on and so forth.

I think, when there is potential inconsistency, even among one single person's deposition transcript, I think that is a dispute of facts. And the Court, at this stage, at least, had to draw all the reasonable inferences and take the facts in the light most favorable to the plaintiff. And that's something I think the jury will end up hearing in cross-examination and direct examination on. And that factual dispute is made for the fact finder to resolve. Thank you.

THE COURT: Thank you, Mr. Li.

Mr. Henk?

MR. HENK: Very briefly, Your Honor.

Ms. Camacho did not attribute anything of what Mr. Li just said to Philip Morris USA. Therefore, there could

not be any causation from any of that.

THE COURT: Thank you.

MR. HENK: Thank you, Your Honor.

THE COURT: Defendants' Motion for Partial Summary Judgment on Plaintiffs' Claims of Negligence is granted.

Mr. Henk, can you prepare the Order?

MR. HENK: Yes, Your Honor.

THE COURT: The last Summary Judgment Motion is Defendants' Motion for Partial Summary Judgment on Plaintiffs' Strict Liability Claims. Mr. Henk?

MR. HENK: I -- in light of Your Honor's ruling, I don't really have -- with respect to Liggett on the same claim, I don't have anything new to add, other than the point that I've already made, which is as to Philip Morris, it would be post-1990. We don't think that they've come forward with consumer expectations evidence post-1990 to create a fact issue. That's really all I have to say on that, Your Honor.

THE COURT: Thank you.

MR. HENK: Thank you.

THE COURT: Mr. Li?

MR. LI: And, Your Honor, I -- I suppose this is the only time and I'm -- I have to do it. I would like for the Court to stay consistent and apply the same ruling it made for Liggett's strict liability claim. And I would

only add one thing, which is that for the post-1990 information, as I put in my response, with the consumer expectation analysis, according to *Rivera* on the Ninth Circuit, it is a fact in question.

THE COURT: Thank you.

MR. LI: Thank you, Your Honor.

THE COURT: Mr. Henk?

MR. HENK: I have nothing to add, Your Honor.

THE COURT: Defendants' Motion for Partial Summary Judgment on Plaintiffs' Strict Liability Claims is denied.

Who would like to prepare that Order?

MR. LI: We can, Your Honor.

THE COURT: Thank you, Mr. Li.

Next are the Motions in Limine. We'll start with RJ Reynolds' Motions in Limine Number 1. The parties can advise if any of these are moot, based upon the Court's ruling.

Motion in Limine Number 1 filed by Philip Morris is to Exclude Improper Advertising Opinions.

MS. SORENSON: Good afternoon, Your Honor. Alex Sorenson on behalf of Philip Morris.

THE COURT: Ms. Sorenson, afternoon.

Ms. SORENSON: In this Motion, defendants ask the Court to preclude the plaintiffs' experts, specifically Dr. Proctor, who I know the Court has already heard a lot about

today, Dr. Kyriakoudes, and Dr. Prochaska, from offering opinions or testimony concerning cigarette advertising, including interpreting advertising messages or speculating about the possible impact of such advertisements on Ms. Camacho specifically.

Specifically, Defendants' Motion should be granted for two reasons. First, plaintiff can't establish that these witnesses are qualified to offer opinions on cigarette advertising as required by 50.275. In their Opposition brief, plaintiffs argue that Doctors Proctor and Kyriakoudes are, quote/unquote, career scholars, who have testified in a bunch of smoking and health cases. While Dr. Prochaska has also -- has training and research in reviewing tobacco company documents. But that is not sufficient.

As our initial brief sets forth, even if these experts are arguably qualified in their specific area of expertise, history and addiction, respectfully, each expert must have expertise in the discrete subject of cigarette advertising.

For example, we state the Ninth Circuit case, *United States versus Chang*, for the proposition that finding expertise and its general subject area does not automatically qualify an expert to testify on a specific subcategory within that subject.

But that is not the case -- in this case, is this -- that is not the case in our case. As our Motion sets forth, neither Dr. Proctor, Dr. Kyriakoudes, nor Dr. Prochaska has any specific expertise or education specific to cigarette advertising. And, simply put, experience stemming solely from reviewing information or testifying as an expert witness in prior cases is hardly sufficient to qualify these individuals as expert in the discrete field of advertising.

Second, contrary to plaintiffs' assertion in their Opposition brief, these experts' opinion on advertising will not assist the jury of -- excuse me. Will not assist the trier of fact but, instead, mislead the jury and confuse the issues. Plaintiffs argue that the Court should allow their experts to place advertisements in their historical context. But this is simply a pretext to discuss the advertisements and offer inflammatory remarks concerning the advertisements that have no basis in a legitimate area of expertise.

Moreover, as our initial brief sets forth, plaintiffs' experts' opinions are not the product of reliable methodologies, specifically Doctors Proctor and Kyriakoudes fail to offer even a cursory explanation on the methods on which they base their advertising opinions.

For these reasons, defendants ask that their

Motion be granted in full.

THE COURT: Thank you, Ms. Sorenson.

Mr. Li?

MR. LI: Your Honor, the first issue with the defense Motion in Limine is that this is a very, very wide swath of evidence that they're trying to keep out. And, until Dr. Proctor is properly voir dired, until Dr. Proctor lays the foundation and we start showing you, Your Honor, all the documents, it's very hard for me to describe all of the hundreds of things that might come across from the internal industry documents. And, so, I think this is a little premature.

But I want to address a couple of things. I don't want to spend too much more time talking about Dr. Proctor's qualifications, unless you want me to, Your Honor.

THE COURT: No. It's okay.

MR. LI: I figured. So, I'll just talk about the kind of testimony he's going to give. It's not as though he's going to look at an ad, such as the L&M filter ad, and then just speculate throughout, you know, baselessly, about what the industry had plot, what -- you know, the intent was. He's going to say: Here is why I believe the filter is a countermeasure to the potential warnings; here's the reason why I believe the filter makes people believe it is

safer.

And the reasons he's going to give is going to be based on industry documents or internal memorandum and internal -- you know, letters, talk about how the filter is ineffective. But he will say how filter is effective, how certain a type of advertisement doesn't say the word safe but is -- certainly produces this imagery of health and wellbeing.

So, everything Dr. Proctor is going to testify to is going to be grounded in evidentiary support. And any opinion he comes with is going to be a contextualization of, you know, 40, 50-year-old ads, 40, 50-year-old documents.

A lot of the internal documents are written in codes so that if you just showed it to a lay person, we wouldn't know what it actually means. We wouldn't know out of context, out of -- you know, imagine one piece of memorandum out of 50 years of conspiracy. No one's going to be able to know what that's talking about. And, so, that's the kind thing he's going to do. And, similarly with Dr. Kyriakoudes.

And, between these two experts, there's more than enough education, certainly enough experience. They've spent decades of their career studying these documents, reading probably more documents than, you know, 99.9

percent of the people in the universe have read. And, at the end of the day, all they're doing is assisting the jury to contextualize each document, understand what the documents say, and, also, give both the past and, also, the future. Right? This ad was published in 1964, or this particular measure or device was done in 1964. And how did this advertisement affect the next several decades of generations of smokers or young people who might be attracted to smoking? That's the kind of testimony that's going to be provided.

THE COURT: Thank you, Mr. Li.

MR. LI: Thank you.

THE COURT: Ms. Sorenson?

MS. SORENSON: Just briefly, Your Honor.

As Mr. Li noted in their Opposition brief, plaintiff asked this Court to rule -- defer ruling on this particular Motion. However, because plaintiffs can't meet bedrock foundational evidentiary requirements for this testimony, and no additional context that would be purportedly provided at trial would change that fact, defendants, and Philip Morris in particular, request that the Court rule on the Motion at this time.

Moreover, as Mr. Li's statements just made clear, the purported expertise that these are -- that these experts are relying on is reviewing documents and prior

testimony, which, as I stated in my initial argument here, Your Honor, the law cited in our brief makes clear, is not sufficient under Nevada law to qualify these individuals to testify as to advertising, specifically.

And I'll finally note, there are various other reasons we include in our brief why this the -- why this should be excluded, including misleading the jury and other unfair prejudice considerations. However, as this Court already noted, Ms. Camacho specifically testified that she never relied on any cigarette advertisement in making any decisions relating to her smoking. And, as a result, these opinions are also irrelevant to this case.

THE COURT: Thank you.

MS. SORENSON: Thank you.

THE COURT: Motion in Limine Number 1 to Exclude Improper Advertising Opinions will be denied without prejudice.

Who would like to prepare the Order?

MR. LI: We can do that, Your Honor.

THE COURT: Thank you, Mr. Li.

Motion in Limine Number 2 to Exclude Improper Cigarette Design Options.

Ms. Sorenson?

MR. HENK: Yes, Your Honor.

THE COURT: Mr. Henk.

MR. HENK: This Motion is based on two grounds, Your Honor. The first is that the three experts at issue, although they are experts in some fields, cigarette -- designing a cigarette is not one of them. And the second ground is that their opinions are just ideas. They're not actually based on a reliable methodology.

On the first part, Your Honor, these are Dr. Proctor and Dr. Kyriakoudes, as Your Honor noted earlier, they're historians. Dr. Prochaska is a clinical psychologist.

So, as to Dr. Proctor and Kyriakoudes, one unique aspect of this Motion is the witnesses themselves have previously admitted under oath, as we cited in our Motion, that they're not experts in cigarette design. We submit that ought to be the end of the inquiry when the expert themselves has said they're not an expert in the field, then we believe it's appropriate to hold them to that.

And that makes sense because, again, they're historians. Your Honor raised this issue earlier and counsel said: Well, that would leave the plaintiffs with only people from the industry who would be qualified to testify. That's -- although it's true that there are people that have worked for cigarette companies that would be qualified, there are also people that have not worked for cigarette companies that would be qualified, Your

Honor.

For example, there's a company right now called 22nd Century that Your Honor may or may not have seen in the news. But they are trying to -- they're currently test marketing a lower nicotine cigarette in Chicago. They've been developing this product for 20 years. All kinds of trials, prototypes, testing, test marketing now. And they obviously have employees who designed that cigarette, designed the prototypes. That would be somebody who would be qualified, not a historian, Your Honor, or a clinical psychologist.

So, what these witnesses have -- as Your Honor knows from, for example, the *Hallmark* case, the four things that we look at are -- is the: Are the opinions within a recognized field of expertise; are they testable and have they been tested; are they published -- the opinions published and subject to peer-review; and fourth, generally accepted within the scientific community?

And when you look at the particular opinions we're addressing in this Motion, Your Honor, which are theories of safer alternative designs, -- and I think Your Honor has heard three of them, one would be a cigarette that's not inhalable, one would be a cigarette that you don't even ignite, and third would be a low nicotine cigarette.

And, so, when you look at it, with respect to

these three witnesses, they have not -- let's take the testing element, Your Honor. They've not done a shred of testing on any of these products -- these theories. And, if you take, for example, the non-inhalable cigarette, there's not even such a thing that's ever been created. I don't believe counsel will dispute that, that it's not just that these witnesses haven't created a prototype of an un-inhalable cigarette, that nobody has. So, when you look at that element, it's -- it may be testable. It's not been tested.

The other problem with it, Your Honor, is there is a product that exists that's basically what they're saying the cigarette company should make. And that product is called the cigar. It has the high PH they're talking about. But, as I think Your Honor knows, for example, you can't come forward with a defect theory on a motorcycle by saying what you should make is something with four wheels. That product exists. It's a different product. So, this hasn't been tested.

The only one of the three that's been tested in terms of specifics is the lower nicotine product. But, as I said, that's still ongoing right now. So, the best anyone would be able to testify to, even today, -- and, of course, Ms. Camacho's not smoking anymore, is they're still working on it. There's a debate about what the threshold

level of nicotine needs to be beneath which it would not be addictive. That is not even a settled issue today.

So, I won't repeat, you know, everything else we have in our brief on. These witnesses are just not qualified. And that's why -- and there's been a split of authority, I'll be very forthcoming on that, around the country, about whether they are or whether they've not. There have been Judges that have said they're not qualified in this. There are Judges that have said they are qualified.

What I'd like to move onto, though, is the reliable methodology, second ground, Your Honor. And, in *Hallmark*, there's a very clear holding:

> An expert's testimony will assist the trier of fact only when it's relevant and the product of a reliable methodology.

So, in other words, if there's not a reliable methodology, then it will not assist the trier of fact. If it does not assist the trier of fact, then Your Honor, as a gatekeeper, excludes it.

And, so, where is the proffer here? And it's really -- we're at the similar stage of summary judgment, as Your Honor notes. Their time to come forward with the evidence was now.

And, honestly, Your Honor, when I look at their

Opposition, I don't see that they've even addressed the rest -- the reliable methodology prong that we've raised, let alone come forward with the evidence, the proffer, at a normal *Daubert* hearing. You know? A witness would actually testify and say: Here's what the methodology is.

These witnesses -- the reason, Your Honor, they don't have a reliable methodology gets back to they don't know the first thing about how you design a cigarette. What they know about are design concepts. So, they know about a filter. They know about reconstituted tobacco. They know about nicotine. They've read about all of those things.

And Judges will allow them to testify factually, historically, from the companies' use. When did they start using filters? How is a filter -- you know, what is it made of? What is reconstituted tobacco? So, they'll allow factual testimony on that. But, in terms of the opinion that you could make a cigarette that's safer than existing cigarettes by raising the PH, that's just an idea. There's no reliable methodology for that, Your Honor.

And, so, I submit, Your Honor, they haven't made their proffer. And, so, at a minimum, what we would ask for at this point, Your Honor, is that they be precluded from offering these safer alternative design opinions, unless and until -- if Your Honor wants to give them an

opportunity to make a proffer at a later date, we submit they had their chance. But I do recognize we're eight months from trial.

But, as of right now, we're asking that those opinions be excluded, that if Your Honor finds that they do have qualifications, that they be allowed to testify factually, historically as to certain design concepts were used. But not take that next step to give an opinion that three design concepts, which haven't been tested, for which there's not a reliable methodology, there's not even a settled view within the scientific community, that they may not be able to give those opinions to the jury, Your Honor.

THE COURT: Thank you, Mr. Henk.

MR. HENK: Thank you.

THE COURT: Mr. Li?

MR. LI: Your Honor, I want to first by -- I want to start by just correcting some of the things that Mr. Henk had mentioned.

Number one, Dr. Proctor testified in both Massachusetts and Oregon, that he is an expert in cigarette design. And it's not surprising for all the qualifications I read out to Your Honor earlier today.

Second, regarding the three particular alternative -- safer alternative designs that Mr. Henk had just mentioned. Non-inhalable cigarette. If you pluck tobacco

out of the field, dry it naturally, roll it in paper, it's going to be pretty un-inhalable. And the reason for that is because the natural tobacco's PH. Without special treatment by flue-curing, by additional sugar and moisturizer, which the defendants do add in their factories, without that, it's going to be pretty inhalable.

And it's not a cigar. It's not a different thing. Like I mentioned earlier today, the federal regulated definition of a cigarette is just tobacco wrapped in something that's not tobacco. And, so, it would exactly be a cigarette. But it's going to be way safer than Marlboro, Basic, or L&M cigarettes.

Regarding noncombustible cigarettes, the reason why Mr. Henk did not dwell on that particular safer alternative design is because the defendants know that in their historical documents, they have made cigarettes that don't need to be burned. They have made devices where you can plug a cigarette into it, it toasts the cigarette, and therefore -- it's kind of like the predecessor of a vaping pen. Right? It toasts the cigarette, releases the fume, which contains nicotine, and supposedly it's better for you than lighting it up and burning the whole thing.

And, finally, the low nicotine cigarette. Even without having heard admission from the defendants that those things exist, we know for a fact that our experts can

testify that the even consistent level of nicotine, the quantity of nicotine that is made so that you have 20 per pack and each one of those cigarettes, they don't vary all that much. That is because it's engineered that way. Natural tobacco, if you roll it up, chop it up, and roll it up, it's going to be very -- it's going to be very different in terms of level of nicotine. And, so, if the company has the opportunity and ability to produce consistent level of nicotine, it certainly has opportunity to produce consistently lower level of nicotine.

And, so, when we're talking about alternative design, when Mr. Henk is referring to safer alternative designs, what he's really talking about -- and he's complaining about Dr. Proctor's testimony on those things as, you know, speculation. He says Dr. Proctor wouldn't know the first thing about designing a cigarette. He only knows design concept. The thing about safer alternative design is that a lot of that has to do with the concept of the design. Right? We're not putting Dr. Proctor on the stand to talk about, you know, exactly how many shreds of the tobacco plant you have to cut or how thin the paper has to be. We're putting him up to talk about the design features that are causing the most harm to the consumers and whether those features can be changed.

And, so, when it comes to what is feasible in

cigarette design for a safer alternative, everything Mr. Henk had just mentioned, I will submit, that goes to the weight, not admissibility.

Thank you.

THE COURT: Thank you, Mr. Li.

Mr. Henk?

MR. HENK: Briefly, Your Honor.

Counsel said that Dr. Proctor has testified that he is an expert in cigarette design. That's true. What I was saying is, before he testified to that, he testified he was not an expert in cigarette design. And, so, what has he done -- he now says otherwise. But what has he done to become an expert? And it's not anything that's recognized by Courts as being sufficient. He's just kept working on these cases. He's published a paper, for example, counsel mentioned, on design concepts. He's not published a peer-reviewed paper on the three safer alternative design opinions we're talking about. Those are the opinions that we are seeking to exclude, Your Honor, specifically.

In his first noncombustible, counsel mentioned that Philip Morris has made such a product in the past. That's true. That's not what the issue is here. The issue is: Can somebody testify that a specific design for such a product, not the concept of a noncombustible cigarette, but a particular design, that that product would be safer than

conventional cigarettes? And, then, ultimately, specifically, that if Ms. Camacho had smoked those as to Philip Morris, starting in 1990, instead of Marlboro and Basic, that she would have had a different outcome. They haven't even tried to proffer such an opinion. So, there wouldn't be any ultimate -- again, getting back to *Hallmark*, the opinion has to be relevant.

So, an opinion in a vacuum that a noncombustible cigarette, if Your Honor were to accept that that's not a different product, there's no tie to how that would have made a difference as to Ms. Camacho, Your Honor.

So, again, what we seek right now is just exclusion of the opinions. Because, when counsel got up, he did not say: Your Honor here's our proffer on their liable methodology. That was not part of the presentation, it's not in the papers, and, most importantly, it's plaintiffs' burden. It's not our burden to show that they do not have a reliable methodology. Plaintiff has the burden to establish that they do, Your Honor.

THE COURT: Okay. Motion in Limine Number 2 to Exclude Improper Cigarette Design Options will be denied without prejudice.

Mr. Li, will you prepare the Order?

MR. LI: Yes, Your Honor.

THE COURT: Thank you.

The next one is Motion in Limine 3, to Preclude Certain Types of Testimony and Conduct from Plaintiffs' Expert Robert Proctor, Ph.D.

MS. SORENSON: That's me again, Your Honor.

THE COURT: Ms. Sorenson.

MS. SORENSON: In this Motion, defendants ask the Court to take certain steps to ensure plaintiffs' expert historian, because that what he is, an expert historian, doesn't engage in the inappropriate and inflammatory misconduct seen in prior smoking and health trials. Contrary to plaintiffs' assertion, this isn't a smear campaign of Dr. Proctor. But, rather, a Motion made necessary by Dr. Proctor's own documented and wholly improper actions in prior smoking and health cases.

Saying Dr. Proctor is an experienced expert witness is taking it lightly -- saying it lightly. For more than a decade, he's traveled around the country, testifying at smoking and health trials just like this. And he's made millions of dollars doing so. And, in that prior testimony, he is engaged in repeated misconduct, meant only to provoke and anger the jury at defendants' expense. This has led to countless admonishments and Motions for Mistrial.

In hopes of avoiding similar behavior in this case, defendants ask the Court to admonish Dr. Proctor

before his direct examination begins and outside the presence of the jury, that such tactics won't be permitted in this courtroom. Moreover, defendants ask the Court to take several other concrete steps related to Dr. Proctor, seven specifically, which I'm happy to address in turn quickly.

First, defendants seek to prohibit Dr. Proctor from offering testimony or other evidence regarding the cover or specific contents of his book, Golden Holocaust, Origins of the Cigarette Catastrophe and the Case for Abolition. Simply put, displaying or discussing the cover of Dr. Proctor's book will serve no purpose other than inflame the jury and prejudice defendants. As depicted in defendants' brief on this issue, the cover shows a skeleton smoking a cigarette.

As to the specific contents itself, any discussion of the substance of the book by Dr. Proctor will inevitably involve the use of inflammatory terminology and comparisons. In addition to comparing defendants to Nazis, the book also explicitly advocates for a complete ban on selling cigarettes, which, as Your Honor has already heard multiple times, runs directly contrary to congressional policy, expressly recognized by the United States Supreme Court.

Second, defendants ask the Court to prohibit Dr.

Proctor from offering speculative opinions. Dr. Proctor's repeatedly attempted to testify well beyond his expertise as a historian by giving testimony beyond historical facts. This includes speculative opinions about how things might have happened differently, predictions about how things might happen in the future, and opinions not based on any historical record. However, in this case, the Court should prohibit such opinions because they will not assist the jury, and they are duly prejudicial under 50.275 and 48.035.

Third, defendants seek to prohibit Dr. Proctor from testifying about document destruction without first laying the factual predicate required to establish spoliation of evidence.

In their Opposition brief on this point, plaintiffs claimed that defendants' destruction of documents is as historical fact. However, as we cite in our initial Motion, Dr. Proctor has himself admitted that he has no evidentiary foundation for any such claim. He has no information regarding who was involved in this alleged, quote/unquote, massive shredding operation, end quote, when it happened, or how many, and what documents were destroyed.

Instead, Dr. Proctor's accusation is based on nothing more than speculation based upon, among other

things, internal company documents, indicating that tobacco companies at times purchased electronic shredding machines.

Fourth, defendants seek to prohibit Dr. Proctor from attacking the adequacy of the Surgeon General's warnings. Dr. Proctor's repeatedly attacked the adequacy and effectiveness of the federal -- federally mandated Surgeon General's warnings by asserting, among other things, that tobacco manufacturers watered down the warnings or that the warnings were other somehow ineffective. But this testimony violates the precise preemption principles the Court has already heard about repeatedly today.

Fifth, defendants ask to preclude Dr. Proctor from testifying that defendants are engaged in an ongoing conspiracy with other tobacco companies, organizations, or that defendants have not admitted certain facts. As previously discussed today, a central theme of Dr. Proctor's anticipated testimony relates to an alleged formal conspiracy to conceal from 1953 to end of 2000.

Dr. Proctor also likes to tell the jury about his personal opinion that there's an informal or *COSI* conspiracy continued to this day. However, yet again. Dr. Proctor's conceded that he has no evidence of this alleged *COSI* conspiracy and said his opinions rest on Dr. Proctor's own suppositions and tobacco company's insistence on their

due process rights to defend themself in individual smoking and health lawsuits.

Sixth, defendants ask the Court to prohibit Dr. Proctor from offering testimony that defendants used the Council for Tobacco Research, or CTR, to launder money and pay off witnesses. Yet again, Dr. Proctor doesn't have any evidence to support the notion that defendants ever paid off a witness or that the real purpose of the CTR was to serve as a trade organization in which defendants could launder money. This testimony is, therefore, both speculative and lacks foundation. Simply put, it is nothing more than an unfounded attack on defense counsel and their witnesses in this case. Moreover, the danger of unfair prejudice and confusion of the issues substantially outweighs any possible marginal probative value of the testimony.

Seventh and finally, defendants ask that the Court prohibit Dr. Proctor from offering testimony about, quote/unquote, cigarette slavery, or any other topics related to race, ethnicity, or religion. As set forth in defendants' initial brief, plaintiff knows this testimony is improper and potential cause for a mistrial, yet he keeps doing it. Plaintiffs' Opposition as to this particular point sets forth no valid or seemingly valid reason that this testimony would be admissible. And

there's simply no place for this testimony in this case.

There is no possible argument that, as he's done in prior cases, making an unfounded and inappropriate references to Martin Luther King, Jr. -- Dr. Martin Luther King, Jr., excuse me, and other racially-based or religion-based testimony in this case. There's simply no place for that here.

THE COURT: Thank you, Ms. Sorenson.

Mr. Li?

MR. LI: Your Honor, this is a man who contributes to the Surgeon General's Report. I won't go through each one of the points Ms. Sorenson went through. I want to highlight three. Or, rather, three categories.

The first is the destruction of documents. There is evidence. The Federal Judge, Gladys Kessler, who oversaw the DOJ's prosecution talked about this. There's ample record -- there's ample evidence to suggest that the defendants and their counsel -- certainly, I'm not saying the current counsel. The past counsel, during the conspiracy, certainly engaged in destruction of documents. So, yes, Dr. Proctor might not know exactly how many were destroyed or who actually did all the destruction. But there is enough evidence to give the logical and reasonable inference that things were done and that we have lost documents that -- untold numbers of documents. I think

that's fair testimony based on the records.

Second is the preemption argument. It is important for me to distinguish what had happened during the Motion for Summary Judgment proceedings and what's happening now. The preemption of the advertising and promotional -- sorry. Failure to warn claims based on advertising and promotion. Number one, again, our claims were not based on that. Our claims for failure to warn post-1969 is based on the additional attack and the counter -- disinformation campaign counteracting the official health official's warnings. That's the basis of the claim. So, it's not precluded.

But, even if they were, the evidence itself is not precluded. The claim may be. But not the evidence. And that's exactly the same thing that applies to Dr. Proctor's opinion -- personal opinion, that he'd rather see a ban on cigarettes. We're not raising the argument that all cigarettes are illegal. And, certainly, that's something the defense can cross-examine Mr. Proctor on. But, the fact of the matter is, the claim has not been raised and the evidence is certainly not precluded by any caselaw.

The last thing is about the tobacco company's front group, the CTR, the Council for Tobacco Research, paying off witnesses. Again, there's ample evidence in the record that the CTR developed scientists in order to become

spokespeople. And the way they developed them is that they fund research. And they fund research that distracts the public and the government from the research that's being done to see the causal link between smoking and lung cancer. They fund research that basically supports anything causes cancer. They fund research that say we don't know what causes cancer. They fund research to say that the cancer research based on smoking is statistically not reliable. Right?

So, they're developing people for testimony. They're developing people for publicity. They're developing people for the disinformation campaign. And that is certainly fair argument and fair opinion from Dr. Proctor upon cross or direct examination.

And the last thing I will say -- and I don't address the title of the Golden Holocaust. I don't address the slavery, the one -- one cherrypicked line in trial about slavery or about abolition. And the reason why I don't address that is because we're working with real human beings who have critical thinking capacity.

I was walking right out here at the balcony. And I saw there's a quote from, I think, Judge Learned Hand from 1932 that says:

Juries are not leaves swayed by every breath.

And that's exactly the situation here. He has

testified in numerous trials. They picked out a couple occasions where he said something. And, now, they point to the fact that he mentioned he's not -- he mentioned that he's an abolitionist because he wants to get rid of cigarettes in totality. And they claim that somehow swayed the African American jurors. I mean, that's incredible -- that's incredibly speculative to think that that alone changed the verdict.

So, I would ask that Your Honor deny this Motion until and, frankly, unless Dr. Proctor does any of those things, or does anything this Court disapproves of. He shouldn't be admonished. Thank you.

THE COURT: Okay. Thank you, Mr. Li.

Ms. Sorenson?

MS. SORENSON: Briefly, Your Honor.

In discussing the third category of evidence that defendants seek to preclude, speaking to the spoliation of evidence aspect, Mr. Li referenced the corrective statements, which are subject to a separate Motion in Limine with which Your Honor has not yet heard. I will just preface that by saying that those findings were from one Federal District Judge, one individual. And, as set forth in that motion, those corrective statements should be excluded for a multitude of reasons, including because they are inadmissible hearsay, irrelevant, and unduly

prejudicial.

I will also note, unless I missed it, I did not see cited testimony in Plaintiffs' Opposition brief in which Dr. Proctor referenced those findings or referenced the corrective statements to support this particular argument that he's set forth before. That seems to be a connection that Mr. Li or plaintiffs' counsel is attempting to put before this Court. But I didn't see that in the actual Opposition brief filed in this case. Again, unless I missed it.

I'm also addressing the CTR as a, quote/unquote, front organization. In the *Principe* trial, which was a Florida smoking health trial back in January 2020, PM USA actually conducted a voir dire of Dr. Proctor on this issue and specifically asked him to identify, quote:

> For the Court one document that he had seen where there had been a description of paying off a witness.
>
> And he responded, quote: I don't recall those exact words.

That goes back to plaintiffs' argument in responding to the majority of these responses, which is, they rely on Mr. Proctor's general qualifications as a historian, rather than specifically addressing the specific categories of evidence and specific categories of testimony defendants seek to exclude here, which, even just from

first blush, are so inflammatory and so inappropriate, in addition to the fact that they lacked any evidentiary support.

THE COURT: Thank you, Ms. Sorenson.

Motion in Limine Number 3 to Preclude Certain Types of Testimony and Conduct from Plaintiffs' Expert Robert Proctor, Ph.D., is denied without prejudice.

Mr. Li, can you prepare the Order?

MR. LI: Yes, Your Honor.

THE COURT: Next is Motion in Limine Number 4, to Preclude Plaintiffs' Expert Witness From Reading Documents and Advertisements to the Jury or, Alternatively, Testifying Regarding the Meaning and Intent of Company Documents.

Ms. Sorenson? Mr. Henk?

MR. HENK: Yes, Your Honor.

So, to provide context, really, the purpose of this motion is to see if we can have the most efficient trial we have -- can have. And, then, the second point is to limit the unfair prejudice that's caused by documents being literally read to the jury for days on end, which any juror is capable of doing themselves. And, also, just rank speculation about what the author intended by a document.

Your Honor, we, obviously, although not in Nevada, we have, you know, quite a track record in terms of how

long trials take. And what's really interesting is if you look at the cases that were tried in Federal Court in Florida versus the trials in State Court in Florida, in Federal Court, they were tried much faster. They were all tried in about seven to 10 days. In State Court, they take anywhere from two to six weeks. Although, there was one county that basically applied the same approach as the Federal Court, that was in Alachua County, and they tried cases in seven to 10 days.

I actually was one of Philip Morris's trial counsel at several of those trials. So, it can be done. But it can only be done if these witnesses -- and it's the conduct witnesses that we're talking about, Your Honor, where they give -- the historian witnesses, where they give testimony, Your Honor, about historically what they say occurred over decades of time. And that can either be done efficiently or it can be done where it just drags out on direct examination for as long as three or more days just on direct, for just one of the witnesses. And they're apparently intending to call more than one witness on conduct issues.

And, so, it begs the question: Why does it take that long? Why can't it be done more efficiently? Well, it can. The reason it takes so long is because what you would see is over, and over, and over again, a document

will be put up on the screen, the witness will either be asked to read portions of the document and, then, will just read them, or the counsel will read them and, then, say: Did I read that correctly? And the witness will say: Yes, you read it correctly.

Obviously, that is not bringing any expertise to the table. Anybody could do that. It certainly wouldn't need to be an expert witness. And the jurors can do that in the deliberation room if they want to. But this is done repeatedly, document after document.

And, really, the only other thing that I will carve out, there is -- there's obviously some legitimacy to some parts of that. Which, for example, if you have an acronym and the witness is familiar with what the acronym means, the jury wouldn't be. So, the witness can explain that. If the document says, you know, Surgeon General's Report and the witness can explain what a Surgeon General's Report is and when the particular one was issued. Those sorts of things, that's just fine. But the wholesale, just document after document, reading them, Your Honor, that's not assisting the jury. It's boring the jury. And it's making the trial take way longer than it needs to.

The related thing that happens is, after the witness has read a whole bunch of information, the witness will then be asked to basically speculate: So, what was

the author talking about here? What was the author intending here? And the witness, of course, is always pleased to give their opinion about that. But that opinion is just speculation, Your Honor.

And, so, we've cited the authority in our Motion that that's not appropriate for an expert. There is no expertise in speculating about the intent of an author on a particular document.

And, so, what we're, you know, basically asking for, Your Honor, is we understand that there couldn't be a blanket ruling that covers every which way this would be done. But we basically wanted to flag the issue and suggest to the Court, respectfully, that this trial can take a whole lot less time through these two things of not just simply having the -- you know, a lawyer read the passage, did I read that correctly, and, then, not having the witness speculate about what the author intended, Your Honor.

THE COURT: Thank you, Mr. Henk.

Mr. Li?

MR. LI: Your Honor, I've never tried a case against Mr. Henk, so I don't think any of those things apply to us. I certainly don't intend to bore the jury. That's never worked out for anybody.

The second thing I will say is that there was a

lot of discussion about Dr. Proctor and Dr. Kyriakoudes's methodology. Well, a historian's methodology is reading and contextualizing. And what they bring to the -- to the jury and, also, to this Court, is exactly that.

So, you order -- I mean, this is why we produced a document, a sample document in the response, to show Your Honor just how complicated and, also, coded these documents are. And, out of context, zero chance anyone sitting in this box is going to understand anything on that document. But that's why we put it on the screen. We're not going to read everything verbatim. We're going to read the highlighted portion that's relevant to the case. And, then, we're going to ask the expert to give us the context.

That's all there is. Thank you.

THE COURT: Thank you, Mr. Li.

Mr. Henk?

MR. HENK: I have nothing to add, Your Honor.

THE COURT: Thank you. The Motion in Limine Number 4 to Preclude Plaintiffs' Expert Witness From Reading Documents and Advertisements to the Jury or, Alternatively, Testifying Regarding the Meaning and Intent of Company Documents is denied.

Mr. Li, can you prepare the Order?

MR. LI: Yes, Your Honor.

THE COURT: Motion Number 5 to Limit the Testimony

of Dr. Ruckdeschel.

Mr. Henk?

MS. DIOLOMBI: Actually, Your Honor, I am arguing that motion. This is Hassia Diolombi on behalf of Philip Morris USA.

And, respectfully, Your Honor, we request that the Court grant Defendants' Motion and preclude Dr. Ruckdeschel, who is plaintiffs' disclosed oncologist, from testifying on four separate topics. First one, first topic being addiction. The second topic is to preclude him from testifying that smoking was the cause or, as he colloquially also put it, or the first 10 causes of Ms. Camacho's laryngeal cancer. And her GERD, or gastroesophageal reflux, was merely a contributing cause.

And, then, the third and fourth areas that we would like to preclude him from talking about or opining on is speculating as to why Ms. Camacho did not get a CT scan and opining whether Ms. Camacho was following an appropriate schedule with her ENT. On those last two points, Your Honor, in plaintiffs' response, plaintiff says they don't intend to have Dr. Ruckdeschel speculate as to why Ms. Camacho did not get a CT -- a CAT scan. Sorry. And they don't intend to have him opine on whether Ms. Camacho was following an appropriate schedule with her ENT.

However, I'm still going to address those points

because plaintiffs then say that they may want Dr. Ruckdeschel to be able to provide generic testimony regarding the difficulties he's observed in patients over his decades of medical practice. I don't know exactly what that would entail. So, in an abundance of caution, I will address those last two points.

But, as to the first point on the topic of addiction, Dr. Ruckdeschel is not an addiction specialist. He's not an expert in addiction. Nothing in his Report or his qualifications address addiction. And, therefore, he shouldn't be talking about addiction at all. And, in his deposition, he was specifically asked whether he was intending to offer any opinions as to whether Ms. Camacho was addicted to cigarettes containing nicotine and he said, not unless asked, which is what concerning to defendants.

He's then again asked: And, just to be clear, you don't intend to offer any opinions about addiction in this case. Right?

And he says: Correct.

But it's been our experience that Dr. Ruckdeschel will still try to interject addiction opinions, even though his specialty -- and, if you look at his disclosure, it is focused on oncology.

So, he's been disclosed to offer case specific opinions on medical causation. While smoking was a

substantial contributing cause of Ms. Camacho's laryngeal cancer, the cumulative effects of smoking and have exposure to cigarettes contributed substantially to Ms. Camacho's cancer.

So, anyway, based -- just based on that and his education, his training and expertise, we'd like the Court to preclude him from testifying or raising any opinions related to addiction because he's just not qualified to do so.

THE COURT: Thank you, Ms. Diolombi.

MS. DIOLOMBI: Now, on the second point, that smoking was the cause. And, then, he says, or the first 10 causes, sort of flippantly, of Ms. Camacho's laryngeal cancer and her gastroesophageal reflux, was merely a contributing cause. I know Your Honor has reviewed the Exhibits that we provided with our Motion. But, specifically as to this, I just want to highlight that he says he cannot say the cancer was 85 percent caused by smoking, 14 by GERD, or 1 percent by her minimal alcohol use. He says:

> I can't make that delineation. I would say that her cancer was caused by her smoking, was contributed to by her drinking, if she had any, which she did not, and also by her GERD.
>
> He's admitted that he can't determine the relative

contribution that each of these risk factors -- the relative contribution that each of Ms. Camacho's risk factors contributed to the cause of her laryngeal cancer. Excuse me. Sorry. And he has no scientific support that smoking caused the cancer, or that GERD, or the gastroesophageal reflux, was merely a contributing factor. He discussed no methodology or any scientific basis for offering the opinions that I read to Your Honor.

And, then, you know, he joked -- and I said -- he colloquially said that the first 10 causes of her laryngeal cancer were her smoking. And this colloquialism shouldn't be allowed and should be precluded.

And, just for Your Honor's benefit, smoking, yes, is a risk factor of laryngeal cancer. But so is gastroesophageal reflux, so is HPV, so is obesity, so is alcohol use. And those are all evidenced in the record here.

On the third prong that we want to preclude him on from speculating as to why Ms. Camacho did not get a CAT scan, I know plaintiff said they don't intend to do it. But, just in abundance of caution, he literally says:

> I can only intimate from this. I have no direct knowledge and I'm intimating it.

He uses ifs and mights throughout his testimony on this issue. He never treated Ms. Camacho. He never cared

for her. He talks about UCLA Medical Center. He never worked at UCLA Medical Center by his own admission. He's not familiar with Ms. Camacho's insurance provider or any of their processes. So, he really cannot speak to why Ms. Camacho did not get a CAT scan.

And, then, on that last point -- and I won't belabor it, but, lastly, the opining of whether Ms. Camacho was falling an appropriate schedule with her ENT, he specifically says:

I don't know. I don't do these procedures.

He should not be allowed to speak to the frequency of Ms. Camacho's ENT visits or whether she was following an appropriate schedule. He's not an ENT. Again, he's an oncologist and he should stick to his area of expertise.

And I'll stop there, Your Honor.

THE COURT: Thank you, Ms. Diolombi.

Mr. Li?

MR. LI: Your Honor, I'll be quick with this one.

On the first issue of addiction, I think there is another Motion in Limine regarding whether lay witnesses can say the word addiction. And I feel like if we defer that to when that Motion's ruled on, there may be a pretty easy ruling there.

My contention here is just that, yes, we do have a separate witness who's going to talk about addiction. But

I want to be set up so that if Dr. Ruckdeschel, who has tons of experience treating people who ended up smoking a lot, which caused cancer, and he obviously has the medical training and expertise to talk about how addiction elongates your smoking behavior, which then leads to the causation of cancer, I don't want him to be precluded to -- from saying the word that's necessary in making that explanation to the jury.

And the second thing, which is smoking is the causation. It's hard to believe we're still fighting on this. But it all goes to weight, not admissibility. He certainly has the proper training as an oncologist to say smoking over half a century, one to two packs a day, is a substantial contributor of laryngeal cancer.

And, based on his analysis and his review of the record, the GERD issue is less prominent. And he doesn't put a percentage on it because it would be scientifically unprofessional and inaccurate to do so. In fact, none of the defendants' expert witnesses put a percentage on which caused, you know, the cancer more. And, so, all that is subject to a spontaneous -- sorry. Subject to cross-examination anyway.

And, the last thing is, I stand by what I said in my response regarding the CAT scan and the scheduling. The only thing I added there is just to make sure, upon cross-

examination, if the defense is trying to get out of Dr. Ruckdeschel that Ms. Camacho behaved unreasonably, that she had caused all the medical problems herself, then he gets to explain: No, in cancer patients I've treated, which are, you know, numbered in the hundreds, I've seen certain behaviors similar to delay of getting certain scans or choosing, you know, a closer to home doctor because you're more familiar or maybe it falls within your insurance. Right? These are reasonable things to say on cross-examination because, had you handed down a ruling that's unfavorable to the plaintiff, he'll be precluded from making a full explanation.

That's all. Thank you.

THE COURT: Thank you, Mr. Li.

Ms. Diolombi?

MS. DIOLOMBI: Your Honor, the only thing I will say, Your Honor, is the burden of proof is on plaintiff. I'm not going to -- I don't need to rehash anything else. But, you know, the burden of proof is on the plaintiff. And if their own expert says that he cannot make a delineation in terms of risk factors, then he shouldn't be allowed to testify to such speculative opinion.

But, unless Your Honor has any other questions?

THE COURT: No questions. Thank you.

The Motion in Limine Number 5 to Limit the

Testimony of Dr. Ruckdeschel will be denied.

Mr. Li, can you prepare the Order?

MR. LI: Yes, Your Honor.

THE COURT: Next Motion is Motion in Limine Number 6 to Exclude the Testimony of Dr. Louis Kyriakoudes Concerning Regulatory Matters.

MS. DIOLOMBI: Your Honor, Hassia Diolombi again for Philip Morris. And I'll be arguing this Motion for the defendants.

In this Motion, defendants are moving to exclude the testimony of plaintiffs' expert historian who you've heard about, Dr. Kyriakoudes, on certain regulatory processes and procedures specific to the FDA's Family Smoking Prevention and Tobacco Control Act.

In particular, Dr. Kyriakoudes, who you've heard is a historian, attempts to give opinions and testimony that, one, the FDA failed to fully implement the Tobacco Control Act, in part by not exercising all the authority granted under the act. He then also tries to testify that the Tobacco Control Act has not impacted the defendants' industry or conduct.

And, then, he also tries to opine that defendants drove members of the FDA's Tobacco Products Scientific Advisory Committee off that committee. And, really, he's speaking to one member who's a testifying expert in

cigarette litigation. And he's basing that last opinion on Dr. Jack Henningfield's. I think you've heard the name earlier in the day, I think from this morning. Dr. Henningfield is one of plaintiffs' experts and listed experts in this case. And it's Dr. Henningfield's hearsay statements that Dr. Kyriakoudes is now trying to speak to and say that because one thing happened to Dr. Kyriakoudes, it means the cigarette manufacturers were actually targeting and getting committee members off of this Tobacco Products Scientific Advisory Committee.

To the extent that Dr. Kyriakoudes has going to come to talk about how defendants interact with the FDA, what defendants do that was right or wrong as it relates to the FDA regulation, Your Honor, and anything related, then that testimony should be precluded. Dr. Kyriakoudes has testified, Your Honor, that he's not an expert in regulatory processes and procedures. These are just his opinions based on noticed methodology, at least none that he has articulated in his depositions or prior testimony.

His statements on the FDA as set forth in our motion are unsupported by statements or anything aside from his personal belief and opinions. So, for -- instead, he says:

Generally, for example, that the Tobacco Control Act, while it authorizes a lot of things, it's still

not fully implementing those things because it hasn't, as of this point, made an impact.

What he's referencing there, he does not specify or get into more detail about that. He doesn't have a basis for that lack of impact or any basis to tie it to the impact the regulatory body intends the act to have.

He also says the former Tobacco Products Scientific Advisory Committee Members were attacked by cigarette manufacturers and driven off. And, again, I've spoken to that, Your Honor. This is just all based on plaintiffs' expert Dr. Henningfield's one experience that Dr. Kyriakoudes never even researched, validated. He has absolutely no idea why Dr. Henningfield resigned from the committee. He hasn't talked to Dr. Henningfield about it. I mean, he's done no research at all to substantiate Dr. Henningfield's claim that he was somehow targeted and forced to resign from this committee.

You know, Dr. Kyriakoudes says that the FDA's regulations of cigarettes are anemic and industry favorable. But those are his opinions based on nothing more than his personal feelings about the industry. As a historian, his disclosed area of expertise, he's not qualified to characterize the current regulatory framework governing tobacco products.

He has no qualifications to assess the efficacy or

impact of any such regulation. By his own admission, he has no specialized knowledge in regulatory affairs. So, why should he be allowed to testify as to any regulatory affairs, in particular, the FDA's authority and its impact on the defendants' industry?

Dr. Kyriakoudes shouldn't be allowed to present these unfounded theories to a jury because he said himself on some of these issues, his opinions are legal conclusions at best and he's not a lawyer. And we cited you to that transcript where he says:

> But you wouldn't hold yourself out as an expert as how to comply with each of the litany of things that the FDA is enacted under the Tobacco Control Act?
>
> His answer: That's correct. That would be perhaps more under the purview of an attorney.

And we know that Dr. Kyriakoudes is not an attorney.

He's interpreting over a regulation and he's not a legislator. He's never worked as a legislative staff. He's never advised any entity on any regulatory matter. He's never worked for the FDA in any capacity whatsoever. He's never published a peer-reviewed article on the mechanics of FDA regulation of tobacco products or the efficacy or impact of FDA regulation of tobacco products. He's never reviewed any of the FDA's documents concerning

day-to-day oversight of tobacco manufacturers. He's never reviewed any defendant -- any of the defendants' internal documents concerning efforts to comply with FDA regulations under the Tobacco Control Act. He's never worked for any state or federal regulators.

And, despite wanting to talk about members of the FDA's committee that I mentioned being driven off, he's never served on the FDA committee that he wants to speak to. He's never attended a meeting, he's never read a transcript of a meeting, and he's never interviewed any members of that committee. He doesn't even know who the head of the FDA Center for Tobacco Products is, has never visited the Center for Tobacco Products, and has never interviewed or corresponded with any of the individuals who work for the Center for Tobacco Products.

So, without any of that, his opinions fail to satisfy the Nevada requirements for competent and reliable expert testimony by an expert qualified for experience, education, training, knowledge, etcetera. And, since he lacks those qualifications by his own admissions, Your Honor, he definitely lacks the methodology necessary to allow any FDA testimony to assist the trier of fact in understanding the evidence and determining the facts of an issue.

His testimony is not reliable because of

everything that I've previously listed. And it's not even recognized in any regulatory field. And, so, he shouldn't be presenting any such testimony to a jury.

One other point, Your Honor, on this issue of the FDA and the Tobacco Control Act. He cites two industry documents. He's got a citation to another author's articles regarding menthol cigarettes, which, by the way, Ms. Camacho didn't even like menthol cigarettes. I think she tried one, didn't like it, so menthol not even an issue here. He's got four citations to federal statutes, case law, and, then, the FDA website, which I've already said he's not a lawyer, he shouldn't be giving any opinions as to the statutes and the caselaw.

Your Honor, the law is clear that he can't simply read a large amount of materials, which he definitely did not do on this issue or topic. He can't just read materials and, then, decide that this is an area that he's going to be able to provide expert opinion on.

Furthermore, Your Honor, he shouldn't be allowed to second guess the FDA's regulatory decisions or if defendants have committed any regulatory infractions. That's the purview of the FDA within its regulatory authority. And it's not being litigated here in State Court. All right. Those matters belong to the federal government to assess and regulate and make determinations

about and should not be litigated here.

And all that's going to happen is if Dr. K -- Dr. Kyriakoudes is allowed to come in and testify about these regulations, that's going to interject an issue into the litigation that the trier of fact isn't being asked to determine.

And, so, with that, Your Honor, I respectfully request that the Court grant Defendants' Motion to Preclude Dr. Kyriakoudes from speaking on the FDA regulations under the Tobacco Control Act and as to whether any committee members were pushed off a committee by something that defendants allegedly did. Thank you, Your Honor.

THE COURT: Thank you, Ms. Diolombi.

Mr. Li?

MR. LI: Your Honor, if the defendants go to the jury and talk about how the FDA has regulated tobacco so well that this field is essentially no longer -- this whole case is no longer necessary, if they project this messaging that the federal government is taking care of the problem already, then I think it's proper for -- upon cross or direct examination, for an expert historian to talk about, historically, how the FDA was influenced by tobacco industry. You have to be able to show the jury both sides of the story.

As to his qualifications, -- and, Your Honor, the

reason why the response is so brief is because we don't know yet, we don't affirmatively intend to bring a lot of information out on this subject, which is sort of -- it's almost too specific. But the reason why we put it in there is because on the off chance we need to, we want to have the ability to.

And, as for the qualification, he is a historian. The event that Ms. Diolombi is talking about is when Dr. Jack Henningfield, and I believe Dr. Neal Benowitz, were essentially booted from this particular committee on the FDA due to the industry's influence. That was a well-covered event by the *New York Times*. I was just looking on the Internet for it. So, if that is a well-covered event, it certainly belongs to a -- and it's a piece of history that belongs to a historian's realm of expertise.

THE COURT: Thank you, Mr. Li.

Ms. Diolombi?

MS. DIOLOMBI: The only thing I'll say, using Dr. Kyriakoudes's own words, Your Honor, is that he says that a historian's research must be systematic and comprehensive. It has to be as systematic and comprehensive as possible. And the documents must be placed in their proper context or the results could be invalid. When it comes to these particular topics, Your Honor, he hasn't done a systematic and comprehensive review of the topics. I want to be clear

on that.

And the content -- the context of his knowledge shows that he has no basis to render the opinions he purports to want to convey to the jury. And, so, our motion should be granted for that basis. And everything I've previously set forth.

Thank you, Your Honor.

THE COURT: Thank you. Motion in Limine Number 6 to Preclude Testimony of Louis Kyriakoudes Concerning Regulatory Matters is denied.

Mr. Li, could you prepare the Order?

MR. LI: Yes, Your Honor.

THE COURT: Thank you. Motion in Limine Number 7 to Exclude Evidence an Argument Related to Ammonia Compounds and Other Additives or Ingredients Used in Cigarettes.

Mr. Henk?

MR. HENK: Yes, Your Honor.

This Motion is the first of a series of motions that deal with conduct that the plaintiffs allege that the defendants engaged in. And, so, the big issue here is going to be relevance. And, then, if there's probative value, whether it's substantially outweighed by unfair prejudice.

And -- and, obviously, it needs to be relevant

under the rulings today. So, that would mean it has to be relevant to the strict liability claim. And, as to Philip Morris, that would mean post-1990.

So, this motion, Your Honor, pertains to ammonia compounds and additives or ingredients. Notably, the Plaintiffs' Opposition doesn't say a word about the fact that their own experts have admitted that there's no foundation to say that additives or ammonia compounds made cigarettes more dangerous or addictive.

So, if you assume for purposes of this Motion that the companies engaged in the conduct that they're alleged to have engaged in, the relevance question is: How did that cause harm to Ms. Camacho? That's the first layer of relevance.

Well, they don't even try to go there because, of course, they can't. Because they can't even establish that it made cigarettes more dangerous or addictive, let alone the cigarettes that she smoked. So, they can't go there.

So, what they say, Your Honor, is that it's general misconduct and that it should come in for purposes of punitive damages, that it shows that the defendants experimented, essentially, that they tried to do this. But, Your Honor, the United States Supreme Court, including as interpreted here in Nevada, has been very clear about when evidence comes in where you don't have a foundation to

say that the conduct caused any harm to the person at issue in the case.

Then, what you would have to do is you would have to lay a foundation that the conduct caused harm to others and that the conduct that caused that harm to others was sufficiently similar to conduct that caused harm to Ms. Camacho. And, again, they don't even try to do that here because they can't do that here. Because you would have to have a foundation that additives, or ingredients, or ammonia, that it actually made cigarettes more dangerous or addictive.

If you could do that, for example, on a brand that she didn't smoke, then maybe you would have a foundation to say: Well, that caused harm to somebody else. And, then, you would try, under the *Williams* case that Your Honor mentioned previously, to say that somehow that conduct replicates conduct that caused harm to Ms. Camacho. But they don't have any of that.

And that's why, in their Opposition, they don't address the fact that their own witnesses have said things like -- I mean, Dr. Proctor even referred to additives. We have this in our Motion, Your Honor, as a minor issue. And he knows that's because -- and this is on page 5 of our Motion, Your Honor. The additives are relatively unimportant in terms of the overall toxicity and harm of

the potential of a cigarette. He said: Taking them out doesn't really make it safer.

His opinion, to the extent, you know, Your Honor finds him to be qualified, is that additives-free cigarettes, that people are actually having misconception that those are safer. And you may, in fact, hear that in jury selection in this case. The jurors, there are people that actually believe that. He's saying that is a false belief. Additives-free cigarettes are not safer.

And, so, why that's so important, then, is it begs the question: Why are we talking about additives? Why are we talking about ammonia? Why would the jury ever hear about that alleged conduct? Because there's no foundation that it caused cigarettes to be more dangerous or addictive. Therefore, there's no foundation that it caused harm to anybody, including Ms. Camacho. Therefore, there's no relevance to it, Your Honor.

And, even if it somehow had some tiny probative value that we can't see, it would be substantially outweighed by the danger of unfair prejudice, including because of these false beliefs that are out there in terms of people thinking that additives actually -- there are actually two schools of thought on that.

But I'm sure you will hear in jury selection, Your Honor, jurors who believe that the companies, for example,

spike the products with nicotine to make them more addictive, the testimony at trial will be that doesn't actually happen. Testimony at trial will be that there is less nicotine at the end of the manufacturing process than at the beginning of it, that they are not spiked with nicotine. They are not made to be more dangerous or addictive. So, there's just no foundation for any of that. So, we're saying, obviously, there's no relevance to it. And it should therefore be excluded, Your Honor.

THE COURT: Thank you, Mr. Henk.

Mr. Li?

MR. LI: Your Honor, the -- in 1982, RJR had studied Philip Morris's cigarettes and realized that the addition of ammonia make the cigarettes sell better. And RJ Reynolds said:

> Based on the above observation, it was decided decided to investigate the use of ammoniated reconstituted tobacco as a means of increasing the smoke PH of RJR's cigarettes.

And, then, you have the 2010 report from the Surgeon General, which said:

> Increased rates of deposition in the respiratory tract lead to increased rates of nicotine delivering to the brain, which intensified the addictive properties of a drug.

So, there's ample evidence here that ammoniated tobacco, ammoniated nicotine, free-based nicotine makes it more addictive.

I want to address what Mr. Henk talked about in terms of Dr. Proctor's testimony. The first thing that we have to understand about Dr. Proctor is that he is a self-proclaimed abolitionist. Right? He doesn't want to reduce cigarettes into a potentially safer version. He wants to essentially advise the government that this is not a product that can -- you know, that would be safe.

And, so, when he talks about how the additives are, quote, a minor problem, it's relative. It's relative to the massive defects that we're going to show and we've already talked about earlier in the day.

And, so, there are two different factors here. Number one, he doesn't have to come out and say: I have, you know, scientific certainty that by adding ammonia to cigarettes it increases the cigarette's addictive property by 100 percent. He doesn't have to say that.

What he does have to say and he has the foundation to say in these documents I just read, is that ammoniated nicotine is more addictive. It increases, it enhances the addictive properties of the cigarettes. Whether it's by 100 or by 2 percent, he doesn't have to give that value. He just has to say that the design right here is defective.

Because a user with ordinary knowledge that's accessible to them, new information that's available to them from 1964 until 2018, that user is not going to know that Philip Morris had started putting ammonia in their cigarettes, to the envy of their competitors, that that particular design had rapid increased how the nicotine travels, and how the nicotine affects your brain, and how that makes it more addictive. That is the proper testimony that he is definitely not speculating when he's giving that testimony.

And, so, the only last thing I want to add here is that, since we only have strict liability claims left, this is one of the most important pieces of evidence. Right? This is one of the crucial innovations during that period of the conspiracy. And we have good documents to show for it. And this is one of the design defects that definitely -- I will say not only most of the smokers wouldn't know, but perhaps most of the jurors wouldn't know. And that is important.

Thank you, Your Honor.

THE COURT: Thank you, Mr. Li.

Mr. Henk?

MR. HENK: Yes, Your Honor.

I'd like to briefly refer to what we have at page 3 of our Motion. Because, again, these are two really important quotes from Dr. Proctor from prior testimony.

These are Exhibits E and F, Your Honor, to our Motion. Dr. Proctor said, quote:

> Regardless of whether cigarettes are made with ammonia or without ammonia, they're equally dangerous and addictive.

Closed quote. That was in a 2019 trial in Florida. Then, in a 2021 trial in Oregon, he said that ammonia does, quote:

> Not at all make cigarettes, quote, more addictive.

So, regardless of what counsel's opinion is about whether ammonia makes cigarettes more addictive, his own witnesses disagree. They've testified under oath they do not make them more dangerous and addictive. So, it's the witnesses that would have to provide the foundation to have some link to Ms. Camacho and harm that was caused to her.

And -- you know, I forgot to mention earlier, punitive damages aren't even in the case. So, they cannot have that as a theory of admissibility. So, it has to be that the conduct caused harm to Ms. Camacho. And they're not even claiming that, Your Honor.

THE COURT: Thank you.

Motion in Limine Number 7 to Exclude Evidence and Argument Related to Ammonia Compounds and Other Additives or Ingredients Used in Cigarettes will be denied.

Mr. Li, can you prepare the order?

MR. LI: Yes, Your Honor.

THE COURT: It's time for our next break. Do the parties want to recess for the evening or do they want to take a 15-minute recess and come back? It's up to the parties.

MS. LUTHER: Defer to Your Honor.

MR. ROBERTS: How long does the Court have reserved for us tomorrow, Your Honor?

THE COURT: We can start at 9:30 tomorrow morning. The Court has a meeting with the Chief Judge tomorrow at noon, from noon to 1. So, we have to take a full lunch break tomorrow. I'll probably have to leave a little bit earlier so I can make the meeting. But, aside from that, the Court has the rest of the day.

MR. ROBERTS: From the defense standpoint, we have plenty of time to finish tomorrow, even with that full lunch. So, we would be fine taking a break now. It's been a long day.

THE COURT: Okay. Thank you.

Mr. Li?

MR. LI: Your discretion, Your Honor.

THE COURT: All right. We'll take our evening recess. It's been a long day. So, we'll start tomorrow at 9:30 in the morning. All right. Thank you.

MR. LI: Thank you, Your Honor.

MR. ROBERTS: Thank you, Your Honor.

PROCEEDING CONCLUDED AT 3:30 P.M.

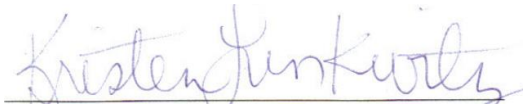
* * * * *

CERTIFICATION

I certify that the foregoing is a correct transcript from the audio-visual recording of the proceedings in the above-entitled matter.

AFFIRMATION

I affirm that this transcript does not contain the social security or tax identification number of any person or entity.



KRISTEN LUNKWITZ
INDEPENDENT TRANSCRIBER