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.

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PETITIONERS' APPENDIX
VOLUME 59 (NOS. 8965-9217)

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DISTRICT COURT

CLARK COUNTY, NEVADA

SANDRA CAMACHO, individually, and ANTHONY CAMACHO, individually, Plaintiffs, vs. PHILIP MORRIS USA, INC., a foreign corporation; R.J. REYNOLDS TOBACCO COMPANY, a foreign corporation, individually, and as successor-by-merger to LORILLARD TOBACCO COMPANY and as successor-in-interest to the United States tobacco business of BROWN & WILLIAMSON TOBACCO CORPORATION, which is the successor-by-merger to THE AMERICAN TOBACCO COMPANY; LIGGETT GROUP, LLC., a foreign	Case No.: A-19-807650-C Dept. No.: IV **NOTICE OF ENTRY OF ORDER GRANTING PHILIP MORRIS AND R.J. REYNOLDS' MOTION FOR PARTIAL SUMMARY JUDGMENT ON PLAINTIFFS' PUNITIVE DAMAGES CLAIM**

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

Defendants.

PLEASE TAKE NOTICE that an Order Granting Philip Morris and R.J. Reynolds' Motion For Partial Summary Judgment On Plaintiffs' Punitive Damages Claim was entered on October 26, 2022, in this matter. A copy is attached hereto.

Dated this 26th day of October, 2022.

/s/ Howard J. Russell

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CERTIFICATE OF SERVICE

I hereby certify that on the 26th day of October, 2022, a true and correct copy of the foregoing **NOTICE OF ENTRY OF ORDER GRANTING PHILIP MORRIS AND R.J. REYNOLDS' MOTION FOR PARTIAL SUMMARY JUDGMENT ON PLAINTIFFS' PUNITIVE DAMAGES CLAIM** was electronically filed and served on counsel through the Court's electronic service system pursuant to Administrative Order 14-2 and N.E.F.C.R. 9, via the electronic mail addresses noted below, unless service by another method is stated or noted:

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DISTRICT COURT

CLARK COUNTY, NEVADA

SANDRA CAMACHO, individually, and ANTHONY CAMACHO, individually, Plaintiffs, vs. PHILIP MORRIS USA, INC., a foreign corporation; R.J. REYNOLDS TOBACCO COMPANY, a foreign corporation, individually, and as successor-by-merger to LORILLARD TOBACCO COMPANY and as successor-in-interest to the United States tobacco business of BROWN & WILLIAMSON TOBACCO CORPORATION, which is the successor-by-merger to THE AMERICAN TOBACCO COMPANY; LIGGETT GROUP, LLC., a foreign corporation; ASM NATIONWIDE	Case No.: A-19-807650-C Dept. No.: IV **ORDER GRANTING PHILIP MORRIS AND R.J. REYNOLDS' MOTION FOR PARTIAL SUMMARY JUDGMENT ON PLAINTIFFS' PUNITIVE DAMAGES CLAIM**

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

Defendants.

On August 29, 2022, the Court heard argument on Philip Morris and R.J. Reynolds' Motion for Partial Summary Judgment on Plaintiffs' Punitive Damages Claim, and the Court, having considered the Motion and Opposition thereto (if filed) and arguments of counsel, and for all of the reasons stated by the Court on the record,

IT IS HEREBY ORDERED THAT:

Philip Morris and R.J. Reynolds' Motion for Partial Summary Judgment on Plaintiffs' Punitive Damages Claim is GRANTED. This ruling also applies to Liggett, in light of Liggett's filed joinder to Philip Morris and R.J. Reynolds' Motion, therefore the punitive damage claims against Liggett are hereby DISMISSED.

In Nevada, punitive damages vindicate a public interest and punitive damages are not to compensate a plaintiff. In *Siggelkow v. Phoenix Ins. Co.,* 109 Nev. 42, 44–45, 846 P.2d 303, 304–05 (1993), the Nevada Supreme Court explained that: "Punitive damages are not awarded as a matter of right to an injured litigant, but are awarded in addition to compensatory damages as a means of punishing the tortfeasor and deterring the tortfeasor and others from engaging in similar conduct. Accordingly, a punitive damage award has as its underlying purpose public policy concerns unrelated to the compensatory entitlements of the injured party".

Philip Morris USA v. Williams, 549 U.S. 346, 127 S. Ct. 1057, 166 L. Ed. 2d 940 (2007) does not undermine Defendants' position. In that case, Philip Morris argued that the Constitution "prohibits the state, acting through a civil jury, from using punitive damages to punish a defendant for harm to nonparties." 549 U.S. 346, 356, 127 S. Ct. 1057, 1064. Here, we have the complete reverse. In *Williams* there was no privity. In the matter at bar, the Court finds that there is privity and that the Plaintiffs were in privity with the Nevada Attorney General.

Privity exists between two otherwise unrelated parties where one party "adequately

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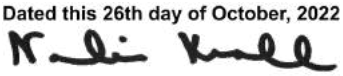
represented" another party's interests in a prior lawsuit—even if one of the parties' was not a "party" to the prior lawsuit. *Alcantara ex rel. Alcantara v. Wal-Mart Stores, Inc*., 130 Nev. 252, 261, 321 P.3d 912, 917 (2014) (adopting the "adequate representation" analysis from the Restatement (Second) of Judgements section 41). The Court finds that whether the Nevada Attorney General adequately represented the Plaintiffs interests in the prior litigation is an issue of law for the Court. The Court further finds that the Nevada Attorney General's representation of Plaintiffs' interests was more than "adequate." Nevada resolved its lawsuit via the MSA, pursuant to which Defendants agreed to be punished in the amount $240 billion dollars and deterred from engaging in the activities that both the Nevada Attorney General and Plaintiffs alleged were wrongful. MSA prohibits the Defendants from marketing to youth, advertising in certain mediums (e.g., billboards and in public transit), communicating with the public through trade groups, and failing to disclose internal research.

For these reasons, and other reasons set forth in Defendants briefing and oral argument, the Motion is granted.

Dated this 26th day of October, 2022



EE9 80B D285 A066
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DISTRICT COURT
CLARK COUNTY, NEVADA

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

AUTOMATED CERTIFICATE OF SERVICE

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

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DISTRICT COURT

CLARK COUNTY, NEVADA

SANDRA CAMACHO, individually, and ANTHONY CAMACHO, individually, Plaintiffs, vs. PHILIP MORRIS USA, INC., a foreign corporation; R.J. REYNOLDS TOBACCO COMPANY, a foreign corporation, individually, and as successor-by-merger to LORILLARD TOBACCO COMPANY and as successor-in-interest to the United States tobacco business of BROWN & WILLIAMSON TOBACCO CORPORATION, which is the successor-by-merger to THE AMERICAN TOBACCO COMPANY; LIGGETT GROUP, LLC., a foreign corporation; ASM NATIONWIDE CORPORATION d/b/a SILVERADO SMOKES & CIGARS, a domestic corporation; and LV SINGHS INC. d/b/a SMOKES & VAPORS, a domestic corporation; DOES I-X; and ROE BUSINESS ENTITIES XI-XX, inclusive, Defendants.	CASE NO.: A-19-807650-C DEPT. NO.: 4 **NOTICE OF ENTRY OF ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT LIGGETT GROUP LLC'S MOTION FOR PARTIAL SUMMARY JUDGMENT ON PLAINTIFFS' NEGLIGENCE AND STRICT LIABILITY CLAIMS** Hearing Date: August 29, 2022 Hearing Time: 10:30 a.m.

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NOTICE IS HEREBY GIVEN that an Order was entered on October 26, 2022, granting in part and denying in part defendant Liggett Group LLC's Motion for Partial Summary Judgment on Plaintiff's Negligence and Strict Liability Claims.

A copy of said Order is attached hereto.

DATED: October 27, 2022

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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I caused the foregoing document entitled *Notice of Entry of Order Granting In Part and Denying In Part Defendant Liggett Group LLC's Motion For Partial Summary Judgment on Plaintiffs' Negligence and Strict Liability Claims* to be served via the Court's Odyssey EFile & Serve system, which will send an electronic copy to all interested parties. The date and time of the electronic service is in place of the date and place of deposit in the mail.

DATED: October 27, 2022

/s/ Annette Jaramillo
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DISTRICT COURT

CLARK COUNTY, NEVADA

SANDRA CAMACHO, individually, and ANTHONY CAMACHO, individually, Plaintiffs, vs. PHILIP MORRIS USA, INC., a foreign corporation; R.J. REYNOLDS TOBACCO COMPANY, a foreign corporation, individually, and as successor-by-merger to LORILLARD TOBACCO COMPANY and as successor-in-interest to the United States tobacco business of BROWN & WILLIAMSON TOBACCO CORPORATION, which is the successor-by-merger to THE AMERICAN TOBACCO COMPANY; LIGGETT GROUP, LLC., a foreign corporation; and ASM NATIONWIDE CORPORATION d/b/a SILVERADO SMOKERS & CIGARS, a domestic corporation, and ROE BUSINESS ENTITIES XI-XX, inclusive. Defendants.	Case No. A-19-807650-C Dept. No. IV **ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT LIGGETT GROUP LLC'S MOTION FOR PARTIAL SUMMARY JUDGMENT ON PLAINTIFFS' NEGLIGENCE AND STRICT LIABILITY CLAIMS** **Hearing Date: August 29, 2022** **Hearing Time: 10:30 a.m.**

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On May 25, 2022, Defendant Liggett Group LLC ("Liggett"), filed its Motion for Partial Summary Judgment on Plaintiffs' Negligence and Strict Liability Claims. On June 8, 2022, Plaintiffs Sandra Camacho and Anthony Camacho filed their opposition. On August 29, 2022, this Court heard oral argument on the motion.

Having reviewed the pleadings and papers and having heard oral argument, the Court now grants in part and denies in part Liggett's Motion. Specifically, the Court rules as follows:

Liggett's Motion is granted to the extent it seeks Summary Judgment on Plaintiffs' negligence claims.

The Court finds that there was no special relationship between Liggett and Sandra Camacho giving rise to a duty on Liggett's part to disclose information to Sandra Camacho, therefore, the duty element on Plaintiffs' failure to warn claims, both before and after July 1, 1969, was not established. Plaintiffs' warning claims arising before July 1, 1969 also fail because there is no evidence that Mrs. Camacho would not have started smoking or would have quit between 1964 and July 1, 1969 but for Liggett's failure to provide additional warnings. There is no evidence that Mrs. Camacho's decision to start or continue smoking Liggett brand cigarettes were related to any statement made by Liggett. The Court finds that the Surgeon General provided his report in January of 1964 and that Ms. Camacho started smoking on or after April of 1964. The evidence is that Sandra Camacho started smoking Liggett's L&M brand because that is what her girlfriend smoked and gave her, she thought they were cool, and she continued to smoke L&M brand cigarettes until 1990 because that is what she was familiar with and because it was a milder smoker.

Additionally, the Court finds that after July 1, 1969, the Federal Cigarette Labelling and Advertising Act, 15 U.S.C. § 1331, preempts any failure to warn claims premised on advertising and promotion and Plaintiffs have failed to establish that Liggett made any other type of statement(s) other than with respect to advertising and promotion on which a failure to warn claim might be premised.

Plaintiffs' design claims fail because the mere manufacture of cigarettes—commonly known to be an inherently dangerous consumer product—does not constitute a defect. Plaintiffs must instead prove that Liggett made design choices in connection with its L&M brand that

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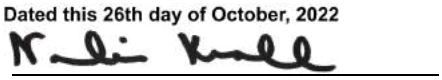
increased the danger of cigarettes beyond the expectations of the ordinary consumer and that such increased danger was a legal cause of Mrs. Camacho's laryngeal cancer. Here, Plaintiffs have no evidence of either element. Plaintiffs did not demonstrate in opposition to the motion that Liggett did something to its L&M brand cigarettes that rendered them *more* dangerous than any other cigarette, beyond the common knowledge of the ordinary consumer, i.e. that cigarettes can cause cancer and death. Nor can Plaintiffs show that but for Liggett's design choices, Mrs. Camacho would have avoided her laryngeal cancer.

None of Plaintiffs' experts provided evidence that Mrs. Camacho developed laryngeal cancer because of any defective design in Liggett's L&M brand cigarettes. Plaintiffs' experts concede that *all* combustible cigarettes are addictive and can cause laryngeal cancer—regardless of any design features and claim that all cigarettes are inherently defective, which is insufficient to support their claims. Plaintiffs' design-defect theory that all cigarettes are inherently dangerous is precluded by federal conflict preemption and the Restatement (Second) of Torts § 402A.

Liggett's Motion is denied to the extent that it seeks Summary Judgment on Plaintiffs' strict liability claims.

IT IS SO ORDERED

Dated this 26th day of October, 2022



B38 2C8 CF54 4629
Nadia Krall
District Court Judge

Respectfully submitted

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DISTRICT COURT

CLARK COUNTY, NEVADA

SANDRA CAMACHO, individually, and ANTHONY CAMACHO, individually, Plaintiffs, v. PHILIP MORRIS USA, INC., a foreign corporation; R.J. REYNOLDS TOBACCO COMPANY, a foreign corporation, individually, and as successor-by-merger to LORILLARD TOBACCO COMPANY and as successor-in-interest to the United States tobacco business of BROWN & WILLIAMSON TOBACCO CORPORATION, which is the successor-	CASE NO.: A-19-807650-C DEPT NO.: IV **PLAINTIFFS' MOTION TO RECONSIDER ORDERS GRANTING DEFENDANTS PHILIP MORRIS USA, INC.'S AND LIGGETT GROUP LLC'S MOTIONS FOR PARTIAL SUMMARY JUDGMENT ON PLAINTIFFS' NEGLIGENCE CLAIMS** **HEARING REQUESTED**

Case Number: A-19-807650-C

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

Defendants.

Plaintiffs, SANDRA CAMACHO and ANTHONY CAMACHO, individually, by and through their counsel of record, SEAN K. CLAGGETT, ESQ., of CLAGGETT & SYKES LAW FIRM, hereby move this Court to reconsider the Court's October 23, 2022 Order Granting Defendants' Motion for Partial Summary Judgment on Plaintiffs' Negligence Claim and October 26, 2022 Order Granting in Part and Denying in Part Defendant Liggett Group LLC's Motion for Partial Summary Judgment on Plaintiffs' Negligence and Strict Liability Claims.[1] This motion is made and based upon all papers, pleadings, and records on file herein, the attached memorandum of points and authorities, and any oral argument allowed at the time of the hearing.[2]

I. FACTUAL AND PROCEDURAL BACKGROUND

A. COURT'S ORDER GRANTING PARTIAL SUMMARY JUDGMENT AGAINST PLAINTIFFS' NEGLIGENCE CLAIMS AGAINST PHILIP MORRIS USA, INC

On August 29, 2022, this Court heard the parties' arguments on Defendants' Motion for Partial Summary Judgment on Plaintiffs' Negligence Claim. On October 23, this Court issued a written order stating:

[1] See Exhibits 1 and 2.

[2] Plaintiffs do not waive any previously-made argument at the hearing or in pleadings. Without waiving any argument on matters unaddressed here, this motion focuses only on issues of law.

> The Court finds that there is no special relationship between Plaintiff and the Defendants. Therefore, the duty element of Plaintiffs' negligence claim cannot be met. Also, the Court finds that post-1969, the Federal Cigarette Labeling Advertising Act, 15 U.S., Section 1331, preempts any advertising-based claims after 1969.

See **Exhibit 1**. Therefore, the Court granted summary judgment on Plaintiffs' negligence claims against Philip Morris USA, Inc. (hereafter "Philip Morris").

These negligence claims include failure-to-warn and defective design claims. Without waiving any right to appeal on matters unaddressed here, this motion asks this Court to reconsider its finding that Plaintiffs' defective design claims against Philip Morris require a "special relationship" between the two parties, since no such requirement exists under Nevada law. See *Long v. Flanigan Warehouse Co.*, 79 Nev. 241, 250 (1963).

Further, Plaintiffs request clarification from this Court that the Federal Cigarette Labeling Advertising Act only preempts ***failure-to-warn*** claims—not defective design claims—based on advertising and promotion after 1969, per *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 524–25 (1992) ("insofar as claims under either **failure-to-warn** theory require a showing that respondents' post-1969 advertising or promotions should have included additional, or more clearly stated, warnings, those claims are pre-empted.") [emphasis added] and *Rivera v. Philip Morris, Inc.*, 395 F.3d 1142, 1147 (9th Cir. 2005) ("As to the claims before us, a majority of the Court, including two dissenting Justices, agreed that **failure-to-warn** claims based on allegations that post–1969

advertising or promotional materials should have included additional, or more clearly stated, warnings are preempted by the Labeling Act.") [emphasis added].

B. COURT'S ORDER GRANTING PARTIAL SUMMARY JUDGMENT AGAINST PLAINTIFFS' NEGLIGENCE CLAIMS AGAINST LIGGETT GROUP LLC

On August 29, 2022, this Court heard the parties' arguments on Defendant Liggett Group LLC's Motion for Partial Summary Judgment on Plaintiffs' Negligence and Strict Liability Claims. On October 26, 2022, this Court issued a written order granting summary judgment on Plaintiffs' negligence claims against Liggett Group LLC (hereafter "Liggett"). See **Exhibit 2.** These claims include both failure-to-warn and defective design claims.

On the failure-to-warn claims, the Court granted summary judgment because: 1) there is no special relationship between Liggett and Sandra Camacho; 2) Mrs. Camacho failed to present evidence that she would not have started smoking or would have quit between 1964 and 1969 had there been additional warning about the dangers of Liggett cigarettes; 3) Mrs. Camacho failed to present evidence that she began or continued to smoke due to Liggett's statements; and 4) the Federal Cigarette Labeling and Advertising Act preempts "any **failure to warn** claims premised on advertising and promotion." *Id* at 2 [emphasis added].

On the defective design claims, the Court granted summary judgment because it found that Plaintiffs failed to prove that Liggett's L&M cigarettes were "*more* dangerous than any other cigarette, beyond the common knowledge of the ordinary consumer, i.e., that cigarettes can cause cancer and death." *Id* at 3.

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Without waiving any right to appeal on matters unaddressed here, this motion asks this Court to reconsider its finding regarding Plaintiffs' defective design claims against Liggett, because Nevada law only requires Plaintiffs to prove that L&M cigarettes were more dangerous than the ordinary consumer's expectation. Furthermore, "[t]he common knowledge inquiry should have been narrowed to whether the link between cigarette smoking and lung cancer was common knowledge, not simply whether the link between smoking and general health hazards was well-known." *Rivera* at 1152–53.

II. LEGAL ARGUMENT

A. RECONSIDERATION STANDARD

A district court may reconsider an issue that it previously decided if "the decision is clearly erroneous." *Masonry & Tile Contractors Ass'n v. Jolley, Urga & Wirth, Ltd.*, 113 Nev. 737, 741, 941 P.2d 486, 489 (1997).

B. A MANUFACTURER OF A PRODUCT OWES ITS CONSUMERS A DUTY TO USE ORDINARY CARE

The Nevada Supreme Court has long established the elements of a negligence claim in product liability cases:

> To recover on that theory of liability [negligence] the plaintiff had to offer probative evidence to show (a) a defect in the ladder; (b) that it was in existence when the ladder left the possession of the manufacturer; and (c) that the defect came about as the result of the failure of the manufacturer to **use ordinary care**.

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Long v. Flanigan Warehouse Co., 79 Nev. 241, 250 (1963) [emphasis added]. There is no requirement for the plaintiff to prove a "special relationship" beyond that which exists between a manufacturer and a product user. Indeed, Philip Morris did not even advance this argument in its Motion for Partial Summary Judgment. See **Exhibit 3**. Therefore, Plaintiffs respectfully request this Court to reconsider and vacate its ruling, and reinstate Plaintiffs' negligence claims against Philip Morris.

C. THE FEDERAL CIGARETTE LABELING ADVERTISING ACT ONLY PREEMPTS FAILURE-TO-WARN CLAIMS, NOT DEFECTIVE DESIGN CLAIMS

The U.S. Supreme Court held in *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 524–25 (1992) that "insofar as claims under either **failure-to-warn** theory require a showing that respondents' post-1969 advertising or promotions should have included additional, or more clearly stated, warnings, those claims are pre-empted." *Id* [emphasis added]. This holding was applied in all subsequent tobacco litigations and, in Nevada, the Ninth Circuit reiterated it in *Rivera v. Philip Morris, Inc.*, 395 F.3d 1142, 1147 (9th Cir. 2005): "As to the claims before us, a majority of the Court, including two dissenting Justices, agreed that **failure-to-warn** claims based on allegations that post–1969 advertising or promotional materials should have included additional, or more clearly stated, warnings are preempted by the Labeling Act." *Id* [emphasis added].

The law has always been clear that the preemption applies only to failure-to-warn claims, not any other types of claims. Therefore, Plaintiffs respectfully request that this Court revise its ruling by adding "failure-to-warn" to clarify the scope of the preemption.

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D. PLAINTIFFS NEED NOT PROVE THAT L&M CIGARETTES ARE MORE DANGEROUS THAN OTHER BRANDS

Liggett's argument, which this Court adopted in its order, is effectively one of federal preemption, i.e., Plaintiffs cannot sue for the inherent dangers of cigarettes since it is a federally permissible and regulated consumer product. However, Plaintiffs do not seek a ban on all cigarettes. The danger in L&M cigarette is not inherent, but designed and added by Liggett. A cigarette is defined by federal statute as simply "any roll of tobacco wrapped in paper or in any substance not containing tobacco." 15 U.S.C. § 1332 (1)(A). The inherent dangers in smoking natural tobacco rolled in paper pales in comparison to the dangers in smoking an L&M cigarette, which is designed to addict the smoker and contains additives that heighten the chance of laryngeal cancer. That is the basis of Plaintiffs' defective design claim, not that *any* cigarette would be defective. In short, it is possible that most cigarette brands on the market are as dangerous as L&M cigarettes, but that does not mean cigarettes are inherently that dangerous—it just means that the largest cigarette manufacturers in the US continued to make defective products even after the formal conspiracy ended in the 2000s.

Nevada law only requires Plaintiffs to prove that L&M cigarettes are "more dangerous than would be contemplated by the ordinary user having the ordinary knowledge available in the community." *Ford Motor Co. v. Trejo*, 133 Nev. Adv. Rep. 68, 402 P.3d 649, 650 (2017). There is no requirement for Plaintiffs to prove that L&M cigarettes are also more dangerous than its competitors.

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E. THIS COURT'S COMMON KNOWLEDGE INQUIRY SHOULD HAVE BEEN NARROWED TO CIGARETTES' LINK TO LARYNGEAL CANCER, NOT HEALTH RISKS IN GENERAL

The Ninth Circuit in *Rivera* examined Nevada law when addressing the issue of the common knowledge inquiry. Liggett's argument, which provided a basis for this Court's order, was rejected by the Ninth Circuit because it found:

> The issue is unresolved in Nevada, but there is a basis to conclude that Nevada courts would narrow the inquiry and distinguish between knowing about general health risks of smoking and knowing about specific risks, like lung cancer or addiction, caused by tobacco products. *See Allison v. Merck & Co., Inc.,* 110 Nev. 762, 878 P.2d 948, 952–56 (1994) (plurality opinion) (recognizing Nevada's long-standing public policy grounds for holding manufacturers and distributors of defective products responsible for injuries caused by the defective products and rejecting the concept of "unavoidably unsafe products" as an exception to the rules of strict liability). **Such an inquiry is a question of fact to be decided by a jury.**

Rivera at 1152–53 [emphasis added]. In that case, the plaintiff alleged that Philip Morris' cigarettes caused the decedent's lung cancer. The court held that: "The common knowledge inquiry should have been narrowed to whether the link between cigarette smoking and lung cancer was common knowledge, not simply whether the link between smoking and general health hazards was well-known." *Id* at 53. Furthermore, the court observed once more that it was a factual inquiry for the jury because "[i]t is at least premature on this record to take judicial notice of the fact that the link between smoking

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and specific illnesses allegedly caused by smoking was common knowledge during the relevant time." *Id.*

Plaintiffs respectfully ask this Court to reconsider its common knowledge inquiry and find that, at a minimum, the question of whether the ordinary consumer would have known about the link between Philip Morris' cigarettes and laryngeal cancer is one for the jury.

III. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully ask this Court to:

a) reinstate Plaintiffs' negligence claims against Philip Morris;

b) reinstate Plaintiffs' negligence claims against Liggett; and

c) clarify that the Federal Cigarette Labeling Advertising Act only preempts failure-to-warn claims based on advertising and promotion after July 1, 1969.

DATED this 7th day of November, 2022.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 7th day of November 2022, I caused to be served a true and correct copy of the **PLAINTIFFS' MOTION TO RECONSIDER ORDERS GRANTING DEFENDANTS PHILIP MORRIS USA, INC.'S AND LIGGETT GROUP LLC'S MOTIONS FOR PARTIAL SUMMARY JUDGMENT ON PLAINTIFFS' NEGLIGENCE CLAIMS** on the following person(s) by the following method(s) pursuant to NRCP 5(b) and NEFCR 9:

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

Exhibit 1

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DISTRICT COURT

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SANDRA CAMACHO, individually, and ANTHONY CAMACHO, individually, Plaintiffs, vs. PHILIP MORRIS USA, INC., a foreign corporation; R.J. REYNOLDS TOBACCO COMPANY, a foreign corporation, individually, and as successor-by-merger to LORILLARD TOBACCO COMPANY and as successor-in-interest to the United States tobacco business of BROWN & WILLIAMSON TOBACCO CORPORATION, which is the successor-by-merger to THE AMERICAN TOBACCO COMPANY; LIGGETT GROUP, LLC., a foreign	Case No.: A-19-807650-C Dept. No.: IV **ORDER GRANTING DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT ON PLAINTIFFS' NEGLIGENCE CLAIM**

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

Defendants.

On August 29, 2022, the Court heard Defendants' Motion for Partial Summary Judgment on Plaintiffs' Negligence Claim. Having reviewed the pleadings and papers and having heard oral argument,

IT IS HEREBY ORDERED THAT:

Defendants' Motion for Partial Summary Judgment on Plaintiffs' Negligence Claim is **GRANTED**. The Court finds that there is no special relationship between Plaintiff and the Defendants. Therefore, the duty element of Plaintiffs' negligence claim cannot be met. Also, the Court finds that post-1969, the Federal Cigarette Labeling Advertising Act, 15 U.S., Section 1331, preempts any advertising-based claims after 1969.

Dated this 23rd day of October, 2022

97B 340 0CD5 60DE
Nadia Krall
District Court Judge

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Sent: Tuesday, September 20, 2022 8:52 PM
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Cc: Roberts, Lee <LRoberts@wwhgd.com>; Russell, Howard <HRussell@wwhgd.com>; Smith, Jr., Phillip N. <PSmithJr@wwhgd.com>; LaBounty, Daniela <DLaBounty@wwhgd.com>; Gormley, Ryan <RGormley@wwhgd.com>; Bonney, Audra R. <ABonney@wwhgd.com>; 'bjackson@shb.com' <bjackson@shb.com>; 'A. Sorenson' <asorenson@shb.com>; J. Kenyon <JBKENYON@shb.com>; B. Tepikian <btepikian@shb.com>; A. Nayeri <ANAYERI@shb.com>; K. Grace <kgrace@shb.com>; N. Anderson <NANDERSON@SHB.COM>; chatch@shb.com
Subject: [EXTERNAL] Camacho - proposed orders for final review

Good Afternoon Everyone,

Please see the attached 24 proposed orders for final review by all counsel. Please let us know by mid-day tomorrow whether we have approval to use your e-signatures so that we can get these submitted to the Court.

Pierce, Kelly L.

From: Kelly Anne Luther <KLuther@kasowitz.com>
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Cc: Roberts, Lee; Russell, Howard; Smith, Jr., Phillip N.; LaBounty, Daniela; Gormley, Ryan; Bonney, Audra R.; 'bjackson@shb.com'; 'A. Sorenson'; J. Kenyon; B. Tepikian; A. Nayeri; K. Grace; N. Anderson; chatch@shb.com
Subject: RE: Following Up -- Camacho - proposed orders for final review

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Approved for Liggett. You can use my e-signature.

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Subject: RE: Following Up -- Camacho - proposed orders for final review

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Approved.

From: Pierce, Kelly L. <KPierce@wwhgd.com>
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To: Fan Li <fli@kulaw.com>; Kelly Anne Luther <KLuther@kasowitz.com>; 'jabrego@claggettlaw.com' <jabrego@claggettlaw.com>; 'Jocelyn@claggettlaw.com' <Jocelyn@claggettlaw.com>; 'malvarez@claggettlaw.com' <malvarez@claggettlaw.com>; 'micah@claggettlaw.com' <micah@claggettlaw.com>; 'Moises Garcia' <MGarcia@claggettlaw.com>; 'mgranda@claggettlaw.com' <mgranda@claggettlaw.com>; 'anna@claggettlaw.com' <anna@claggettlaw.com>; Kimberly L. Wald <klw@kulaw.com>; Dennis Kennedy <DKennedy@baileykennedy.com>; Joseph Liebman <JLiebman@baileykennedy.com>; NVtobacco <NVtobacco@kulaw.com>; Maria H. Ruiz <MRuiz@kasowitz.com>; 'Helm, Jessica (JHelm@lewisroca.com)' <JHelm@lewisroca.com>; 'Jorgensen, J. Christopher (CJorgensen@lewisroca.com)' <CJorgensen@lewisroca.com>; 'Jaramillo, Annette (AJaramillo@lewisroca.com)' <AJaramillo@lewisroca.com>; 'tobacco@integrityforjustice.com' <tobacco@integrityforjustice.com>; NVtobacco <NVtobacco@kulaw.com>; 'agalvan@kslaw.com' <agalvan@kslaw.com>; 'klehman@kslaw.com' <klehman@kslaw.com>; 'Diamond, Spencer' <SDiamond@KSLAW.com>; 'ksnevada@kslaw.com' <ksnevada@kslaw.com>; 'rslaton@kslaw.com' <rslaton@kslaw.com>; Maria H. Ruiz <MRuiz@kasowitz.com>; 'emartinez@lewisroca.com' <emartinez@lewisroca.com>
Cc: Roberts, Lee <LRoberts@wwhgd.com>; Russell, Howard <HRussell@wwhgd.com>; Smith, Jr., Phillip N. <PSmithJr@wwhgd.com>; LaBounty, Daniela <DLaBounty@wwhgd.com>; Gormley, Ryan <RGormley@wwhgd.com>; Bonney, Audra R. <ABonney@wwhgd.com>; 'bjackson@shb.com' <bjackson@shb.com>; 'A. Sorenson' <asorenson@shb.com>; J. Kenyon <JBKENYON@shb.com>; B. Tepikian <btepikian@shb.com>; A. Nayeri <ANAYERI@shb.com>; K. Grace <kgrace@shb.com>; N. Anderson <NANDERSON@SHB.COM>; chatch@shb.com
Subject: Following Up -- Camacho - proposed orders for final review
Importance: High

Good Afternoon,

Will counsel for Liggett and R.J. Reynolds please advise whether we have approval to use your e-signatures on the attached?

CSERV

DISTRICT COURT
CLARK COUNTY, NEVADA

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

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Exhibit 2

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Attorneys for Defendant Liggett Group LLC

DISTRICT COURT

CLARK COUNTY, NEVADA

SANDRA CAMACHO, individually, and ANTHONY CAMACHO, individually, Plaintiffs, vs. PHILIP MORRIS USA, INC., a foreign corporation; R.J. REYNOLDS TOBACCO COMPANY, a foreign corporation, individually, and as successor-by-merger to LORILLARD TOBACCO COMPANY and as successor-in-interest to the United States tobacco business of BROWN & WILLIAMSON TOBACCO CORPORATION, which is the successor-by-merger to THE AMERICAN TOBACCO COMPANY; LIGGETT GROUP, LLC., a foreign corporation; and ASM NATIONWIDE CORPORATION d/b/a SILVERADO SMOKERS & CIGARS, a domestic corporation, and ROE BUSINESS ENTITIES XI-XX, inclusive. Defendants.	Case No. A-19-807650-C Dept. No. IV **ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT LIGGETT GROUP LLC'S MOTION FOR PARTIAL SUMMARY JUDGMENT ON PLAINTIFFS' NEGLIGENCE AND STRICT LIABILITY CLAIMS** **Hearing Date: August 29, 2022** **Hearing Time: 10:30 a.m.**

118703632.3

LEWIS ROCA
3993 Howard Hughes Parkway, Suite 600
Las Vegas, NV 89169

On May 25, 2022, Defendant Liggett Group LLC ("Liggett"), filed its Motion for Partial Summary Judgment on Plaintiffs' Negligence and Strict Liability Claims. On June 8, 2022, Plaintiffs Sandra Camacho and Anthony Camacho filed their opposition. On August 29, 2022, this Court heard oral argument on the motion.

Having reviewed the pleadings and papers and having heard oral argument, the Court now grants in part and denies in part Liggett's Motion. Specifically, the Court rules as follows:

Liggett's Motion is granted to the extent it seeks Summary Judgment on Plaintiffs' negligence claims.

The Court finds that there was no special relationship between Liggett and Sandra Camacho giving rise to a duty on Liggett's part to disclose information to Sandra Camacho, therefore, the duty element on Plaintiffs' failure to warn claims, both before and after July 1, 1969, was not established. Plaintiffs' warning claims arising before July 1, 1969 also fail because there is no evidence that Mrs. Camacho would not have started smoking or would have quit between 1964 and July 1, 1969 but for Liggett's failure to provide additional warnings. There is no evidence that Mrs. Camacho's decision to start or continue smoking Liggett brand cigarettes were related to any statement made by Liggett. The Court finds that the Surgeon General provided his report in January of 1964 and that Ms. Camacho started smoking on or after April of 1964. The evidence is that Sandra Camacho started smoking Liggett's L&M brand because that is what her girlfriend smoked and gave her, she thought they were cool, and she continued to smoke L&M brand cigarettes until 1990 because that is what she was familiar with and because it was a milder smoker.

Additionally, the Court finds that after July 1, 1969, the Federal Cigarette Labelling and Advertising Act, 15 U.S.C. § 1331, preempts any failure to warn claims premised on advertising and promotion and Plaintiffs have failed to establish that Liggett made any other type of statement(s) other than with respect to advertising and promotion on which a failure to warn claim might be premised.

Plaintiffs' design claims fail because the mere manufacture of cigarettes—commonly known to be an inherently dangerous consumer product—does not constitute a defect. Plaintiffs must instead prove that Liggett made design choices in connection with its L&M brand that

LEWIS ROCA
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increased the danger of cigarettes beyond the expectations of the ordinary consumer and that such increased danger was a legal cause of Mrs. Camacho's laryngeal cancer. Here, Plaintiffs have no evidence of either element. Plaintiffs did not demonstrate in opposition to the motion that Liggett did something to its L&M brand cigarettes that rendered them *more* dangerous than any other cigarette, beyond the common knowledge of the ordinary consumer, i.e. that cigarettes can cause cancer and death. Nor can Plaintiffs show that but for Liggett's design choices, Mrs. Camacho would have avoided her laryngeal cancer.

None of Plaintiffs' experts provided evidence that Mrs. Camacho developed laryngeal cancer because of any defective design in Liggett's L&M brand cigarettes. Plaintiffs' experts concede that *all* combustible cigarettes are addictive and can cause laryngeal cancer—regardless of any design features and claim that all cigarettes are inherently defective, which is insufficient to support their claims. Plaintiffs' design-defect theory that all cigarettes are inherently dangerous is precluded by federal conflict preemption and the Restatement (Second) of Torts § 402A.

Liggett's Motion is denied to the extent that it seeks Summary Judgment on Plaintiffs' strict liability claims.

IT IS SO ORDERED

Dated this 26th day of October, 2022

B38 2C8 CF54 4629
Nadia Krall
District Court Judge

Respectfully submitted

LEWIS ROCA ROTHGERBER CHRISTIE LLP

/s/ *J Christopher Jorgensen*
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CSERV

DISTRICT COURT
CLARK COUNTY, NEVADA

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

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Exhibit 3

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DISTRICT COURT

CLARK COUNTY, NEVADA

SANDRA CAMACHO, individually, and ANTHONY CAMACHO, individually, Plaintiffs, vs. PHILIP MORRIS USA, INC., a foreign corporation; R.J. REYNOLDS TOBACCO COMPANY, a foreign corporation, individually, and as successor-by-merger to LORILLARD TOBACCO COMPANY and as successor-in-interest to the United States tobacco business of BROWN & WILLIAMSON TOBACCO CORPORATION, which is the successor-by-merger to THE AMERICAN TOBACCO COMPANY; LIGGETT GROUP, LLC., a foreign corporation; ASM NATIONWIDE CORPORATION d/b/a SILVERADO SMOKES & CIGARS, a domestic corporation; and LV SINGHS INC. d/b/a SMOKES & VAPORS, a domestic corporation; DOES I-X; and ROE BUSINESS ENTITIES XI-XX, inclusive, Defendants.	Case No.: A-19-807650-C Dept. No.: IV **HEARING REQUESTED** **DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT ON PLAINTIFFS' NEGLIGENCE CLAIM**

/ / /

Defendant PHILIP MORRIS USA INC. ("PM USA"), by and through its counsel of record, WEINBERG, WHEELER, HUDGINS, GUNN & DIAL, LLC, and SHOOK, HARDY & BACON L.L.P., hereby submits this Motion for Partial Summary Judgment on Plaintiffs' Negligence Claim.[1]

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

To prove negligence, Plaintiffs must prove that PM USA's conduct—*i.e.*, a design defect or failure to warn—caused Mrs. Camacho's alleged injury, laryngeal cancer. Plaintiffs cannot establish that essential element of their claim for multiple reasons. First, they have no evidence that the cigarettes made by PM USA that Mrs. Camacho smoked from 1990-2017 were defective because Plaintiffs have no evidence that they were more dangerous than contemplated by the ordinary user during that time frame. Second, Plaintiffs' design-defect theory that all cigarettes are inherently dangerous is precluded by federal conflict preemption and the Restatement (Second) of Torts § 402A. None of Plaintiffs' experts provided evidence that Mrs. Camacho developed laryngeal cancer because of any defective design in PM USA's cigarettes.[2] Rather, Plaintiffs' experts claim that all cigarettes are inherently defective, which is insufficient to support their claims. Finally, Plaintiffs' failure-to-warn theory is expressly preempted by federal law because Mrs. Camacho did not start smoking PM USA cigarettes until the 1990s, decades after Congress preempted any claims for failure to warn post-July1, 1969. Courts across the country have granted summary judgment on these claims in smoking and health cases with similar lack of evidence.[3] This Court should do likewise because Plaintiffs cannot prove the essential elements of their negligence claim.

---

[1] The arguments raised herein apply equally to Plaintiffs' strict liability claim against PM USA because "there is no practical difference in Plaintiffs' negligence and strict liability claims in this case. Therefore, the negligence claims are subsumed in the strict liability claims." *Carter v. Ethicon, Inc.*, No. 2:20-CV-1232-KJD-VCF, 2021 WL 1226531, at *4 (D. Nev. Mar. 31, 2021). Should the Court grant summary judgment in PM USA's favor on one or more grounds raised herein, summary judgment on the same grounds would be warranted as to Plaintiffs' strict liability claim. *Id.* at *3, *4.

[2] Indeed, none of Plaintiffs' experts are qualified to opine on cigarette design (other than from a historical perspective, at most).

[3] *See supra* I.A.2-3.

WEINBERG WHEELER HUDGINS GUNN & DIAL

II. UNDISPUTED FACTS

1. Plaintiffs claim that smoking cigarettes manufactured by PM USA caused Mrs. Camacho to develop laryngeal cancer. (*See, e.g.*, Am. Compl. ¶¶ 17, 19, 20, 21.)

2. Mrs. Camacho seeks compensatory damages for medical expenses, loss of enjoyment of life, and physical and mental pain and suffering. (*Id.* ¶¶ 99-102, 117-21, 138-41, 139-42, 230-33.) Mr. Camacho seeks compensatory damages for loss of consortium. (*Id.*)

3. Plaintiffs claim that PM USA was negligent for designing, engineering, manufacturing, distributing, marketing, and selling defective cigarettes, which they contend caused Mrs. Camacho's laryngeal cancer. (*Id.* ¶ 92.)

4. Plaintiffs also allege that PM USA was negligent because it failed to properly warn Mrs. Camacho about the health risks and addictive nature of smoking. (*Id.* ¶ 93.)

5. Mrs. Camacho testified that she started smoking L&M cigarettes (a Liggett brand cigarette) in 1964. Sandra Camacho Dep. at 145-46 (Nov. 3, 2021) ("Sandra Camacho Dep. Vol. 2") (Ex. A).[4]

6. Starting on January 1, 1966, a congressionally mandated health warning label appeared on every cigarette package sold in the United States. (Pub. L. No. 89-92, § 4, 79 Stat. 282, 283 (1965).)

7. Mrs. Camacho smoked L&M cigarettes from approximately 1964 to 1990. Sandra Camacho Dep. Vol. 2 at 158-59.

8. She smoked Marlboro Red (a PM USA brand cigarette) from approximately 1990 to 2000. Sandra Camacho Dep. at 333 (December 8, 2021) ("Sandra Camacho Dep. Vol. 4"); Anthony Camacho Dep. at 118 (Nov. 4, 2021) (Ex. B).

9. She smoked Basic (a PM USA brand cigarette) from approximately 2000 to 2017. (*See* Am. Compl. ¶ 17); *see also* Sandra Camacho Dep. Vol. 4 at 333-34; Anthony Camacho Dep. at 118.

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[4] All volumes of Sandra Camacho's deposition are collected in Exhibit A.

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10. Although she might have tried the Marlboro Lights cigarettes that her daughter Laura smoked, Mrs. Camacho smoked five or fewer of them in total. Sandra Camacho Dep. Vol. 2 at 84; Laura Purkett Dep. at 99-100 (Feb. 16, 2022) (Ex. C). Mrs. Camacho never smoked light or low-tar cigarettes as her regular brand. Sandra Camacho Dep. at 205 (Dec. 7, 2021) ("Sandra Camacho Dep. Vol. 3"); Anthony Camacho Dep. at 116, 149, 189; Laura Purkett Dep. at 100, 115-16; Donna Kinsella Dep. at 168-69 (Feb. 10, 2022) (Ex. D).

11. Every cigarette manufactured by PM USA that Mrs. Camacho smoked came from a pack bearing a health warning.

12. Plaintiffs disclosed three purported expert witnesses to offer opinions about cigarette design: Drs. Robert Proctor (a historian), Louis Kyriakoudes (a historian), and Judith Prochaska (a psychiatrist). (Pls.' Expert Witness Disclosure (Feb. 10, 2022).)

13. None of these witnesses is qualified to testify about cigarette design in terms of specific design features that were a but-for cause or a substantial factor in causing Mrs. Camacho's cancer. *See* Defendants' expert motions to be filed on June 17, 2022.

14. None of these expert witnesses identified in their reports an alleged specific defect in any of the cigarettes Mrs. Camacho smoked beyond the inherent characteristics of all cigarettes in the market.

15. All these expert witnesses have previously testified that there is no way to make a cigarette safe for its intended use: smoking. *See* Trial Tr. at 2086:16-19, *Jordan v. R. J. Reynolds Tobacco Co.*, 2013-CA-008903-XXX-MA (Fla. 4th Cir. Ct. July 21, 2015) (Dr. Proctor's testimony) ("Proctor *Jordan* Trial Tr.") (Ex. E); Trial Tr. at 1426:4-8, *Martin v. R. J. Reynolds Tobacco Co.*, No. 07-34267 CA 15 (Fla. 11th Cir. Ct. May 9, 2017) (Dr. Kyriakoudes's testimony) ("Kyriakoudes *Martin* Trial Tr.") (Ex. F); Dr. Prochaska Dep. at 96:24-97:1, *Kaplan v. R. J. Reynolds Tobacco Co.*, No. 08-025823(19) (Fla. 17th Cir. Ct. Dec. 20, 2016) ("*Kaplan* Dr. Prochaska Dep.") (Ex. G).

16. None of Plaintiffs' expert witnesses can opine that a design defect in the PM USA cigarettes Mrs. Camacho smoked was a proximate cause of her laryngeal cancer.

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III. LEGAL STANDARD

The Court "shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Nev. R. Civ. P. 56. Summary judgment is appropriate "when the pleadings, depositions, answers to interrogatories, admissions, and affidavits, if any, that are properly before the court demonstrate that no genuine issue of material fact exists, and the moving party is entitled to judgment as a matter of law." *Wood v. Safeway, Inc.*, 121 Nev. 724, 731, 121 P.3d 1026, 1030 (2005).[5] "[I]f the nonmoving party will bear the burden of persuasion at trial, the party moving for summary judgment may satisfy the burden of production by either (1) submitting evidence that negates an essential element of the nonmoving party's claim, or (2) 'pointing out . . . that there is an absence of evidence to support the nonmoving party's case.'" *Cuzze v. Univ. & Cmty. Coll. Sys. of Nevada*, 123 Nev. 598, 602–03, 172 P.3d 131, 134 (2007) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 331 (1986)). "In such instances, in order to defeat summary judgment, the nonmoving party must transcend the pleadings and, by affidavit or other admissible evidence, introduce specific facts that show a genuine issue of material fact." *Id* 123 Nev. at 603, 172 P.3d at 134.

IV. ARGUMENT

A. PM USA Is Entitled to Summary Judgment Because Plaintiffs Have No Evidence the PM USA Cigarettes that Mrs. Camacho Smoked Were Defective.

Plaintiffs have no evidence of a defect in Mrs. Camacho's cigarettes and therefore their negligence claim based on a design defect theory fails. Under a design defect theory, a product is defective when it "failed to perform in the manner reasonably to be expected in light of its nature and intended function and was more dangerous than would be contemplated by the ordinary user having the ordinary knowledge available in the community." *Ford Motor Co. v. Trejo*, 133 Nev. 520, 523, 402 P.3d 649, 652 (2017). As explained in Defendants' Motion for Partial Summary Judgment on Plaintiffs' Strict Liability Claims, which is incorporated herein, Plaintiffs have no evidence to prove that the PM USA cigarettes Mrs. Camacho smoked were more dangerous than

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

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would be contemplated by the ordinary user having the ordinary knowledge available in the community during the relevant time frame. As such, Plaintiffs cannot prove a required element of their claim.

B. PM USA Is Entitled to Summary Judgment Because Plaintiffs Have No Evidence that Any Design Feature Was a Legal Cause of Mrs. Camacho's Cancer.

"Negligence, is not actionable unless, without the intervention of an intervening cause, it proximately causes the harm for which complaint was made. An intervening cause means not a concurrent and contributing cause but a superseding cause which is itself the natural and logical cause of the harm." *Thomas v. Bokelman*, 86 Nev. 10, 13, 462 P.2d 1020, 1022 (1970). Plaintiffs do not have sufficient evidence to show that any design features of the PM USA brand cigarettes that Mrs. Camacho smoked proximately caused her laryngeal cancer.

1. Federal law bars Plaintiffs' design defect theories because they would result in a *de facto* ban on cigarettes.

Implied conflict preemption precludes state-law tort claims that stand as an obstacle to "the accomplishment and execution of important . . . federal objectives." *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 881 (2000) (citations and internal quotation marks omitted). The policy implicated here is Congress's decision to foreclose the removal of tobacco products from the market. *See FDA v. Brown & Williamson*, 529 U.S. 120, 137-38 (2000). A *de facto* ban on cigarettes is directly contrary to congressional policy—expressly recognized by the United States Supreme Court—against "the removal of tobacco products from the market":

> Congress . . . has foreclosed the removal of tobacco products from the market. A provision of the United States Code currently in force states that '[t]he marketing of tobacco constitutes one of the greatest basic industries of the United States with ramifying activities which directly affect interstate and foreign commerce at every point, and stable conditions therein are necessary to the general welfare.' More importantly, Congress has directly addressed the problem of tobacco and health through legislation on six occasions since 1965. **When Congress enacted these statutes, the adverse health consequences of tobacco use were well known, as were nicotine's pharmacological effects. Nonetheless, Congress stopped well short of ordering a ban.**

FDA v. Brown & Williamson, 529 U.S. at 137-38 (emphasis added and internal citations omitted).

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Congress's clear intent to keep cigarettes on the market despite their potential adverse health effects implicitly preempts and precludes Plaintiffs' design-defect theories. *See Geier*, 529 U.S. at 873-74.

Courts throughout the country have recognized that claims similar to Plaintiffs'—which would effectively ban the manufacture and sale of cigarettes containing nicotine—are subject to conflict preemption. In *Pooshs v. Phillip Morris USA, Inc.*, 904 F. Supp. 2d 1009 (N.D. Cal. 2012), the court granted summary judgment on the plaintiff's strict liability and negligent design claims because there was "no evidence that the design of defendants' cigarettes—as opposed to plaintiff's smoking of cigarettes—was a substantial factor in causing [the smoker's] lung cancer." *Id.* at 1025. The court rejected the plaintiff's inhalability and nicotine content defect theories because they were implicitly preempted by congressional policy. Despite noting the "general agreement that it is the nicotine that causes smokers to become addicted," the *Pooshs* court found that nicotine could not constitute a defect as a matter of law because "nicotine is normally present in tobacco" and therefore was an inherent characteristic of cigarettes rather than a defect. *Id.* It likewise rejected the plaintiff's theory that cigarettes are defectively designed because the smoke from cigarettes is intended to be inhalable as "untenable" because "inhalable smoke is an inherent feature of cigarettes." *Id.* The court concluded:

> Taken to its logical conclusion, the argument that cigarettes are defectively designed because they deliver nicotine through the inhalation of smoke, if adopted, ***would mean that the only remedy for this alleged design defect would be a ban on the manufacture and sale of any cigarettes containing nicotine***. However, the Supreme Court noted . . . 'Congress . . . has foreclosed the removal of tobacco products from the market [,]' notwithstanding the general acceptance of the adverse health consequences of using tobacco. *See Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 137-138, 120 S. Ct. 1291, 146 L. Ed. 2d 121 (2000).

Id. at 1025–1026 (emphasis added).

Likewise, in *Liggett Group, Inc. v. Davis*, the Florida Fourth District Court of Appeal applied *FDA v. Brown & Williamson* in ruling that conflict preemption barred a claim that the defendant was negligent in "continuing to manufacture" cigarettes because a state cause of action imposing liability for nothing more than the manufacture and sale of cigarettes is "contrary to

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Congress's intent to protect commerce and not to ban tobacco products." 973 So. 2d 467, 472–473 (Fla. 4th DCA 2007), *rev. granted on other grounds*, 978 So. 2d 160 (Fla. 2008), *rev. dismissed*, 997 So. 2d 400 (Fla. 2008).

The same logic applies here. Plaintiffs' design-defect theory would impose liability for nothing more than manufacturing and selling cigarettes. Such a liability theory is implicitly preempted by clear Congressional policy. The Court should therefore grant summary judgment on Plaintiffs' negligent design claims.

2. Plaintiffs Have Failed to Identify Any Specific Design Defect that Caused Mrs. Camacho's Cancer and Instead Point to Characteristics Inherent in All Cigarettes.[6]

Plaintiffs have disclosed three witnesses who purport to have design defect opinions—Dr. Kyriakoudes, Dr. Prochaska and Dr. Proctor.[7] (*See* Pl.'s Expert Witness Disclosure (Feb. 10, 2022).) None of these experts testified that Mrs. Camacho would have avoided her laryngeal cancer if she smoked cigarettes without any specific defect—as opposed to the risks inherent in smoking.[8] Thus, even if Mrs. Camacho had smoked only cigarettes without the specific features that Plaintiffs claim made some cigarettes defective, Mrs. Camacho still would have faced the risk of developing cancer.

Plaintiffs have no evidence to show that any design defect in Mrs. Camacho's PM USA brand cigarettes—as opposed to smoking of cigarettes in general—was a proximate cause of her laryngeal cancer.[9] On the contrary, Plaintiffs' experts opine that *all* conventional cigarettes,

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[6] Although plaintiffs need not always identify a specific defect to prevail in a strict liability case, *see Reed v. Arthrex, Inc.*, 2017 U.S. Dist. LEXIS 168247, *6-7 (D. Nev. Oct. 11, 2017), they must do so here where the product at issue is a cigarette. Without identifying some defect other than the inherent risks associated with smoking cigarettes, Plaintiffs' claims are preempted by federal law.

[7] PM USA notes that Dr. Kyriakoudes, Dr. Proctor, and Dr. Prochaska are not qualified to opine on cigarette design, nor are their opinions on cigarette design reliable. PM USA will file motions to exclude these opinions by the June 17, 2022 deadline.

[8] Moreover, Plaintiffs cannot argue that Mrs. Camacho would have avoided addiction in the absence of any particular defect in PM USA brand cigarettes. Mrs. Camacho claims that she was hopelessly addicted to cigarettes after her first cigarette, decades before she ever smoked a PM USA brand cigarette. Sandra Camacho Dep. Vol. 3 at 195-96.

[9] Nor do Plaintiffs have admissible evidence to show that use of additives increase health risks or addictiveness of smoking. In fact, Dr. Proctor recently stated, "It's not the additives that make a cigarette harmful." Proctor Dep. at 27–28, *In re Santa Fe Natural Tobacco Co. Marketing & Sales Practices and*

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irrespective of any specific design features, are addictive and cause cancer. *See, e.g.*, Proctor *Jordan* Trial Tr. at 2086:16-19; Kyriakoudes *Martin* Trial Tr. at 1426:4-8; *Kaplan* Dr. Prochaska Dep. at 96:24-97:1. Thus, at most, Plaintiffs' evidence suggests that smoking in general caused Mrs. Camacho's laryngeal cancer, as opposed to any of the specific design aspects of the PM USA cigarettes Mrs. Camacho smoked. That is wholly insufficient to create a genuine dispute of material fact on causation.

Courts across the country have consistently rejected such theories— a car is not an alternative safer design for a motorcycle, nor grape juice an alternative safer design for wine. *See also Kimball v. R.J. Reynolds Tobacco Co.*, No. C03-664JLR, 2006 WL 1148506, at *3 (W.D. Wash. Apr. 26, 2006) ("For example, a plaintiff injured in a motorcycle accident cannot argue that if the manufacturer had installed four wheels on the motorcycle, it would have been safer. 'Two-wheeledness' is an essential characteristic of a motorcycle."); *City of Phila. v. Lead Indus. Ass'n*, No. 90-7064, 1992 WL 98482, at *3 (E.D. Pa. Apr. 23, 1992) (holding that the presence of lead in lead pigment could not constitute a defect, and stating: "This is akin to alleging a design defect in champagne by arguing that the manufacturer should have made sparkling cider instead. The challenge is to the product itself, not to its specific design.").

Nor can Plaintiffs rely on their allegations that PM USA could have manufactured its cigarettes using an unspecified "alternative" or "less dangerous design." (Am. Compl. at ¶¶ 92(o) (alleging PM USA failed "to develop and utilize alternative designs, manufacturing methods, and/or materials to reduce and/or eliminate harmful materials from cigarettes"), 111 (alleging "Defendant knew there were ways to minimize the disease and destruction of their product, cigarettes, caused through alternative safer designs of cigarettes including but not limited to nicotine free or reduced nicotine cigarettes")). Plaintiffs have no evidence to prove those vague and unsupported allegations. They are nothing more than untested theories, and in any case there is no evidence that Mrs. Camacho would have avoided her cancer had she smoked such theoretical

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Products Liability Litig., No. 1:16-MD-02695-JB-LF (D.N.M. July 31, 2019) (Ex. H); *see also id.* at 85 ("The additives are relatively unimportant in terms of the overall toxicity . . . and harm potential of a cigarette.").

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cigarettes.

Instead, the warnings on cigarette packages shield PM USA from liability based on a safer alternative design because Plaintiffs have no evidence that a commercially feasible change would have allowed Mrs. Camacho to avoid her injuries. "[W]arnings should shield manufacturers from liability unless the defect could have been avoided by a commercially feasible change in design that was available at the time the manufacturer placed the product in the stream of commerce." *Robinson v. G.G.C., Inc.*, 107 Nev. 135, 140, 808 P.2d 522, 524-25 (1991). Plaintiffs have no evidence of a commercial feasible change in design that could override the protection provided by the warning label. Indeed, Plaintiffs have no evidence of a "safer alternative design" that Mrs. Camacho would have smoked and would thereby have avoided her injuries, let alone a commercially feasible design that would have been accepted by consumers more generally. Without that evidence, Plaintiffs cannot rely on some unspecified alternative design to prove that Mrs. Camacho's cigarettes were defective.

In *Pooshs*, the court granted summary judgment on the plaintiff's negligent design claims because there was "no evidence that the design of defendants' cigarettes—as opposed to plaintiff's smoking of cigarettes—was a substantial factor in causing her lung cancer." 904 F. Supp. 2d 1025. The court noted that the plaintiff had merely pointed to evidence indicating "that plaintiff smoked cigarettes manufactured by the defendants, and that she developed lung cancer." *Id.* It therefore concluded that the plaintiff could not meet her burden of establishing proximate causation, stating:

> While cigarettes may be considered generally harmful in the sense that smoking cigarettes can contribute to the development of various diseases, including lung cancer, plaintiff has not met her burden of showing, through admissible evidence, that ***it was the particular design of defendants' cigarettes that caused her lung cancer***.

Id. (emphasis added).

Similarly, the court in *Whiteley* found that the plaintiff's negligent design claim failed where her expert witnesses testified that the defendants had manipulated nicotine levels and failed to remove some harmful elements, but never testified that there was a "'reasonable medical probability' that the alleged ***negligent design[s]*** of those cigarette products was a substantial factor contributing to the dose of carcinogens Whiteley inhaled or ingested, and hence to her risk of

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developing lung cancer." 11 Cal Rptr. at 862-63. Specifically, the "[p]laintiff's expert witnesses did not attempt to quantify the likelihood that the asserted design defects of cigarettes, as distinguished from smoking cigarettes in general, contributed to [the smoker] developing lung cancer." *Id.* at 863.

As in *Pooshs* and *Whiteley*, Plaintiffs here have failed to demonstrate any causal link between the design elements in cigarettes that Mrs. Camacho smoked and Mrs. Camacho's injuries. Furthermore, Plaintiffs' design-based claims fail for the additional reason that they have not shown that, had PM USA not offered the cigarettes Mrs. Camacho smoked, she would have smoked less or quit smoking altogether and avoided her injuries. *See Whiteley*, 11 Cal Rptr. at 863-64 (plaintiff's negligent design claim failed because she did not introduce evidence "from which the jury could assume that, were the suggested design changes made, Whiteley would have smoked the safer cigarettes, smoked less, or quit smoking altogether"); *see also, e.g., White v. R.J. Reynolds Tobacco Co.*, 109 F. Supp. 2d 424, 433-34 (D. Md. 2000); *Cipollone v. Liggett Grp., Inc.*, 683 F. Supp. 1487, 1493-95 (D.N.J. 1988). Accordingly, Plaintiffs lack sufficient evidence to create a genuine dispute of material fact as to any of their defect theories, which entitles PM USA to summary judgment on Plaintiffs' negligence claims.

3. Section 402A of the Restatement (Second) of Torts forecloses Plaintiffs' design defect theories because Cigarettes are Not Defective.

Section 402A of the Restatement (Second) of Torts, which Nevada follows,[10] demands the same conclusion. Comment i provides that many common consumer products, *including tobacco*, are not unreasonably dangerous, and therefore not defective, simply because they cause harm:

> i. *Unreasonably dangerous*. . . . . Many products cannot possibly be made entirely safe for all consumption, and any food or drugs necessarily involves some risk of harm, if only from over-consumption. Ordinary sugar is a deadly poison to diabetics . . . . That is not what is meant by "unreasonably dangerous" in this Section. . . . Good whiskey is not unreasonably dangerous merely because it will make some people drunk, and is especially dangerous to alcoholics; but bad whiskey, containing a dangerous amount of fusel oil, is unreasonably dangerous. **Good tobacco is not unreasonably dangerous merely because the effects of smoking**

[10] *Ford Motor Co. v. Trejo*, 133 Nev. 520, 525, 402 P.3d 649, 653 (2017).

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> **<u>may be harmful; but tobacco containing something like marijuana may be unreasonably dangerous</u>**. Good butter is not unreasonably dangerous merely because, if such be the case, it deposits cholesterol in the arteries and leads to heart attacks; but bad butter, *contaminated* with poisonous fish oil, is unreasonably dangerous.

RESTATEMENT (SECOND) OF TORTS § 402A, Cmt. i (emphasis added). Under Comment i, products like sugar, alcohol, tobacco, and butter are not defective unless they are "contaminated."

A design defect theory based on the inherent dangerous characteristics of cigarettes is therefore insufficient to support a negligent design claim. In other words, to prove their negligent design claims, Plaintiffs must have evidence of a product defect—other than the inherent dangerous characteristics of all cigarettes—that proximately caused Mrs. Camacho's laryngeal cancer. Additionally, because Plaintiffs' design-defect allegations necessarily implicate scientific or technical issues such as the biological impact of certain product characteristics, they must establish the existence of the defect and proximate causation through expert testimony. *See Grover C. Dils Med. Ctr. v. Menditto*, 121 Nev. 278, 287–88, 112 P.3d 1093, 1100 (2005) ("[G]enerally, '[b]ecause an injury is a subjective condition, an expert opinion is required to establish a causal connection between the incident or injury and disability.'" (quoting *Truck Ins. Exch. v. CNA*, 2001 S.D. 46, ¶ 14, 624 N.W.2d 705, 709)). Plaintiff cannot do so here.

C. Plaintiffs' Failure to Warn Theory Likewise Fails.

To the extent Plaintiffs predicate their negligence claim on allegations that PM USA failed to warn Mrs. Camacho about certain health risks of smoking, *see* Am. Compl. at ¶¶ 93, that theory also fails under federal law and Nevada law.

Plaintiffs' negligence claim based on an alleged failure-to-warn fails under Nevada law because there is no "special relationship" between PM USA and Mrs. Camacho. Under Nevada law, a plaintiff may recover under a failure-to-warn theory of negligence "only where there is a special relationship between the parties and the danger is foreseeable." *Wiley v. Redd*, 110 Nev. 1310, 1316, 885 P.2d 592, 596 (1994). However, numerous appellate courts have found that no "special relationship" (*e.g.*, fiduciary, confidential, or otherwise) exists between a cigarette manufacturer (like PM USA) and a consumer (like Mrs. Camacho) as a matter of law. *See, e.g.*, *Prentice v. R.J. Reynolds Tobacco Co.*, SC20-291, 2022 WL 805951, at *6 (Fla. Mar. 17, 2022)

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(holding that a plaintiff in a smoking-and-health case must prove detrimental reliance on a defendant's false statement and not reliance on "silence," in part, because tobacco companies have no "free standing disclosure obligation" including a "confidential or fiduciary relationship" to a plaintiff); *Burton v. R.J. Reynolds Tobacco Co.*, 397 F.3d 906, 911–12 (10th Cir. 2005) (holding that "a buyer/seller relationship does not create a fiduciary duty" and "we do not believe that Kansas would extend . . . fraudulent concealment claims against a manufacturer of cigarettes"); *Jeter v. Brown & Williamson Tobacco Corp.*, 113 F. App'x 465, 469 (3rd Cir. 2004) (stating that "no fiduciary relationship or confidential relationship exists between a manufacturer of cigarettes and consumers of cigarettes, which gives rise to a duty to speak or disclose information"). This smoking-and-health case is no exception, as the record contains no factual justification for concluding otherwise here.

But even if there were a special relationship between PM USA and Mrs. Camacho, PM USA is still entitled to summary judgment on Plaintiffs' negligence claim predicated on a failure to warn theory because there is no evidence that any failure to warn harmed Mrs. Camacho. "In Nevada, it is well-established law that in strict product liability failure-to-warn cases, the plaintiff bears the burden of production and must prove, among other elements, that the inadequate warning caused his injuries." *Rivera v. Philip Morris, Inc.*, 125 Nev. 185, 187, 209 P.3d 271, 273 (2009). A plaintiff likewise has a burden to prove that a defendant's breach of duty (*i.e.*, failure to warn) was the proximate cause of his or her injury. *Perez v. Las Vegas Med. Ctr.*, 107 Nev. 1, 4, 805 P.2d 589, 590–91 (1991). In other words, Plaintiffs must prove that but for PM USA's failure to warn Mrs. Camacho of a danger of smoking cigarettes, she would not have suffered harm.

Moreover, because any claim that PM USA failed to warn Mrs. Camacho about the health risks of smoking after July 1, 1969 is expressly preempted by the Federal Cigarette Labeling and Advertising Act, *see* 15 U.S.C. §§ 1331, *et. seq.*, Plaintiffs must show that a failure to warn by PM USA *before* July 1, 1969 caused Mrs. Camacho's injuries. Plaintiffs cannot do so here since it is undisputed that Mrs. Camacho did not smoke a cigarette manufactured by PM USA until ***1990***—decades after July 1, 1969. As a matter of law, any alleged failure to warm by PM USA could not have harmed Mrs. Camacho, and Plaintiffs' claim is necessarily federally preempted. In other

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words, absent evidence that Mrs. Camacho actually used PM USA's product (*i.e.*, cigarettes) before July 1, 1969, Plaintiffs' failure to warn theory fails for lack of a nexus between PM USA's product and Mrs. Camacho's alleged harm. *See Allison v. Merck & Co.*, 878 P. 2d 948, 952 (1994) (a plaintiff may only recover against the manufacturer of the product that caused the alleged injury in a product liability lawsuit); *Moretti v. Wyeth, Inc.*, No. 2:08-CV-00396-JCMGWF, 2009 WL 749532, at *3–4 (D. Nev. Mar. 20, 2009) ("[a]mong manufacturers of products, liability rests only with the manufacturer of the product that actually caused the alleged injury because that manufacturer profited from sales of the product and controlled its safety.") (citing *Allison*, 878 P.2d at 952); *see also Baymiller v. Ranbaxy Pharms., Inc.*, 894 F. Supp. 2d 1302, 1309–11 (D. Nev. 2012) (relying on *Moretti* and granting summary judgment in defendant's favor on plaintiff's fraud and negligent misrepresentation claims because plaintiff "did not purchase or ingest a Glaxo product.").[11]

Accordingly, PM USA is entitled to summary judgment on Plaintiffs' negligence claim to the extent it is based on any failure to warn.

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[11] Even if Plaintiffs' failure to warn theory were not federally preempted, it would substantively fail for want of causation as the undisputed record evidence makes clear that warnings had been on every pack of cigarettes Mrs. Camacho bought and smoked for **24 years** as of 1990 (when she smoked her first PM USA brand cigarette) and PM USA publicly admitted in 2000 that cigarettes are addictive and cause cancer and other diseases. Yet, Mrs. Camacho chose to smoke anyway in the face of these warnings.

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CONCLUSION

Because Plaintiffs cannot prove the essential elements of their negligence claims against PM USA, this Court should grant summary judgment and enter judgment in favor of PM USA on those claims.

Dated this 25th day of May, 2022.

/s/ Howard J. Russell

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CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of May, 2022, a true and correct copy of the foregoing **DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT ON PLAINTIFFS' NEGLIGENCE CLAIM** was electronically filed and served on counsel through the Court's electronic service system pursuant to Administrative Order 14-2 and N.E.F.C.R. 9, via the electronic mail addresses noted below, unless service by another method is stated or noted:

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WEINBERG WHEELER HUDGINS GUNN & DIAL

Exhibit A

1 DISTRICT COURT

2 CLARK COUNTY, NEVADA

3 SANDRA CAMACHO, individually, and)
ANTHONY CAMACHO, individually,)
4)
Plaintiffs,)
5 vs.)Case No.
)A-19-807650-C
6 PHILIP MORRIS USA INC., a foreign)
corporation; R. J. REYNOLDS TOBACCO)
7 COMPANY, a foreign corporation,)
individually, and as successor-by-)
8 merger to LORILLARD TOBACCO COMPANY)
and as successor-in-interest to the)
9 United States tobacco business of)
BROWN & WILLIAMSON TOBACCO)
10 CORPORATION, which is the)
successor-by-merger to THE AMERICAN)
11 TOBACCO COMPANY; LIGGETT GROUP,)
LLC, a foreign corporation; ASM)
12 NATIONWIDE CORPORATION d/b/a)
SILVERADO SMOKES & CIGARS, a)
13 domestic corporation; and LV SINGHS)
INC. d/b/a SMOKES & VAPORS, a)
14 domestic corporation; DOES I-X; and)
ROE BUSINESS ENTITIES XI-XX,)
15 inclusive,)
Defendants.)
16 _____)

17 VIDEOTAPED DEPOSITION OF SANDRA CAMACHO

18 VOLUME II

19 Taken on Wednesday, November 3, 2021

20 Through a translator

21 By a Certified Stenographer and Legal Videographer

22 At 9:04 a.m.

23 At 531 Morning Mauve Avenue

24 Las Vegas, Nevada

25 Reported by: HOLLY LARSEN, CCR 680, CA CSR 12170

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GIAN SAPIENZA, Legal Videographer
DWAYNE PARRETTE, Translator/Reader
ANTHONY CAMACHO

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P R O C E E D I N G S

THE VIDEOGRAPHER: This begins the video-recorded deposition of Sandra Camacho taken on Wednesday, November 3, 2021, at 9:04 a.m. This deposition is being held at 531 Morning Mauve Avenue, Las Vegas, Nevada 89183, entitled Sandra and Anthony Camacho versus Philip Morris USA Inc., et al., in the District Court, Clark County, Nevada. Case Number A-19-807650-C.

My name is Gian Sapienza with Certified Legal Videography. The court reporter is Holly Larsen with Oasis Reporting Services.

Will the attorneys please state your name and affiliation for the record.

MS. WALD: Kimberly Wald from Kelley Uustal on behalf of the plaintiff.

MS. KENYON: Jennifer Kenyon on behalf of Philip Morris USA.

MR. JACKSON: Brian Jackson on behalf of Philip Morris USA.

MS. LUTHER: Kelly Luther on behalf of Liggett Group, LLC.

MS. HENNINGER: Ursula Henninger on behalf of R. J. Reynolds Tobacco Company.

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THE VIDEOGRAPHER: Thank you. The court reporter will now administer the oath.

(The witness and translator previously sworn.)

EXAMINATION (Continued)

BY MS. KENYON:

Q. Good morning, Mrs. Camacho. How are you? Are you doing okay?

A. Yes.

Q. So same procedures as yesterday. You've got your answer sheets in front of you. Dwayne over here is going to read your answers if you point to it, and if you need to explain more, you have the whiteboard. Sound good?

A. Yes.

Q. Do you feel rested and ready to go today?

A. Yes.

Q. Yesterday we were talking a little bit about your two sisters. They're both living; right?

A. Yes.

Q. So we'll start with Donna. Does that sound good?

A. Okay.

Q. She was born in 1944. Does that sound

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not to smoke?
A. No.
Q. Did John ever talk with you about your smoking?
A. No.
Q. Did he ever ask you to quit smoking?
A. No.
Q. Did he ever tell you anything about the health risks of smoking?
A. No.
Q. Does John have any health issues?
A. No.
Q. What does he do for a living?
A. Work at Supreme for his father.
Q. If I'm recalling correctly, is that Supreme Lobster or Seafood?
A. Yes.
Q. Does John have any children?
A. Yes.
Q. How many?
A. One.
Q. What is his or her name?
A. I do not remember.
Q. Are you doing okay? Do you need to take a minute? It's okay. We can take a minute if you

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want.
MS. WALD: You're okay to keep going? You're okay?
THE WITNESS: (Inaudible response.)
MS. WALD: You're okay?
THE WITNESS: (Inaudible response.)
MS. KENYON: Just for the record she said that she was okay to proceed.
THE WITNESS: Yes.
BY MS. KENYON:
Q. We'll talk about your daughter Laura. Sound good?
A. Yes.
Q. She was your second child. She was born in 1969; is that right?
A. Yes.
Q. Has your daughter Laura ever been a smoker?
A. Yes.
Q. When did she start smoking?
A. I do not remember.
Q. How did you find out she was smoking?
A. I do not remember. I do not know.
Q. What did you do when you found out that Laura was smoking?
A. Nothing.

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Q. Did you tell her that she should not smoke?
A. No.
Q. Why not?
A. Please repeat the question.
Q. I'll ask a little bit different question. When Laura was a child, when she was growing up, did you ever tell her not to smoke?
A. No.
Q. When she was in school, did she ever learn about the health risks of smoking?
MS. WALD: Object to form.
You can answer.
THE WITNESS: I do not remember.
BY MS. KENYON:
Q. Did she ever talk to you about the health risks of smoking?
A. No.
Q. Do you know -- strike that.
What brand of cigarette did Laura smoke?
A. Marlboro Light.
Q. Did you ever share cigarettes with your daughter Laura?
A. Yes.
Q. How often?
A. Often.

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Q. Was Marlboro Light always her -- strike that.
Was Marlboro Light the only brand you recall her smoking?
A. Yes.
Q. Has she quit smoking?
A. No.
Q. Have you ever discussed quitting smoking with your daughter Laura?
MS. WALD: Form.
THE WITNESS: Maybe once.
BY MS. KENYON:
Q. Can you tell me what you recall?
A. Please repeat the question.
Q. You said that you discussed quitting smoking with your daughter Laura. You discussed it with her. Is that what you're saying?
A. Yes.
Q. Can you tell me what you -- did you tell her something?
A. I told her I want to quit smoking. Don't like smell and expensive.
MS. WALD: Sandra, make sure you're listening to the question. I think she's asking you something different. Just make sure you listen to

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1 correct.
2 MS. WALD: Don't ask Tony. It's okay.
3 THE WITNESS: I don't remember when I
4 retired.
5 BY MS. KENYON:
6 Q. That's not a problem. We've gone over now
7 a couple of dates in your interrogatory responses.
8 And so I guess I'm just trying to figure out a
9 couple things, where this information even came from
10 and then what information is actually correct.
11 MS. WALD: Is there a question?
12 MS. KENYON: Yeah. There's two.
13 BY MS. KENYON:
14 Q. Where did this information come from?
15 A. Me and Tony.
16 Q. And you provided us with the second amended
17 interrogatory responses on Monday of this week, so
18 November 1st, so two days ago. And are you telling
19 me now that you don't remember where this
20 information came from?
21 MS. WALD: Object to form. Asked and
22 answered. She just answered that it came from her
23 and Tony. And she just mouthed her husband. She
24 mouthed "me and Tony."
25 THE WITNESS: Me and Tony.

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1 BY MS. KENYON:
2 Q. But you don't know when you retired then?
3 MS. WALD: Form. Asked and answered.
4 THE WITNESS: No.
5 BY MS. KENYON:
6 Q. Why did you stop working?
7 A. Had spur on foot.
8 Q. Did you see a doctor for that?
9 A. Yes.
10 Q. Do you recall who you saw?
11 A. No. Foot doctor.
12 Q. Do you know what treatment the doctor
13 recommended?
14 A. Got shot in foot.
15 Q. Like a cortisone shot?
16 A. Yes.
17 Q. Did you ever try to go back to work at any
18 point?
19 A. No.
20 Q. Did the spur in your foot heal?
21 A. It never goes away, a spur.
22 Q. So you're saying a foot spur never goes
23 away?
24 MS. WALD: Can you point?
25 ///

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1 BY MS. KENYON:
2 Q. Is that correct?
3 A. Correct. Only surgery.
4 Q. Does it still bother you today?
5 A. No.
6 Q. Did your doctor ever tell you the cause of
7 your foot spur?
8 A. No.
9 Q. Did a doctor ever tell you to lose weight
10 or to increase your exercise to try to eliminate
11 some of the pain from the foot spur?
12 A. No.
13 Q. Going back to what we were just talking
14 about a moment ago, do you remember the tobacco
15 companies on the news before the late '80s or early
16 '90s?
17 MS. WALD: Object to form.
18 BY MS. KENYON:
19 Q. Do you recall the tobacco companies on the
20 news before the late '80s or early '90s?
21 MS. WALD: Write it down.
22 THE WITNESS: Billboard, magazine.
23 BY MS. KENYON:
24 Q. What does that mean?
25 A. I saw cigarette advertising.

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1 Q. That's not what I'm asking you. I'm asking
2 you if you ever saw the tobacco companies on the
3 news before the late '80s or early '90s.
4 A. I do not remember.
5 Q. Are you done?
6 A. Yes.
7 Q. Have you ever filed a workers' compensation
8 claim?
9 A. No.
10 Q. Have you otherwise been injured at work?
11 A. No.
12 Q. Are you doing okay?
13 A. (Inaudible response.)
14 Q. You told us you first smoked in 1964 when
15 you were 18 years old. How did you get that first
16 cigarette?
17 MS. WALD: Don't scratch. It's bad. I
18 know it's itchy, but don't scratch. Try not to
19 scratch. He's getting medicine. Why don't you
20 repeat the question.
21 MS. KENYON: Can we go off the record?
22 THE VIDEOGRAPHER: The time is 12:23. We
23 are going off the record.
24 (A break was taken.)
25 THE VIDEOGRAPHER: The time is 12:35. We

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are going back on the record.
BY MS. KENYON:
Q. Mrs. Camacho, we're back. Are you ready to go?
A. Yes.
Q. Are you feeling okay?
A. Yes.
Q. So right before we took a break, I'd asked you to -- how did you get your first cigarette?
A. My girlfriend.
Q. Do you recall her name?
A. No.
Q. Do you know what brand the first cigarette was?
A. L&M.
Q. Why did you choose that brand?
A. Because I thought they were safe.
Q. Where did you get that information?
A. I saw billboards, magazines, and I wanted filter cigarettes. I thought they were safer than nonfilter I thought it was.
Q. And I'm asking about the very first cigarette you smoked. So did you ever -- so the very first cigarette you smoked was a filtered cigarette; is that right?

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A. Yes.
Q. Did you ever smoke an unfiltered cigarette?
A. Tried it. Didn't like.
Q. What did you not like about an unfiltered cigarette?
A. The tobacco stuck in my mouth.
Q. Do you remember the brand of unfiltered cigarette you smoked?
A. No.
Q. Do you recall when you tried an unfiltered cigarette?
A. The other girl smoked, and I took a puff of hers. Nonfilter.
Q. Is this the same girl you were referring to earlier? Is this the girlfriend that you had your first cigarette with?
A. There were three or four girls.
Q. Three or four girls when you had your very first cigarette?
MS. WALD: Point.
THE WITNESS: Yes.
BY MS. KENYON:
Q. I want to go back to that, but I want to ask you some questions about what you just said about L&M. You said that --

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MS. WALD: Erase the whiteboards.
BY MS. KENYON:
Q. You said that you did not like the unfiltered cigarette because you got tobacco on your lips; is that right?
MS. WALD: Object to form.
Mischaracterizes the testimony. She said "mouth."
THE WITNESS: Yes.
BY MS. KENYON:
Q. And because you did not like the tobacco from the unfiltered cigarette on your mouth, you smoked a filtered cigarette.
A. (Inaudible response.)
MS. WALD: Wait for the question.
BY MS. KENYON:
Q. You're mouthing "taste"?
MS. WALD: Write it down. Write it down.
THE WITNESS: Didn't like the taste. Nonfilter.
BY MS. KENYON:
Q. So is the very first cigarette you smoked, was it an unfiltered cigarette?
A. No.
Q. So where did you get the first cigarette that you smoked?

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MS. WALD: Form. Asked and answered.
MS. KENYON: Just so the record is clear, she's changing her testimony.
MS. WALD: The record is perfectly clear, and she has not changed her testimony.
THE WITNESS: From my girlfriend.
BY MS. KENYON:
Q. And what brand did your girlfriend give you?
MS. WALD: Object to form. Asked and answered.
THE WITNESS: L&M.
BY MS. KENYON:
Q. What was your reaction to smoking the first cigarette?
A. I cough.
Q. Did you like it?
MS. WALD: Form.
THE WITNESS: No.
BY MS. KENYON:
Q. So you said you smoked L&M because you thought it was safer?
A. Yes.
Q. Safer in what way?
A. Less nicotine.

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A. I do not remember.
Q. Did they allow smoking inside their home?
A. I don't know.
Q. Did you ever smoke in their home?
MS. WALD: Object to form. Asked and answered.
THE WITNESS: I do not remember.
BY MS. KENYON:
Q. You mentioned that your father smoked Lucky Strikes. Were those filtered or unfiltered?
A. Unfilter.
Q. Did you ever smoke one of his Lucky Strikes?
A. No.
Q. Did your father always smoke an unfiltered Lucky Strike?
A. Yes.
Q. Your mother smoked Pall Mall. Was it filtered or unfiltered?
A. Unfilter.
Q. Did you ever smoke one of her Pall Mall cigarettes?
A. No.
Q. You said that the first brand that you smoked was L&M. You said you started smoking L&M in

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1964. How long did you smoke L&M for?
A. Till I moved here. Hard to find L&M.
Q. Can you -- did you smoke any other brands from 1964 until you moved to Vegas in 1990?
A. No.
Q. Can you describe what the pack of L&Ms looks like?
A. Red and white.
Q. Do you recall any writing or pictures on the pack of the L&M?
A. I do not remember.
Q. Was it menthol or regular?
A. Regular.
Q. Were they regular length, or were they longer cigarettes?
A. Regular length.
Q. Can you describe what the actual cigarette looks like? The actual L&M cigarette, can you describe what it looked like?
A. White.
Q. And if you ran out of an L&M, would you smoke someone else's cigarette?
A. Never ran out.
Q. You told us earlier that you switched to Marlboro when you moved to Vegas because the L&M was

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hard to find. Can you tell me what the pack of Marlboro looked like?
A. Red and white I think.
Q. Do you recall any markings or any words or anything on the Marlboro cigarette pack?
A. No.
Q. Were they menthol or regular?
A. Regular.
Q. And can you describe for me what the cigarette, what the Marlboro cigarette looked like?
A. White.
Q. The whole cigarette, you just recall it being white?
A. I do not remember.
Q. How long did you smoke Marlboro?
A. Until they got expensive.
Q. And then what did you switch to? What brand did you switch to?
A. Basic.
Q. So at some point when the Marlboro got too expensive, you switched to Basic cigarettes; is that right?
A. Yes.
Q. That's the -- strike that.
On the Marlboro, I think you already told

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us you only smoked it filtered. So was the Marlboro a filtered cigarette?
A. Yes.
Q. Why did you smoke the Marlboro filtered cigarette?
A. Couldn't find L&M.
MS. WALD: We're not cold. It's okay. Are you cold? You have a jacket.
BY MS. KENYON:
Q. Besides being less expensive, is there any other reason you switched from Marlboro to Basic?
A. No.
Q. So I want to talk about the Basic cigarettes a little bit as well. How long did you smoke Basic cigarettes?
A. Till I was told I had cancer.
Q. Just so I'm clear, the information we have -- the information that you provided us shows that you quit in 2017 and that you were diagnosed with cancer in 2018.
MS. WALD: Write it down. Write it down.
THE WITNESS: Had no choice. I had to stop after biopsy showed cancer.
BY MS. KENYON:
Q. Do you know when that was?

DISTRICT COURT

CLARK COUNTY, NEVADA

SANDRA CAMACHO, individually, and ANTHONY CAMACHO, individually,	CASE NO.: A-19-807650-C
Plaintiffs,	
vs.	
PHILIP MORRIS USA INC., a foreign corporation; R. J. REYNOLDS TOBACCO COMPANY, a foreign corporation, individually, and as successor-by-merger to LORILLARD TOBACCO COMPANY and as successor-in-interest to the United States tobacco business of BROWN & WILLIAMSON TOBACCO CORPORATION, which is the successor-by-merger to THE AMERICAN TOBACCO COMPANY; LIGGETT GROUP, LLC, a foreign corporation; ASM NATIONWIDE CORPORATION d/b/a SILVERADO SMOKES & CIGARS, a domestic corporation; and LV SINGHS INC. d/b/a SMOKES & VAPORS, a domestic corporation; DOES I-X; and ROE BUSINESS ENTITIES XI-XX, inclusive,	DEPOSITION OF SANDRA CAMACHO VOL. III
Defendants.	DEPOSITION OF SANDRA CAMACHO VOLUME III

Taken on Tuesday, December 7, 2021
At 9:06 a.m.
Las Vegas, Nevada

Reported By: Karen L. Jones, CCR NO. 694

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VIDEOTAPED DEPOSITION OF SANDRA CAMACHO
VOLUME III
Taken on Tuesday, December 7, 2021
Through a translator
By a Certified Stenographer
At 9:06 a.m.
At 531 Morning Mauve Avenue
Las Vegas, Nevada

Reported By: Karen L. Jones, CCR NO. 694

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Also Present:
Gian Sapienza, Legal Videographer
Dwayne Parrette, Translator/Reader
Anthony Camacho

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I N D E X

WITNESS: SANDRA CAMACHO

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BY: Ms. Kenyon	190

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P R O C E E D I N G S
* * * * *

THE VIDEOGRAPHER: This begins the video recorded deposition of Sandra Camacho Volume III taken Tuesday, December 7th, 2021, at 9:06 a.m. The deposition is being held at 531 Morning Mauve Avenue, Las Vegas, Nevada 89183, titled Sandra Camacho and Anthony Camacho versus Philip Morris et al., in the District Court, Clark County, Nevada, Case Number A-19-807650-C.

My name is Gian Sapienza with Certified Legal Videography. The court reporter is Karen Jones with Oasis Reporting Services.

Will the attorneys please state your name and affiliation for the record.

MS. WALD: Kimberly Wald from Kelley Uustal on behalf of the Plaintiff Sandra Camacho.

MS. KENYON: Jennifer Kenyon on behalf of Philip Morris USA.

MS. HENNINGER: Ursula Henninger on behalf of R. J. Reynolds Tobacco Company.

MS. LUTHER: Kelly Luther on behalf of Liggett Group, LLC.

THE VIDEOGRAPHER: Thank you. The court reporter will now administer the oath.

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BY MS. KENYON:
Q. How many cigarettes a day did you smoke when you lived in the Chicago area?
A. I do not know. A lot. Don't know how many.
Q. What does "a lot" mean?
A. Every half-hour.
Q. Do you know how many cigarettes a day that would be?
A. I do not know.
Q. Do you know how many cigarettes are in a pack of cigarettes?
A. I do not remember.
Q. How many cigarettes a day did you smoke when you moved to Las Vegas?
A. I worked -- I worked up to two packs a day.
Q. When you lived in Las Vegas, were you still smoking one cigarette every half-hour?
A. Yes.
Q. What time did you typically wake up in the morning?
MS. WALD: Form. Asked and answered.
THE WITNESS: 5:00, sometime 4:00.
///

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BY MS. KENYON:
Q. And what time would you typically go to bed at night?
A. 12:00 or 1:00.
Q. How many cigarettes a day were you smoking when you quit?
MS. WALD: Form.
THE WITNESS: Two packs.
BY MS. KENYON:
Q. Are you familiar with the term "chain smoker"?
A. Yes.
Q. How would you define "chain smoker"?
A. Light one after another.
Q. Did you consider yourself a chain smoker at any point?
A. Yes.
Q. When?
A. With friends.
Q. What friends?
A. I do not remember. Chicago.
Q. Did you ever chain smoke once you moved to Las Vegas?
A. Not really.
Q. So would you get together with friends

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and -- did your friends also smoke?
A. Chicago.
Q. Right. Did your friends also smoke?
Yeah.
A. Here (indicating)?
Q. You said with friends in Chicago?
A. I do not remember. School friends.
Q. So how old were you?
A. 17 or 18, and don't remember how long.
Q. Well, we know from your interrogatory responses and your prior testimony that you did not start smoking until you were 18; is that correct?
A. Correct.
Q. So did you actually ever light one cigarette off of another?
MS. WALD: Form. Asked and answered.
BY MS. KENYON:
Q. Go ahead and answer.
A. Yes.
Q. Do you know whether it was one time that you did that?
A. Few times.
Q. What does a "few times" mean?
A. More than ten or more.
Q. Would you just do that when you were

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with your girlfriends?
A. Yes.
Q. Did you enjoy socializing and smoking with your girlfriends?
MS. WALD: Form.
THE WITNESS: My first cig I did because it was the cool thing to do then.
BY MS. KENYON:
Q. My question is a little bit different.
Did you enjoy socializing and smoking with your girlfriends?
A. No.
Q. Then why did you do it?
A. Because I was addicted to them.
Q. When do you think you were first addicted to cigarettes?
A. After the first hour. Because I wanted more.
Q. Are you saying you were addicted after your first cigarette?
MS. WALD: Form. Asked and answered.
THE WITNESS: Yes.
BY MS. KENYON:
Q. When did you first learn that cigarette smoking could be addictive?

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A. I do not remember.
Q. What does it mean to you to be addicted to cigarettes?
A. To want one after another.
Q. Being addicted doesn't mean that a smoker cannot quit, correct?
MS. WALD: Form.
THE WITNESS: I tried many times to quit.
BY MS. KENYON:
Q. And you did, in fact, permanently quit over four years ago, correct? And you did, in fact, quit permanently over four years ago, correct?
A. Yes. It will be four years ago I quit because of cancer.
Q. Regardless, you did permanently quit, correct?
MS. WALD: Object to form. Asked and answered.
It's okay, Sandra. Sandra, relax. It's okay. It's okay. Calm down. Just answer the question.
THE WITNESS: Yes.
BY MS. KENYON:
Q. Even though you believed you were

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addicted, you quit?
MS. WALD: Form. Argumentative. Asked and answered. We're not going to keep going down this line. We know she quit.
BY MS. KENYON:
Q. You can go ahead and answer.
Even though you believed you were addicted, you did quit, correct?
A. Tried.
Q. You're not currently smoking.
MS. WALD: And now you're just being argumentative and harassing this witness. We know she quit. She has cancer. That's clear in the testimony. You can't keep harassing the client right now. So I ask you to move on.
MS. KENYON: I just want an answer to my question. And you know the case law as well as I do. Please just object to form and stop trying to coach your witness.
MS. WALD: I'm not trying to coach my witness. You're harassing her right now by beleaguering her with the same questions over and over. We know she is not smoking.
BY MS. KENYON:
Q. You can go ahead and answer my question.

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Can you please read back my question.
(The record is read by the reporter.)
MS. KENYON: Off the record.
(A recess is taken.)
MS. KENYON: We can go back on the record.
THE VIDEOGRAPHER: I'm sorry. We didn't leave record on video.
MS. WALD: It's fine. We can stay on the video.
BY MS. KENYON:
Q. Even though you believe you were addicted, you did permanently quit smoking, correct?
MS. WALD: Write it down or just point. She's just asking if you quit smoking. So point.
THE WITNESS: Yes.
BY MS. KENYON:
Q. You told us that your sister Donna quit smoking. Do you recall that?
MS. WALD: Form. Asked and answered.
BY MS. KENYON:
Q. Do you think Donna was addicted when she quit smoking?
A. I do not know. I do not remember.
MS. LUTHER: She has to go to the

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bathroom.
MS. WALD: You have to go bathroom? We can take a break. You can go off the video.
THE VIDEOGRAPHER: The time is 9:52. We are going off the record.
(A recess is taken.)
THE VIDEOGRAPHER: The time is 10:00 o'clock a.m. We are back on the record.
BY MS. KENYON:
Q. Are you ready to go?
A. Yes.
Q. Have you heard of people being addicted to other things?
MS. WALD: Form.
BY MS. KENYON:
Q. Like food or gambling?
A. I do not know.
Q. Do you believe that you were addicted to anything other than smoking?
A. No.
Q. What did you enjoy about smoking over the years?
MS. WALD: Form. Mischaracterizes testimony.
THE WITNESS: Did not enjoy smoking.

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A. I do not remember.
Q. When's the last time you went on a plane ride?
A. Almost four years ago.
Q. Where was the last flight you took? Where did you go?
A. L.A.
Q. Who did you go with?
You can erase that.
A. Tony, daughter.
Q. What did you go to L.A. for?
A. Surgery.
Q. Did you smoke on that flight?
A. No.
Q. Prior to that, what is the last flight you took?
A. I do not remember.
Q. Did you and Tony ever go on vacation together?
A. I do not remember.
Q. Besides the flight four years ago, has there been any other times where you've taken a plane somewhere?
MS. WALD: Form.
THE WITNESS: Home to see family.

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BY MS. KENYON:
Q. To the Chicago area?
A. Yes.
Q. When's the last time you flew home to see family?
A. I do not remember.
Q. How many times have you flown home to see family?
A. I do not remember.
Q. Was it one time?
A. I do not know. I do not remember.
Q. Switching gears a little bit. Did you ever try a low-nicotine cigarette?
A. No.
Q. Did you ever try a denicotinized cigarette? Have you ever tried a denicotinized or nicotine-free cigarette?
A. No.
Q. Why not?
A. Never heard of that.
Q. Why did you not try a low-nicotine cigarette?
A. I do not remember. I do not know.
Q. Did you ever smoke cigars?
A. No.

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Q. Why not?
A. For a man.
Q. Did you ever try a cigar?
A. No.
Q. Have you ever used any other form of tobacco?
A. What form?
Q. Have you ever used any other types of tobacco or form of tobacco like a pipe or chew?
A. No.
Q. Have you ever used an e-cigarette?
A. Yes.
Q. When?
A. The times I tried to quit.
MS. KENYON: Off the record.
(A recess is taken.)
BY MS. KENYON:
Q. Are you ready to go?
A. Yes.
Q. How many times have you used e-cigarettes in an effort to quit?
A. I do not remember. A lot.
Q. What does a lot mean?
A. Every time I tried to quit.
Q. When is the first time you used an

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e-cigarette to try to quit?
A. I do not remember.
Q. Why did you decide to use an e-cigarette?
A. I tried everything.
Q. But sticking with the e-cigarettes, why did you decide to use e-cigarettes to quit?
A. I do not remember.
Q. What brand did you use? What brand of e-cigarette did you use?
A. I do not remember.
Q. How often did you use it?
MS. WALD: Write it down.
THE WITNESS: Every time I tried to quit.
BY MS. KENYON:
Q. When is the first time you tried to quit smoking?
A. Sometime in the '90s.
Q. Why did you try to quit sometime in the '90s?
A. It was a habit and cigs were getting expensive.
Q. What brand were you smoking the first time you tried to quit?

DISTRICT COURT

CLARK COUNTY, NEVADA

SANDRA CAMACHO, individually, and ANTHONY CAMACHO, individually,

Plaintiffs,

vs.

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

Defendants.

CASE NO.: A-19-807650-C

VIDEOTAPED DEPOSITION OF

SANDRA CAMACHO

VOLUME IV

Taken on Wednesday, December 8, 2021
At 9:04 a.m.
Las Vegas, Nevada

Reported By: Karen L. Jones, CCR NO. 694

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DEPOSITION OF SANDRA CAMACHO
VOLUME IV
Taken on Wednesday, December 8, 2021
Through a translator
By a Certified Stenographer
At 9:04 a.m.
At 531 Morning Mauve Avenue
Las Vegas, Nevada

Reported By: Karen L. Jones, CCR NO. 694

247

APPEARANCES:
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Also Present:

Gian Sapienza, Legal Videographer
Dwayne Parrette, Translator/Reader
Anthony Camacho

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Exhibit 2	Marlboro Advertisements	326
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Exhibit 4	Video Clip of Commercial	362

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PROCEEDINGS
*****

THE VIDEOGRAPHER: This begins the video recorded deposition of Sandra Camacho, Volume IV, Wednesday. December 8th, 2021, at 9:04 a.m.

This deposition is being held at 531 Morning Mauve Avenue, Las Vegas, Nevada 89183, entitled Sandra and Anthony Camacho versus Philip Morris, et al., in the District Court, Clark County, Nevada, Case Number A-19-807650-C.

My name is Gian Sapienza with Certified Legal Videography. The court reporter is Karen Jones with Oasis Reporting Services.

Will the attorneys please state your name and affiliation for the record.

MS. WALD: Kimberly Wald from Kelley Uustal on behalf of the Plaintiff Sandra Camacho.

MS. KENYON: Jennifer Kenyon on behalf of Philip Morris USA.

MS. HENNINGER: Ursula Henninger on behalf R. J. Reynolds Tobacco Company.

MS. LUTHER: And Kelly Luther on behalf of Defendant Liggett Group, LLC.

THE VIDEOGRAPHER: Thank you.

The court reporter will now administer

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MS. KENYON: Form.
THE WITNESS: Magazine.
BY MS. WALD:
Q. How many times did you see advertisements for Basic cigarettes?
MS. KENYON: Form.
THE WITNESS: Lots of times.
BY MS. WALD:
Q. Does that mean you've seen this more than ten times?
MS. KENYON: Form.
THE WITNESS: Yes.
BY MS. WALD:
Q. Were there times growing up in River Grove, Illinois where you saw commercials on television for cigarettes?
A. Yes.
Q. Would it help you if I showed you a video to see if you remembered? Can you point to an answer?
A. Yes. Show me then I probably could remember if you show me.
MS. WALD: I'm going to mark this as Plaintiffs' Exhibit 4. I'll send it to you somehow electronically. It's just the very end for "The

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Call For Philip Morris."
MS. KENYON: Can you play it.
(Video played.)
BY MS. WALD:
Q. Okay, Sandra, I'm going to show you a video, okay? Okay. Wait for me to show you the video.
(Video played.)
A. Yes.
Q. She pointed to yes?
A. Yes.
Q. Seeing this video, do you remember hearing "Call for Philip Morris" on a television growing up?
MS. KENYON: Form.
THE WITNESS: Yes.
BY MS. WALD:
Q. Are these commercials from over 50 years ago that you're remembering?
MS. KENYON: Objection.
MS. LUTHER: Object to the form.
THE WITNESS: Yes.
BY MS. WALD:
Q. I don't have a question, Sandra.
How old were you when you first started

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smoking?
MS. HENNINGER: Objection.
THE WITNESS: 17 or 18.
BY MS. WALD:
Q. Would that have -- would that have been around 1964?
A. Yes.
Q. What brand of cigarette did you first smoke?
A. L&M.
Q. Why did you smoke an L&M cigarette?
A. Because I thought they were safer.
Q. How long after you smoked your first cigarette did it take you to become a regular daily smoker?
A. Soon.
Q. How many packs of cigarettes per day did you smoke throughout your lifetime?
MS. KENYON: Form.
THE WITNESS: Two packs.
BY MS. WALD:
Q. When you were in Chicago, how many packs of cigarettes per day did you smoke?
MS. KENYON: Form.
THE WITNESS: One.

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BY MS. WALD:
Q. When you moved to Las Vegas, how many packs of cigarettes per day did you smoke?
MS. KENYON: Form.
THE WITNESS: Two.
BY MS. WALD:
Q. How many years did you smoke L&M cigarettes?
A. When I was 17 or 18 till 1990.
Q. What brand of cigarette did you switch to in 1990?
A. Marlboro.
Q. How many years did you smoke Marlboro?
A. Ten years. Ten years to 15 years.
Q. You seem to get a little confused during that last question. It took you a while to answer.
MS. HENNINGER: Objection.
MS. KENYON: Form.
BY MS. WALD:
Q. What brand did you smoke after Marlboro?
A. Could not find L&M when I moved here. Then Marlboro was getting expensive. Switched to Basic.
Q. Did you smoke Basic cigarettes for a longer period of time than Marlboro cigarettes?

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A. No.
Q. How long did you smoke Basic cigarettes?
A. I do not remember.
Q. Can you write that down, what you just mouthed?
A. Smoked Basic till cancer.
Q. So I just want to make sure I'm understanding you. When you moved to Vegas, you smoked Marlboro for a few years and then you switched to Basic until you got sick?
MS. KENYON: Form.
MS. LUTHER: Form.
THE WITNESS: Yes.
BY MS. WALD:
Q. When you used to smoke when you woke up in the morning, what was the first thing you would do?
A. Light a cigarette.
Q. How many minutes between waking up until you would light a cigarette?
MS. KENYON: Form.
THE WITNESS: One hour, maybe sooner.
BY MS. WALD:
Q. When you woke up in the morning, how long did it take you until you smoked your first

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cigarette?
MS. KENYON: Form.
MS. LUTHER: Objection.
MS. HENNINGER: Objection.
THE WITNESS: One minute to walk to kitchen.
BY MS. WALD:
Q. You had just written down one hour?
MS. KENYON: Form.
BY MS. WALD:
Q. Right? Can you point?
A. THE WITNESS: No.
Q. So just so we're clear -- Sandra, it's okay. It's okay. Just look at me, okay. It's been a long day. Okay.
MS. KENYON: Form.
BY MS. WALD:
Q. When you woke up in the morning before you did anything else, what would you do?
MS. LUTHER: Form.
MS. KENYON: Form.
BY MS. WALD:
Q. Can you show him?
A. Smoke.
Q. So it wouldn't take you one hour --

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MS. KENYON: Form.
BY MS. WALD:
Q. -- to smoke?
A. No. One hour between cigarettes to smoke another.
Q. Okay. So if I'm understanding you, you would have a cigarette every hour throughout the day?
A. Yes.
Q. That's why you wrote 'one hour' on the board?
MS. LUTHER: Form.
MS. HENNINGER: Form.
MS. KENYON: Form.
THE WITNESS: Yes.
BY MS. WALD:
Q. Before you went to work in the morning, how many cigarettes would you have?
A. Three.
Q. On your drive to work, would you smoke?
A. Yes.
Q. While you were at work, would you take breaks to smoke?
A. Yes.
Q. Would you -- strike that.

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How often would you take breaks at work to smoke?
A. Every chance I get. After taking customer order, went back.
Q. Did you smoke while you cooked dinner?
A. Yes.
Q. If you went to a movie theater, could you sit through the entire movie without smoking?
A. No.
Q. What would you do?
A. Go outside and have one.
Q. Did you ever burn your clothing with cigarettes?
A. Yes.
Q. Did you ever burn the car seat with cigarettes?
A. Yes.
Q. Did you smoke while you were pregnant with John?
A. Yes.
Q. Did you smoke while you were pregnant with Laura?
A. Yes.
Q. Did you smoke around Laura when she was pregnant with her children?

Exhibit B

1 DISTRICT COURT

2 CLARK COUNTY, NEVADA

3 SANDRA CAMACHO, individually, and)
ANTHONY CAMACHO, individually,)
4)
Plaintiffs,)
5 vs.)Case No.
)A-19-807650-C
6 PHILIP MORRIS USA INC., a foreign)
corporation; R. J. REYNOLDS TOBACCO)
7 COMPANY, a foreign corporation,)
individually, and as successor-by-)
8 merger to LORILLARD TOBACCO COMPANY)
and as successor-in-interest to the)
9 United States tobacco business of)
BROWN & WILLIAMSON TOBACCO)
10 CORPORATION, which is the)
successor-by-merger to THE AMERICAN)
11 TOBACCO COMPANY; LIGGETT GROUP,)
LLC, a foreign corporation; ASM)
12 NATIONWIDE CORPORATION d/b/a)
SILVERADO SMOKES & CIGARS, a)
13 domestic corporation; and LV SINGHS)
INC. d/b/a SMOKES & VAPORS, a)
14 domestic corporation; DOES I-X; and)
ROE BUSINESS ENTITIES XI-XX,)
15 inclusive,)
Defendants.)
16 _____)

17

18 DEPOSITION OF ANTHONY CAMACHO

19 VOLUME I

20 Taken on Thursday, November 4, 2021

21 By a Certified Stenographer

22 At 9:00 a.m.

23 At 531 Morning Mauve Avenue

24 Las Vegas, Nevada

25 Reported by: HOLLY LARSEN, CCR 680, CA CSR 12170

2

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For Liggett Group, LLC:
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BY: KELLY ANNE LUTHER, ESQ.
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Miami, Florida 33131
786.587.1045

For R. J. Reynolds Tobacco Company:

KING & SPALDING
BY: URSULA M. HENNINGER, ESQ.
300 South Tryon Street, Suite 1700
Charlotte, North Carolina 28202
704.503.2631

Also Present:
SANDRA CAMACHO

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P R O C E E D I N G S

Whereupon,
ANTHONY CAMACHO,
having been first duly sworn to testify to the truth, was examined, and testified as follows:

EXAMINATION

BY MS. KENYON:
Q. Good morning, Mr. Camacho. I'm Jennifer Kenyon. I'm representing Philip Morris in this case. I've spent the past few days with you here in your home.
How are you feeling this morning?
A. Okay, I guess.
Q. Can you please state your full name for the record.
A. Anthony J. Camacho.
Q. I am wearing a mask. Are you able to hear me okay?
A. Yes.
Q. Able to understand me?
A. Yes.
Q. Off the record you mentioned -- are you vaccinated?
A. Yes. But not the booster. Just the two.

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Q. So you've gotten two COVID-19 vaccinations?
A. Yes.
Q. When did you get those?
MS. WALD: Object to form. Relevance.
THE WITNESS: Do I answer?
MS. WALD: You can answer.
THE WITNESS: Two months ago.
BY MS. KENYON:
Q. Do you know whether your wife, Mrs. Camacho, has been vaccinated?
A. No.
MS. WALD: Object to form.
BY MS. KENYON:
Q. No, she has not been vaccinated?
THE WITNESS: Do I answer?
MS. WALD: You can answer.
THE WITNESS: No, she's not, because of her cancer.
BY MS. KENYON:
Q. Can you explain that?
A. Yeah. Her cancer doctor says that she would be at risk of not being able to survive if she gets the injections. And so he said, "It's your body. I can't tell you what to do. But if it was mine, I wouldn't do it."

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1 everybody started to freak out.
2 Q. Did Mrs. Camacho see that?
3 A. Probably she saw it. We were watching the
4 same news channels all the time.
5 Q. Did you talk to her about it?
6 A. Not really. We just made comments like,
7 "Look, Sandra." But by then we were already so far
8 into the cigarettes and addicted to them that it
9 didn't matter much. Because we were already smoking
10 and hooked, how we gonna kick this habit?
11 Q. Did you try to quit at that time?
12 A. I never did. I was smoking. Somewhere in
13 the middle of 2000 she started doing goofy stuff
14 like throwing cigarettes away or hiding them or --
15 you see, like, Nicorettes.
16 Q. So I'm just trying to ask about you right
17 now.
18 A. Me? I just kept smoking.
19 Q. So you did not try to quit at that time?
20 A. No, ma'am.
21 Q. How do you know you weren't able to quit?
22 A. There were signs there. I was a pretty
23 strong person. Then I thought about it. I kept
24 lighting up.
25 Q. You didn't want to quit?

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1 A. I didn't want to quit. You're right.
2 Q. In 2000 did you talk to Sandra about her
3 needing to quit smoking?
4 MS. WALD: Form.
5 THE WITNESS: Not really. We just kept
6 smoking until this happened. Then we knew we were
7 in trouble.
8 BY MS. KENYON:
9 Q. In 2000 did Mrs. Camacho try to quit
10 smoking?
11 MS. WALD: Form.
12 THE WITNESS: In the middle, multiple times
13 she tried to quit.
14 BY MS. KENYON:
15 Q. Do you recall her quitting when you saw
16 this news story in 2000?
17 A. She never stopped smoking when she saw
18 that. She saw the congressional hearings, but she
19 was already addicted to whatever was in the
20 cigarette. She tried, but she couldn't do it.
21 Q. Did she actually try to quit smoking when
22 you saw this news story in 2000?
23 MS. WALD: Form.
24 THE WITNESS: I don't know that. I can't
25 answer yes or no on that. I don't really know. We

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1 just saw it, and we just went on smoking. I guess.
2 But like, you know, I don't know what to tell you
3 there, ma'am.
4 BY MS. KENYON:
5 Q. Did you ever smoke a different brand from
6 Mrs. Camacho?
7 A. Yeah. When I could afford it, I'd get a
8 pack of Marlboro Lights. They were easier on my
9 throat. But that came to a halt pretty quick
10 because I couldn't afford the money it cost for
11 Marlboro Light. She told me no, too expensive for
12 that. So that was it.
13 Q. Did Mrs. Camacho ever smoke Marlboro Light?
14 A. No. She liked the Marlboro red. She
15 didn't like that smooth inhaling, whatever we were
16 doing at the time.
17 Q. How many packs of Marlboro Lights did you
18 purchase?
19 A. One. One Light. But like I said, it came
20 to a very quick -- I couldn't afford it no more. I
21 tried to buy them, but then I noticed the prices on
22 them, and I stuck with Basic with Sandra.
23 Q. So you only smoked one pack of Marlboro
24 Lights?
25 A. Not in one day. I smoked them, but

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1 whenever I ran out, I'd get another pack. Then she
2 said, "No, no. No more Lights. That's too
3 expensive."
4 Q. So my question then, how many packs of
5 Marlboro Lights did you purchase?
6 A. Well, be specific. In a week, in a day, or
7 a month? And then I can answer. I'm sorry.
8 Q. When you were smoke -- when were you
9 smoking Marlboro Lights?
10 A. Once in a while I would sneak a pack when I
11 could afford to buy one, because they were expensive
12 and she didn't want to see me buying expensive
13 smokes.
14 Q. Was it after you and Mrs. Camacho had
15 switched to Basic?
16 A. Yeah, we were on Basic. But my daughter,
17 Laura, she'd been smoking those Lights, and I used
18 to mooch off of her. When I didn't have my Basics,
19 I used to mooch a few Lights. So then that's when I
20 got to buy them. That's when she put a stop to it.
21 Because Laura smokes Lights.
22 Q. Why did you smoke Marlboro Lights?
23 A. They were easier on my throat.
24 Q. Is that the only reason that you --
25 A. Yeah. I liked the Lights. The Marlboros

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1 were kind of strong for me. I don't know. Maybe I
2 was weak or something.
3 But I noticed when Laura smoked them, like
4 I said, I used to mooch off of her. Then I started.
5 Then again, she put the stop to that. It
6 didn't last very long.
7 Q. Do you know when you and Mrs. Camacho
8 switched from Marlboro to Basic?
9 A. Probably in the middle of 2000 sometime.
10 Because we were going by the not being able to get
11 L&M and then the prices on the Marlboro. Yeah, they
12 didn't last too long. We went right to Basics. It
13 was cheaper, and everybody sold them.
14 Q. How many cigarettes per day were you
15 smoking when you used Marlboro?
16 A. Marlboros? Well, if I had a pack in home
17 here, probably about five a day. But if we went to
18 the casino, kiss that pack goodbye. The excitement
19 of the noises and machines and playing, you know,
20 you get carried away. And then when the pack was
21 gone, I couldn't believe that I went through a pack
22 of smokes. I knew I'd better chill and be careful
23 with all the smoking. But I just kept doing it.
24 Q. Did you enjoy smoking when you were at the
25 casino?

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1 A. Casino, yeah. It was like all the glitter
2 and the machines and everybody smoking. You know,
3 we thought -- it didn't bother us. We were smokers,
4 and we were okay with it. We didn't know we were
5 going to wind up like we did now with all this stuff
6 that went on.
7 Q. Do you have any smoking-related illness?
8 A. Knock on wood, so far I believe I pass all
9 my physicals. I can't walk, like, to get the mail.
10 Just my legs, from the sciatica.
11 Q. But do you have any smoking-related
12 illnesses?
13 A. Not that I know of. I'm not aware of any.
14 Thank God. I don't know. It could change by
15 tomorrow.
16 Q. How many cigarettes a day were you smoking
17 while using Basic?
18 A. Probably about five a day or something like
19 that.
20 Q. When you would smoke Marlboro Lights, did
21 the amount that you smoked in a day change?
22 A. Yeah. The Lights were easier to smoke, so
23 I did increase my smoking. Yeah, that I knew right
24 away. I didn't even want to use Basics. But like I
25 said, again, I couldn't afford it. They were

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1 lighter for some reason, and I did increase it. Go
2 in the yard, in the garage. I said, Uh-oh, these
3 are nice.
4 But like I told you over and over, Sandra
5 said, "No, you can't afford to be buying a pack for
6 yourself too."
7 Q. And you listen to your wife?
8 A. Yeah, 41 years.
9 Q. Did you and Mrs. Camacho like smoking
10 together?
11 A. Yeah.
12 MS. WALD: Form.
13 THE WITNESS: Yeah, we enjoyed it. We'd
14 drink our coffee at the kitchen table and exchange
15 war stories like we always did and -- you know,
16 husband and wife sharing, you know, a moment
17 smoking. That was our way of life. We used to
18 smoke on the table right there (indicating).
19 BY MS. KENYON:
20 Q. So you enjoyed getting up in the mornings,
21 having coffee and smoking a cigarette with
22 Mrs. Camacho?
23 MS. WALD: Form.
24 BY MS. KENYON:
25 Q. You can answer.

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1 A. I didn't really enjoy it. I got up and I
2 had a cigarette. I don't know if it was a habit, if
3 I enjoyed it or not. I got up and I smoked, and I
4 smoked and started feeling good in the morning with
5 my coffee. The next morning I'd repeat the same
6 thing. But I don't know if I enjoyed it. I can't
7 say that I did, and I can't say that I didn't. I
8 kept smoking.
9 BY MS. KENYON:
10 Q. Did you enjoy sitting there with your wife,
11 having your coffee and having your cigarette in the
12 morning?
13 MS. WALD: Form. Asked and answered.
14 You can answer.
15 THE WITNESS: Yeah, we'd sit there and talk
16 and smoke. That was nice. I think I enjoyed the
17 togetherness with her, that we were sharing
18 something.
19 BY MS. KENYON:
20 Q. You mentioned the casinos. Mrs. Camacho
21 told us yesterday you and her would go play penny
22 slots?
23 A. South Point.
24 Q. Is that a "yes," you would go to the
25 casinos and play penny slots?

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A. No vacations.
Q. Are there any other activities that you liked to do together?
A. Let's see. No, ma'am. Probably just going to South Point when we're together all the time. We enjoyed that.
Q. You were here yesterday when I was talking with your wife about her employment history; right?
A. Yes, ma'am.
Q. She worked at Denny's as a waitress and IHOP as a waitress?
A. Yes.
Q. She worked at 7-Eleven and Texaco as a cashier?
A. Yes.
Q. And then she worked as a beautician?
A. Yes.
Q. Do you know what year she retired?
A. No, I don't know that.
Q. Do you know how long after moving to Las Vegas she -- how many years after you moved to Las Vegas she continued to work?
A. Probably -- I don't want to guess. I don't know, ma'am. I'm sorry.
Q. You mentioned a close friend of

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Mrs. Camacho's. I believe her name was Jan?
A. Jan Puccio. Lifelong friend.
Q. Does she still live in the Chicago area?
A. Melrose Park, Illinois.
Q. Earlier you were talking about a congressional hearing that you recall seeing a news story on in the '90s sometime?
A. '80s and '90s. '80s was in Chicago, WGN News, Channel 9. Then the '90s was here, on our system here.
Q. So when you were living in Chicago, did you recall seeing congressional hearings on the news?
A. We just saw news clippings of certain stuff that was going on pertaining to smoking. I don't know if they were congressional hearings or not.
Q. What did you see on the news in the '80s?
A. There was no scientific data about these cigarettes being harmful to your health.
Q. Who was saying that in the '80s?
A. I guess the officials from the tobacco companies.
Q. Are you guessing, or do you --
A. No, I know, because they were interviewing some of them. Like I said, I watched a little bit of it, and then I turned the TV off.

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Q. Right. So are you recalling one instance where you saw this?
A. That was in Chicago or here. I don't recall. But we did see stuff in the '80s in Chicago on our news cable about smoking and how it was okay with the filters and all.
And then over here, I think it was in 2000-something with that congressional hearing when we found out that it was bad for your health.
Q. I thought you said in the '90s you recall a congressional hearing.
A. There was a congressional hearing, I guess, where they drilled the tobacco company executives, and there was all kind of questions. I just changed it. It was too technical for me to listen to so I changed it. I saw part of it. Not all of it.
Q. Was Mrs. Camacho there when you saw that story?
A. Yeah. I think we watched it together. I don't recall, but we always watched the news together at that time.
Q. Did she say, Hey, go back; I want to hear that story?
A. No, not that I recall.
Q. Did you guys discuss anything after you saw

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that story?
A. Not really. Just comments, you know, little comments. What do you think and --
Q. What were the little comments?
A. I don't recall. Just, you know ...
Q. And then in the '80s in Chicago, was Mrs. Camacho present for the news stories on smoking that you saw?
A. I don't know that, because we -- that was in the '80s, and we were just married. I could have saw it by myself and just brushed it off. I don't know if she was with me or not.
Q. Do you know if she saw any news stories on smoking and health in the '80s?
A. I don't know. You would have to ask her.
Q. Do you recall any news stories in the 1980s that said smoking is bad for your health?
A. Only news clippings that it was safe, and there was no scientific data to prove otherwise.
Q. Did Mrs. Camacho ever smoke a light cigarette?
A. No. She stuck with those harder ones like L&M with filters and the red package for Marlboro.
Q. You both smoked filtered cigarettes because you thought they were safer?

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A. No, ma'am.
Q. Why did you keep all the Marlboro gear after you and Sandra quit smoking?
A. I have more, but some of them weren't as good as the bags and the lanterns. So I kept those. Because the lanterns, I always wanted the railroad lanterns, and I kept them. So that. And the bags for traveling, and they're handy for that.
Q. So even though you blame Philip Morris for your wife's injuries, you kept the bags and the lantern?
A. Yeah.
MS. WALD: Object to form.
THE WITNESS: Yeah, I kept them. I don't know -- I just kept them. I earned them, and I kept them. I didn't want to get rid of them.
BY MS. KENYON:
Q. Do you still use the bags today?
A. Yeah. Sometimes I use -- yes, I do.
Q. Do you still use the lantern and the knife?
A. At nighttime, yes.
Q. Did Mrs. Camacho ever look through the Marlboro catalog?
A. Yeah, she would look through it, but she wasn't interested or nothing. I was more interested

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in the catalogs.
Q. When you would have to fill out the order form, was it you that filled them out, or did your wife fill them out?
A. I did, ma'am.
Q. Did you ever fill out an order form on behalf of Mrs. Camacho?
A. No. I would fill out with my information.
Q. Did you continue collecting Marlboro Miles after you switched to Basic?
A. No. We stopped altogether.
Q. So you didn't continue smoking Marlboro because of the promotional program?
A. I couldn't get no more miles and no more jobs where I knew people, so I just gave up on it.
Q. Do you recall there ever being a time where the Marlboro Miles stopped, or the program stopped?
A. I don't know when they stopped, ma'am. I don't know when they stopped.
Q. Were you still smoking Marlboro at that time, or had you switched?
A. Basics.
Q. Do you remember the Marlboro Miles promotion ending?
A. No, I don't know that at all. I don't know

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when it terminated.
Q. Did Mrs. Camacho ever sign up to receive any coupons or promotions from a tobacco company?
A. Not that I know of, ma'am.
Q. Did she ever try a new brand solely because of the coupon or promotion?
A. No.
Q. Did you ever try a new brand solely because of the coupon or promotion?
A. No, ma'am.
Q. Did you ever receive coupons for a brand in the mail?
A. Not that I remember, no.
Q. Did Mrs. Camacho?
A. I don't know that, ma'am.
Q. The order forms you would fill out for the Marlboro merchandise, do you recall anything on the order form?
A. Like items?
Q. Do you recall what the order form said?
A. No. I never paid attention to that. I just pay attention to filling in my information for mailing, checking off on the miles that I'm sending in and the special envelope that I had, and that's all I remember about it. I don't know nothing about

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it. Just from my experience filling it out and making sure they got the right miles.
Q. So you were primarily focused on what you were getting back?
A. Exactly.
Q. You weren't paying attention to what was written on the order form?
A. No, ma'am.
Q. To your knowledge, did Mrs. Camacho ever complete any surveys or sweepstake entries with tobacco companies?
A. No, ma'am.
Q. Have you ever completed any cigarette surveys or sweepstake entries?
A. No, ma'am.
Q. Did you ever complete any cigarette surveys or sweepstake entries on behalf of Mrs. Camacho?
A. No, ma'am.
Q. Did she ever complete any cigarette surveys or sweepstake entries on behalf of you?
A. I don't know that, ma'am.
Q. Did Mrs. Camacho ever try a low-nicotine cigarette?
A. Not that I know of.
Q. Or a de-nicotized cigarette?

Exhibit C

DISTRICT COURT
CLARK COUNTY, NEVADA

SANDRA CAMACHO, individually, and ANTHONY CAMACHO, individually,
Plaintiffs,
vs.
PHILIP MORRIS USA, INC., a foreign corporation; RJ 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; ASM NATIONWIDE CORPORATION d/b/a SILVERADO SMOKES & CIGARS, a domestic corporation; and LV SINGHS INC., d/b/a SMOKES & VAPORS, a domestic corporation; DOES I-X; and ROE BUSINESS ENTITIES XI-XX, inclusive,
Defendants.

CASE NO: A-19-807650-C
DEPT NO: IV

DEPOSITION OF
LAURA PURKETT
LAS VEGAS, NEVADA
WEDNESDAY,
FEBRUARY 16, 2022

REPORTED BY: BRITTANY CASTREJON, RPR, CRR, NV CCR #926
JOB NO: 834115

1 DEPOSITION OF LAURA PURKETT, held at Litigation
2 Services, located at 3960 Howard Hughes Parkway,
3 Suite700, Las Vegas, Nevada 89169, on WEDNESDAY,
4 FEBRUARY 16, 2022, at 8:53 a.m., before
5 Brittany Castrejon, Certified Court Reporter, in and for
6 the State of Nevada.
7
8
9
10 APPEARANCES:
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Q. Where did you get that information?
A. I think it would just be common sense if something is not filtered -- non-filtered versus filtered, you would just think it's safer, that it's filtering out things.
Q. So at the time that you started smoking, did you know that unfiltered cigarettes were not safe?
A. No. I just wouldn't want tobacco in my mouth because they were not filtered. But I would say filtered would just be better for you. You're not getting the tobacco. You would think you're not getting as many chemicals or chemicals with you. I just don't think I could ever smoke a non-filtered. My grandpa smoked non-filtered.
Q. Is that because the unfiltered is too strong or you don't like the tobacco on the lips?
A. Both.
Q. Why did you smoke Marlboro Light and not another -- a different light brand?
A. I think that's the one I started with, and I just stuck with it. I just never -- I've tried, like, a friend's here and there. I just didn't like it.
Q. What did light mean to you?
A. I would say not as strong.
Q. Did you think that a filtered cigarette versus an

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unfiltered cigarette would be completely safe?
A. Safer, yes. Yes, I would say. Anything -- I mean, when you look at filtered water, you think anything filtered would be safer, in my opinion.
Q. But did you think that a filtered cigarette would be completely safe?
A. Yes. Probably. Yeah, I would have to say. It was filtered, so you would think safe. I -- I -- I would say yes. But you can't say completely because you drink non filtered water. But is that safe? No. So, yes, I would think they were safer. Yes.
Q. So at the time that you started smoking a filtered cigarette, you were smoking that, you knew that --
A. I thought they were safer than a non-filtered, yes, than Camel or Pall Mall.
Q. So you new that an unfiltered at that time was not safe?
A. No. I wouldn't say not safe. Just better for you because it was filtered. I wouldn't say -- could I have tried a non-filtered? Yes. But I wouldn't want the tobacco in my mouth. So you think filtered, and you just think safer.
Q. Did you ever think smoking was good for you?
MS. WALD: Form.

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THE WITNESS: No, I never thought of bad or good when I started.
BY MS. KENYON:
Q. At any point, did you think smoking was good for you?
A. I never -- it never really occurred to me that it was good or bad. It was just something that I just got addicted to. I mean, I never thought of it as being good or bad. I mean, if I can quit today, trust me, I would quit today. I want to quit so bad.
Q. Have you smoked a cigarette since we've been here?
A. Yes.
Q. How many?
A. From the time we pulled up, or from the time -- just in here?
Q. From 8:30 to 11:30?
A. Two.
Q. Did your mother ever smoke Marlboro Light?
A. Yes. If she ran out of a cigarette and I had to go get them, she would go out of mine. She didn't like them because they were too light.
Q. How often would that occur?
A. Not that often. She always had cigarettes.
Q. Would you say that happened less than five times?

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A. Yeah. Minimum -- yeah, maximum five times. They were too light for her, my Marlboros.
Q. So at most your mom has only ever smoked five Marlboro Light cigarettes?
A. Yes. She always either had to go get her brand, or she just wouldn't take one of mine. She had to go get them.
Q. Did she ever smoke any light cigarette?
A. No.
Q. Why not?
A. I don't know.
Q. Did you ever encourage your mother to smoke a light cigarette?
A. No.
Sorry. My contacts are cloudy from crying.
Q. That's all right.
How many cigarettes do you smoke a day?
A. Well, it's increased. So I'm going to say a pack, pack and a quarter.
Q. How long has that been the case?
A. Probably more so in the last -- since probably 2019. Yeah, probably 2018, '19.
Q. How many packs per day were you smoking prior to 2018 or 2019?
A. Not even a pack.

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Q. When did she start smoking Basic cigarettes?
A. It was off and on. She switched both. It wasn't just, like, she smoked Basic for ten years. She would smoke both, Marlboro and Basic Full Flavor around the same times. It wasn't like it was specific. It was off and on for both.
Q. How did she decide which brand she was going to smoke at any given time?
A. I think at -- I think as the prices got higher, she may have switched to Basic Full Flavor, but then she went back to Marlboro. I mean, it was just whatever was available out of the two. If she couldn't find Marlboro at a store, if they were out, she would get the Basic Full Flavor. If they didn't have the Basic, she would go with the Marlboro.
Q. What did the pack of Marlboro look like?
A. Red and white.
Q. Do you recall what the cigarette itself looked like?
A. No.
Q. Did she ever tell you why she smoked Marlboro?
A. No.
Q. Was the Marlboro filtered?
A. Yes.
Q. Did she ever tell you why she smoked a filtered

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Marlboro?
A. No.
Q. Did you ever ask her?
A. No.
Q. Did she tell you that she liked the flavor of L&M cigarettes?
MS. WALD: Form.
THE WITNESS: No.
BY MS. KENYON:
Q. Did she ever tell you that she liked the flavor of the Marlboro cigarettes?
MS. WALD: Form.
THE WITNESS: No.
BY MS. KENYON:
Q. And then the Basic that she smoked, what did the pack of Basic cigarettes look like?
A. Red and white.
Q. Do you recall what the cigarette itself looked like?
A. No.
Q. Was the Basic also filtered?
A. Yes.
Q. Did she tell you why she smoked a filtered Basic cigarette?
A. No.

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Q. Did you ever ask her?
A. No.
Q. Did your mom ever smoke a menthol cigarette?
A. Not that I know of. I don't know.
Q. Did your mother ever tell you why she smoked Basic?
A. No.
Q. Did your mother ever smoke a low-tar or low-nicotine cigarette?
A. If a light is low tar, just mine. I don't even know if it's a low tar.
Q. But were any -- none of her brands, her regular brands, the L&M, the basic and the Marlboro --
A. They were all the full. They weren't lights or anything. They were just full strength.
Q. You already told us, I believe, Marlboro Light was never her -- your mother's regular brand?
A. No.
Q. She only smoked --
A. The Marlboro Red.
Q. -- maybe five at most?
A. Yes.
Q. I should say she never smoked more than five cigarettes of Marlboros Lights?
A. Yes. She didn't -- they were too light for her.

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Q. And you're not aware of any low-tar or low-nicotine cigarette that your mom tried?
A. No.
Q. Growing up, do you know how many cigarettes a day your mom would smoke?
A. About a pack. I don't know how many exactly, but I know she would smoke about a pack like me.
Q. How do you know it was about a pack?
A. Because she would buy a carton and by the end of the week -- next week it was gone. I would say about a pack. She was -- I don't think no more than a pack at the time.
Q. Did that amount change at any time?
A. It increased. I noticed her smoking more, yes.
Q. What did it increase to?
A. Probably one to two.
Q. When did it increase?
A. In Vegas. Maybe the last ten years. Maybe eight years, ten years.
Q. Did she typically buy her cigarettes by the carton or the pack?
A. Usually by the pack. Sometimes by the carton. I think -- I don't -- sometimes it was a pack. Sometimes it was a carton. So I would say mostly pack versus carton.

Exhibit D

Page 1

1 DISTRICT COURT

2 CLARK COUNTY, NEVADA

3 SANDRA CAMACHO,)
individually, and ANTHONY)
4 CAMACHO, individually,)
)
5 Plaintiffs,)
) Case A-19-807650-C
6 vs.)
)
7 PHILIP MORRIS USA INC.,)
a foreign corporation;)
8 R.J.REYNOLDS TOBACCO)
COMPANY, a foreign)
9 corporation,)
individually, and as)
10 successor-by-merger to)
LORILLARD TOBACCO COMPANY)
11 and as)
successor-in-interest to)
12 the United States tobacco)
business of BROWN &)
13 WILLIAMSON TOBACCO)
CORPORATION, which is the)
14 successor-by-merger to)
THE AMERICAN TOBACCO)
15 COMPANY; LIGGETT GROUP,)
LLC, a foreign)
16 corporation; ASM)
NATIONWIDE CORPORATION)
17 d/b/a SILVERADO SMOKES &)
CIGARS, a domestic)
18 corporation; and LV)
SINGHS INC. D/b/a SMOKES)
19 & VAPORS, a domestic)
corporation; DOES I-X;)
20 and ROE BUSINESS ENTITIES)
XI-X, inclusive,)
21)
Defendants.)
22
REMOTE DEPOSITION OF DONNA KINSELLA
23 February 10, 2022

24

25

Page 2

The remote deposition of DONNA KINSELLA, called by the Defendants for examination, taken pursuant to the Code of Civil Procedure and the Rules of the Supreme Court of the State of Illinois pertaining to the taking of depositions for the purposes of evidence, taken before Sheri E. Liss, CSR NO. 084-002600, a Certified Shorthand Reporter within and for the State of Illinois, Registered Professional Reporter, Certified Realtime Reporter, on February 10, 2022 at the hour 8:58 o'clock a.m.

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Page 5

I N D E X

DONNA KINSELLA

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Mr. Galvan	297

E X H I B I T S

NO.	DESCRIPTION	MARKED/REFERRED TO
Exhibit 1	Notice of Deposition	39

Exhibits Retained

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1 smoked her first ever cigarette?
2 A. No.
3 Q. Do you know which brand of cigarette
4 Mrs. Camacho's first ever cigarette was?
5 A. I'm thinking L&M. But that's just my
6 recollection. I can't be certain.
7 Q. Did Mrs. Camacho ever tell you that her
8 first ever cigarette was an L&M?
9 A. No.
10 Q. So your — just to make sure I
11 understand. Your testimony that her first ever
12 cigarette was an L&M, that's just based on your
13 recollection and nothing more; is that right?
14 A. That's right.
15 Q. Do you know where Mrs. Camacho obtained
16 her first ever cigarette?
17 A. You know, the dates are really killing
18 me. I didn't realize that I'm that lost in my head
19 with dates.
20 Where? No, I don't know where she
21 smoked her first. She graduated in '64. I was in
22 '62 and smoking, so I'm trying to think while I'm
23 smoking in 1962, I'm away at school, Sandra is still
24 in high school.
25 No, I don't remember. No, she was

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1 not smoking that I knew of when she was in high
2 school. I am just reaffirming the dates to my own
3 self.
4 Q. Do you know why Mrs. Camacho smoked her
5 first ever cigarette?
6 A. Oh, no, I wouldn't know why.
7 Q. Do you know when Mrs. Camacho smoked her
8 second cigarette?
9 A. No, I wouldn't.
10 Q. Do you know when Mrs. Camacho became a
11 regular daily smoker?
12 A. I don't know.
13 Q. Do you recall any of the brands of
14 cigarettes that Mrs. Camacho smoked over the years?
15 A. No. The only one that came to mind was
16 L&M, and I have no idea if she stayed with it or
17 not. But that came to mind.
18 Q. Do you have a specific memory of seeing
19 Mrs. Camacho smoking an L&M cigarette?
20 A. Maybe that's why I'm thinking L&M. I
21 can't remember seeing it. I would see a pack and it
22 may have been L&M, that's how I know, but nothing is
23 certain about that.
24 Q. And that package of cigarettes that you
25 think may have been L&M, do you remember what that

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1 cigarette pack looked like?
2 A. Could it be red and white? I don't know
3 why I'm thinking it. Maybe red and white. I can't
4 be certain.
5 Q. Do you remember any words on that
6 cigarette pack that you think may have been L&M?
7 A. I don't.
8 Q. Do you remember when you may have seen
9 that cigarette pack that may have been L&M?
10 A. No. I would say after she was out of
11 the house or married. That wasn't too long after
12 she graduated.
13 Q. And then other than possibly L&M, are
14 you aware of any other specific brands of cigarettes
15 that Mrs. Camacho smoked over the years?
16 A. I'm really not, no.
17 Q. Do you know why Mrs. Camacho chose to
18 smoke L&M cigarettes?
19 A. No, I don't.
20 Q. Do you remember anything about the
21 actual cigarettes that you believe may have been L&M
22 cigarettes?
23 A. I do not.
24 Q. To your knowledge, did Mrs. Camacho ever
25 smoke a low tar or low nicotine cigarette?

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1 A. I don't remember that.
2 Q. To your knowledge, did Mrs. Camacho ever
3 smoke a light cigarette?
4 A. I don't remember that.
5 Q. Over the years, did you have any idea
6 regarding how many cigarettes Mrs. Camacho would
7 smoke in one day?
8 A. I don't know, but I'm thinking a pack a
9 day.
10 Q. And what makes you think that
11 Mrs. Camacho smoked a pack of cigarettes a day?
12 A. I cannot even tell you that. Maybe when
13 we visited, she seemed to light up enough to smoke a
14 pack a day. I don't remember why I would think
15 that.
16 Q. At any point did you specifically count
17 the number of cigarettes Mrs. Camacho smoked per
18 day?
19 A. No, I did not count them.
20 Q. At any point did Mrs. Camacho tell you
21 how many cigarettes she smoked per day?
22 A. She may have said she's smoking a pack a
23 day, maybe that's where my recollection comes from.
24 I don't know why I say that.
25 Q. So is it fair to say you don't have a

Exhibit E

1 IN THE CIRCUIT COURT, FOURTH
JUDICIAL CIRCUIT, IN AND FOR
2 DUVAL COUNTY, FLORIDA
3 VOLUME 27 (Pages 2025-2103)
4
IN RE: ENGLE PROGENY CASES CASE NO.: 2008-CA-15000
5 TOBACCO LITIGATION DIVISION: Tobacco
6
Pertains To: Elaine Jordan
7 Case No. 2013-CA-8903-XXXX-MA
8
Jury Trial before The Honorable Virginia Norton,
9 Circuit Court Judge, in the above-entitled action,
10 Courtroom 601, at the Duval County Courthouse, 501 West
11 Adams Street, Jacksonville, Florida, on Tuesday, July
12 21, 2015, at 3:00 p.m., before Terry T. Hurley,
13 Registered Professional Reporter, and Notary Public in
14 and for the State of Florida at Large.
15
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24
25

Electronically signed by terry hurley (501-036-985-2158) 76326851-18ac-4e97-8ad0-497ee955

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1 PROCEEDINGS
2 July 21, 2015 3:00 p.m.
3 - - -
4 (The trial continues from Volume 26.)
5 THE COURT: Thank you very much.
6 We're still waiting for the rest of our group.
7 MR. THORNE: Your Honor, Mr. Cofer will be back
8 in a second.
9 THE COURT: That's fine. We're not going
10 anywhere.
11 MR. COFER: Your Honor, just a brief sidebar,
12 since Dr. Proctor is already on the stand. I want
13 to address one thing real quickly.
14 THE COURT: Sure.
15 (The following sidebar was had outside the
16 hearing of the witness.)
17 MR. COFER: I don't agree with presumptive list
18 argument, but Dr. Proctor is familiar with the
19 document, so I think I can do it without, you know,
20 putting the document up.
21 One source of where the confusion may be that I
22 gave her the wrong number. It's actually AN002830.
23 The PMU608 is from a different case. This was
24 originally on the Reynolds' list, which we adopted,
25 so I don't think this was the right number, and that

1 may have been part of the confusion.
2 MS. SHAMP: Okay.
3 THE COURT: I'm not trying to be difficult
4 about this. I just don't know. Since it's
5 impeachment and it's cross, unless there is an
6 order, which what I'm having Mr. Wooded do right
7 now, because I'm not familiar with an all-cases
8 order on this, but I'm not all-knowing, I've asked
9 him and he's going to go through all the all-cases
10 orders, so if I've missed something, because I have
11 missed things before. But what I can do, unless
12 there's an all-cases order saying that about the
13 presumptive exhibits I don't know how I can't tell
14 them to put something on for impeachment.
15 Now that being said, that's why I said because
16 I had this happen in Ellis -- I forgot what issue it
17 was on, but someone said, oh, but when everyone was
18 in the room we all knew what meant so-and-so.
19 So I'm happy, like I did in Ellis, to call
20 Judge Arnold or Judge Mitchell, and I got something
21 clarified one time, with everyone in the room. So
22 I'm happy to do that at any time. I don't want
23 anyone to think I am being difficult. I just wasn't
24 there, and I -- you know, there are a lot of these
25 orders, and I just need to be able to know which

Electronically signed by terry hurley (501-036-985-2158)

76326851-18ac-4e97-8ad0-497ee955

1 field and took a leaf and you ran some chemical analysis
2 on it it would have hundreds of chemicals; right?
3 A Sure. Just like any other plant.
4 Q And if you burned it it would produce hundreds
5 of carcinogens; right?
6 A That's right.
7 Q If you dried it and cured it and rolled it and
8 smoked enough of it you could get cancer; right?
9 A Of course.
10 Q If you took just leaves out of the field and
11 you dried it, cured it, and smoked enough of them you
12 could become addicted; right?
13 A Sure, as long as it contained nicotine. If it
14 was a super low nicotine leaf that might not be true,
15 but in most cases it would be true.
16 Q Okay. And you agree, Doctor, there's no such
17 thing as a safe cigarette; right?
18 A The only true truly safe cigarette would be one
19 you didn't smoke.
20 Q And you agree that smoke from cigarettes from
21 the 1800's was not profoundly less addictive than smoke
22 from cigarettes today?
23 A In principal, yeah. There are certain respects
24 in which it's become more addictive, but those have
25 mainly to do with availability, attractiveness, vending

1 machines, things like that. Basically anything that
2 makes the cigarette more attractive, available,
3 indirectly makes it more addictive.
4 Q But the bottom line, as long as cigarettes have
5 nicotine in them, they have enough nicotine in them they
6 can be addictive; right?
7 A That's true. It's basically about if they have
8 about 1 milligram of nicotine in the rod they are most
9 likely going to be able to create and sustain addiction.
10 Q And as long as they have tobacco in them, if
11 you burn it they create carcinogens that can cause
12 cancer and other diseases; right?
13 A That's true.
14 Q You told the jury that nicotine occurs
15 naturally in the tobacco plant?
16 A Yeah, naturally and artificially.
17 Q You talked about, you know, it's an
18 agricultural product, so it changes over time, you know,
19 each year depending on weather and other things; right?
20 A That's right.
21 Q You talked about the companies controlling
22 nicotine and controlling --
23 A Calibrating.
24 Q -- calibrating cigarettes; right?
25 A Yeah, because each cigarette has a brand

1 specification that includes nicotine control.
2 Q And also the idea is for a consumer product to
3 be successful you want uniformity and consistency;
4 right?
5 A That's right. A Marlboro here should be like a
6 Marlboro elsewhere.
7 Q Sure. And a Coca-Cola here should be like a
8 Coca-Cola elsewhere; right?
9 A Sure.
10 Q So in terms of consumer products, successful
11 manufacturers do try to make sure they have consistency
12 and uniformity and predictability; right?
13 A They do.
14 Q Okay. So let's talk a little bit about
15 selective reduction. Just to set it up, we talked with
16 the jury about this some.
17 So there came a time when smoking is indicted
18 it was causing cancer and the companies said things like
19 if we can find out what's causing it we'll take it out,
20 and, you know, we'll make it safe?
21 A Yeah. I don't think of it as an indictment. I
22 think of it as just evidence.
23 Q Thank you. I probably misspoke.
24 And you talked about the single-factor theory;
25 right?

1 A Yes.
2 Q And there were efforts to try to selectively
3 remove things from tobacco; right?
4 A That's right. There was an effort to remove
5 the arsenic, and that's one reason DDT replaced the lead
6 arsenate and the lead arsenite that were used as
7 pesticides on tobacco. There was an effort to digest or
8 destroy the polycyclics, which is one reason they put
9 catalysts and platinum and various other things.
10 So you're right. There was an effort to try to
11 destroy or eliminate the suspected hazardous element.
12 Q But the problem was the single-factor theory
13 was in fact what was happening?
14 A False. Yeah, the single-factor theory is
15 false. Smoke is complex, and irremediably complex.
16 Q So even though you could reduce some
17 components, maybe you could eliminate some components,
18 the bottom line is it wasn't making cigarettes safer?
19 A That's right. You can't make clean smoke.
20 It's all dirty.
21 Q So you can't selectively remove the compounds
22 from the smoke. So the other thing that was done was
23 something called general reduction?
24 A General reduction I regard as totally
25 fraudulent.

Electronically signed by terry hurley (501-036-985-2158)

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Exhibit F

IN THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT
IN AND FOR MIAMI-DADE COUNTY, FLORIDA

CASE NO. 07-34267 CA 15

LINDA MARTIN,

Plaintiff,

vs.

PHILIP MORRIS USA, INC., a Virginia corporation,

Defendant.
_____/

V O L U M E 12

Pages 1307 to 1448

The above-styled cause came on for trial before the Honorable JOSE RODRIGUEZ, Judge of the above-styled court, at the Miami-Dade County Courthouse, 73 West Flagler Street, Miami, Florida, on Tuesday, May 9, 2017, commencing at 1:40 p.m.

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1 THE COURT: Bring them in.
2 (Jury present in courtroom.)
3 THE COURT: You may be seated.
4 Mr. Carr, you can proceed.
5 CONTINUED DIRECT EXAMINATION
6 BY MR. CARR:
7 Q. Dr. Kyriakoudes, still keeping in mind
8 that the height of cigarette consumption was
9 1980, I would like to direct your attention to
10 Exhibit 1443 which is in evidence. This is a
11 document from the Council for Tobacco Research.
12 What is Council for Tobacco Research?
13 A. That is the successor to the Tobacco
14 Industry Research Committee. Its named changed
15 in 1964. But it was the grant-giving and
16 research division of the tobacco industry's
17 joint actions.
18 Q. Now, the point of this document and
19 question is: How were these two organizations,
20 the Council for Tobacco Research and The Tobacco
21 Institute, how were they funded?
22 A. They were funded by contributions from
23 the member tobacco firms, which included Philip
24 Morris.
25 Q. How did they determine who was going

1 to pay what?
2 A. They base their dues roughly on market
3 share and gross sales and relatively size of the
4 companies.
5 Q. Can we highlight the lower section?
6 So this document is from 1977. What
7 was Philip Morris' market share or share of the
8 payment?
9 A. Yes. So in this case they are funding
10 about 30 percent, just under 2. --
11 28.88 percent, or just under 29 percent of the
12 cost of the organization. Again, based on their
13 share in the market.
14 Q. How many billions of cigarettes was
15 Philip Morris selling domestically in 1977?
16 A. Well, as that indicates there,
17 160 billion cigarettes.
18 Q. And where were they in the
19 marketplace?
20 A. They were, you know, right with R.J.
21 Reynolds. Those were the two leading firms at
22 the time.
23 Q. Okay. Now, I want to talk to you
24 about advertising in particular. We saw the ads
25 and so on. I want to talk about expenditure.

Electronically signed by Carol Hill-Williams (301-354-685-0484)
9c185a3e-c7ff-4838-bada-de327105

Page 1424

1 Q. Benson & Hedges. Do you know they
2 sold Ms. Martin's brand, De-Nic?
3 A. Yes.
4 Q. And you know that they created a
5 cigarette --
6 I want to show the witness some of the
7 cigarettes.
8 MR. CARR: It's not on their exhibit
9 list. It wasn't disclosed. Same objection.
10 MS. SULLIVAN: Demonstrative.
11 THE COURT: Overruled.
12 Q. As part of the historical record you
13 didn't talk to your jurors about all the efforts
14 that Philip Morris took.
15 You showed the document which said:
16 If we can make a safer cigarette, we can take
17 over the whole market.
18 Right? You showed them that document?
19 A. That's true. That was something that
20 a tobacco company official said.
21 Q. But you didn't talk about all the
22 efforts that Philip Morris undertook to do just
23 that, to make the safer cigarette and try to
24 take over the market?
25 A. Those are half-hearted efforts. And,

Page 1425

1 again, keep in mind that Philip Morris continued
2 to manufacture, sell, and heavily market the
3 cigarettes that addicted people and can cause
4 disease.
5 Q. My question, Doctor, is you didn't
6 mention to our jury any of the many efforts that
7 Philip Morris undertook to try to make a safer
8 cigarette?
9 A. We've identified one. There are two
10 really. That's it. So "many" -- I don't know
11 if "many" applies as an adjective to the number
12 two.
13 Q. You know about selective reduction.
14 You know about the De-Nic effort. You know
15 about the effort with the -- Accord, the heat
16 don't smoke. You know about that effort, right?
17 A. Yes. That's the other one I was
18 thinking of.
19 Q. To try to get the smoke to go this way
20 and not out and people didn't have to have it
21 burned, they made this contraption?
22 Unfortunately no customer wanted to smoke it.
23 It doesn't look that great, right?
24 But they tried all kinds of things to
25 make a safer cigarette, and you didn't talk

Page 1426

1 about that?
2 A. No. Because they continued to market
3 and advertise the ones that were not safe.
4 Q. The truth is, notwithstanding all of
5 Philip Morris efforts to make a safer cigarette,
6 the government concluded that there is no such
7 thing as a safer cigarette?
8 A. Because that's true.
9 Q. No one's come up with a way, even
10 today, to make a safer cigarette, no safer
11 cigarette, unfortunately?
12 A. They're too dangerous.
13 Q. Unfortunately, Doctor, we both agree
14 on one thing, no safer cigarette, right?
15 A. A traditional cigarette is just too
16 dangerous for human health.
17 Q. Notwithstanding all of the efforts --
18 do you know how much -- as part of your
19 historical record, did you research how much
20 money Philip Morris spent trying to make a safer
21 cigarette?
22 A. They spent a considerable amount of
23 money.
24 Q. Billions, right? Did you look?
25 A. Millions. Many millions.

Page 1427

1 Q. Billions. Did you not count it up as
2 part of the historical record?
3 A. No. I knew they had these efforts. I
4 haven't sat down and added them up.
5 Q. The government said, Nice try, Philip
6 Morris. There's no way to make this safe.
7 A. That's an accurate judgment.
8 Q. So what the government decided to do
9 is give people the warning and let them make
10 their own decisions?
11 A. Well, now you're getting into politics
12 and the political process, and Philip Morris is
13 deeply involved in every aspect of that.
14 MS. SULLIVAN: Your Honor.
15 Q. The government decided to put warnings
16 on the pack and give people a choice.
17 A. When you say "the government decided,"
18 we're talking about federal legislation that
19 comes about in 1965, 1969, and 1984, all of
20 which --
21 MS. SULLIVAN: Your Honor, move to
22 strike.
23 THE COURT: Overruled.
24 MS. SULLIVAN: This is getting into
25 Noerr-Pennington issues.

Electronically signed by Carol Hill-Williams (301-354-685-0484) 9c185a3e-c7ff-4838-bada-de327105

Exhibit G

1 IN THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL COURT
2 IN AND FOR BROWARD COUNTY, FLORIDA
3 CASE NO. 08-80000 (19)
4 IN RE: ENGLE PROGENY CASES
5 TOBACCO LITIGATION
6
7 PERTAINS TO:
8 MYRON KAPLAN, AS PERSONAL
9 REPRESENTATIVE OF THE ESTATE
10 OF SHEILA KAPLAN
11 Case No. 08-025823
12 ---
13
14 VIDEOTAPED DEPOSITION OF JUDITH J. PROCHASKA, PH.D., MPH
15 SAN FRANCISCO, CALIFORNIA
16 TUESDAY, DECEMBER 20, 2016
17
18
19
20
21
22 REPORTED BY:
23 MEGAN F. ALVAREZ, RPR, CSR No. 12470
24
25

1 IN THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL COURT
2 IN AND FOR BROWARD COUNTY, FLORIDA
3 CASE NO. 08-80000 (19)
4 IN RE: ENGLE PROGENY CASES
5 TOBACCO LITIGATION
6
7 PERTAINS TO:
8 MYRON KAPLAN, AS PERSONAL
9 REPRESENTATIVE OF THE ESTATE
10 OF SHEILA KAPLAN
11 Case No. 08-025823
12 _____
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15
16 Videotaped Deposition of JUDITH J. PROCHASKA,
17 PH.D., MPH, taken on behalf of Defendants, at Veritext,
18 101 Montgomery Street, Suite 450, San Francisco,
19 California, beginning at 9:17 a.m. and ending at
20 5:48 p.m. on Tuesday, December 20, 2016, before
21 Megan F. Alvarez, RPR, Certified Shorthand Reporter
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21 Sheila Kaplan"
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24 Myron Kaplan, 12/19/16 11:00 a.m.
25 - 11:43 a.m."

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1 Parliament filtered cigarette?
2 A. I would refer to those tables in terms of
3 the yields but not about the flow rates.
4 Q. Have you ever designed a cigarette?
5 A. I have no interest in designing a
6 cigarette.
7 Q. Have you ever been involved in any sort of
8 engineering of a cigarette?
9 A. No.
10 Q. You said you also may provide information
11 about the marketing of filtered cigarettes?
12 A. Yes.
13 Q. What information is it you intend to
14 provide about the marketing of filtered cigarettes?
15 A. That it was heavily marketed with
16 innovation of having filtration. The Kent
17 micronite, that it could be pure as the air that's
18 filtered in a hospital; that they had these
19 scientific studies and these are the results of
20 those studies. I think one of the ads I have
21 there...
22 I won't talk about asbestos in the Kent
23 filter, although that was there too.
24 The recessed filter, that it was to keep
25 the tobacco out of your lips. It had -- gave you

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1 more of a margin to keep tobacco away as well as
2 giving you clean, pure taste that's so good.
3 Q. Do you have any degree in marketing?
4 A. A degree in marketing? No, I don't.
5 Q. Have you ever participated in any
6 commercial marketing plan?
7 A. I have.
8 Q. What commercial marketing have you been
9 involved in?
10 A. Commercial marketing? It was a commercial
11 marketing group that developed an ad campaign for
12 tips for the Centers for Disease Control, which is a
13 major national ad campaign, and I worked on that the
14 past year.
15 You and I talked about this for about over
16 an hour and a half, I think, in one of my
17 depositions, and nothing's been added since that
18 last hour-and-a-half thorough review that we did of
19 my marketing expertise.
20 Q. Other than being involved in the CDC ad
21 campaign, nothing else that you've done regarding
22 marketing?
23 A. Well, that same day that we talked about
24 that, we also talked about how I worked with the
25 Cooper Institute with an NFL Play 360 ad campaign.

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1 That also was national, was on all the NFL games
2 and...
3 Q. Can you identify any product marketing
4 that you've been involved in?
5 A. Product? So Quitline is a product and the
6 FitnessGram and -- PE education program. Those were
7 both products.
8 Q. Somebody would go to the store, what would
9 they buy from the FitnessGram?
10 A. You have to go to a store to buy a
11 product. You can't buy online.
12 Q. What online product would be shipped to
13 them?
14 A. Software.
15 Q. Do you know the difference between a
16 product and software that gets loaded on your
17 computer?
18 A. They get FitnessGram reports that they
19 take home to their parents that show their fitness
20 levels.
21 Q. Can you identify any commercial product
22 that you've been involved in the marketing of?
23 A. Nothing other than that.
24 Q. Okay. Do you still agree there's no such
25 thing as a safe cigarette?

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1 A. Yes.
2 Q. The only safe cigarette would be one that
3 you haven't smoked, right?
4 A. Or that isn't sold, sure.
5 Q. Any cigarette that is smoked, regardless
6 of its design, is dangerous, right?
7 A. Some could be less dangerous if they had
8 less nicotine in them.
9 Q. Still dangerous, right?
10 A. Combustion is dangerous, yes.
11 Q. Right. Meaning if you burn tobacco,
12 whether it's from a garden in your backyard or it
13 comes from a tobacco company, it's going to combust
14 and it's going to produce chemicals that are
15 dangerous to you, right?
16 A. I know that, yes.
17 Q. So then you agree as long as cigarettes
18 have tobacco in them and you burn them, they're
19 going to be dangerous, right?
20 A. I do know that.
21 Q. When is it that you believe Ms. Kaplan
22 made her first effort to quit?
23 A. She switched from unfiltered to filtered,
24 it sounds like in the '60s as an attempt to do
25 something more healthy.

Exhibit H

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE DISTRICT OF NEW MEXICO
3
4 IN RE: SANTA FE
NATURAL TOBACCO COMPANY
5 MARKETING & SALES
PRACTICES AND PRODUCTS No. 1:16-MD-02695-JB-LF
6 LIABILITY LITIGATION
_____/
7
8
9 DEPOSITION OF ROBERT N. PROCTOR, Ph.D.
10 Palo Alto, California
11 Wednesday, July 31, 2019
12
13
14
15
16 Reported by:
Natalie Y. Botelho
17 CSR No. 9897
18
19
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

IN RE: SANTA FE
NATURAL TOBACCO COMPANY
MARKETING & SALES
PRACTICES AND PRODUCTS No. 1:16-MD-02695-JB-LF
LIABILITY LITIGATION
_____/

Videotaped deposition of ROBERT N. PROCTOR, Ph.D., taken on behalf of Defendants, at 1755 Embarcadero Road, Palo Alto, California, beginning at 12:08 p.m. and ending at 5:15 p.m. on Wednesday, July 31, 2019, before NATALIE Y. BOTELHO, Certified Shorthand Reporter No. 9897.

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Also Present:
DOUG KLOTE, analyst, Jones Day
KEIGO PAINTER, Videographer

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MR. HABERMAN: Objection.
THE WITNESS: Well, there's multiple problems with that. I mean, the only coherence to it is that you're dead either way. If -- the analogy -- you didn't quite finish it, but they would say that, you know, light cigarettes are like jumping off the 40th floor, and regulars are like jumping off the 45th floor. The better analogy would be they're both like jumping off the 45th floor because there's no difference.
MR. BELASIC: Q. So because so much of your report is about the perception of difference in additive-free things in general and Natural American Spirits in particular, I'm trying to focus on what consumers of Natural American Spirit who say "safer" mean.
And I guess my first question on that would be, in all of the studies and surveys that have been published in peer review journals, none of those studies actually follow up and interrogate or ask the people what they meant by "safer," right? They just ask the question, they record the results?
A. So far as I know. I haven't really probed that particular issue.
Q. Okay. So you're not aware, then, of a

study where they had, like say, extensive follow-up to see what Mr. Smith meant by "My cigarette's safer"?
A. For example. Or to give you another example, I haven't seen surveys that look like -- that say, well, is it safer for heart disease and lung cancer, or just heart disease, for example.
Q. Right. All right. So let's talk about these general forces that created what you called the mythology that added -- that taking additives out of tobacco or reducing additives could be safer.
A. Well, would make them safer.
Q. Would make them safer.
A. The abstract possibility is not the mythology. It's the actual conviction.
Q. Right. You call it a mythology --
A. Because it's not true.
Q. -- because no matter how many additives you remove from a cigarette, it's not going to make it safer than a cigarette with additives; is that correct?
A. Unless you took out the tobacco or --
Q. Right.
A. -- something else. A broader definition of additives. It's not the additives that make a

cigarette harmful.
Q. So let's go back. 1962, Rachel Carson kicks off the environmental movement by publishing a book called Silent Spring --
A. That's right.
Q. -- right? And Silent Spring was basically about DDT and deadly pesticides that killed off birds and other creatures.
A. Right. And she also had some cancer discussions, as well.
Q. One of the things that Rachel Carson did was not just draw attention to DDT and pesticides, but also to draw attention to what she said were the industry's attempt to cover it up and make false claims.
A. That's right.
Q. Right? Is -- starting in the 1960s, you agree there was a growing sense of concern about things like pesticides or chemical additives?
A. Correct.
Q. So just in general, is the environmental movement and sort of, you know, no dangerous chemicals movement is one of the precursors to this additive-free mythology?
A. It is.

Q. Then you identify -- well, I don't know if it's a movement, but sometimes seems like it -- the organic food movement?
A. Sure.
Q. And when did that start?
A. Well, you know, all of these things go in stages. Already at the end of the 19th century, following the packaged pleasures revolution, you have people warning about sugar, warning about additives. There are adulteration laws in England in the 1840s about people adulterating bread. The beer gazettes of Germany, you know, requires that beer be only made from four ingredients.
So there are elements of concern about the purity of air and water that go back probably with -- as old as there are humans, right? But the kind of '60s granola version --
Q. That's what I'm asking about.
A. -- accelerates in the 1960s.
Q. Okay. You say --
A. Mainly in consequence to things like the Rachel Carson book to the worries about air pollution, water pollution, adulteration of foods, chemicalization of our environment.
Q. So organic food becomes a significant

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MR. HABERMAN: Let's take a quick break.
MR. BELASIC: Yeah. In fact, I was just going to say on the record -- I haven't told you -- obviously, you can take a -- let me know you want to take a break at any time, and certainly Plaintiff's counsel.
THE WITNESS: Well, thank you, Mr. Pickles. I mean -- sorry -- Mr. Vlasic. I mean -- sorry -- Mr. Belasic. I appreciate the break.
THE VIDEOGRAPHER: This is the end of Disk 1. Off the record at 1:30.
(Whereupon Exhibit 16, Exhibit 17, and Exhibit 18 were marked for identification.)
THE VIDEOGRAPHER: This is the start of Disk 2. Back on the record at 1:48.
THE WITNESS: We're on.
MR. BELASIC: Q. Oh. So Dr. Proctor, public health community criticism of additives in cigarettes, that didn't stop in 1994 or even in 2001, when Monograph 13 came out?
A. No. I would say, if anything, it probably accelerated.
Q. So I want -- I gave you what I think is a

couple examples of that. If you look at Exhibit 16, it's a document titled "A Report of the Surgeon General, How Tobacco Smoke Causes Disease," and this is the Surgeon General's -- they call it sort of the consumer summary. It's a short design for laypeople, sort of highlights of what the Surgeon General found.
A. It is.
Q. And --
A. Yeah, it's got that phrase "Tobacco smoke is a deadly mix of more than 7,000 chemicals."
Q. If you could look at page 4, and it talks about addiction. And so page 4, the 2010 Surgeon General's report consumer version says, "Cigarettes designed for addiction." And one of the things they highlight again is additives. And it says, quote, "The additives and chemicals that tobacco companies put in cigarettes may have helped them make" -- "make them more addictive," right?
A. Yes.
MR. HABERMAN: Just going to say the document speaks for itself.
MR. BELASIC: Q. So in 2010, though, the Surgeon General's position still is that additives might be making cigarettes more addictive, and

they're telling the public that?
MR. HABERMAN: Objection.
THE WITNESS: Well, that's one thing. I think by that time, they're also recognizing that the claim of being additive-free as a safety claim is also deceptive.
MR. BELASIC: Q. Well, but just in terms of what they're telling the smokers here, you read this 2010 consumer version of the report, you're going to believe that cigarettes may have helped -- additives may have helped cigarettes be more addictive, right?
A. Well, it depends on how you take it, right, and what else you know.
Q. If you could look at Exhibit 17, the WHO.
A. Yes.
Q. And the WHO fact sheet on ingredients in tobacco products also says that ingred- -- they call them ingredients. Could be -- we call it additives -- makes cigarettes more dangerous, correct?
MR. HABERMAN: Objection.
THE WITNESS: Where does it say that?
MR. BELASIC: Q. The "Why are tobacco ingredients of public health concern?" That's the

third subtitle. And they say the answer is, "Ingredients in tobacco products may affect public health in several ways such as increasing the attractiveness, addictiveness, and toxicity of a well-established harmful drug."
A. Sure, yeah, especially if by "ingredients" you include the flue-cured tobacco.
Q. I mean, so -- so this is 2014. So the World Health Organization, they're not saying, as you've explained, that, look, this is a mountain in a molehill. The danger comes from setting tobacco on fire, not from an ingredient or a flavor additive.
A. Well, that is true, yeah. The additives are relatively unimportant in terms of the overall toxicity --
Q. Right.
A. -- and harm potential of a cigarette.
Q. But yet in their World Health Organization fact sheet just recently from 2014, instead of saying that, they go out of their way to have a separate section that says the ingredients they add make them -- can make them more toxic and more addictive.
MR. HABERMAN: Objection.

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DISTRICT COURT

CLARK COUNTY, NEVADA

SANDRA CAMACHO, individually, and ANTHONY CAMACHO, individually, Plaintiffs, v. PHILIP MORRIS USA, INC., a foreign corporation; R.J. REYNOLDS TOBACCO COMPANY, a foreign corporation, individually, and as successor-by-merger to LORILLARD TOBACCO COMPANY and as successor-in-interest to the United States tobacco business of BROWN & WILLIAMSON TOBACCO CORPORATION, which is the successor-by-merger to THE AMERICAN TOBACCO COMPANY; LIGGETT GROUP, LLC., a foreign corporation; and ASM	CASE NO.: A-19-807650-C DEPT NO.: IV **PLAINTIFFS' MOTION TO RECONSIDER ORDER GRANTING PHILIP MORRIS AND R.J. REYNOLDS' MOTION FOR PARTIAL SUMMARY JUDGMENT ON PLAINTIFFS' PUNITIVE DAMAGES CLAIM** **HEARING REQUESTED**

Case Number: A-19-807650-C

NATIONWIDE CORPORATION d/b/a SILVERADO SMOKES & CIGARS, a domestic corporation; and ROE BUSINESS ENTITIES XI-XX, inclusive,

Defendants.

Plaintiffs, SANDRA CAMACHO and ANTHONY CAMACHO, individually, by and through their counsel of record, SEAN K. CLAGGETT, ESQ., of CLAGGETT & SYKES LAW FIRM, hereby move this Court to reconsider the Court's October 26, 2022 Order Granting Philip Morris and R.J. Reynolds' Motion for Partial Summary Judgment on Plaintiffs' Punitive Damages Claim.[1] This motion is made and based upon all papers, pleadings, and records on file herein, the attached memorandum of points and authorities, and any oral argument allowed at the time of the hearing.[2]

I. FACTUAL AND PROCEDURAL BACKGROUND

A. COURT'S ORDER GRANTING PHILIP MORRIS AND R.J. REYNOLDS' MOTION FOR PARTIAL SUMMARY JUDGMENT ON PLAINTIFFS' PUNITIVE DAMAGES CLAIM

On August 29, 2022 this Court heard the parties' arguments on Philip Morris and R.J. Reynolds' Motion for Partial Summary Judgment on Plaintiffs' Punitive Damages Claim. On October 26, this Court issued a written order granting Defendants' motion.

The main reason for the Court's ruling is that it found "that the Nevada Attorney General's representation of Plaintiffs' interests was more than 'adequate'." *See* **Exhibit 1** at 3. Therefore, the Court found there to be privity between the Attorney General and Plaintiffs at the time of the Master Settlement Agreement (hereafter "MSA"). *Id.* The

[1] *See* **Exhibit 1**.

[2] Plaintiffs do not waive any previously made argument at the hearing or in pleadings.

Court held that this is an issue of law for the Court to determine. *Id.* In addition, the Court found *Philip Morris USA v. Williams*, 549 U.S. 346, 127 S. Ct. 1057, 166 L. Ed. 2d 940 (2007) to be "the complete reverse" of this case because "in *Williams* there was no privity." **Exhibit 1** at 2.

B. OTHER NEVADA COURTS' TREATMENT OF THIS ISSUE

To date, three Nevada judges have denied this motion by Defendants; none has granted it. On May 24, 2022, in *Tully v. Philip Morris USA, Inc., et al,* Case No.: A-19-807657-C, Judge Michael Villani denied this motion on the ground that the admissibility of the MSA's scope, terms, meaning, and applicability to subsequent private plaintiff…at this time is questionable." *See* **Exhibit 2** at 3.

On August 19, 2022, upon Defendants' Motion for Reconsideration of Judge Villani's order, Former Chief Justice Mark Gibbons of the Nevada Supreme Court issued a second order denying Defendants' motion. *See* **Exhibit 3**. Justice Gibbons reasoned that: 1) "whether the Attorney General provided adequate representation in the MSA litigation is a mixed issue of law and material fact." Therefore, it is not solely an issue of law for the Court to determine; and 2) "even if Nevada defines punitive damages as a public right, the Nevada Supreme Court is not mandated to follow the persuasive reasoning of the New York and Georgia appellate courts." *See* **Exhibit 3** at 2-3. The New York and Georgia courts each had its own state-law-specific reasons for ruling in Defendants' favor.

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II. LEGAL ARGUMENT

A. RECONSIDERATION STANDARD

A district court may reconsider an issue that it previously decided if "the decision is clearly erroneous." *Masonry & Tile Contractors Ass'n v. Jolley, Urga & Wirth, Ltd.*, 113 Nev. 737, 741, 941 P.2d 486, 489 (1997).

B. THE NEVADA ATTORNEY GENERAL COULD NOT HAVE ADEQUATELY REPRESENTED PLAINTIFFS' INTERESTS IN PUNITIVE DAMAGES ARISING FROM THEIR INJURIES

The Court erred in brushing aside the U.S. Supreme Court's decision in *Williams*. The smoker in that case was in a similar position as Mrs. Camacho: he was a citizen of Oregon; his widow sued Defendants for the injuries and eventual death their cigarettes caused him; and his trial took place after the MSA was signed in 1998.[3] If this Court is right—and Plaintiffs agree—that "in *Williams* there was no privity," then the Court should hold consistently that there is no privity here either. In fact, regarding privity with the Attorney General, Williams had a worse argument than Plaintiffs in this case, since his injuries and death all occurred before the 1998 MSA, so the facts underlying his widow's interests in punitive damages would have overlapped much more with the Oregon Attorney General's evidence. By contrast, Mrs. Camacho's injuries did not occur for two decades after the MSA and her punitive damages in large part arises from Defendants' misconduct *after* 1998. So, if the punitive damages in *Williams* were never found to be precluded by the MSA, then they should not be precluded from this case either.

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[3] The *Williams* trial took place in 1999. See *Philip Morris USA Inc. v. Williams,* 2003 WL 25299699 (U.S.), 4.

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The reason why *Williams* is not only applicable but instructive here is that it addresses this Court's concern regarding *Siggelkow v. Phoenix Ins. Co.*, 109 Nev. 42, 44–45, 846 P.2d 303, 304–05 (1993), where the Nevada Supreme Court noted the public policy purpose of punitive damages. The Supreme Judicial Court of Massachusetts recently examined this very issue in light of *Williams*. Recognizing that punitive damages indeed serve a public interest, the Massachusetts court reasoned that it nevertheless serves a private right because:

> Punitive damages are not intended to punish a defendant for its unlawful conduct generally, but to punish a defendant for its unlawful conduct that caused a plaintiff's specific harm. *See Williams*, supra at 354, 127 S.Ct. 1057. *See also Aleo v. SLB Toys USA, Inc.*, 466 Mass. 398, 414, 995 N.E.2d 740 (2013) (reprehensibility of defendant's conduct turns in part on whether harm inflicted on plaintiff was physical as opposed to economic). **In fact, the Supreme Court has stated that "few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process."** *Campbell*, 538 U.S. at 425, 123 S.Ct. 1513. An award of punitive damages also may not be used to punish a defendant for harm inflicted upon nonparties, or "strangers to the litigation." *Williams*, supra at 353, 127 S.Ct. 1057.

Laramie v. Philip Morris USA Inc., 488 Mass. 399, 407 (2021) [emphasis added]. This analysis is particularly important in Nevada because the Nevada Supreme Court abandoned a standard that considers the "extent to which the punished conduct offends the **public's** sense of justice and propriety" and adopted the U.S. Supreme Court's standard which considers in part the ratio of the punitive damage award to the actual harm inflicted on the plaintiff. *Bongiovi v. Sullivan*, 122 Nev. 556, 582 (2006) [emphasis added].

Ultimately, the issue boils down to this: the Attorney General did not release private claims that have yet to accrue in 1998. The MSA clearly stated that in the phrase, "as opposed solely to private or individual relief for separate and distinct injuries," under

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the definition of "Releasing Parties." Despite Defendants' argument and even the title of their motion, "punitive damages is a remedy, not a cause of action" in Nevada. *Droge v. AAAA Two Star Towing, Inc.*, 136 Nev. 291, 313 (Nev. App. 2020), *review denied* (July 27, 2020). And "cause of action" is the "claim" in claim preclusion doctrine. *See Brownback v. King*, 141 S. Ct. 740, 747 (2021) fn. 3. Therefore, this Court cannot treat Plaintiffs' punitive damages separate and apart from their claims—if their claims for their specific private harms remain, then their remedy of punitive damages remain with those claims.

Lastly, this Court's ruling focused only on the privity requirement of claim preclusion. Plaintiffs urge this Court to reconsider the claim identity element, which cannot possibly be met here given that Plaintiffs' claims and request for punitive damages arise in part from Defendants' misconduct after the 1998 MSA.

III. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully ask this Court to vacate its Order Granting Philip Morris and R.J. Reynolds' Motion for Partial Summary Judgment on Plaintiffs' Punitive Damages Claim and reinstate Plaintiffs' punitive damages request.

DATED this 9th day of November, 2022.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 9th day of November 2022, I caused to be served a true and correct copy of the **PLAINTIFFS' MOTION TO RECONSIDER ORDER GRANTING PHILIP MORRIS AND R.J. REYNOLDS' MOTION FOR PARTIAL SUMMARY JUDGMENT ON PLAINTIFFS' PUNITIVE DAMAGES CLAIM** on the following person(s) by the following method(s) pursuant to NRCP 5(b) and NEFCR 9:

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EXHIBIT 1

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DISTRICT COURT

CLARK COUNTY, NEVADA

SANDRA CAMACHO, individually, and ANTHONY CAMACHO, individually, Plaintiffs, vs. PHILIP MORRIS USA, INC., a foreign corporation; R.J. REYNOLDS TOBACCO COMPANY, a foreign corporation, individually, and as successor-by-merger to LORILLARD TOBACCO COMPANY and as successor-in-interest to the United States tobacco business of BROWN & WILLIAMSON TOBACCO CORPORATION, which is the successor-by-merger to THE AMERICAN TOBACCO COMPANY; LIGGETT GROUP, LLC., a foreign corporation; ASM NATIONWIDE	Case No.: A-19-807650-C Dept. No.: IV **ORDER GRANTING PHILIP MORRIS AND R.J. REYNOLDS' MOTION FOR PARTIAL SUMMARY JUDGMENT ON PLAINTIFFS' PUNITIVE DAMAGES CLAIM**

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

Defendants.

On August 29, 2022, the Court heard argument on Philip Morris and R.J. Reynolds' Motion for Partial Summary Judgment on Plaintiffs' Punitive Damages Claim, and the Court, having considered the Motion and Opposition thereto (if filed) and arguments of counsel, and for all of the reasons stated by the Court on the record,

IT IS HEREBY ORDERED THAT:

Philip Morris and R.J. Reynolds' Motion for Partial Summary Judgment on Plaintiffs' Punitive Damages Claim is GRANTED. This ruling also applies to Liggett, in light of Liggett's filed joinder to Philip Morris and R.J. Reynolds' Motion, therefore the punitive damage claims against Liggett are hereby DISMISSED.

In Nevada, punitive damages vindicate a public interest and punitive damages are not to compensate a plaintiff. In *Siggelkow v. Phoenix Ins. Co.,* 109 Nev. 42, 44–45, 846 P.2d 303, 304–05 (1993), the Nevada Supreme Court explained that: "Punitive damages are not awarded as a matter of right to an injured litigant, but are awarded in addition to compensatory damages as a means of punishing the tortfeasor and deterring the tortfeasor and others from engaging in similar conduct. Accordingly, a punitive damage award has as its underlying purpose public policy concerns unrelated to the compensatory entitlements of the injured party".

Philip Morris USA v. Williams, 549 U.S. 346, 127 S. Ct. 1057, 166 L. Ed. 2d 940 (2007) does not undermine Defendants' position. In that case, Philip Morris argued that the Constitution "prohibits the state, acting through a civil jury, from using punitive damages to punish a defendant for harm to nonparties." 549 U.S. 346, 356, 127 S. Ct. 1057, 1064. Here, we have the complete reverse. In *Williams* there was no privity. In the matter at bar, the Court finds that there is privity and that the Plaintiffs were in privity with the Nevada Attorney General.

Privity exists between two otherwise unrelated parties where one party "adequately

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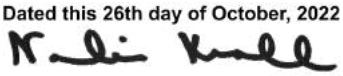
represented" another party's interests in a prior lawsuit—even if one of the parties' was not a "party" to the prior lawsuit. *Alcantara ex rel. Alcantara v. Wal-Mart Stores, Inc*., 130 Nev. 252, 261, 321 P.3d 912, 917 (2014) (adopting the "adequate representation" analysis from the Restatement (Second) of Judgements section 41). The Court finds that whether the Nevada Attorney General adequately represented the Plaintiffs interests in the prior litigation is an issue of law for the Court. The Court further finds that the Nevada Attorney General's representation of Plaintiffs' interests was more than "adequate." Nevada resolved its lawsuit via the MSA, pursuant to which Defendants agreed to be punished in the amount $240 billion dollars and deterred from engaging in the activities that both the Nevada Attorney General and Plaintiffs alleged were wrongful. MSA prohibits the Defendants from marketing to youth, advertising in certain mediums (e.g., billboards and in public transit), communicating with the public through trade groups, and failing to disclose internal research.

For these reasons, and other reasons set forth in Defendants briefing and oral argument, the Motion is granted.

Dated this 26th day of October, 2022



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Nadia Krall
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DISTRICT COURT
CLARK COUNTY, NEVADA

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

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Brian Jackson	bjackson@shb.com
Christopher Jorgensen	cjorgensen@lrrc.com
Jessica Helm	jhelm@lrrc.com
Annette Jaramillo	ajaramillo@lrrc.com
Philip Holden	tobacco@integrityforjustice.com
Philip Holden	tobacco@integrityforjustice.com
Andrea Nayeri	anayeri@shb.com
Kari Grace	kgrace@shb.com
Jennifer Kenyon	JBKENYON@shb.com
Maxine Rosenberg	Mrosenberg@wwhgd.com
Appeals Team	appeals@claggettlaw.com
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KINGSPALDING NEVADA	KSNevada@kslaw.com
Rachel Slaton	rslaton@kslaw.com

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

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

EXHIBIT 2

ELECTRONICALLY SERVED
5/24/2022 8:03 PM

Electronically Filed
05/24/2022 8:02 PM
CLERK OF THE COURT

ORDR

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William T. Sykes, Esq.
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Fan Li, Esq.
Nevada Bar No. 15771
KELLEY | UUSTAL
500 North Federal Highway, Suite 200
Fort Lauderdale, FL 33301
Attorneys for Plaintiffs

CLAGGETT & SYKES LAW FIRM

DISTRICT COURT

CLARK COUNTY, NEVADA

MARTIN TULLY, individually, and DEBRA TULLY, individually,

Plaintiffs,

v.

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

CASE NO.: A-19-807657-C

DEPT. NO.: XVII

ORDER DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON PLAINTIFFS' PUNITIVE DAMAGES CLAIM

Case Number: A-19-807657-C

liability corporation; RED ROCK SMOKE SHOP INC., a domestic corporation; and DOES I-X; and ROE BUSINESS ENTITIES XI-XX, inclusive

Defendants.

ORDER DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON PLAINTIFFS' PUNITIVE DAMAGES CLAIM

Defendants' Motion for Summary Judgment on Plaintiffs' Punitive Damages Claim came before the Court and was heard by former Nevada Supreme Court Justice Mark Gibbons and then taken under advisement by this Court. After carefully considering the evidence and arguments submitted, and good cause appearing, the COURT FINDS and ORDERS as follows:

1. Defendants seek to dismiss Plaintiffs' claims for punitive damages based on the Master Settlement Agreement ("MSA") agreed to in 1998, which resulted from a lawsuit brought by the Nevada Attorney General against several tobacco companies, including the Defendants in this case. Defendants argue that the MSA released Plaintiffs' rights to punitive damages in their private tort action, even though Plaintiffs' private action only accrued in 2018 when Martin Tully was diagnosed with cancer.
2. Summary judgment is appropriate only when no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law. *Stalk v. Mushkin*, 125 Nev. 21, 24–25 (2009). Defendants' Motion relies heavily upon the MSA and its language. Therefore, as a threshold issue, this Court must determine whether it can consider the MSA in a motion for summary judgment.

3. "The admissibility of evidence on a motion for summary judgment is subject to NRCP 43(a), and evidence that would be inadmissible at the trial of the case is inadmissible on a motion for summary judgment. The trial court may not consider hearsay or other inadmissible evidence whether it be in the form of direct testimony given in court of whether it appears in a deposition or answers to interrogatories." *Adamson v. Bowker*, 85 Nev. 115, 119 (1969).
4. In both Nevada and federal courts, a public record that may be subject to judicial notice does not automatically come into evidence if its content is inadmissible. See *Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d 988, 999 (9th Cir. 2018) and *In re Parental Rights as to R.Y.*, 130 Nev. 1197 (2014). As the Ninth Circuit explained, "accuracy is only part of the inquiry under [the rule for judicial notice]…Just because the document itself is susceptible to judicial notice does not mean that every assertion of fact within that document is judicially noticeable for its truth." *Khoja* at 999. It is especially improper for a court to judicially notice a document whose substance "is subject to varying interpretations, and there is a reasonable dispute as to what [it] establishes." *Id.* at 1000.
5. Since there is a dispute over the MSA's scope, terms, meaning, and applicability to subsequent private plaintiffs seeking punitive damages in their individual torts, this Court's ability to take judicial notice of the MSA at this time is questionable. Therefore, as the Court does not take judicial notice of the MSA, the granting of Summary Judgment on Plaintiff's request for punitive damages is unwarranted.

///

CLAGGETT & SYKES LAW FIRM

6. For the above reasons, this COURT ORDER: Defendants' motion is DENIED without prejudice at this time.

IT IS SO ORDERED.

Dated this 24th day of May, 2022

9D8 C2D AECA 78A7
Michael Villani
District Court Judge

For Judge Gibbons

Respectfully Submitted by: Dated this 20th day of May 2022 CLAGGETT & SYKES LAW FIRM */s/ Sean K. Claggett* Sean K. Claggett, Esq. Nevada Bar No. 8407 4101 Meadows Lane, Suite 100 Las Vegas, Nevada 89107 *Attorneys for Plaintiff*	Reviewed as to Form and Content: Dated this 20th day of May 2022 BAILEY KENNEDY */s/ Joseph Liebman* Joseph Liebman Nevada Bar No. 10125 8984 Spanish Ridge Avenue Las Vegas, Nevada 89148 *Attorneys for Defendant, R.J. Reynolds Tobacco Company*
Reviewed as to Form and Content: Dated this 20th day of May 2022 WEINBERG WHEELER HUDGINS GUN & DIAL */s/ Brian A. Jackson* Brian A. Jackson Pro Hac 6385 South Rainbow Boulevard, Ste 400 Las Vegas, Nevada 89118 *Attorneys for Defendant, Philip Morris USA. Inc., Jamez LLC, and Red Rock Smoke Shop Inc.*	Reviewed as to Form and Content: Dated this 20th day of May 2022 LEWIS ROCA ROTHGERBER CHRISTIE */s/ J. Christopher Jorgensen* J. Christopher Jorgensen Nevada Bar No. 5382 3993 Howard Hughes Parkway, #600 Las Vegas, Nevada 89169 *Attorneys for Defendant, Liggett Group, LLC*

From: Jackson, Brian (SHB)
To: Kristian Toimil
Cc: Fan Li; Kenyon, Jennifer (SHB); Heinz, Lindsey (SHB); Sorenson, Alex (SHB); Tepikian, Bruce (SHB); Chesin, Scott A. (SHB); Ursula Henninger; Ryan Kearney; Alex Galvan; Kelly Anne Luther; Russell, Howard; Roberts, Lee; Jorgensen, J. Christopher; dkennedy@baileykennedy.com; Matt Granda; Micah Echols; Moises Garcia; Lindsay Cortez; tullymartinvphilipmorris@projects.filevine.com
Subject: Re: Tully (NV) - Ord Denying Def. Punies MSJ
Date: Friday, May 20, 2022 4:43:11 PM

Yes

Sent from my iPhone

On May 20, 2022, at 5:48 PM, Kristian Toimil <Kristian@kulaw.com> wrote:

EXTERNAL

All, do we have permission to include Defense's E-Signatures?

From: Jackson, Brian (SHB) <BJACKSON@shb.com>
Sent: Friday, May 20, 2022 4:41 PM
To: Fan Li <fli@kulaw.com>
Cc: Kristian Toimil <Kristian@kulaw.com>; Kenyon, Jennifer (SHB) <JBKENYON@shb.com>; Heinz, Lindsey (SHB) <LHEINZ@shb.com>; Sorenson, Alex (SHB) <asorenson@shb.com>; Tepikian, Bruce (SHB) <BTEPIKIAN@shb.com>; Chesin, Scott A. (SHB) <schesin@shb.com>; Ursula Henninger <uhenninger@kslaw.com>; Ryan Kearney <RKearney@kslaw.com>; Alex Galvan <AGalvan@kslaw.com>; Kelly Anne Luther <KLuther@kasowitz.com>; Russell, Howard <HRussell@wwhgd.com>; Roberts, Lee <LRoberts@wwhgd.com>; Jorgensen, J. Christopher <cjorgensen@lewisroca.com>; dkennedy@baileykennedy.com; mgranda@claggettlaw.com; Micah@claggettlaw.com; MGarcia@claggettlaw.com; Lindsay Cortez <Lindsay@claggettlaw.com>; tullymartinvphilipmorris@projects.filevine.com
Subject: Re: Tully (NV) - Ord Denying Def. Punies MSJ

Fan,
With the caveats below we agree that as you revised it is consistent with what the court directed plaintiff to do. Thanks for reaching out again and sorry about the delay. I don't think this requires any joint filing, just a submission by plaintiff of the order so that should eliminate that step. Have a great weekend.

Sent from my iPhone

On May 20, 2022, at 3:34 PM, Fan Li <fli@kulaw.com> wrote:

From:	Ryan Kearney
To:	Kristian Toimil; Jorgensen, J. Christopher; Jackson, Brian (SHB); Fan Li
Cc:	Kenyon, Jennifer (SHB); Heinz, Lindsey (SHB); Sorenson, Alex (SHB); Tepikian, Bruce (SHB); Chesin, Scott A. (SHB); Ursula Henninger; Alex Galvan; Kelly Anne Luther; Russell, Howard; Roberts, Lee; dkennedy@baileykennedy.com; Matt Granda; Micah Echols; Moises Garcia; Lindsay Cortez; tullymartinvphilipmorris@projects.filevine.com; Joseph Liebman
Subject:	Re: Tully (NV) - Ord Denying Def. Punies MSJ
Date:	Friday, May 20, 2022 4:42:11 PM
Attachments:	image001.png image002.png

We consent for RJR. Copying Joseph Liebman who has reviewed as well. Please use his esignature. Thank you.

Ryan T. Kearney

King & Spalding LLP
1180 Peachtree Street NE
Atlanta, GA 30309
Direct Dial: (404) 572-4656
rkearney@kslaw.com

From: Kristian Toimil <Kristian@kulaw.com>
Sent: Friday, May 20, 2022 7:27:00 PM
To: Jorgensen, J. Christopher <CJorgensen@lewisroca.com>; Jackson, Brian (SHB) <BJACKSON@shb.com>; Fan Li <fli@kulaw.com>
Cc: Kenyon, Jennifer (SHB) <JBKENYON@shb.com>; Heinz, Lindsey (SHB) <LHEINZ@shb.com>; Sorenson, Alex (SHB) <asorenson@shb.com>; Tepikian, Bruce (SHB) <BTEPIKIAN@shb.com>; Chesin, Scott A. (SHB) <schesin@shb.com>; Ursula Henninger <uhenninger@KSLAW.com>; Ryan Kearney <RKearney@KSLAW.com>; Alex Galvan <AGalvan@KSLAW.com>; Kelly Anne Luther <KLuther@kasowitz.com>; Russell, Howard <HRussell@wwhgd.com>; Roberts, Lee <LRoberts@wwhgd.com>; dkennedy@baileykennedy.com <dkennedy@baileykennedy.com>; mgranda@claggettlaw.com <mgranda@claggettlaw.com>; Micah@claggettlaw.com <Micah@claggettlaw.com>; MGarcia@claggettlaw.com <MGarcia@claggettlaw.com>; Lindsay Cortez <Lindsay@claggettlaw.com>; tullymartinvphilipmorris@projects.filevine.com <tullymartinvphilipmorris@projects.filevine.com>
Subject: RE: Tully (NV) - Ord Denying Def. Punies MSJ

CAUTION: MAIL FROM OUTSIDE THE FIRM

Thank you; for the remaining Defendants, we will have to submit without your signature if we do not hear back by 4:45 PM PT

From: Jorgensen, J. Christopher <CJorgensen@lewisroca.com>
Sent: Friday, May 20, 2022 7:26 PM
To: Kristian Toimil <Kristian@kulaw.com>; Jackson, Brian (SHB) <BJACKSON@shb.com>; Fan Li <fli@kulaw.com>
Cc: Kenyon, Jennifer (SHB) <JBKENYON@shb.com>; Heinz, Lindsey (SHB) <LHEINZ@shb.com>; Sorenson, Alex (SHB) <asorenson@shb.com>; Tepikian, Bruce (SHB) <BTEPIKIAN@shb.com>; Chesin,

Scott A. (SHB) <schesin@shb.com>; Ursula Henninger <uhenninger@kslaw.com>; Ryan Kearney <RKearney@kslaw.com>; Alex Galvan <AGalvan@kslaw.com>; Kelly Anne Luther <KLuther@kasowitz.com>; Russell, Howard <HRussell@wwhgd.com>; Roberts, Lee <LRoberts@wwhgd.com>; dkennedy@baileykennedy.com; mgranda@claggettlaw.com; Micah@claggettlaw.com; MGarcia@claggettlaw.com; Lindsay Cortez <Lindsay@claggettlaw.com>; tullymartinvphilipmorris@projects.filevine.com
Subject: RE: Tully (NV) - Ord Denying Def. Punies MSJ

Kristian,
You may use my signature on behalf of Liggett for the Order Denying the Punitive Damages Motion for Summary Judgment.
Thank you
Chris Jorgensen

Christopher Jorgensen
Partner

cjorgensen@lewisroca.com
D. 702.474.2642

LEWIS ROCA

From: Kristian Toimil <Kristian@kulaw.com>
Sent: Friday, May 20, 2022 3:48 PM
To: Jackson, Brian (SHB) <BJACKSON@shb.com>; Fan Li <fli@kulaw.com>
Cc: Kenyon, Jennifer (SHB) <JBKENYON@shb.com>; Heinz, Lindsey (SHB) <LHEINZ@shb.com>; Sorenson, Alex (SHB) <asorenson@shb.com>; Tepikian, Bruce (SHB) <BTEPIKIAN@shb.com>; Chesin, Scott A. (SHB) <schesin@shb.com>; Ursula Henninger <uhenninger@kslaw.com>; Ryan Kearney <RKearney@kslaw.com>; Alex Galvan <AGalvan@kslaw.com>; Kelly Anne Luther <KLuther@kasowitz.com>; Russell, Howard <HRussell@wwhgd.com>; Roberts, Lee <LRoberts@wwhgd.com>; Jorgensen, J. Christopher <CJorgensen@lewisroca.com>; dkennedy@baileykennedy.com; mgranda@claggettlaw.com; Micah@claggettlaw.com; MGarcia@claggettlaw.com; Lindsay Cortez <Lindsay@claggettlaw.com>; tullymartinvphilipmorris@projects.filevine.com
Subject: RE: Tully (NV) - Ord Denying Def. Punies MSJ
Importance: High

[EXTERNAL]

All, do we have permission to include Defense's E-Signatures?

From: Jackson, Brian (SHB) <BJACKSON@shb.com>
Sent: Friday, May 20, 2022 4:41 PM
To: Fan Li <fli@kulaw.com>
Cc: Kristian Toimil <Kristian@kulaw.com>; Kenyon, Jennifer (SHB) <JBKENYON@shb.com>; Heinz, Lindsey (SHB) <LHEINZ@shb.com>; Sorenson, Alex (SHB) <asorenson@shb.com>; Tepikian, Bruce

CSERV

DISTRICT COURT
CLARK COUNTY, NEVADA

Martin Tully, Plaintiff(s) vs. Philip Morris USA Inc, Defendant(s)	CASE NO: A-19-807657-C DEPT. NO. Department 17

AUTOMATED CERTIFICATE OF SERVICE

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

Service Date: 5/24/2022

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Maria Alvarez	malvarez@claggettlaw.com
Reception E-File	reception@claggettlaw.com
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Howard Russell	hrussell@wwhgd.com
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Philip Holden	tobacco@integrityforjustice.com
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Kelley Trial Attorneys	Nvtobacco@kulaw.com
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Andrea Nayeri	anayeri@shb.com
Maria Ruiz	mruiz@kasowitz.com

Kari Grace	kgrace@shb.com
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Rhea Rajkumar	rrajkumar@kslaw.com
Nancy Anderson	NANDERSON@SHB.COM

EXHIBIT 3

ELECTRONICALLY SERVED
8/19/2022 9:45 AM

Electronically Filed
08/19/2022 9:45 AM
CLERK OF THE COURT

ORD

Sean K. Claggett, Esq.
Nevada Bar No. 008407
William T. Sykes, Esq.
Nevada Bar No. 009916
Matthew S. Granda, Esq.
Nevada Bar No. 012753
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(702) 655-3763 – Facsimile
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wsykes@claggettlaw.com
mgranda@claggettlaw.com
Attorneys for Plaintiffs

Fan Li, Esq.
Nevada Bar No. 15771
KELLEY | UUSTAL
500 North Federal Highway, Suite 200
Fort Lauderdale, FL 33301

DISTRICT COURT

CLARK COUNTY, NEVADA

MARTIN TULLY, individually, and DEBRA TULLY, individually, Plaintiffs, v. PHILIP MORRIS USA, INC., a foreign corporation; R.J. REYNOLDS TOBACCO COMPANY, a foreign corporation, individually, and as successor-by-merger to LORILLARD TOBACCO COMPANY and as successor-in-interest to the United States tobacco business of BROWN & WILLIAMSON TOBACCO CORPORATION, which is the successor-by-merger to THE AMERICAN TOBACCO COMPANY; LIGGETT GROUP, LLC., a foreign corporation; JAMEZ LLC (d/b/a	CASE NO.: A-19-807657-C DEPT. NO.: XVII **ORDER DENYING DEFENDANTS' MOTION FOR RECONSIDERATION OF THE COURT'S ORDER DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON PLAINTIFFS' PUNITIVE DAMAGES CLAIM**

Case Number: A-19-807657-C

JAMEZ SMOKES & CIGARS), a limited liability corporation; RED ROCK SMOKE SHOP INC., a domestic corporation; and DOES I-X; and ROE BUSINESS ENTITIES XI-XX, inclusive.

Defendants.

ORDER DENYING DEFENDANTS' MOTION FOR RECONSIDERATION OF THE COURT'S ORDER DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON PLAINTIFFS' PUNITIVE DAMAGES CLAIM

Defendants' Motion for Reconsideration of the Court's Order Denying Defendants' Motion for Summary Judgment on Plaintiffs' Punitive Damages Claim came before the Court on August 4, 2022 and was taken under advisement by this Court. After carefully considering the evidence and arguments submitted, and good cause appearing, the COURT FINDS and ORDERS as follows:

1. Defendants contest that claims of the Plaintiffs for punitive damages are barred by the doctrine of claim preclusion and that the Court should so rule without the need to examine the 1998 Master Settlement Agreement (MSA).
2. The Defendants cite to *Mendenhall v. Tassinari*, 133 Nev. 614 (2017) in support of their argument. The facts of *Mendenhall* relate to the interpretation of an Offer of Judgment pursuant to NRCP 68 as it pertains to a second action.
3. The facts of that case are different than the factual allegations in this case involving the interpretation of the MSA.
4. The Court concludes that whether the Attorney General provided adequate representation in the MSA litigation is a mixed issue of law and material fact.

5. The Court further concludes that even if Nevada defines punitive damages as a public right, the Nevada Supreme Court is not mandated to follow the persuasive reasoning of the New York and Georgia appellate courts.
6. Therefore, the Motion for Reconsideration is DENIED.
7. The Court further notes that its decision is ripe for discretionary review under NRAP 21 by the Nevada Supreme Court.

IT IS SO ORDERED.

Dated this 19th day of August, 2022

Mark Gibbons

3D9 CE0 5322 A03D
Mark Gibbons
District Court Judge

Respectfully Submitted by: Dated this 17th day of August 2022 CLAGGETT & SYKES LAW FIRM /s/ Fan Li Sean K. Claggett, Esq. Nevada Bar No. 8407 4101 Meadows Lane, Suite 100 Las Vegas, Nevada 89107 Fan Li, Esq. Nevada Bar No. 15771 KELLEY | UUSTAL 500 North Federal Highway, Suite 200 Fort Lauderdale, FL 33301 *Attorneys for Plaintiff*	Reviewed as to Form and Content: Dated this 17th day of August 2022 KING & SPALDING LLP /s/ Ryan T. Kearney Ryan T. Kearney *Admitted Pro Hac Vice* 1180 Peachtree Street NE Atlanta, GA 30309 *Attorneys for Defendant, R.J. Reynolds Tobacco Company*
Reviewed as to Form and Content: Dated this 17th day of August 2022 WEINBERG WHEELER HUDGINS GUN & DIAL /s/ D. Lee Roberts, Jr. D. Lee Roberts, Jr. Nevada Bar No. 8877 6385 South Rainbow Boulevard, Ste 400 Las Vegas, Nevada 89118 *Attorneys for Defendant, Philip Morris USA. Inc., Jamez LLC, and Red Rock Smoke Shop Inc.*	Reviewed as to Form and Content: Dated this 17th day of August 2022 KASOWITZ BENSON TORRES LLP */s/ Kelly A. Luther* Kelly A. Luther *Admitted Pro Hac Vice* 1441 Brickell Avenue, Suite 1420 Miami, FL 33131 *Attorneys for Defendant, Liggett Group, LLC*

From: Kristian Toimil
To: Moises Garcia; Michelle Rivas
Cc: tullymartinvphilipmorris@projects.filevine.com
Subject: FW: Tully (NV) - Ord Denying D"s Recon. Mot (Punies)
Date: Monday, August 15, 2022 10:19:05 AM
Attachments: image001.png
image002.png
image003.png
image004.png
Ord Denying D"s Recon. Mot (Punies) - Tully (NV) - 2022.08.08.docx

---

May y'all please submit this on Wednesday (08/17)? We don't want to file it any sooner than that

---

From: Ryan Kearney <RKearney@KSLAW.com>
Sent: Thursday, August 11, 2022 7:13 PM
To: Kristian Toimil <Kristian@kulaw.com>; Kelly Anne Luther <KLuther@kasowitz.com>; Roberts, Lee <LRoberts@wwhgd.com>; Heinz, Lindsey (SHB) <LHEINZ@shb.com>; Ursula Henninger <uhenninger@KSLAW.com>; 'DKennedy@BaileyKennedy.com' <dkennedy@baileykennedy.com>; 'JLiebman@baileykennedy.com' <JLiebman@baileykennedy.com>
Cc: Fan Li <fli@kulaw.com>; mgranda@claggettlaw.com; tullymartinvphilipmorris@projects.filevine.com
Subject: Re: Tully (NV) - Ord Denying D's Recon. Mot (Punies)

Yes, we agree.

Ryan T. Kearney

King & Spalding LLP
1180 Peachtree Street NE
Atlanta, GA 30309
Direct Dial: (404) 572-4656
rkearney@kslaw.com

From: Kristian Toimil <Kristian@kulaw.com>
Sent: Thursday, August 11, 2022 4:12:22 PM
To: Kelly Anne Luther <KLuther@kasowitz.com>; Roberts, Lee <LRoberts@wwhgd.com>; Heinz, Lindsey (SHB) <LHEINZ@shb.com>; Ursula Henninger <uhenninger@KSLAW.com>; Ryan Kearney <RKearney@KSLAW.com>; 'DKennedy@BaileyKennedy.com' <dkennedy@baileykennedy.com>; 'JLiebman@baileykennedy.com' <JLiebman@baileykennedy.com>
Cc: Fan Li <fli@kulaw.com>; mgranda@claggettlaw.com <MGranda@claggettlaw.com>; tullymartinvphilipmorris@projects.filevine.com <tullymartinvphilipmorris@projects.filevine.com>
Subject: RE: Tully (NV) - Ord Denying D's Recon. Mot (Punies)

CAUTION: MAIL FROM OUTSIDE THE FIRM

Reynolds counsel, we are waiting on your approval. Per the minute order, this must be submitted by Thursday, August 18th.

From: Kelly Anne Luther <KLuther@kasowitz.com>
Sent: Wednesday, August 10, 2022 5:07 PM
To: Roberts, Lee <LRoberts@wwhgd.com>; Kristian Toimil <Kristian@kulaw.com>; Heinz, Lindsey (SHB) <LHEINZ@shb.com>; Ursula Henninger <uhenninger@kslaw.com>
Cc: Fan Li <fli@kulaw.com>; tullymartinvphilipmorris@projects.filevine.com
Subject: RE: Tully (NV) - Ord Denying D's Recon. Mot (Punies)

Liggett agrees as well.

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

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

From: Roberts, Lee <LRoberts@wwhgd.com>
Sent: Wednesday, August 10, 2022 4:55 PM
To: Kristian Toimil <Kristian@kulaw.com>; Heinz, Lindsey (SHB) <LHEINZ@shb.com>; Ursula Henninger <uhenninger@kslaw.com>; Kelly Anne Luther <KLuther@kasowitz.com>
Cc: Fan Li <fli@kulaw.com>; tullymartinvphilipmorris@projects.filevine.com
Subject: Re: Tully (NV) - Ord Denying D's Recon. Mot (Punies)

ALERT: THIS IS AN EXTERNAL EMAIL. DO NOT CLICK ON ANY LINK, ENTER A PASSWORD, OR OPEN AN ATTACHMENT UNLESS YOU KNOW THAT THE MESSAGE CAME FROM A SAFE EMAIL ADDRESS.

PM agrees that you may submit.

CSERV

DISTRICT COURT
CLARK COUNTY, NEVADA

Martin Tully, Plaintiff(s) vs. Philip Morris USA Inc, Defendant(s)	CASE NO: A-19-807657-C DEPT. NO. Department 17

AUTOMATED CERTIFICATE OF SERVICE

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DISTRICT COURT

CLARK COUNTY, NEVADA

SANDRA CAMACHO, individually, and ANTHONY CAMACHO, individually, Plaintiffs, vs. PHILIP MORRIS USA, INC., a foreign corporation; R.J. REYNOLDS TOBACCO COMPANY, a foreign corporation, individually, and as successor-by-merger to LORILLARD TOBACCO COMPANY and as successor-in-interest to the United States tobacco business of BROWN & WILLIAMSON TOBACCO CORPORATION, which is the successor-by-merger to THE AMERICAN TOBACCO COMPANY; LIGGETT GROUP, LLC., a foreign corporation; ASM NATIONWIDE	Case No.: A-19-807650-C Dept. No.: IV **NOTICE OF ENTRY OF ORDER ON ASM NATIONWIDE CORPORATION'S MOTION FOR PARTIAL SUMMARY JUDGMENT ON PLAINTIFFS' PUNITIVE DAMAGES CLAIM**

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

Defendants.

PLEASE TAKE NOTICE that an Order On ASM Nationwide Corporation's Motion For Partial Summary Judgment On Plaintiffs' Punitive Damages Claim was entered on October 23, 2022, in this matter. A copy is attached hereto.

Dated this 10th day of November, 2022.

/s/ Howard J. Russell

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CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of November, 2022, a true and correct copy of the foregoing **NOTICE OF ENTRY OF ORDER ON ASM NATIONWIDE CORPORATION'S MOTION FOR PARTIAL SUMMARY JUDGMENT ON PLAINTIFFS' PUNITIVE DAMAGES CLAIM** was electronically filed and served on counsel through the Court's electronic service system pursuant to Administrative Order 14-2 and N.E.F.C.R. 9, via the electronic mail addresses noted below, unless service by another method is stated or noted:

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DISTRICT COURT

CLARK COUNTY, NEVADA

SANDRA CAMACHO, individually, and ANTHONY CAMACHO, individually, Plaintiffs, vs. PHILIP MORRIS USA, INC., a foreign corporation; R.J. REYNOLDS TOBACCO COMPANY, a foreign corporation, individually, and as successor-by-merger to LORILLARD TOBACCO COMPANY and as successor-in-interest to the United States tobacco business of BROWN & WILLIAMSON TOBACCO CORPORATION, which is the successor-by-merger to THE AMERICAN TOBACCO COMPANY; LIGGETT GROUP, LLC., a foreign	Case No.: A-19-807650-C Dept. No.: IV **ORDER ON ASM NATIONWIDE CORPORATION'S MOTION FOR PARTIAL SUMMARY JUDGMENT ON PLAINTIFFS' PUNITIVE DAMAGES CLAIM**

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

Defendants.

On August 29, 2022, the Court heard ASM Nationwide Corporation's Motion for Partial Summary Judgment on Plaintiffs' Punitive Damages Claim. Having reviewed the pleadings and papers and having heard oral argument,

IT IS HEREBY ORDERED THAT:

ASM Nationwide Corporation's Motion for Partial Summary Judgment on Plaintiffs' Punitive Damages Claim is **MOOT because Plaintiffs will dismiss that claim**.

Dated this 23rd day of October, 2022

99B 785 B4C3 B0D9
Nadia Krall
District Court Judge

Submitted by:
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Subject: RE: [EXTERNAL] Camacho - proposed orders for final review

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Thank you, Kelly. You can use our signature.

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Good Afternoon Everyone,

Please see the attached 24 proposed orders for final review by all counsel. Please let us know by mid-day tomorrow whether we have approval to use your e-signatures so that we can get these submitted to the Court.

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Subject: RE: Following Up -- Camacho - proposed orders for final review

This Message originated outside your organization.

Approved.

From: Pierce, Kelly L. <KPierce@wwhgd.com>
Sent: Wednesday, September 21, 2022 2:00 PM
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Subject: Following Up -- Camacho - proposed orders for final review
Importance: High

Good Afternoon,

Will counsel for Liggett and R.J. Reynolds please advise whether we have approval to use your e-signatures on the attached?

CSERV

DISTRICT COURT
CLARK COUNTY, NEVADA

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

AUTOMATED CERTIFICATE OF SERVICE

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

Service Date: 10/23/2022

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If indicated below, a copy of the above mentioned filings were also served by mail via United States Postal Service, postage prepaid, to the parties listed below at their last known addresses on 10/24/2022

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11/10/2022 2:04 PM
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DISTRICT COURT

CLARK COUNTY, NEVADA

SANDRA CAMACHO, individually, and ANTHONY CAMACHO, individually, Plaintiffs, vs. PHILIP MORRIS USA, INC., a foreign corporation; R.J. REYNOLDS TOBACCO COMPANY, a foreign corporation, individually, and as successor-by-merger to LORILLARD TOBACCO COMPANY and as successor-in-interest to the United States tobacco business of BROWN & WILLIAMSON TOBACCO CORPORATION, which is the successor-by-merger to THE AMERICAN TOBACCO COMPANY; LIGGETT GROUP, LLC., a foreign corporation; ASM NATIONWIDE	Case No.: A-19-807650-C Dept. No.: IV **NOTICE OF ENTRY OF ORDER GRANTING DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT ON PLAINTIFFS' NEGLIGENCE CLAIM**

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

Defendants.

PLEASE TAKE NOTICE that an Order Granting Defendants' Motion For Partial Summary Judgment On Plaintiffs' Negligence Claim was entered on October 23, 2022, in this matter. A copy is attached hereto.

Dated this 10th day of November, 2022.

/s/ Howard J. Russell

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CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of November, 2022, a true and correct copy of the foregoing **NOTICE OF ENTRY OF ORDER GRANTING DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT ON PLAINTIFFS' NEGLIGENCE CLAIM** was electronically filed and served on counsel through the Court's electronic service system pursuant to Administrative Order 14-2 and N.E.F.C.R. 9, via the electronic mail addresses noted below, unless service by another method is stated or noted:

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

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10/23/2022 6:31 PM
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DISTRICT COURT

CLARK COUNTY, NEVADA

SANDRA CAMACHO, individually, and ANTHONY CAMACHO, individually, Plaintiffs, vs. PHILIP MORRIS USA, INC., a foreign corporation; R.J. REYNOLDS TOBACCO COMPANY, a foreign corporation, individually, and as successor-by-merger to LORILLARD TOBACCO COMPANY and as successor-in-interest to the United States tobacco business of BROWN & WILLIAMSON TOBACCO CORPORATION, which is the successor-by-merger to THE AMERICAN TOBACCO COMPANY; LIGGETT GROUP, LLC., a foreign	Case No.: A-19-807650-C Dept. No.: IV **ORDER GRANTING DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT ON PLAINTIFFS' NEGLIGENCE CLAIM**

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

Defendants.

On August 29, 2022, the Court heard Defendants' Motion for Partial Summary Judgment on Plaintiffs' Negligence Claim. Having reviewed the pleadings and papers and having heard oral argument,

IT IS HEREBY ORDERED THAT:

Defendants' Motion for Partial Summary Judgment on Plaintiffs' Negligence Claim is **GRANTED**. The Court finds that there is no special relationship between Plaintiff and the Defendants. Therefore, the duty element of Plaintiffs' negligence claim cannot be met. Also, the Court finds that post-1969, the Federal Cigarette Labeling Advertising Act, 15 U.S., Section 1331, preempts any advertising-based claims after 1969.

Dated this 23rd day of October, 2022

97B 340 0CD5 60DE
Nadia Krall
District Court Judge

Submitted by:
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Cc: Roberts, Lee; Russell, Howard; Smith, Jr., Phillip N.; LaBounty, Daniela; Gormley, Ryan; Bonney, Audra R.; 'bjackson@shb.com'; 'A. Sorenson'; J. Kenyon; B. Tepikian; A. Nayeri; K. Grace; N. Anderson; chatch@shb.com
Subject: RE: [EXTERNAL] Camacho - proposed orders for final review

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Thank you, Kelly. You can use our signature.

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Subject: [EXTERNAL] Camacho - proposed orders for final review

Good Afternoon Everyone,

Please see the attached 24 proposed orders for final review by all counsel. Please let us know by mid-day tomorrow whether we have approval to use your e-signatures so that we can get these submitted to the Court.

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Subject: Following Up -- Camacho - proposed orders for final review
Importance: High

Good Afternoon,

Will counsel for Liggett and R.J. Reynolds please advise whether we have approval to use your e-signatures on the attached?

CSERV

DISTRICT COURT
CLARK COUNTY, NEVADA

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

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DISTRICT COURT
CLARK COUNTY, NEVADA

SANDRA CAMACHO, individually, and ANTHONY CAMACHO, individually, Plaintiffs, vs. PHILIP MORRIS USA, INC., a foreign corporation; R.J. REYNOLDS TOBACCO COMPANY, a foreign corporation, individually, and as successor-by-merger to LORILLARD TOBACCO COMPANY and as successor-in-interest to the United States tobacco business of BROWN & WILLIAMSON TOBACCO CORPORATION, which is the successor-by-merger to THE AMERICAN TOBACCO COMPANY; LIGGETT GROUP, LLC., a foreign corporation; and ASM NATIONWIDE CORPORATION d/b/a SILVERADO SMOKERS & CIGARS, a domestic corporation, and ROE BUSINESS ENTITIES XI-XX, inclusive. Defendants.	Case No. A-19-807650-C Dept. No. 4 **LIGGETT GROUP LLC'S OPPOSITION TO PLAINTIFFS' MOTION TO RECONSIDER ORDER GRANTING LIGGETT GROUP LLC'S MOTION FOR PARTIAL SUMMARY JUDGMENT ON PLAINTIFFS' NEGLIGENCE CLAIMS**

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Defendant Liggett Group LLC ("Liggett"), by and through its undersigned counsel, hereby submits its Opposition to Plaintiffs' Motion to Reconsider Order Granting Liggett Group LLC's Motion for Partial Summary Judgment on Plaintiffs' Negligence Claims ("Opposition")[1], and states:

INTRODUCTION

Plaintiffs' reconsideration request, asking the Court to overturn its decision to grant Liggett's Motion for Partial Summary Judgment on Plaintiffs' Negligence Claims, is without merit. The Court already considered the arguments and material facts Plaintiffs' present in their Motion for Reconsideration, listened to oral argument, asked questions and determined that summary judgment was warranted on Plaintiffs' negligence claims against Liggett. The Court's prior decision was not erroneous. Therefore, Liggett requests the Court deny Plaintiffs' Motion for Reconsideration.

FACTUAL AND PROCEDURAL BACKGROUND

I. Court's Order Granting Liggett's Motion for Partial Summary Judgment on Plaintiffs' Claims for Negligence

Liggett filed its Motion for Partial Summary Judgment on Plaintiffs' Claims for Negligence and Strict Liability on May 25, 2022. Following a hearing on August 29, 2022, the district court granted Liggett's motion in part. The Court entered its written order ("Order") on October 26, 2022, granting summary judgment in Liggett's favor on Plaintiffs' claims for negligence against Liggett. (*See* Order Granting in Part and Denying in Part Defendant Liggett Group LLC's Motion for Partial Summary Judgment on Plaintiffs' Negligence and Strict Liability Claims, Oct. 26, 2022 (**Ex. A**, "Order")).

The Court's statements and specific ruling demonstrates the Court was not confused, or uninformed or otherwise susceptible of making a mistake in its ruling.

Regarding Plaintiffs' failure to warn negligence claims, the Court found Plaintiffs' claims failed because there was no special relationship between Plaintiff Sandra Camacho

[1] This opposition is limited to the order granting Liggett's Motion for Partial Summary Judgment only. PM USA will file a separate opposition, which Liggett adopts in full and incorporates by reference.

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("Mrs. Camacho") and Liggett, and Plaintiffs therefore could not prove the duty element. (*Id.* at 2). The Court also found, as to Plaintiffs' failure to warn claims arising before July 1, 1969, there was no evidence Mrs. Camacho's decision to start or continue smoking Liggett cigarettes was related to any statements made by Liggett, and there was no evidence Mrs. Camacho would not have started or would have ceased smoking but for Liggett's failure to provide additional warnings. (*Id.*). The Court additionally found that the Federal Cigarette Labelling and Advertising Act, 15 U.S.C. § 1331, preempts any failure to warn claims arising after July 1, 1969, premised on advertising and promotion, and that Plaintiffs did not establish Liggett made any other type of statement(s) that would subject it to liability under a failure to warn claim. (*Id.*).

Regarding Plaintiffs' design defect negligence claims, the Court found Plaintiffs' claims failed because the mere manufacture of cigarettes—commonly known to be an inherently dangerous consumer product—does not constitute a defect. (*Id.*). The Court found Plaintiffs could not prove Liggett made design choices that increased the danger of its cigarettes beyond the expectations of the ordinary consumer, nor could Plaintiffs prove that this alleged increased danger was the legal cause of Mrs. Camacho's cancer. (*Id.* at 2-3). In making this decision, the Court recognized that even Plaintiffs' experts conceded that *all* combustible cigarettes are addictive and can cause laryngeal cancer, defeating Plaintiffs' design defect negligence claims. (*Id.* at 3). The Court further found that "Plaintiffs' design-defect theory that all cigarettes are inherently dangerous is precluded by federal conflict preemption and the Restatement (Second) of Torts § 402A." (*Id.*).

II. Plaintiffs' Motion for Reconsideration

Plaintiffs thereafter filed their Motion for Reconsideration asking the Court to overturn its detailed reasoning, and instead enter an order that (1) Plaintiffs are only required to prove that Liggett's cigarettes were more dangerous than the ordinary consumer's expectations and (2) rejecting whether the link between smoking cigarettes and cancer[2] was common knowledge.

[2] Plaintiffs provide a citation concerning lung cancer to make this point. (Mot. for Recons. at 5). However, this case concerns Mrs. Camacho's laryngeal cancer.

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(Mot. for Recons. at 5). Plaintiffs do not challenge the Court's decision to grant summary judgment on Plaintiffs' negligence claims against Liggett based on a failure to warn theory. (*See generally id.*).[3]

ARGUMENT[4]

I. Plaintiffs' Do Not Present Any New Issues of Fact Or Law

In general, a motion for reconsideration should be denied, except "in very rare instances in which new issues of fact or law are raised supporting a ruling contrary to the ruling already reached should a motion for rehearing be granted." *Moore v. City of Las Vegas*, 92 Nev. 402, 405, 551 P.2d 244, 246 (1976). "A district court may reconsider a previously decided issue if substantially different evidence is subsequently introduced or the decision is clearly erroneous." *Masonry & Tile Contractors Ass'n of S. Nev. v. Jolley, Urga & Wirth, Ltd.*, 113 Nev. 737, 741, 941 P.2d 486, 489 (1997).

Here, Plaintiffs do not present any new issues of fact or law for the Court to consider in their Motion for Reconsideration. Instead, Plaintiffs present the same evidence and laws the Court already considered in making its ruling and aver that the Court simply did not understand the issues. Additionally, as detailed *infra*, Plaintiffs fail to prove that the Court's previous Order granting summary judgment on Plaintiffs' claims for negligence against Liggett was clearly erroneous. Therefore, the Court should deny Plaintiffs' Motion for Reconsideration.

II. Plaintiffs Failed to Prove a Design Defect Negligence Claim

To establish a negligence claim against Liggett, Plaintiffs must demonstrate that (1) Liggett owed Plaintiffs a duty of care; (2) Liggett breached that duty; (3) the breach was the

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[3] Plaintiffs' arguments in their Motion for Reconsideration concerning failure to warn claims are solely directed toward Defendant Philip Morris USA, Inc. (*See generally* Mot. for Recons.). Because Plaintiffs do not present any arguments regarding the Court's Order granting summary judgment on Plaintiffs' claims against Liggett for failure to warn, Liggett does not address this cause of action in this Opposition. The Court properly granted Liggett's motion for summary judgment because Plaintiffs cannot prove the duty and causation elements for their failure-to-warn claims arising before July 1, 1969. (Order, **Ex. A**, at 2). Additionally, Plaintiffs cannot succeed on their failure to warn claims arising on or after July 1, 1969, because those claims are preempted by federal law. (*Id.*).

[4] Liggett incorporates into this Opposition all previous arguments presented in its Motion for Partial Summary Judgment on Plaintiffs' Claims for Negligence and Strict Liability, as well as the corresponding Reply and its arguments made at the August 29, 2022 hearing.

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legal cause of Plaintiffs' injuries; and (4) Plaintiffs suffered damages. *See Sadler v. PacifiCare of Nev.*, 130 Nev. 990, 995, 340 P.3d 1264, 1267 (2014). More specifically, Plaintiffs are required to prove that (1) there was a defect with Liggett's L&M cigarettes; (2) the defect was in existence when the cigarettes left Liggett's possession; (3) the defect came about as the result of the failure of Liggett to use ordinary care; and (4) the claimed defect caused Plaintiffs' injury, otherwise known as proximate cause.[5] *Long v. Flanigan Warehouse Co.*, 79 Nev. 241, 250, 382 P.2d 399, 404 (1963). Negligence requires a greater showing by plaintiffs than strict liability. *Valentine v. Baxter Healthcare Corp.*, 81 Cal. Rptr. 252, 263 (Cal. Ct. App. 1999).[6]

For a design defect claim, Nevada utilizes the consumer expectation test. *Ford Motor Co. v. Trejo*, 133 Nev. 520, 521, 402 P.3d 649, 650 (2017). Under this test, Plaintiffs must "prove that the product failed to perform 'in the manner reasonably to be expected in the light of its nature and intended function.'" *Ward v. Ford Motor Co.*, 99 Nev. 47, 48, 657 P.2d 95, 96 (1983) (citation omitted). Plaintiffs must also prove Liggett's cigarettes were "more dangerous than would be contemplated by the ordinary user having the ordinary knowledge available in the community." *Ginnis v. Mapes Hotel Corp.*, 86 Nev. 408, 413, 470 P.2d 135, 138 (1970); *see Stackiewicz v. Nissan Motor Corp. in USA*, 100 Nev. 443, 448, 686 P.2d 925, 928 (1984) ("Such a condition is, in the words of the Restatement (Second) of Torts, Section 402A(1) (1965), 'unreasonably dangerous.'"). "The test for whether a product is 'unreasonably dangerous' is an objective determination and is measured by the 'ordinary consumer' for whom

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[5] Notably, Plaintiffs omit in their Motion for Reconsideration that product liability negligence requires proof of causation. (*See* Mot. for Recons. at 5).

[6] In theory, claims for negligent design are distinguishable from strict liability claims; "[w]hile strict liability focuses on the condition of the product, '[n]egligence looks at the acts of the manufacturer and determines if it exercised ordinary care in design and production.'" *Am. Tobacco Co., Inc. v. Grinnell*, 951 S.W.2d 420, 437 (Tex. 1997); *see also Whiteley v. Philip Morris Inc.*, 11 Cal.Rptr.3d 807, 856 n.29 (Cal. Ct. App. 2004) ("Product liability actions may be based upon allegations of negligence in the design of the product or upon a strict liability theory based upon an alleged defect in the design."). However, courts interpreting Nevada law have frequently considered claims for negligence and strict liability together. *See, e.g.*, *Forest v. E.I. DuPont de Nemours and Co.*, 791 F.Supp.1460, 1463-64 (D. Nev. 1992). Regardless, in either type of action, "'legal cause' is an element of the cause of action" that a plaintiff must prove, and Plaintiffs here cannot do so. *Whiteley*, 11 Cal.Rptr.3d at 856 n.29.

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the product is designed." *Rivera v. Philip Morris, Inc.*, 395 F.3d 1141, 1151 (9th Cir. 2005). "[A] product is not unreasonably dangerous if everyone knows of its inherent dangers." *Id.* at 1153. Plaintiffs ask this Court to ignore the warnings in place beginning in 1966 and assume the general public knew nothing about the dangers of smoking.

Here, the Court properly granted summary judgment for Liggett on Plaintiffs' claims for negligence because Plaintiffs are unable to establish all elements necessary for a design defect cause of action. Specifically, as the Court found, Plaintiffs are unable to prove that Liggett made design choices that increased the danger of its L&M brand cigarettes beyond the expectations of an ordinary consumer and that those design choices—as opposed to smoking in general—were the legal cause of Mrs. Camacho's cancer. (*See* Order, **Ex. A**, at 2-3). Summary judgment was therefore warranted because there are no genuine disputes of material facts and Liggett is entitled to judgment as a matter of law. Nev. R. Civ. P. 56; *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005).

In their Motion for Reconsideration, Plaintiffs specifically take issue with the Court stating that Plaintiffs did not demonstrate "that Liggett did something to its L&M brand cigarettes that rendered them *more* dangerous than any other cigarette." (*See id.* at 4-5, 7; Order, **Ex. A**, at 3). Plaintiffs are correct that they are only required to "prove that L&M cigarettes were more dangerous than the ordinary consumer's expectation." But this they cannot do, as the Court already determined.

a. Plaintiffs Cannot Prove Liggett's Cigarettes Were More Dangerous Than the Ordinary Consumer's Expectations

i. Liggett Did Not "Design and Add" Danger to its Cigarettes

Plaintiffs disagree with the Court's conclusion that they are unable to prove that Liggett made design choices that increased the danger of L&M cigarettes beyond the expectations of the ordinary consumer. (*See* Mot. for Recons. at 7; Order, **Ex. A.**, at 2-3). However, Plaintiffs present no new evidence for the Court to consider and instead seek to convince the Court, once again, that reconsideration is warranted on the basis that Liggett "designed and added" danger

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to L&M cigarettes that is not inherent, pointing to the federal definition of a cigarette as their guidepost. (*See* Mot. for Recons. at 7).

Plaintiffs have repeatedly attempted to distinguish the broad definition of "cigarette" contained in 15 U.S.C. § 1332(1) from the common characteristics of cigarettes on the market to establish that there is a defect with defendants'—and nearly all other manufacturers'—cigarettes. (*See, e.g.*, Hearing on All Pending Motions, Aug. 29, 2022, at 44-46 (**Ex. B**) (explaining that the majority of cigarettes on the market are not simply tobacco wrapped in paper and that if a manufacturer produced "just naturally organic tobacco rolled in paper," Plaintiffs would not bring a design defect claim against that manufacturer)). Courts have repeatedly rejected this kind of categorical liability with respect to cigarettes and design defects that Plaintiffs seek to impose here. *See Am. Tobacco Co., Inc. v. Grinnell,* 951 S.W.2d 420, 433 n.10 (Tex. 1997); *see also Liggett Group, Inc. v. Davis*, 973 So.2d 467, 472-73 (Fla. Dist. Ct. App. 2007) (concluding that the plaintiff's "negligence claim based on Liggett's mere continuing to manufacture cigarettes [was] barred by conflict preemption," and citing to cases from other jurisdictions to further explain that such categorical negligence claims would run afoul of Congress' intent to not ban cigarettes).

Further, any distinctions are inapposite because the inquiry is whether Liggett negligently produced a product that is more dangerous than an ordinary user would contemplate, not whether cigarettes on the market narrowly conform to the federal definition. *See Ginnis*, 86 Nev. at 413, 470 P.2d at 138. Consumers are well aware that the cigarettes on the market are not just a "roll of tobacco wrapped in paper." 15 U.S.C. § 1332(1)(A). Plaintiffs have not offered any evidence to suggest Plaintiffs, or other ordinary consumers, were reading the federal definition of a cigarette to decipher the risk associated with smoking. Simply repeating an assertion over and over does not make it true, nor does it count as new facts or new law to warrant reconsideration. As such, this is a red herring, and the Court already properly granted summary judgment.

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ii. Liggett's Cigarettes are Inherently Dangerous, But Not Defective

Cigarettes are inherently dangerous products, but that does not make them categorically defective. *See* Restatement (Second) of Torts § 402A cmt. i (1965). "Good tobacco is not unreasonably dangerous merely because the effects of smoking may be harmful." *Id.* Instead, for Liggett's cigarettes to be considered "unreasonably dangerous," constituting a defect, Plaintiffs must show that Liggett's cigarettes were "dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics." *Id.*

Despite Plaintiffs' protestation to the contrary, the Liggett cigarettes Mrs. Camacho smoked were not more dangerous than the ordinary consumer would contemplate. The Court properly found that Plaintiffs had not made any showing or disclosed evidence of such increased danger. Liggett's L&M cigarettes contained the same common design characteristics and corresponding health hazards that consumers expected from other cigarettes on the market at the time. Plaintiffs have been unable to offer evidence to establish Liggett's cigarettes were "unreasonably dangerous," amounting to a design defect. *See Rivera*, 395 F.3d at 1151, 1153.

iii. Liggett's Warning Labels Influenced the Expectations of the Ordinary Consumer

Plaintiffs' design defect claim additionally fails because Liggett complied with federal law to provide warnings on its cigarettes. As such, Plaintiffs are unable to prove that Liggett's cigarettes were more dangerous than would be contemplated by an ordinary user. *Ginnis*, 86 Nev. at 413, 470 P.2d at 138. Plaintiffs are unable to prove Liggett's cigarettes failed the consumer expectation test because "[a] consumer's reasonable expectations are typically influenced by the warning which accompanies the product." *Partie v. Ethicon, Inc.*, 2022 WL 2390545, at *3 (D. Nev. July 1, 2022) (providing in the next sentence that warnings therefore shield a manufacturer from liability, absent a showing of a commercially feasible alternative design); *Ford Motor Co. v. Trejo*, 133 Nev. 520, 529, 402 P.3d 649, 656 (2017) ("[E]vidence related to instructions and warnings included with the product, as well as product advertising

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and marketing, remains relevant to prove a reasonable consumer's expectations with respect to the product.").

In *Papike*, the Ninth Circuit reviewed a case where a woman sued a tampon manufacturer after she contracted toxic shock syndrome. *See generally Papike v. Tambrands Inc.*, 107 F.3d 737 (9th Cir. 1997). The plaintiff claimed the tampons were defectively designed because the tampons contained a layer of viscose rayon, which she alleged amplified toxin production. *Id.* at 743. The Ninth Circuit affirmed the district court's summary judgment order for the manufacturer and explained that the plaintiff's design defect claim failed the "consumer expectation" test because the manufacturer complied with federal warning requirements on the product. *Id.* The *Papike* Court justified, "To rule otherwise would allow the anomalous circumstance that a consumer is entitled to expect a product to perform more safely than its government-mandated warnings indicate." *Id.* The Court therefore concluded the plaintiff's negligence claim, which required her to prove both a design defect and that the manufacturer acted unreasonably, failed. *Id.* at 744.

Plaintiffs' claim here also fails, as the Court already determined. Liggett's warning labels informed consumers that smoking L&M cigarettes could be hazardous to their health, as required by federal law. Liggett provided this information directly to Mrs. Camacho and other consumers. Thus, Liggett's L&M cigarettes were not more dangerous than the ordinary consumer of cigarettes would have expected. *See Partie*, 2022 WL 2390545, at *3.

iv. Plaintiffs Cannot Argue Defective Design When They Provide No Evidence of a Viable Alternative Design

The health warnings Liggett provided with its cigarettes shield Liggett from liability because Plaintiffs have not provided evidence of a commercially feasible alternative design. Under Nevada law, manufacturers are shielded from defective design liability if they provide warnings on their products, "unless the defect could have been avoided by a commercially feasible change in design that was available at the time the manufacturer placed the product in the stream of commerce." *Robinson v. G.G.C., Inc.*, 107 Nev. 135, 139, 808 P.2d 522, 525 (1991).

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Here, Liggett provided warning labels on its cigarettes, and Plaintiffs have not shown that there was a commercially feasible design change available during the time Sandra Camacho used Liggett's L&M brand cigarettes. *See id.* Just the opposite—Plaintiffs' experts have opined that *all combustible cigarettes* on the market contain the same design features Plaintiffs complain of here. Plaintiffs have no evidence of a commercially feasible, "safer" design of cigarettes that Mrs. Camacho, or the ordinary consumer, would have used.

Similar to Plaintiffs' claim here, in *Whiteley*, the plaintiff's "negligent design cause of action was premised not upon defendants' negligence in manufacturing and selling cigarettes *per se*, but upon allegations that defendants negligently designed the cigarettes, insofar as they could have been made safer." 11 Cal.Rptr.3d at 856 (emphasis added). The plaintiff argued that the cigarette manufacturer was liable under a theory of negligent design for his wife's lung cancer because the manufacturer could have produced a "safer" cigarette by reducing the carcinogens and by not manipulating the nicotine in its cigarettes. *Id.* at 857. The *Whiteley* Court concluded there was insufficient evidence of causation because there was no evidence that, if the manufacturer had reduced carcinogens and/or nicotine in their cigarettes, that the plaintiff's wife would have smoked the manufacturer's "safer" cigarettes, smoked less, or quit smoking. *Id.* at 862-64 (providing that the question was "whether plaintiff ha[d] shown 'in reasonable medical probability' that the alleged *negligent design* of those cigarette products was a substantial factor contributing to the dose of carcinogens Whiteley inhaled or ingested, and hence to her risk of developing lung cancer").

So too here does the Plaintiffs' design defect claim fail because they cannot establish a causal link between the specific design of Liggett's cigarettes and Mrs. Camacho's injuries. *See Pooshs v. Philip Morris USA, Inc.*, 904 F.Supp.2d 1009, 1025 (N.D. Cal. 2012) (finding that "there [was] no evidence that the design of defendants' cigarettes—as opposed to plaintiff's smoking of cigarettes—was a substantial factor in causing her lung cancer" because plaintiff could not identify any particular design of the cigarettes that caused her cancer that would not result in the improper categorical ban of cigarettes containing nicotine). Under Nevada law, Liggett is shielded from design defect liability because Plaintiffs have failed to show there was

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a commercially feasible alternative design Liggett could have used and that Mrs. Camacho would have smoked an alternative design product that would have prevented her injuries. *See Robinson*, 107 Nev. at 139, 808 P.2d at 525.

b. The Court Properly Applied the Relevant Common Knowledge Inquiry

Plaintiffs additionally argue the Court should have narrowed the common knowledge inquiry to smoking and laryngeal cancer, as opposed to general health hazards. (Mot. for Recons. at 8-9). Plaintiffs rely on language from the Ninth Circuit in *Rivera*[7] to assert this argument. (*See* Mot. to Recons. 8-9). Notably, the Ninth Circuit stated it was speculating as to whether this inquiry should be narrowed in Nevada. *Rivera*, 395 F.3d at 1152.

Regardless of this argument, the Court already considered this exact issue before granting summary judgment. There is nothing new here. Plaintiffs presented this argument in their Response to Liggett's motion for partial summary judgment. *See* Plaintiffs' Response to Defendant Liggett Group LLC's Motion for Partial Summary Judgment on Plaintiffs' Negligence and Strict Liability Claims, June 8, 2022, at 20-21 (**Ex. C**). Further, the Court already considered evidence that there was information available to the public before Mrs. Camacho started smoking that highlighted smoking could increase a consumer's risk of developing cancer. *See* Defendant Liggett Group LLC's Motion for Partial Summary Judgment on Plaintiffs' Negligence and Strict Liability Claims, May 25, 2022, at 2 (**Ex. D**).

Mrs. Camacho began smoking *after* the issuance of the highly publicized 1964 Surgeon General's Report which linked smoking to cancer and other health hazards. *See id.* Mrs. Camacho continued smoking, despite additional reports and information continually becoming available to the public regarding health hazards linked to smoking. (*See id.* at 3-4). Further, every pack of cigarettes Mrs. Camacho smoked after January 1, 1966, carried health warnings. (*Id.*).

Therefore, even if the Court were to reconsider the common knowledge inquiry, Plaintiffs cannot establish that any alleged design defect in Liggett's cigarettes was the legal cause of Mrs. Camacho's laryngeal cancer. *See, e.g.*, *Ramos v. Philip Morris, Inc.*, 414

[7] *Rivera v. Philip Morris, Inc.*, 395 F.3d 1142, 1152-53 (9th Cir. 2005).

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F.Supp.2d 115, 124 (D.P.R. 2005) (explaining that plaintiffs failed to prove a design defect was the proximate cause of lung cancer because the evidence showed the decedent ignored repeated warnings regarding the health risks of smoking (citing *Est. of White ex rel. White v. R.J. Reynolds Tobacco Co.*, 109 F.Supp.2d 424, 434 (D. Md. 2000) (stating that evidence that decedent ignored warnings regarding health hazards demonstrates a lack of proximate cause for a design defect))). As such, the Court should deny Plaintiffs' request for reconsideration on this point as well.

CONCLUSION

Plaintiffs' Motion for Reconsideration does not raise any new evidence or arguments, and instead only repeats its previous positions. However, the Court's detailed Order granting summary judgment on Plaintiffs' claims for negligence against Liggett was not erroneous. Therefore, for the foregoing reasons, Liggett respectfully requests that the Court deny Plaintiffs' Motion for Reconsideration.

DATED this 21st day of December, 2022.

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CERTIFICATE OF SERVICE

Pursuant to Nev.R.Civ. Rule 5(b) and E.D.C.R. 8.05, I caused a true and correct copy of the foregoing **LIGGETT GROUP LLC'S OPPOSITION TO PLAINTIFFS' MOTION TO RECONSIDER ORDER GRANTING LIGGETT GROUP LLC'S MOTION FOR PARTIAL SUMMARY JUDGMENT ON PLAINTIFFS' NEGLIGENCE CLAIMS** to be served via the Court's Odyssey EFile & Serve system, which will send an electronic copy to all interested parties. The date and time of the electronic service is in place of the date and place of deposit in the mail.

DATED this 21st day of December, 2022.

/s/ Annette Jaramillo
An employee of Lewis Roca
Rothgerber Christie LLP

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EXHIBIT A

EXHIBIT A

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DISTRICT COURT

CLARK COUNTY, NEVADA

SANDRA CAMACHO, individually, and ANTHONY CAMACHO, individually, Plaintiffs, vs. PHILIP MORRIS USA, INC., a foreign corporation; R.J. REYNOLDS TOBACCO COMPANY, a foreign corporation, individually, and as successor-by-merger to LORILLARD TOBACCO COMPANY and as successor-in-interest to the United States tobacco business of BROWN & WILLIAMSON TOBACCO CORPORATION, which is the successor-by-merger to THE AMERICAN TOBACCO COMPANY; LIGGETT GROUP, LLC., a foreign corporation; and ASM NATIONWIDE CORPORATION d/b/a SILVERADO SMOKERS & CIGARS, a domestic corporation, and ROE BUSINESS ENTITIES XI-XX, inclusive. Defendants.	Case No. A-19-807650-C Dept. No. IV **ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT LIGGETT GROUP LLC'S MOTION FOR PARTIAL SUMMARY JUDGMENT ON PLAINTIFFS' NEGLIGENCE AND STRICT LIABILITY CLAIMS** **Hearing Date: August 29, 2022** **Hearing Time: 10:30 a.m.**

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On May 25, 2022, Defendant Liggett Group LLC ("Liggett"), filed its Motion for Partial Summary Judgment on Plaintiffs' Negligence and Strict Liability Claims. On June 8, 2022, Plaintiffs Sandra Camacho and Anthony Camacho filed their opposition. On August 29, 2022, this Court heard oral argument on the motion.

Having reviewed the pleadings and papers and having heard oral argument, the Court now grants in part and denies in part Liggett's Motion. Specifically, the Court rules as follows:

Liggett's Motion is granted to the extent it seeks Summary Judgment on Plaintiffs' negligence claims.

The Court finds that there was no special relationship between Liggett and Sandra Camacho giving rise to a duty on Liggett's part to disclose information to Sandra Camacho, therefore, the duty element on Plaintiffs' failure to warn claims, both before and after July 1, 1969, was not established. Plaintiffs' warning claims arising before July 1, 1969 also fail because there is no evidence that Mrs. Camacho would not have started smoking or would have quit between 1964 and July 1, 1969 but for Liggett's failure to provide additional warnings. There is no evidence that Mrs. Camacho's decision to start or continue smoking Liggett brand cigarettes were related to any statement made by Liggett. The Court finds that the Surgeon General provided his report in January of 1964 and that Ms. Camacho started smoking on or after April of 1964. The evidence is that Sandra Camacho started smoking Liggett's L&M brand because that is what her girlfriend smoked and gave her, she thought they were cool, and she continued to smoke L&M brand cigarettes until 1990 because that is what she was familiar with and because it was a milder smoker.

Additionally, the Court finds that after July 1, 1969, the Federal Cigarette Labelling and Advertising Act, 15 U.S.C. § 1331, preempts any failure to warn claims premised on advertising and promotion and Plaintiffs have failed to establish that Liggett made any other type of statement(s) other than with respect to advertising and promotion on which a failure to warn claim might be premised.

Plaintiffs' design claims fail because the mere manufacture of cigarettes—commonly known to be an inherently dangerous consumer product—does not constitute a defect. Plaintiffs must instead prove that Liggett made design choices in connection with its L&M brand that

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increased the danger of cigarettes beyond the expectations of the ordinary consumer and that such increased danger was a legal cause of Mrs. Camacho's laryngeal cancer. Here, Plaintiffs have no evidence of either element. Plaintiffs did not demonstrate in opposition to the motion that Liggett did something to its L&M brand cigarettes that rendered them *more* dangerous than any other cigarette, beyond the common knowledge of the ordinary consumer, i.e. that cigarettes can cause cancer and death. Nor can Plaintiffs show that but for Liggett's design choices, Mrs. Camacho would have avoided her laryngeal cancer.

None of Plaintiffs' experts provided evidence that Mrs. Camacho developed laryngeal cancer because of any defective design in Liggett's L&M brand cigarettes. Plaintiffs' experts concede that *all* combustible cigarettes are addictive and can cause laryngeal cancer—regardless of any design features and claim that all cigarettes are inherently defective, which is insufficient to support their claims. Plaintiffs' design-defect theory that all cigarettes are inherently dangerous is precluded by federal conflict preemption and the Restatement (Second) of Torts § 402A.

Liggett's Motion is denied to the extent that it seeks Summary Judgment on Plaintiffs' strict liability claims.

IT IS SO ORDERED

Dated this 26th day of October, 2022

B38 2C8 CF54 4629
Nadia Krall
District Court Judge

Respectfully submitted

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CSERV

DISTRICT COURT
CLARK COUNTY, NEVADA

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

AUTOMATED CERTIFICATE OF SERVICE

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DISTRICT COURT

CLARK COUNTY, NEVADA

SANDRA CAMACHO, individually, and ANTHONY CAMACHO, individually, Plaintiffs, vs. PHILIP MORRIS USA, INC., a foreign corporation; R.J. REYNOLDS TOBACCO COMPANY, a foreign corporation, individually, and as successor-by-merger to LORILLARD TOBACCO COMPANY and as successor-in-interest to the United States tobacco business of BROWN & WILLIAMSON TOBACCO CORPORATION, which is the successor-by-merger to THE AMERICAN TOBACCO COMPANY; LIGGETT GROUP, LLC., a foreign	Case No.: A-19-807650-C Dept. No.: IV **DEFENDANT PHILIP MORRIS USA INC.'S OPPOSITION TO PLAINTIFFS' MOTION TO RECONSIDER ORDER GRANTING PHILIP MORRIS AND R.J. REYNOLDS' MOTION FOR PARTIAL SUMMARY JUDGMENT ON PLAINTIFFS' PUNITIVE DAMAGES CLAIM** **Hearing Date: January 31, 2023** **Hearing Time: 9:00 a.m.**

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

Defendants.

Defendant Philip Morris USA Inc. ("PM USA"), by and through its counsel of record, Weinberg, Wheeler, Hudgins, Gunn & Dial, LLC and Shook, Hardy & Bacon, LLP, hereby submit this Opposition to Plaintiffs' Motion to Reconsider Order Granting Philip Morris and R.J. Reynolds' Motion for Partial Summary Judgment on Plaintiffs' Punitive Damages Claim.

MEMORANDUM OF POINTS AND AUTHORITIES

Plaintiffs' Motion to Reconsider fails to identify any legally sufficient reason why this Court should revisit its ruling granting PM USA's Motion for Partial Summary Judgment on Plaintiffs' Punitive Damages Claim. Plaintiffs do not argue that any newly discovered facts of this case or intervening changes in the controlling law should compel a different result. This Court should not entertain Plaintiffs' belated attempt at a second bite at the apple, especially because Plaintiffs cannot demonstrate any clear error in the Court's prior ruling.

For the reasons stated herein, the Court should deny Plaintiffs' Motion to Reconsider.

BACKGROUND

On May 25, 2022, PM USA moved for summary judgment on Plaintiffs' punitive damages claim based on *res judicata* and the terms of the 1998 Master Settlement Agreement ("MSA") entered into between (i) PM USA, Reynolds, and other tobacco companies, and (ii) the Nevada Attorney General for, and on behalf of, the citizens of the State of Nevada.[1] On August 29, 2022, this Court heard arguments on PM USA's Motion. In granting PM USA's Motion, the Court correctly noted that "punitive damages vindicate a public interest and . . . are ***not*** to compensate a plaintiff." *See* Order Granting Philip Morris and R.J. Reynolds' Mot. for Partial Summ. J. on Pls.' Punitive Damages Claim at 2 (emphasis added) (Ex. A). The Court further

[1] PM USA hereby incorporates by reference its previously filed Motion for Partial Summary Judgment on Plaintiffs' Punitive Damages Claim and Reply in Support.

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found that there is privity between Plaintiffs and the Nevada Attorney General, and that the Nevada Attorney General's representation was more than adequate. *Id.* at 2-3.

ARGUMENT

I. LEGAL STANDARD

"Only in the very rare instances in which new issues of fact or law are raised supporting a ruling contrary to the ruling already reached should a motion for rehearing be granted." *Moore v. City of Las Vegas*, 92 Nev. 402, 405, 551 P.2d 244, 246 (1976). Reconsideration is "an extraordinary remedy, to be used sparingly in the interests of finality and conservation of judicial resources." *Kona Entersp., Inc. v. Estate of Bishop*, 229 F.3d 877, 890 (9th Cir. 2000) (quoting Moore's Fed. Prac. § 59.30[4] (3d ed. 2000)).[2] "[A] motion for reconsideration should not be granted, absent highly unusual circumstances, unless the district court is presented with newly discovered evidence, committed clear error, or if there is an intervening change in the controlling law." *Id.* (citation omitted); *see also Masonry & Tile Contractors Ass'n of S. Nev. v. Jolly, Urga & Wirth, Ltd.*, 113 Nev. 737, 741, 941 P.2d 486, 489 (1997) ("A district court may reconsider a previously decided issue if substantially different evidence is subsequently introduced or the decision is clearly erroneous.").

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

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

Kamaka v. Goodsill Anderson Quinn & Stifel, 176 P.3d 91, 103 (Haw. 2008) (citation and

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

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internal quotation marks omitted).

II. PLAINTIFFS' MOTION FAILS TO MEET THE LEGAL STANDARD FOR A MOTION FOR RECONSIDERATION.

Because Plaintiffs' Motion does nothing more than raise arguments previously made and rejected, and because Plaintiffs fail to demonstrate clear error, that there is newly discovered evidence, or a change in the law, the Court need not address the merits of Plaintiffs' Motion, and should stop here and deny Plaintiffs' Motion.

Plaintiffs make the exact same arguments in their Motion as they did in response to PM USA's Motion for Partial Summary Judgment. *Compare, e.g.*, Pls.' Mot. at 4 (arguing the applicability of *Philip Morris USA v. Williams*), *and id.* at 5 (arguing punitive damages are a private right, and citing *Laramie v. Philip Morris USA Inc.* in support of the same), *and id.* (arguing Plaintiffs' unaccrued claims were not released with the MSA), *and id.* at 6 (arguing punitive damages are a remedy, not a cause of action), *with* Pls.' Resp. to Defs.' Mot. for Summ. J. on Pls.' Punitive Damages Claim at 12–13 (Ex. B) (arguing the applicability of *Williams*), *and id.* at 17 (arguing punitive damages are a private right, and citing *Laramie* in support of the same.), *and id.* at 8, 20 (arguing Plaintiffs' unaccrued claims were not released with the MSA), *and id.* at 6 (arguing punitive damages are a remedy, not a cause of action). As a result, the Court should deny Plaintiffs' Motion.

III. THE COURT DID NOT ERR IN GRANTING PM USA'S MOTION FOR PARTIAL SUMMARY JUDGMENT.

Even if Plaintiffs could meet the high threshold to merit reconsideration in the first instance, which they cannot, that does not entitle them to a different result. The question here is whether this Court clearly committed an error of law, and, as addressed herein, it did not.

A. Privity Exists Between Plaintiffs and the Nevada Attorney General.

The Court did not err "in brushing aside the U.S. Supreme Court's decision in *Williams*," Pls.' Mot. at 4, as *Williams* is entirely inapplicable and irrelevant. Quite telling of its inapplicability, privity and the MSA were not issues before the Supreme Court when rendering its decision in that case. *See generally Philip Morris USA v. Williams*, 549 U.S. 346 (2007). In

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Williams, the key issue was whether due process allows a jury to award punitive damages based on evidence of harm to persons not before the court, "*e.g.* victims whom the parties do not represent." *Id.* at 349. Here, and as this Court acknowledged, this case is "actually the complete opposite" of *Williams*. Aug. 29, 2022 Hr'g Tr. at 79 (Ex. C). And that is because the Nevada Attorney General represented all Nevada residents when she brought her lawsuit against PM USA and other tobacco companies.

Whether the Nevada Attorney General and Plaintiffs were in privity is a simple question of applying Nevada law to the undisputed facts. And Nevada law is clear: privity is "broadly construed" to "include ***any*** situation in which the relationship between the parties is sufficiently close to supply preclusion." *Mendenhall v. Tassinari*, 133 Nev. 614, 618, 403 P.3d 364, 369 (2017) (emphasis added). This includes a relationship where there is "sufficient commonality of interest," *id.*, or one where a party "adequately represented" the interests of another party in the prior lawsuit, *Alcantara ex rel. Alcantara v. Wal-Mart Stores, Inc.*, 130 Nev. 252, 261, 321 P.3d 912, 917 (2014). When the Nevada Attorney General brought her lawsuit against the tobacco industry, she brought the lawsuit ***for and on behalf of all Nevada residents*** to recover punitive damages against PM USA for the same conduct Plaintiffs seek to punish PM USA for here. As Nevada residents, Plaintiffs were clearly represented by the Nevada Attorney General in that lawsuit.[3]

B. Punitive Damages are a Public Right in Nevada, Not a Private Right.

Plaintiffs cite to a case from the Massachusetts Supreme Court to argue that punitive damages serve a private right in Nevada. *See* Pls. Mot. at 5. But what Plaintiffs fail to acknowledge is the difference between Massachusetts law and Nevada law. Massachusetts recognizes a private right to punitive damages, whereas Nevada does not. *Compare Laramie v. Philip Morris USA Inc.*, 388 Mass. 399, 407 (2021) ("Nonetheless, [punitive damages] also serve to vindicate a personal right"), *and Drywall Sys., Inc. v. ZVI Constr. Co.*, 435 Mass. 664, 670

[3] Notably, section 41(d) of the Restatement (Second) of Judgments indicates that individuals or entities permitted to represent the interest of a party in a prior action include "[a]n official or agency invested by law with authority to represent the person's interest." Without a doubt, the Nevada Attorney General fits this definition.

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(2002) ("the objective of punitive damages . . . include compensating claimants for their legal costs and emotional injuries and punishing and deterring actual and potential wrongdoers"), *with Siggelkow v. Phoenix Ins. Co.*, 109 Nev. 42, 45, 846 P.2d 303, 305 (1993) (punitive damages "provide a means by which the **community** . . . can express **community** outrage or distaste for the misconduct of an oppressive, fraudulent or malicious defendant and by which others may be deterred and warned that such conduct will not be tolerated.") (emphases added), *and Nevada Cement Co. v. Lemler*, 89 Nev. 447, 452, 514 P.2d 1180, 1183 (1973) ("The concept of punitive damages rests upon a presumed **public** policy . . . [that an award] should be in an amount that would promote the **public** interest without financially annihilating the defendant.") (emphases added).

Plaintiffs' base their contention that the Nevada Attorney General did not release their claims on the same mistaken premise: that punitive damages are a private right. *See* Pls.' Mot. at 6. But that is not so. Punitive damages are a public right. *See Nevada Cement Co.*, 514 P.2d at 1183; *Siggelkow*, 846 P.2d at 305. And as a result, the Nevada Attorney General did, in fact, release *all* claims for punitive damages. *See* Defs.' Mot. for Partial Summ. J. on Pls.' Punitive Damages Claim at 4–5 (Ex. D) (detailing the terms of the MSA as releasing both accrued and unaccrued claims for past and future conduct).

Finally, Plaintiffs argue that claim preclusion does not apply because punitive damages are a remedy and not a cause of action. Pls.' Mot. at 6. But it is the facts and circumstances upon which their punitive damages claim is based, not its legal label, that matters. *See Mendenhall*, 402 P.3d at 370 ("[t]he test for determining whether the claims, or any part of them, are barred in a subsequent action is if they are 'based on the same set of facts and circumstances as the [initial action]"). In other words, so long as the claim stems from "the same set of facts and circumstances," *res judicata* applies, irrespective of whether a plaintiff in a second lawsuit seeks to present different evidence or legal theories or seeks additional damages. *Id.* Thus, Plaintiffs having pled punitive damages as a "remedy" in their Complaint is irrelevant; what governs is the substance, not the label. And the substance of their Complaint is identical to the Nevada Attorney General's Complaint. *See* Defs.' Mot. for Partial Summ. J. (Ex. D) at 10–11.

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CONCLUSION

For these reasons, which are the same reasons the Court granted summary judgment, the Court should deny Plaintiffs' Motion for Reconsideration.

Dated this 21st day of December, 2022.

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I hereby certify that on the 21st day of December, 2022, a true and correct copy of the foregoing **DEFENDANT PHILIP MORRIS USA INC.'S OPPOSITION TO PLAINTIFFS' MOTION TO RECONSIDER ORDER GRANTING PHILIP MORRIS AND R.J. REYNOLDS' MOTION FOR PARTIAL SUMMARY JUDGMENT ON PLAINTIFFS' PUNITIVE DAMAGES CLAIM** was electronically filed and served on counsel through the Court's electronic service system pursuant to Administrative Order 14-2 and N.E.F.C.R. 9, via the electronic mail addresses noted below, unless service by another method is stated or noted:

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EXHIBIT A

EXHIBIT A

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DISTRICT COURT

CLARK COUNTY, NEVADA

SANDRA CAMACHO, individually, and ANTHONY CAMACHO, individually, Plaintiffs, vs. PHILIP MORRIS USA, INC., a foreign corporation; R.J. REYNOLDS TOBACCO COMPANY, a foreign corporation, individually, and as successor-by-merger to LORILLARD TOBACCO COMPANY and as successor-in-interest to the United States tobacco business of BROWN & WILLIAMSON TOBACCO CORPORATION, which is the successor-by-merger to THE AMERICAN TOBACCO COMPANY; LIGGETT GROUP, LLC., a foreign corporation; ASM NATIONWIDE	Case No.: A-19-807650-C Dept. No.: IV **ORDER GRANTING PHILIP MORRIS AND R.J. REYNOLDS' MOTION FOR PARTIAL SUMMARY JUDGMENT ON PLAINTIFFS' PUNITIVE DAMAGES CLAIM**

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

Defendants.

On August 29, 2022, the Court heard argument on Philip Morris and R.J. Reynolds' Motion for Partial Summary Judgment on Plaintiffs' Punitive Damages Claim, and the Court, having considered the Motion and Opposition thereto (if filed) and arguments of counsel, and for all of the reasons stated by the Court on the record,

IT IS HEREBY ORDERED THAT:

Philip Morris and R.J. Reynolds' Motion for Partial Summary Judgment on Plaintiffs' Punitive Damages Claim is GRANTED. This ruling also applies to Liggett, in light of Liggett's filed joinder to Philip Morris and R.J. Reynolds' Motion, therefore the punitive damage claims against Liggett are hereby DISMISSED.

In Nevada, punitive damages vindicate a public interest and punitive damages are not to compensate a plaintiff. In *Siggelkow v. Phoenix Ins. Co.,* 109 Nev. 42, 44–45, 846 P.2d 303, 304–05 (1993), the Nevada Supreme Court explained that: "Punitive damages are not awarded as a matter of right to an injured litigant, but are awarded in addition to compensatory damages as a means of punishing the tortfeasor and deterring the tortfeasor and others from engaging in similar conduct. Accordingly, a punitive damage award has as its underlying purpose public policy concerns unrelated to the compensatory entitlements of the injured party".

Philip Morris USA v. Williams, 549 U.S. 346, 127 S. Ct. 1057, 166 L. Ed. 2d 940 (2007) does not undermine Defendants' position. In that case, Philip Morris argued that the Constitution "prohibits the state, acting through a civil jury, from using punitive damages to punish a defendant for harm to nonparties." 549 U.S. 346, 356, 127 S. Ct. 1057, 1064. Here, we have the complete reverse. In *Williams* there was no privity. In the matter at bar, the Court finds that there is privity and that the Plaintiffs were in privity with the Nevada Attorney General.

Privity exists between two otherwise unrelated parties where one party "adequately

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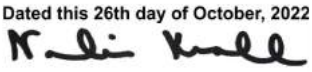
represented" another party's interests in a prior lawsuit—even if one of the parties' was not a "party" to the prior lawsuit. *Alcantara ex rel. Alcantara v. Wal-Mart Stores, Inc.*, 130 Nev. 252, 261, 321 P.3d 912, 917 (2014) (adopting the "adequate representation" analysis from the Restatement (Second) of Judgements section 41). The Court finds that whether the Nevada Attorney General adequately represented the Plaintiffs interests in the prior litigation is an issue of law for the Court. The Court further finds that the Nevada Attorney General's representation of Plaintiffs' interests was more than "adequate." Nevada resolved its lawsuit via the MSA, pursuant to which Defendants agreed to be punished in the amount $240 billion dollars and deterred from engaging in the activities that both the Nevada Attorney General and Plaintiffs alleged were wrongful. MSA prohibits the Defendants from marketing to youth, advertising in certain mediums (e.g., billboards and in public transit), communicating with the public through trade groups, and failing to disclose internal research.

For these reasons, and other reasons set forth in Defendants briefing and oral argument, the Motion is granted.

Dated this 26th day of October, 2022



EE9 80B D285 A066
Nadia Krall
District Court Judge

Submitted by:
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DISTRICT COURT
CLARK COUNTY, NEVADA

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

AUTOMATED CERTIFICATE OF SERVICE

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DISTRICT COURT

CLARK COUNTY, NEVADA

SANDRA CAMACHO, individually, and ANTHONY CAMACHO, individually, Plaintiffs, v. PHILIP MORRIS USA, INC., a foreign corporation; R.J. REYNOLDS TOBACCO COMPANY, a foreign corporation, individually, and as successor-by-merger to LORILLARD TOBACCO COMPANY and as successor-in-interest to the United States tobacco business of BROWN & WILLIAMSON TOBACCO CORPORATION, which is the successor-by-merger to THE AMERICAN TOBACCO COMPANY; LIGGETT GROUP, LLC., a foreign corporation; and ASM NATIONWIDE CORPORATION d/b/a SILVERADO SMOKES & CIGARS, a	CASE NO.: A-19-807650-C DEPT NO.: IV **PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON PLAINTIFFS' PUNITIVE DAMAGES CLAIM**

domestic corporation; and ROE BUSINESS ENTITIES XI-XX, inclusive,

Defendants.

COME NOW, Plaintiffs, SANDRA CAMACHO and ANTHONY CAMACHO, by and through their counsel of record, CLAGGETT & SYKES LAW FIRM, and provides Plaintiffs' Response to Defendants' Motion for Summary Judgment on Plaintiffs' Punitive Damages Claim ("Defendants' Motion"), as follows:

I. INTRODUCTION

This is a private personal injury action brought by two private citizens for the distinct injuries Sandra Camacho suffered. Plaintiffs' interests in this case did not accrue until 20 years after the Master Settlement Agreement ("MSA") was signed. As such, the punitive damages in this case are based on different operative facts and sought different injuries than the Attorney General's suit in 1997. While the Attorney General's suit sought punitive damages for Defendants' harm to the State, such as the healthcare costs caused by smoking, Plaintiffs seek punitive damages only for misconduct that caused Ms. Camacho's cancer. Indeed, much of the evidence Plaintiffs rely on—especially evidence of Defendants' wrongdoing after 1998 and Ms. Camacho's injuries in 2018—could not have been contemplated, much less released, by the MSA, because they had yet to occur at the time.

In the face of these facts, Defendants move this Court to preclude punitive damages here simply because the MSA released Nevada residents' right to sue Defendants on behalf of the *general public*. Defendants' argument is defective both procedurally and substantively.

Procedurally, Defendants ask this Court to grant summary judgment on inadmissible evidence. Former Supreme Court Justice Mark Gibbons heard and considered an almost identical motion on May 3, 2022 while sitting pro tem for Judge Michael Villani in *Tully v. Philip Morris USA, Inc., et al*, Case No.: A-19-807657-C, Clark County, Nevada. Ruling for the plaintiffs in that case, Judge Villani—who signed the order for former Justice Gibbons—denied Defendants' motion because the MSA is inadmissible. See **Exhibit 14.** Further, Defendants intentionally mischaracterize punitive damages as a claim preclusion issue (even in the title of their motion), when in fact Nevada law makes clear that punitive damages are only subject to issue preclusion analysis because it is not a claim.

Substantively, Defendants' argument fails even under claim preclusion for the lack of claim identity and privity between the Attorney General and Plaintiffs. The MSA 1) expressly preserved all the rights of future individual plaintiffs who pursue private torts; 2) could not have released Plaintiffs' private tort rights to punitive damages because it would have been contrary to Nevada law; and 3) did not contain any contractual prohibition against punitive damages in private suits. Most importantly, Defendants wholly ignore the elephant in the room—that the U.S. Supreme Court has declared punitive damages unconstitutional when used to punish a defendant for harming nonparties, such as the public, even if the same wrongdoing also injured the plaintiff. *Philip Morris USA v. Williams*, 549 U.S. 346, 350, 355, 357, 127 S. Ct. 1057, 1061, 166 L. Ed. 2d 940 (2007). Therefore, the Attorney General in 1998 could not seek and therefore could not release punitive damages rights belonging solely to Plaintiffs, who were not party to the Attorney General's suit. Likewise, the Camachos, whose

injuries only occurred two decades later, cannot and do not seek punitive damages to punish Defendants for anyone's injuries but their own. That decision alone undermines Defendants' entire motion.

II. APPLICABLE STANDARD OF REVIEW

A. Motion for Summary Judgment Cannot Be Granted Based On Material Evidence That Is Subject To Varying Interpretations

Summary judgment is appropriate only when no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law. *Stalk v. Mushkin*, 125 Nev. 21, 24–25 (2009). "The burden of proving the nonexistence of a genuine issue of material fact is on the moving party." *Fergason v. LVMPD*, 131 Nev. 939, 943 (2015). In deciding whether summary judgment is appropriate, this Court must view all evidence in the light most favorable to Plaintiffs, and all reasonable inferences in favor of Plaintiffs must be presumed correct. See *NGA #2 Ltd. Liability Co. v. Rains*, 113 Nev. 1151, 1157, 946 P.2d 163, 167 (Nev. 1997).

Defendants' Motion relies entirely upon the 1998 Master Settlement Agreement and its related court documents between Defendants and the Nevada Attorney General. See Def. Appx. Therefore, at least one set of the operative facts asserted by Defendants depend on how these documents must be interpreted, such as the scope of the MSA, the contractual parties' understanding of its application, and whose claims were dismissed. By Defendants' own admission, these operative facts are heavily disputed, since their Motion seek to interpret the terms and ramifications of the MSA. See Def. Mtn. at 4 & 10. The only indisputable fact here is that there is ample dispute over the MSA's scope, terms, meaning, and applicability to subsequent private plaintiffs seeking punitive damages in their individual torts. As such, Defendants did not and cannot meet the

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burden of proving the nonexistence of a genuine issue of material fact. This alone requires a denial of Defendants' Motion.

B. The Master Settlement Agreement Is Inadmissible For This Court's Consideration In A Motion For Summary Judgment

"The admissibility of evidence on a motion for summary judgment is subject to NRCP 43(a), and evidence that would be inadmissible at the trial of the case is inadmissible on a motion for summary judgment. The trial court may not consider hearsay or other inadmissible evidence whether it be in the form of direct testimony given in court of whether it appears in a deposition or answers to interrogatories." *Adamson v. Bowker*, 85 Nev. 115, 119 (1969). Regarding the admissibility of court records in a separate case, the Supreme Court cautioned that "[i]t is a general rule that courts should not take judicial notice of their records in another and different case, even though the cases are connected…" *Occhiuto v. Occhiuto*, 97 Nev. 143, 145 (1981). While exceptions exist to that rule, Defendants' Motion never bothered to explain why this Court can and should base its decision on documents whose admissibility is questionable and which are subject to varying interpretations such that there is a reasonable dispute as to what they establish.

This fatal flaw underlies the Order Denying Defendants' Motion for Summary Judgement on Plaintiffs' Punitive Damages Claim in *Tully v. Philip Morris USA, Inc., et al*, Case No.: A-19-807657-C, Clark County, Nevada, from former Supreme Court Justice Mark Gibbons and District Judge Michael Villani. See **Exhibit 14.**

The MSA is unrelated to this case since it was signed two decades before Sandra Camacho was diagnosed with cancer, and it contains multiple layers of hearsay. The only conceivable evidentiary rule they may try to assert here is judicial notice but, as the

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court in *Tully* explained in its order, the MSA's admissibility is questionable and this Motion must be denied. Additional detailed arguments are provided in Plaintiffs' Response to Defendants' Motion for Judicial Notice.

III. THE MSA AND CONSENT JUDGMENT DO NOT BAR PUNITIVE DAMAGES IN PLAINTIFFS' PRIVATE TORT ACTION

A. Punitive Damages Are Not Subject To Claim Preclusion Because They Are Not A Separate Cause of Action

Defendants' Motion seeks relief under the doctrine of claim preclusion. Def. Mtn. at 5. As the movant, Defendants bear the burden of proof. *Bennett v. Fid. & Deposit Co. of Maryland*, 98 Nev. 449, 452 (1982).

Nevada's claim preclusion doctrine "applies to preclude an entire second **suit** that is based on the same set of facts and circumstances as the first **suit**." *Five Star* at 1055 [emphasis added]. The Supreme Court emphasized this as the distinction from issue preclusion, which "applies to prevent relitigation of only a specific **issue** that was decided in a previous suit between the parties, even if the second **suit** is based on different **causes of action** and different circumstances." *Id.* Therefore, punitive damages are only subject to claim preclusion under Nevada law if they were a basis for a suit, i.e. a cause of action. If punitive damages were merely an issue in a suit, then the proper analysis is issue preclusion, not claim preclusion. This distinction between suit and issue is critical, because Defendants' arguments cannot survive an analysis under issue preclusion. Yet, that is the applicable doctrine here.

The Nevada Supreme Court has made clear that "punitive damages is a remedy, not a cause of action." *Droge v. AAAA Two Star Towing, Inc.*, 136 Nev. 291, 313 (Nev. App. 2020), *review denied* (July 27, 2020). The U.S. Supreme Court in turn clarified that

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"cause of action" is the "claim" in claim preclusion doctrine. See *Brownback v. King*, 141 S. Ct. 740, 747 (2021) fn. 3 ("Claim preclusion prevents parties from relitigating the same 'claim' or 'cause of action,' even if certain issues were not litigated in the prior action. Suits involve the same 'claim' or 'cause of action' if the later suit 'aris[es] from the same transaction' or involves a 'common nucleus of operative facts.'"). The logical conclusion then is that punitive damages are not subject to claim preclusion.

On the other hand, issue preclusion is fatal to Defendants' arguments. The elements are: "(1) the issue decided in the prior litigation must be identical to the issue presented in the current action; (2) the initial ruling must have been on the merits and have become final; (3) the party against whom the judgment is asserted must have been a party or in privity with a party to the prior litigation; and (4) the issue was actually and necessarily litigated." *Five Star* at 1055. At a minimum, Defendants cannot prove that the punitive damages issue was actually and necessarily litigated, because the MSA expressly denied all wrongdoing on Defendants' part:

> No Determination or Admission. This Agreement is not intended to be and shall not in any event be construed…as an admission or concession or evidence of (1) any liability or any wrongdoing whatsoever on the part of any Released Party or that any Released Party has engaged in any of the activities barred by this Agreement…Each Participating Manufacturer specifically disclaims and denies any liability or wrongdoing whatsoever…

Def. Ex. B at 131. How could punitive damages, which purport to punish wrongdoing, have been actually litigated in the Attorney General's action when the MSA and the Final Judgment disclaimed any wrongdoing? See also *In re Sandoval*, 126 Nev. 136, 141 (2010) ("we conclude that Nevada's issue-preclusion test requires that an issue be 'actually litigated' and not simply that a party had an opportunity to litigate the issue.").

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It is perhaps for this very reason that Defendants tried so persistently to shoehorn their arguments into a claim preclusion analysis. However, as explained below, they failed to meet their burden of proof even then.

B. Individual Claims Such As Plaintiffs' Were Specifically Excluded from the MSA

The elements of claim preclusion are: (1) the parties or their privies are the same, (2) the final judgment is valid, and (3) 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." *Five Star Capital Corp. v. Ruby*, 124 Nev. 1048, 1054 (2008), *holding modified by Weddell v. Sharp*, 131 Nev. 233 (2015). Here, Defendants failed to prove two of the three elements.

First, Plaintiffs did not and could not have brought their claims at the time of the MSA lawsuit since Ms. Camacho's cancer diagnosis had not occurred yet. Further, ensuring there was no doubt that individual, private claims were excluded from the State's action, as well as the MSA and Consent Judgment, the language of the MSA made clear that the only claims that were being released were the claims of the State, specifically only the claims asserted "on behalf of or generally applicable to the general public…, as opposed solely to private or individual relief for separate and distinct injuries." Def. Ex. B. In other words, the intent of the State's action, and the intent of the MSA, was to compensate the State for its own expenditures for treating smoking related diseases, not to vindicate private claims such as Plaintiffs'. At least one state supreme court has found, "the master settlement agreement preserves the right of smokers to bring their own actions against the manufacturers of tobacco products." *Lopes v. Com.*, 442 Mass. 170, 177, 811 N.E.2d 501, 507–08 (2004).

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Whatever doubt there remains is illuminated by Section I(C) of the Nevada Attorney General's 1997 Complaint, for it lists the five objectives of the MSA lawsuit: "(i) To secure for the people of the State of Nevada a fair and open market…(ii) to return to the State the increased costs of health care…(iii) to require fair and full disclosure by defendants of the nature and effects of their products; (iv) to unequivocally halt marketing of tobacco products to minors; and (v) to disgorge defendants' profits from their sales…" Def. Ex. A at 8. Nowhere among these objectives is any claim for private, individual tort action. To the contrary, in the 1997 complaint, counts pertinent to this motion—such as strict liability for defective products—only sought for Defendants to reimburse Nevada for medical care expenses and attorney fees. *Id* at 125.

In short, Plaintiffs' private claims (and remedies included in those claims, such as punitive damages) were never intended as a part of the 1997 suit, and therefore could not have been dismissed with prejudiced by the 1998 MSA and its attendant Consent Judgment.

C. There Is No Privity Between The State and Plaintiffs On Plaintiffs' Private Claims

The other element of claim preclusion Defendants failed to prove is that the parties or their privies are the same in both cases. Since Plaintiffs are not the State, Defendants must show that they were in privity with the State in the State's action against Defendants. More importantly, Defendants must prove that such privity goes to Plaintiffs' private claims, because those are the ones at issue here. However, U.S. Supreme Court precedents negate any such argument.

The State's powers to address wrongs through litigation is restricted. The State can only maintain an action based on *parens patriae* for sovereign or quasi-sovereign

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claims, not for a citizen's private interests. The U.S. Supreme Court has held, "[i]n order to maintain such an action, the State must articulate an interest apart from the interests of particular private parties, *i.e.*, the State must be more than a nominal party. The State must express a quasi-sovereign interest." *Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez*, 458 U.S. 592, 607, 102 S. Ct. 3260, 3268, 73 L. Ed. 2d 995 (1982). "[I]f the State is only a nominal party without a real interest of its own—then it will not have standing under the *parens patriae* doctrine." *Id.* at 600, 102 S. Ct. at 3265.

Quasi-sovereign interests are those that "consist of a set of interests that the State has in the well-being of its populace." *Id.* at 602, 102 S. Ct. 3260. These interests can relate to either the physical or economic well-being of the citizenry. *Id.* at 607, 102 S. Ct. 3269. They can evolve and change with time, and as such, the Court made very clear its desire to maintain a definition that is conducive to a case-by-case analysis. *Id.* The only hard and fast rule set forth by the Court is that a State may not invoke this doctrine when it is only a nominal party asserting the interests of another, such as a plaintiff's private tort claims. *Id.* at 602, 102 S. Ct. 3266 ("In such [a] situation[], the State is no more than a nominal party" and does not have standing to sue on the plaintiff's behalf.)

Plaintiffs' interest in vindicating their individual, private claims as alleged in this case is not a sovereign interest, or even a quasi-sovereign interest, that the State could bring on their behalf. "This means that the State and its citizens can be privies only with regard to public claims; they cannot be privies with regard to private claims." *Brown & Williamson Tobacco Corp. v. Gault*, 280 Ga. 420, 421, 627 S.E.2d 549, 551 (2006). Thus, the State and Plaintiffs were never in privy with regards to the claims brought here. Since the State was not in privity with Plaintiffs, it could not even assert,

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let alone release, Plaintiffs' claims on their behalf in the 1997 action. And if the State could not release the private claims, then it certainly could not release the remedies Plaintiffs sought for these claims, such as punitive damages.

Since the State had no authority to assert private claims on behalf of individuals, imposing claim preclusion on such claims or any remedy for those claims, would raise serious constitutional problems. Due process protects against the arbitrary deprivation of property, including a cause of action. *Tulsa Pro. Collection Servs., Inc. v. Pope*, 485 U.S. 478, 485, 108 S. Ct. 1340, 1345, 99 L. Ed. 2d 565 (1988); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428, 102 S. Ct. 1148, 1154, 71 L. Ed. 2d 265 (1982) ("a cause of action is a species of property protected by the Fourteenth Amendment's Due Process Clause"). Accordingly, "extreme application of state-law res judicata principles violates the Federal Constitution." *Richards v. Jefferson Cty., Ala.*, 517 U.S. 793, 804, 116 S. Ct. 1761, 1769, 135 L. Ed. 2d 76 (1996). It would constitute a violation of Plaintiffs' due process rights to preclude them from seeking punitive damages on their own individual, private claims that could not have been brought in 1997.[1]

[1] Given that punitive damages are traditionally treated as a remedy to an underlying claim, and the states attorneys general could not pursue individual claims on behalf of private parties, it is no surprise that after 1998, punitive damages against the cigarette companies have been awarded and recognized in states that were parties to the MSA. *See, e.g.*, *Izzarelli vs. R.J. Reynolds*, 701 F. App'x 26, 29-30 (2d Cir. 2017) (unpublished); *Boerner v. Brown & Williamson Tobacco Co.*, 394 F.3d 594 (8th Cir. 2005); *Bifolck v. Philip Morris, Inc.*, 152 A.3d 1183, 1209-15 (Conn. 2016); *Smith v. Brown & Williamson*, 410 S.W.3d 623, 628–29 (Mo. 2013) (en banc); *In re Tobacco Litig.*, 624 S.E.2d 738, 741-44 (W. Va. 2005); *Schwarz v. Philip Morris*, 355 P.3d 931, 932-33 (Or. Ct. App. 2015); *Craft v. Philip Morris*, 190 S.W.3d 368, 375, 388 (Mo. Ct. App. 2005). Even the United States Supreme Court has recognized the viability of punitive damages in tobacco actions post the MSA. Notably, when Defendant Philip Morris USA Inc. successfully persuaded the Supreme Court to change the law on how punitive damages are calculated in mass torts, the decision implicitly negates the argument Defendants now advances—that the MSA precludes any punitive damages in any subsequent tobacco suits. *Williams*, 549 U.S. at 350, 355, 357.

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D. U.S. Supreme Court's Precedent On Punitive Damages Forecloses Defendants' Argument

Defendants' argument—that Plaintiffs' request for punitive damages is a "public interest" that belongs to the "general public" and therefore Plaintiffs cannot now seek punitive damages for their own injuries—violates the United States Supreme Court's ruling in *Philip Morris USA v. Williams*, 549 U.S. 346, 350, 355, 357, 127 S. Ct. 1057, 1061, 166 L. Ed. 2d 940 (2007).

In *Williams*, Philip Morris argued the cigarette companies were being punished again and again for the same conduct. 549 U.S. at 355-57. The United States Supreme Court agreed and held that, when the same conduct harms many people (a mass tort), the amount of the punitive assessment must be limited to address the one person at issue, even though the jury hears about conduct harming others to decide whether punitive damages apply. 549 U.S. at 355 ("a jury may not…use a punitive damages verdict to punish a defendant directly on account of harms it is alleged to have visited on nonparties"); *id.* at 357 (holding "a jury may not punish for the harm caused others"). Thus, punitive damages will not be imposed for harm caused to others unless those victims file their own suit.

There is no reconciling Philip Morris' successful argument in *Williams* with the argument that Defendants make here—that one instance of litigation addresses punitive damages for all potential victims. The Supreme Court specifically held, "the Constitution's Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties…" *Id.* at 353. When the State filed its complaint in 1997, it could not have sought punitive damages relating to Plaintiffs' individual claims here, because they were nonparties whose underlying claims

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had yet to even accrue. Plaintiffs were "strangers to the litigation" and punitive damages could not have been awarded based upon harms done to them. *Id* at 346.

In fact, later in the *Williams* litigation, the Oregon Supreme Court rejected the same argument Defendants raise here:

> When the estate sued Philip Morris, the estate did not 'seek[ ] relief on behalf of or generally applicable to the general public.' Nor could it. As noted above, the United States Supreme Court has held that punitive damages may not be awarded to punish a defendant for harms to persons who were not parties to the litigation. Rather, in its effort to recover damages for injuries suffered by Jesse Williams, the estate was seeking "private or individual relief" for the death of Jesse Williams, a "separate and distinct injur[y]."

Williams v. R.J. Reynolds, 271 P.3d 103, 113 (Or. 2011) (citations omitted).

E. The New York And Georgia Decisions Turned On Unique State Laws, And Never Addressed U.S. Supreme Court's Ruling In *Williams*

Defendants are correct that punitive damages serve some public policy purpose. *Bongiovi v. Sullivan*, 122 Nev. 556, 580 (2006). But that is not determinative of the issue here, as evidenced by multiple state supreme and appellate courts, including ones Defendants cite. See *Laramie v. Philip Morris USA Inc.*, 488 Mass. 399 (2021); *Williams v. R.J. Reynolds*, 271 P.3d 103, 113 (Or. 2011); *Engle v. Liggett Grp., Inc.*, 945 So. 2d 1246, 1260 (Fla. 2006); *Bullock v. Philip Morris USA, Inc.*, 198 Cal. App. 4th 543 (2011). Broadly relying on the "benefit to society" language cherrypicked from caselaw, Defendants attempt to conflate punitive damages rooted in injuries suffered by the State with those rooted in injuries suffered by Plaintiffs. But the two are separate and distinct.

A thorough review of the various state supreme courts' decisions reveals that the determinative factor here is not the underlying policy objective of punitive damages, but whether Nevada views punitive damages in the language used in the MSA to describe the "Releasing Parties:"

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> persons or entities acting in a parens patriae, sovereign. quasi-sovereign, **private attorney general**, qui tam, taxpayer, or any other capacity, whether or not any of them participate in this settlement, (A) to the extent that any such person or entity is seeking relief on behalf of or generally applicable to the general public in such Settling State or the people of the State, **as opposed solely to private or individual relief for separate and distinct injuries...**

Def. Ex. B at 14-15 [emphasis added].

What differentiates New York and Georgia from Massachusetts and Nevada is that New York and Georgia have laws that definitively position plaintiffs seeking punitive damages as private attorneys general. To the contrary, NRS 42.005 makes clear that punitive damages in Nevada belong solely to the individual who brings suit, not to the State or the public. Under that statute, it is the "plaintiff [who] in addition to the compensatory damages, may recover damages for the sake of example and by way of punishing the defendant." *Id.* Further, rather than fixing the amount of the award based on broad-based policy considerations, the amount of punitive damages in Nevada is directly linked in most cases to the plaintiff's compensatory damages. *Id.* Notably, the Supreme Court changed Nevada's excessive punitive damages analysis in 2006 by **abandoning** a standard that considered the "extent to which the punished conduct offends the public's sense of justice and propriety" and **adopting** the federal standard, which simply considers:

> (1) "the degree of reprehensibility of the defendant's conduct," (2) the ratio of the punitive damage award to the "actual harm inflicted on the plaintiff," and (3) how the punitive damages award compares to other civil or criminal penalties "that could be imposed for comparable misconduct."

Bongiovi v. Sullivan, 122 Nev. 556, 582 (2006). Combined with the U.S. Supreme Court's decision in *Williams* in 2007, the caselaw leaves no doubt that punitive damages in

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Nevada are rooted entirely in an individual plaintiff's injuries and not in harm suffered by the public.

Unlike Nevada, New York holds punitive damages are only available when an injury is "shown to be emblematic of much more than individually sustained wrong. It must be shown to reflect pervasive and grave misconduct *affecting the public generally*, to, in a sense, *merge with a serious public grievance*, and thus merit punitive, indeed quasi-criminal sanction by the State." *Fabiano v. Philip Morris Inc.*, 54 A.D.3d 146, 150, 862 N.Y.S.2d 487 (2008) (emphasis added and internal citations omitted).[2] New York law treats plaintiffs seeking punitive damages as "private attorneys general". *Id.* New York goes so far as to hold that imposition of punitive damages for private purposes violates public policy. *Id*; *see also Clinton v. Brown & Williamson Holdings, Inc.*, 498 F. Supp. 2d 639, 653 (S.D.N.Y. 2007) (holding "enforcement of an award of punitive damages as a purely private remedy would violate strong public policy.").

This public wrong requirement persists through New York jurisprudence and is an element of punitive damages. In *Rocanova v. Equitable Life Assur. Soc. of U.S.*, 83 N.Y.2d 603, 634 N.E.2d 940 (1994), the New York Court of Appeals held, "a private party seeking to recover punitive damages must not only demonstrate egregious tortious conduct by which he or she was aggrieved, but also that such conduct was part of a pattern of similar conduct directed at the public generally." *Id.* at 613; *see, e.g.*, *Varveris v. Hermitage Ins. Co.*, 24 A.D.3d 537, 538, 806 N.Y.S.2d 688, 689 (2005) (punitive damages only permitted in limited circumstances where necessary to deter conduct directed at the public generally"); *Amherst Magnetic Imaging Associates, P .C. v.*

[2] New York further treats punitive damages as "distinct claims". *Fabiano v. Philip Morris Inc.*, 54 A.D.3d 146, 151, 862 N.Y.S.2d 487 (2008).

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Community Blue, 239 A.D.2d 892, 659 N.Y.S.2d 657, 658 (4th Dep't 1997) (dismissing claim for punitive damages in fraud case because no allegation of fraud aimed at public generally); *see also United States v. Merritt Meridian Construction Corp.*, 95 F.3d 153, 161 (2d Cir.1996) (upholding dismissal of punitive damages claim, because even assuming defendant's conduct was "actionable as independent torts" and "evidenced criminal indifference to its civil obligations," it did not demonstrate "a pattern of conduct harming the general public")

Because punitive damages are permissible in New York only where there is a public wrong, the *Fabiano* court (an intermediate appellate court) held the plaintiff there was pursuing "an essentially public interest in imposing a punitive sanction" which had been previously addressed by the state attorney general in the prior action against the industry. *Fabiano*, 54 A.D.3d at 151. This falls within the MSA's description of "Releasing Parties."

Similarly, Georgia has a statutory scheme that makes clear that punitive damages are sought on behalf of the state. Codified in Ga. Code Ann. § 51-12-5.1, Georgia law demands that "75 percent of the punitive damages awarded in a product liability action, less a proportion of the costs of litigation, are to be paid into the State treasury." *Brown & Williamson Tobacco Corp. v. Gault*, 280 Ga. 420, 423 (2006). Additionally, since punitive damages are expressly *not* a private interest, "Georgia law limits the recovery of punitive damages in product liability cases to one award of punitive damages from a defendant in a court in this State "for any act or omission...regardless of the number of causes of action which may arise from such act or omission." *Id.* These two uniquely Georgian elements were determinative in *Gault*, and are the polar opposite of Nevada's

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statutory scheme, which does not require any punitive damages to be allocated to the State treasury. NRS 42.005(2)(a).

Equally important is the fact that neither *Fabiano* nor *Gault* addresses the U.S. Supreme Court's decision in *Williams*. *Gault* was decided in 2006, so it preceded *Williams*. But *Fabiano* ignored the Due Process Clause issue at the center of *Williams*. As the Massachusetts Supreme Judicial Court reasoned in 2021:

> Punitive damages "operate as **'private fines'** intended to punish the defendant and to deter future wrongdoing...An award of punitive damages also may not be used to punish a defendant for harm inflicted upon nonparties, or "strangers to the litigation." *Williams*, supra at 353, 127 S.Ct. 1057. Because due process precludes a defendant from being punished without "an opportunity to present every available defense,"...permitting punishment based on harm to nonparties implicates due process concerns, including "arbitrariness, uncertainty, and lack of notice..." **Thus, the plaintiff's interest in an award of punitive damages was not a general interest in punishing Philip Morris for selling defective Marlboro cigarettes or in recovering for harms to the public at large; rather, the plaintiff asserted a personal interest**, tied to punishing Philip Morris for the harm its conduct specifically inflicted on the plaintiff's husband, Laramie. See *Williams*, 549 U.S. at 353, 127 S.Ct. 1057. **This interest in punitive damages was not adequately represented by the Attorney General in the prior action.**

Laramie v. Philip Morris USA Inc., 488 Mass. 399 (2021)[emphasis added].

F. The Public Policy Exception To Claim Preclusion Bars This Court From Granting Defendants' Motion

Since even before the MSA, Nevada Supreme Court has recognized a public policy exception to claim preclusion:

> We discern an exception to according res judicata effect to a prior judgment when to accord such preclusive effect would contravene an important public policy, particularly when the judgment was entered after stipulation or settlement.

Willerton v. Bassham, by Welfare Div., State, Dept. of Human Res., 111 Nev. 10, 18–19 (1995). The Court found support for such an exception in various state cases and

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secondary sources. *Id* citing *Modern Cases,* 91 A.L.R.3d at 1180; Comment Note, *Res judicata as subject to exception when its application would be opposed to public policy,* 88 L.Ed. at 389, 390 (1944); and *Varsity Amusement Company v. Butters,* 155 Colo. 330, 394 P.2d 603, 607 (1964). Most recently, the Supreme Court noted that "exceptions to the doctrine have been created to address situations in which barring a later-filed claim does not advance the doctrine's underlying policies or **conflicts with a statutory scheme, constitutional rights, or the agreed-upon or stated limits of the first proceeding."** *Boca Park Martketplace Syndications Group, LLC v. Higco, Inc.*, 133 Nev. 923, 925 (2017)[emphasis added].

Not only would claim preclusion conflict with Plaintiffs' statutory and constitutional rights, but the MSA expressly contained an agreed-upon "No Determination or Admission" clause that denied "any liability or wrongdoing whatsoever." Def. Ex. B at 131. The MSA was never intended to punish the Defendants and in fact has not punished them. Defendants ultimately avoided any punishment under the MSA. The tobacco industry negotiated what amounted to an exemption from the antitrust laws which allowed them to jointly coordinate price hikes without fear of losing market share, so that the costs of the settlement were passed on to consumers.[3] The industry turned a huge profit on the deal even after sharing their gains from this arrangement with the states.

[3]F.A. Sloan et al., *Impacts of the Master Settlement Agreement on the Tobacco Indus.*, 13 *Tobacco Control* 356, 359 (2004), available at http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1747950; W. Kip Viscusi, *Smoke- Filled Rooms: A Postmortem on the Tobacco Deal* 17-18, 33-42 (2002); Margaret A. Little, *A Most Dangerous Indiscretion: The Legal, Econ., & Political Legacy of the Gov'ts' Tobacco Litig.*, 33 Conn. L. Rev. 1143, 1143-44, 1174-75 (2001); Michael DeBow, *The State Tobacco Litig. & the Sep. of Powers in State Gov'ts: Repairing the Damage*, 31 Seton Hall L. Rev. 563, 569 (2001); Thomas C. O'Brien, *Constitutional & Antitrust Violations of the Multistate Tobacco Settlement*, CATO Institute Policy Analysis at 2-5 (No. 371, 2000).

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For example, cigarette prices increased $.45 per pack just days after the MSA was announced, more than double the $.19 per pack needed to fund the MSA. *A.D. Bedell Wholesale Co., Inc. v Philip Morris Inc.*, 263 F.3d 239, 249 (3d Cir. 2001). By April 2002, the average retail per-pack price of Defendants' cigarettes had increased by $1.27, or 85%. *Freedom Holdings, Inc. v. Spitzer*, 447 F. Supp. 2d 230, 239 (S.D.N.Y. 2004).

It is no surprise courts have recognized that "the MSA has no meaningful deterrent effect on Philip Morris and others and is not an effective punishment." *Bullock v. Philip Morris*, 198 Cal. App. 4th 543, 571 (Ct. App. 2011).

IV. NO CONTRACTUAL PROHIBITION AGAINST PUNITIVE DAMAGES IN INDIVIDUAL, PRIVATE SUITS

Defendants argue separately that, by the function of contract law, the MSA released Plaintiffs' right to pursue punitive damages. But Defendants' tortured reading of the MSA finds scant evidentiary support in the document itself. The analysis of the MSA already detailed in Section III applies equally here. Furthermore, "any ambiguity [in a contract] is construed against the drafter." *Mendenhall v. Tassinari*, 133 Nev. 614, 625 (2017). In 1998, Defendants certainly had reason to anticipate that individual plaintiffs will file private tort actions seeking damages for their separate and distinct injuries. Defendants also were well aware of Nevada's punitive damages statute, NRS 42.005, which was last amended in 1995. Yet, neither Defendants nor the Attorney General inserted any express language into the MSA to preclude a future private plaintiff's right to punitive damages. Unlike Defendants, the Camachos did not and could not have participated in the drafting of the MSA. Thus, the lack of any clear expression supporting Defendants' argument must be construed against them.

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A. The MSA Did Not Release Individual, Private Claims Or Their Attendant Remedies

As stated in section III.B., the MSA carves out individual claims, and therefore the elements of, and remedies flowing from, those claims are excluded from the MSA. By its terms, the MSA does not release claims by persons who seek "private or individual relief for separate and distinct injuries" as Plaintiffs do in this case. As the *Williams* holding requires, the MSA could not assert punitive damages for nonparties like Plaintiffs. Even more pertinent, Plaintiffs cannot in this case seek punitive damages for the general public even if they wished to. Since Plaintiffs can only recover punitive damages for the injury Defendants inflicted in causing them damages, Plaintiffs' suit and the remedies they seek do not overlap with the claims the State released in the MSA. Contractual language, however craftily written, cannot overcome the Due Process Clause.

B. Plaintiffs Are Not a "Releasing Party" As Defined By The MSA

As stated in Section III.D, the Oregon Supreme Court in *Williams* explained that a plaintiff in a private action for personal damages cannot be considered a "Releasing Party" under the MSA because the definition of "Releasing Party" only applies to third parties who seek relief on behalf of the general public. *Williams*, 271 P.3d at 113-14. And as detailed in Section III.E., unlike New York (where plaintiffs seeking punitive damages are acting as private attorneys general) and Georgia (where the statutory scheme allocates 75% of punitive damages to the State Treasury), Nevada's punitive damages scheme does not view Plaintiffs in a similar light.

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C. Defendants Did Not Pay Punitive Damages Under The MSA

Finally, and most importantly, Defendants cannot enforce a right they did not bargain for in the MSA. Nor can they claim benefits for purportedly performing a duty which the contract expressly voided. Since Defendants disclaimed all wrongdoing in the MSA, barring Plaintiffs' punitive damages would give Defendants a windfall which was never contemplated by the parties to the MSA. Moreover, it would allow Defendants to escape punishment once and for all in Nevada. Such a decision would sweep decades of conspiracy, deception, and reckless misconduct to these specific Plaintiffs under the rug as actions that warrant mere compensation, but never punishment and deterrence.

V. CONCLUSION

Plaintiff respectfully requests this Court deny Defendants' Motion for the reasons stated herein.

DATED this 8th day of June, 2022.

CLAGGETT & SYKES LAW FIRM

/s/ Fan Li

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 8th day of June, 2022 I caused to be served a true and correct copy of the **PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON PLAINTIFFS' PUNITIVE DAMAGES CLAIM** on the following person(s) by the following method(s) pursuant to NRCP 5(b) and NEFCR 9:

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/s/: *Lindsay S. Cortez*
An Employee of CLAGGETT & SYKES LAW FIRM

EXHIBIT C

EXHIBIT C

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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.

APPEARANCES:

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HASSIA T. DIOLOMBI, ESQ.
[Via BlueJeans]

ALEXANDRA L. SORENSON, ESQ.

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

EXHIBIT D

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DISTRICT COURT

CLARK COUNTY, NEVADA

SANDRA CAMACHO, individually, and ANTHONY CAMACHO, individually, Plaintiffs, vs. PHILIP MORRIS USA, INC., a foreign corporation; R.J. REYNOLDS TOBACCO COMPANY, a foreign corporation, individually, and as successor-by-merger to LORILLARD TOBACCO COMPANY and as successor-in-interest to the United States tobacco business of BROWN & WILLIAMSON TOBACCO CORPORATION, which is the successor-by-merger to THE AMERICAN TOBACCO COMPANY; LIGGETT GROUP, LLC., a foreign corporation; ASM NATIONWIDE CORPORATION d/b/a SILVERADO SMOKES & CIGARS, a domestic corporation; and LV SINGHS INC. d/b/a SMOKES & VAPORS, a domestic corporation; DOES I-X; and ROE BUSINESS ENTITIES XI-XX, inclusive, Defendants.	Case No.: A-19-807650-C Dept. No.: IV **HEARING REQUESTED** **DEFENDANTS PHILIP MORRIS USA INC. AND R.J. REYNOLDS TOBACCO COMPANY'S MOTION FOR PARTIAL SUMMARY JUDGMENT ON PLAINTIFFS' PUNITIVE DAMAGES CLAIM**

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WEINBERG WHEELER HUDGINS GUNN & DIAL

Defendants Philip Morris USA Inc. and R.J. Reynolds Tobacco Company ("Defendants"), by and through their counsel of record, hereby submit this Motion for Partial Summary Judgment on Plaintiffs' Punitive Damages Claim.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Res judicata and the terms of the 1998 Master Settlement Agreement ("MSA") bar Plaintiffs Sandra and Anthony Camacho from seeking punitive damages.

In 1997, the Nevada Attorney General—for and on behalf of *all* Nevada residents—filed a lawsuit against various members of the tobacco industry. The complaint sought, among other forms of relief, punitive damages to punish Defendants for their alleged conduct relating to the marketing, manufacture, and sale of cigarettes that harmed Nevada and its residents and to deter them (and others) from engaging in similar conduct in the future. In 1998, Nevada (and 45 other states) settled their claims by reaching a global **$240 billion** settlement with the tobacco industry. Now, almost 25 years later, Plaintiffs—again—seek to punish Defendants for the same decades-old alleged conduct via an award of punitive damages in this lawsuit.[1]

But *res judicata* and the MSA bar any such claims—as has been found in lawsuits filed in two other states. It is undisputed that the Nevada Attorney General was in privity with Plaintiffs when she filed the 1997 lawsuit; she had the same public interest as Plaintiffs in seeking punitive damages (*i.e.,* punishment and deterrence) and did so adequately (hence, the $240 billion settlement). Nor is there any dispute that the parties entered into a settlement, agreeing to dismiss with prejudice any claim relating to punitive damages as a part of the MSA, and reduced it to a valid final judgment. It is equally undisputed that Plaintiffs premise their punitive damages claim

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[1] The MSA can be considered as evidence on a motion for summary judgment based on *res judicata* without the Court taking judicial notice of it. However, if the Court decides that it needs to take judicial notice of the MSA, it can do so pursuant to Defendants' contemporaneously filed Motion for Judicial Notice, which was filed out of an abundance of caution. The bottom line is that Defendants have a due process right to have their *res judicata* defense heard on the merits. And the means by which Defendants are pursuing their *res judicata* defense are no different than what defendants in other cases here in Nevada and across the country have employed countless times. *See, e.g.*, *Nev. Contractors Ins. Co., Inc. v. Risk Serv.-Nev., Inc.*, 132 Nev. 1011 (2016).

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on the same allegations of decades-old conduct and legal theories that formed the basis of the 1997 complaint. Thus, *res judicata* bars Plaintiffs' punitive damages claim. But even if *res judicata* does not apply, which it undoubtedly does, the MSA independently bars Plaintiffs' punitive damages claim because it released them as a condition of the MSA. Of the appellate courts in the five other states that have considered this issue, those whose laws and litigation history most closely mirror Nevada's (*i.e.*, New York and Georgia) have ruled that *res judicata* and the MSA bar punitive damages in private suits by individual citizens against tobacco companies. Accordingly, the Court should grant summary judgment in Defendants' favor on Plaintiffs' punitive damages claim under Nevada Rule of Civil Procedure 56.

II. STATEMENT OF UNDISPUTED MATERIAL FACTS

The following facts are undisputed for purposes of this Motion.

On May 21, 1997, the Nevada Attorney General sued various participants in the tobacco industry, including Philip Morris, Reynolds, Liggett, and their predecessors in interest, "for and on behalf of the State of Nevada."[2] Nev. A.G. Compl. ¶ 20 (May 21, 1997) (Ex. A). The complaint asserted hundreds of allegations concerning the "massive unlawful course of conduct and conspiracy perpetrated by the defendants," *id.* ¶ 2, relating to the marketing, manufacture, and sale of cigarettes, which "originated in response to medical and scientific studies publicizing the adverse health impact of smoking in the early 1950s." *Id.* ¶ 12. More specifically, the complaint asserted 14 separate causes of action against the defendants, including violations of the Nevada Deceptive Trade Practices Act, civil conspiracy to fraudulently misrepresent and conceal,

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[2] Allegations throughout the complaint make clear that the Nevada Attorney General was seeking relief, including punitive damages, for harms suffered by the residents of Nevada caused by the use of tobacco products manufactured by Defendants. *See, e.g.*, Nev. A.G. Compl. ¶ 354 ("[D]efendants have unreasonably injured and endangered the comfort, repose, health and safety of the **residents of the State of Nevada** by selling tobacco products which are dangerous to human life and health and cause injury, disease and sickness. Defendants' acts have caused damage to the public, the public safety and the general welfare of **citizens of Nevada** and have caused great and/or irreparable harm to the State of Nevada." (emphases added)); *id.* ¶ 359 ("defendants have unreasonably injured and endangered the comfort, repose, health and safety of the **residents of the State of Nevada** in violation of NRS 202.450 by selling their tobacco products in an unlawful manner as outlines in Counts 1-5 above. Defendants have caused damage to the public, the public safety and the general welfare of the **residents of the State of Nevada**, and constitute a public nuisance.") (emphases added); *id.* ¶¶ 278–98, 376, 378, 381, 386, 398-399, 403-404 (asserting numerous allegations regarding the health effects of tobacco products on Nevada residents).

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negligence, and strict products liability. *See generally id*. The complaint also sought various forms of relief, including "an award of punitive damages against the defendants." *Id.* ¶ 408.

In November 1998, Nevada (along with 45 states, five U.S. territories, and the District of Columbia that had similar lawsuits pending) executed a $240 billion MSA with the defendants. Master Settlement Agreement (Ex. B); Tobacco Settlement Escrow-Notice of Nevada State-Specific Finality (dated Jan. 21, 1999) (Ex. C).[3] Under the terms of the settlement, Nevada has received almost $1 billion as of April 2021, and will receive additional payments in perpetuity for as long as the defendants remain in business. *Id.* In addition to paying money, the defendants agreed to refrain from many of the activities that had given rise to Nevada's 1997 complaint. *Id.*

In return, the parties expressly agreed to release certain claims. According to the MSA, both Nevada and any person in Nevada seeking to vindicate the interests of the "general public" are "absolutely and unconditionally" barred from bringing claims for "civil penalties and punitive damages," "accrued or unaccrued," "for past conduct . . . in any way related . . . to" cigarette "manufactur[ing] and "marketing," or for "future conduct" related to the "use of" cigarettes. *Id.* at 7, 13-14, 110. Indeed, the MSA made clear that those deemed to have released their claims included "persons or entities acting in a parens patriae . . . private attorney general . . . or any other capacity, whether or not any of them participate in this settlement" to the extent such persons or entities sought "relief on behalf of or generally applicable to the general public in such Settling State or the people of the State, as opposed solely to private or individual relief for separate and distinct injuries." *Id.* at 15. Finally, in December 1998, the parties reduced the settlement to a Consent Decree and Final Judgment. Nev. Consent Decree & Final J., § VII.A. (Dec. 10, 1998), (Ex. D), *as amended* Orer for Correction of Consent Decree and Final J. *Nunc Pro Tunc* (Jan. 15, 1999) (Ex. E).

III. LEGAL STANDARD

The Court "shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Nev. R.

[3] The four non-signatory states, Mississippi, Florida, Texas, and Minnesota, settled before execution of the MSA.

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Civ. P. 56. Summary judgment is appropriate "when the pleadings, depositions, answers to interrogatories, admissions, and affidavits, if any, that are properly before the court demonstrate that no genuine issue of material fact exists, and the moving party is entitled to judgment as a matter of law." *Wood v. Safeway, Inc.*, 121 Nev. 724, 731, 121 P.3d 1026, 1030 (2005).[4] "[I]f the nonmoving party will bear the burden of persuasion at trial, the party moving for summary judgment may satisfy the burden of production by either (1) submitting evidence that negates an essential element of the nonmoving party's claim, or (2) 'pointing out . . . that there is an absence of evidence to support the nonmoving party's case.'" *Cuzze v. Univ. & Cmty. Coll. Sys. of Nev.*, 123 Nev. 598, 602–03. 172 P.3d 131, 134 (2007) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 331 (1986)). "In such instances, in order to defeat summary judgment, the nonmoving party must transcend the pleadings and, by affidavit or other admissible evidence, introduce specific facts that show a genuine issue of material fact." *Id.* at 134.

IV. ARGUMENT

Defendants are entitled to summary judgment on Plaintiffs' punitive damages claim because (i) it is barred by *res judicata* and (ii) was released by the MSA.

A. *Res Judicata* Bars Plaintiffs from Pursuing a Punitive Damages Claim in Subsequent Litigation.

"The doctrine of res judicata precludes parties or their privies from relitigating a cause of action which has been finally determined by a court of competent jurisdiction." *Horvath v. Gladstone*, 97 Nev. 594, 596, 637 P.2d 531, 533 (1981). The Nevada Supreme Court has explained that claim preclusion, a form of *res judicata*, applies if: "(1) the parties or their privies are the same, (2) the final judgment is valid, and (3) 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." *Five Star Capital Corp. v. Ruby*, 124 Nev. 1048, 1054, 194 P.3d 709, 713 (2008), *holding modified by Weddell v. Sharp*, 131 Nev. 233, 350 P.3d 80 (2015). Bottom line: "claim preclusion applies to preclude an entire second suit that is based on the same set of facts and circumstances as the first suit." *Five Star*,

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[4] The Nevada Supreme Court has adopted the federal summary judgment standard. *See id.*

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194 P.3d at 713–14.

1. Plaintiffs were in privity with the Nevada Attorney General.

The Nevada Supreme Court has recognized "that privity does not lend itself to a neat definition, thus determining privity for preclusion purposes requires a close examination of the facts and circumstances of each case." *Mendenhall v. Tassinari*, 133 Nev. 614, 618, 403 P.3d 364, 369 (2017). Indeed, "[c]ontemporary courts . . . have **broadly construed** the concept of privity, far beyond its literal and historical meaning, to include **any** situation in which the relationship between the parties is sufficiently close to supply preclusion." *Id.* (quoting *Vets North, Inc. v. Libutti*, No. CV-01-7773-DRHETB, 2003 WL 21542554, at *11 (E.D.N.Y. Jan. 24, 2003)) (emphases added). For example, privity exists where "there is substantial identity between parties, that is, when there is sufficient commonality of interest." *Mendenhall*, 403 P.3d at 369 (citing *Tahoe–Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 322 F.3d 1064, 1081–82 (9th Cir. 2003) (internal quotations omitted). Privity also exists between two otherwise unrelated parties where one party "adequately represented" another party's interests in a prior lawsuit—even if one of the parties' was not a "party" to the prior lawsuit. *Alcantara ex rel. Alcantara v. Wal-Mart Stores, Inc.*, 130 Nev. 252, 261, 321 P.3d 912, 917 (2014) (adopting the "adequate representation" analysis from the Restatement (Second) of Judgements section 41).[5] The facts of this case indisputably satisfy both the "commonality of interest" and "adequate representation" analyses.

i. Plaintiffs' interest in pursuing punitive damages is the same public interest pursued by the Nevada Attorney General in the 1997 lawsuit.

Plaintiffs' interest in pursuing punitive damages against Defendants in this lawsuit is the same as the Nevada Attorney General's in 1997: punishing and deterring Defendants on behalf of the citizens of Nevada. The purpose of punitive damages is not to compensate a plaintiff—an award of compensatory damages serves that purpose. *See, e.g.*, *Coughlin v. Hilton Hotels Corp.*,

[5] Notably, the Restatement (Second) of Judgments Section 41(d) indicates that individuals or entities permitted to represent the interest of a party in a prior action include "[a]n official or agency invested by law with authority to represent the person's interest." Without question, the Nevada Attorney General fits this definition.

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879 F. Supp. 1047, 1050 (D. Nev. 1995) ("punitive damages are not designed to compensate the victim of a tortious act but rather to punish and deter oppressive, fraudulent or malicious conduct."); *Siggelkow v. Phoenix Ins. Co.*, 109 Nev. 42, 45, 846 P.2d 303, 305 (1993) ("a punitive damage award has as its underlying purpose public policy concerns unrelated to the compensatory entitlements of the injured party."). Rather, the purpose of punitive damages is "to punish a wrongdoer for his act and to deter others from acting in similar fashion." *Nevada Cement Co. v. Lemler*, 89 Nev. 447, 452, 514 P.2d 1180, 1183 (1973).

Nevada law makes clear that these dual purposes are public, not private. *See id*. ("[t]he concept of punitive damages rests upon a presumed public policy . . . [that an award] should be in an amount that would promote the public interest without financially annihilating the defendant."). The condemnation expressed by a jury awarding punitive damages "provide a means by which the **community** . . . can express **community** outrage or distaste for the misconduct of an oppressive, fraudulent or malicious defendant and by which others may be deterred and warned that such conduct will not be tolerated." *Siggelkow*, 846 P.2d at 305. And any subsequent punitive damages award should "provide **a benefit to society** by punishing undesirable conduct that is not punishable by the criminal law." *Id*. (emphasis added). This is why punitive damages "are not awarded as a matter of right to an injured litigant, but are awarded in addition to compensatory damages as a means of punishing the tortfeasor and deterring the tortfeasor and others from engaging in similar conduct." *Id*. at 304–05. Indeed, Plaintiffs acknowledge their interest in pursuing punitive damages is the same public interest pursued by the Nevada Attorney General in 1997 by repeatedly alleging that Defendants' decades-old conduct warrants a punitive damages award "to punish and make an example of Defendant[s] and to deter similar conduct in the future." *See, e.g.*, Pls.' Am. Compl. ¶¶ 105, 124, 145, 164, 189, 203, 219, 236 (Ex. F).

ii. The Nevada Attorney General adequately represented Plaintiffs' interests in the prior suit.

The law under which the Nevada Attorney General filed the 1997 complaint (*i.e.*, NRS

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598.0963(3), NRS 228.170(1), and Nevada common law[6]) provided her with the authority to bring civil lawsuits on behalf of the residents and citizens of Nevada to protect and secure the **public interests**. The Nevada Attorney General invoked this authority, claiming that the 1997 complaint presented "significant public policy issues" that affected Nevada citizens. Nev. A.G. Compl. at 1. The factual allegations demonstrate why, as they allege that the defendants:

- "[U]nfairly and unlawfully encouraged minors to use tobacco in violation of the declared public policy of the State of Nevada." *Id.* ¶ 314.
- "[D]efendants have unreasonably injured and endangered the comfort, repose, health and safety of the residents of the State of Nevada by selling tobacco products which are dangerous to human life and health and cause injury, disease and sickness." *Id.* ¶ 354.
- "Conspiracy caused smokers in the State of Nevada to take up or continue smoking." *Id.* ¶ 366.
- Delivered "cigarettes and tobacco products . . . to the residents of the State of Nevada in a condition that was unreasonably dangerous to the users." *Id.* ¶ 399.

Moreover, the Nevada Attorney General's representation of Plaintiffs' interests was more than "adequate." Nevada resolved its lawsuit via the MSA, pursuant to which Defendants were **punished** to the tune of $240 billion dollars (almost 1 billion of which has already gone directly to Nevada) and **deterred** from engaging in the activities that the Nevada Attorney General and Plaintiffs alleged were wrongful, violated Nevada law, and warranted an award of punitive damages. But not only were Defendants deterred from engaging in certain conduct, the MSA flat out prohibits them from marketing to youth, advertising in certain mediums (*e.g.*, billboards and in public transit), communicating with the public through trade groups, and failing to disclose internal research. Simply put, Plaintiffs' interests in pursuing punitive damages are the same as in

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[6] *See* NRS 228.170 ("when, in the opinion of the Attorney General, to protect and secure the interest of the State it is necessary that a suit be commenced or defended in any federal or state court, the Attorney General shall commence the action or make the defense"); NRS 598.0963(3) ("If the Attorney General has reason to believe that a person has engaged or is engaging in a deceptive trade practice, the Attorney General may bring an action in the name of the State of Nevada against that person to obtain a temporary restraining order, a preliminary or permanent injunction, or other appropriate relief."); *State ex rel. Johnson v. Reliant Energy, Inc.*, 128 Nev. 483, 486, 289 P.3d 1186, 1188 n.2 (2012) (recognizing that Nevada common law provides the Attorney General with the ability to sue on behalf of the State "in its capacity as parens patriae on behalf of the residents").

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the 1997 lawsuit filed by the Nevada Attorney General and she adequately represented those interests.

2. The final judgment is valid.

Under Nevada law, a stipulated settlement and dismissal satisfies the "final judgment" requirement of *res judicata*. *Mendenhall*, 403 P.3d at 370. That is what happened here: Nevada's Attorney General signed the MSA on behalf of the people of Nevada, and the State's suit was subsequently resolved via a consent decree and final judgment, which remains in force today. Nev. Consent Decree & Final J., § VII.A. (Dec. 10, 1998), *as amended* Or. for Correction (Jan. 15, 1999).

3. The issues to be decided in the present case are the same as those raised in the 1997 lawsuit filed by the Nevada Attorney General.

Under Nevada law, "[t]he test for determining whether the claims, or any part of them, are barred in a subsequent action is if they are 'based on the same set of facts and circumstances as the [initial action].'" *Mendenhall*, 403 P.3d at 370 (quoting *Five Star*, 194 P.3d at 714). In other words, so long as the claims stem from "the same set of facts and circumstances," *res judicata* applies, irrespective of whether a plaintiff in a second lawsuit seeks to present different evidence or legal theories or seek additional damages. *Id*.

Here, both Plaintiffs' Amended Complaint and the 1997 complaint assert identical claims for negligence, strict liability, civil conspiracy, and violations of the Nevada Deceptive Trade Practices Act. To support these claims, Plaintiffs and the Nevada Attorney General asserted hundreds of allegations detailing a history of purported wrongdoing by the tobacco industry during the second half of the twentieth century. Indeed, it is not possible to read Plaintiffs' extensive Complaint and conclude that they do not base their claims on "the same set of facts and circumstances" as those included in the 1997 complaint. *Id*. For example, both complaints:

- Allege that beginning in 1953, Defendants entered into a "conspiracy" to suppress information and create doubt regarding the health effects and addictiveness of cigarettes and did so in the form of various advertisements and public statements. *Compare* Pls.' Am. Compl. ¶¶ 33–46 *with* Nev. A.G. Compl. ¶¶ 9–14, 62–74.

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- Describe the formation of the same industry trade groups (*i.e.*, Tobacco Industry Research Committee, Council for Tobacco Research, and the Tobacco Institute) to further the goals of the conspiracy and recount that in 1954, in response to research demonstrating the risks of smoking, manufacturers published a newspaper advertisement (*i.e.*, "The Frank Statement") telling consumers they would conduct research regarding smoking and health and work with the public health community to disseminate that research. *Compare* Pls.' Am. Compl. ¶¶ 8–9, 42–50, 70 *with* Nev. A.G. Compl. ¶¶ 12–13, 38–40, 75–87.

- Rely on the same industry documents to allege that Defendants knew about the health effects and addictiveness of cigarettes for decades. *Compare* Pls.' Am. Compl. ¶ 54 (citing 1963 memorandum indicating "Nicotine is addictive . . . We are then, in the business of selling nicotine, an addictive drug") *with* Nev. A.G. Compl. ¶ 6 (quoting the same language from the same memorandum).

- Allege that the Defendants sought to encourage underage consumers to smoke in order to induce addiction at a young age. *Compare* Pls.' Am. Compl. ¶¶ 27(h), 64, 84, 92(m), 180(h), 194(g) *with* Nev. A.G. Compl. ¶¶ 2(a), 16, 189, 238-265, 270-273, 291, 312-322, 324(e), 325(e).

- Allege that the Defendants manipulated nicotine in cigarettes to create and sustain addiction. *Compare* Pls.' Am. Compl. ¶¶ 22, 55, 112–13 *with* Nev. A.G. Compl. ¶¶ 220–37, 311, 324(d), 325(d), 349, 367.

- Claim that the Defendants failed to develop alternative safer cigarette designs despite having the means and capabilities to do so. *Compare* Pls.' Am. Compl. ¶¶ 92(o), 111–13, 135(k) *with* Nev. A.G. Compl. ¶¶ 127–56.

Plaintiffs conclude by asserting a theory and basis for punitive damages that is no different from that of the 1997 lawsuit. *Compare* Pls.' Am. Compl. at ¶¶ 105, 124, 145, 164, 189, 203, 219, 236 ("Defendants' outrageous and unconscionable conduct warrants an award of exemplary and punitive damages pursuant to NRS 42.005, in an amount appropriate to **punish** and make an **example** of Defendants, and to deter similar conduct in the future." (emphasis added)), *with* Nev. A.G. Compl. ¶¶ 408 ("The defendants' conduct as described in this complaint was oppressive, fraudulent, and malicious and plaintiff is entitled, therefore, to an award of punitive damages against the defendants **for the sake of example** and **by way of punishing** the defendants." (emphasis added)). Simply put, the complaints do not merely allege similar or related misconduct—they allege the *same* causes of action, based on the *same* misconduct and the *same* evidence.

Accordingly, the facts of this case indisputably satisfy all three elements of *res judicata*, thereby barring Plaintiffs from seeking punitive damages—again—in this case.

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B. The Terms of the MSA Bar Punitive Damages.

Even if *res judicata* did not apply, the MSA would independently bar Plaintiffs' claims for punitive damages because such claims were released as a condition of the settlement. "Because a settlement agreement is a contract, its construction and enforcement are governed by principles of contract law." *May v. Anderson*, 121 Nev. 668, 672, 119 P.3d 1254, 1257 (2005). Under Nevada law, "an intended third-party beneficiary is bound by the terms of a contract even if she is not a signatory" and "[w]hether an individual is an intended third-party beneficiary [] depends on the parties' intent, gleaned from reading the contract as a whole in light of the circumstances under which it was entered." *Canfora v. Coast Hotels & Casinos, Inc.*, 121 Nev. 771, 779, 121 P.3d 599, 604–05 (2005). Here, Plaintiffs were "intended beneficiaries" of the MSA because it provides that it will "achieve for the Settling States and their citizens significant funding for the advancement of public health" and "the implementation of important tobacco-related public health measures." MSA at 2. Thus, because the MSA parties intended to benefit nonparties such as Plaintiffs, they are bound by its provisions, including the "unconditional" release of "future" claims for "civil penalties and punitive damages" "for past conduct . . . in any way related . . . to" cigarette "manufactur[ing] and "marketing." *Id.*

C. Persuasive Authority Confirms that the MSA Bars Plaintiffs' Claims for Punitive Damages.

Although the issue of whether the MSA bars Plaintiffs from recovering punitive damages has not been addressed by appellate courts in Nevada, this Court would not be "breaking new ground" if it finds that the MSA bars recovery of punitive damages in individual suits. Courts in states whose punitive damages laws most closely parallel that of Nevada, *i.e.*, Georgia and New York, have already reached this conclusion.

1. The Court should follow the reasoning of the New York and Georgia courts.

This Court should follow the authority of other states that, like Nevada, characterize punitive damages as a public, rather than a private, right. The multiple New York decisions on this issue are the most relevant authority. In *Fabiano v. Philip Morris Inc.*, the Appellate Division First Department (in a decision authored by the future Chief Judge of New York's highest court)

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concluded that under New York law, "punitive damages are quintessentially and exclusively public in their ultimate orientation and purpose," and "do not, even when asserted in the context of a personal injury action, essentially relate to individual injury." 54 A.D.3d 146, 150 (N.Y. App. Div. 2008). Because there was no "private interest to be vindicated by a claim for punitive damages" against the tobacco companies, any such claims were barred by res judicata. *Id*. at 151. Relying on *Fabiano*, the First Department's sister court, the Second Department, held the same in *Shea v. American Tobacco Co*., explaining that res judicata barred punitive damages claims because they were "among those [] encompassed by the expressed language and scope of the master settlement agreement." 73 A.D.3d 730, 732 (N.Y. App. Div. 2010). Federal courts applying New York state law are in accord. *See, e.g*., *Grill v. Philip Morris USA, Inc*., 653 F. Supp. 2d 481, 498 (S.D.N.Y. 2009); *Mulholland v. Philip Morris USA, Inc*., 598 F. App'x 21, 24 (2d Cir. 2015). Because New York and Nevada have practically identical approaches to *res judicata* these decisions are directly on point. *See O'Brien v. City of Syracuse*, 54 N.Y.2d 353, 357 (1981)) (pursuant to which a claim is barred if it stems from the same transaction or series of transactions as those at issue in the prior suit).

The Supreme Court of Georgia, on substantially similar facts and applicable law[7], has also held that the MSA barred private claims for punitive damages. *Brown & Williamson Tobacco Corp. v. Gault*, 627 S.E.2d 549, 552 (Ga. 2006). The court reasoned that "[b]ecause punitive damages serve a public interest and are intended to protect the general public, as opposed to benefitting or rewarding particular private parties," "the State, in seeking punitive damages in the suit against B&W, did so as parens patriae and in this capacity represented the interests of all Georgia citizens, including plaintiffs here." *Id.* (emphases added). Then, as now, no material difference exists in this instance between the treatment of those claims in Georgia and the claims now pressed before this Court.

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[7] Notably, Georgia applies a more stringent test than Nevada, requiring an "identity of the cause of action," *Corp. v. Gault*, 627 S.E.2d 549, 551 (Ga. 2006), which the Nevada Supreme Court has rejected as a too "limited interpretation" for claim preclusion. *Mendenhall*, P.3d at 370 n. 2.

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2. The Court should reject the reasoning from the courts in California, Florida, and Massachusetts.

Out-of-state authority to the contrary is distinguishable. In *Bullock v. Philip Morris USA, Inc.*, 198 Cal. App. 4th 543 (2011), the California Court of Appeal held that the MSA did not preclude punitive damages claims, but only because California does not apply the approach to *res judicata* that applies in Nevada, New York, and Georgia. Instead, California follows a "primary rights" theory, under which "a cause of action consists of the plaintiff's primary right to be free from a particular injury." *Id*. at 557. The *Bullock* court expressly distinguished New York's decisions based on the difference between these two doctrines (*see id*. at 558 n.5), which also distinguishes *Bullock* from Nevada law. Because Nevada does not follow such a "primary rights" theory of *res judicata*, *see* Section III.A *supra*, the analysis of the *Bullock* court is inapplicable.

Florida's Supreme Court has also held that punitive damages claims are not barred by the state's prior tobacco litigation. *Engle v. Liggett Grp., Inc*., 945 So. 2d 1246, 1260 (Fla. 2006). But this analysis is based on the fact that Florida settled its tobacco suit through an agreement separate from the MSA that did not bar individual punitive damages claims. The Florida agreement resolved claims "which [were] or could have been asserted by *any of the parties*" to the underlying litigation. *Id*. at 1258 (emphasis in *Engle*). By contrast, the MSA more broadly defined "Releasing Parties" as "persons or entities acting in a . . . private attorney general . . . or any other capacity, whether or not any of them participate in this settlement, [] to the extent that any such person or entity is seeking relief on behalf of or generally applicable to the general public . . . as opposed solely to private or individual relief for separate and distinct injuries." MSA at 14-15. As discussed, this definition includes plaintiffs who sue as private attorneys general seeking punitive damages. That this definition also carves out claims for individual relief only reinforces the conclusion that the MSA (unlike Florida's agreement) covers the punitive damages claim here. *Engle* is further inapposite because the holding was based on the fact that the underlying state lawsuit was not brought in a *parens patriae* capacity, unlike Nevada's action. *See Engle*, 945 So. 2d at 1260.

Finally, the Supreme Judicial Court of Massachusetts's decision in *Laramie v. Philip Morris USA Inc.*, 173 N.E.3d 731 (Mass. 2021) is equally distinguishable. There, the court found

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that the "Attorney General did not adequately represent the plaintiff's personal interest in punitive damages." *Id*. at 744. That was because "the plaintiff has a private interest in punitive damages" under the state statute at issue, as interpreted by Massachusetts courts. *Id.* at 744. But that result does not follow in this case because controlling Nevada is not in accord with Massachusetts law. *Laramie* forthrightly "recognize[d] that appellate courts in New York and Georgia have taken a different view and have concluded that the master settlement agreement precludes their residents from seeking punitive damages in wrongful death claims against manufacturers of tobacco products." *See id.* at 744 at n.9. The Massachusetts court also explained that those decisions "differ markedly from Massachusetts precedent," which "explicitly declined to adopt New York's view that punitive damages serve only a public purpose." *Id*. In other words, Massachusetts's view of punitive damages as purely a private issue divorced from sovereign provenance or public derivation is at odds with Nevada law. *See, e.g., Lemler*, 514 P.2d at 1183 ("[t]he concept of punitive damages rests upon a presumed public policy . . . [and an award] should be in an amount that would promote the public interest without financially annihilating the defendant."); *Siggelkow*, 846 P.2d at 305 ("The condemnation expressed by a jury awarding punitive damages "provide a means by which the **community** . . . can express **community** outrage or distaste for the misconduct of an oppressive, fraudulent or malicious defendant and by which others may be deterred and warned that such conduct will not be tolerated" and any subsequent punitive damages award should "provide **a benefit to society** by punishing undesirable conduct that is not punishable by the criminal law") (emphasis added)). Thus, none of the authority from California, Florida, or Massachusetts is persuasive.

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CONCLUSION

For these reasons, the Court should grant summary judgment in Defendants' favor on Plaintiffs' punitive damages claim under Nevada Rule of Civil Procedure 56.

Dated this 25th day of May, 2022.

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CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of May, 2022, a true and correct copy of the foregoing **DEFENDANTS PHILIP MORRIS USA INC. AND R.J. REYNOLDS TOBACCO COMPANY'S MOTION FOR PARTIAL SUMMARY JUDGMENT ON PLAINTIFFS' PUNITIVE DAMAGES CLAIM** was electronically filed and served on counsel through the Court's electronic service system pursuant to Administrative Order 14-2 and N.E.F.C.R. 9, via the electronic mail addresses noted below, unless service by another method is stated or noted:

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