

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.

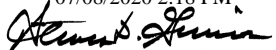
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Elizabeth A. Brown
Clerk of Supreme Court

PETITIONERS' APPENDIX
VOLUME 62 (Nos. 9613-9655)

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Attorneys for Petitioners, Sandra Camacho and Anthony Camacho


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mgranda@claggettlaw.com
Attorneys for Plaintiffs

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

CASE NO.: A-19-807657-C

DEPT. NO.: VI

**ORDER DENYING DEFENDANTS
LIGGETT GROUP LLC'S NOTICE OF
ADOPTION AND JOINDER IN
DEFENDANT R.J. REYNOLDS
TOBACCO COMPANY'S MOTION TO
DISMISS PLAINTIFF'S AMENDED
COMPLAINT UNDER NRCP 12(b)(5).**

On June 16, 2020, the Court issued a Minute Order regarding Defendant Liggett Group LLC's Notice of Adoption and Joinder in Defendant R.J. Reynolds Tobacco Company's Motion To Dismiss Plaintiff's Amended Complaint Under NRCP 12(B)(5). The Court, having considered Defendants' Motion, the Opposition, and Reply thereto, hereby finds as follows:

THE COURT HEREBY FINDS that Defendants' Motion is **DENIED**.

After reviewing the motions, oppositions, joinders and replies, the Court has made the decisions detailed below. This decisions was reached in accordance with precautions being taken due to COVID-19 and the Administrative Order 20-01, which states that certain nonessential matters may be decided on the pleadings without an in court hearing.

Defendant Philip Morris USA Inc., Jamez, LLC, and Red Rock Smoke Shop, Inc.'s Motion to Dismiss Plaintiffs Amended Complaint under NRCP 12(b)(5) is hereby DENIED. To survive a motion to dismiss under NRCP 12(b)(5), a complaint must contain some set of facts which, if true, would entitle the plaintiff to relief. *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 228, 181P.3d 670, 672 (2008). When reviewing a NRCP 12(b)(5) motion, all factual allegations in the complaint must be regarded as true. *Hampe v. Foote*, 118 Nev. 405, 408, 47 P.3d 438, 439 (2002). In fact, the court must accept as true the complaint's allegations and draw all reasonable inferences in [plaintiff s] favor. *Shoen v. SAC Holding Corp.*, 122 Nev. 621, 635, 137 P.3d 1171, 1180 (2006).

Plaintiffs have not alleged any claims that are pre-empted by federal law. Federal law pre-empts claims that challenge the adequacy of post-1969 warning labels. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 524 (1992). However, here Plaintiffs are only alleging failures to warn prior to July 1, 1969.

Federal law also pre-empts claims that the Defendant is negligent for merely continuing to manufacture cigarettes. *Liggett Grp., Inc. v. Davis*, 973 So. 2d 467, 472 (Fla. Dist. Ct. App. 2007) (interpreting *Cipollone*, 505 U.S. at 523 to hold that a design defect claim is not pre-empted by Congress). Here, Plaintiffs are alleging that cigarettes are unreasonably dangerous and defective and that the defect was a direct cause of Plaintiffs' addiction. They are not alleging that Defendants are merely negligent for continuing to manufacture cigarettes. Furthermore, the Ninth Circuit Court of Appeals, applying Nevada law, has held that Plaintiffs' strict liability failure to warn and fraudulent

1 concealment claims were not barred by Federal pre-emption. *Rivera v. Philip Morris, Inc.*, 395 F.3d
2 1142, 1148-49 (9th Cir. 2005).

3 NRCP 8(a) requires a complaint contain a short and plain statement of the claim showing that
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5 gives fair notice of the nature and basis of the claim a pleading of conclusions is sufficient. *Crucil v.*
6 *Carson City*, 95 Nev. 583, 585, 600 P.2d 216, 217 (1979). Plaintiffs' Amended Complaint meets the
7 requirements of NRCP 8(a). Plaintiffs have plead facts with sufficient specificity to show that they
8 are entitled to relief. *See, e.g.*, Amended Complaint, 134.

9 To survive a defendant's NRCP 12(b)(5) motion, all factual assertions in the complaint will be
10 regarded as true. Here, Plaintiffs assert that Defendant created a duty by making false and misleading
11 promises to public through marketing campaigns and public statements. This is an issue to be decided
12 by a jury and survives the NRCP 12(b) standard. Additionally, Plaintiffs have plead sufficient facts
13 supporting multiple, specific examples of how Defendants defective and unreasonably dangerous
14 cigarettes lead to Mr. Tully's injury. *See, e.g.*, Amended Complaint, 134. The Amended Complaint
15 also survives the consumer expectation test laid out in *Rivera*. *Rivera*, 395 F.3d at 1148-49.

16 The civil conspiracy claims survive the motion because their underlying fraud claims and
17 conspiracy claims were plead with particularity. NRCP 9 sets out additional requirements for pleading
18 special matters such as fraud. The marketing efforts allegedly used by defendants, combined, with the
19 assertion that defendants created a false perception and mislead the public regarding the concerns
20 related to cigarettes meet the requirements. *See, e.g.*, Amended Complaint, 154-56, 173.

21 The Nevada Deceptive Trade Practices Act claim was also plead with sufficient particularity.
22 The Nevada Federal District Court held that to prevail under an NDTPA claim, a plaintiff must show:
23 (1) the defendant engaged in a consumer fraud of which the plaintiff was a victim, (2) causation, and
24 (3) the plaintiff sustained damages as a result. *Picus v. Wal-Mart Stores, Inc.*, 256 F.R.D. 651, 657
25 (D. Nev. 2009). The Plaintiff sets out with particularity the false and misleading statements to meet
26 the NRCP 9 requirements. *See, e.g.*, Amended Complaint, 201-03.

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 4101 Meadows Lane, Suite 100
 Las Vegas, Nevada 89107
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Defendant Liggett Group LLC's Notice of Adoption and Joinder in Defendant R.J. Reynolds Tobacco Company's Motion To Dismiss Plaintiff's Amended Complaint Under NRCP 12(B)(5) is hereby also **DENIED** for the reason detailed above.

Dated this 8th day of July, 2020

DATED this ____ day of June 2020.



DISTRICT COURT JUDGE
 1F8 0A3 021A 2F33 NL
 Jacqueline M. Bluth

Respectfully Submitted By: Dated this 17 th June 2020 CLAGGETT & SYKES LAW FIRM <i>/s/ Sean K. Claggett</i> <hr/> Sean K. Claggett, Esq. Nevada Bar No. 008407 4101 Meadows Lane, Suite 100 Las Vegas, Nevada 89107 <i>Attorneys for Plaintiff</i>	Reviewed as to Form and Content: Dated this 17 th day of June 2020 WEINBERG WHEELER HUDGINS GUN & DIAL <i>/s/ Lindsey Heinz</i> <hr/> D. Lee Roberts, Jr., Esq. Nevada Bar No. 8877 6385 South Rainbow Boulevard, Suite 400 Las Vegas, Nevada 89118 Lindsey K. Heinz, Esq. <i>Admitted Pro Hac Vice</i> Shook, Hardy & Bacon L.L.P. 2555 Grand Boulevard Kansas City, MO 64108 (816) 474-6550 <i>Attorneys for Defendant, Philip Morris USA. Inc., Jamez LLC, and Red Rock Smoke Shop Inc.</i>
Reviewed as to Form and Content: Dated this 17 th June 2020 BAILEY KENNEDY <i>/s/ Joseph Liebman</i> <hr/> Dennis L. Kennedy, Esq. Joseph Liebman, Esq. 8984 Spanish Ridge Avenue Las Vegas, Nevada 89148 <i>Attorneys for Defendant, R.J. Reynolds Tobacco Company</i>	Reviewed as to Form and Content: Dated this 17 th day of June 2020 LEWIS ROCA ROTHGERBER CHRISTIE <i>/s/ Christopher J. Jorgensen</i> <hr/> Daniel F. Polsenberg, Esq. Christopher J. Jorgensen, Esq. 3993 Howard Hughes Parkway, #600 Las Vegas, Nevada 89169 <i>Attorneys for Defendant, Liggett Group, LLC</i>

Moises Garcia

From: Joseph Liebman <JLiebman@baileykennedy.com>
Sent: Wednesday, June 17, 2020 8:57 AM
To: Kimberly Wald
Cc: Kearney, Ryan; Heinz, Lindsey (SHB); Henninger, Ursula; Diamond, Spencer; Kelly Anne Luther (KLuther@kasowitz.com); Jackson, Brian (SHB); Kenyon, Jennifer (SHB); Jorgensen, J. Christopher; Roberts, Lee; Maria H. Ruiz; Tepikian, Bruce (SHB); Dennis Kennedy; Matt Granda; Moises Garcia; Deana Foster
Subject: Re: Tully, Martin v. Philip Morris, et al.
Follow Up Flag: Follow up
Flag Status: Flagged

If Ryan approved it it's good with me.

Sent from my iPhone

On Jun 17, 2020, at 8:56 AM, Kimberly L. Wald <klw@kulaw.com> wrote:

Ryan, do we have approval on behalf of your local counsel to use their electronic signature?

Kimberly L. Wald, Esq.
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tel: 954.522.6601
fax: 954.522.6608
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From: Kearney, Ryan <RKearney@KSLAW.com>
Sent: Wednesday, June 17, 2020, 11:53 AM
To: Kimberly L. Wald; Heinz, Lindsey (SHB); Henninger, Ursula; Diamond, Spencer; Joseph Liebman; Kelly Anne Luther (KLuther@kasowitz.com); Jackson, Brian (SHB); Kenyon, Jennifer (SHB); Jorgensen, J. Christopher; Roberts, Lee; Maria H. Ruiz; Tepikian, Bruce (SHB); Dennis Kennedy
Cc: Matt Granda; Moises Garcia
Subject: RE: Tully, Martin v. Philip Morris, et al.

Yes, thanks.

Ryan T. Kearney

King & Spalding LLP
1180 Peachtree Street NE
Atlanta, GA 30309
Direct Dial: (404) 572-4656<tel:(404)%20572-4656>

rkearney@kslaw.com<<mailto:rkearney@kslaw.com>>

----- Original message -----

From: "Kimberly L. Wald" <klw@kulaw.com>

Date: 6/17/20 11:52 AM (GMT-05:00)

To: "Heinz, Lindsey (SHB)" <LHEINZ@shb.com>, "Henninger, Ursula" <uhenninger@KSLAW.com>, "Diamond, Spencer" <SDiamond@KSLAW.com>, "Kearney, Ryan" <RKearney@KSLAW.com>, Joseph Liebman <JLiebman@baileykennedy.com>, "Kelly Anne Luther (KLuther@kasowitz.com)" <KLuther@kasowitz.com>, "Jackson, Brian (SHB)" <BJACKSON@shb.com>, "Kenyon, Jennifer (SHB)" <JBKENYON@shb.com>, "Jorgensen, J. Christopher" <CJorgensen@lrrc.com>, "Roberts, Lee" <LRoberts@wwhgd.com>, "Maria H. Ruiz" <MRuiz@kasowitz.com>, "Tepikian, Bruce (SHB)" <BTEPIKIAN@shb.com>, Dennis Kennedy <DKennedy@baileykennedy.com>

Cc: Matt Granda <MGranda@claggettlaw.com>, Moises Garcia <MGarcia@claggettlaw.com>

Subject: Re: Tully, Martin v. Philip Morris, et al.

****External Sender****

Thank you. Counsel for Reynolds please let me know if you approve.

[cid:image949331.png@E7D28D1B.E99D7F6C]<<http://www.kelleyuustal.com/>>

Kimberly L. Wald, Esq.

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From: Heinz, Lindsey (SHB) <LHEINZ@shb.com>

Sent: Wednesday, June 17, 2020 11:41:29 AM

To: Kimberly L. Wald <klw@kulaw.com>; Henninger, Ursula <uhenninger@KSLAW.com>; Diamond, Spencer <SDiamond@KSLAW.com>; Kearney, Ryan <RKearney@KSLAW.com>; Joseph Liebman <JLiebman@baileykennedy.com>; Kelly Anne Luther (KLuther@kasowitz.com)

<KLuther@kasowitz.com>; Jackson, Brian (SHB) <BJACKSON@shb.com>; Kenyon, Jennifer (SHB) <JBKENYON@shb.com>; Jorgensen, J. Christopher <CJorgensen@lrrc.com>; Roberts, Lee <LRoberts@wwhgd.com>; Maria H. Ruiz <MRuiz@kasowitz.com>; Tepikian, Bruce (SHB) <BTEPIKIAN@shb.com>; Dennis Kennedy <DKennedy@baileykennedy.com>
Cc: Matt Granda <MGranda@claggettlaw.com>; Moises Garcia <MGarcia@claggettlaw.com>
Subject: RE: Tully, Martin v. Philip Morris, et al.

Kim,

Approved for PM.

Thank you,

Lindsey

From: Kimberly L. Wald <klw@kulaw.com>
Sent: Wednesday, June 17, 2020 10:40 AM
To: Heinz, Lindsey (SHB) <LHEINZ@shb.com>; Henninger, Ursula <uhenninger@KSLAW.com>; Diamond, Spencer <SDiamond@KSLAW.com>; Kearney, Ryan <RKearney@KSLAW.com>; Joseph Liebman <JLiebman@baileykennedy.com>; Kelly Anne Luther (KLuther@kasowitz.com) <KLuther@kasowitz.com>; Jackson, Brian (SHB) <BJACKSON@shb.com>; Kenyon, Jennifer (SHB) <JBKENYON@shb.com>; Jorgensen, J. Christopher <CJorgensen@lrrc.com>; Roberts, Lee <LRoberts@wwhgd.com>; Maria H. Ruiz <MRuiz@kasowitz.com>; Tepikian, Bruce (SHB) <BTEPIKIAN@shb.com>; Dennis Kennedy <DKennedy@baileykennedy.com>
Cc: Matt Granda <MGranda@claggettlaw.com>; Moises Garcia <MGarcia@claggettlaw.com>; Kimberly L. Wald <klw@kulaw.com>
Subject: RE: Tully, Martin v. Philip Morris, et al.

EXTERNAL

Can counsel for Philip Morris and Liggett please send me your authorization to submit these with your electronic signatures?

Thank you,

Kim

[cid:image005.png@01D64493.D53F1210]<<http://www.kelleyuustal.com/>>

Moises Garcia

From: Jorgensen, J. Christopher <CJorgensen@lrrc.com>
Sent: Wednesday, June 17, 2020 8:52 AM
To: Kimberly Wald
Cc: Heinz, Lindsey (SHB); Henninger, Ursula; Diamond, Spencer; Kearney, Ryan; Joseph Liebman; Kelly Anne Luther (KLuther@kasowitz.com); Jackson, Brian (SHB); Kenyon, Jennifer (SHB); Roberts, Lee; Maria H. Ruiz; Tepikian, Bruce (SHB); Dennis Kennedy; Matt Granda; Moises Garcia
Subject: Re: Tully, Martin v. Philip Morris, et al.

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You have my authorization to use my signature and file on behalf of Liggett.

Thank you.

Chris Jorgensen

Sent from my iPhone

On Jun 17, 2020, at 8:40 AM, Kimberly L. Wald <klw@kulaw.com> wrote:

[EXTERNAL]

Can counsel for Philip Morris and Liggett please send me your authorization to submit these with your electronic signatures?

Thank you,
Kim

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Fort Lauderdale, FL 33301
www.kulaw.com

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From: Kimberly L. Wald
Sent: Wednesday, June 17, 2020 11:24 AM
To: Heinz, Lindsey (SHB) <LHEINZ@shb.com>; Henninger, Ursula <uhenninger@KSLAW.com>; Diamond, Spencer <SDiamond@KSLAW.com>; Kearney, Ryan <RKearney@KSLAW.com>; Joseph Liebman <JLiebman@baileykenedy.com>; Kelly Anne Luther (KLuther@kasowitz.com) <KLuther@kasowitz.com>; Jackson, Brian (SHB) <BJACKSON@shb.com>; Kenyon, Jennifer (SHB) <JBKENYON@shb.com>; Jorgensen, J. Christopher <CJorgensen@lrrc.com>; Roberts, Lee <LRoberts@wwhgd.com>; Maria H. Ruiz <MRuiz@kasowitz.com>; Tepikian, Bruce (SHB) <BTEPIKIAN@shb.com>; Dennis Kennedy <DKennedy@baileykenedy.com>
Cc: NVtobacco <NVtobacco@kulaw.com>; Tobacco <tobacco@integrityforjustice.com>; Matt Granda <MGranda@claggettlaw.com>; Micah Echols <Micah@claggettlaw.com>; Sean Claggett <Sean@claggettlaw.com>; Moises Garcia <MGarcia@claggettlaw.com>
Subject: RE: Tully, Martin v. Philip Morris, et al.

1 CSERV

2 DISTRICT COURT
3 CLARK COUNTY, NEVADA

4
5
6 Martin Tully, Plaintiff(s)

CASE NO: A-19-807657-C

7 vs.

DEPT. NO. Department 6

8 Philip Morris USA Inc,
9 Defendant(s)

10
11 **AUTOMATED CERTIFICATE OF SERVICE**

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

14 Service Date: 7/8/2020

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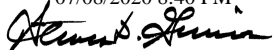
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25 Moises Garcia

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28		


CLERK OF THE COURT

ORDR

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wsykes@claggettlaw.com
mgranda@claggettlaw.com
Attorneys for Plaintiffs

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Defendants.

CASE NO.: A-19-807657-C

DEPT. NO.: VI

**ORDER DENYING DEFENDANTS
PHILIP MORRIS USA INC., JAMEZ
LLC, AND RED ROCK SMOKE SHOP
INC.'S MOTION TO DISMISS
PLAINTIFFS' AMENDED COMPLAINT
UNDER NRCP 12(b)(5)**

CLAGGETT & SYKES LAW FIRM
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Las Vegas, Nevada 89107
702-655-2346 • Fax 702-655-3763

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22 The Nevada Federal District Court held that to prevail under an NDTPA claim, a plaintiff must show:
23 (1) the defendant engaged in a consumer fraud of which the plaintiff was a victim, (2) causation, and
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25 (D. Nev. 2009). The Plaintiff sets out with particularity the false and misleading statements to meet
26 the NRCP 9 requirements. *See, e.g.*, Amended Complaint, 201-03.

Defendants Philip Morris USA Inc., Jamez LLC, and Red Rock Smoke Shop Inc.'s Motion to Dismiss Plaintiffs' Amended Complaint under NRCP 12(b)(5) is hereby also **DENIED** for the reasons detailed above.

Dated this 8th day of July, 2020

DATED this ____ day of June 2020.


 DISTRICT COURT JUDGE NL

Respectfully Submitted By: Dated this 17 th June 2020 CLAGGETT & SYKES LAW FIRM <i>/s/ Sean K. Claggett</i> <hr/> Sean K. Claggett, Esq. Nevada Bar No. 008407 4101 Meadows Lane, Suite 100 Las Vegas, Nevada 89107 <i>Attorneys for Plaintiff</i>	Reviewed as to Form and Content: Dated this 17 th June 2020 WEINBERG, JACOBSON & GINS GUN & DIAL <i>/s/ Lindsey Heinz</i> <hr/> D. Lee Roberts, Jr., Esq. Nevada Bar No. 8877 6385 South Rainbow Boulevard, Suite 400 Las Vegas, Nevada 89118 Lindsey K. Heinz, Esq. <i>Admitted Pro Hac Vice</i> Shook, Hardy & Bacon L.L.P. 2555 Grand Boulevard Kansas City, MO 64108 (816) 474-6550 <i>Attorneys for Defendant, Philip Morris USA, Inc., Jamez LLC, and Red Rock Smoke Shop Inc.</i>
Reviewed as to Form and Content: Dated this 17 th June 2020 BAILEY KENNEDY <i>/s/ Joseph Liebman</i> <hr/> Dennis L. Kennedy, Esq. Joseph Liebman, Esq. 8984 Spanish Ridge Avenue Las Vegas, Nevada 89148 <i>Attorneys for Defendant, R.J. Reynolds Tobacco Company</i>	Reviewed as to Form and Content: Dated this 17 th day of June 2020 LEWIS ROCA ROTHGERBER CHRISTIE <i>/s/ Christopher J. Jorgensen</i> <hr/> Daniel F. Polsenberg, Esq. Christopher J. Jorgensen, Esq. 3993 Howard Hughes Parkway, #600 Las Vegas, Nevada 89169 <i>Attorneys for Defendant, Liggett Group, LLC</i>

Moises Garcia

From: Joseph Liebman <JLiebman@baileykennedy.com>
Sent: Wednesday, June 17, 2020 8:57 AM
To: Kimberly Wald
Cc: Kearney, Ryan; Heinz, Lindsey (SHB); Henninger, Ursula; Diamond, Spencer; Kelly Anne Luther (KLuther@kasowitz.com); Jackson, Brian (SHB); Kenyon, Jennifer (SHB); Jorgensen, J. Christopher; Roberts, Lee; Maria H. Ruiz; Tepikian, Bruce (SHB); Dennis Kennedy; Matt Granda; Moises Garcia; Deana Foster
Subject: Re: Tully, Martin v. Philip Morris, et al.
Follow Up Flag: Follow up
Flag Status: Flagged

If Ryan approved it it's good with me.

Sent from my iPhone

On Jun 17, 2020, at 8:56 AM, Kimberly L. Wald <klw@kulaw.com> wrote:

Ryan, do we have approval on behalf of your local counsel to use their electronic signature?

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

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

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Cc: Matt Granda; Moises Garcia
Subject: RE: Tully, Martin v. Philip Morris, et al.

Yes, thanks.

Ryan T. Kearney

King & Spalding LLP
1180 Peachtree Street NE
Atlanta, GA 30309
Direct Dial: (404) 572-4656<tel:(404)%20572-4656>

rkearney@kslaw.com<<mailto:rkearney@kslaw.com>>

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Thank you. Counsel for Reynolds please let me know if you approve.

[cid:image949331.png@E7D28D1B.E99D7F6C]<<http://www.kelleyuustal.com/>>

Kimberly L. Wald , Esq.

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Kim,

Approved for PM.

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Lindsey

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EXTERNAL

Can counsel for Philip Morris and Liggett please send me your authorization to submit these with your electronic signatures?

Thank you,

Kim

[cid:image005.png@01D64493.D53F1210]<http://www.kelleyuustal.com/>

Moises Garcia

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You have my authorization to use my signature and file on behalf of Liggett.

Thank you.

Chris Jorgensen

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Cc: NVtobacco <NVtobacco@kulaw.com>; Tobacco <tobacco@integrityforjustice.com>; Matt Granda <MGranda@claggettlaw.com>; Micah Echols <Micah@claggettlaw.com>; Sean Claggett <Sean@claggettlaw.com>; Moises Garcia <MGarcia@claggettlaw.com>
Subject: RE: Tully, Martin v. Philip Morris, et al.

1 CSERV

2 DISTRICT COURT
3 CLARK COUNTY, NEVADA

4
5
6 Martin Tully, Plaintiff(s)

CASE NO: A-19-807657-C

7 vs.

DEPT. NO. Department 6

8 Philip Morris USA Inc,
9 Defendant(s)

10
11 **AUTOMATED CERTIFICATE OF SERVICE**

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

14 Service Date: 7/8/2020

15 Jackie Abrego

jabrego@claggettlaw.com

16 Maria Alvarez

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21 Joseph Liebman

jliebman@baileykennedy.com

22 Dennis Kennedy

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bkfederaldownloads@baileykennedy.com

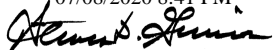
24 Matthew Granda

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25 Moises Garcia

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1	Jessie Helm	jhelm@lrrc.com
2	Daniela LaBounty	dlabounty@wwhgd.com
3	J Christopher Jorgensen	cjorgensen@lrrc.com
4	Annette Jaramillo	ajaramillo@lrrc.com
5	Phillip Smith, Jr.	psmithjr@wwhgd.com
6	Flor Gonzalez-Pacheco	FGonzalez-Pacheco@wwhgd.com
7	Kelly Gaez	kgaez@wwhgd.com
8	Jocelyn Abrego	Jocelyn@claggettlaw.com
9	Micah Echols	micah@claggettlaw.com
10	Kimberly Wald	klw@kulaw.com
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12	Anna Gresl	anna@claggettlaw.com
13	Philip Holden	tobacco@integrityforjustice.com
14	Philip Holden	tobacco@integrityforjustice.com
15	Lindsey Heinz	lheinz@shb.com
16	Kelley Trial Attorneys	NVtobacco@kulaw.com
17	Kelley Trial Attorneys	Nvtobacco@kulaw.com
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CLERK OF THE COURT

ORDR

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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wsykes@claggettlaw.com
mgranda@claggettlaw.com
Attorneys for Plaintiffs

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

CASE NO.: A-19-807657-C

DEPT. NO.: VI

**ORDER DENYING DEFENDANT R.J.
REYNOLDS TOBACCO COMPANY'S
MOTION TO DISMISS PLAINTIFFS'
AMENDED COMPLAINT UNDER NRCP
12(b)(5)**

CLAGGETT & SYKES LAW FIRM
4101 Meadows Lane, Suite 100
Las Vegas, Nevada 89107
702-655-2346 • Fax 702-655-3763

On June 16, 2020, the Court issued a Minute Order regarding Defendant R.J. Reynolds Tobacco Company's Motion to Dismiss Plaintiffs' Amended Complaint Under NRCP 12(B)(5). The Court, having considered Defendants' Motion, the Opposition, and Reply thereto, hereby finds as follows:

THE COURT HEREBY FINDS that Defendants' Motion is **DENIED**.

After reviewing the motions, oppositions, joinders and replies, the Court has made the decisions detailed below. This decisions was reached in accordance with precautions being taken due to COVID-19 and the Administrative Order 20-01, which states that certain nonessential matters may be decided on the pleadings without an in court hearing.

Defendant Philip Morris USA Inc., Jamez, LLC, and Red Rock Smoke Shop, Inc.'s Motion to Dismiss Plaintiffs Amended Complaint under NRCP 12(b)(5) is hereby DENIED. To survive a motion to dismiss under NRCP 12(b)(5), a complaint must contain some set of facts which, if true, would entitle the plaintiff to relief. *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 228, 181P.3d 670, 672 (2008). When reviewing a NRCP 12(b)(5) motion, all factual allegations in the complaint must be regarded as true. *Hampe v. Foote*, 118 Nev. 405, 408, 47 P.3d 438, 439 (2002). In fact, the court must accept as true the complaint's allegations and draw all reasonable inferences in [plaintiff s] favor. *Shoen v. SAC Holding Corp.*, 122 Nev. 621, 635, 137 P.3d 1171, 1180 (2006).

Plaintiffs have not alleged any claims that are pre-empted by federal law. Federal law pre-empts claims that challenge the adequacy of post-1969 warning labels. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 524 (1992). However, here Plaintiffs are only alleging failures to warn prior to July 1, 1969.

Federal law also pre-empts claims that the Defendant is negligent for merely continuing to manufacture cigarettes. *Liggett Grp., Inc. v. Davis*, 973 So. 2d 467, 472 (Fla. Dist. Ct. App. 2007) (interpreting *Cipollone*, 505 U.S. at 523 to hold that a design defect claim is not pre-empted by Congress). Here, Plaintiffs are alleging that cigarettes are unreasonably dangerous and defective and that the defect was a direct cause of Plaintiffs' addiction. They are not alleging that Defendants are merely negligent for continuing to manufacture cigarettes. Furthermore, the Ninth Circuit Court of Appeals, applying Nevada law, has held that Plaintiffs' strict liability failure to warn and fraudulent

1 concealment claims were not barred by Federal pre-emption. *Rivera v. Philip Morris, Inc.*, 395 F.3d
2 1142, 1148-49 (9th Cir. 2005).

3 NRCP 8(a) requires a complaint contain a short and plain statement of the claim showing that
4 the pleader is entitled to relief. The Nevada Supreme Court has interpreted that so long as the pleading
5 gives fair notice of the nature and basis of the claim a pleading of conclusions is sufficient. *Crucil v.*
6 *Carson City*, 95 Nev. 583, 585, 600 P.2d 216, 217 (1979). Plaintiffs' Amended Complaint meets the
7 requirements of NRCP 8(a). Plaintiffs have plead facts with sufficient specificity to show that they
8 are entitled to relief. *See, e.g.*, Amended Complaint, 134.

9 To survive a defendant's NRCP 12(b)(5) motion, all factual assertions in the complaint will be
10 regarded as true. Here, Plaintiffs assert that Defendant created a duty by making false and misleading
11 promises to public through marketing campaigns and public statements. This is an issue to be decided
12 by a jury and survives the NRCP 12(b) standard. Additionally, Plaintiffs have plead sufficient facts
13 supporting multiple, specific examples of how Defendants defective and unreasonably dangerous
14 cigarettes lead to Mr. Tully's injury. *See, e.g.*, Amended Complaint, 134. The Amended Complaint
15 also survives the consumer expectation test laid out in *Rivera*. *Rivera*, 395 F.3d at 1148-49.

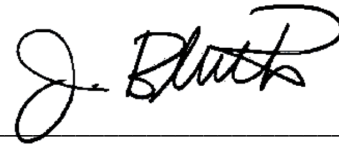
16 The civil conspiracy claims survive the motion because their underlying fraud claims and
17 conspiracy claims were plead with particularity. NRCP 9 sets out additional requirements for pleading
18 special matters such as fraud. The marketing efforts allegedly used by defendants, combined, with the
19 assertion that defendants created a false perception and mislead the public regarding the concerns
20 related to cigarettes meet the requirements. *See, e.g.*, Amended Complaint, 154-56, 173.

21 The Nevada Deceptive Trade Practices Act claim was also plead with sufficient particularity.
22 The Nevada Federal District Court held that to prevail under an NDTPA claim, a plaintiff must show:
23 (1) the defendant engaged in a consumer fraud of which the plaintiff was a victim, (2) causation, and
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Defendant R.J. Reynold Tobacco Company s Motion to Dismiss Plaintiff's Amended
 Complaint under NRCP 12(b)(5) is hereby also **DENIED** for the reason detailed above.

DATED this ____ day of June 2020.

Dated this 8th day of July, 2020



DISTRICT COURT JUDGE NL

Respectfully Submitted By: Dated this 17 th June 2020 CLAGGETT & SYKES LAW FIRM <i>/s/ Sean K. Claggett</i> <hr/> Sean K. Claggett, Esq. Nevada Bar No. 008407 4101 Meadows Lane, Suite 100 Las Vegas, Nevada 89107 <i>Attorneys for Plaintiff</i>	Reviewed as to Form and Content: Dated this 17 th day of June 2020 27A 854 BAC 8 5P 89 Jacqueline M. Bluth WEINBERG WHEELER HUDGINS GUN & DIAL <i>/s/ Lindsey Heinz</i> <hr/> D. Lee Roberts, Jr., Esq. Nevada Bar No. 8877 6385 South Rainbow Boulevard, Suite 400 Las Vegas, Nevada 89118 Lindsey K. Heinz, Esq. <i>Admitted Pro Hac Vice</i> Shook, Hardy & Bacon L.L.P. 2555 Grand Boulevard Kansas City, MO 64108 (816) 474-6550 <i>Attorneys for Defendant, Philip Morris USA. Inc., Jamez LLC, and Red Rock Smoke Shop Inc.</i>
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From: Kimberly L. Wald <klw@kulaw.com>
Sent: Wednesday, June 17, 2020 10:40 AM
To: Heinz, Lindsey (SHB) <LHEINZ@shb.com>; Henninger, Ursula <uhenninger@KSLAW.com>; Diamond, Spencer <SDiamond@KSLAW.com>; Kearney, Ryan <RKearney@KSLAW.com>; Joseph Liebman <JLiebman@baileykennedy.com>; Kelly Anne Luther (KLuther@kasowitz.com) <KLuther@kasowitz.com>; Jackson, Brian (SHB) <BJACKSON@shb.com>; Kenyon, Jennifer (SHB) <JBKENYON@shb.com>; Jorgensen, J. Christopher <CJorgensen@lrrc.com>; Roberts, Lee <LRoberts@wwhgd.com>; Maria H. Ruiz <MRuiz@kasowitz.com>; Tepikian, Bruce (SHB) <BTEPIKIAN@shb.com>; Dennis Kennedy <DKennedy@baileykennedy.com>
Cc: Matt Granda <MGranda@claggettlaw.com>; Moises Garcia <MGarcia@claggettlaw.com>; Kimberly L. Wald <klw@kulaw.com>
Subject: RE: Tully, Martin v. Philip Morris, et al.

EXTERNAL

Can counsel for Philip Morris and Liggett please send me your authorization to submit these with your electronic signatures?

Thank you,

Kim

[cid:image005.png@01D64493.D53F1210]<http://www.kelleyuustal.com/>

Moises Garcia

From: Jorgensen, J. Christopher <CJorgensen@lrrc.com>
Sent: Wednesday, June 17, 2020 8:52 AM
To: Kimberly Wald
Cc: Heinz, Lindsey (SHB); Henninger, Ursula; Diamond, Spencer; Kearney, Ryan; Joseph Liebman; Kelly Anne Luther (KLuther@kasowitz.com); Jackson, Brian (SHB); Kenyon, Jennifer (SHB); Roberts, Lee; Maria H. Ruiz; Tepikian, Bruce (SHB); Dennis Kennedy; Matt Granda; Moises Garcia
Subject: Re: Tully, Martin v. Philip Morris, et al.

Follow Up Flag: Follow up
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You have my authorization to use my signature and file on behalf of Liggett.

Thank you.

Chris Jorgensen

Sent from my iPhone

On Jun 17, 2020, at 8:40 AM, Kimberly L. Wald <klw@kulaw.com> wrote:

[EXTERNAL]

Can counsel for Philip Morris and Liggett please send me your authorization to submit these with your electronic signatures?

Thank you,
Kim

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Cc: NVtobacco <NVtobacco@kulaw.com>; Tobacco <tobacco@integrityforjustice.com>; Matt Granda <MGranda@claggettlaw.com>; Micah Echols <Micah@claggettlaw.com>; Sean Claggett <Sean@claggettlaw.com>; Moises Garcia <MGarcia@claggettlaw.com>
Subject: RE: Tully, Martin v. Philip Morris, et al.

1 CSERV

2 DISTRICT COURT
3 CLARK COUNTY, NEVADA

4
5
6 Martin Tully, Plaintiff(s)

CASE NO: A-19-807657-C

7 vs.

DEPT. NO. Department 6

8 Philip Morris USA Inc,
9 Defendant(s)

10
11 **AUTOMATED CERTIFICATE OF SERVICE**

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

14 Service Date: 7/8/2020

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ORDR

**DISTRICT COURT
CLARK COUNTY, NEVADA**

TIMOTHY A. GEIST, individually, and as
Administrator and Personal Representative of
the Estate of VERNA LEE GEIST,
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; C-CIGARETTES
CHEAPERS, LLC, a Nevada limited liability
company; MARWAN MEDIATI d/b/a C-
CIGARETTES CHEAPER, a Nevada
business entity; CHRISTINE MEDIATI d/b/a
C-CIGARETTES CHEAPER, a Nevada
business entity; DOES I-X; and ROE
BUSINESS ENTITIES XI-XX, inclusive,

Defendants.

CASE NO: A-19-807653-C

DEPT NO: VIII

**ORDER ON DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT ON
PLAINTIFF'S CLAIMS FOR PUNITIVE DAMAGES**

On August 12, 2022, the Court heard Defendants' Motion for Partial Summary Judgment on Plaintiff's Claims for Punitive Damages.¹ Having reviewed the pleadings and papers and having heard oral argument, the Court finds that neither *res judicata* nor issue preclusion applies

¹ Defendants, Liggett Group LLC, and C-Cigarettes Cheaper, LLC, both joined in the Motion.

1 to this matter as punitive damages are a right belonging to the individual, as such the Master
2 Settlement Agreement entered into by the State and the Defendant does not preclude Plaintiff
3 from obtaining punitive damages.

4 **FINDINGS OF FACT**

5 Plaintiff brought a personal injury action, representing his private interests and seeking
6 damages related to his and Mrs. Geist's own distinct damages. Plaintiff alleges Defendants
7 designed, manufactured, and sold cigarettes they knew to be addictive and cancer-causing, while
8 conspiring to deceive Mrs. Geist about the dangers of smoking, and therefore are seeking
9 punitive damages. Plaintiffs further allege that Defendants' carried on a systemic and decades-
10 long disinformation campaign, which ensnared millions of smokers and directly caused Mrs.
11 Geist's specific injuries and death. This is what the Plaintiff claims as the basis for punitive
12 damages.

13 In November 1998, Nevada—along with 45 states, five U.S. territories, and the District
14 of Columbia—reached a global settlement with the tobacco industry, the memorialized
15 agreement of which is commonly referred to as the Master Settlement Agreement (“MSA”). In
16 December 1998, the states, including Nevada, reduced the MSA to state-specific consent decrees
17 and final judgments, and then submitted proposed judgments for approval in the respective
18 courts of each of the states. In defining those who released their claims against the tobacco
19 industry, the MSA included those persons or entities who sought relief on behalf of or generally
20 applicable to the general public, as opposed to those seeking private or individual relief for
21 separate and distinct injuries. Examples of entities who released future claims are states as
22 sovereign entities as well as persons or entities acting in a capacity such as in *parens patriae* or
23 as a private attorney general.

24 As a result of this MSA between the tobacco industry and the Attorney General of
25 Nevada, Defendants move this Court to preclude punitive damages, alleging that the final
26 judgment arising from the MSA and Nevada consent decree bars punitive damages in this case as
27 a matter of law because *res judicata* precludes relitigating an issue already reduced to final
28 judgment. Defendants allege that the final judgment dismissed all claims with prejudice, which
included the Attorney General's claim of punitive damages to vindicate the public's interest in
punishment. Because that is so—and because the dismissed claim for punitive damages derives

1 from wholly sovereign prerogatives under Nevada law—Defendants argue *res judicata* bars
2 punitive damages in this case because the 1998 final judgment has already resolved the claim.

3 Defendants argue that the Court should recognize legal precedents in Georgia and New
4 York in finding that there is privity between Plaintiff and the Nevada Attorney General and
5 punitive damages bared as a result of *res judicata*. However, Plaintiffs argue that the Court
6 should recognize precedent from states such as California and Massachusetts as their laws
7 regarding punitive damages are more similar to Nevada’s and it is the individual’s right to pursue
8 punitive damages as a remedy. The Court agrees with Plaintiff and holds that punitive damages
9 are private in nature and the remedy is not barred by claim or issue preclusion in this case.

10 **LEGAL STANDARDS**

11 Summary judgment is appropriate only when no genuine issues of material fact exist, and
12 the moving party is entitled to judgment as a matter of law. Nev. R. Civ. P. 56; Wood v.
13 Safeway, Inc., 121 Nev. 724, 731, 121 P.3d 1026, 1031 (2005). When the movant has made and
14 supported its motion as required, the non-moving party must, by affidavit or otherwise, set forth
15 specific facts demonstrating the existence of a genuine factual issue.” Id. The non-movant “may
16 not rest upon general allegations and conclusions and “is not entitled to build a case on the
17 gossamer threads of whimsy, speculation, and conjecture.” Id. at 731–32, 121 P.3d 1030–31.

18 Nevada’s claim preclusion doctrine applies to preclude an entire second suit that is based
19 on the same set of facts and circumstances as the first suit. Five Star Cap. Corp. v. Ruby, 124
20 Nev. 1048, 1055, 194 P.3d 709, 713 (2008). The Nevada Supreme Court emphasized there is a
21 distinction from issue preclusion, which “applies to prevent relitigation of only a specific issue
22 that was decided in a previous suit between the parties, even if the second suit is based on
23 different causes of action and different circumstances.” Id. at 1054, 194 P.3d at 713. The
24 elements of claim preclusion are: (1) the parties or their privies are the same, (2) the final
25 judgment is valid, and (3) the subsequent action is based on the same claims or any part of them
26 that were or could have been brought in the first case.” Id.

27 The elements of issue preclusion are: “(1) the issue decided in the prior litigation must be
28 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

1 been a party or in privity with a party to the prior litigation; and (4) the issue was actually and
2 necessarily litigated.” *Id.* at 1055, 194 P.3d at 713.

3 NRS 42.005 governs punitive damages in Nevada and it states that “[e]xcept as otherwise
4 provided in NRS 42.007, in an action for the breach of an obligation not arising from contract,
5 where it is proven by clear and convincing evidence that the defendant has been guilty of
6 oppression, fraud or malice, express or implied, the plaintiff, in addition to the compensatory
7 damages, may recover damages for the sake of example and by way of punishing the defendant.
8 NRS 42.005(1).

9 **CONCLUSIONS OF LAW**

10 The issue at Bar is whether Nevada law recognizes punitive damages as a public or
11 private interest, which is determinative as to whether Plaintiff is in privity with the Attorney
12 General in relation to the MSA signed in 1998. Plaintiff argues that the MSA is inadmissible;
13 however, even if it were admissible, the Court finds that Mr. Geist’s prayer for punitive damages
14 was not released by the MSA because he is seeking private relief for injuries separate from those
15 alleged in the Attorney General’s suit.

16 Claim preclusion does not apply to punitive damages in Nevada because punitive damages are a
17 remedy and not a claim.

18 Punitive damages would only be subject to claim preclusion under Nevada law if they
19 were a basis for a suit, i.e., a “claim” or a “cause of action”. If punitive damages were merely an
20 issue in a suit, i.e., one of the elements to be proven on underlying substantive claims, then the
21 proper analysis is issue preclusion, not claim preclusion. Further, Nevada Courts have noted that
22 punitive damages is a remedy, not a cause of action. *See Droge v. AAAA Two Star Towing, Inc.*,
23 136 Nev. 291, 313, 468 P.3d 862, 881 (Nev. App. 2020). The U.S. Supreme Court in turn
24 clarified that “cause of action” is the “claim” in claim preclusion doctrine. *See Brownback v.*
25 *King*, 209 L. Ed. 2d 33, 141 S. Ct. 740, 747 (2021). (Claim preclusion prevents parties from
26 relitigating the same “claim” or “cause of action,” even if certain issues were not litigated in the
27 prior action. Suits involve the same “claim” or “cause of action” if the later suit aris[es] from the
28 same transaction or involves a common nucleus of operative facts.). The logical conclusion then
is that punitive damages are not subject to claim preclusion because they are only a remedy, not a
cause of action.

1 In order to meet the elements for issue preclusion, the Defendant would have to be in privity with
2 the Plaintiff in both cases.

3 The third element in the issue preclusion analysis, “the party against whom the judgment
4 is asserted must have been a party or in privity with a party to the prior litigation” requires that
5 parties be the same or in privity. *See Five Star*, 124 Nev. at 1055, 194 P.3d at 713. This is a
6 matter of first impression in Nevada in regard to the MSAs between the tobacco industries and
7 states and whether punitive damages recovered by the state preclude the recovery of punitive
8 damages by individuals in subsequent litigation against the tobacco industry. The Defendant
9 argues that the Court should look to precedent in Georgia and New York, whereas the Plaintiff

10 Since Plaintiff is not the State, Defendants must show that he was in privity with the State
11 in the State’s action against Defendants. More importantly, Defendants must prove that such
12 privity goes to Plaintiff’s private claims, because those are the ones at issue here. The State’s
13 powers to address wrongs through litigation is restricted. The State can only maintain an action
14 based on *parens patriae* for sovereign or quasi-sovereign claims, never for a citizen’s private
15 interests. The U.S. Supreme Court held, “[i]n order to maintain such an action, the State must
16 articulate an interest apart from the interests of particular private parties, *i.e.*, the State must be
17 more than a nominal party. The State must express a quasi-sovereign interest.” Alfred L. Snapp
18 & Son, Inc. v. Puerto Rico, ex rel., Barez, 458 U.S. 592, 607, 102 S. Ct. 3260, 3268 (1982). “[I]f
19 the State is only a nominal party without a real interest of its own—then it will not have standing
20 under the *parens patriae* doctrine.” *Id.* at 600, 102 S. Ct. at 3265. Quasi-sovereign interests are
21 those that “consist of a set of interests that the State has in the well-being of its populace.” *Id.* at
22 602, 102 S. Ct. 3266. These interests can relate to either the physical or economic well-being of
23 the citizenry. *Id.* at 607, 102 S. Ct. 3269. They can evolve and change with time, and as such, the
24 Court made very clear its desire to maintain a definition that is conducive to a case-by-case
25 analysis. *Id.* The only hard and fast rule set forth by the Court is that a State may not invoke this
26 doctrine when it is only a nominal party asserting the interests of another, such as a plaintiff’s
27 private tort claims. *Id.* at 602, 102 S. Ct. 3266 (“In such [a] situation[], the State is no more than
28 a nominal party” and does not have standing to sue on the plaintiff’s behalf.)

Plaintiff’s interest in vindicating his individual, private claims in this case is not a
sovereign interest, or even a quasi-sovereign interest, that the State could bring on his behalf.

1 “[T]he State and its citizens can be privies only with regard to public claims; they cannot be
2 privies with regard to private claims.” Brown & Williamson Tobacco Corp. v. Gault, 280 Ga.
3 420, 421, 627 S.E.2d 549, 551 (2006). Thus, the State and Plaintiff were never in privy with
4 regards to the claims brought here. Since the State was not in privity with Plaintiff, it could not
5 even assert, let alone release, Plaintiff’s claims on his behalf in the 1997 action. And if the State
6 could not release the private claims, then it certainly could not release the remedies Plaintiff
7 seeks for these claims, including punitive damages.

8 What differentiates New York and Georgia from Massachusetts, California, and Nevada
9 is that New York and Georgia have laws that definitively position plaintiffs seeking punitive
10 damages as private attorneys general, therefore the damages are being sought on behalf of the
11 general public in those states.

12 Defendants argue Nevada courts should treat punitive damages similar to New York and
13 Georgia, which ruled in Defendants’ favor. However, Defendants’ argument ignores significant
14 differences between Nevada’s punitive damages statute and the law in New York and Georgia.
15 Unlike New York (where plaintiffs seeking punitive damages are acting as private attorneys
16 general) and Georgia (where the statutory scheme allocates 75% of punitive damages to the State
17 Treasury), Nevada’s punitive damages scheme does not view plaintiffs seeking punitive damages
18 in a similar light.

19 New York holds punitive damages are only available when an injury is shown to be
20 emblematic of much more than individually sustained wrong. It must be shown to reflect
21 pervasive and grave misconduct affecting the public generally, to, in a sense, merge with a
22 serious public grievance, and thus merit punitive, indeed quasi-criminal sanction by the State.
23 Fabiano v. Philip Morris Inc., 54 A.D.3d 146, 150, 862 N.Y.S.2d 487 (2008).² New York law
24 treats plaintiffs seeking punitive damages as “private attorneys general.” Id. New York goes so
25 far as to hold that imposition of punitive damages for private purposes violates public policy. Id.
26 Because punitive damages are permissible in New York only where there is a public wrong, the
27 Fabiano court held the plaintiff there was pursuing “an essentially public interest in imposing a
28 punitive sanction” which had been previously addressed by the state attorney general in the prior
action against the industry. Id. at 151.

² New York further treats punitive damages as “distinct claims” and not a remedy. Fabiano, 54 A.D.3d at 151, 862 N.Y.S.2d at 487.

1 Georgia has a statutory scheme that makes clear that punitive damages are sought on
2 behalf of the state. Codified in Ga. Code Ann. § 51-12-5.1, Georgia law demands that “75
3 percent of the punitive damages awarded in a product liability action, less a proportion of the
4 costs of litigation, are to be paid into the State treasury.” Gault, 280 Ga. at 423, 627 S.E.2d at
5 552. Additionally, since Georgia treats punitive damages not as a private interest, “Georgia law
6 limits the recovery of punitive damages in product liability cases to one award of punitive
7 damages from a defendant in a court in this State ‘for any act or omission...regardless of the
8 number of causes of action which may arise from such act or omission.’” Id. at 422-423, 627
9 S.E.2d at 552. These two uniquely Georgian elements were determinative in Gault, and are the
10 polar opposite of Nevada’s statutory scheme, which does not require any punitive damages to be
11 allocated to the State treasury, and explicitly lifts any statutory limitation on punitive damages
12 from all product liability cases. NRS 42.005(2)(a).

12 Given the significant differences from Nevada law, the Court finds the Fabiano and Gault
13 decisions unpersuasive.

14 Several courts have rejected Defendants’ argument that a plaintiff’s private, individual
15 tort claims seek relief “on behalf of or generally applicable to the general public.” For example,
16 the Oregon Supreme Court in Williams rejected the same argument Defendants raise here:

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

24 Williams v. RJ Reynolds Tobacco Co., 351 Or. 368, 387, 271 P.3d 103, 113 (2011). The
25 Massachusetts Supreme Court also rejected these same arguments in Laramie v. Philip Morris
26 USA Inc., 488 Mass. 399, 173 N.E.3d 731 (2021). The Laramie Court, relying on Williams, held
27 that:

28 “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. This interest in punitive damages
was not adequately represented by the Attorney General in the prior action. To be
sure, where a State litigates on behalf of its citizens’ “common public rights,”
judgments resulting from such litigation will bind the State’s citizens and, as to

1 those rights, will have preclusive effect. . . . Such litigation does not, however, bar
2 citizens from recovering for injuries to private interests.”

3 Laramie v. Philip Morris USA Inc., 488 Mass. 399 at 407, 173 N.E.3d at 743.

4 The Laramie Court compared the State’s Attorney General’s complaint to the Plaintiff’s.
5 Id. at 411, 173 N.E.3d at 746. The Court in Laramie found that while the complaints both sought
6 to punish Defendants based on sales of defective and unreasonably dangerous cigarettes, the
7 allegations in the complaints differed in “important respects”:

8 “The “wrong” the plaintiff sought to remedy was the loss she and her daughter
9 sustained due to Laramie’s death, caused by Philip Morris’s malicious, willful,
10 wanton, reckless, or grossly negligent conduct, see G. L. c. 229, § 2. The “wrong”
11 the Attorney General sought to remedy, by contrast, was the Commonwealth’s
12 increased medical expenditures caused by Philip Morris’s commission of unfair or
13 deceptive acts or practices in violation of G. L. c. 93A, § 2.”

14 Id.

15 Like the Plaintiff in Laramie, Plaintiff here is seeking punitive damages for harms
16 specifically inflicted on an individual under the wrongful death and survival statutes pursuant to
17 NRS 41.085 and NRS 41.100 respectively. Any award must be tethered to the harm the jury
18 determines Defendants inflicted on Mrs. Geist. NRS 42.005; NJI 12.1 (“You have discretion to
19 award such damages, only if you find by clear and convincing evidence that the defendant was
20 guilty of [oppression] [fraud] [or] [malice] in the conduct providing your basis for liability.”).
21 Plaintiff is seeking to vindicate interests personal to him and his deceased wife, not the public in
22 general. Williams, 351 Or. at 387, 271 P.3d at 113 (“punitive damages may not be awarded
23 to punish a defendant for harms to persons who were not parties to the litigation”).

24 By contrast, the Attorney General’s interest in punitive damages in the 1997 action
25 stemmed from the consumer protection act and was tied to the harm Philip Morris inflicted on
26 the state of Nevada in the form of increased medical expenditures incurred by the state of
27 Nevada as a result of Defendants’ unfair and deceptive trade practices. At no time did the
28 Attorney General seek to recover for personal injuries or wrongful death, especially as to Mrs.
Geist, as these damages are personal and the Attorney General did not have standing to bring
such claims. *See Barez*, 458 U.S. at 607, 102 S. Ct. at 3268. Thus, the Attorney General did not
adequately represent the plaintiff’s personal interest in punitive damages, an interest in punishing
Defendants for Mrs. Geist’s injuries and death. Laramie, 488 Mass. at 409, 173 N.E.3d at 744

1 (“Thus, the Attorney General did not adequately represent the plaintiff’s personal interest in
2 punitive damages, an interest in punishing Philip Morris for Laramie’s death”).

3 Defendants point out that punitive damages in Nevada are awarded for punishment and
4 deterrence, which serve a public policy purpose. Bongiovi v. Sullivan, 122 Nev. 556, 580, 138
5 P.3d 433, 450 (2006). But that is the nature of punitive damages across this country. As the
6 Massachusetts Supreme Judicial Court reasoned in Laramie, the fact that punitive damages serve
7 to punish and provide a public policy purpose does not mean they can be awarded for harms
8 inflicted on non-parties, and therefore are not a general interest in recovering for the harms to the
public at large:

9 “Punitive damages “operate as ‘private fines’ intended to punish the defendant
10 and to deter future wrongdoing. . . . An award of punitive damages also may not
11 be used to punish a defendant for harm inflicted upon nonparties, or “strangers to
12 the litigation.” Because due process precludes a defendant from being punished
13 without “an opportunity to present every available defense,”...permitting
14 punishment based on harm to nonparties implicates due process concerns,
15 including “arbitrariness, uncertainty, and lack of notice...” Thus, the plaintiff’s
16 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. This interest in punitive damages was not adequately
represented by the Attorney General in the prior action.”

17 Laramie, 488 Mass. at 406–07, 173 N.E.3d at 742–43 (citations omitted). Further,
18 “Punitive damages are not intended to punish a defendant for its unlawful conduct generally, but
19 to punish a defendant for its unlawful conduct that caused a plaintiff’s specific harm.” Id. at 407,
20 173 N.E.3d at 742; *citing* Philip Morris USA v. Williams, 549 U.S. 346, 353, 127 S. Ct. 1057,
21 1063, 166 L. Ed. 2d 940 (2007).

22 Moreover, Defendants’ view of the MSA’s effect on an individual’s private right to seek
23 punitive damages is the minority view of the courts that have addressed this argument. A number
24 of states that were signatories to the MSA have permitted awards of punitive damages in private
25 smoking and health actions. *See, e.g.,* Izzarelli vs. R.J. Reynolds, 701 F. App’x 26 (2d Cir. 2017)
26 (unpublished); Boerner v. Brown & Williamson Tobacco Co., 394 F.3d 594 (8th Cir. 2005);
27 Bifolck v. Philip Morris, Inc., 324 Conn. 402, 152 A.3d 1183 (2016); Smith v. Brown &
Williamson Tobacco Corp., 410 S.W.3d 623 (Mo. 2013); In re Tobacco Litig., 218 W. Va. 301,

1 624 S.E.2d 738 (2005); and Schwarz v. Philip Morris USA, Inc., 272 Or. App. 268, 355 P.3d 931
2 (2015).

3 Because under Nevada law the Plaintiff is seeking punitive damages for a private claim,
4 the injury to Mrs. Geist and himself, and not a public claim, there is not privity between the State
5 in the first case and Mr. Geist in the case at hand. Therefore, the elements of issue preclusion are
6 not met and the Plaintiff may maintain a prayer for punitive damages in this matter.

7 **ORDER**

8 Based on the foregoing Findings of Fact and Conclusions of Law, IT IS HEREBY
9 ORDERED that:

10 Defendants' Motion for Partial Summary Judgment on Plaintiff's Claims for Punitive
11 Damages is **DENIED**.

12
13 Dated this 17th day of March, 2023

14 
15

16
17 648 E02 A7E7 FB2C
18 Jessica K. Peterson
19 District Court Judge

20 **AFFIRMATION**

21 Pursuant to NRS 239B.030

22 The undersigned does hereby affirm that the
23 preceding Order filed in District Court case number
24 A818973 **DOES NOT** contain the social security
25 number of any person.

26 /s/ Jessica K Peterson
27
28

1 CSERV

2 DISTRICT COURT
3 CLARK COUNTY, NEVADA
4

5		
6	Timothy Geist, Plaintiff(s)	CASE NO: A-19-807653-C
7	vs.	DEPT. NO. Department 27
8	Philip Morris USA Inc,	
9	Defendant(s)	

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11 **AUTOMATED CERTIFICATE OF SERVICE**

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16 Service Date: 3/17/2023

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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 3/20/2023

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