APPENDIX

APPENDIX A

**IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT
DUVAL COUNTY, FLORIDA
CIVIL DIVISION**

IN RE: *ENGLE* PROGENY CASES
TOBACCO LITIGATION

CASE NO. 2008-CA-15000
DIVISION: TOBACCO

Pertains to: *Elaine Jordan*
Case No.: 2013-CA-8903-XXXX-MA

DEFENDANT'S MOTION FOR A DIRECTED VERDICT ON ALL CLAIMS MADE AT THE CLOSE OF PLAINTIFF'S CASE IN PHASE I

Pursuant to Rule 1.480 of the Florida Rules of Civil Procedure, Defendant Philip Morris USA Inc. ("PM USA") respectfully moves for a directed verdict on each claim asserted by Plaintiff for the reasons set forth below.[1]

[1] PM USA files concurrently herewith PM USA's Motion For A Directed Verdict On Punitive Damages Made At The Close Of Plaintiff's Case, and incorporates by reference the arguments set forth in that motion.

ARGUMENT

I. THE *ENGLE* FINDINGS CANNOT BE USED TO SATISFY PLAINTIFF'S BURDEN OF PROVING ESSENTIAL ELEMENTS OF HER CLAIMS

In *Philip Morris USA Inc. v. Douglas*, 110 So. 3d 419 (Fla. 2013), the Florida Supreme Court held that the *Engle* findings can be given preclusive effect to relieve progeny plaintiffs of their burden to prove the conduct elements of their negligence and strict liability compensatory damages claims. *Id.* at 427. PM USA disagrees with that decision, but recognizes that *Douglas* currently constitutes controlling Florida precedent with respect to the issue of the preclusive effect of the *Engle* findings under Florida state law. PM USA continues to maintain, however, that permitting Plaintiff to use the *Engle* findings to eliminate her burden of proving the conduct elements of her claims violates PM USA's federal constitutional rights to due process and equal protection under the law because it is impossible to determine what specific conduct by PM USA was found to be tortious by the *Engle* jury. PM USA recognizes that this Court (and the *Douglas* Court with respect to the negligence and strict liability claims) previously rejected this position, but PM USA respectfully disagrees with those rulings and preserves its position for appeal.

The U.S. Supreme Court has held that the "abrogation of a well-established common-law protection against arbitrary deprivations of property raises a presumption" of a due process violation. *Honda Motor Co. v. Oberg*, 512 U.S. 415, 430 (1994). The Court has repeatedly employed due process principles to prevent

state courts from "extreme applications of the doctrine of res judicata." *Richards v. Jefferson Cnty., Ala.*, 517 U.S. 793, 797 (1996) (citation omitted); *see also Hansberry v. Lee*, 311 U.S. 32, 40 (1940).

As PM USA argued in *Douglas* and in prior briefing in this case, federal due process requires the proponent of preclusion to establish that the specific issue relevant to her case was actually decided in her favor in the prior litigation. *See Fayerweather v. Ritch*, 195 U.S. 276, 297-98 (1904) (giving "unwarranted effect to a decision" by accepting as "a conclusive determination" a verdict "made without any finding of [a] fundamental fact" would violate due process). A determination in an earlier judicial proceeding cannot be given preclusive effect in a later case unless "it is certain that the precise fact was determined by the former judgment." *De Sollar v. Hanscome*, 158 U.S. 216, 221 (1895); *see also, e.g.*, *Russell v. Place*, 94 U.S. 606, 608 (1876).

In *Douglas*, the Florida Supreme Court held that this requirement is inapplicable to *Engle* progeny cases. It did not hold that the *Engle* jury had actually decided that the cigarettes Mrs. Douglas smoked were defective. Nor did it determine that the *Engle* jury actually had decided any of the other issues as to which progeny plaintiffs typically seek preclusion. Instead, the Court refused to apply the "actually decided" requirement at all, stating that *Engle*'s reference to "res judicata" meant claim preclusion—under which there is no "actually decided" requirement and thus the parties lawfully could be barred from re-litigating any claims that either were *or could have been* decided in the prior action. *Douglas*, 110 So. 3d at

432-35. The Court implicitly recognized that the "actually decided" requirement was *not* satisfied, stating that the application of issue preclusion principles would "make the Phase I findings regarding the *Engle* defendants' conduct *useless* in individual actions." *Id.* at 433 (emphasis added).

But calling the analysis "claim preclusion" instead of "issue preclusion" does not change the fundamental constitutional problem: PM USA is being precluded from contesting elements of liability that no jury ever resolved against it. The Florida Supreme Court's application of claim preclusion in this context is precisely the type of "extreme application" of preclusion that violates federal due process, *see Richards*, 517 U.S. at 797, because claim preclusion has never been applied to a jury's determination of *issues*, rather than *claims* that have been reduced to a final judgment.

"[I]t is familiar law that only a final judgment is res judicata as between the parties." *Merriam v. Saalfield*, 241 U.S. 22, 28 (1916); *see also Okla. City v. McMaster*, 196 U.S. 529, 533 (1905) ("Without a judgment the plea of res judicata has no foundation."); Second Restatement of Judgments § 13 ("The rules of res judicata are applicable only when a final judgment is rendered."). The final judgment requirement is so "fundamental" to the "well-established common law" of res judicata that it has become a component of due process. *See Oberg*, 512 U.S. at 430; *Douglas*, 110 So. 3d at 438 (Canady, J., dissenting) (majority's analysis represents "a radical departure from the well established Florida law concerning claim preclusion"). Indeed, the requirement is older than the Fourteenth Amendment itself. *See, e.g.*, *Johnson v. Weld*, 8 La.

Ann. 126, 129 (La. 1853), *Dick v. Gilmer*, 4 La. Ann. 520, 520 (La. 1849).

The final judgment requirement serves a critical due process function: it *identifies precisely who won, and what they won*. When there is a true final judgment, the claim or claims merge into a judgment, the claims disappear, and only the judgment exists, barring reassertion both of the claim and of any defenses to the claim. *See Fayerweather*, 195 U.S. at 300 (a "demand or claim" that "ha[s] *passed into judgment[ ]* cannot again be brought into litigation between the parties" (emphasis added)); *Kaspar Wire Works, Inc. v. Leco Eng'g & Machine, Inc*., 575 F.2d 530, 535 (5th Cir. 1978). If there is no final judgment, there is no way of knowing whether any factfinder has resolved all of the essential elements of a claim against a party, and preclusion might be invoked against a party that *won* on the issue in the first proceeding. That is unacceptable as a matter of due process. *See Fayerweather*, 195 U.S. at 297-98.

The Florida Supreme Court characterized "[t]he *Engle* judgment [ ]as a final judgment on the merits because it resolved substantive elements of the class's claims against the *Engle* defendants," not merely "procedural or technical elements." *Douglas*, 110 So. 3d at 434. As Justice Canady explained in his dissent, however, the question is not whether the *Engle* jury decided *elements* that were "substantive" or "procedural or technical," but whether the *claims* of the progeny plaintiffs were reduced to a judgment. *Id.* at 439 (Canady, J., dissenting) ("In *Engle*—stating the obvious—we specifically acknowledged that the Phase I jury did not determine whether the defendants were liable to anyone. The Phase I findings of

the jury were determinations of fact on particular issues; the jury's verdict did not fully adjudicate any claim and did not result in a final judgment on the merits." (internal quotation marks and citation omitted)). A decision as to an element of a claim is nothing more than a "preliminary determination of the . . . jury," and by definition does not extinguish any claims. *McMaster*, 196 U.S. at 533. If the Phase I verdicts truly had extinguished the class members' claims and replaced them with a judgment into which those claims merged, the progeny plaintiffs would be unable to sue: whereas issue preclusion applies only to the party who lost on the issue in the first proceeding, claim preclusion works against both parties in the same fashion.

The Florida Supreme Court's analysis violates due process for a second, related reason: in addition to relieving progeny plaintiffs of the burden of proving that the *Engle* defendants engaged in tortious conduct, the Court relieved plaintiffs of the burden of proving legal causation on their strict liability and negligence claims. It is well established in Florida law that legal causation is a necessary element of every tort claim. *Engle*, 945 So. 2d at 1263, 1268. The *Douglas* Court implicitly recognized that the generality of the Phase I findings makes it impossible for a progeny jury to determine whether the plaintiffs injuries were legally caused by a *defect* or *act of negligence*, as opposed to smoking generally. *See* 110 So. 3d at 429. The Court attempted to evade that problem by holding that where a plaintiff can prove that his alleged injuries resulted from "addiction to the *Engle* defendants' cigarettes containing nicotine," then "injury as a re-

sult of the *Engle* defendants' conduct [would be] *assumed* based on the Phase I common liability findings." *Id.* (emphasis added). Relieving class members of a burden that is imposed on every other Florida tort plaintiff violates due process. *See, e.g.*, *Lindsey v. Wormet*, 405 U.S. 56, 66 (1972); *In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1020 (7th Cir. 2002); *Broussard v. Meineke Disc. Muffler Shops, Inc.*, 155 F.3d 331, 345 (4th Cir. 1998). *Cf. Philip Morris USA Inc. v. Scott*, 131 S. Ct. 1, 3 (2010) (Scalia, J., in chambers) (state court decision that "eliminated any need for plaintiffs [in a class action] to prove, and denied any opportunity for [defendants] to contest," the element of reliance in a fraud claim would give rise to due process concerns).[2]

* * *

CONCLUSION

For the foregoing reasons, PM USA respectfully requests that the Court direct a verdict in its favor on all of Plaintiff's claims

* * *

[Dated: July 27, 2015]

---

[2] In addition, any conclusion that Plaintiff may use the *Engle* findings to remove her burden to prove the conduct elements of her claims because *Engle* was a class action or because of any other unique element of the *Engle* litigation would constitute a violation of the Equal Protection Clause. *See* U.S. Const. amend. XIV § 1.

APPENDIX B

IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT
DUVAL COUNTY, FLORIDA
CIVIL DIVISION

IN RE: *ENGLE* PROGENY CASES
TOBACCO LITIGATION

CASE NO. 2008-CA-15000
DIVISION: TOBACCO

Pertains to: *Elaine Jordan*
Case No.: 2013-CA-8903-XXXX-MA

DEFENDANT'S MOTION TO SET ASIDE THE PHASE I AND PHASE II VERDICTS AND FOR JUDGMENT IN ACCORDANCE WITH DEFENDANT'S MOTION FOR A DIRECTED VERDICT ON ALL CLAIMS

Pursuant to Rule 1.480 of the Florida Rules of Civil Procedure, Defendant Philip Morris USA Inc. ("PM USA") respectfully moves to set aside the Phase I and II verdicts and for judgment in its favor in accordance with its prior motion for a directed verdict on each claim asserted by Plaintiff made on July 27, 2015 and renewed orally on July 30, 2015. PM USA incorporates by reference all of the arguments made in that motion.[1]

[1] PM USA files concurrently herewith the following motions, which it incorporates by reference: * * * .

ARGUMENT

I. THE *ENGLE* FINDINGS CANNOT BE USED TO SATISFY PLAINTIFF'S BURDEN OF PROVING ESSENTIAL ELEMENTS OF HER CLAIMS

In *Philip Morris USA Inc. v. Douglas*, 110 So. 3d 419 (Fla. 2013), the Florida Supreme Court held that the *Engle* findings can be given preclusive effect to relieve progeny plaintiffs of their burden to prove the conduct elements of their negligence and strict liability compensatory damages claims. *Id.* at 427. PM USA disagrees with that decision, but recognizes that *Douglas* currently constitutes controlling Florida precedent with respect to the issue of the preclusive effect of the *Engle* findings under Florida state law. PM USA continues to maintain, however, that permitting Plaintiff to use the *Engle* findings to eliminate her burden of proving the conduct elements of her claims violates PM USA's federal constitutional rights to due process and equal protection under the law because it is impossible to determine what specific conduct by PM USA was found to be tortious by the *Engle* jury. PM USA recognizes that this Court (and the *Douglas* Court with respect to the negligence and strict liability claims) previously rejected this position, but PM USA respectfully disagrees with those rulings and preserves its position for appeal.

The U.S. Supreme Court has held that the "abrogation of a well-established common-law protection against arbitrary deprivations of property raises a presumption" of a due process violation. *Honda Motor Co. v. Oberg*, 512 U.S. 415, 430 (1994). The Court has repeatedly employed due process principles to prevent

state courts from "extreme applications of the doctrine of res judicata." *Richards v. Jefferson Cnty., Ala.*, 517 U.S. 793, 797 (1996) (citation omitted); *see also Hansberry v. Lee*, 311 U.S. 32, 40 (1940).

As PM USA argued in *Douglas* and in prior briefing in this case, federal due process requires the proponent of preclusion to establish that the specific issue relevant to her case was actually decided in her favor in the prior litigation. *See Fayerweather v. Ritch*, 195 U.S. 276, 297-98 (1904) (giving "unwarranted effect to a decision" by accepting as "a conclusive determination" a verdict "made without any finding of [a] fundamental fact" would violate due process). A determination in an earlier judicial proceeding cannot be given preclusive effect in a later case unless "it is certain that the precise fact was determined by the former judgment." *De Sollar v. Hanscome*, 158 U.S. 216, 221 (1895); *see also, e.g.*, *Russell v. Place*, 94 U.S. 606, 608 (1876).

In *Douglas*, the Florida Supreme Court held that this requirement is inapplicable to *Engle* progeny cases. It did not hold that the *Engle* jury had actually decided that the cigarettes Mrs. Douglas smoked were defective. Nor did it determine that the *Engle* jury actually had decided any of the other issues as to which progeny plaintiffs typically seek preclusion. Instead, the Court refused to apply the "actually decided" requirement at all, stating that *Engle*'s reference to "res judicata" meant claim preclusion—under which there is no "actually decided" requirement—and thus the parties lawfully could be barred from relitigating any claims that either were *or could have been* decided in the prior action. *Douglas*, 110 So. 3d at 432-35. The Court implicitly recognized that the

"actually decided" requirement was *not* satisfied, stating that the application of issue preclusion principles would "make the Phase I findings regarding the *Engle* defendants' conduct *useless* in individual actions." *Id.* at 433 (emphasis added).

But calling the analysis "claim preclusion" instead of "issue preclusion" does not change the fundamental constitutional problem: PM USA is being precluded from contesting elements of liability that no jury ever resolved against it. The Florida Supreme Court's application of claim preclusion in this context is precisely the type of "extreme application" of preclusion that violates federal due process, *see Richards*, 517 U.S. at 797, because claim preclusion has never been applied to a jury's determination of *issues*, rather than *claims* that have been reduced to a final judgment.

"[I]t is familiar law that only a final judgment is res judicata as between the parties." *Merriam v. Saalfield*, 241 U.S. 22, 28 (1916); *see also Okla. City v. McMaster*, 196 U.S. 529, 533 (1905) ("Without a judgment the plea of res judicata has no foundation."); Second Restatement of Judgments § 13 ("The rules of res judicata are applicable only when a final judgment is rendered."). The final judgment requirement is so "fundamental" to the "well-established common law" of res judicata that it has become a component of due process. *See Oberg*, 512 U.S. at 430; *Douglas*, 110 So. 3d at 438 (Canady, J., dissenting) (majority's analysis represents "a radical departure from the well established Florida law concerning claim preclusion"). Indeed, the requirement is older than the Fourteenth Amendment itself. *See, e.g.*, *Johnson v. Weld*, 8 La. Ann. 126, 129 (La. 1853); *Dick v. Gilmer*, 4 La. Ann. 520, 520 (La. 1849).

The final judgment requirement serves a critical due process function: it *identifies precisely who won, and what they won.* When there is a true final judgment, the claim or claims merge into a judgment, the claims disappear, and only the judgment exists, barring reassertion both of the claim and of any defenses to the claim. *See Fayerweather*, 195 U.S. at 300 (a "demand or claim" that "ha[s] *passed into judgment[ ]* cannot again be brought into litigation between the parties" (emphasis added)); *Kaspar Wire Works, Inc. v. Leco Eng'g & Machine, Inc.*, 575 F.2d 530, 535 (5th Cir. 1978). If there is no final judgment, there is no way of knowing whether any factfinder has resolved all of the essential elements of a claim against a party, and preclusion might be invoked against a party that *won* on the issue in the first proceeding. That is unacceptable as a matter of due process. *See Fayerweather*, 195 U.S. at 297-98.

The Florida Supreme Court characterized "[t]he *Engle* judgment [ ]as a final judgment on the merits because it resolved substantive elements of the class's claims against the *Engle* defendants," not merely "procedural or technical elements." *Douglas*, 110 So. 3d at 434. As Justice Canady explained in his dissent, however, the question is not whether the *Engle* jury decided *elements* that were "substantive" or "procedural or technical," but whether the *claims* of the progeny plaintiffs were reduced to a judgment. *Id.* at 439 (Canady, J., dissenting) ("In *Engle*—stating the obvious—we specifically acknowledged that the Phase I jury did not determine whether the defendants were liable to anyone. The Phase I findings of the jury were determinations of fact on particular issues; the jury's verdict did not fully adjudicate any

claim and did not result in a final judgment on the merits." (internal quotation marks and citation omitted)). A decision as to an element of a claim is nothing more than a "preliminary determination of the . . . jury," and by definition does not extinguish any claims. *McMaster*, 196 U.S. at 533. If the Phase I verdicts truly had extinguished the class members' claims and replaced them with a judgment into which those claims merged, the progeny plaintiffs would be unable to sue: whereas issue preclusion applies only to the party who lost on the issue in the first proceeding, claim preclusion works against both parties in the same fashion.

The Florida Supreme Court's analysis violates due process for a second, related reason: in addition to relieving progeny plaintiffs of the burden of proving that the *Engle* defendants engaged in tortious conduct, the Court relieved plaintiffs of the burden of proving legal causation on their strict liability and negligence claims. It is well established in Florida law that legal causation is a necessary element of every tort claim. *Engle*, 945 So. 2d at 1263, 1268. The *Douglas* Court implicitly recognized that the generality of the Phase I findings makes it impossible for a progeny jury to determine whether the plaintiff's injuries were legally caused by a *defect* or *act of negligence*, as opposed to smoking generally. *See* 110 So. 3d at 429. The Court attempted to evade that problem by holding that where a plaintiff can prove that his alleged injuries resulted from "addiction to the *Engle* defendants' cigarettes containing nicotine," then "injury as a result of the *Engle* defendants' conduct [would be] *assumed* based on the Phase I common liability findings." *Id.* (emphasis added). Relieving class members

of a burden that is imposed on every other Florida tort plaintiff violates due process. *See, e.g.*, *Lindsey v. Normet*, 405 U.S. 56, 66 (1972); *In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1020 (7th Cir. 2002); *Broussard v. Meineke Disc. Muffler Shops, Inc.*, 155 F.3d 331, 345 (4th Cir. 1998). *Cf. Philip Morris USA Inc. v. Scott*, 131 S. Ct. 1, 3 (2010) (Scalia, J., in chambers) (state court decision that "eliminated any need for plaintiffs [in a class action] to prove, and denied any opportunity for [defendants] to contest," the element of reliance in a fraud claim would give rise to due process concerns).[2]

* * *

CONCLUSION

For the foregoing reasons, PM USA respectfully requests that the Court set aside the verdict and enter judgment in its favor on all of Plaintiff's claims.

* * *

[Dated: August 17, 2015]

---

[2] In addition, any conclusion that Plaintiff may use the *Engle* findings to remove her burden to prove the conduct elements of her claims because *Engle* was a class action or because of any other unique element of the *Engle* litigation would constitute a violation of the Equal Protection Clause. *See* U.S. Const. amend. XIV § 1.