COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

No. SJC-11179

WILLIE EVANS, as Executor of the Estate of Marie R. Evans,

Plaintiff-Appellee,

v.

LORILLARD TOBACCO COMPANY,

Defendant-Appellant.

BRIEF OF CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT

Robin S. Conrad
Kate C. Todd
National Chamber
Litigation Center, Inc.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

Of Counsel

Carolyn A. Pearce
BBO No. 673127
Lisa S. Blatt
Arnold & Porter LLP
555 12th Street, N.W.
Washington, D.C. 20004
(202) 942-6806

Counsel to Amicus Curiae Chamber of Commerce of the United States of America

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Other Authorities

INTERESTS OF *AMICUS CURIAE*

The Chamber of Commerce of the United States of America ("the Chamber") is the world's largest business federation, representing 300,000 direct members and indirectly representing an underlying membership of more than three million companies and professional organizations of every size, in every industry sector and from every region of the country. The Chamber represents its members' interests by, among other activities, filing briefs in courts throughout the country on issues of critical concern to the business community.

The Chamber submits this *amicus* brief in support of Lorillard Tobacco Co. ("Lorillard") to address the trial court's application of offensive collateral estoppel. *See* Record Appendix ("A.") 3820, 3841-50, 3872-74. The trial court's approach to collateral estoppel was erroneous and, if affirmed, could have several unwarranted and unintended consequences in products liability and other large-scale litigations in the Commonwealth.

The trial court determined that offensive collateral estoppel provided an independent and alternative basis for liability under Chapter 93A because another court, in another lawsuit, brought by another plaintiff, pursuing different claims, had made findings against Lorillard. The trial court did so

despite that in many other cases Lorillard has prevailed on the very issues for which the trial court applied collateral estoppel. The trial court's ruling is contrary to the decision of every state and federal court to address this question, all of which denied similar requests for collateral estoppel.[1]

The Chamber's members include myriad manufacturers of a broad variety of consumer products, and any of these members could be subject to the offensive use of collateral estoppel. The trial court's decision is highly problematic for the Chamber's members because a single product or event often prompts multiple independent actions by different plaintiffs. If affirmed, the trial court's

---

[1] *See Shaffer v. R.J. Reynolds Tobacco Co.*, -- F. Supp. 2d --, 2012 WL 1830219 (D. Ariz. 2012); *In re Light Cigarettes Mktg. Sales Practices Litig.*, 691 F. Supp. 2d 239 (D. Me. 2010); *Grisham v. Philip Morris Inc.*, 670 F. Supp. 2d 1014, 1037 (C.D. Cal. 2009); *Schwab v. Philip Morris USA Inc.*, 449 F. Supp. 2d 992, 1079 (E.D.N.Y. 2006), *rev'd on other grounds sub nom. McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215 (2d Cir. 2008); *Aspinall v. Philip Morris Cos. Inc.*, No. 98-6002-H, slip op., 2012 WL 1063342 (Mass. Super. Ct. Mar. 13, 2012) (Addendum, Tab 1); *Craft v. Philip Morris Companies Inc.*, No. 002-00406-02, slip op., 2010 WL 8523193 (Mo. Cir. Ct. Dec. 28, 2010) (Addendum, Tab 2); *Curtis v. Altria Grp., Inc.*, 792 N.W.2d 836, 853-55 (Minn. Ct. App. 2010); *Brown v. Am. Tobacco Co.*, No. JCCP 4042, slip op. at 2-3 (Cal. Super. Ct. Nov. 4, 2010) (Addendum, Tab 3); *City of St. Louis v. Am. Tobacco Co.*, No. 22982-09652-01, slip op., 2010 WL 2917188 (Mo. Cir. Ct. June 2, 2010) (Addendum, Tab 4); *Curtis v. Altria Grp., Inc.*, No. 27-CV-01-18042, slip op., 2009 WL 5820516 (Minn. Dist. Ct. Oct. 14, 2009), *aff'd*, 792 N.W.2d at 853-55 (Addendum, Tab 5).

approach to collateral estoppel would encourage plaintiffs in complex products liability or other large litigations to file cases seriatim, litigating each until they obtain one favorable verdict. Once that verdict is obtained, they could then - under the trial court's approach - use the verdict to collaterally estop defendants in *all* later cases. And they could do so even if plaintiffs had *lost* all the cases leading up to a single win. That result would conflict not only with longstanding collateral estoppel law in the Commonwealth and all jurisdictions, but also with fundamental fairness. If the Court reaches the collateral estoppel issue in this case, it should reverse.[2]

INTRODUCTION

The trial court issued an unprecedented, unwarranted, and unnecessary ruling when, as an alternative basis for Chapter 93A liability, it applied non-mutual, offensive collateral estoppel based on *United States v. Philip Morris USA Inc.*, 449 F. Supp. 2d 1 (D.D.C. 2006), *aff'd in part, vacated in part*, 566 F.3d 1095 (D.C. Cir. 2009) ("the DOJ case").

---

[2] Undersigned counsel for Arnold & Porter LLP notes that Arnold & Porter LLP has represented Philip Morris USA Inc., who is not a party here, in other cases and that Philip Morris USA Inc. has been a defendant in cases where collateral estoppel was addressed.

Non-mutual offensive collateral estoppel "occurs when the plaintiff seeks to foreclose the defendant from litigating an issue the defendant has previously litigated unsuccessfully in an action with another party." *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 n.4 (1979). The doctrine has long been disfavored because it conflicts with a basic tenet of American law: every defendant deserves its day in court. The doctrine is the most "detailed, difficult, and potentially dangerous" form of preclusion. *Jack Faucett Assocs., Inc. v. AT&T Co.*, 744 F.2d 118, 124 (D.C. Cir. 1984). Courts recognize that non-mutual offensive collateral estoppel must be "viewed with stricter scrutiny," *Estate of Portnoy v. Cessna Aircraft Co.*, 612 F. Supp. 1147, 1150 (S.D. Miss. 1985); that "the restrictions on the use of the doctrine are more stringent," *Winters v. Diamond Shamrock Chem. Co.*, 149 F.3d 387, 395 n.9 (5th Cir. 1998); and that its application requires safeguards "a cut above" the norm. *Jack Faucett*, 744 F.2d at 125 (citation omitted). Courts therefore consistently limit use of the doctrine to preclude a defendant from presenting its defense.

The trial court's application of collateral estoppel contradicts this longstanding approach. The trial court's decision is contrary to the conclusions of *every other* federal and state court that has been

asked to apply collateral estoppel to the findings in the DOJ case - eleven judges in nine cases, including another Massachusetts Superior Court Justice. *See supra* at 2 n.1 (collecting cases). These courts, in situations identical to this case, uniformly denied requests for collateral estoppel.

The trial court's decision veered off course by erroneously applying two baseline prerequisites of collateral estoppel. *First*, offensive collateral estoppel cannot apply where the decision upon which it is based is inconsistent with verdicts in favor of the defendant in other cases. As noted, the DOJ case is demonstrably inconsistent with numerous defense verdicts in favor of Lorillard and other tobacco companies in cases raising virtually identical allegations. These verdicts alone should have foreclosed offensive collateral estoppel. *Second*, collateral estoppel applies only where the issues in both cases are identical and essential to the judgment in the prior case. The trial court, however, failed to even assess these requirements, choosing instead to just take the plaintiff's word for it.

Affirming the trial court's decision not only would affect Lorillard, it could have unwarranted consequences in other litigations. Under the trial court's relaxed approach, parties could rely easily on a doctrine that is supposed to be only cautiously

employed. Moreover, under the trial court's approach, "[a] defendant in a products liability action could win an issue in the first 500 cases, lose the issue in the 501st case, and face the prospect of losing the issue in the next 1,000 cases due to plaintiffs' use of offensive collateral estoppel." Amy Gibson, *Cimino v. Raymark Industries: Propriety of Using Inferential Statistics and Consolidated Trials to Establish Compensatory Damages for Mass Torts*, 46 Baylor L. Rev. 463, 464 n.9 (1994).

Finally, one of the principal reasons courts permit collateral estoppel is to conserve judicial resources by avoiding a trial on issues where the plaintiff shows that the rigorous requirements of the doctrine are satisfied. Yet here, the trial court applied collateral estoppel only as an *alternative* ground for liability and only *after* a complete trial on the merits. Allowing the doctrine in this context would not serve judicial economy. To the contrary, it may only encourage trial courts to employ the doctrine post-trial in support of "alternative" holdings, in an improper attempt to insulate their rulings from reversal.

For all of these reasons, if the Court reaches the alternative collateral estoppel ruling here, it should reverse.

BACKGROUND

The trial court below applied offensive collateral estoppel based on the DOJ case as an alternative and "independent basis for liability in this case." A. 3820, 3842. The DOJ case was a federal RICO action brought by the federal government in 1999 against several U.S. tobacco manufacturers, certain parent companies, and other defendants. *See* 449 F. Supp. 2d at 31-32. The government sought equitable relief to "prevent and restrain" future RICO violations. *See United States v. Philip Morris USA Inc.*, 396 F.3d 1190, 1198-1200 (D.C. Cir. 2005). The government did not litigate the claims of any individual smoker or class of smokers or seek damages on behalf of any consumer. The DOJ case was thus unlike personal injury lawsuits against tobacco manufacturers.

In August 2006, the trial court in the DOJ case issued its decision, which included numerous "findings of fact," the vast majority of which were adopted verbatim from the government's proposed findings. The court found that defendants had violated RICO, 449 F. Supp. 2d at 27-28, and granted certain equitable relief, *id.* at 938-45.

The D.C. Circuit "affirm[ed] the district court's judgment of liability" as to the tobacco company defendants and "largely affirm[ed] the remedial

order." 566 F.3d at 1150. The court emphasized that it "may not have reached all the same conclusions as the district court," but deferred given the posture of the case and applicable standard of review. *Id.* at 1134.

Plaintiffs in personal injury and other litigations have sought to apply collateral estoppel to the DOJ case. But, as discussed below, courts have found the DOJ case cannot justify depriving a defendant of its day in court.

ARGUMENT

I. The Trial Court's Offensive Collateral Estoppel Ruling Is Erroneous

The ruling below is a stark aberration from a wall of precedent. Every state and federal court to address whether the DOJ case estops companies from defending themselves (nine courts and eleven judges), has rejected plaintiffs' requests to apply the doctrine. *See Shaffer*, 2012 WL 1830219; *Aspinall*, 2012 WL 1063342; *Light Cigarettes*, 691 F. Supp. 2d at 251; *Grisham*, 670 F. Supp. 2d at 1037; *Schwab*, 449 F. Supp. 2d at 1079; *Craft*, 2010 WL 8523193; *Brown*, slip op. at 2-3; *City of St. Louis*, 2010 WL 2917188; *Curtis*, 792 N.W.2d at 855; *Curtis*, 2009 WL 5820516. Applying the same federal preclusion law that governs this case, these courts have found numerous, independent reasons why collateral estoppel would be

inappropriate.[3] The trial court should have reached the same outcome.

A. Offensive Collateral Estoppel Is Erroneous Because The DOJ Case Conflicts With Numerous Defense Verdicts In Favor Of Lorillard And Other Tobacco Companies

"Where offensive estoppel is involved, the element of 'fairness' gains special importance," and "'a trial judge should not allow the use of offensive collateral estoppel'" where it "'would be unfair to a defendant.'" *Jack Faucett*, 744 F.2d at 125 (quoting *Parklane Hosiery*, 439 U.S. at 331); *see also, e.g.*, *Enica v. Principi*, 544 F.3d 328, 337 (1st Cir. 2008) (similar); *Jean Alexander Cosmetics, Inc. v. L'Oreal USA, Inc.*, 458 F.3d 244, 248 (3d Cir. 2006) (similar); *Hicks v. Quaker Oats Co.*, 662 F.2d 1158, 1170 (5th Cir. 1981) (similar); *Matter of Cohen*, 435 Mass. 7, 16-17 (2001) (similar); *Hizer v. Gen. Motors Corp., Allison Gas Turbine Div.*, 888 F. Supp. 1453, 1458 n.4 (S.D. Ind. 1995) (similar). The party seeking offensive collateral estoppel thus "bear[s] the burden

---

[3] "State courts are bound to apply federal rules in determining the preclusive effect of federal-court decisions on issues of federal law." *Heck v. Humphrey*, 512 U.S. 477, 488 n.9 (1994); *see also, e.g.*, *Aronovitz v. Fafard*, 78 Mass. App. Ct. 1, 5 (Mass Ct. App. 2010) (same). Because plaintiff based preclusion on the federal decision in the DOJ case, federal preclusion principles apply. Nevertheless, we have identified no material variations between federal and Massachusetts preclusion law.

of establishing" that preclusion will not "work a basic unfairness." *Estate of Gaither v. District of Columbia*, 655 F. Supp. 2d 69, 81 (D.D.C. 2009) (citation omitted). The fairness requirement stems from the fact that the doctrine of collateral estoppel is "shaped by fundamental notions of due process." *Stichting v. Schreiber*, 327 F.3d 173, 184 (2d Cir. 2003); *see also, e.g., Burrell v. Armijo*, 456 F.3d 1159, 1170-73 (10th Cir. 2006) (similar); *Berger Transfer & Storage v. Cent. States, Se. & Sw. Areas Pension Fund*, 85 F.3d 1374, 1377 (8th Cir. 1996) (similar); *Conte v. Justice*, 996 F.2d 1398, 1400 (2d Cir. 1993) (similar).

The U.S. Supreme Court recognized in *Parklane Hosiery* that to apply collateral estoppel would be unfair if "the judgment relied upon as a basis for the estoppel is itself inconsistent with one or more previous judgments in favor of the defendant." 439 U.S. at 330. Consistent with *Parklane Hosiery*, courts across the country have held that "[o]ffensive estoppel should not be applied . . . where the judgment relied on is inconsistent with other decisions." *Jack Faucett*, 744 F.2d at 125-26; *see also, e.g., Aetna Cas. & Sur. Co. v. Gen. Dynamics Corp.*, 968 F.2d 707, 711 (8th Cir. 1992) (refusing to apply collateral estoppel in the face of inconsistent prior judgments); *Setter v. A.H. Robins Co., Inc.*, 748

F.2d 1328, 1330-31 (8th Cir. 1984) (same); *Trimble v. Westinghouse Elec. Corp.*, 1999 WL 768307, at *5 (E.D. Pa. 1999) (same); *Badon v. Transworld Sys., Inc.*, 1997 WL 149986, at *5 (E.D. La. 1997) (same); Restatement (Second) of Judgments § 29(4) & cmt. f (1982) (similar); 18A Charles A. Wright *et al.*, *Federal Practice & Proc.* § 4465.2 (2d ed.) (similar). Under Massachusetts law, too, collateral estoppel is impermissible and unfair where "the judgment relied upon as a basis for the estoppel is itself inconsistent with one or more previous judgments in favor of the defendant." *In re Brauer*, 452 Mass. 56, 70 (2008) (citations and quotations omitted).

This principle applies with full force in this case because the DOJ case is unquestionably inconsistent with numerous defense verdicts won by Lorillard. Courts repeatedly have concluded that offensive collateral estoppel based on the DOJ case would be unfair and improper because tobacco company defendants have won numerous defense verdicts in cases involving allegations similar to those in the DOJ case. As one court aptly explained:

> there is absolutely no doubt that application of offensive collateral estoppel in this case would be glaringly inconsistent with a large number of prior jury verdicts in many cases around this country where identical (or else

> nearly-identical) issues were litigated; this would directly violate one of the fundamental fairness precepts established by the Supreme Court in *Parklane Hosiery*.

City of St. Louis, 2010 WL 2917188, slip op. at 17; *see also Shaffer*, 2012 WL 1830219, at *4 ("The inconsistent cases in this area of tobacco litigation . . . indicate that it would be unfair to give preclusive effect to the findings in the DOJ Case to establish liability in this case."); *Schwab*, 449 F. Supp. 2d at 1079 ("defendants have won so many of the tobacco cases" that applying "conclusive effect to" the DOJ case would be "inappropriate"); *Aspinall*, 2012 WL 1063342, slip op. at 12 ("Given that at least two juries have come to a different conclusion on the same issues under the same statute as did the court in the DOJ Action, this court concludes that unfairness to the defendants cuts sharply against the application of offensive collateral estoppel here."); *Craft*, 2010 WL 8523193, slip op. at 9 ("the application of offensive collateral estoppel in this case would result in fundamental unfairness to Defendants because it would be inconsistent with a number of prior jury verdicts in many cases where identical, or nearly-identical, issues were litigated"); *Brown*, slip op. at 2 (agreeing that "offensive preclusion in this case would be unfair based on the existence of inconsistent

verdicts"); *Curtis*, 2009 WL 5820516, slip op. at 8 (rejecting collateral estoppel because "there are several cases that are inconsistent with the trial court's judgment in *DOJ*").[4]

Two of the inconsistent defense verdicts in Lorillard's favor are especially relevant here: *Blue Cross & Blue Shield of N.J. Inc. v. Philip Morris, Inc.*, No. 98 CV 3287 (E.D.N.Y.), and *Iron Workers Local Union No. 17 Insurance Fund v. Philip Morris Inc.*, No. 1:97-CV-1422 (N.D. Ohio). These cases involved federal or state RICO claims, *i.e.*, the same claim as in the DOJ case. In both *Blue Cross* and *Iron Workers*, the jury returned a verdict in favor of Lorillard after considering the same allegations, arguments and evidence offered in the DOJ case.

---

[4] *But see Grisham*, 670 F. Supp. 2d 1014. *Grisham* rejected collateral estoppel based on the DOJ case, but declined to rely on the verdicts as an additional basis for its decision. The *Grisham* court's dicta on the inconsistent verdicts is not only irrelevant, it also is incorrect and has been rejected by subsequent courts. *See, e.g., Aspinall*, 2012 WL 1063342, slip op. at 10-11 (rejecting *Grisham*); *Shaffer*, 2012 WL 1830219, at *5 n.2 (same); *City of St. Louis*, 2010 WL 2917188, slip op. at 17 n.11 (rejecting *Grisham* because "the vast multitude of prior inconsistent verdicts the Court would have to ignore in order to grant the instant motion, is simply too great to try to rationalize or explain away; doing so, the Court believes, would violate both the spirit and letter of *Parklane Hosiery*"); *Craft*, 2010 WL 8523193, slip op. at 9 (rejecting collateral estoppel based on the DOJ case despite plaintiffs' reliance on *Grisham*).

Notably, the court in *Blue Cross* was the Eastern District of New York (Judge Jack B. Weinstein), which subsequently rejected offensive collateral estoppel because of inconsistent verdicts: "defendants have won so many of the tobacco cases that applying the rule of the Restatement according conclusive effect to the last of the series of litigations is inappropriate." *Schwab*, 449 F. Supp. 2d at 1079; *cf. Oldham v. Pritchett*, 599 F.2d 274, 281 (8th Cir. 1979) (where judge who presided over earlier action makes a "determination of its collateral estoppel effect" in a subsequent action, that determination "is entitled to great weight" because he "was in a particularly good position to determine what was actually litigated" in the prior proceeding).

More recently, another Superior Court in Massachusetts (Justice Peter M. Lauriat, Suffolk County) denied a motion for partial summary judgment seeking offensive collateral estoppel based on the DOJ case. *See Aspinall*, 2012 WL 1063342, slip op. at 11-12. Like numerous other decisions, *Aspinall* recognized that "the verdicts in [*Blue Cross* and *Iron Workers* found] that the defendants, including Philip Morris, did not engage in the same fraudulent conduct under RICO that was asserted in the DOJ Action. The judgments in both *Blue Cross* and *Iron Workers* are inconsistent with the judgment in the DOJ Action for

purposes of offensive collateral estoppel." *Aspinall*, 2012 WL 1063342, slip op. at 11; *see also Shaffer*, 2012 WL 1830219, at *4 ("in contrast to the DOJ bench trial where the court found that liability had been established under RICO stemming from the tobacco defendants' fraudulent conduct, juries in other states have found in favor of RJR on similar federal and state RICO claims"); *Craft*, 2010 WL 8523193, slip op. at 10 ("at least two federal RICO fraud/conspiracy actions against tobacco industry defendants have resulted in jury verdict outcomes that are directly opposite of the outcome in the court-tried DOJ case"); *City of St. Louis*, slip op. at 18 n.12 (describing *Blue Cross* as "flatly contrary" to the DOJ case); *Curtis*, 2009 WL 5820516, slip op. at 9-11 (discussing *Blue Cross* and *Iron Workers* as inconsistent with the DOJ case). The same reasoning applies in this case.

Nevertheless, the trial court below concluded that collateral estoppel was not unfair because Lorillard "ha[d] not cited or provided any examples of such cases where it prevailed." A. 3820, 3874. Lorillard, however, did identify inconsistent verdicts both by citing decisions rejecting collateral estoppel that discussed these inconsistent verdicts and by citing certain decisions in which Lorillard had won defense verdicts. *See* A. 2297, 2300-01, 2970, 2981. Given the presumptive unfairness of the doctrine, the

court should have paused before applying the doctrine based on a perceived procedural deficiency.

Moreover, any deficiencies in the collateral estoppel record resulted from the procedural context in which the court permitted the plaintiff to raise collateral estoppel. Because of the fairness issues at play, courts usually require plaintiffs to move for collateral estoppel well before trial, allowing defendants time to provide comprehensive materials identifying inconsistent verdicts or other grounds why the doctrine should not apply. That is true in cases addressing collateral estoppel based on the DOJ case, where defendants have provided the trial courts with voluminous record materials detailing defense verdicts that are inconsistent with the DOJ case.

Here, the plaintiff, after stating pre-trial that he would not seek to apply collateral estoppel, sharply changed course halfway through trial at the court's prompting and indicated for the first time he would be relying on the doctrine.[5] By permitting plaintiff to do so, the trial court ended up deciding collateral estoppel without the complete collateral

---

[5] *See, e.g.*, A. 1869-70 ("Plaintiff has *not* moved to have Lorillard collaterally estopped from contesting facts found in [the DOJ case].") (emphasis in original); A. 6389 (Tr. 1674-75) (plaintiff's counsel stating for the first time that he would be seeking collateral estoppel).

estoppel record that every other court has had when it decided the same issue and denied collateral estoppel. This was procedurally unfair and contrary to the due process rationale underlying the standards for invoking non-mutual collateral estoppel. *See supra* at 9-10. At a minimum, to the extent that the trial court was dissatisfied with the record on inconsistent verdicts, it should have ordered the parties to provide supplemental materials before applying the disfavored doctrine of offensive collateral estoppel. Fairness and due process demanded as much.

B. The Trial Court Erred By Applying Offensive Collateral Estoppel Even Though Plaintiff Failed To Establish Its Other Requirements

Under the federal law applicable here, and the law of the Commonwealth, the party seeking collateral estoppel also must show that the "issue at stake is identical to an issue raised in the prior litigation" and that the issue was essential to that judgment. *See, e.g., Littlejohn v. United States*, 321 F.3d 915, 923 (9th Cir. 2003). "Before a party will be precluded from relitigating an issue, a court must determine that . . . the issue in the prior adjudication was identical to the issue in the current adjudication" and that "the issue decided in the prior adjudication [was] essential to the earlier judgment." *Tuper v. N. Adams Ambulance Serv., Inc.*, 428 Mass.

132, 134-35 (1998). Again, contrary to other courts considering similar requests for collateral estoppel, the trial court erroneously found that that the DOJ case litigated identical issues and that those issues were essential to its judgment.

1. The Trial Court Incorrectly Concluded That The Issues In This Case Were Identical To Those In The DOJ Case

Parties seeking to rely on collateral estoppel must establish that "the facts and the legal standard used to assess them" are "the same in both proceedings." *In re Southmark Corp.*, 163 F.3d 925, 932 (5th Cir. 1999); *Tuper*, 428 Mass. at 134 ("issue in the prior adjudication" must be "identical to the issue in the current adjudication"). "It is not sufficient that an issue is 'factually similar' to the one in an earlier case . . . the issues must be *identical* and involve the same facts and surrounding context." *Visa U.S.A. Inc. v. First Data Corp.*, 369 F. Supp. 2d 1121, 1123 (N.D. Cal. 2005) (emphasis in original) (citation omitted). The trial court erred when concluding that the issues on which plaintiffs sought preclusion in this case were "identical in all respects" to the issues actually litigated and decided in the DOJ case. *Faigin v. Kelly*, 184 F.3d 67, 78 (1st Cir. 1999) (citation omitted).

In the DOJ case, the federal government sought only equitable relief to restrain future conduct based on alleged federal RICO violations. 449 F. Supp. 2d at 27. The government did not litigate claims or seek damages on behalf of any individual smoker. *See generally id.* Likewise, to find RICO liability, there was no need for the court in the DOJ case to determine whether defendants owed plaintiff or other smokers a duty of care or that defendants breached that duty or to adjudicate whether plaintiff or any other particular smoker was injured by any alleged misconduct. *See id.* at 901-06 (discussing elements of government's claims). The DOJ case also did not conclude that any brands of cigarettes - including the specific brand at issue here - were defective as a question of Massachusetts law; again, it did not even address this question. *See generally id.* Plaintiff's claims for negligence and products liability thus did not present issues that were remotely identical to those raised by the government's RICO claims in the DOJ case.

The trial court did not explain how the issues resolved when deciding RICO claims for equitable relief in the DOJ case were "identical in all respects" to the issues in this case. Rather, the trial court offered only the conclusory statement that "[t]here is every indication that the issues in [the

DOJ case] are identical to those raised in this case." A. 3820, 3874. This summary approach is patently inadequate to ensure fundamental fairness. Any contrary result deprives the defendant of the opportunity to present its defense. This aspect of the court's decision too was erroneous.

2. The Trial Court Also Failed To Assess Whether The Findings Sought To Be Precluded Were Essential To The Judgment In The DOJ Case

Courts cannot apply collateral estoppel if a party "fail[s] to demonstrate that the issue was essential to the [prior] judgment." *Aronovitz*, 78 Mass. App. Ct. at 5 (applying federal law); *see also, e.g., In re Kelly*, 182 B.R. 255, 258 (B.A.P. 9th Cir. 1995) (same). The U.S. Supreme Court has explained that "[a] determination ranks as necessary or essential only when the final outcome hinges on it," and the party seeking preclusion bears the burden of distinguishing between those "determination[s] necessary to the bottom-line judgment" and those that are nothing more than "a subsidiary finding that, standing alone, is not outcome determinative." *Bobby v. Bies*, 556 U.S. 825, 835 (2009).

A court cannot undertake this necessity analysis with respect to the earlier findings *en masse*, but must consider the necessity requirement on a finding-by-finding basis. *See, e.g., Pool Water Prods. v.*

Olin Corp., 258 F.3d 1024, 1033 (9th Cir. 2001) ("Neither the district court nor the defendant is required to engage in a 'hunt and peck' exercise to ferret out potentially relevant and necessary findings.") (citation omitted).

Yet, the trial court here did not even acknowledge this requirement, *see* A. 3820, 3872-74, let alone discuss how the specific findings to be precluded in this case were "*necessary* to [the DOJ case] judgment." *United States v. Alaska*, 521 U.S. 1, 13 (1997) (emphasis in original). Again, this relaxed approach to collateral estoppel is wrong and will all but invite estoppel where it does not belong. This case aptly demonstrates the point. Had the trial court undertaken the proper analysis, it could not have found that the findings it held to be precluded were necessary to the DOJ case judgment.

In the present case, the trial court found that the DOJ case's findings as to certain schemes to defraud could estop Lorillard from refuting allegations of misconduct. But courts have rejected similar assertions of collateral estoppel based on the DOJ case because the court there found liability without resting its determination on any single scheme, much less any single findings or group of findings. *See Light Cigarettes*, 691 F. Supp. 2d at 249 ("the extent to which Judge Kessler separately

considered issues unique to light cigarettes is unclear."); *see also Brown*, slip op. at 2-3 (similar). In the DOJ case, the federal government alleged multiple different schemes to defraud, called "pillars of fraud." 449 F. Supp. 2d at 27, 853 n.46. The DOJ case expressly *rejected* the argument that each "pillar" was an independent, stand-alone basis for its decision and concluded that it was dealing with a *single scheme* with different components: "[t]he individual components must be viewed *not independently* but in context of the entire scheme to defraud." *Id.* at 853 (emphasis added). Based on this view, the court in the DOJ Case explained that it was *not* necessary for the government to show that each defendant committed the two predicate acts required for RICO liability for each pillar: "[i]t is sufficient to prove by the totality of the circumstances that the defendant devised a scheme intended to defraud *which included one or more of the individual component schemes alleged.*" *Id.* (emphasis added).

The court below simply identified findings that it claimed could be precluded, but never explained how these findings were "necessary to the bottom-line judgment." *Bobby*, 556 U.S. at 835. Without any showing that any of these findings was essential to the judgment in the DOJ case, the court lacked the

authority to apply offensive collateral estoppel, and this Court should not affirm that holding.

II. Affirming The Trial Court's Offensive Collateral Estoppel Ruling Would Improperly Broaden The Doctrine And Unfairly Deprive Future Litigants Of Their Right To Defend Themselves

If this Court reaches the alternative collateral estoppel holding, it should reverse the trial court's ruling given the errors discussed above. Beyond that, affirming the trial court's ruling also would improperly broaden the circumstances under which courts might apply collateral estoppel. That result would create significant adverse and unfair consequences for defendants in other contexts.

First, the trial court's collateral estoppel ruling paves the way for plaintiffs to rely on a single favorable decision as the basis for collateral estoppel even where there are numerous inconsistent verdicts. For instance, in certain types of cases, such as products liability or mass torts, where a single product or event can result in multiple lawsuits, plaintiffs would have every incentive to pursue lawsuits seriatim in the hope that eventually a judgment will be rendered in a plaintiff's favor. The decision below opens the door for plaintiffs to rely on a single decision for collateral estoppel to forever foreclose defendants from contesting certain issues, even though the defendant may have prevailed

in any number of prior cases. The Supreme Court in *Parklane Hosiery* vividly described these problems:

> In Professor Currie's familiar example, a railroad collision injures 50 passengers all of whom bring separate actions against the railroad. After the railroad wins the first 25 suits, a plaintiff wins in suit 26. Professor Currie argues that offensive use of collateral estoppel should not be applied so as to allow plaintiffs 27 through 50 automatically to recover.

439 U.S. at 330 n.14. "The unfairness of a contrary result is apparent. A defendant in a products liability action could win an issue in the first 500 cases, lose the issue in the 501st case, and face the prospect of losing the issue in the next 1,000 cases due to plaintiffs' use of offensive collateral estoppel." Gibson, *supra*, at 464 n.9 (1994); *see also* 2 L. of Toxic Torts, § 17:9, The Future Of Collateral Estoppel In Toxic Tort Litigation (2012) ("Perhaps the most significant reason why collateral estoppel should not and probably will not play a significant role in toxic tort litigation is the unfairness of letting litigants with knowledge of their claims intentionally schedule those claims so as to get the benefit of a favorable plaintiffs' verdict without the danger of being affected by an adverse determination.").

Relatedly, permitting a single verdict to stand as collateral estoppel in the face of inconsistent verdicts is contrary to the "premise that different juries [may] reach equally valid verdicts." *Hardy v. Johns-Manville Sales Corp.*, 681 F.2d 334, 346 (5th Cir. 1982); *see also, e.g., Jack Faucett*, 744 F.2d at 129 (inconsistent verdicts "may have been based on equally reasonable resolutions of doubt as to the probative strength of the evidence or the appropriate application of a legal rule to the evidence") (quoting Restatement (Second) of Judgments § 29 cmt. f, at 295). "Collateral estoppel . . . will not be applied where the determination relied on as preclusive is itself inconsistent with another determination of the same issue, which diminishes any confidence that the result reached in the first action was substantially correct; issue preclusion in the face of inconsistent verdicts appears arbitrary to a defendant who has had favorable judgments on the same issue, and undermines the premise that different juries may reach equally valid verdicts." Am. L. Prod. Liab. 3d § 55:17. "It seems most inappropriate for this Court to pick out one case upon which the jury reached a verdict for the plaintiff, and accord it preclusive effect, and at the same time to ignore all the others in which equally competent juries have reached the opposite

conclusion." *Harrison v. Celotex Corp.*, 583 F. Supp. 1497, 1503 (E.D. Tenn. 1984).

Second, permitting offensive collateral estoppel without first ensuring that parties have satisfied its requirements would cast aside decades of collateral estoppel jurisprudence and greatly expand the circumstances under which courts could apply the doctrine. The trial court's approach to identity of issues, for example, would allow parties to satisfy that requirement by pointing just to some factual overlap between the two cases. This approach would unjustifiably lower the current bar – under which plaintiffs must establish that an issue is "identical in all respects" – so far down that it would be satisfied in cases, like this one, where the fact-finder in the prior suit did not even consider the issues a plaintiff seeks to preclude.

The Court should not endorse the lower court's departure from collateral estoppel's long-established prerequisites. Such an outcome would result in far more frequent requests for offensive collateral estoppel in which parties seek to misuse the doctrine to foreclose issues that are neither identical to those resolved in prior actions nor necessary to that earlier judgment. Precluding parties from litigating non-identical and non-essential issues under such circumstances would radically change the issues

subject to collateral estoppel and restrict parties' ability to litigate these issues in violation of due process. *See, e.g., Richards v. Jefferson Cnty.*, 517 U.S. 793, 797 (1996) ("extreme applications" of preclusion violate due process). At a minimum, this Court should not endorse the belated and improper procedures in which the court applied the doctrine. Defendants should be permitted a full and fair opportunity to address collateral estoppel before trial.

Finally, the Court should not affirm the trial court's approach to collateral estoppel because that approach defied the doctrine's central purpose of efficiency. "[E]fficiency is [offensive] collateral estoppel's only true justification." *Gough v. Natural Gas Pipeline Co. of Am.*, 996 F.2d 763, 769 (5th Cir. 1993) (citation omitted). As such, "courts have understandably declined to apply the doctrine" where "the efficiency rationale for collateral estoppel fails." *SEC v. Monarch Funding Corp.*, 192 F.3d 295, 304 (2d Cir. 1999); *see also, e.g., Parklane Hosiery*, 439 U.S. at 331-32; 18A Charles Alan Wright, *et al.*, *Federal Practice & Procedure* § 4465 (2 ed.) ("[p]reclusion has been denied" where it "would not significantly expedite the second trial").

The trial court held that offensive collateral estoppel "furnish[es] an independent basis for

liability in this case." A. 3820, 3842. Applying collateral estoppel post-trial as an alternative basis for liability, *i.e.*, after a proof has been considered and weighed through a trial on the merits - turns the doctrine on its head. "[A]llowing issue preclusion claims to be raised *post-trial* does nothing to vindicate two primary policies behind the doctrine, conserving judicial resources and protecting parties from 'the expense and vexation' of relitigating issues that another party previously has litigated and lost." *Harvey v. United Transp. Union*, 878 F.2d 1235, 1243 (10th Cir. 1989) (emphasis added).

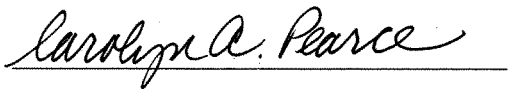
The trial court's ruling did not narrow the issues considered at trial or in any way promote efficiency. Rather, application of the doctrine was entirely superfluous. Beyond that, applying the doctrine post-trial undermines judicial economy by increasing the number of issues that must be considered on appeal without any corresponding economies. This Court should not endorse the lower court's erroneous and unfair application of the doctrine.

CONCLUSION

The trial court ruled on offensive collateral estoppel only as an alternative ground to impose Chapter 93A liability. In the event the Court reaches the issue, the Court should reverse.

June 7, 2012

Respectfully submitted,



Carolyn A. Pearce
(BBO No. 673127)
Lisa S. Blatt
Arnold & Porter LLP
555 12th Street, N.W.
Washington, D.C. 20004
(202) 942-6806

Counsel to Amicus Curiae Chamber of Commerce of the United States of America

Of Counsel

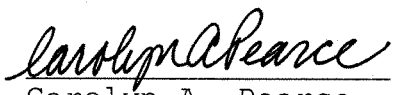
Robin S. Conrad
Kate C. Todd
National Chamber
Litigation Center, Inc.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that on this 7th day of June, 2012, two copies of the foregoing Brief of Chamber of Commerce of the United States of America as Amicus Curiae in Support of Appellant were served via overnight mail on the following counsel of record:

Kendra Kinscherf
Davis, Malm & D'Agostine, P.C.
One Boston Place, 37th floor
Boston, MA 02108
(617) 367-2500
Counsel to Plaintiff-Appellee

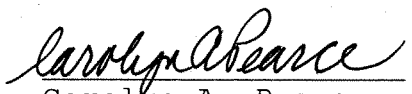
Andrew J. McElaney, Jr.
Nutter, McClennen & Fish, LLP
World Trade Center West
155 Seaport Boulevard
Boston, MA 02210
(617) 439-2000
Counsel to Defendant-Appellant



Carolyn A. Pearce
(BBO No. 673127)

RULE 16(k) CERTIFICATION

I hereby certify pursuant to Rule 16(k) of the Massachusetts Rules of Appellate Procedure that this brief complies with the Massachusetts Rules of Appellate Procedure and the Rules of the Massachusetts Supreme Judicial Court that pertain to the filing of briefs.



Carolyn A. Pearce
(BBO No. 673127)